

NEW YORK STATE BAR ASSOCIATION
Dispute Resolution Section
BENJAMIN N. CARDOZO SCHOOL OF LAW
COMMERCIAL ARBITRATION TRAINING
June 17-19, 2019
BENJAMIN N. CARDOZO SCHOOL OF LAW
55 Fifth Avenue
New York, NY 10003

Day III

Table of Contents

Arbitration Law	001
Federal Arbitration Act	003
William J. T. Brown, "The Dark Before the Dawn: How New York's Venerable but Outdated Arbitration Statute Has Fallen Into Desuetude and How Enactment of the Revised Uniform Arbitration Act Can Restore Logic and Reason to New York Arbitration"	011
William J. T. Brown, "Reaffirming Basic Powers of the New York Arbitrator: A Plea for Harmony in State and Federal Arbitration Law"	019
Charles J. Moxley, Jr., "Exploring The Murky Boundaries Between The FAA and State Law in Arbitrations in New York: Which Law Applies and When? An Overview of Arbitration Choice of Law"	027
Michael S. Oberman, "Vacatur / Confirmation", June 20, 2017	057
Michael S. Oberman, "The <i>Hall</i> Street Parade: State Courts Step Out and Consider Expanded Review of Arbitration Awards," <i>NYSBA New York Dispute Resolution Lawyer</i> , Vol. 4 No. 3, (Fall 2011).....	121
Michael S. Oberman, "Clarifying the Standards for Determining Arbitrator Bias," <i>NYLJ</i> , (April 2012)	125
Michael S. Oberman, "The Other Shoe: Are Agreements Narrowing Judicial Review Enforceable?" (May 2013)	129
Matter of Flintlock Constr. Servs., LLC v Weiss, 2014 NY Slip Op 05818 Appellate Division, First Department, Decided on August 14, 2014	133

Nicholas R. Weiskopf, "Binding Third Parties"	149
Nicholas R. Weiskopf, "Arbitrability"	161
Lea Haber Kuck and Timothy G. Nelson, "The Evolving Landscape for Enforcement of International Arbitral Awards in the United States"	185
Lea Haber Kuck and Amanda Raymond Kalantirsky, "Vacating an International Arbitration Award Rendered in the United States: Does the New York Convention, The Federal Arbitration Act or State Law Apply?"	191
Steven Skulnik, NYSBA, New York Dispute Resolution Lawyer, Interim, Provisional and Conservatory Measures in U.S. Arbitration, Spring 2017, Vol. 10	215
Norman Solovay, Alternatives to the High Cost of Litigation, Vol. 35, No.8, Sept. 2017, "The Arbitration from Hell and How the New York Court Got It Wrong"	221
New York City Bar, Committee on International Commercial Disputes, Awards of Interest in International Arbitration: New York Law and Practice	229
Ethics and Cybersecurity	301
NYSBA Commercial Arbitration Training June 2019	303
Stephanie Cohen, Mark Morril, "A Call to Cyberarms: The International Arbitrator's Day To Avoid Digital Intrusion", Fordham International Law Journal, 2019	305
Kathleen Paisley, "It's All About the Data: The Impact of the EU General Data Protection Regulation on International Arbitration", Fordham International Law Journal, 2018	349
ICCA-IBA Joint Task Force on Data Protection in International Arbitration, Roadmap to Data Protection in International Arbitration, 2019	445
Cybersecurity Guidelines.....	475
Stephanie Cohen, Announcement of Cybersecurity Protocol Consultation.....	511
Daniel Weitz, "The Brains Behind Mediation: Reflections on Neuroscience, Conflict Resolution and Decision-Making"	543
Daniel Weitz, "This is Your Brain on Mediation: What Neuroscience Can Add to the Practice of Mediation"	557
Edna Sussman, Power Point: Mastering the Unconscious. Arbitrators and Decision Making: Can we Improve (June 2017).....	561
Charles J. Moxley, Jr., "Arbitrators, Mediators, and Heuristics --- The Search for Antidotes to Potential Distortions in Our Thinking"	593

Diversity, Inclusion and Elimination of Bias – Implicit Bias	609
Sasha Carbone and Jeffrey Zaino, “Increasing Diversity Among Arbitrators”	611
Arbitration Ethics	617
The Code of Ethics for Arbitrators in Commercial Disputes (2004).....	619
Charles J. Moxley, Jr., Discussion Guide, “Limitations on Arbitrators’ Use of Associates”	629
Steven C. Bennett, “Who Is Responsible for Ethical Behavior by Counsel in Arbitration” <i>Dispute Resolution Journal</i> , May-July 2008.....	631
Lea Haber Kuck, Julie Bedard and Timothy G. Nelson, “Challenging the Selection of Party- Appointed Arbitrators,” January 2016	641
American Arbitration Association, The Code of Ethics for Arbitrators in Commercial Disputes https://www.americanbar.org/groups/dispute_resolution/resources/Ethics/Code_Ethics_Com_Arb_Ann/ / (not reproduced due to bulk, available online)	
Perspectives on Practice Development in the Arbitration World.....	643
FDRP Brochure	645
How Does a New Arbitrator Get Their First Appointment?	647
Jeffrey T. Zaino, Power Point: Expectation of AAA-ICDR and ADR Users	651
Charles J. Moxley, Jr., “Selecting the Ideal Arbitrator,” <i>Dispute Resolution Journal</i> , August – October 2005	661
About the ADR Providers: American Arbitration Association of AAA, February 1, 2015.....	667
M. Salman Ravala, “Climbing the ADR Neutral Ladder: A Next Steps Guide For Neutral Opportunities in New York City	675
Erin Gleason Alvarez, Power Point: Building Your Arbitration Practice.....	679
FINRA Dispute Resolution: Arbitration, Mediation and the Neutrals Who Serve	685
FINRA, The Financial Industry Regulatory Authority’s Dispute Resolution Activities	693
Biographies.....	713

Arbitration Law



American Arbitration Association
Dispute Resolution Services Worldwide

The Federal Arbitration Act

The Federal Arbitration Act

Title 9, US Code, Section 1-14, was first enacted February 12, 1925 (43 Stat. 883), codified July 30, 1947 (61 Stat. 669), and amended September 3, 1954 (68 Stat. 1233). Chapter 2 was added July 31, 1970 (84 Stat. 692), two new Sections were passed by the Congress in October of 1988 and renumbered on December 1, 1990 (PLS 669 and 702); Chapter 3 was added on August 15, 1990 (PL 101-369); and Section 10 was amended on November 15.

Arbitration

Chapter 1. General Provisions

Section 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such

agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Section 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Section 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

Section 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Section 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award

Section 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

Section 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

Section 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration--

- (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
- (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Section 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Section 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

- (a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.
- (b) The award.
- (c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

Section 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

Section 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

Section 16. Appeals

(a) An appeal may be taken from--

(1) an order--

- (A) refusing a stay of any action under section 3 of this title,
- (B) denying a petition under section 4 of this title to order arbitration to proceed,
- (C) denying an application under section 206 of this title to compel arbitration,
- (D) confirming or denying confirmation of an award or partial award, or
- (E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--

- (1) granting a stay of any action under section 3 of this title;
- (2) directing arbitration to proceed under section 4 of this title;
- (3) compelling arbitration under section 206 of this title; or
- (4) refusing to enjoin an arbitration that is subject to this title.

Chapter 2. Convention On The Recognition And Enforcement Of Foreign Arbitral Awards

Section 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

Section 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Section 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

Section 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

Section 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

Section 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

Section 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

Section 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

Chapter 3. Inter-American Convention On International Commercial Arbitration**Section 301. Enforcement of Convention**

The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

Section 302. Incorporation by reference

Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter "the Convention" shall mean the Inter-American Convention.

Section 303. Order to compel arbitration; appointment of arbitrators; locale

(a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.

(b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the Inter-American Convention.

Section 304. Recognition and enforcement of foreign arbitral decisions and awards; reciprocity

Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

Section 305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.

(2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

Section 306. Applicable rules of Inter-American Commercial Arbitration Commission

(a) For the purposes of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in Article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on July 1, 1988.

(b) In the event the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules of that Commission, the Secretary of State, by regulation in accordance with section 553 of title 5, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this chapter.

Section 307. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.

- AAA MISSION & PRINCIPLES
- PRIVACY POLICY
- TERMS OF USE
- TECHNICAL RECOMMENDATIONS

- ©2007 AMERICAN ARBITRATION ASSOCIATION. ALL RIGHTS RESERVED

The Dark Before the Dawn: How New York's Venerable but Outdated Arbitration Statute Has Fallen into Desuetude and How Enactment of the Revised Uniform Arbitration Act Can Restore Logic and Reason to New York Arbitration.

By William J.T. Brown

In 1920 New York was the leader, the first of the states to enact an arbitration statute directing courts to enforce the agreements of commercial parties to resolve their future disputes through arbitration. That 1920 enactment remains at the core of New York's present arbitration law, C.P.L.R. Article 75. New York's 1920 enactment was also the model for the Federal Arbitration Act ("FAA"), which Congress adopted in 1925. The two acts co-existed for decades, with little suggestion of conflict. In general concept, the New York arbitration statute applied when parties brought an arbitration-related dispute into New York state court. The Federal act applied when such a dispute came before the federal court, which could only occur when there was an independent basis for federal jurisdiction, such as diversity of citizenship.

Some conceptual change did occur in 1956 when the Supreme Court decided the case of Bernhardt v. Polygraphic Co. of America, 350 U.S. 200 (1956), a diversity case in which the Court held that Congress' power to adopt the FAA was based on its power over interstate commerce, not its authority to adopt rules of decision for federal courts, and thus that federal courts were without authority to apply the FAA in an employer-employee relationship that was deemed outside the stream of commerce. That meant that the federal court had to apply state arbitration law.

Federal Preemption

In a countervailing development, however, the Supreme Court decided that one section of the FAA, section 2, which the Court identified as the "primary substantive provision" of the FAA (see Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983), had to be enforced in state courts as well as federal courts. Southland Corp. v. Keating, 465 U.S. 1 (1984). The substantive rule of that section is that an agreement to arbitrate arising from "a transaction involving commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." In three Supreme Court decisions, most recently in Justice Scalia's 2006 opinion in Buckeye Check Cashing v. Cardegna, 546 U.S. 440 (2006), the Court has been at pains to point out that FAA section 2 is "the only [FAA] provision that we have applied in state court." *Id.* at 447. See also Volt Information Sciences v. Board of Trustees, 489 U.S. 468, 477 n.6, and Southland Corp., *supra*, 465 U.S. at 16 n. 10. The Court has acknowledged that the FAA was not intended to occupy the entire field of arbitration (e.g., Volt, *supra*, 489 U.S. at 477), and states are free to use their own procedures to implement the basic federal rule that the arbitration provision in an agreement linked to interstate commerce must be enforced unless revocable on state law grounds that would be applicable to any contract.

The author would state that all Supreme Court cases holding that an aspect or provision of state arbitration law is preempted are based on conflict with FAA section 2. To cite just a few examples, the Montana rule that arbitration clauses would not be enforced unless written in large letters violated section 2 because it discriminated against arbitration, allowing arbitration agreements to be revoked on grounds not applicable to “any contract.” Doctor’s Associates, Inc. v. Casarotto, 517 U.S. 681 (1996). Dispute resolution by California officials under the Talent Agencies Act (“TAA”) conflicted with section 2 because it would have supplanted parties’ agreements to arbitrate issues that California wanted to reserve for official decision under the TAA. Preston v. Ferrer, 128 S. Ct. 978 (2008). State enactments allowing various categories of parties to opt out of their agreements to arbitrate—employees, consumers, franchisees—have also been preempted for conflict with section 2. E.g., Southland Corp., supra (California statute relating to franchisees).

New York arbitration law, whether established by state court decision or legislative enactment, seems to have been particularly hard-hit by section 2 preemption. The New York statute which nullifies consumer agreements to arbitrate, section 399 (c) of the General Business Law, would be preempted in cases linked to interstate commerce but is enforced in consumer cases not involving commerce. See Ragucci v. Prof. Construction Services, 25 A.D. 3d 43 (2d Dep’t 2005). The Supreme Court’s rule of Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), that the arbitrator, rather than the court, must decide whether a party was induced by fraud to sign a commercial agreement, was held to preempt the contrary rule that had been developed by New York courts. See Weinrott v. Carp, 32 N.Y. 2d 190 (1973), overruling Matter of Wrap-Vertiser Corp., 3 N.Y. 2d 17 (1957). The Court of Appeals’ rule that the addition of an arbitration clause to an existing contract had to be proved by “express, unconditional” evidence rather than by the preponderance standard applicable to other amendments was preempted as discriminating against arbitration. Progressive Casualty Ins. Co. v. C.A. Reasegureadora Nacional, 991 F.2d 42, 46 (2d Cir.) 1993), preempting the rule set forth in Marlene Indus. Corp. v. Carnac Textiles, Inc., 45 N.Y. 2d 327 (1978). Of broader impact were federal decisions such as Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52 (1995), preempting New York’s judge-made rule that arbitrators lacked power to award punitive damages, even where the facts of the case would have justified a court in awarding such damages; or PaineWebber Inc. v. Bybyk, 81 F. 3d 1193 (2d Cir. 1996), preempting the rule of CPLR section 7502 (b) that, despite the parties’ agreement to arbitrate all issues, a judge may decide as a preliminary matter whether the statute of limitations bars the claim; or preempting the New York rule that the arbitrator lacks authority to make an award of attorneys’ fees except where the parties have so agreed.

To be sure, these preemptive changes to New York arbitration law applied only to arbitration cases linked to interstate commerce. Nor did they apply to cases where the parties had agreed to arbitrate under New York arbitration law, as FAA section 2 calls for the enforcement of agreements to arbitrate, leaving the parties free to adopt and demand the enforcement of such terms as they may wish. E.g., Volt, supra. This left open an

important question: what arbitration law applies if the parties have agreed on a choice of law clause providing that the commercial agreement containing their arbitration clause shall be governed by New York law? When such a choice is made, does that mean that New York arbitration law is also applicable? In Mastrobuono the Supreme Court held that a New York choice of law clause in a commercial agreement was not intended to apply to arbitration under the agreement. And the New York Court of Appeals has held, asserting its own policy in favor of arbitration, that the parties' adoption of a New York choice of law clause will not be deemed to import the limitations that New York law would impose on the authority of the arbitrator (Smith Barney Shearson Inc. v. Sacharow, 91 N.Y. 2d 39, 47 (1997)); that would result only if the parties made their choice of New York arbitration law clear as by providing that "enforcement" of the agreement would be subject to New York law.

A Different Kind of Preemption –Voluntary Adoption of Federal Law

At the same time as New York courts were coming to terms with section 2 preemption, they embarked, almost imperceptibly at first, on a different, far broader form of voluntary preemption or abnegation of New York arbitration law not required by FAA section 2 –adopting the notion that New York arbitration law should be considered as replaced by analogous provisions of the FAA when the arbitration case arose from a transaction involving interstate commerce; and that, in such cases, New York Courts should act in effect as though they were federal courts carrying out the FAA's procedural directives and exercising the powers conferred by Congress upon the federal courts. The author would trace the origins of this development to the Court of Appeals decision in Salvano v. Merrill Lynch, Pierce, Fenner & Smith, 85 N.Y. 173 (1995). That case involved an agreement by the parties to arbitrate under New York Stock Exchange Rules a dispute that plainly arose from transactions linked to interstate commerce. One party to the arbitration had been placed under severe pre-arbitration restraints by a federal court in Illinois, affecting his ability to carry on his business. In view of the apparent urgency, a New York court, which had jurisdiction, intervened under CPLR 7506 (b) to order that the panel accelerate its proceedings. However, The resulting expedited award was ordered set aside by the New York Court of Appeals, on grounds that such an arbitration was governed by the FAA, and New York courts were without authority to accelerate proceedings. The case might have been decided upon the narrower ground that the parties had agreed to arbitrate under NYSE rules and that FAA section 2 required their agreement to be respected, leaving no room for a court to exercise its supervisory power under provisions of CPLR Article 75. Instead the Court of Appeals made a broad statement about application of the FAA in general in securities cases.

The statement that "the FAA applies" has been repeated in a succession of cases and New York state courts have indeed made direct application of various sections of the FAA, as though they considered that those provisions addressed by Congress to the federal courts were also addressed to state courts. See, e.g., Imclone Systems, Inc. v. Waksal, 22 A.D. 3d 387 (1st Dep't 2005) (enforcement of arbitrators' discovery order

under FAA section 7); Sawtelle v. Waddell & Reed, Inc. 304 A.D. 2d 103(1st Dep't 2003) (FAA sections 9, 10 and related federal case law used as standards for review of awards) section 7 (authority to enforce arbitrator subpoenas), and section 4 (stay of proceedings to permit arbitration). In Diamond Waterproofing Sys. v. 55 Liberty Owners Corp., 4 N.Y. 3d 247, 250 (2005), the Court of Appeals indicated, at least in dictum, that all provisions of the FAA were potentially applicable in a commerce -related case.

This approach reached a climax in Wien & Malkin LLP v. Helmsley- Spear, Inc., 6 N.Y. 3d 471, cert. dismissed, 127 S. Ct. 34 (2006), an arbitration case concerning authority to manage New York City real estate. The first department, fresh from a review of the Supreme Court's decision in United States v. Lopez, 514 U.S. 549 (1995), which had held that the commerce clause gave Congress no power to regulate the introduction of guns into the local school yard, thought that it followed that Congress could not use the commerce power to regulate disputes about the management of New York City office buildings and so declared, proceeding to review an arbitration award under standards of New York state arbitration law. At almost the same time the Supreme Court had made a sharp distinction between supervision of school yards and supervision of commercial arbitration, holding in The Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003), that Congress had far broader power¹ over arbitration and that, in the FAA, Congress had made the broadest permissible exercise of its commerce power. *Id.* at 56. In light of Alafabco, the Supreme Court, issuing its writ directly to the Appellate Division, First Department, summarily reversed that court's holding that New York office buildings were beyond Congress' power to regulate. In that summary reversal, the Supreme Court did not address the question whether it followed that the state court should make direct application of FAA provisions to review an arbitration award. As noted above, the Supreme Court had repeatedly stated that section 2 of the FAA was the only provision that it had held applicable in state court. Nonetheless, the First Department took the summary reversal as mandating direct application of FAA sections 9 and 10 and federal case law, and applying those standards, vacated the award. On appeal, the Court of Appeals assumed the applicability of the same federal standards and found that they called for affirmance of the award

The result is that today, in commerce-related cases, New York state courts appear to be making direct application of provisions of the FAA which on their face appear to be addressed only to federal courts, with no explanation as to how those provisions became applicable in state court. The contrasting practice of the California courts, which apply their own arbitration standards to review of commerce-related awards (see Cable Connection Inc. v. DIRECTV, Inc., 44 Cal. 4th 1334 (2008)), seems to confirm that New York courts are engaged in a voluntary abandonment of the statutory criteria adopted by the state legislature in 1920.

Every Arbitration Case a Constitutional Case

The decision that New York state courts must apply one set of legal criteria in commerce-related cases and another set in cases outside the stream of commerce means that every arbitration case raises a constitutional issue and may require a difficult factual determination -- whether the underlying transactions fall within the broadest permissible scope of Congress' authority to regulate commerce, as contemplated by Alafabco, *supra*. Some state courts appear reluctant to recognize just how broad the federal commerce power may be. See Ragucci, *supra*, where a million dollar home renovation project was held to be a consumer transaction not involving interstate commerce and thus the agreement to arbitrate was held to be nullified under General Business Law section 399 (c). Similarly, arbitration agreements relating to schools, teachers, municipal construction projects and the like might well fall within the outer limits of Congress' power to regulate, but it may seem unpalatable to exclude state arbitration procedures in such a context, and, as suggested above, federal arbitration law does not dictate such a result. In any case, the practitioner cannot be sure where the state court will draw the line as to interstate commerce, nor can one be sure whether the state court will even persist in the notion that FAA provisions are directly applicable in state court. The prudent course may be for counsel in most cases to apply for the requested relief on alternative grounds of pertinent provisions of C.P.L.R. Article 75 and FAA, leaving it to the court to say which is applicable.

The Fate of Pro-Arbitration Provisions of New York Law

An additional substantive issue is presented as to whether provisions of New York state arbitration law that are in fact more favorable to arbitration than the analogous federal rule are also displaced by the federal rule. One example is the unfortunate provision in FAA section 9 indicating that after an arbitration award is rendered, judgment will be entered thereon only if the parties had included in their arbitration agreement a formalistic statement that judgment should indeed be entered on the award. New York law is far more sensible, and C.P.L.R. section 7510 allows judgment to be entered with no such requirement. Does application of the FAA mean that New York state courts are now saddled with this archaic federal requirement?

Of similar importance is New York's provision in CPLR section 7503(c) authorizing a party to give notice in its demand for arbitration that, if the respondent contends that he is not obligated to arbitrate, he must commence an action to stay arbitration within 20 days or forfeit his right to dispute the point. The Court of Appeals has recently reaffirmed the vitality of this provision in a case involving lease of coin operated video and music machines for use in a bar, without mention of the issue whether such entertainment operations involved interstate commerce. In re Fiveco, Inc. v. Haber, 11 N.Y. 3d 140 (2008). Would application of the FAA nullify this provision of New York state law, even where the parties would otherwise be subject to New York law or where the arbitration is to be held in New York? Whether federal courts would enforce this provision of New York arbitration law is said to be uncertain. See I.K. Bery, Inc. v. Irving R. Boody & Co., 2000 U.S. Dist LEXIS 1872, note 10 (S.D.N.Y. 2000).

As a final example, we can point to the New York rule that the party who denies that he agreed to arbitrate but chooses to participate in arbitration, rather than ask a court to rule that he has no obligation to arbitrate, is bound by the arbitrator's decision on the point. See In re Blamowski v. Munson Transp. Inc., 91 N.Y. 2d 190 (1997). The federal rule is more lenient—a party can assert in arbitration that he is not required to participate but participate nonetheless and then, if the arbitrator finds that he was indeed obligated to arbitrate, go to court to assert that the arbitrator had no authority over him. See First Options of Chicago, Inc. v Kaplan, 514 U.S. 938 (1995). Which rule should be applied in New York state court in a commerce-related arbitration sited in New York?

Conclusion

The author would submit that, in seeking to harmonize federal and state arbitration, we New Yorkers have deviated too far from the basic rule that state arbitration law should be applicable in state court except to the extent it may be preempted by the single federal rule that, in the context of commerce, the parties' agreement to arbitrate must be enforced according to its terms. As shown above, and despite the venerable origins of New York State's arbitration law, there is now so much confusion and uncertainty about the application of that law that a fresh start is required. Eschewing the rivalry between New York State arbitration law and the FAA, virtually all of the states, beginning in 1956, had adopted the Uniform Arbitration Act, as recommended by the National Conference of Commissioners on Uniform State Laws. That uniform act has been updated in recent years and has become the Revised Uniform Arbitration Act ("RUAA"), and has already been enacted by some twelve states. Designed to supplement the FAA and operate in harmony with it, a New York version of the RUAA, as reviewed and adapted by a New York task force over the past several years, would eliminate the idiosyncratic provisions that place New York law in conflict with the FAA, while preserving pro-arbitration features of New York law, such as the party's ability to obtain an early decision as to its right to arbitrate by giving notice of intent to arbitrate. The RUAA will also ensure greater fairness in arbitration by recognizing a potential right to discovery of evidence, requiring disclosure of potential conflicts by the arbitrator, and authorizing the arbitrator to grant provisional remedies to prevent irreparable harm while the arbitration process goes forward. The New York State Bar Association, supported by the New York City Bar and the New York County Lawyers' Association, has recommended enactment of the RUAA, and appropriate bills have been introduced in the New York State Legislature. By such enactment, the legislature will establish clear and comprehensive rules to be applied by the state courts in harmony with FAA requirements, thus ending the present state of overlap and confusion. The RUAA will respect the present New York rule that consumer agreements to arbitrate future disputes are null and void. Its comprehensive terms should ensure fairness in the arbitration process and predictability of application, so that a need for resort to the courts for interpretation will be minimized. Adoption of the RUAA should

also help restore New York to its rightful position as a leader in arbitration and a favored arbitration venue.

July 30, 2011

© William J.T. Brown

**REAFFIRMING BASIC POWERS OF THE NEW YORK ARBITRATOR:
A PLEA FOR HARMONY IN STATE AND FEDERAL ARBITRATION LAW**

Arbitrators acting in New York State derive their powers from the parties' agreement to submit their dispute to arbitration and from the law that validates and implements that agreement: the New York State arbitration statute ("CPLR Article 75") and, if the dispute involves interstate or international commerce, the Federal Arbitration Act ("FAA"). These two statutes are quite similar in text and vintage. New York in 1920 was the first of the states to enact an arbitration statute and thus to reject the traditional view of arbitration as a competitive threat to the judiciary. The 1920 New York enactment was the model and inspiration when Congress in turn enacted the FAA in 1925. Interpretation of the two statutes underwent parallel and sometimes divergent development over most of the last century. Although the statutes confer power on arbitrators, an equally important function is their directive to courts as to how and when to intervene in the arbitral process. The arbitrator in performing his tasks may or may not be able to predict whether his work will be subject to supervision and review under state or federal law or by a state or federal court. Despite their similarities, the New York statute has historically been interpreted by New York State judges as withholding from the arbitrator certain powers that the FAA does grant to arbitrators. To cite three examples: the power to decide whether the claim in arbitration is barred by the statute of limitations¹, whether punitive damages should be awarded², and whether an award of attorneys' fees should be granted (permitted under New York arbitration law only if the parties have agreed to confer such a power)³. A further difference that may now be at issue in New York's appellate courts concerns the authority of the arbitrator to impose a monetary sanction for party obstruction causing injury or prejudice to the other party.

The Authority of the New York Arbitrator to Impose Sanctions.

The federal courts, applying the FAA, generally hold that the arbitrator may defend the orderly procedure of arbitration through imposition of sanctions in much the same way as a judge might defend the procedures of litigation. Thus in Reliastar Life Ins. Co. of New York v. EMC Life Co. the Second Circuit has held that in matters governed by the FAA, "[w]here an arbitration clause is broad, arbitrators have the discretion to order such remedies as they deem appropriate...Consistent with this principle we here clarify that a broad arbitration clause . . . confers inherent authority to sanction a party that participates in the arbitration in bad faith."⁴ However a recent case in New York State Supreme Court, Grynberg v. BP Exploration Operating Co. Limited, involving an equally broad arbitration clause, held that since the parties had agreed that "the arbitration shall be regulated by the procedures of the New York

¹ See In Re Smith Barney, Harris Upham & Co. v. Luckie, 85 N.Y. 193 (1995.)

² See Garrity v. Lyle Stuart, Inc., 40 N.Y. 2d 354 (1976).

³ See CPLR 7513.

⁴ 564 F.3d 81, 86 (2d Cir. 2009). The "broad" arbitration clause in that case gave the arbitrators authority to decide "any disputes or differences arising hereafter between the parties with reference to any transaction under or relating in any way to this Agreement...." *Id.*, 564 F.3d at 84.

Arbitration Act (CPLR Article 75)” the arbitrator (Stephen A. Hochman, Esq.) lacked authority to defend the arbitral process through imposition of sanctions, even though the case presented a vivid example of the need for such a sanctions power, as arbitral proceedings had seemingly languished for some ten years due to obstruction by the sanctioned party.⁵

The New York State Court’s Analysis.

Justice Solomon pointed out that the authority of New York State Courts to impose sanctions is established by court rule, 22 NYCRR 130, and held that this rule is a law to be applied by judges only, conferring no authority upon arbitrators, citing a First Department case, Emery Roth v. M&B Oxford 41, Inc.⁶ However, Emery Roth seems distinguishable as the First Department there placed primary emphasis on the point that the AAA rules under which the parties had agreed to arbitrate precluded award of the costs and fees at issue.⁷ Thus the agreement of the parties to arbitrate under those rules denied the arbitrators authority to impose the sanction at issue. Of course neither a court rule nor a statute, operating alone, confers power on arbitrators: it takes the consent of the parties to confer power on arbitrators. But if the parties have agreed to give the arbitrator broad powers of decision, in effect the power to decide as a judge would decide, that agreement may be deemed to encompass authority to impose sanctions like those a court might impose, just as the Second Circuit held in Reliastar, cited above. While the Grynberg dispute arose in international commerce (development of oil fields near the Caspian Sea) and thus was squarely within the ambit of the FAA, Justice Solomon pointed out that the parties in their arbitration agreement had referred to procedures of New York arbitration law and had not mentioned the application of the FAA, unlike Reliastar, where the parties had agreed that arbitration would be under “the laws of the State of New York and to the extent applicable the Federal Arbitration Act.”⁸ Justice Solomon also sought to distinguish the federal holding in Reliastar, pointing out that the sanction approved in that case was an award of attorneys’ fees, whereas the sanction in the Grynberg case was not tied to specific expenditure of attorneys’ fees, and thus could be deemed in the nature of punitive damages, which are not available under New York state arbitration law,⁹ even though the \$3 million sanction appeared to bear a reasonable relationship to legal costs incurred in ten years of obstruction and delay in a large case. Also unavailing in Justice Solomon’s view were the provisions of the American Arbitration Association’s Commercial Rules, under which the parties had agreed to arbitrate, whose Rule R-45 gave the arbitrator authority “to grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties.” While the arbitrator no doubt believed that the award of sanctions was a just and equitable remedy in the circumstances, Rule R-45’s general grant of authority did not contain a specific reference to sanctions and thus, for Justice Solomon, was insufficient to encompass a sanctions power.

⁵ Grynberg v. BP Exploration Operating Co., Ltd., 2010 N.Y. Misc. Lexis 5985 (N.Y. County 2010). The arbitration clause extended to “a dispute or differences arising out of, in relation to or in any way connected with this Agreement....” *Id.* at 4.

⁶ 298 AD 2d 320, 321 (1st Dep’t 2002).

⁷ Applicable rules denied recovery of witness fees and also denied recovery of attorneys’ fees where the parties had not requested them. *Id.*

⁸ Grynberg, *supra*, 2010 N.Y. Misc. LEXIS 5985 at 8.

⁹ Garrity v. Lyle Stuart, Inc. 40 N.Y. 2d 354 (1976).

A Critique of the Grynberg Decision.

We can respectfully question Justice Solomon's conclusion that the FAA did not apply to this arbitration due to the parties' omission of any reference to the FAA in the arbitration clause. Where an agreement to arbitrate is concluded in the context of interstate or international commerce, it appears that section 2 of the FAA operates of its own force to make that agreement valid and require its enforcement.¹⁰ Certainly the arbitration clause defines the scope of the issues that are subject to the arbitrator's decision and must be interpreted under the state contract law that the parties have chosen¹¹, but the U.S. Supreme Court has held repeatedly that such a clause must also be interpreted under substantive federal law requiring that any ambiguity as to the scope of matters in arbitration be resolved in favor of subjecting the matter to arbitration.¹² Where the parties by their agreement have empowered the arbitrator to decide a body of issues but have specified that he is to act under rules that do not allow for decision of some of those issues, is that an ambiguity that must be resolved in favor of arbitration? The Second Circuit's recent decision in Bechtel do Brasil Construcões would suggest that it is.¹³

Justice Solomon pointed to the Supreme Court's Volt case as recognizing the right of the parties to agree to arbitrate under rules of state law that had the effect of impeding arbitration, but the impediment in Volt was one of timing.¹⁴ In that case, California law required that the arbitration be stayed while a related matter involving a third party was adjudicated in court proceedings, after which the arbitration was to go forward. The parties' choice of state arbitration procedures thus delayed but did not prohibit arbitration of a matter that the parties had agreed to arbitrate. The choice of California arbitral procedure thus did not deprive the arbitrator of the ultimate power of decision. The Supreme Court's subsequent decision in Mastrobuono underlines this distinction between procedure and the substance of arbitral power.¹⁵ There the parties had agreed to arbitrate the issues between them, which would have included a claim for punitive damages, but had subjected their commercial agreement to New York law, which in substance denied arbitrators the authority to award punitive damages. The Supreme Court held that New York law should be deemed applicable to commercial aspects of the parties' agreement but that the limitations of New York arbitration law were not applicable and thus did not curtail the arbitrator's power derived from federal law.¹⁶ Subsequently the New York Court of Appeals in the Sacharow case rallied to the Supreme Court's interpretation, holding that a New York

¹⁰ Indeed, as Grynberg involved an international arbitration, the New York Convention and FAA Chapter 2, section 207 would have applied to bring FAA section 2 into operation.

¹¹ See *Credit Suisse First Boston Corp. v. Pitofsky*, 4 N.Y. 3d 149, 154 n.2 (2005), citing federal precedents

¹² E.g., *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

¹³ *Bechtel do Brasil Construcões v. AUG Araucaria Ltda.*, F.3d (2011), discussed below.

¹⁴ *Volt Info. Sciences v. Board of Trustees*, 489 U.S. 468 (1989).

¹⁵ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

¹⁶ *Id.*, 514 U.S. at 64-66.

choice of law clause in a commercial agreement calling for arbitration would not be deemed to “pull in conflicting restrictions on the scope of authority of arbitrators...”¹⁷ The question remains, for purposes of the Grynberg analysis, does the parties’ agreement to arbitrate under procedures of New York state law deprive the arbitrator of powers that the FAA and the parties’ choice of AAA Commercial Rules would give him, or is there ambiguity on this point, ambiguity that must be resolved in favor of arbitration.

Absent from the court’s analysis in Grynberg is any suggestion of public policy reasons that would justify New York State in seeking to impose restrictions on arbitrators that would conflict with their authority under federal law. Apart from any application of casuistical reasoning to the state and federal precedents, the writer submits that there is a real need to consider the public policy costs that are incurred when the basic grant of authority to the arbitrator is interpreted as divergent under New York State and federal law. Adoption of arcane and unnecessary differences invites protracted litigation, undermining arbitration’s basic goal of efficiency and speed first recognized by the New York State Legislature in 1920 and thereafter by Congress in 1925. Indeed, both the New York state courts and the federal courts have strongly affirmed again and again their common policy in favor of arbitration.¹⁸ While all would agree that a need to impose sanctions in arbitration can arise only rarely, it is also undeniable that, in the context of obdurate disputation, such a need can indeed arise. Once arbitration is in progress, the arbitrator, rather than a court, is best qualified to assure that the process moves forward to conclusion. To be sure, the role of state contract law in defining the agreement of the parties cannot be denied;¹⁹ and if, in applying state contract law, the court finds that the parties have expressed an unambiguous intent to limit the powers of the arbitrator and to withhold any sanctions power, such a party decision must be respected. Nor can it be predicted that our New York state courts will abolish existing New York limitations on the power of the arbitrator which place New York law at odds with the FAA, even though the legislature’s enactment of the Revised Uniform Arbitration Act, strongly recommended by bar association groups, would substantially achieve the desirable goal of creating uniformity between state and federal arbitration law.²⁰ But neither should new limitations on the power of the arbitrator, at variance with developing federal law, be created or extended.

The New York Court of Appeals Has Sought to Achieve Uniformity with Federal Arbitration Law.

Past history shows that New York Courts have sought to move state and federal arbitration law toward a goal of greater harmony. For example, New York arbitration cases originally held that only a court, not the arbitrator, had power to decide whether a party had been induced by fraud to enter the commercial agreement containing an arbitration clause.²¹ It was only after the U.S. Supreme Court in

¹⁷ In *Re Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 49 (1997).

¹⁸ For affirmation of New York’s “public policy in favor of arbitration,” see, e.g., *Matter of Falzone v. New York Cent. Mut. Fire Ins. Co.*, 15 N.Y. 3d 530 (2010); *Brady v. Williams Capital Group, L.P.*, 14 N.Y.3d 459 (2010); for the “federal policy in favor of arbitration,” see, e.g., *Circuit City Stores v. Adams*, 532 U.S. 105 (2001).

¹⁹ See *Credit Suisse First Boston Corp. v. Pitofsky*, 4 N.Y. 3d 149, 154 n.2 (2005), citing federal precedents.

²⁰ Such enactment has been recommended by the New York State Bar, the New York City Bar and the New York County Lawyers’ Association.

²¹ See *Matter of Wrap-Vertiser Corp (Plotnick)*, 3 N.Y. 2d 17(1957).

Prima Paint established a contrary rule,²² that the New York Court of Appeals in a unanimous opinion by Judge Wachtler found that it was unduly “bothersome” for the state courts to be enforcing a different rule than that which prevailed both in federal court and in maritime and securities cases in New York State court, and thus changed New York arbitration law to achieve uniformity on this issue.²³ Similarly, although New York courts had originally held that claims of human rights violation could not be subjected to arbitration, after the U.S Supreme Court held in Gilmer v. Interstate/Johnson Lane²⁴ that such claims were arbitrable, the New York Court of Appeals recognized the predominant federal role in this field and adhered to the federal rule.²⁵ In yet another initiative, New York Courts have been highly supportive of uniformity in requiring the application of the FAA by New York state courts in all disputes involving interstate commerce.²⁶ To be sure, consenting parties retain the right under FAA section 2 itself to decide in what manner they shall arbitrate; and that would permit them, within certain limits²⁷, to choose procedures of New York state law even if idiosyncratic or anomalous. But, as noted above, there is no public policy need to accentuate or cultivate the anomalous.

State and Federal Arbitration Statutes as Concurrent Grants of Authority.

In the interest of good arbitration policy we should also consider that state and federal arbitration laws need not be considered as conflicting or preempting each other. In some cases there may indeed be a true conflict in which one law or the other must prevail, for example, cases where it is contended that a party by failing to commence an action to stay arbitration has waived its objections to arbitration.²⁸ However, the U.S. Supreme Court has emphasized that the FAA does not occupy the entire field of arbitration law, even in areas linked to interstate commerce.²⁹ State and federal arbitration law should best be considered as having concurrent effect where state and federal spheres overlap: concurrent grants of authority, first empowering private parties to choose arbitration and to shape their procedures by explicit agreement, and then as concurrent grants of authority to the arbitrator, finally as concurrent grants of authority to the court, state or federal, that may be called

²² Prima Paint v. Flood, 388 U.S. 395, holding that the arbitration clause should be considered as a contract separate from the commercial agreement and that the arbitrator did indeed have authority to decide the issue of fraud in the inducement to enter the commercial agreement (so long as it was not claimed that there was fraud in inducing the agreement to arbitrate itself).

²³ See In Re Weinrott v. Carp, 32 N.Y. 2d 190, 199 (1973).

²⁴ 500 U.S. 20 (1991).

²⁵ See Fletcher v. Kidder, Peabody & Co., 81 N.Y. 2d 623 (1993).

²⁶ See Diamond Waterproofing Sys. v. 55 Liberty Owners Corp., 4 N.Y. 3d 247, 250 (2005); Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 N.Y. 3d 471, cert. dismissed, 127 S. Ct. 34 (2006); Imclone Systems, Inc. v. Waksal, 22 A.D. 3d 387 (1st Dep’t 2005); even though the U.S. Supreme Court has reiterated that state courts are free to apply their own state arbitration law so long as that does not interfere with the essential principle reflected in section 2 of the FAA, the rule that agreements to arbitrate linked to interstate commerce must be enforced in accordance with their terms. E.g., Buckeye Check Cashing v. Cardegna, 546 U.S. 440 (2006); Volt Information Sciences v. Board of Trustees, 468 U.S. 468, 477 n. 6 (1989); Southland Corp. v. Keating, 465 U.S. 1, 16 n. 10 (1984).

²⁷ See, e.g., Hall Street Assocs. LLC v. Mattel, Inc., 552 U.S. 576 (2008).

²⁸ See CPLR 7503 (c). See federal cases cited on this point in I.K. Bery, Inc. v. Irving R. Boody & Co., 2000 U.S. Dist. LEXIS 1872, n. 10 (S.D.N.Y. 2000).

²⁹ See Volt, supra, 489 U.S. 468, 477.

upon to act in respect of the arbitration. The limitations that New York arbitration law places on the authority of arbitrators can no longer be considered as reflecting a public policy prohibiting exercise of arbitrator power in such areas, as the Court of Appeals has emphasized³⁰ that the choice of New York law to govern a commercial agreement will not be interpreted as importing those limitations into arbitration under that agreement. Explicit (or implicit) decision by the parties is required to make the New York arbitral limitations applicable in a given arbitration. Thus, while the New York arbitration statute may not give the arbitrator power to decide certain matters, it does not stand in the way of the arbitrator's exercise of those powers if he obtains them from concurrent grant of authority by the FAA (or party agreement validated and enforced by section 2 of the FAA).

The concept of concurrent grant of arbitral authority should not be limited to the notion that the FAA may supplement the limitations of the New York arbitration statute. The FAA too has its awkward limitations, most notably the troublesome rule of 9 U.S.C. §9 that judgment is to be entered under the FAA on an arbitration award only if the parties have specified in their arbitration clause that judgment is to be entered.³¹ New York arbitration law imposes no such formulaic requirement.³² If arbitration has taken place under concurrent authority of New York and federal law and the verbal formula required by section 9 of the FAA is missing, there is no reason why judgment on the award cannot be entered by the state or federal court under New York state arbitration law.³³ Similarly if an arbitrator is deemed to lack authority under New York state law to impose a sanction, surely he may do so under a concurrent grant of authority under federal law. True, there is some authority suggesting that if the parties have agreed to arbitrate under both state and federal law the arbitrator should be subjected to the cumulative limitations of both.³⁴ In light of the strong federal and state policy in favor of arbitration, however, the agreement to empower the arbitrator under state and federal law should more aptly be deemed a grant of the authority of each, free of any inconsistent limitations of the other.

Resolution of Ambiguity in Favor of Arbitration: the Bechtel do Brasil Case.

Of course the parties may preclude imposition of sanctions in arbitration if they wish to do so. Under the authority of Volt³⁵ and Hall Street³⁶ they may also preclude application of all or at least most of the provisions of the FAA if they indeed wish to arbitrate under a different body of law, such as New York State law. But why should it be presumed that parties who have agreed to arbitrate under New York state arbitration law wish to preclude the application of the FAA where its terms may supplement but are not in conflict with the chosen state law procedures? The Second Circuit considered such an issue in the recent Bechtel do Brasil case, mentioned above.³⁷ There, as in Grynberg and Reliastar, the

³⁰ In Sacharow, supra, note 17 and Diamond Waterproofing, supra, note 26.

³¹ See Varley v. Tarrytown Assocs., Inc. 477 F.2d 208 (2d Cir. 1973)

³² See CPLR § 7510.

³³ See The Home Ins. Co. v. RHA/Pennsylvania Nursing Homes, Inc., 113 F.Supp. 633 (S.D.N.Y. 2000). But see Franklin Hamilton LLC v. Creative Insurance Underwriters, Inc., 2008 U.S. Dist. LEXIS 92980 (S.D.N.Y.2008).

³⁴ See Coleman & Co. Securities, Inc. v. Giaquinto Family Trust, 2000 U.S. Dist. LEXIS 16215, a case which seems in conflict with the subsequent Second Circuit decision in Bechtel do Brasil, discussed below.

³⁵ Supra, note 14.

³⁶ Supra, note 27.

³⁷ Bechtel do Brasil Construcões v. AUG Araucaria Ltda., .638 F.3d 150 (2d Cir. 2011).

parties had adopted a “broad” arbitration clause and had also agreed, as in both of the cited cases, that arbitration was to be under arbitration procedures of New York state law. Since the Bechtel case arose in the context of interstate commerce, the court held that the FAA was applicable except to the extent displaced by the parties’ decision to arbitrate under procedures of New York state arbitration law. Admittedly, under those procedures a court, not the arbitrator, would have been called on to decide statute of limitations issues. But the parties had also agreed in their broad arbitration clause that the arbitrator should decide all issues in dispute. Thus the court found it ambiguous whether, in choosing New York arbitration law, the parties had intended to deny the arbitrator the authority to decide the statute of limitations issue. And in the face of such ambiguity, the court held that under Supreme Court precedent doubt had to be resolved in favor of submitting the issue to arbitration.

The analysis in Bechtel do Brasil suggests that the Second Circuit might have decided Grynberg so as to affirm the arbitrator’s imposition of a sanction under authority of the FAA. In Grynberg, as in Bechtel, the parties had adopted a broad arbitration clause submitting all issues to the arbitrator, but had then agreed that arbitration was to be under procedures of New York state law, which, in Justice Solomon’s view, did not authorize imposition of a sanction. But the FAA would have had continuing effect in this international arbitration, and it would have been ambiguous whether, in subjecting the arbitration to procedures of New York state law, the parties wished to countermand their agreement that the arbitrator was to decide all issues, including the question whether a sanction was appropriate under the FAA or AAA Commercial Rules.

Conclusion: The Ongoing Need for Greater Harmony in State and Federal Arbitration Law.

The strong policy in favor of arbitration, shared in common by New York state and federal law, calls for a commitment to harmonious interpretation and avoidance of conflict between the two systems, permitting arbitration to go forward to final and enforceable results without unnecessary impediment. This need is especially clear in New York, which serves as a great center for international commercial arbitration and should seek to offer consistent, predictable and welcoming procedures for international arbitration. Indeed, it can be argued that uncertainty as to the body of arbitration law that may be applicable, and the potential for conflict between state or federal arbitration law, create an impediment to foreign parties’ choice of New York as a site of arbitration, second only to the concern that arbitration in the United States may be burdened by excessive discovery.³⁸

Certainly the New York state courts in reviewing the decision in Grynberg will give due effect to the application of federal law and the need for harmony. As noted above, the New York Court of Appeals has again and again adjusted state arbitration law to achieve relative uniformity with federal law. As that Court emphasized in Weinrott, the policy of the federal courts “is significant since the Federal arbitration statute is almost identical to, and is derived from, our own arbitration statute.”³⁹

³⁸ See generally, William J.T. Brown and Alain de Foucaud, “Risk and Uncertainty of Arbitrating in the United States: Overcoming the Choice of Law Problem,” 2 *Revista Romana de Arbitraj*, April 2008.

³⁹ *Matter of Weinrott v. Carp*, supra, 32 N.Y. 2d at 198.

The New York state courts have correctly pointed out that in applying federal arbitration law they are not bound to follow the precedents of the Second Circuit, only those of the U.S. Supreme Court.⁴⁰ Nonetheless, the Bechtel case seems to be soundly based in Supreme Court precedent of the First Options and Moses Cone cases.⁴¹ Practitioners in the arbitration area, ever in search of harmony and reason, might hope that state and federal courts will find their respective decisions mutually persuasive.

⁴⁰ Imclone Sys. v. Waksal, 22 A.D. 3d 387 (1st Dep't 2005).

⁴¹ Cited *supra*, note 11.

EXPLORING THE MURKY BOUNDARIES BETWEEN THE FAA AND STATE LAW IN ARBITRATIONS IN NEW YORK: WHICH LAW APPLIES AND WHEN?

OVERVIEW OF ARBITRATION CHOICE OF LAW

Presented at the ABA Section of Dispute Resolution's
11th Annual Spring Conference, April 16, 2009
Updated 3/25/2013

by

Charles J. Moxley, Jr.¹

Scope

The following is a broad overview of choice of law issues with respect to domestic commercial arbitrations held in New York, focusing on the matter from the perspective of both advocates and arbitrators.

The issues arise in two overall contexts:

- What law should arbitrators apply in arbitrations held in New York?
- What law should state and federal courts, respectively, follow when asked to rule on issues relating to arbitrations held or possibly to be held in New York?

Presence of Choice of Law Issues in Every Case

Arbitrations inevitably involve questions as to what law is applicable to matters relating to them.

In my experience, issues as to choice of law largely remain inchoate in arbitrations themselves, only occasionally developing into a bone of contention. Parties' arbitration clauses typically provide for the application of the law of a particular state. The parties generally acknowledge the applicability of that law and rely in their legal arguments, at least in part, on cases from that jurisdiction, although (on the implicit assumption, I take it, that our commercial

¹ Charles J. Moxley, Jr. is an arbitrator, mediator, and litigator, specializing in complex commercial disputes. He is a member of arbitration and mediation panels of the American Arbitration Association, the International Institute for Conflict Prevention and Resolution (CPR), the U.S. Council of International Business (USCIB) for the ICC International Court of Arbitration, and Supreme Court, New York County, and is an ARIAS-U.S. Certified Arbitrator. The principal in MoxleyADR LLC, Mr. Moxley is an Adjunct Professor at Fordham Law School, the Distinguished ADR Practitioner in Residence at the Benjamin N. Cardozo School of Law, Chair of the Committee on Arbitration and ADR of the Commercial and Federal Litigation Section of the New York State Bar Association (NYSBA) and past Chair of NYSBA's Dispute Resolution Section.

law is fairly uniform) they often end up, with respect to issues of substantive law, citing the best cases they can find from wherever those cases happen to arise. Occasionally, arbitration clauses specify that the FAA applies to the arbitration of any dispute arising under the parties' agreement, although, in my experience, such provisions only occasionally lead to disputes in arbitrations as to the relative applicability of state and federal law to various phases of the proceedings.

There are a number of substantial differences between New York and federal arbitration law, some real distinctions to be made. This is an evolving area presenting opportunities for creative lawyering and challenges to arbitrators to get it right.

The issues are difficult, the boundaries murky, not least because state and federal courts have at times resolved them inconsistently and many issues remain unsettled in the two legal systems.

Types of Law Applicable to Arbitrations

Areas of law potentially involved in any particular arbitration include:

- Substantive law;
- arbitration law, including;
 - substantive arbitration law;
 - procedural arbitration law; and
- procedural law.

“Substantive law,” in this context, generally refers to the applicable contract, tort, securities, consumer, or other law establishing or referencing a legal right, duty, or the like upon which a claim or defense in an arbitration is premised.

“Arbitration law” generally refers to law that is specific to arbitration and does not otherwise apply to a dispute. It includes substantive arbitration law--such as the basic rule of the Federal Arbitration Act (FAA) that arbitration agreements are enforceable--and procedural arbitration law relating to actual and prospective arbitrations, both within the arbitrations themselves and within courts presiding over issues relating to such arbitrations.

“Procedural law,” in this context, refers at times to general rules of procedure applicable to all kinds of disputes, including those involving arbitration, and to procedural rules specific to arbitration.²

² Federal Rule of Civil Procedure 81(a)(6) [previously 81(a)(3)] applies, to the extent the FAA is silent, to matters of procedure applicable to federal court proceedings involving arbitration. See *Glencore, Ltd. v. Schnitzer Steel Prods. Co.*, 189 F.3d 264 (2d Cir. 1999), *abrogated in part, in other respects, at Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008).

Choice of Law and Other Contract Clauses Rarely Resolve All Choice of Law Issues in an Arbitration

Parties in their agreements typically include a generic choice of law clause.

Such clauses are generally understood to designate the substantive law applicable to determining the respective rights of the parties, but not the arbitration law applicable to the administration of any arbitration that ensues under the agreement. In effect, choice of law clauses are generally understood to establish the law applicable to the parties' dispute, whereas arbitration clauses, which are typically parallel independent clauses, are understood as establishing arbitration as the mode of dispute resolution but not as selecting any applicable arbitration law unless that is done with some specificity.³

This heightens the importance of the distinction, one that is often overlooked, between the general substantive law and the arbitration law of a particular jurisdiction.

Parties in their arbitration agreements do occasionally specify the arbitration law that will be applicable to disputes between them, but, in my experience, this happens relatively infrequently.

Often in their arbitration agreements parties adopt the rules of an organization such as the American Arbitration Association (AAA), the AAA's International Centre for Dispute Resolution (ICDR), the International Institute for Conflict Prevention & Resolution (CPR), or JAMS. Such rules establish contractually matters that might otherwise have been provided for by arbitration law.

The Law Applicable to an Arbitration May be State or Federal

The substantive, arbitration, and procedural law applicable to an arbitration and to litigation relating to the arbitration may be state or federal or a combination thereof.

Variables in Choice of Law Decisions in Arbitrations

There are many variables relevant to the determination of applicable law in disputed situations, including:

- the intra-state, interstate, or international nature of the dispute;
- characterization of the applicable rule of law in question as:
 - substantive law;
 - arbitration law; and/or
 - procedural law;
- provisions in the parties' agreement as to:
 - choice of law generally;

³ See *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 62-64, 115 S. Ct. 1212, 1218-19, 131 L. Ed. 2d 76, 87-88 (1995).

- arbitration law;
- arbitration generally;
- provisions of the rules of arbitration providers or the like adopted by the parties in their agreement; and
- the extent to which the counsel, arbitrators, and judges involved in the particular matter are familiar with the choice of law issues discussed herein.

It is worth emphasizing that all of these matters relate to the arbitration law applicable to a particular case, specifically, to questions as to how arbitrations are to be conducted and to what orders courts might enter with respect to actual or prospective arbitrations. It is entirely another question as to what contract, tort, securities, or other substantive law might apply to the dispute being arbitrated.

New York Arbitration Law

New York arbitration law is primarily set forth in New York CPLR Article 75 and case law, although there are rules of law in other statutes that apply to arbitration, typically within limited contexts.⁴

Following is an overview of the scope of coverage of Article 75:

- § 7501: Enforceability of arbitration agreements;
- § 7502: Special proceedings affecting arbitration, including proceedings to stay or bar arbitrations or confirm arbitration awards; statute of limitations; provisional remedies;
- § 7503: Application to compel or stay arbitration; stay of action; notice of intention to arbitrate;
- § 7504: Court appointment of arbitrator in certain circumstances;
- § 7505: Powers of arbitrator to issue subpoenas and administer oaths;
- § 7506: Hearing, including Oath of arbitrator; time and place of arbitration; evidence to be heard of parties' right of cross-examination; parties' right to have counsel represent them; majority decision by arbitrators; waiver by parties of rights under this section;
- § 7507: Form, time, and delivery of the Award;
- § 7508: Award by confession;
- § 7509: Modification of award by arbitrator;
- § 7510: Confirmation of award;
- § 7511: Vacating or modifying award;

⁴ See, e.g., N.Y. General Business Law § 399(c), applying to contracts for the purchase of consumer goods or services and prohibiting the inclusion of a mandatory arbitration clause that would commit the consumer to arbitrate any disputes; Gen. Bus. Law § 198-a(k), part of the New Car Lemon Law, permitting a new car purchaser to seek the enforcement of substantive rights under the law through binding arbitration, even if the manufacturer has not consented; and other laws collected and described in 13-75 New York Civil Practice: CPLR ¶ 7501.03, "The Federal Arbitration Act and Other Statutory Sources of Arbitration in New York".

- § 7512: Death or incompetency of a party;
- § 7513: Fees and expenses; and
- § 7514: Judgment on an Award.

Federal Arbitration Law

Federal arbitration law is generally set forth in the Federal Arbitration Act⁵ (FAA) and case law. The FAA was enacted in 1925, five years after New York CPLR Article 75 (as originally enacted). The text of the FAA was largely based on Article 75.

The objective of the originators of New York Arbitration Law and the FAA was first to get a state statute then a federal statute, addressing arbitration to cover interstate and foreign commerce and admiralty, and, ultimately to get a treaty to protect arbitration internationally.

New York arbitration law and the FAA remain quite similar, although there are a number of significant areas where they diverge.

As to domestic arbitrations, the FAA does not establish exclusive subject matter jurisdiction in federal court. Parties must find an independent basis for subject matter jurisdiction so that a federal court can properly exercise jurisdiction of an arbitration issue.

Accordingly, disputes relating to actual or prospective arbitrations affecting interstate commerce and hence subject to the FAA may be litigated in state as well as federal court.

Following is an overview of the scope of coverage of Chapter 1 of the FAA:⁶

- Section 1. “Maritime transactions” and “commerce” defined; exceptions to operation of title
- Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate involving interstate commerce.
- Section 3. Stay of proceedings where issue therein referable to arbitration.
- Section 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.
- Section 5. Appointment of arbitrators or umpire.
- Section 6. Application heard as motion.
- Section 7. Witnesses before arbitrators; fees; compelling attendance.
- Section 8. Proceedings begun by libel in admiralty and seizure of vessel of property.
- Section 9. Award of arbitrators; confirmation; jurisdiction; procedure.
- Section 10. Same; vacation; grounds; rehearing
- Section 11. Same; modification or correction; grounds; order
- Section 12. Notice of motions to vacate or modify; service; stay of proceedings.

⁵ 9 USCS § 1 et seq.

⁶ Chapters 2 and 3 of the FAA address international arbitration.

- Section 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement.
- Section 14. Contracts not affected.
- Section 15. Inapplicability of the Act of State doctrine.
- Section 16. Appeals.

Some of the provisions of the FAA--specifically § 2 along with the definitional § 1--on their face seem generally applicable without reference to whether the issues arose in state or federal court.⁷ Most of the other sections, particularly §§ 3, 4, 7, 9 (in part), 10, 11, and 12 specifically refer to the federal courts. §§ 5 and 6 make references to “the court” where in neither the text of the section, nor indeed in all of Chapter 1 of the FAA, does there appear to be any reference to any court other than federal court. Section 9, covering confirmation of awards, refers repeatedly to federal courts, although also referencing the possibility of the parties’ agreeing as to the court in which any award shall be confirmed.

Preliminary Overview of Federal Arbitration Law⁸

The FAA governs arbitration agreements that involve interstate or maritime commerce, preempting state law as to such matters.

The Supreme Court has interpreted the term “commerce” as used in the FAA very broadly as extending as expansively as the Commerce Clause to any dispute affecting interstate commerce.⁹

⁷ As William J. T. Brown has pointed out, the Supreme Court has stated repeatedly that § 2 is the only section of the FAA that it has applied in state court. *See* William J. T. Brown, “The Dark Before the Dawn: How New York’s Venerable but Outdated Arbitration Statute Has Fallen into Desuetude and How Enactment of the Revised Uniform Arbitration Act Can Restore Logic and Reason to New York Arbitration,” paper prepared for ABA Section of Dispute Resolution’s 11th Annual Spring Conference, April 16, 2009 [hereinafter “Brown Paper”], *citing* *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006); *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 477 n.6, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

However, the Supreme Court has stated in *dictum* that state courts, as much as federal courts, are obliged to grant stays of litigation under FAA §3. The Court characterized it as less clear but an open question as to whether the same is true of an order to compel arbitration under FAA §4. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26-27, 103 S. Ct. 927, 942-43, 74 L. Ed. 2d 765, 786-87 (1983). Responding to objections that FAA §2 is the only section of the FAA that the Supreme Court has applied in state court and §§ 3 and 4 do not apply in state court, the Court, focusing on § 4, has also noted that that section “ultimately arises out of § 2”. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447, 126 S. Ct. 1204, 1209, 163 L. Ed. 2d 1038, 1044 (2006).

⁸ *See generally*, 13-75 New York Civil Practice: CPLR ¶ 7501.12.

The central thrust of the FAA is § 2, which establishes the enforceability of all arbitration agreements relating to interstate commerce, save upon such grounds as exist at law or in equity for the revocation of any contract. The FAA requires that all such agreements be enforced in accordance with their terms.

The FAA is understood to express a Congressional intent to encourage arbitration, notwithstanding any state substantive or procedural law to the contrary.

The import of this is that any state law that purports to restrict the arbitrability of a dispute affecting interstate commerce is preempted. States may not require a judicial forum for the resolution of claims or issues in interstate commerce that the parties agreed to arbitrate. Rules of state law that preclude arbitration of particular claims or issues are preempted. Any state law that would treat an arbitration agreement less favorably than other agreements is preempted.

Areas of Variance between New York and Federal Arbitration Law: Rules of New York Arbitration Law that Are Preempted by the FAA

New York arbitration law includes a number of rules at variance with federal arbitration law.

Following is a discussion of some such areas of potential variance:¹⁰

- **Whether the court or the arbitrator should determine challenges to the validity of the parties' overall agreement:** A challenge to the Parties' overall agreement on the ground that it is permeated with illegality is generally, under

⁹ *Citizens Bank v Alafabco, Inc.*, 539 U.S. 52, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003); *Allied-Bruce Terminix Cos. v Dobson*, 513 U.S. 265, 273, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995).

¹⁰ See generally, Brown Paper, *supra* n. 7; 13-75 New York Civil Practice: CPLR ¶ 7501.03, "The Federal Arbitration Act and Other Statutory Sources of Arbitration in New York"; T. Barry Kingham, *Enforcement of Forum Selection and Arbitration Clauses*, 2 N.Y. Prac., Com. Litig. in New York State Courts, § 11:19 "Enforcement of Forum Selection and Arbitration Clauses" (2d ed. 2008); George K. Foster, *Confusion among Courts over the Interplay of State, Federal, and International Arbitration Law*, Nat. L. J. (Dechert on Choice of Law); 21 Williston on Contracts § 57:5 "Federal Arbitration Act – Preemption of State Law"; 5 N.Y. Jur. 2d Arbitration and Award § 64 ("Effect of Federal Arbitration Act-Where agreement contains provision choosing New York law") (2008).

William J.T. Brown has argued that New York's adoption of the Revised Uniform Arbitration Act (the "RUAA") would "eliminate the idiosyncratic provisions that place New York law in conflict the FAA, while preserving pro-arbitration features of New York law, such as the party's ability to obtain an early decision as to its right to arbitrate by giving notice of intent to arbitrate." Brown Paper, *supra* n. 7 at 6.

New York arbitration law, to be decided by the court¹¹ and under the FAA by the arbitrator.¹² In contrast, challenges to the validity of the arbitration clause itself are generally decided by the court under both New York arbitration law and the FAA.¹³

- **The extent to which participation by a party in an arbitration constitutes the party's waiver of jurisdictional objection to arbitration:** CPLR 7503(b) provides that, by participating in an arbitration, a party waives the right to apply to a court to stay the arbitration based on the invalidity of the arbitration agreement or statute of limitations. By participating in the arbitration, the party becomes subject to the decision of the arbitrator on such issues; if the party wants to contest arbitrability, it must make an application in court to stay the arbitration without first contesting the matter before the arbitrator. In contrast, cases in the Second Circuit permit a much higher level of participation in an arbitration before waiver of the right to object to arbitrability will be found.¹⁴
- **Statute of limitations:**
 - CPLR 7502(b) provides that a party may submit to a court the question of whether an arbitration is barred by a statute of limitations.¹⁵ The U.S.

¹¹ See *Utica Mut. Ins. Co. v. Gulf Ins. Co.*, 306 A.D.2d 877, 762 N.Y.S.2d 730 (4th Dep't 2003); *Teleserve Sys. v. MCI Telcoms. Corp.*, 230 A.D.2d 585, 659 N.Y.S.2d 659 (4th Dep't 1997); see also, David Elsberg, *Validity of Pacts with Arbitration Clauses: Courts Split*, N.Y.L.J., Dec. 18, 2006 (reporting that New York courts have been resistant to enforcing the FAA rule that arbitrators, not courts, should decide challenges to the parties' overall agreement). Under New York arbitration law, however, claims of fraud in the inducement are to be decided by arbitrators where there is a broad arbitration clause. See *Weinrott v. Carp*, 32 N.Y.2d 190, 298 N.E.2d 42, 344 N.Y.S.2d 848 (1973). The United States Supreme Court recently reiterated in *Rent-A-Center* that, when an agreement delegates the authority to determine the arbitrability of a dispute to the arbitrator, claims that challenge the enforceability and validity of an agreement as a whole will be determined by the arbitrator, while claims that specifically challenge the enforcement of the delegation provision will be considered by the district court. See *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010); see generally, Quincy M. Crawford and Claudia T. Saloman, "*Rent-a-Center, West, Inc. v. Jackson: US Supreme Court Decision Applies to Both Domestic and International Arenas*," available at <http://www.dlapiper.com/rent-a-center-v-jackson-us-supreme-court-decision-applies-to-both-domestic-and-international-arenas/>.

¹² *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46, 126 S. Ct. 1204, 1208-09, 163 L. Ed. 2d 1038 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967).

¹³ See *Rent-a-Center*, 130 S.Ct. at 2782; *Buckeye Check Cashing*, 546 U.S. at 445-46; *Utica Mut. Ins.* 306 A.D.2d at 762.

¹⁴ See, e.g., *Penrod Mgmt. Group v. Stewart's Mobile Concepts, Ltd.*, 2008 U.S. Dist. LEXIS 11793 (S.D.N.Y. Feb. 16, 2008); *Jones v. Watts Inv. Co. (In re Will of Jones)*, 2000 U.S. Dist. LEXIS 5864 (S.D.N.Y. Apr. 28, 2000).

¹⁵ See 13-75 New York Civil Practice: CPLR ¶ 7502.14.

Supreme Court has reached the opposite result under the FAA, finding that such objections are generally to be decided by the arbitrator when the parties have agreed to submit their dispute to arbitration.¹⁶

- There is a further conflict of state and federal case law as to whether a court or arbitrator should determine limitations issues in cases where (1) the FAA is applicable and (2) the parties' agreement includes a choice of law clause designating New York arbitration law.
 - The New York Court of Appeals has suggested in dictum that, even in cases where the FAA is applicable, limitations defenses should be heard by the court if the parties adopted New York arbitration law (which, in its view, they would do by providing that New York law would apply to the "enforcement" of their agreement).¹⁷ The basis for this conclusion is that, under the FAA, party autonomy in choosing arbitration is paramount: If the parties, through selecting New York arbitration law, chose to have the court determine limitations questions, that choice should be respected.
 - In contrast there are local federal cases providing that, even in such circumstances, limitations questions are for the arbitrators.¹⁸
- **Punitive damages:** New York arbitration law generally prohibits arbitrators from awarding punitive damages, even if the parties agreed that the arbitrators would have such a power.¹⁹ The Supreme Court in *Mastrobuono* found that the FAA permits arbitrators to award punitive damages.²⁰ The New York state courts have

¹⁶ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002).

¹⁷ *Diamond Waterproofing Sys. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 826 N.E.2d 802, 793 N.Y.S.2d 831 (2005); *CSAM Capital, Inc v. Lauder*, 67 A.D.3d 149, 885 N.Y.S.2d 473 (1st Dep't 2009).

¹⁸ See, e.g., *Bechtel Do Brasil Construções Ltda. v. UEG Araucária Ltda.*, 638 F.3d 150 (2d Cir. 2011); *Goldman, Sachs & Co. v. Griffin*, 2007 U.S. Dist. LEXIS 36674 (S.D.N.Y.); see generally, William J.T. Brown, "Reaffirming Basic Powers of the New York Arbitrator: A Plea for Harmony in State and Federal Arbitration Law," manuscript available with author; Craig P. Miller and Laura Danish "The Enforceability and Applicability of a Statute of Limitations in Arbitration" *Franchise Law Journal*, (2012), available at [http://www.gpmlaw.com/uploadedFiles/Resources/Articles/enforceability_applicability_statute_1imitations_arbitration_CMiller\(1\).pdf](http://www.gpmlaw.com/uploadedFiles/Resources/Articles/enforceability_applicability_statute_1imitations_arbitration_CMiller(1).pdf)

¹⁹ See *Garrity v Lyle Stuart, Inc.* (40 NY2d 354 [1976]). See also, *Kudler v Truffelman*, 2012 NY Slip Op 02155 (1st Dept., 2012).

²⁰ *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 182 L. Ed. 2d 42 (2012); *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995); *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 353 N.E.2d 793, N.Y.S.2d 831 (1976); *Matter of Mohawk Val. Community Coll. v. Mohawk Val. Community Coll. Professional Ass'n.*, 28 A.D.3d 1140, 814 N.Y.S.2d 428 (4th Dep't 2006); *Application of Dreyfus Service Corp. v. Kent*, 183 A.D.2d 446, 584 N.Y.S.2d 483 (1st Dep't 1992).

been inconsistent after *Mastrobuono*, with some courts following the decision²¹ and at least one not following it and sticking to the strong New York public policy against punitive damages.²²

- **Attorneys' fees:** CPLR 7513 generally precludes arbitrators from awarding attorneys' fees, unless otherwise provided in the parties' agreement to arbitrate or implied by their choice of arbitration forum.²³ Federal law contains no such prohibition.²⁴
- **Consolidation of arbitrations:** New York courts have held that they have the power to consolidate arbitrations based upon the same general bases applicable to the consolidation of actions²⁵ and have suggested that arbitrators have this same power to consolidate.²⁶ In contrast, federal courts have generally concluded that, given a broad arbitration clause, consolidation is for arbitrators not courts.²⁷ Although the Supreme Court's 2010 decision in *Stolt-Nielsen* seemed, by its treatment of class action arbitration, to imply that, absent an explicit delegation of the issue to the arbitrators, consolidation may be for the courts, several recent district court decisions in the Second Circuit have held that joinder and consolidation present different issues than class action arbitration and remain generally for arbitrators not courts to decide.²⁸

The Court in *Mastrobuono* held that a general choice of law clause in the parties' contract providing that the contract shall be governed by New York law did not establish the parties' intent to incorporate the New York law allocating power between the courts and arbitrators—that a general choice of law clause adopting New York law does not adopt New York arbitration law.

²¹ *212 Inv. Corp. v. Kaplan*, 16 Misc. 3d 1125(A), 847 N.Y.S.2d 905 (N.Y. Co. 2007); *Prudential Sec. v. Pesce*, 168 Misc. 2d 699, 642 N.Y.S.2d 466, 1996 N.Y. Misc. LEXIS 141 (Sup. Ct. N.Y. Co. 1996).

²² *Dean Witter Reynolds, Inc. v. Trimble*, 166 Misc. 2d 40, 631 N.Y.S.2d 215 (Sup. Ct. N.Y. Co. 1995); see 5 N.Y. Jur.2d Arbitration and Award § 64.

²³ See, e.g., *Grossman v. Laurence Handprints-N.J., Inc.*, 90 A.D.2d 95, 455 N.Y.S.2d 852 (2d Dep't 1982); *CIT Project Fin., L.L.C. v. Credit Suisse First Boston LLC*, 5 Misc. 3d 1030A, 799 N.Y.S.2d 159 (Sup. Ct. N.Y. Co. 2004).

²⁴ See *Merrill Lynch, Pierce, Fenner & Smith v. Adler*, 234 A.D.2d 139, 651 N.Y.S.2d 38 (1st Dep't 1996).

²⁵ See *Matter of Cohen v. S.A.C. Capital Advisors LLC*, 11 Misc. 3d 1054A, 815 N.Y.S.2d 493 (2006); 13-75 New York Civil Practice: CPLR 7502.05.

²⁶ *Avon Products, Inc. v. Solow*, 150 A.D.2d 236, 541 N.Y.S.2d 406 (1st Dep't 1989), later proceeding at 151 A.D.2d 342, 544 N.Y.S.2d 728 (1st Dep't 1989).

²⁷ See generally, Susan Jordan *Stolt-Nielsen's Effect on Consolidation of Arbitrations*, Law 360, (July 7, 2010), available at http://www.lockelord.com/files/News/9424c623-87bd-4514-97a6-9da91766731d/Presentation/NewsAttachment/a4608d66-324a-467c-82dd-9db2056704c4/2010-07_Stolt-NielsensEffect_Jordan.pdf.

²⁸ See *Safra Nat'l Bank (SNB) v. Penfold Investment Trading, Ltd.*, 10 Civ. 8255, *8-11 (S.D.N.Y. 2011) (“As this Court held in *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 462, 477 (S.D.N.Y. 2010), *Stolt-Nielsen* did not abrogate the rule that federal courts consider consolidation to be a question of procedure to be decided by the arbitrators.”); see also, *Rice Co. v. Precious Flowers LTD*, 2012 U.S. Dist. LEXIS 78269, 2012 AMC 1947 (S.D.N.Y. 2012).

- **Pre-Award removal of arbitrator:** There is authority to the effect that New York permits the pre-award removal of an arbitrator, whereas the FAA does not.²⁹
- **Unenforceability of New York's heightened burden of proof requirement to establish that an arbitration clause had been added to an existing contract:** The Second Circuit, reviewing the New York Court of Appeals' rule that the addition of an arbitration clause to an existing contract had to be proved by "express, unconditional" evidence rather than by the preponderance standard applicable to other amendments, found the rule to be preempted as discriminating against arbitration.³⁰
- **Whether arbitrators have authority to issue subpoenas to non-parties for production of documents pre-hearing:** CPLR 7505 provides that an arbitrator and any attorney of record in an arbitration proceeding have the power to issue subpoenas. While the case law is sparse and inconsistent,³¹ there is some authority in New York that arbitrators can issue subpoenas to non-parties for discovery purposes.³² While the issue of whether the FAA permits arbitrators to subpoena non-parties for discovery purposes, as opposed to for purposes of calling the witnesses to the "hearing," has divided the Circuits Courts of Appeal.

²⁹ See *IRB-Brasil Resseguros S.A. v. Nat'l Indem. Co.*, 2011 U.S. Dist. LEXIS 136640, *17 (S.D.N.Y. 2011) ("It is well established in this Circuit that parties are precluded from attacking the partiality of an arbitration panel until after an award has been issued."); *AIU Ins. Co. v. Am. Int'l Marine Agency*, 2006 N.Y. Misc. LEXIS 2352, 236 N.Y.L.J. 36 (2006).

³⁰ *Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela*, 991 F.2d 42 (2d Cir. 1993).

³¹ See generally, Weinstein, Korn & Miller, 13-75 New York Civil Practice: CPLR § 7505.06; Dennis M. Rothman, Expert Analysis, 13-75 New York Civil Practice: CPLR § 7505.

³² See, e.g., *ImClone Sys. v. Waksal*, 22 A.D.3d 387, 802 N.Y.S.2d 653 (1st Dep't 2005); *Schumacher v. Genesco, Inc.*, 82 A.D.2d 739, 440 N.Y.S.2d 4 (1st Dep't 1981); *Motor Vehicle Acci. Indemnification Corp. v. McCabe*, 19 A.D.2d 349, 353, 243 N.Y.S.2d 495, 499 (1st Dep't 1963); *Katz v. State Dep't of Corr. Serv's*, 64 A.D.2d 900, 407 N.Y.S.2d 967 (2d Dep't 1978); *ConnecU, Inc., v. Quinn Emanuel*, Slip op., Supreme Court, N.Y. County, Index No. 602082/2008, January 6, 2010; but see, *De Sapio v. Kohlmeyer*, 35 N.Y.2d 402, 321 N.E.2d 770, 362 N.Y.S.2d 843 (1974).

There is authority that arbitrators' subpoena power under CPLR 7505 is restricted to the procuring of evidence for the hearing. See Alexander, "N.Y. Practice Commentaries," C 7505 (1998). There is also authority that discovery in aid of arbitration pursuant to CPLR 3102(c) is only available where the requesting party demonstrates that the discovery is necessary and not merely convenient. See *International Components Corp. v. Klaiber*, 54 A.D.2d 550, 387 N.Y.S.2d 253 (1st Dep't 1976).

The Court in *ConnecU* suggested that discovery from out-of-state non-parties can be obtained through CPLR 3108, which authorizes New York courts to seek the assistance of courts of other states to compel discovery by issuing a commission or letter rogatory to such courts. *Id* at 22.

the Second Circuit has found that arbitrators do not have such a power, *i.e.*, that they may only subpoena non-parties' documents to a hearing.³³

- **Precluding parties from applying in court to stay arbitration:** CPLR 7503(c) provides a procedure whereby a party, by its demand for arbitration or notice of intention to arbitrate, may notify another party that, unless the party applies to stay the arbitration within twenty days after such service, it shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. The FAA contains no such provision. The law is unsettled whether CPLR 7503(c) is applicable to proceedings in state and federal court in New York, respectively, with respect to arbitrations to which the FAA is applicable.³⁴
- **Prerequisites to having judgment entered upon an arbitral award:** FAA § 9 requires that, for a party to obtain judgment on an arbitration award, the parties need in their agreement to have agreed that a judgment shall be entered upon the award. CPLR 7510, the analogous New York provision, contains no such requirement. It appears to be questionable but unsettled whether this requirement of FAA § 9 is applicable in New York state courts to cases to which the FAA is applicable or whether federal courts sitting in diversity in New York in such cases could issue judgment on an award under CPLR 7510 where § 9 had not been complied with.³⁵
- **Challenges to arbitral award based on arbitrators' refusal to grant adjournment:** Unlike FAA § 10(a), CPLR 7511(b)(1) does not specify an arbitrator's refusing to postpone a hearing upon sufficient cause as misconduct constituting a ground for vacating an award, rather relying on the general language of "misconduct" to address the issue. Interestingly, New York Civil Practice Act (CPA) 1461(3), the predecessor to CPLR 7511(b)(1), contained the same language as FAA§10(a).³⁶
- **Time for making an application to vacate an award:** Under CPLR 7511(a), an application by a party to vacate an award must be commenced within 90 days after the delivery of the award to him. Under FAA § 12, notice of motion to

³³ See *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008); *Schnall v. ProShares Trust*, 2010 U.S. Dist. LEXIS 127208 (S.D.N.Y. 2010).

³⁴ *Matter of Fiveco, Inc. v. Haber*, 11 N.Y.3d 140, 893 N.E.2d 807, 863 N.Y.S.2d 391 (2008); *I. K. Bery, Inc. v. Irving R. Boody & Co.*, 2000 U.S. Dist. LEXIS 1872, footnote 10 (S.D.N.Y. 2000); see also, Brown Paper, *supra* n. 7.

However, courts have noted an exception to the twenty day rule. See *Matter of Allstate Ins. Co. v. LeGrand*, 91 A.D.3d 502 (2012) (citing *Matter of Matarasso [Continental Cas. Co.]*, 56 NY2d 264, 266 (1982)). ("However, a motion to stay arbitration may be entertained outside the 20-day period when "its basis is that the parties never agreed to arbitrate, as distinct from situations in which there is an arbitration agreement which is nevertheless claimed to be invalid or unenforceable because its conditions have not been complied with").

³⁵ *Franklin Hamilton, LLC v. Creative Ins. Underwriters, Inc.*, 1:08-cv-7449 (JFK), 2008 U.S. Dist. LEXIS 92980 (S.D.N.Y. November 6, 2008) ; see also, Brown Paper, *supra* n. 7.

³⁶ See *Matter of Ames v. Garfinkel*, 11 Misc. 3d 1051A, 814 N.Y.S.2d 889 (Sup. Ct. N.Y. Co. 2006).

vacate an award must be served on the adverse party within three months after the award is filed or delivered.³⁷

- **Availability of interim appeals:** Under the CPLR, a party may file an interlocutory appeal to the Appellate Division from any ruling of the Supreme Court. Under FAA § 16 (b), the federal “final judgment rule” applies, *inter alia*, to foreclose an interlocutory appeal from a District Court order compelling arbitration.³⁸

Beyond Preemption: Areas where New York Courts Have Applied the FAA Where Ostensibly Not Constitutionally Required To Do So

Discussed above are respects in which New York and FAA arbitration law differ. There are also a number of areas, as William J. T. Brown has identified, where New York state courts, generally without elaboration, have applied FAA arbitration law where ostensibly they were not required to have applied it, specifically with respect to various FAA provisions that appear by their terms to apply only in federal courts. Mr. Brown has identified such areas as the following:³⁹

- **Enforcing agreements by their terms without adding new terms, even if said terms are supported by state law and not inconsistent with the parties’ agreement:** CPLR 7506(b) empowers the New York courts to direct an arbitrator to proceed promptly with the hearing and determination of the controversy. The New York Court of Appeals has held that, absent a choice of law clause explicitly adopting this provision (or perhaps New York arbitration law generally), this provision of the CPLR does not apply to an arbitration to which the FAA is applicable, since it would involve the court in effectively adding to the parties’ agreement something to which they had not agreed.⁴⁰
- **New York state courts’ application of FAA § 7 to subpoenas issued by arbitrators in cases involving interstate commerce:**
 - As noted above, CPLR 7505 empowers arbitrators to issue subpoenas in arbitrations over which they preside.
 - Correspondingly, FAA § 7 empowers arbitrators, or a majority of them in a particular case, to issue subpoenas and provides for the enforcement of such subpoenas by the federal district court in which the arbitrators are sitting.

³⁷ See *Id*

³⁸ See *Id*.

³⁹ Brown Paper, *supra* n. 7; see also, Richard L. Barnes, *Prima Paint Pushed Compulsory Arbitration under the Erie Train*, 2 Brook. J. Corp. Fin. & Com. L. 1 (2007); Jill I. Gross, *Over-Preemption of State Vacatur Law: State Courts and the FAA*, 3 J. Am. Arb. 1 (2004).

⁴⁰ *Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 85 N.Y.2d 173, 647 N.E.2d 1298, 623 N.Y.S.2d 790 (1995). The New York Court of Appeals in *Salvano* held that, for parties to adopt New York arbitration law, they must, under the United States Supreme Court’s decision in *Volt*, do so with specificity. In the Court of Appeals’ view, the key issue is the parties’ expressed intent.

- Since FAA § 7 on its face provides only for enforcement in federal court, but disputes relating to arbitrations affecting interstate commerce may be litigated in state court, one might expect CPLR 7505 to apply to such disputes litigated in state court.
- Nonetheless, the First Department in at least one case has reflexively applied FAA § 7 to issues as to subpoenas in arbitrations to which the FAA is applicable.⁴¹
- **Application by New York state courts of the provisions of FAA §§ 9, 10, and 11 to issues as to the review of awards issued by arbitrators in cases involving interstate commerce:**
 - CPLR 7511 sets forth the standards for vacating or modifying arbitration awards.
 - FAA §§ 9, 10, and 11 set forth standards for confirming, vacating, and modifying arbitration awards. As noted above, § 10 refers specifically to vacating arbitration awards in federal district courts, without reference to state courts. Section 9 refers to confirming awards in federal court, although it also refers to the possibility of the parties' specifying the court in which judgment on an award shall be entered, without specifying what that court might be, or whether it might be a state court. Section 11 refers to modifying awards in federal district court.
 - Accordingly, one might expect that a New York state court hearing a motion to vacate an award in an arbitration to which the FAA is applicable would apply the standards set forth in CPLR 7511, except perhaps, as to confirming awards, if the parties' agreement provided otherwise.
 - Yet the New York courts, including the Court of Appeals, have often proceeded seemingly automatically and reflexively, from the determination that the FAA is applicable to the application of the standards of FAA §§ 10 and 11 for modifying and vacating awards.⁴²

⁴¹ *Imclone Sys. v. Waksal*, 22 A.D.3d 387, 802 N.Y.S.2d 653 (1st Dep't 2005).

⁴² *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, 846 N.E.2d 1201, 813 N.Y.S.2d 691 (2006). Indeed, even in *Roberts v. Finger*, 15 Misc. 3d 1118A, 839 N.Y.S.2d 436 (Sup. Ct. N.Y. Ct. 2007), where Justice Moskowitz applied CPLR 7511 to the review of an arbitration decision to which the FAA applied, she only did so because of her conclusion that the parties, by their agreement, had adopted New York law and CPLR 7511 did not conflict with the FAA. However, the Court in *Matter of Ames v. Garfinkel*, 11 Misc. 3d 1051A, 814 N.Y.S.2d 889 (Sup. Ct. N.Y. Co. 2006), noted that the fact that the FAA is applicable to an arbitration does not necessarily mean that all provisions of the FAA are applicable. It focused, for instance, on CPLR 7511 and FAA §10(a), relating to the grounds for vacating an award, but the First Department, in upholding the trial court's confirmation of the award, referred only to the FAA standards for vacatur. See *Uram v. Garfinkel*, 16 A.D.3d 347, 792 N.Y.S.2d 430 (1st Dep't 2005).

**SUMMARY OF THE INTERPLAY OF
STATE AND FEDERAL ARBITRATION LAW:
HOW CHOICE OF LAW ISSUES ARE RESOLVED**

Scope of the FAA

- The FAA applies broadly to disputes affecting interstate commerce. Its reach essentially coincides with that of the Commerce Clause.⁴³ The nature of modern commercial life is such that it would seem that, from the perspective of the Supreme Court's decisions in the area, virtually all --- certainly the vast majority --- of commercial disputes that become the subject of arbitration are subject to the FAA.
- However, as discussed hereinafter, the New York state courts at times seem to ignore the scope of FAA and hence impliedly the scope of the Commerce Clause, essentially deciding cases as if the FAA did not exist, or referencing the FAA and essentially ignoring its scope as defined by the Supreme Court.⁴⁴

⁴³ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274, 115 S. Ct. 834, 840, 130 L. Ed. 2d 753, 764 (1995).

⁴⁴ See, e.g., *Byrnes v. Castaldi*, 72 A.D.3d 718, 898 N.Y.S.2d 640 (2d Dep't 2010); *Ragucci v. Professional Constr. Servs.*, 25 A.D.3d 43, 803 N.Y.S.2d 139 (2d Dep't 2005); *Baronoff v. Kean Dev. Co., Inc.*, 12 Misc. 3d 627, 818 N.Y.S.2d 421 (Nas. Co. 2006).

Ragucci was a case involving construction work in a home. The homeowner commenced litigation alleging deficiencies in the work performed; the architect moved to stay the action and compel arbitration, based on an arbitration clause in the parties' agreement. The motion court denied the architect's motion on the ground that arbitration was barred by New York General Business Law § 399(c) nullifying certain consumer agreements to arbitrate. Upholding the motion court, the Second Department ignored what would appear to be the interstate nature of the dispute, never mentioning the FAA.

Baronoff involved similar facts, including construction work in a home. Trial Term granted the homeowners' motion for a stay of the arbitration commenced by the contractor on the ground that the parties' arbitration agreement was barred by General Business Law § 399(c). In *Baronoff*, unlike in *Ragucci*, the Court specifically considered whether the FAA was applicable, finding that it was not. While acknowledging the broad scope of the FAA under state and federal law as applying to all disputes affecting interstate commerce, the court found that the fact that some of the goods used in the construction in question came from out-of-state did not mean that the dispute affected interstate commercing, stating, "If the use of any out-of-state materials triggers the applicability of the Federal Arbitration Act, then General Business Law § 399-c would be eviscerated and preempted in most cases. Taking respondent's reasoning to its logical extreme, any contract for consumer goods, involving any goods from outside of New York, would not receive the intended protection of General Business Law § 399-c." 12 Misc. 3d at 631, 818 N.Y.S.2d at 424-25.

This narrow view of the scope of the FAA, while seemingly questionable, illustrates the narrow view the New York state courts at times take as to the scope of the FAA. William J.T. Brown has noted that the New York courts can be expected to take a dim view as to whether the

Basic Substantive Rule of the FAA

- Under the FAA, arbitration agreements are enforceable, except upon such grounds as exist at law or equity for the revocation of any contract.
- Both elements are important. The central point is the enforceability of arbitration agreements, displacing the earlier state of the law where arbitration was distrusted and arbitration agreements often not enforced by courts.
- But the second part of the rule, that arbitration clauses are challengeable for the same reasons other agreements may be challenged, provides a powerful ground for challenging an arbitration agreement, perhaps even more so now than in the past, as it becomes increasingly clear under the Supreme Court's decisions in the area that it is one of the few ways to avoid an arbitration clause under the FAA.⁴⁵ However, the Supreme Court in *AT&T Mobility* held that state law, such as that relating to unconscionability, may not be used to stand as an obstacle to the accomplishment of the FAA's objectives, finding that the FAA preempted a state law that rendered class action waivers unconscionable.⁴⁶
- Examples of such general bases for opposing an arbitration clause include challenges to an arbitration agreement based on duress, adhesion, unconscionability, fraud in the inducement, and the like.

Applicability of the FAA's Pro-Arbitration Rule in State and Federal Court

- The FAA is federal law, applicable in state and federal court, preempting state laws that would limit the enforceability of arbitration agreements.
- It establishes a strong federal public policy in favor of enforcement of arbitration agreements. Arbitration agreements are to be liberally enforced. Where parties have agreed to arbitrate their dispute, the presumption is in favor of arbitrability of the dispute, including all aspects of the dispute. Any doubt regarding the scope of arbitrable issues must be "resolved in favor of arbitration."⁴⁷
- The FAA does not provide an independent basis for federal subject matter jurisdiction. A person seeking to enforce a right under the FAA in federal court

FAA reaches such areas as arbitration agreements relating to schools, teachers, municipal construction projects, and the like. See *Brown Paper*, *supra* n. 7.

⁴⁵ See Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging And The evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, Nov. 2008. Bruhl argues that as the Supreme Court has shut off most other means of resisting arbitration, the state law doctrine of unconscionability has in the past several years become an attractive and successful tool for striking down arbitration agreements.

⁴⁶ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1743, 179 L. Ed. 2d 742, 748 (2011) ("Although § 2's saving clause preserves generally applicable contract defenses, it does not suggest an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."); *Rent-a-Center West v. Jackson*, 130 S. Ct. 2772 (2010).

⁴⁷ *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 475, 109 S. Ct. 1248, 1253, 103 L. Ed. 2d 488, 497-98 (1989).

must have an independent basis for federal subject matter jurisdiction. However, as noted, a person may assert her right to arbitration under the FAA in state court. The FAA's basic substantive rule of enforceability of arbitration agreements is equally applicable in state and federal courts.

Examples of State Laws Preempted by the FAA

- Accordingly, any state law imposing special conditions to the enforceability of arbitration agreements--conditions not applicable to other agreements--is unenforceable.
- Examples of state laws that have been invalidated on this basis include:
 - New York case law prohibiting arbitrators' awarding of punitive damages;⁴⁸
 - An Alabama statute making written pre-dispute arbitration agreements invalid and unenforceable;⁴⁹
 - A Montana statute declaring an arbitration clause unenforceable unless notice was typed in underlined capital letters on the first page of the contract;⁵⁰
 - A California statute, the Talent Agencies Act (TAA), providing that certain matters covered by the statute were subject to the exclusive original jurisdiction of the California Labor Commissioner;⁵¹ and
 - A California statute applicable only in California State courts that precluded arbitration in franchise investment agreements.⁵²
 - A California rule classifying most collective arbitration waivers as unconscionable.⁵³

Scope of Arbitrability: How Much of a Dispute is Arbitrable

- Under the FAA, as discussed above, parties who have agreed to arbitrate their dispute are generally understood to have agreed to submit their entire dispute to the arbitrator(s). Of course, if they have only agreed to arbitrate a narrow issue or group of issues to arbitration, that agreement as to the restrictive scope of the arbitration will be honored. The overriding point is that the parties' agreement to arbitrate will be enforced as written.

⁴⁸ *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995).

⁴⁹ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 115 S. Ct. 834, 837, 130 L. Ed. 2d 753, 761 (1995).

⁵⁰ *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 683, 116 S. Ct. 1652, 1654, 134 L. Ed. 2d 902, 906 (1996).

⁵¹ *Preston v. Ferrer*, 128 S. Ct. 978, 981, 169 L. Ed. 2d 917, 923 (2008).

⁵² *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

⁵³ *AT&T Mobility LLC*, *supra* n. 46 and accompanying text.

Reversing the Presumption of Arbitrability for Gateway Issues of Substantive Arbitrability

- However, this presumption in favor of arbitrability of all questions when the parties have agreed to arbitration is subject to one narrow but important exception—"gateway issues" which the parties are deemed likely to have expected a court to decide, such as:
 - whether the parties have a valid arbitration agreement at all; or
 - whether a concededly binding arbitration clause applies to a certain type of controversy,
 - *i.e.*, questions of the
 - *validity* of the arbitration clause and
 - its *applicability* to the underlying dispute between the parties.⁵⁴
- The Supreme Court in *Howsam* gave the following examples of such "questions of arbitrability" which parties are presumed to have intended that a court decide, notwithstanding their arbitration clause:
 - whether the arbitration contract bound parties who did not sign the agreement;
 - whether an arbitration agreement survived a corporate merger and bound the resulting corporation;
 - whether an arbitration clause in a concededly binding contract applies to a particular type of controversy;
 - whether a labor-management layoff controversy falls within the arbitration clause of a collective-bargaining agreement; and
 - whether a clause providing for arbitration of various grievances covers claims for damages for breach of a no-strike agreement.⁵⁵
- As to these gateway issues of arbitrability, the general presumption as to arbitrability discussed above is reversed: *As to these gateway issues, the presumption is against arbitrability, such that there would have to be a strong showing of party intent to establish that the parties intended to have such gateway issues decided by the arbitrator(s).* These issues are presumed non-arbitrable unless the parties "*clearly and unmistakably provide[d] otherwise.*"⁵⁶

⁵⁴ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002); *see also*, 13-75 New York Civil Practice: CPLR ¶ 7503.38 for a discussion of New York arbitration law in this area.

⁵⁵ *Howsam*, 537 U.S. at 84.

⁵⁶ *Howsam*, 537 U.S. at 83, stating:

Although the Court has also long recognized and enforced a "liberal federal policy favoring arbitration agreements," *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983), it has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the "question of arbitrability," is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise." *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986) (emphasis added); *First Options*, 514 U.S. at 944.

- It must be emphasized that the scope of this exception to the presumption of arbitrability is narrow. The Court in *Howsam* found that it is not applicable in other circumstances where parties would likely have expected that an arbitrator would decide the gateway matter. The Court said that procedural questions that grow out of the dispute and bear on its final disposition are presumptively for an arbitrator, not a judge, to decide. The Court gave the following examples:
 - Whether the first two steps of a grievance procedure were completed, where these steps are prerequisites to arbitration;
 - The validity of allegations of waiver, delay, or a like as a defense to arbitrability; and
 - Whether a condition precedent to arbitrability has been fulfilled.⁵⁷
- The Supreme Court in *First Options* formulated the rule as to this narrow exception to the presumption of arbitrability somewhat differently. There, the Court defined the exception as applying when the issue is not arbitrability in general, but rather the question of *who* shall determine arbitrability, the court or the arbitrator, stating that, when that is the question, the presumption is reversed and it is assumed that the matter should be decided by the court unless there is “clear and unmistakable evidence” that the parties intended the arbitrator(s) to decide it.⁵⁸

Judicial Determination of Issues of Substantive Arbitrability/Arbitral Determination of Issues of Procedural Arbitrability

- Quoting the Comments to the Revised Uniform Arbitration Act (the “RUAA”), the Court in *Howsam* summed it up that, “[I]n the absence of an agreement to the contrary, issues of substantive arbitrability ... are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice,

⁵⁷ *Id.* at 84-85.

⁵⁸ *First Options v. Kaplan*, 514 U.S. 938, 944-45, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985, 994 (1995), stating:

This Court, however, has (as we just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is “clea[r] and unmistakabl[e]” evidence that they did so. *AT&T Technologies, supra*, at 649; see *Warrior & Gulf, supra*, at 583, n. 7. In this manner the law treats silence or ambiguity about the question “*who* (primarily) should decide arbitrability” differently from the way it treats silence or ambiguity about the question “*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement” -- for in respect to this latter question the law reverses the presumption. See *Mitsubishi Motors, supra*, at 626 (“Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”) (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)); *Warrior & Gulf, supra*, at 582-583.

laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.”⁵⁹

Challenges to the Parties’ Underlying Agreement and Arbitration Agreement

- Given the above lay of the land as to who — the arbitrator(s) or the courts — decide issues as to arbitrability, who decides challenges to the validity of the parties’ overall agreement and of the arbitration provisions therein?⁶⁰
- The Supreme Court has distinguished the two situations and treats them differently under the FAA. The general rule it has established is that arbitrators decide challenges to the parties’ overall agreement but courts decide challenges to the arbitration clause itself. If there is a claim of fraud in the inducement of the arbitration agreement itself, an issue that goes to the making of the agreement to arbitrate it, the court may decide it. But if there is a valid, unchallenged arbitration clause, the challenge to the parties’ overall agreement is for the arbitrator(s) to decide.⁶¹

514 U.S. at 944-45, 115 S. Ct. at 1924, 131 L. Ed. 2d at 994.

⁵⁹ *Howsam*, 537 U.S. at 85.

⁶⁰ The issue of the validity of the parties’ overall agreement is different from the issue of whether the arbitration agreement was validly entered into by the parties, the latter being one that would be decided by the courts as a matter of substantive arbitrability. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444-445, 126 S. Ct. 1204, 1208, 163 L. Ed. 2d 1038, 1043 (2006); see also, *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012).

⁶¹ *Nitro-Lift Techs.*, *supra*, n. 60; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444-445, 126 S. Ct. 1204, 1208, 163 L. Ed. 2d 1038, 1043 (2006) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967); *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984)). See also, Richard L. Barnes, *Prima Paint Pushed Compulsory Arbitration under the Erie Train*, 2 BROOK. J. CORP. FIN. & COM. L. 1 (2007).

Barnes argues that *Buckeye*, along with its predecessors *Prima Paint* and *Southland*, undermines the *Erie* doctrine. He argues that the Supreme Court’s rule as to the severability of the arbitration agreement from the overall agreement of which it is a part is inconsistent with substantive state law that should govern in federal court in diversity cases. Barnes concludes that, with the Supreme Court’s rulings in the area, we are back to a federal common law.

Perhaps an answer to Barnes’ observations is that the FAA, as construed by the Supreme Court in *Buckeye* and related cases, represents an overriding federal policy favoring arbitration — and that that policy, to have any chance of being actualized, needs to protect the arbitral process from any but absolutely necessary court intervention. Let the courts start ruling broadly on wide areas of a case and the parties might as well be in court as arbitration; the arbitration objectives, indeed, *raison d’etre*, of simplicity, expedition and economy would be lost.

Concern with letting arbitrators decide questions as to the validity of the parties’ overall agreement also would seem, at some level, to be based on a distrust that arbitrators are as competent as judges to decide such matters, a premise that in the view of many is unfounded and unsubstantiated.

- The question arises, how can the arbitration clause be treated differently from the overall agreement in which it appears? Would not its validity be subject to the validity of the overall agreement? If the overall agreement is determined to have been invalid, how can the arbitration clause from the agreement be valid?

The Court has answered this by determining that the arbitration agreement is *severable*. The Court stated in *Buckeye Check Cashing*, “[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.”⁶² The general rule is thus that a broad arbitration clause generally renders challenges to the parties’ overall agreement arbitrable, but a challenge specifically to the validity of the arbitration clause can be decided by the court.⁶³

General Scope of Applicability of the FAA in New York Courts

- As noted above, the FAA’s primary substantive rule of arbitration law – the enforceability of arbitration agreements — is set forth in § 2 of Chapter 1 of the FAA and applies in state as well as federal court.
- The other provisions of Chapter 1 of the FAA generally, on their face, apply to proceedings in federal court.
- Such provisions are certainly applicable in federal court, but are they applicable in state court?
- As noted, the Supreme Court has only explicitly found § 2 to be applicable in state court, and has gone out of its way to note that it has not held the other provisions of the FAA to be applicable in state court, although it has suggested in dictum that § 3 as to staying litigation and possibly § 4 as to compelling arbitration are applicable in state court.
- Accordingly, one might expect that New York state courts, in deciding arbitration issues to which the FAA is applicable, would apply FAA § 2 but otherwise generally apply New York arbitration law.
- However, the New York courts, in what some (including William J.T. Brown) have characterized as over-preemption, have tended to apply other provisions of the FAA in state court without qualification once they determine that the FAA is applicable, including with respect to such areas as the review of awards, the issuance of subpoenas by arbitrators, and the imposition of legal requirements not contained in the FAA or of contract terms not contained in the parties’ contract.
- However, there are a limited number of cases addressing these areas of inconsistency between New York and federal arbitration law and some of these

⁶² *Buckeye*, 546 U.S. at 445-446; see also, *Rent-a-Center*, 130 S.Ct. at 2778; *Nitro-Lift Techs.*, 133 S.Ct. at 503

⁶³ The Supreme Court has continued to strengthen the role of arbitrators in determining questions of arbitrability *vis-à-vis* that of courts. For example, a challenge to an arbitration agreement must specifically target the provision thereof relegating questions of arbitrability to the arbitrator (the “delegation” provision), where there is such a provision, for the issue of the unconscionability of the arbitration agreement to be decided by a court rather than an arbitrator. See *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010).

issues have not yet been addressed at all by the courts, so it will be interesting seeing how this plays out.

The Reverse: The Applicability of New York Arbitration Law in State and Federal Courts in FAA Cases

- As discussed above, in the context of New York, state arbitration law often contains limits on arbitrability of certain issues or other distinct arbitration-related rules, such as, in the case of New York, the following:
 - The rule that contesting arbitrability before the arbitrator(s) waives a party's right to contest arbitrability or assert a defense based on statutes of limitations in court;
 - The rule that arbitrators may not award punitive damages;
 - The rule that arbitrators may not award attorney's fees absent the parties' having agreed to such authority;
 - The rule that courts and possibly even arbitrators may order consolidations of arbitrations;
 - The rule permitting pre-award removal of arbitrators;
 - The provision for a heightened burden of proof to establish that an arbitration clause has been added to an existing contract;
 - The rule, in the view of some courts, that arbitrators may issue subpoenas to non-parties for discovery of documents;
 - The prohibition of parties' applying to a court to stay arbitration if they do not do so within 20 days of receiving a demand for arbitration or notice of intention to arbitrate containing a demand that they make any such application within 20 days; and
 - The rule that judgment may be entered on an arbitral award even if the parties' agreement did not specify that judgment could be entered on such an award.
- The question becomes, to what extent are these provisions of New York arbitration law applicable to arbitrations that are subject to the FAA?

Applicability of New York Arbitration Law in State and Federal Court to Cases in Which the FAA is Applicable *Where the Parties Have Agreed to State Arbitration Law*

- The easy part of the answer seems to be that state arbitration law is applicable to arbitration-related proceedings in state and federal court to which the FAA is applicable *if the parties have, by their arbitration clause, agreed that it is applicable*, except perhaps if the provision the parties have agreed to adopt is inconsistent with the FAA (though, given the Court's commitment to the idea that parties are entitled to have their arbitration agreements enforced as written, it would seem that parties' agreement to limit arbitrability will generally be enforced—Parties, after all, don't have to agree to arbitration at all and may limit the extent to which they subject themselves to arbitration).
- This is the Supreme Court decision in *Volt*. The California Court of Appeal had upheld the lower court's stay of the arbitration in question on the ground that the

- parties, by their contract, had adopted California arbitration law, including a provision that permitted the staying of an arbitration pending related litigation.
- The Supreme Court upheld the California Court of Appeal, based on application of a two-pronged approach:
 - The first prong looks to the parties' arbitration agreement. The fundamental thrust of the FAA is that the parties' agreement to arbitrate is to be enforced as written. The California state court had construed the parties' agreement as incorporating the California state arbitration law, a determination that the Supreme Court took as a given and did not see as within its scope of review. Reaffirming the parties' right to adopt California arbitration law, the Supreme Court emphasized that the FAA does not require arbitration pursuant to a particular set of procedural rules, but rather ensures the enforceability of parties' arbitration agreements, according to their terms.⁶⁴
 - According to the Supreme Court's approach in *Volt*, once this determination is made – once the conclusion is reached that the parties, by their agreement, have adopted some other rule of law — the second issue is reached.
 - The second issue is whether the particular state arbitration rule in question that the parties have adopted is preempted by the FAA, which depends on whether it “*actually conflicts with federal law — that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'*”⁶⁵
 - Somewhat counter-intuitively, the Supreme Court said that it thought that the California statute permitting the staying of arbitrations pending related litigation generally fostered the federal policy favoring arbitration, since California, by that statute, was legislating in an area that the FAA did not cover.⁶⁶ The Supreme Court went on to repeat that to prevent the enforcement of the parties' agreement to adopt California arbitration law “would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms.”⁶⁷
 - Whether this second prong of the Court's analysis in *Volt* will be a significant basis for evaluating this issue going forward is unclear. To the extent that the policies and purposes of the FAA are satisfied by enforcing parties' agreements as written, it is not evident what kinds of state law or outside standards parties might adopt that would be found to undermine the FAA.
 - The New York Court of Appeals has reached essentially the same conclusion, finding that, where the parties agreed that New York law would apply to the “enforcement” of their agreement, they thereby adopted New York arbitration

⁶⁴ *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 476, 109 S. Ct. 1248, 1254, 103 L. Ed. 2d 488, 498 (1989).

⁶⁵ *Id.* at 477.

⁶⁶ *Id.*

⁶⁷ *Id.* at 479.

law, including the rule that statute of limitations issues should be determined by the court, not the arbitrator.⁶⁸

- The California arbitration rule that the Supreme Court found that the parties in *Volt*, by their agreement, had adopted was ostensibly a procedural rule, but the principle of *Volt* does not appear to be limited by the nature of the rule involved in that case. The fundamental point, a substantive one — that FAA § 2 requires that parties' arbitration agreements be enforced as written — ostensibly applies to all state arbitration rules, substantive and procedural.
- This was implicit in *Mastrobuono*, where the issue was whether the FAA rule permitting, or the New York rule prohibiting, punitive damages was applicable in the case in light of the parties' choice of law clause providing that their contract was governed by New York law. Reaffirming that parties may agree as they like, to include or exclude punitive damages from their arbitration, the Court saw the issue as a contract issue as to what the parties had agreed.⁶⁹ Based on its interpretation of the parties' choice of law and arbitration provisions and their selection of the NASD rules, which the Court found to permit punitive damages, the Court determined that the parties intended that punitive damages be available and hence upheld the award of such damages. The Court emphasized that, in interpreting an arbitration agreement, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself are resolved in favor of arbitration and a court should construe ambiguous contract language against the party that drafted it.⁷⁰
- Accordingly, it would appear to be the rule that state arbitration law, whether of a substantive or procedural nature, will be applicable in cases covered by the FAA when the parties have agreed that such law will be applicable.

Applicability of New York Arbitration Law in State and Federal Court in Cases to Which the FAA is Applicable *Where the Parties Have Not Agreed to Such Arbitration Law*

- There would not appear to be any basis for the application of New York arbitration law in federal court to cases to which the FAA is applicable, where the parties have not stipulated to application of state arbitration law. The FAA has its own procedural provisions and the Federal Rules of Civil Procedure are applicable to fill in procedural gaps not covered by the FAA.
- Ironically, if the above-described trend of over-preemption continues, whereby the New York state courts, once they determine that the FAA is applicable to a case, proceed to apply provisions of the FAA that do not otherwise seem applicable in state court, it would seem that New York arbitration law will

⁶⁸ *Diamond Waterproofing Sys. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 252-53, 826 N.E.2d 802, 805-806, 793 N.Y.S.2d 831 834-35 (2005); *see also*, *N.J.R. Assoc. v. Tausend*, 19 N.Y.3d 597, 973 N.E.2d 730, 950 N.Y.S.2d 320 (2012); *Roberts v. Finger*, 15 Misc. 3d 1118A, 839 N.Y.S.2d 436 (Sup. Ct. N.Y. Ct. 2007).

⁶⁹ *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 57, 115 S. Ct. 1212, 1216, 131 L. Ed. 2d 76, 84 (1995).

⁷⁰ *Id.*

generally not be applied even in New York state courts when the FAA is applicable, absent agreement by the parties to the application of such arbitration law.

- Even with over-preemption, however, there will be circumstances where New York courts may be expected to apply New York arbitration law in cases to which the FAA is applicable, including possibly in circumstances such as the following:
 - **When the FAA is silent:** New York courts may be expected to apply New York arbitration law, at least in some instances, when New York arbitration law covers the point in question and the FAA is silent. The Supreme Court has, after all, specifically noted that the FAA does not occupy the entire field of arbitration, even of arbitration affecting interstate commerce, and that state law is only preempted to the extent that it actually conflicts with federal law -- that is, to the extent that it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁷¹
 - **When New York arbitration law is consistent with the FAA:** New York courts may be expected to apply New York arbitration law when such law is consistent with the corresponding FAA provisions and does not conflict with the enforcement of arbitration agreements. Indeed, where the New York and FAA rules seem consistent, the courts may continue their present practice in many instances of noting the consistency of the two bodies of arbitration law and essentially deciding applicable issues under both sets of rules.
 - **When New York arbitration law is more protective than the FAA of arbitration:** There will also be cases where New York arbitration law is more protective of arbitration than the FAA. State and even federal courts in cases where the FAA is applicable may choose to apply such stricter rules. Examples of such New York arbitration rules discussed above include:
 - That an arbitrator’s failure to grant an adjournment is not a specified basis for overturning an award;
 - That a party that has received notice under CPLR 7503(c) has only 20 days to contest arbitrability or statute of limitations in court and is otherwise relegated to arguing such matters before the arbitrator(s);
 - That parties need include no talismanic language in their arbitration agreement allowing for judgment to be entered on an award.
 - **Head in the sand or bold defiance: When the New York courts essentially ignore the applicability of the FAA:** To a surprising extent New York courts--not just lower courts, but the Appellate Divisions and even the Court of Appeals--have decided arbitration related cases that ostensibly affect interstate commerce without so much as a glance in the FAA’s direction. These courts have simply ignored the applicability of

⁷¹ *Volt Information Sciences*, 489 U.S. at 477-478.

- the FAA and proceeded in their analysis and decisions to apply New York arbitration law. It would be interesting investigating whether counsel simply didn't raise the issue in such cases or the courts chose to ignore it.
- **When the New York courts have a narrower view of the scope of the Commerce Clause:** Another explanation for cases in which the New York courts ignore the applicability of the FAA is that those courts, as discussed above, entertain a narrow view of the reach of the FAA, although this approach seems unrealistic, given the Supreme Court's clear rulings that "commerce" for purposes of the FAA encompasses the full scope of the Commerce Clause.
 - **Where the issue is so fundamental that the New York courts feel strongly about the application of New York law as the law of the forum:** There is also a fundamental underlying concept of the law of the forum – that certain fundamental rules, issues — need to be decided pursuant to the law of the jurisdiction in which the arbitration sits, given the heightened interest of the forum jurisdiction in them. While this concept seems to come up more in international arbitration and does not seem to have played much of a role in choice of law issues relating to domestic arbitration in New York, it is perhaps a concept that is always out there and that could play a role in the resolution of choice of law issues that might come up.
 - **Reversal or moderation of the New York courts' trend of self-preemption:** As discussed above, the New York courts, in cases before them subject to the FAA, have been applying not only the provisions of the FAA clearly applicable in state court but also provisions that, on their face, seem applicable only in federal court. If this trend is reversed or moderated, New York courts might more often apply New York arbitration law not inconsistent with the basic thrust of the FAA in state court cases subject to the FAA. As William J.T. Brown has suggested, such a situation should not be surprising: After all, for some decades after the enactment first of CPLR Article 75 and then of the FAA, the two bodies of arbitration law existed side by side, with New York arbitration law being applied in New York courts and federal arbitration law being applied in federal court. It was only in 1984 in *Southland* that the Supreme Court found that the FAA was applicable in state court.⁷²
 - Whether New York's trend of over-preemption will continue will be interesting to watch. Numerous other states, including California, have tended to apply the FAA on a more limited basis in cases before them, generally applying their own arbitration law when it does not conflict with the central rule of the FAA that parties' arbitration agreements are enforceable as written.⁷³

⁷² *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

⁷³ See Brown Paper, *supra* n. 7, citing *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 1352, 134882 Cal. Rptr. 3d 229, 240, 244, 190 P.3d 586, 598 (2008), which in turn cited Pennsylvania and Wisconsin decisions to the same effect and a Rhode Island decision to the contrary, *Trombetta v. Raymond James Financial Services, Inc.* (2006) 2006 PA Super 229

Trap for the Unwary: Limited Reach of a Standard Choice of Law Provision

- The above highlights what the courts have found to be the limited thrust of a standard choice of law clause in an agreement, providing generally that the law of a particular state will apply to the parties' agreement. Such clauses are generally

[907 A.2d 550, 568]; *DeBaker v. Shah* (Ct.App. 1994) 187 Wis. 2d 252 [522 N.W.2d 268, 271], reversed on other grounds in *DeBaker v. Shah* (1995) 194 Wis. 2d 104 [533 N.W.2d 464]; *Flexible Mfg. Systems Pty v. Super Products* (E.D.Wis. 1994) 874 F.Supp. 247, 249; *M&L Power Services v. American Networks Intern.* (D.R.I. 1999) 44 F.Supp.2d 134, 139–142; *see also*, Howard S. Suskin and Stuart D. Polizzi, *A Cautionary Reminder About the Unique Application of the Federal Arbitration Act in State Court Proceedings*, 38 Securities Reg. L. & Rep. 2006 (Dec. 11, 2006), *citing, inter alia*, *Joseph v. Advest, Inc.*, 906 A.2d 1205 (Pa. Super. Ct. Aug. 8, 2006); *Atlantic Painting & Contracting, Inc. v. Nashville Bridge Co.*, 670 S.W.2d 841, 846 (KY 1984); *Manson v. Dain Bosworth Inc.*, 623 N.W.2d 610 (Minn. Ct. App. 1998), and *Simmons Co. v. Deutsche Financial Services Corp.*, 532 S.E.2d 436, 439–40 (Ga. Ct. App. 2000).

As pointed out in these various decisions in California, Pennsylvania, Wisconsin, Kentucky, Minnesota, and Georgia, and probably decisions in other jurisdictions (the above list does not purport to be exhaustive), there is an entirely different way than New York has chosen to look at the scope of the FAA in state courts under the Supreme Court's decisions. Specifically, numerous states have found that, under *Volt* and other cases, state arbitration law is only displaced to the extent that it conflicts with the FAA.

Perhaps what this means is that, in state court cases subject to the FAA, the courts should be looking at the individual state arbitration rules in question to evaluate whether they are pro- or anti- arbitration, generally applying them if the former and deeming them preempted if the latter.

The question arises as to how this mode of analysis applies to purely procedural rules of state versus federal arbitration law, given the Supreme Court's conclusion in *Volt* that the FAA does not establish a federal policy favoring arbitration under a certain set of procedural rules, but rather seeks to ensure the enforceability according of their terms of private agreements to arbitrate (*see* Suskin and Polizzi, *supra*, *citing Volt* at 476). Perhaps this means that purely procedural (presumably, non-outcome determinative) provisions of the FAA need not, as a matter of federal law, be applied in state court.

While following this general approach to choice of law issues may provide a consistent standard, such a standard does not promise consistent results, as the cases emerging on the issue throughout the country display significant originality and diversity by the courts in determining whether particular rules of state arbitration law are pro- or anti- arbitration (*see, e.g.*, cases discussed in Suskin and Polizzi, *supra*).

It should be noted that this analysis ostensibly applies regardless of whether the parties have adopted the state's arbitration law. Where the parties have not adopted that law, the question would appear to be simply whether that law is consistent and the like with the FAA. Where parties have adopted the state's arbitration law, that adoption will generally be enforced under *Volt*, subject, at least in theory, to some scrutiny as to whether the law in question is consistent with the FAA. Presumably, however, in the latter instance, the level of scrutiny as to the consistency of the rule with the FAA will be less probing.

understood to provide the substantive law applicable to determination of the parties' underlying dispute, but not to adopt the specified jurisdiction's arbitration law. To do that, parties must be more explicit that that is what they intend.

- In effect, the choice of law and arbitration clauses, respectively, are seen as essentially separate, with the former supplying the substantive law of contract, tort, securities, or the like, and the latter providing for arbitration without specifying what arbitration law applies.⁷⁴
- This is a key distinction that is as integral to understanding this area as it is elusive and counterintuitive. One might have expected, that the standard choice of law clause adopting the law of a particular state, say of New York, would make all of the law of that state applicable, including its arbitration law. But that, as we have seen, is not generally the case; the standard choice of law clause has been interpreted as not reaching the jurisdiction's arbitration law.
- This distinction and the way the Supreme Court has developed it may perhaps best be understood as the Court's effort to intuit what parties presumptively intended by their use of what is typically boilerplate language appearing at the end of documents that may themselves have been largely boilerplate.

CONCLUSION

Perhaps the consummate irony of the complexity and murkiness of this whole area of arbitration choice of law is that it exists as the overlay and foundation for arbitration, a process supposed to be simple, expeditious, and economical.

It is not even that one approach or another to choice of law will necessarily be favorable to one side or the other in any particular situation, but that the ambiguity can fuel litigation causing prolixity, expense, and delay.

Enacting the Revised Uniform Arbitration Act in New York may help resolve some of the ambiguities, but the reality certainly is that we will likely have to wait a long time before the legislatures and courts of the country, state and federal, clear away this morass.

⁷⁴ See *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995); see also, 5 N.Y. Jur.2d Arbitration and Award § 64.

The Court in *Mastrobuono* stated:

We think the best way to harmonize the choice-of-law provision with the arbitration provision is to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other. In contrast, respondents' reading sets up the two clauses in conflict with one another: one foreclosing punitive damages, the other allowing them. This interpretation is untenable.

514 U.S. at 62-64.

But the fortunate reality is that we control our destiny in this area. The FAA applies to all domestic arbitrations that affect interstate commerce -- and its central thrust is that parties' arbitration agreements are enforceable as written.

Therein lies a way out of the murk: Parties and their counsel need to use arbitration clauses that specify the arbitration rules of law they want. If this is done, the FAA will generally make such clauses enforceable.

The complexity of the issue highlights the drafting challenges, but the power of § 2 as a norm offers parties the prospect that their drafting efforts will be rewarded. Parties should not have to end up in expensive time-consuming litigation over choice of law when they have chosen arbitration.



NYSBA Commercial Arbitration Training Program:

Benjamin N. Cardozo School of Law

June 19, 2019

- Outline of Presentation
- Summaries of Select Cases
- Articles

Michael S. Oberman

Counsel

New York

moberman@kramerlevin.com

T 212.715.9294

F 212.715.8294

New York State Bar Association – Dispute Resolution Section

Commercial Arbitration Training

VACATUR/CONFIRMATION – June 19, 2019

By Michael S. Oberman

I. Introduction

- a. We all know that awards are often challenged, but few challenges succeed

--See, e.g., *In the Matter of Daesang Corp. v. Nutrasweet Co.*, 85 N.Y.S. 3d 6 (1st Dep't 2018), *leave to appeal den.*, 32 N.Y.3d 915 (2019); *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60 (2d Cir. 2012), where the appellate courts reversed trial court vacatur.

--Among the rare appellate opinions vacating or upholding a vacatur, see *Thomas Kincade Co. v. White*, 711 F.3d 719 (6th Cir. 2013) (evident partiality); *U.S. Soccer Federation, Inc. v. U.S. National Soccer Team Players Ass'n*, 838 F.3d 826 (7th Cir. 2016) (exceeding authority).

- b. And yet, a second take-away: even if a challenge to an award is ultimately unsuccessful, the challenge takes time and expense – especially if pursued on appeal.
1. While there is a short period in which to commence a challenge to an award at the trial court level, there is no expedition for decision or appeal.
 2. A recent study of 200 cases decided by the Southern District of New York since 2005 found that the average time from petition to district court judgment was 42 weeks and for international cases 35 weeks; most of the cases were employment disputes, with only 27 domestic commercial awards reviewed by the SDNY in that time period. See Tim McCarthy, David Hoffman and Ryham

Ragab, “Review of New York Federal Petitions for Confirmation of Arbitral Awards Shows Swift Resolutions and Certainty of Awards,” 6 New York Dispute Resolution Lawyer, No. 1 at 47 (Spring 2013).

3. Some courts see frivolous challenges to an arbitration award as a basis for sanctions. *See Johnson Controls, Inc. v. Edman Controls, Inc.*, 712 F.3d 1021, 1028 (7th Cir. 2013) (cautioning that frivolous challenges present a “high risk of sanctions”); *DigiTelCom, Ltd. v. Tele2 Sverige AB*, 2012 WL 3065345, at *7-8 (S.D.N.Y. 2012) (imposing attorneys’ fees as a sanction under 28 U.S.C. § 1927); *see also Kailuan (Hong Kong) Int’l Co., v. Sino East Minerals, Ltd.*, 2016 WL 7187631, at *7 (S.D.N.Y. 2016) (denying sanctions where arguments were “unpersuasive” and “unmeritorious but not frivolous or vexatious”).

II. Choice of Law

- a. In the review of an award, there is the threshold issue of whether the case is governed by the FAA or by state law.
- b. It is not the courthouse that determines whether the FAA or state law controls; it is the wording of the arbitration agreement along with the nature of the underlying dispute (i.e., interstate commerce).
- c. *See Cusimano v. Schnurr*, 26 N.Y.3d 391, 399-400 (2015)(describing “undeniably broad” “interpretation” to be applied is assessing interstate commerce for purposes of the FAA); *Krantz & Berman LLP v. Dalal*, 472 F. App’x 76, 77 (2d Cir. 2012) (“But the record reflects that, pursuant to the retainer agreement, K&B (a New York law firm) provided services to Dalal (then a resident of Washington, D.C.) related to litigation involving a New Jersey corporation. We need go no further”) (citing *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) as holding “involving commerce” in the FAA signifies the “broadest permissible exercise of Congress’ Commerce clause power”), *cert. denied*, 133 S. Ct. 1584 (2013)).

- d. See also *N.J.R. Assoc. v. Tausend*, 19 N.Y.3d 597, 601-02 (2012) (“We have explained that a contract specifying that ‘New York law shall govern both “the agreement and its enforcement[]” adopts’ the New York rule that the threshold statute of limitations issues are resolved by the courts and not arbitrators. . . .”; *County of Nassau v. Chase*, 402 F. App’x 540, 541 (2d Cir. 2010) (where contract specifies “that any appeal from an arbitration award is to be governed exclusively by New York state law, the designation must be honored by the courts unless the state law conflicts with federal law”).
- e. Scope of Review Under FAA or State Law
 - i. Law applied can matter—among other reasons—because of *SCOTUS* decision in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 576-77 (2008): held that the FAA grounds for review are exclusive (i.e., the parties cannot by contract provide that an award will be reviewed for mere error of law), but the Court specifically mentioned the possibility that broader review of awards may be had under state or common law.
 - ii. Three states have concluded that Sections 9-11 of the FAA do not preempt state law and that their state law provides for broader review (Alabama, California, and Texas); four have held otherwise (Maine, Georgia, Tennessee, and Massachusetts). See Michael S. Oberman, “The *Hall Street* Parade: State Courts Step Out and Consider Expanded Review of Arbitration Awards,” 4 New York Dispute Resolution Lawyer, No. 3 at 23 (Fall 2011); *Katz, Nannis & Solomon, P.C. v. Levine*, 46 N.E.3d 541 (Mass. 2016).
 - iii. Going in the other direction, state and federal courts are exploring whether parties may, by agreement, narrow or even eliminate all—or certain—steps of judicial review.
 - 1. See Michael S. Oberman, “The Other Shoe: Are Agreements *Narrowing* Judicial Review Enforceable,” 31 Alternatives at 65 (May 2013).

III. Statute of Limitations

- a. One of the ways the governing statute matters is in the applicable deadlines.
- b. The time to seek confirmation is one year under either the FAA or the CPLR, but the rules are different for a petition to vacate.
 1. Under the FAA, a petitioner has only three months to petition to vacate, and that period ends with the last day of the third month even if the other party subsequently moves to confirm within the year allowed. *See Stevens v. Jiffy Lube Int'l, Inc.*, 911 F.3d 1249, 1252 (9th Cir. 2018) (calculating three months); *Martin v. Deutsche Bank Sec. Inc.*, 676 F. App'x 27 (2d Cir. 2017) (enforcing three month requirement).
 2. Under the CPLR, a petitioner has 90 days to petition to vacate, but if the 90 days goes by and a petition to confirm is therefore timely made, the losing party may cross-move to vacate.
- c. *See also Thompson v. Lithia ND Acquisition Corp.*, 896 N.W.2d 230 (N.D. 2017) (noting split among federal circuits on whether one-year period is mandatory under FAA, holds later confirmation allowed under state statute).

IV. Mechanics: Proceedings

- a. Even if review is under FAA, an independent basis is required for subject matter jurisdiction in federal court. However, a district court may look through a petition to vacate or confirm to determine jurisdiction based on the underlying dispute. *See Landau v. Eisenberg*, __ F. 3d __, 2019 WL 1924224 (2d Cir. May 1, 2019).
- b. Most often, the proceeding consists of written submissions and oral argument; occasionally, there can be an evidentiary hearing and/or discovery.
- c. Burden of Proof

- i. Second Circuit has held that the showing required to avoid summary confirmation of an arbitration award under FAA is very high. *See Scandanavian Reinsurance*, 668 F.3d at 71-72.
- ii. For CPLR cases, courts have applied a clear and convincing standard (*see, e.g., Allstate Ins. Co. v. Geico*, 100 A.D.3d 878, 879 (2d Dep't 2012)).

V. Substantive Grounds for Review: Manifest Disregard

- a. There is conflict and confusion over the role of the doctrine of "manifest disregard of the law."
 - i. Again, *Hall Street* held that the FAA grounds are exclusive and cannot be expanded by private agreement.
 - ii. Had Justice Souter stopped there, an issue would have been resolved, and clarity would prevail.
 - iii. But he went a step further, observing how lower courts had extracted from the Supreme Court's own *Wilko v. Swan* opinion in 1953 language suggesting manifest disregard as a separate ground, and he appeared to suggest it is not a separate ground under the FAA.
 - iv. Following *Hall Street*, both the circuits and state highest courts have divided on whether the SCOTUS really meant to extinguish "manifest disregard" or merely to curtail its role (e.g., can be a gloss on statutory grounds); courts also split on whether violation of public policy is a cognizable non-statutory ground.
 - v. *See Bangor Gas Co., LLC v. H.Q. Energy Servs. (U.S.) Inc.*, 695 F.3d 181, 187 n.3 (1st Cir. 2012) (finding Second, Fourth, Sixth and Ninth applying manifest disregard; Fifth, Eighth and Eleventh not; First Circuit, in dicta, saying no).
 - vi. In 2010, the SCOTUS had an easy opportunity to erase the confusion it created when it decided *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010),

which is the case where the Second Circuit found manifest disregard to still have a role.

- vii. Instead, Justice Alito noted the growing conflict but stated the Court would reserve on the issue of whether *Hall Street* eradicated manifest disregard.
- viii. SCOTUS continues to deny cert. in cases re-presenting the “manifest disregard” issue.
- ix. New York state courts apply manifest disregard in FAA cases, *see, e.g., In the Matter of Daesang Corp. v. Nutrasweet, supra* (finding no manifest disregard shown); and under CPLR, *see, e.g., Schiferle v. Capital Fence Co.*, 155 A.D.3d 122 (4th Dep’t 2017).

VI. FAA Statutory Grounds

- a. Section 10 of the FAA has four sub-sections (see below) —two of which appear most frequently in recent cases of note.
 - i. Section 10(a)(2): “where there was evident partiality or corruption in the arbitrators, or either of them.” 9 U.S.C. § 10(a)(2).
 - 1. As applied by the circuits, nondisclosure by itself does not equal evident partiality.
 - a. SCOTUS last addressed evident partiality in 1968, a case called *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), and split 4-2-3, leaving circuits and state courts to debate the effect of the plurality decision and to find their own way.
 - b. *See generally*, Michael S. Oberman, “Clarifying the Standard for Determining Arbitrator Bias,” *New York Law Journal*, Apr. 2, 2012.
 - c. Second Circuit standard: whether a reasonable person, considering all of the

circumstances, would *have* to conclude that an arbitrator was partial to one side

- i Most circuits are aligned with at least this level of review; two apply a lower standard of “reasonable impression of partiality.”
- ii *See generally*, Brief for Respondent-Respondent, *U.S. Electronics, Inc. v. Sirius Satellite Radio Inc.*, 2011 WL 6986868 (N.Y. 2011) (compiling case law); *see also Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 252-53 (3d Cir. 2013) (adopting Second Circuit standard).
- d. N.Y. Court of Appeals adopted Second Circuit standard in *U.S. Electronics Inc. v. Sirius Satellite Radio Inc.*, 17 N.Y.3d 912, 913 (2011) (argued by Michael Oberman)
- e. *Scandanavian Reinsurance*: Really good opinion that explains evident partiality; the Court stated:

“The evident-partiality standard is, at its core, directed to the question of bias.... It follows that where an undisclosed matter is not suggestive of bias, vacatur based upon that nondisclosure cannot be warranted under an evident-partiality theory....” 668 F.3d at 73.

[I]n ascertaining whether a relationship is “material”... we think that a court must focus on the question of how strongly that relationship tends to indicate the possibility of bias in favor of or against one party, and not on how closely that relationship appears

to relate to the facts of the arbitration... *Id.* at 75.

[W]e do not think it appropriate to vacate an award solely because an arbitrator fails to consistently live up to his or her announced standards for disclosure, or to conform in every instance to the parties' respective expectations regarding disclosure. The nondisclosure does not by itself constitute evident partiality.... *Id.* at 76-77.

Even where an arbitrator fails to abide by arbitral or ethical rules concerning disclosure, such a failure does not, in itself, entitle a losing party to vacatur. . . ." *Id.* at 77 n.22.

- f. A challenge for evident partiality may be waived if the challenging party sat on the information on which the challenge was based and perhaps if that information was as easily available *before* the award as *after* the award. *See Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 249-50 (3d Cir. 2013) (surveying case law on waiver).

b. *Dealer Computer Servs. v. Michael Motor Co.*

- i. DCS offers computer hardware and software for automobile dealerships; Michael Motor was one dealership which contracted with DCS.
- ii. The dispute turned on an interpretation of a provision of DCS's standard contract.
- iii. DCS appointed Carol Butner as its party-appointed neutral arbitrator.
- iv. Butner disclosed: "I served on panel [sic] of three arbitrators that considered a dispute between Dealer Computer Services, Inc. and another party." 485 F.

App'x at 728. On her questionnaire, she answered "Yes" to question on parties and counsel appearing before her in the past, and put a question mark in response to question on whether she served as an arbitrator in which listed witnesses or individual parties gave testimony.

- v. After panel ruled for DSC, Michael Motor learned that Butner had served on the panel in the arbitration between DSC and Venus Ford. That panel issued an 8 page award in favor of DSC, which required application of the very same contract provision.
- vi. The same law firm represented DSC in both arbitrations; the same damages expert testified for DSC in both arbitrations (which the Venus Ford panel credited); and the Venus Ford panel heard two additional witnesses for DSC who did not testify in *Michael Motor*.
- vii. The district court held that Butner's conduct created a "reasonable impression of bias" and rose to the level of evident partiality—a connection to DSC that significantly compromised her ability to act impartially, 485 F. App'x at 726.
- viii. The briefs on appeal focused more on whether Michael Motor waived the challenge—and the Fifth Circuit accepted this argument in a summary order reversing district court:

"Even without the specific information of the *Venus Ford* arbitration, Butner's disclosures were sufficient to put MMC on notice of a potential conflict. Accordingly, the [district] court's conclusion that the arbitrator completely failed to disclose a potential conflict is incorrect. Particularly, in light of MMC's duty to reasonably investigate, Butner's disclosures were sufficient to put MMC on notice. The information was available on the AAA online Webfile system, which was the agreed upon method of disclosure." 485 F. App'x at 728.

- ix. The fourth ground is “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.” 485 F. App’x at 727.
1. There is a chance that this ground might provide a way to challenge an error of law.
 - a. If a clause says that an arbitrator may only issue an award consistent with governing case law, and the arbitrator is seen as misapplying that law, can a challenge be raised for exceeding power—recognizing that the parties could not provide for an award to be reviewed for errors of law? The Texas Supreme Court has said this can be done under the Texas statute and consistent with FAA in *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex.), *cert. denied*, 565 U.S. 963 (2011).
 2. But many other courts have held that a questioning of the arbitrator’s authority should not be an indirect way of getting judicial review of the merits of an award.
 3. “The Second Circuit has ‘consistently accorded the narrowest of reading to the FAA’s authorization to vacate awards pursuant to § 10(a)(4) . . . focus[ing] on whether the arbitrators had the power based on the parties’ submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue.” *DigiTelCom*, 2012 WL 3065345, at * 2 (citations omitted).
 4. *See Timegate Studios, Inc. v. Southpeak Interactive, L.L.C.*, 713 F.3d 797 (5th Cir. 2013) (holding that an arbitrator did not exceed his powers by amending the parties’ agreement to

grant a perpetual license to the prevailing party in the intellectual property of the losing party.)

VII. CPLR Statutory Grounds

- a. Quite similar to the federal grounds (the FAA was based on New York's arbitration statute at the time).
- b. But CPLR 7511(b)(1) has the following set-up language: "if the court finds the rights of that party were prejudiced"; this is not expressed in the FAA.
 - i. First: "corruption, fraud or misconduct in procuring the award."
 1. Leading case is *Goldfinger v. Lisker*, (68 N.Y.2d 225(1986)), where the arbitrator met with a party-litigant privately without the knowledge of the other party—seen as "misconduct" or "undue means."
 2. The Court stated: "Precisely because arbitration awards are subject to such judicial deference, it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded...Our general reluctance to disturb arbitration awards must yield in this case to the clear necessity of safeguarding the integrity of the arbitration process." 68 N.Y.2d at 231, 232-33.
 - ii. Second: "partiality of an arbitrator appointed as a neutral."
 1. See *Weinrott v. Carp*, 32 N.Y.2d 190, 201 (1973): "We believe it is incumbent upon an arbitrator to disclose any relationship which raises even a suggestion of possible bias. This case, however, involves no direct relationships between arbitrator and client....Thus, we have only a weak link of indirect relationships purporting to tie an arbitrator to a claimant through a third party who is known

only very casually by both parties. The decision of the arbitrators was unanimous, and there is no evidence of any bias. It would have been preferable if Vogel had disclosed the relationship, however distant, but in the modern world of sprawling corporations and rapid travel, it would be most difficult to find a large number of potential well-qualified arbitrators who did not have some indirect relationship with one of the parties to the litigation. After the protracted hearings consumed by this case, we think the asserted relationship too remote and speculative to provide a basis for reversal.”

2. A petitioner’s subjective belief that the arbitrator’s rulings favored respondent does not create an actual or perceived conflict of interest between the arbitrator and respondent that prejudiced petitioner’s rights.
3. A failure to pursue a possible ground for challenge known *before* the award can result in a waiver *after* the award. *See Goldstein v. 12 Broadway Realty LLC*, 105 A.D.3d 506, 506-07 (1st Dep’t 2013).

iii. Third: “an arbitrator...exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter was not made.”

1. Exceeding power—at variance with a limitation in the arbitration clause (versus contract itself).
2. It is important to know that New York has recognized that an arbitrator “may do justice as he sees it, applying his own sense of the law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement.” *Matter of Silverman*, 61 N.Y.2d 299, 308 (1984).

3. In applying this section, the New York Court of Appeals has recognized “three narrow grounds that may form the basis for vacating an arbitrators award—that it violates public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator’s power.”
Shenendehowa Cent. Sch. Dist. Bd. of Educ. v. Civil Serv. Employees Assoc., Inc., 20 N.Y.3d 1026, 1027 (2013) (citation omitted).

- iv. Fourth: “failure to follow the procedure of this article”—like notice.

VIII. Enforcing Awards

- a. Most post-award proceedings are brought to confirm or vacate an award, but occasionally a dispute over the meaning of an award leads to a court proceeding to interpret and enforce the award.
- b. In *Pine Street Assocs., L.P. v. Southridge Partners, L.P.*, 107 A.D.3d 95, 100 (1st Dep’t 2013), the court addressed its role when a dispute exists over the meaning of a confirmed award. “[T]he Court’s function [is] to determine and declare the meaning and intent of the arbitrator,” adopting the “most reasonable meaning of the text by avoiding any potential interpretations of the award that would render any part of its language superfluous or lead to an absurd result.” In addition, the “award must be interpreted in the light most favorable to the prevailing party” (citing a U.S. Court of Appeals for the Sixth Circuit decision for this last principle).
- c. In *Tricon Energy v. Vinmar Int’l. Ltd.*, 718 F.3d 448, 456, 460 (5th Cir. 2013), the court held: “If an arbitration panel has been granted authority by the parties to award a non-statutory rate of postjudgment interest, and if it wishes to do so, it must expressly award ‘postjudgment interest.’ This panel did not.” The court found that the parties had authorized the panel to award post-judgment interest, but the award did not state that post-judgment interest was being awarded at a non-statutory rate. The award spoke of post-award interest: “the arbitrators in this

case did not award postjudgment interest, but post-award interest, and that distinction makes a difference.”

- d. *See Herll v. Auto-Owners Ins. Co.*, 879 F.3d 293 (8th Cir. 2018) (applying Minnesota Arbitration Act, which expressly provides for a court to submit a claim that an award is ambiguous back to the arbitrators); *Gen. Re Life Corp. v. Lincoln Nat'l Life Ins. Co.*, 909 F.3d 544 (2d Cir. 2018) (holding that the doctrine of *functus officio* does not prevent a court from submitting to the arbitrator 1n ambiguous award for clarification). *See also American Int'l Specialty Lines Ins. Co. v. Allied Capital Corp.*, 167 A.D.3d 142 (1st Dep't 2018), *leave to review granted* (2019) (vacating award under doctrine of *functus officio*).
- e. For international awards, *see generally CBF Industria DeGusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58 (2d Cir.) (discussing the procedure for confirmation/vacatur in contrast to enforcement) *cert. denied*, 133 S. Ct. 557 (2017).

FEDERAL ARBITRATION ACT

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in [§§] 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

- a. In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration
 1. [W]here the award was procured by corruption, fraud, or undue means;
 2. [W]here there was evident partiality or corruption in the arbitrators, or either of them;
 3. [W]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
 4. [W]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and

definite award upon the subject matter submitted was not made.

- b.* If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.
- c.* The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration.

- a.* Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
- b.* Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
- c.* Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

CPLR 7511
Vacating or modifying award

(a) When application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award; or

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that:

(i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or

(ii) a valid agreement to arbitrate was not made; or

(iii) the agreement to arbitrate had not been complied with; or

(iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.

(c) Grounds for modifying. The court shall modify the award if:

1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or

2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

(d) Rehearing. Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed in accordance with this article. Time in any provision limiting the time for a hearing or award shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court.

(e) Confirmation. Upon the granting of a motion to modify, the court shall confirm the award as modified; upon the denial of a motion to vacate or modify, it shall confirm the award.

JUNE 2019 SELECTED CASES ON VACATUR

Selected and compiled by Michael S. Oberman

<u>Case</u>	<u>Description</u>
<i>Adviser Dealer Services, Inc. v. Icon Advisers, Inc.</i> , 557 F. App'x 714 (10th Cir. 2014)	Reversing vacatur of award, and directing confirmation of award that awarded attorney's fees in a FINRA arbitration, where the parties' submissions each requested attorney's fees which—under FINRA rules—constituted a request by all parties for an award of fees.
<i>Aerotel, Ltd. v. IDT Corp.</i> , 568 F. App'x 51, 53 (2d Cir. 2014)	Affirmed a judgment denying a petition for vacatur on the grounds of manifest disregard and exceeding powers. This order does not discuss the substantive law at issue but rather observed how the district court had found that the arbitration panel had looked at the applicable law. The court added: "The District Court properly concluded that while another panel might have reached a different conclusion, the panel in this case, whether correctly or not, was unquestionably applying the governing law." The District Court also noted that "New York law gives arbitrators substantial power to fashion remedies"...and, accordingly, the decision to deny specific performance and instead grant lost profit damages was not in excess of its powers under the FAA. We agree." (citation omitted).
<i>A&G Coal Corp. v. Integrity Coal Sales, Inc.</i> , 565 F. App'x 41, 43-44 (2d Cir.), <i>cert. denied</i> , 135 S. Ct. 368 (2014)	Affirmed a judgment rejecting a petition to vacate an award of \$21,074,300.30 premised on manifest disregard of the law and of the parties' contract. Petitioner A&G—while conceding "that the arbitrator's fact-finding in calculating market price is essentially unreviewable"—nonetheless contended that (a) the award granted more than Integrity had sought in the arbitration and was therefore "punitive rather than compensatory" and (b) the arbitrator "disregarded New York law in calculating damages." The Second Circuit held that the fact that an arbitrator "reached a greater figure than the one calculated by [the claimant] does not transform a compensatory award into a punitive one."
<i>Agility Public Warehousing Co. K.S.C. v. Supreme Foodservice GMBH</i> , 495 F. App'x 149, 150, 151, 153 (2d Cir. 2012)	Confirmed a \$41 million award in favor of Agility. The court first held that the New York Convention plainly applies, since Supreme is a Swiss company. The court rejected Supreme's argument that the award was contrary to New York public policy, in that certain Agility witnesses refused to testify in the face of an indictment of Agility and yet Agility sought and obtained affirmative relief in the arbitration. The court held that the Convention's public policy ground pertains to "national" policies and not the

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>policies of particular states within a country. The court declined to rule if any “basic, fundamental United States public policy” was implicated, because the “situation that Supreme complains of was largely, if not entirely, of Supreme’s own making”—specifically, it declined to adjourn the arbitration until after the criminal proceeding was concluded and it invited the arbitrators to draw adverse inferences from the refusal of the Agility executives to testify. “Under such circumstances, the arbitrators’ decision to draw adverse inferences from the executives’ absence” instead of dismissing Agility’s claims “did not violate ‘basic notions of morality and justice.’” Nor did the refusal to dismiss the claims of Agility violate due process. The court further rejected a challenge under §10(a)(3) since “misconduct” requires violation of “fundamental fairness,” which was not shown. The court additionally rejected a challenge of exceeding power under § 10(a)(4), where Supreme argued the panel improperly awarded post-termination airlift fees; there was no issue about the arbitrators’ authority to award such fees, only a contention of an erroneous legal ruling. The court finally rejected a manifest disregard challenge relating to the adverse inferences (rather than dismissal of the claim) in light of New York public policy; at most, there would be “a mere error in the application in the application of state law.” Note: the court framed manifest disregard as a “gloss” on the statutory grounds, in contrast to some other recent cases which simply apply manifest disregard as if a separate ground.</p>
<p><i>Am. Postal Workers Union, AFLCIO v. U.S. Postal Serv.</i>, 754 F.3d 109, 113-14 (2d Cir. 2014)</p>	<p>Rejected an “exceeded powers” challenge. The court relied on the <i>Oxford Health</i> opinion from the Supreme Court for the proposition that “an arbitral decision even arguably construing or applying the contract must stand, regardless of a court’s view of its (de)merits.” The Second Circuit also reaffirmed that “arbitrators possess authority to apply collateral estoppel based on prior judicial or administrative decisions” under “a broad arbitration agreement.”</p>
<p><i>American Brokerage Network v. American General Life Ins. Co.</i>, 744 F. App’x 388, 388-89 (9th Cir. 2018)</p>	<p>In reversing vacatur of an award relating to a relationship of which the arbitrator “was not actually aware,” the court of appeals stated:</p> <p style="padding-left: 40px;">Given the arbitrator’s disclosure that AIG was a former client of her firm, ABN [that is, one of the</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>parties] had some duty to inquire about the nature of that relationship. <i>See Fid. Fed. Bank, FSB v. Durga Ma Corp.</i>, 386 F.3d 1306, 1313 (9th Cir. 2004); <i>Lucent Techs. Inc. v. Tatung Co.</i>, 379 F.3d 24, 28 (2d Cir. 2004). But ABN asked no questions and proceeded with the hearing. Further, the laborious efforts required to discover the undisclosed relationships give credence to the reasonableness of the arbitrator's investigation. <i>See New Regency</i>, 501 F.3d at 1110 (arbitrators have a duty to "make a reasonable effort to inform themselves of any interests or relationships" subject to disclosure) (citation omitted). Lastly, the undisclosed relationships, considered in light of those the arbitrator did disclose, are insufficient to create a "[r]easonable impression of partiality." <i>Schmitz v. Zilveti</i>, 20 F.3d 1043, 1047 (9th Cir. 1994) (citation omitted).</p>
<p><i>American International Specialty Lines Ins. Co. v. Allied Capital Corp.</i>, 167 A.D.3d 142, 146-48 (1st Dep't 2018), <i>leave to review granted</i> (2019)</p>	<p>The First Department vacated an award under the <i>functus officio</i> doctrine, where a panel—asked to determine first on summary disposition the threshold liability issue—issued a partial final award that determined that issue but then, on request of the party that was unsuccessful in the partial fund award, reconsidered the partial fund award and issued a "Corrected" partial final award. The court (4-1) stated:</p> <p>The corrected PFA and final award should be vacated and the PFA should be confirmed on the ground that the panel exceeded its authority when it reconsidered the PFA. "Vacatur of an arbitrator's award is statutorily limited to occasions involving fraud, corruption or bias ... or occasions when the arbitrator exceeded his or her power, or so imperfectly executed it so that a final and definite award was not made" (<i>Matter of Curley [State Farm Ins. Co.]</i>, 269 A.D.2d 240, 241-242, 702 N.Y.S.2d 305 [1st Dept. 2000]; <i>see also</i> CPLR 7511[b]).</p> <p>Here, when the panel reconsidered the PFA, it exceeded its authority based on the common law doctrine of <i>functus officio</i>. The doctrine of <i>functus officio</i> provides that absent an agreement to the contrary, after an arbitrator renders a final award,</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>the arbitrator may not entertain an application to change the award, “except ... to correct a deficiency of form or a miscalculation of figures or to eliminate matter not submitted” (<i>Matter of Wolff & Munier [Diesel Constr. Co.]</i>, 41 A.D.2d 618, 618, 340 N.Y.S.2d 455 [1st Dept. 1973]; <i>see also Levine v. Klein</i>, 70 A.D.2d 532, 416 N.Y.S.2d 28 [1st Dept. 1979]; CPLR 7509; CPLR 7511[c]). “In order to be ‘final,’ an arbitration award must be intended by the arbitrators to be their complete determination of all claims submitted to them” (<i>Michaels v. Mariforum Shipping, S.A.</i>, 624 F.2d 411, 413 [2d Cir.1980]). “Generally, in order for a claim to be completely determined, the arbitrators must have decided not only the issue of liability of a party on the claim, but also the issue of damages” (<i>id.</i> at 414).</p> <p>However, “the submission by the parties determines the scope of the arbitrators’ authority” (<i>Trade & Transport, Inc. v. Natural Petroleum Charterers Inc.</i>, 931 F.2d 191, 195 [2d Cir.1991]). Thus, “if the parties agree that the [arbitration] panel is to make a final decision as to part of the dispute, the arbitrators have the authority and responsibility to do so ... [and] once [the] arbitrators have finally decided the submitted issues, they are, in common-law parlance, ‘functus officio,’ meaning that their authority over those questions is ended” (<i>id.</i> at 195)... .</p> <p>In this case, the panel was functus officio with respect to the PFA and thus, the panel’s reconsideration of the PFA on substantive grounds was improper and exceeded its authority. During the arbitration proceeding, AISLIC and Allied agreed that the panel was to make an immediate, final determination as to the issue of AISLIC’s liability under the policies, including whether Allied had suffered an insurable “Loss” and whether Allied was entitled to defense costs, and that the issue of the amount of defense costs would be determined at a separate evidentiary hearing if it was found that the claims made in the other litigation were covered under the policies. Indeed, Allied stated in its brief in opposition to AISLIC’s motion that “the quantum</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>of attorneys' fees need not be decided on this motion, but could be subject to a separate evidentiary process in the event coverage is found." At the dispositive motion hearing, Allied's counsel stated that the amount awarded as defense costs "would be the topic for a separate proceeding ... like an inquest to prove up what was done and how much was done." Counsel for AISLIC did not disagree. Thus, the panel had the authority and responsibility to determine the issue of AISLIC's liability under the policies and once the panel made such determination, the panel was functus officio, meaning that its authority over such issue was ended.</p>
<p><i>Americo Life, Inc. v. Myer</i>, 440 S.W.3d 18 (Tex. 2014)</p>	<p>Applying the FAA, the Texas Supreme Court vacated an award for exceeding authority where the parties' agreement allowed each party to appoint a party-appointed arbitrator, one party's designation of an arbitrator was challenged by the other side and the AAA upheld the challenge; the court held that the composition of the panel did not comply with the agreement and therefore that panel exceeded its power in rendering the award.</p>
<p><i>Aspic Engineering and Construction Co. v. ECC Centcom Constructors LLC</i>, 913 F.3d 1162, 1168-69 (9th Cir. 2019)</p>	<p>Affirming a district court's vacatur of an award, the circuit first reiterated that, in reviewing a district court vacatur, the court of appeals reviews legal rulings de novo and findings of fact for clear error. The court next reiterated that arbitrators exceed their powers when the award is "completely irrational" or exhibits a "manifest disregard of the law." In reviewing a contract dispute, the arbitrator found that a subcontractor need not comply with requirements of the Federal Acquisitions Regulations that were incorporated into the contract; the district court and court of appeals ruled that the arbitrator failed to draw the essence of the award from the subcontract but rather improperly disregarded contract provisions "to achieve a desired result." The court closed with the following two observations, the first about the importance of the government regulations and the second about the role of courts where arbitration has become more common:</p> <p>To allow contractors and subcontractors, foreign or domestic, to evade the FAR provisions because a subcontractor was too unsophisticated or</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>inexperienced to fully understand them would potentially cripple the government's ability to contract with private entities, and would violate controlling federal law. . . .</p> <p>We have become an arbitration nation. An increasing number of private disputes are resolved not by courts, but by arbitrators. Although courts play a limited role in reviewing arbitral awards, our duty remains an important one. When an arbitrator disregards the plain text of a contract without legal justification simply to reach a result that he believes is just, we must intervene.</p> <p>The Arbitrator's Award in this case was "irrational" because it directly conflicted with the Subcontracts' FAR-related provisions, without evidence of the parties' past practices deviating from them, in order to achieve a desired outcome. We therefore affirm the district court's vacatur of the Award.</p>
<i>Bamberger Rosenheim, Ltd. v. OA Development, Inc.</i> , 862 F.3d 1284, 1288 (11th Cir. 2017), <i>cert. denied</i> , 138 S. Ct. 654 (2018)	<p>Declining to vacate an award under the New York Convention, where petitioner argued that the arbitrator had improperly interpreted the arbitral venue provision in the arbitration clause. The court did not separately analyze whether to vacate under the New York Convention and the FAA, finding that the scope of review was covered by the clause that "the arbitral procedure was not in accordance with the agreement of the parties," New York Convention, Art. V(1)(d), and the prong that "the arbitrator[] exceeded [his] powers" under § 10(a)(4) of the FAA. The court determined (even in an international dispute) that the issue of the proper venue under an arbitration clause is a procedural issue for the arbitrator to determine, where the parties agree that there is a valid arbitration clause in a binding agreement. And the court concluded that the arbitrator at least arguably interpreted the venue provision, ending the court's review. (The clause provided that any proceedings "shall take place in Tel Aviv, Israel, in the event the dispute is submitted by OAD, and in Atlanta, Georgia, in the event the dispute is submitted by Profimex." Profimex commenced arbitration in Atlanta; OAD submitted a counterclaim; Profimex argued OAD's counterclaim must be brought in Tel Aviv. The arbitrator found the counterclaim was part of the dispute initiated by</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	Profimex.)
<i>Benihana, Inc. v. Benihana of Tokyo, LLC</i> , 784 F.3d 887, 891, 893, 900 (2d Cir. 2015)	<p>The case arises from a license agreement to operate Benihana restaurants in the United States (among other places) and to use the Benihana trademark. The license agreement had a broad arbitration clause, including a provision covering disputes over the “right of termination, or the reasonableness thereof” as well as “any other dispute” that arose between the parties with respect to the agreement. A dispute arose, and in advance of an arbitration commenced by Benihana of Tokyo (the licensor), Benihana America (the licensee) sought an injunction enjoining Benihana of Tokyo from selling certain hamburgers in Hawaii (the alleged breach of the license agreement) and from “arguing to the arbitration panel that it be permitted to cure any defaults if the arbitrators rule that [Benihana of Tokyo] breached the License Agreement.” The district court granted the requested injunction.</p> <p>The Second Circuit affirmed those portions of the injunction that preserved the status quo pending arbitration. However, it vacated that portion of the injunction that would have prevented Benihana of Tokyo from arguing that an extended cure period could be found under the license agreement. The court saw the issue as being asked to determine whether arbitrators would exceed their power by deciding this issue under the agreement, a question normally reserved for review of an award. The court stated: “Tellingly, Benihana America has not cited, and we have not found, any precedent for a court holding that a particular remedy may not be awarded by an arbitrator <i>before</i> the arbitrator has actually awarded that remedy. On the contrary, courts that have determined that a remedy exceeded the scope of an arbitrator’s power have done so exclusively after the arbitrator’s ruling.” Given the broad arbitration clause, the court held that it was for the arbitrators in the first instance to rule on whether an extended cure period could be found under the agreement.</p>
<i>BNSF Railway Co. v. Alstom Trans., Inc.</i> , 777 F.3d 785, 788 (5th Cir. 2015)	Reversed district court and reinstated arbitration award which had been vacated for exceeding powers. The Court of Appeals held that a court’s role is limited to determining whether the arbitrator attempted to interpret an agreement and apply the controlling law, even if the court would reach

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	a different conclusion. “In determining whether the arbitrator exceeded her authority, district courts should consult the arbitrator’s award itself. The award will often suggest on its face that the arbitrator was arguably interpreting the contract. Several pieces of relevant evidence can be gleaned from the award’s text, including but not limited to: (1) whether the arbitrator identifies her task as interpreting the contract; (2) whether she cites and analyzes the text of the contract; and (3) whether her conclusions are framed in terms of the contract’s meaning.”
<i>Burton v. Class Counsel & Party to Arbitration</i> , 737 F.3d 1262 (9th Cir. 2013)	The Ninth Circuit, as a question of first impression, held that the FAA does not permit parties to contractually eliminate all judicial review of an arbitration award. Section 10 of the FAA reflects the intent of Congress “to preserve due process while still promoting the ultimate goal of speedy dispute resolution...If parties could contract around this section of the FAA, the balance Congress intended would be disrupted, and parties would be left without any safeguards against arbitral abuse.” The clause in question provided for “binding, non-appealable arbitration.” The court did not resolve the ambiguity of whether this language simply waived an appeal on the merits (but still permitted review under Section 10) or whether the language divested both the district court and the circuit court of jurisdiction to review the award at all; instead, the court found that the latter reading is unenforceable.
<i>CAA Sports LLC v. Dogra</i> , 2019 WL 1001041 (E.D. Mo. 2019)	District court dismisses without prejudice a motion to vacate a fourth supplemental award in arbitration on the basis that there was no final award since the arbitrator had left some issues to be determined. The court reasoned that its dismissal was not premised on a lack of subject matter jurisdiction but rather a prudential “complete arbitration rule” intended to avoid piecemeal determinations.
<i>Campbell Harrison & Dagley, L.L.P. v. Hill</i> , 782 F.3d 240, 245 (5th Cir. 2015) (internal quotes and citations omitted)	The court reversed a district court’s vacatur of an arbitration award that awarded contingency fees to a law firm on public policy grounds. The court of appeals, applying Texas arbitration law, held: “Vacating an award on public-policy grounds requires an extraordinary case in which the award clearly violates carefully articulated, fundamental policy. For satisfying that standard, the policy must be well defined and dominant and not derived from

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	general considerations of supposed interests.”
<i>CEEG (Shanghai) Solar Sciences & Tech. Co., Ltd. v. LUMOS, LLC</i> , 829 F.3d 1201, 1206 (10th Cir. 2016)	Affirmed denial of motion to confirm an award under the New York Convention, where the notice of arbitration had been sent in Chinese whereas the parties’ business dealings had been conducted in English. The court found that this met the Convention’s provision allowing vacatur where “[t]he party against whom the award is invoked did not receive proper notice...of the arbitration proceedings.” In addition, the court found that “the composition of the arbitral authority . . . was not in accordance with the agreement of the parties,” since LUMOS missed the opportunity to participate in the selection of the arbitrators due to late notice of the arbitration (i.e., when it finally became aware that the Chinese language document gave notice of an arbitration).
<i>Certain Underwriting Members at Lloyds of London v. State of Florida</i> , 892 F.3d 501, 503-04 (2d Cir. 2018)	<p>The Second Circuit reversed the vacatur of an award on the ground of evident partiality, framing a different standard to be applied to a party-appointed arbitrator who was expected to serve as a <i>de facto</i> advocate. Here is the syllabus from the opinion:</p> <p>Insurance Company of the Americas (“ICA”) appeals the order vacating the arbitral award (the “Award”) issued in a reinsurance dispute between ICA and Certain Underwriting Members of Lloyds of London including those members subscribing to Treaty No. 02072/04 (the “Underwriters”). The issue on appeal is whether the Award is void for evident partiality under the Federal Arbitration Act (“FAA”), 9 U.S.C. § 10(a)(2), by reason of the failure by ICA’s party-appointed arbitrator to disclose close relationships with former and current directors and employees of ICA. The district court concluded under our reasonable person standard that the ICA-appointed arbitrator was impermissibly partial to ICA. We hold that a party seeking to vacate an award under Section 10(a)(2) must sustain a higher burden to prove evident partiality on the part of an arbitrator who is appointed by a party and who is expected to espouse the view or perspective of the appointing party. <u>See Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire and Marine</u></p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p><u>Ins. Co.</u>, 668 F.3d 60, 76 n.21 (2d Cir. 2012).</p> <p>The district court weighed the conduct of ICA's party-appointed arbitrator under the standard governing neutral arbitrators. We therefore vacate and remand for the district court to reconsider under the proper standard. An undisclosed relationship between a party and its party-appointed arbitrator constitutes evident partiality, such that vacatur of the award is appropriate if: (1) the relationship violates the contractual requirement of disinterestedness (see <u>Sphere Drake Ins. v. All American Life Ins.</u>, 307 F.3d 617, 620 (7th Cir. 2002)); or (2) it prejudicially affects the award (see <u>Delta Mine Holding Co. v. AFC Coal Properties, Inc.</u>, 280 F.3d 815, 821-22 (8th Cir. 2001)).</p>
<p><i>CBF Industria De Gusa S/A v. AMCI Holdings Inc.</i>, 850 F.3d 58, 72, 75 (2d Cir. 2017), <i>cert. denied</i>, 138 S. Ct. 55 (2017)</p>	<p>Reversed a district court decision that had refused to enforce a foreign arbitration award issued in an ICC arbitration seated in Paris that had not previously been confirmed. The Second Circuit held that, under the New York Convention, a district court should enforce a foreign award, even if not confirmed by a court in a primary or secondary jurisdiction, subject only to the limited New York Convention/FAA grounds for denying enforcement. The court observed that confusion has arisen because Section 207 of the FAA, intended to implement the New York Convention, uses the word "confirming" in providing that "[w]ithin three years after an arbitral award...is made..[any party may] apply to any court having jurisdiction under this chapter for an order confirming the award." The court further observed that Chapter 2 of the FAA also refers to confirmation of the award. The court reasoned that, since the FAA was intended to implement the New York Convention, the word "confirm" for these purposes is "the equivalent of 'recognition and enforcement' as used in the New York Convention for the purposes of foreign arbitral awards." The court also stated that this reading was consistent with the objective of having a single proceeding to enforce an award. In reaching this decision, the Court pointed to the amicus brief for the United States, which was entitled to great weight since the United States is a party to the New York Convention, a treaty. The court remanded this portion of the case for</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>proceedings consistent with its opinion. The court in concluding its discussion of this issue of enforcement stated: “In order to avoid such confusion in the future, we encourage litigants and district courts alike to take care to specify explicitly the type of arbitral award the district court is evaluating (domestic, nondomestic or foreign), whether the district court is sitting in primary or secondary jurisdiction, and, accordingly, whether the action seeks confirmation of a domestic or nondomestic arbitral award under the district court’s primary jurisdiction or enforcement of a foreign arbitral award under its secondary jurisdiction.”</p> <p>When the district court denied enforcement for lack of a confirmed award, the award-creditor commenced a separate confirmation action. The district court dismissed the confirmation action, finding that the non-party sued as an alleged alter-ego of the award-debtor was immune from suit under Federal Rule of Civil Procedure 17(b)(lack of capacity to be sued), because the entity had been removed as a legal entity from the Swiss Commercial Register. The Second Circuit remanded with instructions for the district court to determine under “the law of the enforcing jurisdiction, here the Southern District of New York.”</p> <p>The court next turned to the district court’s dismissal of fraud claims, where the district court applied issue preclusion based on determinations in the arbitration. The Second Circuit found that allegations of fraud on the part of the award-creditor made application of the equitable doctrine of issue preclusion inappropriate without discovery on the allegations of fraud. Finally, the Second Circuit declined to affirm the dismissal of the enforcement action on the alternative ground of forum non conveniens, instead providing for the district court to revisit that issue on the remand.</p> <p>For further discussion of the terms “confirmation,” “recognition” and “enforcement,” see <i>Mobil Cerro Negro, Ltd. v. Bolivian Republic of Venezuela</i>, 863 F.3d 96, 119 n. 18, 121-22 (2d Cir. 2017) (holding that the Convention on the Settlement of Investment Disputes Act of 1966 does not confer subject matter over foreign sovereigns and that the ICSID requires a district court to “‘enforce’ ICSID awards and accord them ‘the same full faith and credit as if [they] were [] final judgment[s] of a court of general jurisdiction</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	of one of the several states.’”) (citation omitted).
<i>Citizen Potawatomi Nation v. Oklahoma</i> , 881 F.3d 1226 (10th Cir 2018), <i>cert. denied</i> , 139 S. Ct. 375 (2018)	Vacating an award where the arbitration clause between the tribe and the state provided for de novo review of the arbitral award. The court found that such expanded review was precluded by Supreme Court precedent and that the specified standard of review was a material term of the parties’ agreement. The court accordingly ruled that the arbitration clause was unenforceable and should have been severed from the parties’ compact, such that the award had to be vacated.
<i>Corporacion Mexicana de Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploracion Y Produccion</i> , 832 F.3d 92, 97 (2d Cir. 2016), <i>cert. dismissed</i> , 137 S. Ct. 1622 (2017)	Affirming district court’s confirmation of an arbitral award rendered in Mexico, where (a) COMMISA initially sought confirmation in the Southern District of New York, which was granted; (b) PEP simultaneously appealed from that confirmation and also sought nullification in Mexican courts; (c) the Mexican court nullified the award on the ground that PEP was an entity deemed part of the Mexican government that could not be ordered to arbitrate; (d) the Second Circuit initially vacated the district court’s judgment and remanded in light of the Mexican court order; (e) the district court adhered to its confirmation; and (f) the Second Circuit held that the district court properly exercised its discretion because giving effect to the subsequent nullification would “run counter to United States public policy and would...be ‘repugnant to fundamental notions of what is decent and just in this country.’” In addition, the court stated that confirmation is mandatory when a convention ground for vacatur or modification has not been established.
<i>In the Matter of Daesang Corp. v. NutraSweet Co.</i> , 167 A.D.3d 1, 4, 25 (1st Dep’t 2018); <i>lv. to appeal denied</i> , 32 N.Y.3d 915 (2019)	The Appellate Division reversed the vacatur of an award issued by the Commercial Division Justice assigned to review all commercial international awards presented to the court. The Appellate Division began by emphasizing that the vacatur could not be justified under the “‘emphatic federal policy in favor of arbitral dispute resolution’ embodied in the FAA, a policy that ‘applies with special force in the field of international commerce’” (citation omitted), and by confirming that the enforcement of the award in this case was governed by the New York Convention and by the FAA; because the award was rendered in the U.S., the FAA governed whether the award could be set aside within the U.S. while the New York

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>Convention and the FAA mandate that an award shall be confirmed unless a court finds that one of the Convention grounds in 9 U.S.C. § 207 for non-recognition or non-enforcement applies. The court then reviewed each ground on which Supreme Court had relied to find that the arbitrators either exceeded their powers or acted in manifest disregard of the law and found each to be in error. The court recited the high standard for manifest disregard without mention of the question of whether manifest disregard should remain a separate basis for reviewing an award. The court lastly rejected a challenge to the award as violating public policy, finding that this Convention ground applies only “where enforcement would violate our most basic notions of morality and justice.” (citation omitted).</p>
<p><i>Dealer Computer Servs., Inc. v. Michael Motor Co</i>, 485 F. App’x 724, 726, 728 (5th Cir. 2012), <i>cert. denied</i>, 133 S. Ct. 945 (2013)</p>	<p>MMC asserted that arbitrator Butner failed to disclose that she was an arbitrator on the Venus Ford arbitration panel, which considered similar contract language and heard from the same damages experts as in the MMC proceeding. District Court found evident partiality holding, where arbitrator Butner had disclosed only that she had served on a previous arbitration involving one of the parties, that “Butner’s prior exposure to the legal issues and witnesses involved in the Michael Motor arbitration creates a reasonable impression that she had prejudged at least some of the issues in the arbitration. It would be unreasonable to expect an arbitrator who had already signed an eight-page opinion ruling for a party as to how a contractual provision should be interpreted to change her mind in a subsequent arbitration and rule against that party on the exact same contractual provision. Likewise, it would be unreasonable to expect an arbitrator who had fully adopted the damages theories of an expert witness to then reject the damages theories of that same witness on similar issues in a subsequent arbitration. It is also reasonable to believe that Butner may have considered [witness] testimony from the Venus Ford Arbitration in evaluating evidence in the Michael Motor Arbitration. . . . Butner’s participation in the Venus Ford Arbitration is ‘a significant compromising connection’ to DCS, and her failure to disclose that participation constitutes ‘evident partiality.’” District Court found that the arbitrator’s “minimal acknowledgement” was not sufficient to put Michael Motor on notice of a potential conflict such that it had waived its nondisclosure objections under either “actual knowledge” or “on notice”</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>standard. 761 F.Supp. 459, 465, 468 (S.D. Tex. 2010).</p> <p>Fifth Circuit reversed on ground of waiver, where Butner had disclosed that she served on a panel that “considered a dispute between Dealer Computer Services, Inc. and another party.” Court held: “Butner’s disclosures were sufficient to put MMC on notice of a potential conflict. . . . The information was available on the AAA online Webfile system, which was the agreed upon method of disclosure.” Court does not reach issue of whether – absent waiver – there was evident partiality.</p>
<i>Dewan v. Walia</i> , 544 F. App’x 240 (4th Cir. 2013), <i>cert. denied</i> , 134 S. Ct. 1788 (2014)	Vacated award for manifest disregard of law where the arbitrator ruled that a release signed by Walia was valid and enforceable but nonetheless arbitrated Walia’s counterclaims.
<i>Doscher v. Sea Port Group Securities, LLC</i> , 832 F.3d 373, 388-89 (2d Cir. 2016)	In determining subject matter jurisdiction, a district court may look through a petition to vacate an award and determine jurisdiction based on the underlying disputes as defined by <i>Vaden v. Discover Bank</i> , 556 U.S. 49 (2009). The court extended <i>Doscher</i> to a petition to confirm an award in <i>Landau v. Eisenberg</i> , __ F.3d __, 2019 WL 1924224, at *2 (2d Cir. 2019).
<i>Eddystone Rail Co., LLC v. Jamex Transfer Services, LLC</i> , 289 F. Supp. 3d 582, 588, 590 (S.D.N.Y. 2018)	This case addresses whether a non-party to an arbitration may intervene in the proceeding to confirm/vacate an award. Noting that § 10(a) of the FAA provides that “any party to the arbitration” may petition to vacate, the court finds that the statutory language on its face appears to preclude intervention. The court, however, further discussed a line of cases that have allowed intervention in limited circumstances, where a proposed intervenor could satisfy the threshold requirement of an “injury in fact” arising from the award, if confirmed, in order to participate in the proceeding; that requirement was not met in this case.
<i>Finn v. Ballentine Partners, LLC</i> , 143 A.3d 859 (N.H. 2016)	Held that Sections 9, 10 and 11 of the FAA apply only to review of awards in federal district courts and do not preempt New Hampshire’s statute for review of awards where, as here, a court finds that the parties’ contract specified that New Hampshire law would control. The court then vacates the award under the state statute, which allows vacatur for “plain error” of fact or law.

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
<p><i>Freeman v. Pittsburgh Glass Works, LLC</i>, 709 F.3d 240, 255-56 (3d Cir. 2013)</p>	<p>Reiterated its adoption of the Second Circuit’s reasonable person standard for evident partiality, and affirmed the denial of a petition to vacate. Freeman, the losing party in the arbitration, first argued that the arbitrator was partial because the 40% owner of the prevailing party had contributed \$4,500 to the arbitrator’s unsuccessful campaign for a seat on the Pennsylvania Supreme Court—which the court saw as a small amount in relation to the \$1.7 million raised for the campaign. The court sternly noted that the petition to vacate had failed to reveal that the law firm representing Freeman had contributed \$26,000 to the same campaign. The court, as an issue of first impression, held that this undisclosed campaign donation did not amount to evident partiality and “the reasons are many,” including the facts that the donations were a matter of public record, the amount donated was small by comparison, the donating entity was only a minority owner of the party to the arbitration, and Freeman’s law firm donated five times as much. A reasonable person could not conclude that the arbitrator was partial to Pittsburgh Glass. The court added that “campaign contributions are a way of life in many state judicial systems,” and a mere nondisclosure of a relatively small donation does not, by itself, show evident partiality. The court also rejected a challenge based on the fact that the arbitrator had taught a seminar with a senior employment attorney at the entity owning 40% of the prevailing party: “a professional relationship with a party’s minority owner is not ‘powerfully suggestive of bias’”; the FAA requires “more than suppositions based on mutual familiarity.”</p>
<p><i>General Re Life Corp. v. Lincoln National Life Ins. Co.</i>, 909 F.3d 544, 548-49 (2d Cir. 2018), <i>aff’g</i>, 273 F. Supp. 3d 307 (D. Conn. 2017)</p>	<p>The Second Circuit recognized an exception to the doctrine of <i>functus officio</i> where arbitrators were called upon to clarify an ambiguous award. After the final award was issued, the parties disagreed over how to implement it, and one side sought clarification while the other objected. The panel (with one dissent) issued a “clarification.” The party seeking that clarification moved to confirm the award as clarified; the other side moved to confirm the original award. The district court confirmed the clarified award (in a decision that thoroughly explored the <i>functus officio</i> doctrine). The Second Circuit affirmed, largely based on precedent from other circuits:</p> <p style="text-align: right;">We join the Third, Fifth, Sixth, Seventh, and Ninth</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>Circuits in recognizing an exception to functus officio where an arbitral award “fails to address a contingency that later arises or when the award is susceptible to more than one interpretation.”</p> <p>Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers Local No. 24, 357 F.3d 546, 554 (6th Cir. 2004) (internal quotation marks omitted); Brown v. Witco Corp., 340 F.3d 209, 219 (5th Cir. 2003) (“An arbitrator can . . . clarify or construe an arbitration award that seems complete but proves to be ambiguous in its scope and implementation.”); Glass, Molders, Pottery, Plastics & Allied Workers Int’l Union v. Excelsior Foundry Co., 56 F.3d 844, 847 (7th Cir. 1995) (same); Colonial Penn. Ins. Co. v. Omaha Indem. Co., 943 F.2d 327, 334 (3d Cir. 1991) (“[W]hen the remedy awarded by the arbitrators is ambiguous, a remand for clarification of the intended meaning of an arbitration award is appropriate.”); McClatchy Newspapers v. Central Valley Typographical Union No. 46, 686 F.2d 731, 734 n.1 (9th Cir. 1982) (same). Adopting this exception to functus officio furthers the well-settled rule in this Circuit that when asked to confirm an ambiguous award, the district court should instead remand to the arbitrators for clarification.</p>
<p><i>Great American Ins. Co. v. Russell</i>, 914 F.3d 1147, 1150 (8th Cir. 2019)</p>	<p>The court of appeals reversed the vacatur of an award against an insurer for crop damages. The insurer argued that the panel “so imperfectly executed” its powers such that it rendered no “mutual, final, and definite award” (citing Section 10(a)(4)) because it did not break down by county and units how the damages were calculated; the court of appeals found the panel was required “to break down its award only by claim, not by unit.”</p>
<p><i>Harshad & Nasir Corp. v. Global Sign Systems</i>, 14 Cal. App. 5th 523, 530-31(2d Dist., Div. 1, 2017)</p>	<p>Vacating an award for error of law, where parties had agreed to submit to arbitration under the California Code of Civil Procedure and agreed that the arbitrator’s “findings of fact and conclusions of law shall be reviewed on appeal to the trial court and thereafter to the appellate courts upon the same grounds and standards of review as if said decision and supporting findings of fact and conclusions of law were entered by a court with subject matter and present jurisdiction.” On de novo review, the court found no substantial evidence to support a finding that an agreement</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	to perform the work at issue was formed or a writing sufficient to satisfy the statute of frauds.
Hoskins v. Hoskins, 497 S.W.3d 490, 498 (Tex. 2016)	Applying the Texas arbitration statute, the court held that the statutory grounds for vacatur are exclusive and that manifest disregard of the law is not a valid ground for vacatur.
<i>Hyatt Franchising, L.L.C. v. Shen Zhen New World I, LLC</i> , 876 F.3d 900, 902, 903 (7th Cir. 2017)	Affirming confirmation of an award, the court first held that the phrase “refusing to hear evidence” in § 10(a)(3) refers to the conduct of the hearing; nothing in the FAA requires an arbitrator to allow any discovery. The court further noted that the requested discovery was not relevant to the particular dispute. The court next found that the arbitrator’s refusal to disqualify respondent’s counsel did not constitute “misbehavior” under § 10(a)(3), because at most the ruling was an error and an error is not “misbehavior.” (The court did not address whether an arbitrator has the power to disqualify counsel for a party.) The court also rejected a challenge under § 10(a)(4) (exceeding powers) for supposedly failing to comply with federal and state franchise laws; once more, the court said that legal error is not a ground for vacation of an award. “An arbitrator is not like a magistrate judge whose recommendations are subject to plenary judicial review.” The court went on to say that an arbitrator “acts as the parties’ joint agent and may do anything they parties themselves may do”; that is, if the parties may reach a compromise of a legal dispute without being accused of violating some law, “then the arbitrator may do so on their behalf.” As one last ground, the court rejected an argument that the award violated public policy, because public policy is typically invoked to protect persons who have not agreed to arbitrate; where the outcome of the award is something the parties could agree to themselves under the law, public policy is not implicated. Finally, the court ruled that petitioner must bear the costs of the district court and appellate proceedings based on the contract and circuit precedent; while the American rule requires each side ordinarily to bear its own costs and fess “in an initial round, but an entity that insists on multiplying the litigation must make the other side whole for rounds after the first.”
<i>In re Citigroup Global Markets, Inc. v. Fiorilla</i> , 127 A.D.3d 491, 492 (1st Dep’t 2015)	The court held: The motion court properly vacated the arbitration award based on a prior settlement agreement. The arbitrators

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	manifestly disregarded the law by failing to enforce the settlement that respondent and petitioner Citigroup Global Markets, Inc. entered into on April 29, 2012. Notably, petitioners provided the relevant law regarding the enforcement of settlement agreements (<i>see Kowalchuk v Stroup</i> , 61 AD3d 118 , 873 N.Y.S.2d 43 [1st Dept 2009]) in their motions to enforce the agreement, but the arbitrators ignored the law and denied the motions without explanation (<i>see Wien & Malkin LLP v Helmsley-Spear, Inc.</i> , 6 NY3d 471 , 481 , 846 N.E.2d 1201 , 813 N.Y.S.2d 691 [2006], <i>cert dismissed</i> 548 U.S. 940 , 127 S. Ct. 34 , 165 L. Ed. 2d 1012 [2006]). "Although arbitrators have no obligation to explain their awards, when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account" (<i>Matter of Spear, Leeds & Kellogg v Bullseye Secs., Inc.</i> , 291 AD2d 255 , 256 , 738 N.Y.S.2d 27 [1st Dept 2002] [internal quotation marks omitted])
<i>Int'l Brotherhood of Elec. Workers, Local Union 824 v. Verizon Fla.</i> , 803 F.3d 1241, 1248 (11th Cir. 2016)	Vacated award when the arbitrator, having ruled, was later persuaded he made an error and issued a superseding award; without determining the bounds of functus officio, the court held that the AAA rule specifying that an arbitrator "is not empowered to redetermine the merits of any claim already decided" controlled and defined the powers of the arbitrator.
<i>Inversiones y Procesadora Tropical INPROSTA, S.A. v. Del Monte Int'l GMBH</i> , ___ F.3d ___, 2019 WL 1768911, at *7, *9, (11th Cir. 2019)	The court of appeals ruled that the district court had subject matter jurisdiction under §§ 203 and 205 of the FAA implementing the New York Convention to rule on a petition to vacate an international award seated in Miami, even though the FAA provisions for the Convention do not expressly provide subject matter jurisdiction for a petition to vacate an award. In the particular case, the petition had originally been filed in Florida state court and was removed to federal court under FAA § 205; the court reasoned that an action properly removed under § 205 should be seen as falling under the Convention for purposes of § 203. The court "express[ed] no opinion on whether the Convention Act implicitly permits a petition to vacate an international arbitral award filed directly in the district court." The court found no merit in the "exceeding powers" challenge, finding that the arbitrators "at least arguably interpreted the contract"; that any mistake as to the correct measure of damages would not warrant a vacatur; and that the

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>arbitrators reasonably construed the ICC rules. Finally, the court rejected the argument that confirmation should have been denied on public policy grounds. The petition claimed that the agreement was fraudulently induced; assuming (without deciding) that this fraud defense could rise to a public policy defense, the court ruled that the arbitration had determined the fraudulent inducement claim and the supposed fraud was known at the time of the arbitration, such that it could not provide a ground for overturning the award.</p>
<p><i>IQ Products Co. v. WD-40 Co.</i>, 871 F.3d 344, 352 (5th Cir. 2017)</p>	<p>Rejecting challenge for “exceeding...powers” where “the parties clearly and unmistakably delegated the gateway issue of arbitrability to arbitration, and the assertion of arbitrability was not wholly groundless. Thus, the arbitrators acted within their authority in deciding that the dispute was arbitrable.”</p>
<p><i>Katz, Nannis & Solomon, P.C. v. Levine</i>, 46 N.E.3d 541, 546 (Mass. 2016)</p>	<p>The Supreme Judicial Court of Massachusetts, applying Massachusetts’ arbitration statute, followed <i>Hall St. Assocs., L.L.C. v. Mattel, Inc.</i>, 552 U.S. 576 (2008), and held that the parties may not alter the grounds of judicial review of an award because the statutory grounds control. The parties’ agreement provided a standard for vacatur if there was a “material, gross and flagrant error” and the challenge to the award alleged that the arbitrator fundamentally misinterpreted a contract provision; the court ruled that this standard could not be applied by a court.</p>
<p><i>Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust</i>, 729 F.3d 99 (2d Cir. 2013)</p>	<p>The Second Circuit addressed the “corruption” prong of 10(a)(2) of the FAA (the seldom invoked part of the clause that includes evident partiality). The opinion largely turns on the sufficiency of the evidence offered to prove corruption, in a case where there was no transcript of the proceedings (a fact the court repeated several times). The court ultimately found corruption was not established to the level required to vacate an award.</p> <p>This arbitration was conducted by a rabbinical arbitration panel, where each side (in a dispute over ownership of life insurance policies) appointed a rabbi, and those two selected the chair, Rabbi Kaufman. The principal contention was that Rabbi Kaufman acted in a corrupt</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>manner, based on evidence that he told a non-party in advance of the award to “[t]ell [the president of Kolel] that he has to give me another week and he will receive a [ruling] in his favor.” It was further alleged that Rabbi Kaufman purposely excluded the arbitrator selected by the losing party from the arbitration and abruptly cut off the testimony of a witness called by that party in order to rush to a premature decision. The award was only signed by Rabbi Kaufman and the rabbi chosen by the prevailing party.</p> <p>The main point of law expressed in the opinion is the meaning of “corruption” in 10(a)(2) along with the high burden of proof. The court first recited its reasonable person standard for evident partiality, and said it was applicable to this case. However, the court at the same time quoted a case that held that “the award here must stand unless it is made abundantly clear that it was obtained through corruption, fraud or undue means.” (citations omitted). This appears to refer to the 10(a)(1) ground for vacatur, which was also invoked by petitioner. The court then stated: “Evidence of corruption must be abundantly clear in order to vacate an award under Sec. 10(a)(2).” The emphasis used by the court in deciding the case, is on that high level of proof—“abundantly clear.” And the court held petitioner did not meet this standard. Notably, the court mentioned that Rabbi Kaufman “denies that the conversation took place” and “states he was in another part of the state” that day. In other words, in this proceeding there was testimony from the arbitrator.</p> <p>The Court then rejected the 10(a)(3) misconduct challenge, finding that petitioner has not shown a denial of “fundamental fairness,” given the latitude arbitrators have to conduct a proceeding.</p>
<p><i>Leeward Construction Co., v. American University of Antigua.</i> 826 F.3d 634, 640 (2d Cir. 2016)</p>	<p>The Court adopted the following standard for a reasoned award:</p> <p>We agree with our sister Circuits, and hold today that a reasoned award is something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel. A reasoned award sets forth the basic reasoning of the arbitral</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>panel on the central issue or issues raised before it. It need not delve into every argument made by the parties. The award here satisfies that standard: while it does not provide a detailed rationale for each and every line of damages awarded, it does set forth the relevant facts, as well as the key factual findings supporting its conclusions. The summary nature of its analytical discussion reflects only that, as the district court found, '[t]he parties had ample opportunity to contest Leeward's entitlement to compensation for change order work, and the summary nature of the discussion in the decision shows that the panel simply accepted Leeward's arguments on this particular point.' <i>Leeward Constr.</i>, 2013 WL 1245549, at *3. No more is needed."</p>
<p><i>Martin v. Deutsche Bank Securities Litigation</i>, 676 F. App'x 27 (2d Cir. 2017)</p>	<p>Reiterated that a petition to vacate an award must be served within three months after the award is filed or delivered (quoting and citing Sec. 12 of the FAA). In this case, Martin's counsel within the time period emailed counsel for Deutsche Bank attaching a copy of the petition to vacate asking whether counsel would accept service on behalf of the bank. Deutsche Bank's counsel responded, offering to accept service if given 90 days to respond to the petition; Martin's counsel did not accept that offer. Martin's counsel then effected personal service beyond the three month period. The Second Circuit affirmed the district court's dismissal of the petition as untimely. Under Section 12 of the FAA, local law controlled effective service and Fed. R. Civ. P 5 makes email service effective only if the party to be served consents in writing. On this record, the courts found no written consent to accept email service, such that the emailing of the petition did not achieve service within the three month period and the three month period ran without effective service. This decision bears of course on petitions under the FAA, but the decision hinges as much on the application of the requirements of Fed. R. Civ. P. 5.</p>
<p><i>Matter of Andrews v. County of Rockland</i>, 120 A.D.3d 1227, 1228-29 (2d Dep't 2014) (citations omitted)</p>	<p>Affirmed the vacatur of an award under this New York statutory ground: that the award was "so imperfectly executed...that a final and definite award upon the subject matter submitted was not made." CPLR 7511(b)(1)(iii).</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>Here is the central part of the order:</p> <p>The parties agreed to arbitrate the issue of negligence and agreed to a "high-low" limit to the amount of damages, the sums of which were not disclosed to the arbitrator. The arbitrator was asked to decide the issue of liability, to wit, the negligence of each of the parties in connection with the incident, and, if established, to render a determination as to damages.</p> <p>After a hearing, the arbitrator determined that the petitioner was barred from any recovery irrespective of any negligence of the County because she was not wearing her seatbelt. Nonetheless, the arbitrator awarded the petitioner "the low" sum of damages in light of the parties' private agreement as to damages. . . .</p> <p>Although judicial review of arbitration awards is limited . . . , an award will be vacated when the arbitrator making the award "so imperfectly executed it that a final and definite award upon the subject matter submitted was not made" (CPLR 7511[b][1][iii]). An award will be vacated as indefinite or nonfinal for purposes of CPLR 7511 if it does not "dispose of a particular issue raised by the parties" . . . "if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy". . . .</p> <p>Here, the arbitrator's award was neither definite nor final, as it failed to resolve the controversy submitted, to wit, the negligence of each party and the amount of damages, if any. The arbitrator did not make any specific findings of fact or credibility or dispose of the issues raised by the parties. Instead, the arbitrator pointed to a fact not in dispute—that the petitioner was not wearing a seatbelt—and determined that he did not need to decide whether the County was negligent. In doing so, the arbitrator failed to dispose of the controversy with which he had been charged.</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	Moreover, the arbitrator also failed to determine damages and instead referred to the parties' agreement, to which he was not privy, and awarded the petitioner "the low" sum of damages, despite finding that the petitioner was barred from recovering any damages. . . . In so doing, the arbitrator did not perform the job he was required to do pursuant to the parties' arbitration agreement.
<i>Matter of New York City Tr. Auth. v. Phillips</i> , 2018 WL 1719789, at *4 (1st Dep't 2018)	Reverses confirmation of award in a sexual harassment case, finding that the arbitrator's award was irrational and violated public policy by failing to find a dischargeable offense where the arbitrator's findings (similar to the EEO investigation) showed harassment; the "arbitrator's decision belies the realities of workplace sexual harassment."
<i>Matter of Pinkesz v. Wertzberger</i> , 139 A.D.3d 1071, 1072 (2d Dep't 2016)	A rabbinical arbitration court issued an award in 2011 and then, based on new information, issued a modified award in 2013. The court vacated the 2013 award, finding that the "rabbinical court exceeded its authority in modifying the original award by rendering the new arbitration award."
<i>McCormick v. America Online, Inc.</i> , 909 F.3d 677, 679 (4th Cir. 2018)	Addressing subject matter jurisdiction for a motion to vacate or modify under Sections 10 and 11 of the FAA, the court held: We conclude that the better reasoned approach for determining subject-matter jurisdiction over <u>§ 10</u> and <u>§ 11</u> motions is to look to the nature of the underlying claim in dispute, just as is done with respect to § 4 petitions to compel arbitration. Thus, if the underlying claim is one that otherwise could be litigated in federal court, the <u>§ 10</u> or <u>§ 11</u> motion can likewise be resolved in federal court.
<i>McKool Smith, P.C. v. Curtis Int'l, Ltd.</i> , 650 F. App'x 208, 212 (5th Cir. 2016)	The court noted that it has already held that non-statutory grounds such as manifest disregard of the law and violation of public policy can no longer be a basis for vacating awards. However, the court declined to rule on whether such grounds are part of "exceeded [his] powers."
<i>Move, Inc. v. Citigroup Global Markets, Inc.</i> , 840 F.3d 1152,	Vacated an award where a FINRA arbitrator had lied on his Arbitrator Disclosure Report; most particularly, the

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
1157-59 (9th Cir. 2016)	arbitrator stated he was an experienced attorney when in fact he was not an attorney. The court vacated the award under § 10(a)(3), providing for vacatur upon finding that “the arbitrators were guilty of...any . . . misbehavior by which the rights of any party have been prejudiced.” The court found that Move was prejudiced, because it had expressly sought an experienced attorney who could address sophisticated securities law issues. The court ruled that, although the award was unanimous, “there is simply no way to determine” if the other panel members were influenced by the challenged arbitrator. In any event, the court found that Move was deprived of a fundamentally fair hearing because it “received a hearing chaired by an imposter.” The court, as an issue of first impression, also found that equitable tolling permitted this challenge to the award, where Move learned of the arbitrator’s misconduct four years after the award when a legal newspaper revealed the arbitrator’s falsification of his background. The court found that the three month deadline for seeking vacatur of an award could be overcome by equitable tolling, because the FAA’s structure is not “incompatible with equitable tolling,” “equitable tolling would not undermine the basic purpose of the FAA,” and the FAA’s time deadline is “neither unusually generous” nor “unusually emphatic” (the latter being factors considered when applying equitable tolling to a statutory limitations period).
<i>NAPPA Constr. Mgm’t, LLC v. Flynn</i> , 152 A.3d 1128, 1134 (2017)	Under Rhode Island statute, the court vacated an award for exceeding power, where the arbitrator’s interpretation of the contract “is in direct contravention of the contractual language.”
<i>Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n</i> , 820 F.3d 527, 544, 548-49 (2d Cir. 2016) (citations omitted)	Reversed district court’s vacatur of NFL Commissioner’s award suspending Tom Brady, the Second Circuit (in a 2-1) decision held, under the Labor Management Relations Act, that the Commissioner had not improperly rendered “his own brand of industrial justice” (the standard under the LMRA). Addressing a claim that the Commissioner had improperly excluded key evidence, the court stated that the test under Section 10(a)(3) of the FAA is whether “fundamental fairness is violated” and held that “the Commissioner’s decision to exclude the testimony fit comfortably within his broad discretion to admit or exclude evidence and raises no questions of fundamental fairness.” The court also rejected a claim of evident partiality, finding

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	that “the parties contracted” in their collective bargaining agreement “to specifically allow the Commissioner to sit as arbitrator” and that—because arbitration is a matter of contract—the parties can ask for “no more impartiality than inheres in the method they have chosen.”
<p><i>Nat’l Indemnity Co. v. IRB Brasil Reseguros S.A.</i>, 675 F. App’x 89, 90-91 (2d Cir. 2017)</p>	<p>Addressed evident partiality in the context of a neutral chair who accepted appointment as a party-appointed arbitrator in two other cases supposedly for the party that won the arbitration awards that are the subject of this appeal. IRB sought vacatur of related awards in favor of NICO. The tribunal was composed of two party selected arbitrators and a neutral umpire-arbitrator (Daniel Schmidt). IRB based its challenge on evident partiality, arguing that Schmidt refused to withdraw from the case after IRB objected to his service as a party-appointed arbitrator on behalf of Equitas, which IRB alleged “is effectively identical to NICO.” (Order at 2). The court noted that Schmidt accepted his first appointment as Equitas’s party-arbitrator from NICO’s counsel; he was appointed a second time as a party arbitrator by Equitas but that appointment did not involve NICO’s counsel. IRB also argued it was improper for Schmidt to accept appointment in 2015 as Equitas’s party-appointed arbitrator while the arbitrations between NICO and IRB were already in progress.</p> <p>The Second Circuit affirmed confirmation and denial of vacatur, reasoning as follows:</p> <p>As the District Court explained in its March 10, 2016 Memorandum and Order, Schmidt’s work as a party-arbitrator on behalf of Equitas does not amount to “evident partiality” under § 10(a)(2). Notwithstanding NICO’s arguments to modify the standard, our case law states that evident partiality is found when “a reasonable person, considering all the circumstances, would <i>have</i> to conclude that an arbitrator was partial to one side.” <i>Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.</i>, 492 F.3d 132, 137 (2d Cir. 2007) (emphasis added) (internal quotation marks omitted). Here, even assuming that Equitas is an affiliate of NICO, the District Court correctly noted that IRB does not allege that Schmidt had any familial, business, or employment relationship with</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>NICO or Equitas, or that he had any financial interest in the outcome of his arbitrations. Schmidt's relationships with NICO and Equitas, including his role as a party-arbitrator for Equitas, are professional. Furthermore, Schmidt ultimately voted against Equitas in his party-arbitrator role, and has accepted party-arbitrator appointments "against" other NICO-reinsured parties. Accordingly, considering all of these circumstances, a reasonable person would not have to conclude that Schmidt was partial to NICO.</p> <p>Note that the Second Circuit, in applying the "reasonable person" standard, pointed out that Schmidt voted against Equitas in his party-arbitrator role and has served as a party-arbitrator in other cases "against" NICO-reinsured parties. The court included these facts within "all of these circumstances," in concluding a reasonable person would not find evident partiality. The timeline of each of these facts is not clear from the Summary Order, but it appears that IRB might have raised its original challenge to Schmidt within the arbitration before Schmidt voted against Equitas in the other arbitration. The court rejected an additional challenge to the awards for misbehavior, because that ground was not asserted in the district court (and, for that reason, the Circuit did not provide the details of this ground). In addition, the court denied NICO's request for attorney's fees and costs because "IRB's arguments are not 'frivolous' under Rule 38."</p>
<p><i>Norfolk Southern Railway Co. v. Sprint Communications Co. L.P.</i>, 883 F.3d 417, 422-23 (4th Cir. 2018)</p>	<p>Vacates an award as non-final, where the agreement provided for each party to designate an appraiser and—if they did not reach agreement for a payment amount—the two would pick a third appraiser who was to seek a compromise with the two other appraisers or at least one of them (and, failing that, to conduct his own appraisal). The third appraiser, Argianas, reached a compromise with one of the party appointed appraisers, with whom he issued a Majority Decision. Subsequently, a separate AAA case was brought to re-determine the payment owed; the AAA panel ruled that the Majority Decision was an enforceable final award subject to review under the FAA. The court ruled that the Majority Decision was not final, and therefore could not be confirmed, because Argianas (the third appraiser) "reserve[d] his assent" to the award 'subject to'</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>two ‘extraordinarily appraisal assumptions,’” “without prejudice or time limitation’ if either of these two ‘assumptions’ ever proved to be incorrect. That is, Argianas made clear that he might withdraw his assent—thus dissolving the compromise and the arbitration award itself—at some point in the future.” In these circumstances, the court found that the award was not final.</p>
<p><i>NGC Network Asia, LLC v. PAC Pacific Group Int’l, Inc.</i>, 511 F. App’x 86, 88 (2d Cir. 2013), <i>aff’g</i>, 2012 WL 377995, at *5 (S.D.N.Y. Feb. 3, 2012), <i>cert. denied</i>, 134 S. Ct. 265 (2013)</p>	<p>Affirmed denial of a petition alleging evident partiality, where the arbitrator—a Los Angeles-based partner of Arent Fox—disclosed that the Washington, D.C. office of his firm had done work for the National Geographic Society, which was a parent company of National Geographic Television. The arbitrator thought National Geographic Television might be a witness, since it sold programming to NGC Network International, LLC, which in turn provided the programming to the NCG Network Asia, LLC (NGC), one of the two parties to the arbitration. The other party, PAC Pacific, challenged the arbitrator, which the AAA overruled. The arbitrator issued an award in favor of PAC Pacific and against NGC, and NGC moved to vacate. The district court had pointed to an evidentiary record before her that established that the National Geographic Society had no role in the arbitration and was an indirect, minority owner of the party, NGC. The district court stated: “Given the facts, there was no requirement that [the arbitrator] disclose the Society/Arent Fox relationship—it is tangential, at best, to the dispute underlying the arbitration. But he did.” The Second Circuit held: “Because the arbitrator properly complied with his disclosure obligations, “[t]he concern . . . that nondisclosure might create an appearance of bias or even be evidence of bias is simply not present in this case.” The circuit also found that the findings by the district court were not “clearly erroneous.” The circuit further upheld the denial of vacatur based on the AAA’s rejection of the challenge to the arbitrator; it was not “undue means” for the AAA to apply its rules.</p>
<p><i>Odeon Capital Group LLC v. Ackerman</i>, 864 F.3d 191, 196 (2d Cir. 2017)</p>	<p>Affirming denial of petition to vacate based on § 10(a)(1) (“where the award was procured by corruption, fraud, or undue means”). Odeon argued that Ackerman had committed perjury in the arbitration. The court stated:</p> <p style="text-align: center;">A petitioner seeking to vacate an award on the</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>ground of fraud must adequately plead that (1) respondent engaged in fraudulent activity; (2) even with the exercise of due diligence, petitioner could not have discovered the fraud prior to the award issuing; and (3) the fraud materially related to an issue in the arbitration. . . .</p> <p>For fraud to be material within the meaning of Section 10(a)(1) of the FAA, petitioner must demonstrate a nexus between the alleged fraud and the decision made by the arbitrators, although petitioner need not demonstrate that the arbitrators would have reached a different result.</p> <p>Agreeing with the district court, the court of appeals noted that Ackerman had brought a number of claims, including a claim for unpaid wages. The perjured testimony related to the other claims, and therefore did not warrant a vacatur.</p> <p>In addition, the court reversed the district court on denying fees to Odeon for prevailing in the district court proceedings, finding that a New York statute provided for attorneys' fees; the court of appeals read the word "proceedings" in the applicable New York statute to include a proceeding to confirm or vacate an arbitration award dealing with unpaid wages.</p>
<i>Oxford Health Plans LLC v. Sutter</i> , 569 U.S. 564, 569 (2013)	<p>This case primarily dealt with the determination of whether there was an agreement on class arbitration, but it is now cited as the leading case on exceeding power. The Court stated: "[T]he sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." (internal quotes and citations omitted). A petitioner must show that the arbitrator acted "outside the scope of his contractually delegated authority – issuing an award that simply reflects his own notions of economic justice rather than drawing its essence from the contract."</p>
<i>PDV Sweeny, Inc. v. Conocophillips Co.</i> , 670 F. App'x 23, 24-25 (2d Cir. 2016)	<p>Reviewed an international award under the Inter-American Convention on International Arbitration, which provides for refusal to recognize an award if the court finds "recognition or execution of the decision would be contrary to public policy." The court first stated the applicable</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>standard:</p> <p>[A] court's task in reviewing an arbitral award for possible violations of public policy is limited to determining whether the award itself, as contrasted with the reasoning that underlies the award, 'creates an explicit conflict with other laws and legal precedents' and thus clearly violates an identifiable public policy." <i>International Bhd. Of Elec. Workers, Local 97 v. Niagara Mohawk Power Corp.</i>, 143 F.3d 704, 716 (2d Cir.1998) (alterations omitted) (quoting <i>United Paperworkers Int'l Union v. Misco, Inc.</i>, 484 U.S. 29, 43 (1987)). The public policy exception to enforcement of arbitral awards is "construed very narrowly," requiring a showing that "enforcement [of the challenged award] would violate our most basic notions of morality and justice." <i>Telenor Mobile Commc'ns AS v. Storm LLC</i>, 584 F.3d 396, 411 (2d Cir. 2009) (internal quotation marks omitted)....</p> <p>The court then addressed petitioners' challenge that the award ran afoul of public policy against penalty provisions in contracts. The court noted that, although New York had such a policy, it was not clear that the policy was one embodied in "our most basic notions of morality and justice." The court found that it need not decide if this policy was applicable, because a court's role is only to "consider whether the award itself violates public policy." Here, the arbitrators considered and addressed the issue of public policy against contract penalties, but concluded that the amount to be paid fell under a termination provision and not a liquidated damages provision. The Second Circuit made clear that "we cannot revisit or question the fact-finding or legal reasoning that produced a challenged arbitration award." The court concluded:</p> <p>Here, petitioners point to no laws [or] legal precedents indicating that termination provisions setting the terms for ending a joint venture are contrary to 'well defined and dominant' public policy, <i>W.R. Grace & Co. v. Local Union 759</i>, 461 U.S. 757, 766 (1983) (internal quotation marks omitted), much</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>less are violative of our most basic notions of morality and justice.</p> <p>Thus, like the district court, we conclude that petitioners failed to show that public policy precluded confirmation of the arbitration award. <i>See generally Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.</i>, 403 F.3d 85, 90 (2d Cir. 2005)(stating that party opposing arbitral award bears ‘heavy’ burden to prove that exception applies).”</p>
<i>PoolRe Ins. Corp. v. Organizational Strategies, Inc.</i> , 783 3d 256 (5th Cir. 2015)	<p>The court affirmed the vacatur of an award for exceeding powers, where related parties had entered into separate agreements, with one agreement providing for AAA arbitration and another agreement providing for ICC arbitration. The arbitrator appointed in the AAA case ruled that he had the power to decide the disputes arising under the agreement with the ICC arbitration provision. The court reasoned that the ICC provision constituted a forum selection clause integral to the agreement in which it appeared. The arbitrator’s actions were found to be contrary to an express contractual provision—a provision providing for the forum and for an ICC arbitrator to resolve disputes under that agreement. In dicta, the court noted that a court may affirm in part and vacate in part on review of an arbitration award.</p>
<i>Republic of Argentina v. AWG Group Ltd.</i> , 894 F. 3d 327, 335-38 (D.C. Cir. 2018)	<p>Drawing on Justice White’s concurrence in <i>Commonwealth Coatings Corp. v. Continental Casualty Co.</i>, 393 U.S. 145, 152 (1968), the D.C. Circuit finds disclosure required “[w]here the arbitrator has a substantial interest in a firm which has done more than trivial business with a party.” In addition, a petitioner must present “specific facts that indicate improper motives on the part of an arbitrator.” (Citation omitted). During the course of an arbitration that went on for twelve years, arbitrator Kaufman-Kohler was appointed to the board of UBS. At the time, she was unaware that UBS held investments for its clients and for itself of some \$ 2 billion (out of \$3.6 trillion of invested assets) in two consortium members that were part of a party to the arbitration. When she learned of UBS’ passive investment, she resigned from the board and remained on the arbitral panel. The court held: “Because UBS’s interest in Suez and Vivendi were trivial, and therefore Kaufman-</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>Kohler's interests in these parties were insignificant, they could not have created evident partiality." The court added: "If the interest presented here could disqualify an arbitrator who did not disclose it, parties would hesitate to select arbitrators associated with financial companies that invest broadly." In addition, the court rejected a challenge for exceeding the arbitrators' power by failing to consider one of its defenses (as displayed by lack of discussion of it); the court said: "We have never required of an arbitration award the sort of extended explanation Argentina urges. In fact, we have determined that a panel's decision may be upheld even if it offered no explanation at all because the alternative, requiring a particular level of detail for every response to each party's theories, would 'unjustifiably undermine the speed an thrift sought' from arbitration proceedings." (Citation omitted). The court lastly denied a request to vacate under the New York Convention, finding that the grounds to vacate under the FAA are broader, not narrower, than under the Convention.</p>
<p><i>Rogers v. Ausdal Fin. Partners, Inc.</i>, 168 F. Supp. 3d 378, 389 (D. Mass. 2016)</p>	<p>In this FINRA case, the federal district court rejected vacatur based on the contention that the arbitrators failed to order third-party discovery that they themselves stated was relevant:</p> <p style="padding-left: 40px;">Here, the panel may well have acted unfairly. It appears that the chair denied respondents the right to obtain the Verizon information, then concluded that the same information "seems to be important." Presumably, the panel could not and did not take that information into account, as it was not part of the record. However, the panel was acting within its legal authority when it reviewed and denied respondents' requests for subpoenas and this Court is without the power to vacate the award on that basis.</p>
<p><i>Salus Capital Partners, LLC v Moser</i>, 289 F. Supp. 3d 468, 481-82 (S.D.N.Y. 2018)</p>	<p>Noting that § 12 of the FAA does not define "filed or delivered" in setting the three months deadline for petitioning to vacate an award, the court looked to the applicable rules the parties had agreed to for the conduct of the arbitration, which provided for mail, personal service or the filing of the award. Even though petitioner had received the final award by email ten days longer than the three month period, the court calculated the trigger date from when petitioner received by mail and personal service the</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	petition to confirm the award—making the petition to vacate timely. The court confirmed the award, including an award of attorneys’ fees as a sanction for Moser’s actions in the arbitration; the court held that a broad arbitration clause confers discretion to award whatever remedies the arbitrators deem appropriate (including the power to sanction a party for participate in the arbitration in bad faith). The court rejected a challenge to an award of “punitive damages,” finding that such damages were for pre-award interest and disgorgement of compensation under the faithless servant doctrine—which, by law, are compensatory. The court finally awarded pre-judgment interest, on top of the pre-award interest in the award, at the 9% rate specified in the CPLR, which the court cited as the common practice within the Second Circuit.
<i>Sanchez v. Elizondo</i> , 878 F.3d 1216, 1221-22 (9th Cir. 2018)	The court first holds that it has appellate jurisdiction under § 16(a) of the FAA to review an award that both vacated an award and remanded for a new arbitration, thereby joining the First, Second, Third, Fifth and Seventh Circuits on this point. The court then reversed the district court and confirmed the underlying award, finding that the arbitrator had neither exceeded powers nor exhibited manifest disregard of the law in interpreting a FINRA rule as permitting arbitration of the dispute before a single arbitrator. For “exceeding powers,” the court applied a standard that the award must be “completely irrational.”
<i>Savers Prop. & Cas. Ins. Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA</i> , 748 F.3d 708 (6th Cir. 2014)	<p>Reversed a district court injunction that had enjoined any further proceedings in a pending arbitration. The case reached the district court after the panel had issued a partial award on liability but had retained jurisdiction to complete the damage phase. Petitioner argued improper conduct on the part of a party appointed arbitrator. The district court—recognizing limits on judicial review before a final award—had recast the action as one for breach of contract concerning the rules under which the arbitration was to be conducted (in particular, the way party-appointed arbitrators were supposed to act).</p> <p>The Sixth Circuit rejected this approach, and instead applied the familiar principle that a court interacts with arbitration only at two stages—a proceeding to enforce an arbitration agreement and then the limited review of a final</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>award.</p> <p>It is notable that the circuit panel chose to discuss a number of issues along the way. While finding no difference between Michigan arbitration law and the FAA, the court held that this case was governed by Michigan law, because the contract provided that the arbitration shall be "subject to the laws of the State of Michigan." The court also distinguished judicial review of interim awards regarding class actions, noting that the controlling rules in that context contemplated judicial review of stages of the class determination process. Finally, the court noted that in the district court it had been argued that Section 2 of the FAA might permit judicial review during an arbitration, and the court (even though the issue was not pressed on appeal) found that this section did not relate at all to the timing of judicial review.</p>
<p><i>Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.</i>, 668 F.3d 60 (2d Cir. 2012)</p>	<p>Reversed district court, finding no evident partiality where two members of the panel in the St. Paul arbitration did not disclose that they were selected to serve together on a panel in a contemporaneous arbitration (the Platinum case); St. Paul's business had some connections to Platinum's, and a former employee of both Scandinavian and Platinum testified in both arbitrations. The court found that these facts did not show that the arbitrators would be partial to one side in the St. Paul case. The court did not suggest an alternative ground for challenging a nondisclosure related to the arbitrators unrelated to a relationship with a party or its counsel. The court did not invoke its prior opinion in <i>STMicroelectronics, N.V. v. Credit Suisse Securities (USA) LLC</i>, 648 F. 3d 68 (2d Cir. 2011), which had considered and rejected a challenge under § 10(a)(3) ("other misbehavior by which the rights of any party have been prejudiced"), where an arbitrator allegedly had not fully disclosed his background as an expert witness suggesting a "predisposition" against financial institutions.</p>
<p><i>Schneider v. Kingdom of Thailand</i>, 688 F.3d 68 (2d Cir. 2012)</p>	<p>The Kingdom of Thailand appealed from a judgment of the SDNY confirming an arbitration award in favor of appellee Schneider, the insolvency administrator of Walter Bau AG. The Second Circuit held that the district court, before performing a deferential review of the arbitration award, should have determined whether there was clear and unmistakable evidence that the parties agreed that the scope</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	of the arbitration agreement would be decided by the arbitrators. Nevertheless, the circuit concluded that such clear and unmistakable evidence exists in the record.
<i>Singh v. Raymond James Fin. Servs.</i> , 633 F. App'x 548, 551 (2d Cir. 2015)	<p>Upheld a judgment confirming an award and rejected a manifest disregard challenge. In particular, the court rejected challenges to the award of damages. The court stated in pertinent part:</p> <p>“[i]t is settled law in this circuit that arbitrators may render a lump sum award without disclosing their rationale for it, and that when they do, courts will not inquire into the basis of the award unless they believe that the arbitrators rendered it in ‘manifest disregard’ of the law or unless the facts of the case fail to support it.” <i>Koch Oil, S.A. v. Transocean Gulf Oil Co.</i>, 751 F.2d 551, 554 (2d Cir. 1985).</p>
<i>Smarter Tools Inc. v. Chongqing Senci Import & Export Trade Co., Ltd.</i> , 2019 WL 1349527, at *3-5 (S.D.N.Y. 2019), <i>appeal filed</i> (2d Cir. Apr. 11, 2019)	<p>The district court first found that an arbitrator exceeded her authority in failing to provide a reasoned award; the court stated:</p> <p>The Court concludes that the award at issue here does not meet the standard for a reasoned award because it contains no rationale for rejecting STI's claims. <i>Cf. Am. Centennial Ins. Co.</i>, 2012 U.S. Dist. LEXIS 94754, at *25 (holding that an award was reasoned where it contained “the panel's rationale”); <i>see also Fulbrook Capital Mgmt. LLC v. Batson</i>, 14-CV-7564 (JPO), 2015 WL 321889, at *5, 2015 U.S. Dist. LEXIS 8204, at *13 (S.D.N.Y. Jan. 23, 2015) (holding that an award was reasoned where it set out “the arbitrator's key findings and, where necessary, the reasons for those findings”). In dismissing STI's arguments, the arbitrator conclusorily states that “[h]aving heard all of the testimony, reviewed all of the documentary proofs and exhibits, [he does] not find support for STI's claims....” Dkt. No. 6, Ex. C at 5. There is no reason given for this finding other than the negative credibility determination as to STI's expert witness, Zukerman. <i>See id.</i> at 5–6. While this credibility determination does provide a rationale for rejecting STI's calculations of its lost profits and goodwill, it does not provide a basis for a dismissal of STI's claims in their totality. <i>See id.</i> at 5 (describing Zukerman's changing testimony concerning STI's</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>“loss of future profit and loss of goodwill”). Notably, STI did not rely on Zukerman’s testimony in support of its argument that SENCI promised to deliver CARB-compliant generators—an argument that the award does not address at all. Although the arbitrator was not obliged to discuss each piece of evidence presented by STI, he must at least provide some rationale for the rejection of STI’s overall argument for STECI’s liability. <i>Cf. Fulbrook Capital Mgmt. LLC</i>, 2015 U.S. Dist. LEXIS 8204 at *14 (determining that an award was reasoned in part because the award “explain[ed] in full its rejection of what was perhaps Petitioner’s most important argument”). The Court therefore concludes that the award as issued is not a reasoned award.</p> <p>Courts in this district have held that “an arbitrator exceeds his or her powers when the arbitrator renders a form of award that does not satisfy the requirements the parties stipulated to in their arbitration agreement.” <i>Tully Constr. Co.</i>, 2015 U.S. Dist. LEXIS 25690 at *47; <i>see also id.</i> at 46–47 (collecting cases); <i>Leeward Const. Co.</i>, 826 F.3d at 638–640 (2d Cir. 2016)(assessing the merits of whether an arbitral award was “reasoned”). Because the parties here agreed that the award should be “reasoned,” the arbitrator exceeded his authority in issuing an award that does not meet the standard of a reasoned opinion.</p> <p>The Court next held that a remand would be the proper remedy, rather than vacatur:</p> <p>STI maintains that this Court can vacate the award on the sole basis that it is not reasoned. <i>See</i> Dkt. No. 36 at 11. However, the Court is cognizant that that the remedy of vacatur must be strictly limited “in order to facilitate the purpose underlying arbitration: to provide parties with efficient dispute resolution, thereby obviating the need for protracted litigation.” <i>T.Co Metals, LLC</i>, 592 F.3d at 342 (quoting <i>ReliaStar Life Ins. Co. of N.Y. v. EMC Nat’l Life Co.</i>, 564 F.3d 81, 85 (2d Cir. 2009)). The Court therefore determines that the proper remedy is to remand to the arbitrator for clarification of his</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	findings. <i>See Tully Const. Co.</i> , 2015 U.S. Dist. LEXIS at *49–52 (concluding that remand is the proper remedy for an award that was issued in an improper form); <i>see also Cannelton Industries, Inc. v. District 17, United Mine Workers</i> , 951 F.2d 591, 594 (4th Cir. 1991) (“A court’s power to vacate an award because of an arbitrator’s failure to address a crucial issue necessarily includes a lesser power to remand the case to the same arbitrator for a determination of that issue.”); <i>Siegel v. Titan Indus. Corp.</i> , 779 F.2d 891, 894 (2d Cir. 1985) (“[C]ourts on occasion may remand awards to arbitrators to clarify the meaning or effect of an award ... or to determine whether the arbitrator has in some way exceeded his powers.”) (internal citations omitted).
<i>Sotheby’s Int’l Realty, Inc. v. Relocation Grp., LLC</i> , 588 F. App’x 64, 65-66 (2d Cir. 2015)(internal quotations, punctuation and citations omitted)	Reversed a district court vacatur and rejects a manifest disregard of the law challenge. The court states that a “court reviewing an arbitral award cannot presume that the arbitrator is capable of understanding and applying legal principles with the sophistication of a highly skilled attorney....For this reason, and because of the ‘great deference’ that courts must grant an arbitration panel’s decision, this Court has imposed the following three requirements in order to find that an award was issued in manifest disregard of the law. First, we must consider whether the law that was allegedly ignored was clear, as an arbitrator obviously cannot be said to disregard a law that is unclear or not clearly applicable. Second, we must find that the arbitrators did in fact err in their application of the law, and that the outcome reached was erroneous. Even where explanation for an award is non-existent, we can confirm it if a justifiable ground for the decision can be inferred from the facts of the case. Third, we must find that the arbitrators knew of the law’s existence and its applicability to the problem before them.”
<i>Stevens v. Jiffy Lube Int’l, Inc.</i> , 911 F.3d 1249, 1252 (9th Cir. 2018)	The Ninth Circuit affirmed the dismissal of a petition to vacate an award filed on December 15, 2016 seeking to vacate an award delivered on September 14, 2016 as untimely by one day to satisfy the three-month requirement under the FAA to challenge the award. The court explained that under Fed. R. Civ. P. 81(a)(6)(B), the Federal Rules apply to FAA proceedings unless the FAA provides other

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>procedures, so that the calculation of time was controlled by Fed. R. Civ. P. 6(a)(1). Applying that rule, the court provides the calculation requiring that the petition be dismissed:</p> <p>Applying this three-step process, the Stevenses filed their petition one day late. At step one, we exclude the first day, September 14, 2016, when the arbitrator delivered the final award. At step two, we calculate three months from September 15, 2016. The first month began September 15 and concluded October 14; the second month began October 15 and concluded November 14; and the third month began November 15 and concluded December 14. Step three requires no adjustment because December 14, 2016, was a Wednesday and not a legal holiday.</p> <p>The Stevenses dispute only the calculation at step two, arguing that three months from September 15, 2016, was December 15, 2016. Not so. “[C]ount[ing] every day,” Fed. R. Civ. P. 6(a)(1)(B), a month beginning on the fifteenth concludes on the fourteenth of the following month—just as the month beginning January 1 concludes on January 31, not February 1; and just as the week beginning on Monday concludes on Sunday, not the following Monday</p>
<p><i>Stone v. Bear, Stearns & Co.</i>, 872 F. Supp. 2d 435, 447-48, 451-52, 456 (E.D. Pa. 2012), <i>aff’d</i>, 538 F. App’x 169 (3d Cir. 2013), <i>cert. denied</i>, 134 S. Ct. 2292 (2014)</p>	<p>Confirmed award and denied petition to vacate, where Stone claimed that FINRA public arbitrator failed to disclose her husband’s connection to the securities industry; in fact, the arbitrator had disclosed to FINRA in general terms her husband’s connections to the securities industry, but that information was not included in the disclosure form sent by FINRA to the parties. The court does a full analysis of the law on evident partiality, and applies the Third Circuit standard requiring “proof of circumstances powerfully suggestive of bias.” Emphasizing that nondisclosure or failure to follow FINRA disclosure rules by themselves would not constitute evident partiality, the court found that the fact that the arbitrator made disclosure (even though not provided to Stone) meant that bias could not be inferred from the disclosure conduct of</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	the arbitrator. The court also found that the arbitrator's husband's connections to the securities industry were too tenuous to infer bias (he taught a course years before for J.P. Morgan and gave a keynote speech at a J.P. Morgan conference). The court also rejected Stone's argument that the nondisclosure constituted misbehavior under § 10(a)(3); that ground has never been applied to a nondisclosure and Stone failed to show misconduct so severe that he was deprived of a fundamentally fair hearing. The court further rejected Stone's argument that the arbitrator exceeded her powers, where she was supposed to be the FINRA public arbitrator but where her husband's connections supposedly disqualified her for this role; while finding that the argument had some "logical appeal," the court found that Stone failed to show that the arbitrator did not make a good faith attempt to comply with her mandate. Finally, the court held Stone waived his challenge, because he "should have known" the basis of his challenge before the award; his investigation could have yielded the same information had it been done earlier.
<i>Strausser Enters., Inc. v. Segal & Morel, Inc.</i> , 2016 WL 4905677 (Pa. Super. Ct., 2016) (non-precedential), <i>appeal denied</i> , 169 A.3d 1020 (Pa. 2016)	Under the common law of arbitration conducted in Pennsylvania, ordinarily a unanimous decision by a panel of arbitrators is required for confirmation of an award; in this non-precedential decision (which the Pennsylvania Supreme Court declined to review), the court found that the parties by contract and conduct intended to be bound by a majority decision and therefore declined to vacate the 2-1 award.
<i>Szczepanek v. Dabek</i> , 465 F. App'x 74, 75 (2d Cir. 2012)	Affirmed a district court order that found "manifest error" in the backup documentation for calculation of an award of attorney's fees imposed as a sanction and that reduced the fees to a "reasonable amount." The Second Circuit rejected an argument that the district court failed to give substantial deference to the award because the district court found "manifest error on the record before it." And the court rejected an argument that the district court acted without a statutory or judicial ground for departing from the award: "On the contrary, upon correcting the manifest error in the fee calculation, the district court enforced the terms of the arbitration award without any modification or vacatur." The court also rejected the challenge to the district court's recalculation of the fee amount, finding "no clear error." In essence, the district court reviewed the record of the

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	attorneys' billing and then applied the percentage of the fees (30%) that the arbitration award granted as a sanction. The petitioner had sought \$944,604 based on allegedly incurred fees of \$3,148,680, but the district court found that the proffered fees were overstated and allowed \$283,381.21.
<i>TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC</i> , 153 A.D.3d 140, 149, 152, 162 (1st Dep't 2017), <i>appeal dismissed</i> , 30 N.Y.3d 1005 (2017)	<p>The First Department affirmed the vacatur of an arbitration award issued in an arbitration initiated before the Revenue Sharing Definitions Committee ("RSDC") of Major League Baseball (MLB") and further affirmed an order directing that the new arbitration be conducted by the RSDC; the vacatur was based on evident partiality. The dispute arose over the division of telecast rights fees among TCR Sports Broadcasting d/b/a The Mid-Atlantic Sports Network ("MASN"), the Baltimore Orioles and the Washington Nationals. In the arbitration, Proskauer represented the Nationals; the Orioles objected to Proskauer's participation on the basis that Proskauer had regularly represented MLB as well as at least one baseball team participating on the RSDC (where the clubs appointed to the RSDC effectively determined the dispute). The RSDC issued an award favoring the Nationals. "Although MLB cautioned all parties that they should not challenge the award," MASN on behalf of itself and the Orioles commenced the proceeding to vacate the award. In upholding the vacatur, the First Department wrote:</p> <p style="padding-left: 40px;">The evidence that the same lawyers in the same firm were representing interests of the arbitrators and MLB at the same time as they represented the Nationals in the arbitration is an objective fact inconsistent with impartiality. The arbitrators had a duty to, but did not, investigate or disclose their relationships with Proskauer, and MLB failed to exercise what power it had to ensure confidence in the fairness of the proceedings in light of MASN's stated concerns.</p> <p>Nonetheless, a majority of the Court held that the new arbitration should be conducted before the RSDC since that was the forum selected by the parties in their agreements, and the FAA directs courts to enforce arbitration agreements in accordance with their terms.</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>In a dissent on the issue of sending the case back to the RSDC (instead of a neutral body like the AAA), Judge Acosta offered this analogy:</p> <p>Part of what makes baseball such a beloved sport is its rules, which preserve the integrity and popularity of the game. . . . Players take the field with the expectation that the umpires are not predisposed to apply those rules in favor of one team over the other. The players win or lose each game based on their own skills and the fair application of the rules—not the influence of some outside force, such as partial umpires or illegal betting. In short, the game is fundamentally fair, a concept that is equally important in arbitrations. An arbitration, like most sports, requires that adversaries begin on a level playing field, with ground rules that are applied fairly to both sides, and without decision-makers who will prejudge the matter. Otherwise, there would be no integrity or trust in the process. Unfortunately, in this case, we are confronted with a fundamentally unfair arbitration that was conducted by Major League Baseball and involved a dispute between two baseball clubs.</p>
<p><i>Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC</i>, 437 S.W.3d 518, 519-20 (Tex. 2014)</p>	<p>Supreme Court of Texas vacated an award for evident partiality (applying the FAA, although the same ground is found in the Texas stature). The court summarized its opinion as follows:</p> <p>Evident partiality of an arbitrator is a ground for vacating an arbitration award under both the Federal Arbitration Act and the Texas Arbitration Act. Adhering to United States Supreme Court precedent, we held almost two decades ago that a neutral arbitrator is evidently partial if she fails to disclose facts that might, to an objective observer, create a reasonable impression of her partiality. And we have held that a party does not waive an evident partiality challenge if it proceeds to arbitrate without knowledge of the undisclosed facts.</p> <p>Today, we are asked to evaluate these standards in light of a partial disclosure. Here, the neutral</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	<p>arbitrator in question disclosed that the law firm representing one party to the arbitration had recommended him as an arbitrator in three other arbitrations. He also disclosed that he was a director of a litigation services company and attended a meeting at the law firm, but there was no indication the firm and company would ever do business. The trial court found the arbitrator failed to disclose that all of his contacts at the 700-lawyer firm were with the two lawyers that represented the party to the arbitration at issue; he owned stock in the litigation services company that was pursuing business opportunities with the firm; he served as the president of the company's United States subsidiary; he conducted significant marketing in the United States for the company; he had additional meetings or contacts with the two lawyers in question to solicit business from the firm for the company; and he allowed one of the two lawyers to edit his disclosures to minimize the contact. The trial court vacated the arbitration award, but the court of appeals reversed, concluding the party waived its evident partiality claim by failing to object or inquire further when the disclosures occurred. We hold the failure to disclose this additional information might yield a reasonable impression of the arbitrator's partiality to an objective observer. We further hold that because the party making the evident partiality challenge was unaware of the undisclosed information, it did not waive the claim. Accordingly, we reverse the court of appeals' judgment and reinstate the trial court's order vacating the award and requiring a new arbitration.</p>
<p><i>Thomas Kinkade Co. v. White</i>, 711 F.3d 719, 720, 724 (6th Cir. 2013)</p>	<p>Upholding a judgment vacating an award in an arbitration that took over five years; the circuit observed the “arbitration itself was a model of how not to conduct one.” Well into the arbitration, the “neutral” arbitrator, Mark Kowalsky, announced to the parties that the respondent, White, and his party-appointed arbitrator on the panel, had entered into engagements with Kowalsky’s firm. First, White (a party to the arbitration) had hired one of the arbitrator’s law firm partners to represent White in an unrelated arbitration. Second, White’s party-appointed arbitrator hired a different one of the arbitrator’s partners as</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	a defense expert in a malpractice claim against that party-appointed arbitrator. On top of this, White's counsel was the one to advise Kowalsky that he had been "re-confirmed" as an arbitrator after the AAA denied Kinkade's challenge. The award gave White all the relief he requested. The Sixth Circuit held: "Here, Kinkade established a convergence of undisputed facts that considered together, show a motive for Kowalsky to favor the Whites and multiple, concrete actions in which he appeared actually to favor them." The court, noting that Kowalsky made disclosure of the engagements, added: "Five years into an arbitration, those disclosures were little better than no disclosures at all."
<i>Tully Constr. Co, v. Canam Steel Corp.</i> , 684 F. App'x 24, 26 (2d Cir. 2017)	<p>Affirmed the denial of a vacatur petition that was based on manifest disregard of the law. The court stated the standard for vacatur as follows:</p> <p>Under Section 10 of the FAA, an arbitration award may be vacated if, <i>inter alia</i>, it was procured by corruption or fraud, or the arbitrators "exceeded their powers." 9 U.S.C. § 10(a). The Second Circuit recognizes two additional bases for vacatur: if the award "was rendered 'in manifest disregard of the law,'" <i>Schwartz v. Merrill Lynch & Co., Inc.</i>, 665 F.3d 444, 451 (2d Cir. 2011) (quoting <i>T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.</i>, 592 F.3d 329, 340 (2d Cir. 2010)), or "the terms of the [parties' relevant] agreement[s]," <i>id.</i> at 452 (second alteration added) (quoting <i>Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.</i>, 126 F.3d 15, 23 (2d Cir. 1997)). However, only "a barely colorable justification for the outcome reached" by the arbitrator is necessary to confirm the award. <i>Landy Michaels Realty Corp. v. Local 32B-32J, Service Employees Int'l Union</i>, 954 F.2d 794, 797 (2d Cir. 1992) (quoting <i>Andros Compania Maritima, S.A. v. Marc Rich & Co.</i>, 579 F.2d 691, 704 (2d Cir. 1978)).</p> <p>The Court agreed with the district court's rulings that the three alleged instances of manifest disregard urged by petitioners were without merit.</p>
<i>United Brotherhood of Carpenters and Joiners of America v. Tappan</i>	A governing arbitration agreement empowered an arbitrator to issue an initial bottom line decision (stating who won)

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
<i>Zee Constructors, LLC</i> , 804 F.3d 270, 276 (2d Cir. 2015)	and then to reverse the outcome in the final award contemplated under the agreement. The opinion turns on language of the National Plan for the Settlement of Jurisdictional Disputes in the Construction Industry that sets out a process for unions to resolve jurisdictional issues—in this context, the allocation of work in a project. The arbitrator is given factors to apply and is directed to issue a short form decision within 5 days of the hearing stating the outcome, with a reasoned award to follow within 30 days of the hearing. In this case, the arbitrator’s short form decision ruled in favor of the Dockworkers, but his reasoned award ruled in favor of the Carpenters, saying that his original analysis was incorrect and further saying that the arbitration provision gives the arbitrator continued power to resolve the dispute through issuance of the final award. The court of appeals ruled that a court must defer to the arbitrator’s interpretation of the language of the agreement concerning the sequence of awards. The court found that its holding was consistent with previous opinions deferring to an arbitrator’s interpretation of contract language (whether the court agreed with the interpretation or not). The court observed: “While the ultimate result was perhaps a bit unusual, it was not a declaration of the arbitrator’s ‘own brand of justice in contradiction of the clearly expressed language of the contract’” (citation omitted). The court rejected appellant’s argument that the parties had not submitted the issue of what an arbitrator was permitted to do in the short form award and final award, and also rejected the argument that the issue of the scope of the awards was a gateway issue for a court to decide. Rather, the court held that the dispute over allocation of work was submitted to arbitration and that the arbitrator’s construction of what he could do in the two awards was a matter of contract interpretation as part of his resolution of the dispute. And the court found that the arbitrator did not lose power under the doctrine of <i>functus officio</i> because until the final award he had not fully exercised his authority to determine the submitted issues.
<i>U.S. Elec., Inc. v. Sirius Satellite Radio Inc.</i> , 17 N.Y.3d 912, 915 (2011) (Argued by Michael S. Oberman)	Held that New York courts applying the FAA will follow the Second Circuit’s standard for evident partiality.

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
<p><i>U.S. Soccer Federation, Inc. v. U.S. National Soccer Team Players Association</i>, 838 F.3d 826, 835, 837 (7th Cir. 2016)</p>	<p>Vacated an arbitration award, where the arbitrator had found the contract language to be ambiguous; the court agreed with the district court that the arbitrator invoked the terms “silence” and “ambiguity” “far too cavalierly.” Construing the agreement, the court found that the language was clear and express on the point in issue. The court held that the arbitrator had exceeded his authority by not applying the clear and unambiguous contract language. In so holding, the court found that the award ran “contrary to this court’s well-established holding that ‘the arbitrator cannot dress his policy desires up in contract interpretation clothing.’” (citation omitted). The court concluded that the goal of arbitration of providing “swift, inexpensive and final decisions” “does not vitiate judicial review of an arbitrator’s decision.” (citation omitted). The court found its ruling consistent with the parties’ agreement since the arbitral award was a decision that “stray[ed] beyond [the arbitrator’s] delegated authority” and “is barred by the negotiated contract.”</p>
<p><i>Wells Fargo Advisors, LLC, v. Mercer</i>, 735 F. App’x 23, 24 (2d Cir. 2018)</p>	<p>Court reiterates that under Section 12 of the FAA, a party must petition to vacate within three months after the award is “filed or delivered,” and that such relief may not later be sought even if raised as a defense to a motion to confirm (when a petition to confirm may be commenced within a year after the award is delivered)(quoting statute; citation omitted). The three-months deadline is absolute.</p>
<p><i>Zurich Am. Ins. Co. v. Team Tankers A.S.</i>, 811 F.3d 584, 589, 591 (2d Cir. 2016)</p>	<p>Affirmed the confirmation of an award, finding no manifest disregard of the law; the court stated: “It is arguable that the shipper’s evidence could have supported a contrary conclusion, but that does not show that the panel majority manifestly disregarded the law.” The court further found no “corruption” or “misbehavior” where the panel chairman did not disclose that he had a brain tumor with which he had been diagnosed during the arbitration; the petitioner contended that the parties’ shipping rules required disclosure of such an illness. The court treated the argument as an attempt to expand the FAA grounds for vacatur, and held that the parties’ rules could not alter the statutory grounds. The Second Circuit additionally held that the district court erred in awarding attorneys’ fees and costs incurred in the proceeding to confirm or vacate the award. The court found that the parties’ agreement (relied on by the district court) only allowed fees and costs for</p>

JUNE 2019 SELECTED CASES ON VACATUR

<u>Case</u>	<u>Description</u>
	breach of contract, and in this case no breach was shown. The court reasoned that seeking confirmation or vacatur was part of the contract, not a breach of it. And the court ruled that, if the contract did require a shipper to forbear from resisting confirmation, that would be unenforceable under the FAA, stating: "We have held that '[p]arties seeking to enforce arbitration awards through federal-court confirmation judgments may not divest the courts of their statutory and common-law authority to review both the substance of the awards and the arbitral process for compliance with § 10(a) and the manifest disregard standard.'" Lastly, the court found that the record did not warrant fees for bad faith conduct. (citation omitted).

The *Hall Street* Parade: State Courts Step Out and Consider Expanded Review of Arbitration Awards

By Michael S. Oberman

In *Hall Street Assocs., L.L.C. v. Mattel, Inc.*,¹ the Supreme Court in 2008 resolved a then-surfing conflict among the federal courts of appeals and unambiguously held that the parties to an arbitration agreement cannot by contract expand the scope of judicial review of an arbitration award under the Federal Arbitration Act. In particular, the parties cannot cause a court to review an award for errors of law. Instead, the Court held that the narrow statutory categories set out in Sections 10 and 11 of the FAA are the exclusive grounds for vacating or modifying an award under the FAA.

But the Court left open the possibility of expanded review outside of the FAA. The Court stated: “[W]e do not purport to say that [Sections 10 and 11] exclude more searching review based on authority outside the statute.... [Parties] may contemplate enforcement under state statutory or common law,...where judicial review of different scope is arguable”; the Court “decid[ed] nothing about other possible avenues for judicial enforcement of arbitration awards.”² With the Supreme Court “deciding nothing” about those state law avenues, state courts have picked up where *Hall Street* left off. This article discusses a cluster of post-*Hall Street* decisions by the highest courts of six states addressing the enforceability of an agreement to expand the scope of judicial review (as well as a decision of the New York Court of Appeals applying *Hall Street* on a motion to stay arbitration). The picture that emerges from this cluster of cases pretty much matches the Supreme Court’s description: “judicial review of different scope is arguable.” Looking at these decisions one-by-one, each state court is providing clear guidance on whether expanded review is permitted by the arbitration law of its state.

Texas

The most recent case comes from the Supreme Court of Texas. In *Nafta Traders, Inc. v. Quinn*,³ the court held that the Texas Arbitration Act permits parties to expand the scope of judicial review by agreement and that the FAA does not preempt enforcement of such an agreement. The court found its holding to “flow inexorably from the fact that arbitration is simply a matter of contract between the parties.”⁴ The parties’ contract specified that the “arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law.”⁵ Nafta—the

party seeking vacatur of the award in a sex discrimination case—argued that there were reversible errors of law and remedies not permitted by law.

The court applied the Texas Arbitration Act, noting that the parties had not disputed the applicability of the TAA and that the “TAA and the FAA may both be applicable to an agreement, absent the parties’ choice of one or the other.”⁶ The TAA, like the FAA, includes as a ground for vacatur “where the arbitrators exceeded their powers.”⁷ The court viewed the contractual provision limiting the arbitrator’s authority as the “flip-side” of an agreement to expand the scope of judicial review.⁸ Yet because the agreement in question was structured as a limitation on the arbitrator’s power, the court homed in on the “exceeded their powers” ground for vacatur, pointedly observing that the Supreme Court in *Hall Street* did not discuss whether this ground might permit judicial review for error. The Texas court found that the statutory language—“where the arbitrators exceeded their powers”—can lead to vacatur when an award is shown to exceed the contractual authority given to the arbitrator. The court ultimately held “that the TAA presents no impediment to an agreement that limits the authority of an arbitrator in deciding a matter and thus allows for judicial review of an arbitration award for reversible error.”⁹

Having held that expanded review is permitted under the TAA but noting that the case was covered by both the TAA and the FAA, the court proceeded to consider whether the FAA preempted Texas law permitting expanded review. The court found there was no preemption, because preemption occurs only where “state law... refuse[s] to enforce an arbitration agreement that the FAA would enforce.”¹⁰ “Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA.”¹¹ The court cited Justice Breyer’s dissent in *Hall Street*, which “emphasized that the Court was in agreement that its decision would not have preclusive effect.”¹² The court was also “mindful of the TAA’s mandate that it ‘be construed to...make uniform the construction of other states’ law applicable to an arbitration.’”¹³ The court reported that three states had found their arbitration statutes to permit expanded review while five states found that their arbitration statutes did not permit expanded review (including, in this tabulation, three pre-*Hall Street* cases).¹⁴

Maine

Moving slightly back in time, the Supreme Judicial Court of Maine held in *HL 1, LLC v. Riverwalk, LLC*¹⁵ that an arbitration agreement providing a right to appeal any questions of law was invalid under the Maine Uniform Arbitration Act. The court applied Maine law because the parties' agreement stated that "the Agreement, and the interpretation hereof, shall be governed exclusively by its terms and the laws of the State of Maine."¹⁶ Finding that the Maine statute and the FAA had similar provisions, the court followed *Hall Street's* textual analysis and interpreted the state statute consistent with *Hall Street's* reading of the FAA. The court also pointed to the following language in the Maine statute as limiting judicial review: "But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award."¹⁷ The court held that the Maine statute reflected only one policy: "when parties have agreed to arbitration that results in an award, the role of the court is to promptly confirm the award subject to narrow review upon application of a party."¹⁸ The court therefore upheld the lower court decision that confirmed the award after severing the expanded review clause from the arbitration agreement pursuant to the agreement's severability clause.

Georgia

The Supreme Court of Georgia applied reasoning similar to the Maine court in *Brookfield Country Club, Inc. v. St. James-Brookfield, LLC*,¹⁹ rejecting expanded review. There, the parties' agreement provided that an award could be reviewed for error of law as an additional ground for vacatur under the Georgia arbitration statute. The court found *Hall Street* to be persuasive authority and held: "We...reiterate that arbitration in this state is no longer governed by common law, but is wholly a creature of statute, and thus it is the role of the legislature, not this Court, to augment any fundamental changes in the nature of the proceeding.... Although we acknowledge the fundamental principle that parties have the right to freely contract, courts may not enforce a contractual provision which contravenes the statutory law of this state."²⁰

Tennessee

The Supreme Court of Tennessee followed *Hall Street* as persuasive authority in applying Tennessee's arbitration statute in *Pugh's Lawn Landscape Co. v. Jaycon Development Corp.*,²¹ but also emphasized that the Tennessee statute expressly disallows vacation of an award on the ground that "the relief was such that it could not or would not be granted by a court of law or equity."²² The court applied a game-changing remedy. It held that the provision in the parties' agreement providing for expanded judicial review constituted a mutual mistake

requiring rescission of the parties' arbitration agreement and a vacatur of the award.

Alabama

The Supreme Court of Alabama displayed a different approach in *Raymond James Fin. Servs, Inc. v. Honea*.²³ The court recounted that it had previously applied Section 10 of the FAA to motions for vacatur, without having to decide whether it was obliged to do so. The court, in view of *Hall Street*, confronted the issue and decided that it need not apply the FAA to state court proceedings to vacate an award. The court held that "[u]nder the Alabama common law, courts must rigorously enforce contracts, including arbitration agreements, according to their terms in order to give effect to the contractual rights and expectations of the parties.... Applying that principle in this case requires us to give effect to the provision in the arbitration agreement authorizing a court having jurisdiction to conduct a de novo review of the [transcript and exhibits of the arbitration hearing]...pursuant to that same agreement."²⁴

California

In this parade of state cases, the Supreme Court of California led the way, responding to *Hall Street* within months of its issuance. In *Cable Connections, Inc. v. DIRECTV, Inc.*,²⁵ the court held that Section 10 of the FAA did not preempt California law governing review of arbitration awards, that California law permitted parties to alter the usual scope of judicial review by an express agreement, and that enforcement of such agreements was consistent with the FAA's policy of enforcing private contractual arrangements.

New York

The New York Court of Appeals has recognized the holding of *Hall Street* but enforced it in a different context from the cases discussed above. In *Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's*,²⁶ the court reviewed a motion to stay or enjoin an arbitration where the arbitration clause provided for judicial review for errors of law and where the issue presented was whether a court or an arbitrator should decide the enforceability of the arbitration agreement that contained an unenforceable clause (that is, the expanded review clause rendered unenforceable by *Hall Street*). In a memorandum decision, the court held: "Although *Hall Street*...prohibits parties from expanding, by their own agreement, the scope of judicial review beyond that authorized by the Federal Arbitration Act, clear and unmistakable evidence exists in this case that the parties agreed to arbitrate questions of arbitrability, including whether the parties' arbitration agreement is invalid under *Hall St. Assoc.* or whether the apparently offending provision could be severed from the remainder of the agreement."²⁷ It appears from the dissent in the

Appellate Division-First Department decision (where the majority held the issue of enforceability was for the arbitrator) that the "parties agree that their agreement is subject to the Federal Arbitration Act."²⁸

Practice Point

If an award is reviewed pursuant to Section 10 of the FAA, an agreement for expanded judicial review will not be enforced. This article shows an emerging split among state courts on the enforceability of agreements for expanded judicial review. To the extent parties seek expanded judicial review, consideration must be given in drafting the arbitration agreement to the law that will govern the review of the award (looking particularly at the few states that permit expanded review).

Endnotes

1. 552 U.S. 576 (2008).
2. *Id.* at 590.
3. 339 S.W.3d 84 (Tex. 2011).
4. *Id.* at 87 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)).
5. *Id.* at 88 (citation and internal quotation marks omitted).
6. *Id.* at 97 n.64.
7. *Id.* at 92 (citing § 10(a)(4) of the FAA and § 171.088(a)(3)(A) of the TAA).
8. *Id.*
9. *Id.* at 97.
10. *Id.* at 98.
11. *Id.* at 99.
12. *Id.* at 100-01 (citing 552 U.S. at 596).
13. *Id.* at 97 (citing Tex. Civ. Prac. & Rem. Code § 171.003).
14. *Id.* (citing as states permitting review *Raymond James Fin. Servs., Inc. v. Honea*, 55 So.3d 1161, 1170 (Ala. 2010); *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586, 606 (2008); and *Tetina Printing, Inc. v. Fitzpatrick & Assocs., Inc.*, 135 N.J. 349, 640 A.2d 788, 793 (1994)); and citing as states not permitting expanded review *Brookfield Country Club, Inc. v. St. James-Brookfield, LLC*, 287 Ga. 408, 696 S.E.2d 663, 667 (2010); *HL 1, LLC v. Riverwalk, LLC*, 15 A.3d 725, 736 (Me. 2011); *John T. Jones Constr. Co. v. City of Grand Forks*, 665 N.W.2d 698, 704 (N.D. 2003); *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 261 (Tenn. 2010); and *Barnett v. Hicks*, 119 Wash. 2d 151, 829 P.2d 1087, 1095 (1992).
15. 15 A.3d 725 (Me. 2011).
16. *Id.* at 730.
17. *Id.* at 734 (citing M.R.S. § 5938(1) (2010)).
18. *Id.* at 736.
19. 696 S.E. 2d 663 (Ga. 2010).
20. *Id.* at 666-67.
21. 320 S.W.3d 252 (Tenn. 2010).
22. *Id.* at 260 (citing Tenn. Code Ann. § 29-5-313(a)(5)).
23. 55 So. 3d 1161 (Ala. 2010).
24. *Id.* at 1169.
25. 190 P.3d 586, 597-99 (Cal. 2008).
26. 927 N.E. 2d 553 (N.Y. 2010).
27. *Id.*
28. 888 N.Y.S.2d 458, 459-60 (1st Dep't 2009).

Michael S. Oberman, moberman@kramerlevin.com, is a litigation partner of Kramer Levin Naftalis & Frankel LLP where he heads the firm's Alternative Dispute Resolution Practice Group. He has litigated a wide variety of complex civil cases at the trial and appellate levels and in arbitration and serves as an arbitrator and a mediator. He is a Fellow of the College of Commercial Arbitrators. He has served since 1989 on the Executive Committee of the New York State Bar Association's Commercial and Federal Litigation Section and was that Section's Delegate to the House of Delegates from 1989-91.



New York Law Journal

A NEW YORK LAW JOURNAL SPECIAL SECTION

An ALM Publication

Alternative Dispute Resolution

WWW.NYLJ.COM

MONDAY, APRIL 2, 2012



Clarifying the Standard For Determining **Arbitrator Bias**

ISTOCK

New decisions take on 'evident partiality.'

BY MICHAEL S. OBERMAN

IN AN ARTICLE entitled "Gotcha Game," The National Law Journal reported last year on a "rising tide of challenges to arbitration awards [that] threatens to undermine the system."¹ The article focused on challenges alleging "evident partiality" on the part of an arbitrator, and

observed that a "wide jurisdictional disparity regarding what constitutes partiality" was compounding the added time and expense inherent in any judicial challenge to an award.² But the last year has brought new clarity to the standard for evident partiality applied by the U.S. Court of Appeals for the Second Circuit and now by state courts in New York. This article traces the evolution of that standard, concluding with two recent cases that clarify the law—the Second Circuit's *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.* opinion³ and the N.Y. Court of Appeals' decision in *U.S. Electronics Inc. v. Sirius Satellite Radio Inc.*⁴

More Issues Raised Than Resolved

Section 10(a)(2) of the Federal Arbitration Act (FAA) empowers a federal district court to vacate an arbitration award "where there was evident partiality or corruption in the arbitrators, or either of them."⁵ New York state courts also apply the FAA when the dispute affects interstate commerce.⁶ Any "jurisdictional disparity" regarding the meaning of evident partiality primarily results from a lack of clear guidance from the U.S. Supreme Court. Its only evident partiality case—*Commonwealth Coatings Corp. v. Continental Casualty Co.*, decided in

MICHAEL S. OBERMAN is a litigation partner and head of the ADR practice group at Kramer Levin Naftalis & Frankel. He served as lead counsel for Sirius in the 'U.S. Electronics' case discussed herein.

1968⁷—prompted 40 years of debate on whether the plurality opinion of Justice Hugo Black or the concurring opinion of Justice Byron White should be followed, with most courts concluding that the plurality opinion does not control.⁸

Commonwealth Coatings presented a nondisclosed financial relationship between a neutral arbitrator and the successful party to the arbitration, with “repeated and significant” business lasting over a period of four or five years (but not the year before the arbitration), including “services on the very projects” involved in the arbitration.⁹ Six justices agreed that the award should be vacated but did not agree on the reasoning. Justice Black offered “the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias,” stating that arbitrators “not only must be unbiased but also must avoid even the appearance of bias.”¹⁰

Justice White stated that he was “glad to join” Justice Black’s opinion, but then declared that “[t]he Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges.”¹¹ For Justice White, it was “enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed.”¹² Both opinions looked more to recusal standards for federal judges than to the statutory words. As the dissent argued, an “innocent failure to volunteer information” about a relationship does not constitute evident partiality in a case where the award was unanimous and “no claim is made of actual partiality, unfairness, bias or fraud”; “evident partiality” “means what it says: conduct—or at least an attitude or disposition—by the arbitrator favoring one party, rather than the other.”¹³

Reasonable Person Standard

In 1984, the Second Circuit adopted a reasonable person standard for evident partiality in *Morelite Constr. Corp. v. NYC Dist Council Carpenters Benefit Funds*,¹⁴ the court’s seminal opinion that has been applied in dozens of cases.¹⁵ Judge Irving Kaufman treated “much of Justice Black’s opinion...as dicta,” allowing the court to “delineate standards of impartiality on a relatively clean slate.”¹⁶ “Mindful of the trade-off between expertise [in the relevant industry] and impartiality, and cognizant of the voluntary nature of submitting to arbitration,” the court read “Section 10(b) as requiring a showing of something more than the mere ‘appearance of bias’ to vacate an arbitration award.”¹⁷ But the court could not “countenance the promulgation of a standard of partiality as

insurmountable as ‘proof of actual bias’—as the literal words of Section 10 might suggest.”¹⁸ The court concluded:

If the standard of “appearance of bias” is too low for the invocation of Section 10 and “proof of actual bias” too high, with what are we left? Profoundly aware of the competing forces that have already been discussed, we hold that “evident partiality” within the meaning of 9 U.S.C. §10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.¹⁹

Applying this standard, *Morelite* held that a reasonable person would have to conclude that a sole arbitrator, whose father was president of an international union, would be partial to a local of that union that was a party to the arbitration. The court emphasized that it did not “intend that unsuccessful parties to arbitration may have awards set aside by seeking out and finding tenuous relationships between the arbitrator and the successful party.”²⁰

In *Local 814, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. J & B Systems Installers & Moving Inc.*,²¹ the court declined to vacate an award where an arbitrator allegedly had, in a separate incident, gone to jail for contempt rather than testify against the father of a party to the arbitration. The court held that while the speculation of a close friendship between the party’s father and the arbitrator “might suffice to show ‘an appearance of bias’...it falls short of *Morelite*’s ‘reasonable person’ standard.”²² The court further observed: “Nor have appellants presented any evidence tending to show that [the arbitrator’s] putative partiality prejudiced them.”²³

In *Lucent Technologies Inc. v. Tatung Co.*,²⁴ the Second Circuit held that evident partiality was not shown where an arbitrator disclosed that he had served as an expert witness for Lucent in an unrelated case completed months before the arbitration was commenced, but where the losing party had not received the disclosure form. Judge Wilfred Feinberg stated that the court has

“not been quick to set aside the results of an arbitration because of an arbitrator’s alleged failure to disclose information.” In particular, [it has] declined to vacate awards because of undisclosed relationships where the complaining party should have known of the relationship or could have learned of the relationship “just as easily before or during the arbitration rather than after it lost the case.”²⁵

In 2007, the court underscored the burden faced by a petitioner, holding in *Applied Indus., Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*:²⁶

Unlike a judge, who can be disqualified in any proceeding in which his impartiality *might* reasonably be questioned, ...an arbitrator is disqualified only when a reasonable person, considering all of the circumstances, would *have* to conclude that an arbitrator was partial to one side.

The court stated that

[a]n arbitrator who knows of a material relationship with a party and fails to disclose it meets *Morelite*’s “evident partiality” standard: A reasonable person would have to conclude that an arbitrator who failed to disclose under such circumstances was partial to one side.²⁷

Applied Industrial also addressed whether an arbitrator has a duty to investigate, holding that where an arbitrator has reason to believe that a nontrivial conflict of interest might exist, he must (1) investigate the conflict (which may reveal information that must be disclosed...) or (2) disclose his reasons for believing there might be a conflict and his intention not to investigate.²⁸

Applied Industrial vacated an award where the chair of the panel—the CEO of multinational holding corporation—became aware that a division of his corporation had business dealings with the parent of one of the parties to the arbitration and he erected a so-called “Chinese wall” to prevent him from learning anything more about such dealings. The losing party to the arbitration determined that the chair’s corporation received approximately \$275,000 from the business relationship, which the court said was “not a trivial amount”²⁹ and which the arbitrator (whose vote was decisive to a 2-1 arbitration award) would have uncovered had he investigated the relationship.

Second Circuit’s Latest Guidance

On Feb. 3, 2012, the Second Circuit issued its opinion in *Scandinavian Reinsurance*. The challenged relationship was not between an arbitrator and a party. Instead, two members of the panel in the *St. Paul* arbitration did not disclose that they were selected to serve together on a panel in a contemporaneous arbitration (the *Platinum* case); *St. Paul*’s business was related in several ways to *Platinum*’s, and a former employee of both *Scandinavian* and *Platinum* testified in both proceedings. The district court had vacated the award;³⁰ the Second Circuit reversed. In doing so, the court not only reviewed its precedents but also filled in additional details for the reasonable person standard and eliminated some of the “jurisdictional disparity.” Specifically, the court stated:

The evident-partiality standard is, at its core, directed to the question of bias.... It follows that where an undisclosed matter is

not suggestive of bias, vacatur based upon that nondisclosure cannot be warranted under an evident-partiality theory....³¹

But, in ascertaining whether a relationship is "material"—or, to use the terminology of *Applied Industrial*, whether it is "nontrivial"—we think that a court must focus on the question of how strongly that relationship tends to indicate the possibility of bias in favor of or against one party, and not on how closely that relationship appears to relate to the facts of the arbitration....³²

[W]e do not think it appropriate to vacate an award solely because an arbitrator fails to consistently live up to his or her announced standards for disclosure, or to conform in every instance to the parties' respective expectations regarding disclosure. The nondisclosure does not by itself constitute evident partiality....³³

Even where an arbitrator fails to abide by arbitral or ethical rules concerning disclosure, such a failure does not, in itself, entitle a losing party to vacatur....³⁴

We do not in any way wish to demean the importance of timely and full disclosure by arbitrators. Disclosure not only enhances the actual and apparent fairness of the arbitral process, but it helps to ensure that the process will be final, rather than an extended by proceedings like this one.³⁵

In addition, the court adopted the Fourth Circuit's nonexclusive guidelines for evaluating evident partiality:

"(1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitrator; and (4) the proximity in time between the relationship and the arbitration proceeding."³⁶

It also drew on Seventh Circuit precedent for the proposition that "arbitrators [are] not disqualified merely because they acquired relevant knowledge in a previous arbitration";³⁷ on Ninth Circuit precedent for the proposition that an arbitrator is "required to disclose only facts indicating that he might reasonably be thought biased against one litigant and favorable to another";³⁸ and on Fourth Circuit precedent for the proposition that the "asserted bias" may not be "remote, uncertain, or speculative."³⁹

The court ultimately held that the two arbitrators' service in both arbitrations "does not, in itself, suggest they were predisposed to rule in any particular way in the St. Paul Arbitration. As a result, their failure to disclose their concurrent service is not indicative of evident partiality."⁴⁰

Court of Appeals Concurs

In *U.S. Electronics*, decided Nov. 15, 2011, the New York Court of Appeals "adopt[ed] the Second Circuit's reasonable person standard" and stated that it would "apply it when we are asked, as in this case, to consider the federal evident partiality standard."⁴¹ *U.S. Electronics* challenged an award on the basis that the chairman of the arbitration panel's son, a member of Congress, had "publicly advocated a merger between Sirius and XM Satellite Radio Inc. (XM)" and "was a close political ally of Congressman Darrell Issa, the founder and director of a competitor of U.S. Electronics in radio receiver distribution."⁴² The Court held that evident partiality is not shown "premised on attenuated matters and relationships."⁴³

That Chairman Sessions' son publicly endorsed the Sirius-XM merger had no impact on the merits of the separate and distinct breach of contract matter. Moreover, the purported connection between Chairman Sessions and Congressman Issa through his son's political relationship is too tenuous to impute partiality to the chairman.... This would be a far different case if USE could allude to a personal or business relationship between Chairman Sessions and Congressman Issa; or if his son had a prominent role at Sirius or DEL.... However, absent such a showing, these allegations, without more, amount to speculation of bias.⁴⁴

In a word, clarity. New York state courts will now follow the Second Circuit's standard for evident partiality, and *Scandinavian Reinsurance* has made that standard even clearer.

1. Leigh Jones, "Gotcha Game," *National Law Journal*, Feb. 14, 2011 at 1.

2. *Id.* at 5.

3. ___ F.3d ___, No. 10-0910-cv, 2012 WL 335772 (2d Cir. Feb. 3, 2012).

4. 958 N.E.2d 891 (N.Y. 2011). Sirius' brief included a nationwide survey of the case law on evident partiality, contending there was more concurrence than disagreement among the federal circuits on the standard for evident partiality. 2011 WL 6986868, at *23-52.

5. 9 U.S.C. §10(a)(2).

6. *Diamond Waterproofing Sys. Inc. v. 55 Liberty Owners Corp.*, 826 N.E.2d 802, 803 (N.Y. 2005).

7. 393 U.S. 145 (1968).

8. See *Positive Software Solutions Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 281-82 (5th Cir. 2007) (en banc) (collecting cases).

9. 393 U.S. at 146.

10. *Id.* at 149-50.

11. *Id.* at 150-52.

12. *Id.* at 151-52.

13. *Id.* at 152, 154.

14. 748 F.2d 79 (2d Cir. 1984).

15. See, e.g., *Transportes Coal Sea de Venezuela C.A. v. SMT Shipmanagement & Transp. Ltd.*, No. 05-CV-9029 (KMK), 2007 WL 62715 (S.D.N.Y. Jan. 9, 2007) (collecting cases).

16. *Morelute*, 748 F.2d at 83.

17. *Id.* at 83-84.

18. *Id.* at 84.

19. *Id.*

20. *Id.* at 85.

21. 878 F.2d 38 (2d Cir. 1989) (per curiam).

22. *Id.* at 40.

23. *Id.*

24. 379 F.3d 24 (2d Cir. 2004).

25. *Id.* at 28 (citations omitted).

26. 492 F.3d 132, 137 (2d Cir. 2007) (citations and internal quotation marks omitted).

27. *Id.* at 137.

28. *Id.* at 138.

29. *Id.* at 139.

30. 732 F. Supp. 2d 293 (S.D.N.Y. 2010) (Scheindlin, J.).

31. 2012 WL 335772, at *9.

32. *Id.* at *11.

33. *Id.* at *12.

34. *Id.* at *12 n. 22.

35. *Id.* at *13 (citing Justice White).

36. *Id.* at *10 (quoting *Three S. Del. Inc. v. Dataquick Info Sys. Inc.*, 492 F.3d 520, 530 (4th Cir. 2007)).

37. *Id.* at *13.

38. *Id.* at *9 (quoting *Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 646 (9th Cir. 2010)).

39. *Id.* at *8 (quoting *Three S. Del.*, 492 F.3d at 530).

40. *Id.* at *1; see also *STMicroelectronics, N.V. v. Credit Suisse Securities (USA) LLC*, 648 F.3d 68, 74 (2d Cir. 2011), which addressed whether an arbitrator's experience as an expert witness would cause him to have a "predisposition" against financial institutions in disputes over account management; the court rejected a challenge to the award under §10(a)(3) of the FAA ("other misbehavior by which the rights of any party have been prejudiced").

41. 958 N.E.2d at 893.

42. *Id.* at 892.

43. *Id.* at 893.

44. *Id.* at 893-94.

Alternatives

TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute For Conflict Prevention & Resolution

VOL. 31 NO. 5 MAY 2013

Court Decisions

'The Other Shoe': Are Agreements Narrowing Judicial Review Enforceable?

BY MICHAEL S. OBERMAN

Any list of the attributes of arbitration surely would spotlight the scope of judicial review—although that scope often provokes two disparate reactions.

Some companies are concerned about having a significant matter resolved in arbitration, where there is no review by a court on the merits (e.g., for errors of law). In contrast, some companies seeking finality expeditiously and inexpensively are discour-

aged by the sometimes drawn-out process of subjecting an award to the limited review permitted by the Federal Arbitration Act or state arbitration statute at the trial and appellate court levels.

In roughly the decade leading to the U.S. Supreme Court's decision in *Hall Street Assocs. LLC v. Mattel Inc.*, 552 U.S. 576 (2008), some parties attempted to expand by contract the scope of judicial review, providing in particular that the award would be reviewed for errors of law. These expanded judicial review clauses soon faced judicial challenge, and the lower courts split on their enforceability.

Some courts reasoned that arbitration is a creature of contract, and courts should honor the scope of review the parties agreed upon. Other courts found that parties could not by contract alter a statutory scheme for judicial review, and that the statutory grounds were the exclusive bases for judicial review. See, generally, *Petition for a Writ of*

Certiorari, MACTAC Inc. v. Gorelick, 2006 WL 189805 (Jan. 23, 2006) (collecting cases and law review articles).

Hall Street definitely resolved the issue for cases under the Federal Arbitration Act, holding that the FAA grounds for vacatur or modification are exclusive and cannot be expanded by the parties' agreement.

The Court, however, held open the possibility that broader review might be available under state law. After *Hall Street*, the highest courts of California, Alabama and Texas held that their state laws permit expanded review and are not preempted by the FAA.

In contrast, the Maine, Georgia and Tennessee top courts held that their state statutes do not permit expanded review. See Michael S. Oberman, "The *Hall Street* Parade State Courts Step Out and Consider Expanded Review of Arbitration Awards," 43 *N. Y. Dispute Resolution Lawyer* 23 (Fall 2011).

So the enforceability of arbitration clauses expanding judicial review has been substantially resolved, especially for the many cases controlled by the FAA.

But what about the flip side? Can parties by contract reduce the scope of judicial review, by providing that the award will be subject to limited or even no judicial review?

(continued on page 72)

COURT DECISIONS	65
CPR NEWS	66
CONTRACT CLAUSES	67
THE MASTER MEDIATOR	69
ADR BRIEF	74

A|S|B|P|E
Association of Business Publication Editors
 2012 National
 EDITORIAL
 Gold
revenue \$2 million or under

2012
APEX
AWARDS FOR PUBLICATION EXCELLENCE

CPR

Michael S. Oberman is a litigation partner and head of the Alternative Dispute Resolution Practice Group of Kramer Levin Naftalis & Frankel LLP in New York. His experience includes service as an arbitrator. He is a member of the CPR Panels of Distinguished Neutrals, the American Arbitration Association's Large, Complex Case Panel, and the AAA's Commercial Arbitration Panel. He is a Fellow of the College of Commercial Arbitrators and a board member of the N.Y. International Arbitration Center.

Court Decisions

(continued from front page)

This question is percolating in lower federal courts and in state courts, and at the moment there is a conflict of authority. Once again, some courts see arbitration as a creature of contract and are inclined to enforce a clearly expressed waiver of judicial review agreed to by the parties.

In contrast, some courts find that the narrowing of judicial review violates public policy, on the theory that the already limited scope of review set out in statute protects the integrity of the arbitral process.

This article takes a brisk walk through the case law to date, which currently shows a trend against narrow review—especially where parties attempt to waive judicial review entirely.

FIRST IN NINTH

1. The Ninth U.S. Circuit Court of Appeals appears to be the first federal court of appeals to discuss the issue, although its statements supporting narrow review have been dicta. In *Aerojet-General Corp. v. Am. Arbitration Assn.*, 478 F.2d 248, 251 (9th Cir. 1973), the court stated that “[w]hile it has been held that the parties to an arbitration can agree to eliminate all court review of the proceedings [citing *Gramling v. Food Machinery & Chemical Corp.*, 151 F. Supp. 853 (D.S.C. 1957)], the intention to do so must clearly appear.” The court held that an AAA rule making the association’s determination as to locale for an arbitration “final and binding” did not preclude review “in accordance with a minimum standard of fair dealing.”

The Ninth Circuit was clear that the issue remains unresolved in that circuit in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 999 n.16 (9th Cir. 2003) (en banc). This case is likely best remembered for its holding that parties could not expand the scope of judicial review, but the court also observed that “the decision to contract for a narrower standard of review than the courts generally apply in the absence of a statutory command is a decision that may be less troublesome than the attempt for a broader standard of review than that authorized by

Congress, although we need not resolve that question here.” (Emphasis in the opinion.) *Kyocera* is the latest expression from the Ninth Circuit. See *Swenson v. Bushman Investment Properties, Ltd.*, 870 F. Supp. 2d 1049, 1055-56 (D. Idaho 2012) (available at <http://bit.ly/YgKv3g>) (tracing case law and holding in the case before it that the parties’ agreement did not clearly waive judicial review).

2. In *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 931 (10th Cir. 2001), the Tenth Cir-

Court Clash

The subject: Another visit to *Hall Street*

Isn’t judicial review settled law? It depends. The Supreme Court ended attempts at expanded federal court review. But there is . . .

. . . An issue for contract writers: Can parties limit the courts’ inquiry into their arbitration awards?

cuit noted in dicta that “parties to an arbitration agreement may eliminate judicial review by contract,” while holding that parties could not expand judicial review.

3. The Second Circuit squarely held in *Hoeft v. MVL Grp. Inc.*, 343 F.3d 57, 63 (2d Cir. 2003), overruled on other grounds, *Hall Street Assocs. LLC v. Mattel, Inc.*, 552 U.S. 576 (2008) (available at <http://bit.ly/WI-N3AU>), that an arbitration clause providing that the award “shall be binding and conclusive upon each of the parties hereto and shall not be subject to any type of review or appeal whatsoever” was unenforceable (citation and internal question marks omitted).

The case reached the circuit from a judgment vacating an award for manifest disregard of the law and denying a petition to confirm the award. The district court had assumed that parties could agree to eliminate judicial review but found that the clause in the case did not clearly do so.

The circuit stated: “Arbitration awards are not self-enforcing, a fact that the Hoefts,

who petitioned the District Court to confirm the award, cannot deny. Thus, while we have spoken in broad terms of deference to private agreements to arbitrate, we have always done so with an awareness of the confirmation-and-vacatur-safety net that hangs below.” *Id.* The court added:

An agreement that contemplates confirmation but bars all judicial review presents serious concerns. Arbitration agreements are private contracts, but at the end of the process the successful party may obtain a judgment affording resort to the potent public legal remedies available to judgment creditors. In enacting [FAA] § 10(a), Congress impressed limited, but critical, safeguards onto this process. . . . This balance would be eviscerated, and the integrity of the arbitration process could be compromised, if parties could require that awards, flawed for any of these reasons [in § 10(a)], must nevertheless be blessed by federal courts. Since federal courts are not rubber stamps, parties may not, by private agreement, relieve them of their obligation to review arbitration awards for compliance with § 10(a).

Id. at 64. The court cited the dicta of the Ninth and Tenth Circuits (discussed above) in noting that “[d]ecisions enforcing agreements to decrease the otherwise applicable level of judicial review” are “scarce.” *Id.* The Second Circuit recently treated *Hoeft* as its controlling precedent on the issue of waiving judicial review in a post-*Hall Street* summary order in *Agility Public Warehousing Co. K.S.C. v. Supreme Foodservice GMBH*, 2012 WL 3854880 (2d Cir. Sept. 6, 2012) (available at <http://bit.ly/ZNYJKp>).

4. In *MACTEC Inc. v. Gorelick*, 427 F.3d 821 (10th Cir. 2005), the Tenth Circuit—five years after *Bowen*—returned to the question of narrowed review and granted a motion to dismiss an appeal from a district court judgment confirming an award, where the arbitration agreement provided: “Judgment upon the award rendered by the arbitrator shall be final and nonappealable and may be entered in any court having jurisdiction thereof.” *Id.* at 827.

The court noted that, in *Bowen*, it had ruled against expanded judicial review, but it was now permitting restricted review. The

court explained that *Bowen* rested on the FAA's underlying policies. Because, in the present case, the award had been reviewed by the district court under § 10(a), elimination of appellate review would not conflict with the policies of the FAA.

The court held "that contractual provisions limiting the right to appeal from a district court's judgment confirming or vacating an arbitration award are permissible, so long as the intent to do so is clear and unequivocal." *Id.* at 830. The court found that the word "nonappealable" "serves this purpose." *Id.* The Tenth Circuit cited *Hoelt* in drawing a distinction between a clause that applied to a district court's review of an award as opposed to a clause that applied only to appellate review of a district court's judgment on an award.

5. *Van Duren v. Rzasa-Ormes*, 926 A 2d 372, 374 (N.J. Super Ct. App Div 2007), held that an arbitration agreement "that clearly precludes judicial review beyond the trial court level is enforceable," *aff'd*, 948 A 2d 1285 (N.J. 2008). The court dismissed the appeal because the "defendant obtained meaningful review of her claims in the Chancery Division and waived any further review by way of appeal here." *Id.* Before the lower court, the plaintiff had moved to confirm the award, and the defendant had moved to vacate it.

The court relied on New Jersey precedent enforcing a waiver of appeal (not specific to arbitration cases). The court observed, however, that arbitration parties already have effectively waived a right to appeal the merits of an arbitration award, limited to the grounds of review contained in the arbitration statute. The court added that "complete elimination of judicial review at the initial trial level" would violate public policy, citing *Hoelt*. *Id.* at 380.

LIMITED 'APPEALABILITY'

6. In *Uhl v. Komatsu Forklift Co.*, 512 F3d 294, 300-01 (6th Cir. 2008), the Sixth Circuit construed a provision that "[t]he award shall be exclusive, final, and binding to all issues

and claims" and held that this formulation did not waive appealability of a judgment confirming an award (citation and quotation marks omitted).

7. In *Southco Inc. v. Reel Precision Manufacturing Corp.*, 331 F. App'x 925, 927 (3d Cir. 2009), the Third Circuit touched the issue but resolved it, in an unreported order, by contract construction. The court held that an agreement stating that the arbitration is "non-appealable" "signifies that the parties to the contract may not appeal the merits of the arbitration; not that the parties agree to waive a right to appeal the district court's judgment confirming or vacating the arbitration decision" under the limited grounds of § 10(a). *Id.*

The court cited its earlier decision in *Tabas v. Tabas*, 47 F3d 1280, 1288 (3d Cir. 1995) (en banc), as "observing that, where a contract provided for 'final, binding and non-appealable' arbitration, the Court must adhere to the arbitration decision on the merits."

The Third Circuit also cited *Rollins Inc. v. Black*, 167 F. App'x 798, 799 n.1 (11th Cir. 2006) as holding that a binding, final and non-appealable award "simply means the parties have agreed to relinquish their right to appeal the merits of their dispute; it does not mean the parties relinquish their right to appeal an award resulting from an arbitrator's abuse of authority. ..." *Southco*, 331 F. App'x at 927. *Southco* is in obvious tension with *MACTEC*, which found that the word "non-appealable" does suffice to waive an appeal from the trial court.

8. *Strom v. First Am. Prof. Real Estate Servs. Inc.*, 2009 WL 2244211 (W.D. Okla. July 24, 2009) (available at <http://bit.ly/ZNZ-P8Y>), decided a motion to compel arbitration, where the arbitration clause contained a provision that "[t]here shall be no right to appeal the decision of the arbitrator." *Id.* at *1. Finding a severability provision in the underlying agreement, the court ruled that—to the extent that the language of the waiver clause actually provided a total waiver of review—the waiver clause would be unenforceable; the court then

struck that clause, enforcing the balance of the arbitration agreement.

9. *Heartland Surgical Specialty Hosp. LLC v. Reed*, 287 P.3d 933 (Kan. Ct. App. 2012), is the most recent "first-impression" appellate decision on the enforceability of a provision narrowing judicial review. The arbitration agreement stated that the "parties waive their right to appeal the ultimate decision of the arbitrator." *Id.* at 937.

The court began by construing the clause as a waiver of appeal of "the substantive findings of fact and conclusions of law" in the arbitration. *Id.* The court then surveyed the case law—not including *Hall Street*—and found two approaches: one permitting a waiver of judicial review if the waiver is clear (citing *Bowen* and *MACTAC*), and the other declining enforcement of such a waiver as contrary to public policy (citing *Silicon Power v. General Elec. Zenith Controls*, 661 F. Supp. 2d 524 (E.D. Pa. 2009); *Barnes v. Scott*, 126 S.W. 3d 232, 238 (Tex. Ct. App. 2003), and *Circle Zebra Fabricators Ltd. ex rel. Circle Zebra Management L.L.C. v. Americas Welding Corp.*, 2011 WL 1844443, at *6 (Tex. Ct. App. Mar. 17, 2011), rehearing denied (May 5, 2011)).

The court recognized that these latter courts permitted waiver of the review of arbitration awards' merits, but not of judicial review under statutory grounds. "The rationale here generally is that allowing judicial review under these limited circumstances protects the integrity of arbitrations." *Heartland*, 287 P.3d at 937-38.

The court agreed with the second approach, and held "that public policy prohibits parties from contractually eliminating judicial review of all aspects of the arbitrator's decision. Arbitration loses its value if there is no protection for the integrity of the process." *Id.* at 938.

The court observed that no parties in their "right mind" would agree to accept an arbitration award even if later discovered that the award tripped the limited review grounds of the arbitration statute. *Id.* at 938-39. The court added: "The right of parties to contract does not trump this basic principle of fairness." *Id.* at 939.

In the alternative, the court held that the waiver of the "ultimate decision of the arbitrator" did not "clearly and unequivocally

(continued on next page)

'[A] failure to timely file a challenge is the equivalent of a waiver. Clauses that provide in advance for a waiver by whichever side loses—in some respects—merely advance the moment of waiver.'

Court Decisions

(continued from previous page)

express an intention to waive the right of appeal on the basis of bias, corruption, fraud, or other factors set forth" in the Kansas arbitration statute. *Id.*

* * *


Hall Street might suggest that courts should in all instances apply the FAA where applicable, and not permit parties to force departures from statutory mandates.

That was certainly the thrust of the *Hall Street* opinion, when courts were being asked by parties to do *more* review than provided by statute.

But the opposite situation—a waiver of review—arguably can be distinguished. A losing party need not challenge an award, and a failure to timely file a challenge is the equivalent of a waiver. Clauses that provide in advance for a waiver by whichever side loses—in some respects—merely advance the moment of waiver.

Yet the statutory limited grounds for review are intended to accord relief when there

is a denial of a fundamentally fair process, and a party that waives this limited review in advance could be surprised by circumstances surrounding an award that might warrant vacatur even under the limited statutory grounds.

These considerations are likely to keep the issue percolating until the Supreme Court (which denied certiorari on the issue as recently as 2006 in the *MACTAC* case, 126 S. Ct. 1622) finally gives us a companion case to *Hall Street* and lets the other shoe drop. 

(For bulk reprints of this article, please call (201) 748-8789.)

Matter of Flintlock Constr. Servs., LLC v Weiss
2014 NY Slip Op 05818
Decided on August 14, 2014
Appellate Division, First Department
Manzanet-daniels, J., J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on August 14, 2014 SUPREME COURT, APPELLATE DIVISION First
Judicial Department

Rolando T. Acosta, J.P.

Dianne T. Renwick

Richard T. Andrias

David B. Saxe

Sallie Manzanet-Daniels, JJ.

156278/12

**[*1]In re Flintlock Construction Services, LLC., et al., Petitioners-
Appellants,**

v

Gretchen Weiss, Respondent-Respondent.

Petitioners appeal from the order of the Supreme Court, New York County (Anil C. Singh, J.), entered October 26, 2012, which, to the extent appealed from as limited by the briefs, denied the petition to stay arbitration of respondent's claims for punitive damages.

Leahey & Johnson, P.C., New York (Peter James Johnson, Jr., Joanne Filiberti and Gabriel M. Krausman of counsel), and Becker & Poliakoff LLP, New York (Helen Davis Chaitman, Lance Gotthoffer, Peter W. Smith and Valerie Sirota of counsel), for appellants.

Goodwin Procter LLP, New York (Jeffrey Alan Simes and Nathaniel J. Moore of counsel), for respondent.

MANZANET-DANIELS, J.

This appeal arises from the motion court's denial of a motion to stay arbitration of claims for punitive damages in a dispute among investors in a real estate development company. In 2011, respondent investor commenced an arbitration proceeding against petitioners real estate development companies and their principals, alleging fraud and breach of contract, and seeking punitive damages. The parties' relationship was governed by a letter agreement and the [*2]operating agreements for petitioners Flintlock Construction Services, LLC (Flintlock) and Basque Construction LLC (Basque).

The Flintlock and Basque operating agreements contain identical choice of law clauses, providing that the agreements "shall be construed and enforced in accordance with the laws of the State of New York."

The Flintlock and Basque operating agreements contain identical arbitration provisions, which provide, in relevant part, that "[a]ny controversy or claim arising out of or relating to this Agreement or the breach or alleged breach of this Agreement, shall be resolved by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association which are then in effect." Although the letter agreement does not itself contain an arbitration clause, it was executed contemporaneously with the operating agreements and describes respondent's role as a member of Flintlock and Basque.

Although petitioners did not object to the punitive damages claim in the original demand for arbitration, they challenged respondent's right to amend the demand to assert claims for fraud and intentional misrepresentation, and moved before the arbitration panel to dismiss several of the claims, including the request for punitive damages. Petitioners asserted, inter alia, that punitive damages were not available/arbitrable. The motion to dismiss the request for punitive damages was denied, on or about July 5, 2012, without prejudice to renewal at the hearing, based on a more complete record as to whether the claim affected interstate commerce, and thus, mandated application of the Federal Arbitration Act (FAA), 9 USC § 1 *et seq.* A hearing before the arbitration panel was scheduled to commence on November 5, 2012.

On or about September 12, 2012, petitioners commenced a special proceeding to "permanently enjoin" the arbitration on the ground that the arbitrators had exceeded their authority, and lacked power to award punitive damages. The motion court denied the petition, finding that petitioners, having "actively litigated" before the arbitration panel, had "charted their own course," and could not now assert that the arbitrators could not hear the issue of punitive damages.

Petitioners argue that the motion to stay arbitration of the claim for punitive damages was improperly denied, asserting that under New York law arbitrators "ha[ve] no power to award punitive damages, even if agreed upon by the parties" (*Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 356 [1976]).

We disagree, and now affirm. The arbitration panel denied the motion to dismiss the punitive damages claim without prejudice to renewal upon a complete record. Petitioners

ask us, in effect, to render an advisory opinion concerning the availability of punitive damages, which we ought not do. It remains to be determined whether, on this record, the contracts evidence a "transaction involving commerce" such that the FAA, and not state law, applies.

To the extent petitioners argue that the New York choice-of-law provision in the contracts displaces the FAA and mandates the application of the *Garrity* rule, we must disagree. The rules of the American Arbitration Association (AAA) specify that an arbitrator is authorized to award "any remedy which [is] just and equitable and within the scope of the agreement." Where parties agree that the AAA rules will govern, questions concerning the scope and validity [*3]of the arbitration agreement, including issues of arbitrability, are reserved for the arbitrators ([*see Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495](#), 496 [1st Dept 2009], *affd* 14 NY3d 850 [2010], *cert denied* __ US __, 131 S Ct 463 [2010]).

Under the FAA, it is for the arbitrators, and not a court, to determine the availability of punitive damages, notwithstanding the general choice-of-law provision in the contracts that they are to be construed and enforced according to New York law. The choice-of-law provision, in the absence of language expressly invoking the *Garrity* rule, or expressly excluding claims for punitive damages, is insufficient to remove the issue of punitive damages from the arbitrator.

Where the parties "agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration" (*Mastrobuono v Shearson Lehman Hutton*, 514 US 52, 58 [1995]). In *Mastrobuono*, the United States Supreme Court held that a New York choice-of-law clause providing an agreement "shall be governed by the laws of the State of New York," did not unequivocally demonstrate an intent to preclude an award of punitive damages. The Court reasoned that best means of "harmoniz[ing]" the choice-of-law provision with the arbitration provision was to read "the laws of the State of New York" to refer to substantive principles a New York court would apply, but not to include rules limiting the

authority of arbitrators: "Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither [] intrudes upon the other" (*id.* at 63, 64).

Merely stating, without further elaboration, that an agreement is to be construed and enforced in accordance with the law of New York does not suffice to invoke the *Garrity* rule. The Supreme Court has made clear that in order to remove the issue of punitive damages from the arbitrators, the agreement must "unequivocal[ly] exclu[de]" the claim (*id.* at 60). The agreement in this case, which provided only that it was to be "construed and enforced" in accordance with the law of New York, did not unequivocally exclude claims for punitive damages from the consideration of the arbitrators (*see e.g. Matter of Americorp Sec. v Sager*, 239 AD2d 115 [1st Dept 1997], *lv denied* 90 NY2d 808 [1999] [affirming arbitral award of punitive damages in the wake of *Mastrobuono*]; *Merrill Lynch, Pierce, Fenner & Smith v Adler*, 234 AD2d 139 [1st Dept 1996] [same]; *Mulder v Donaldson, Lufkin & Jenrette*, 224 AD2d 125 [1st Dept 1996] [same]; [Tong v S.A.C. Capital Mgt., LLC](#), 16 Misc 3d 401 (Sup Ct NY County 2007), *affd as modified*, 52 AD3d 386 [1st Dept 2008] [same]). A New York choice-of-law provision does not constitute a manifestation of unequivocal intent sufficient to invoke the *Garrity* rule.

We cannot agree with the dissent's conclusion that the parties' choice-of-law provision evinces "unequivocally" with the requisite specificity demanded by the United States Supreme Court that the parties intended to incorporate the *Garrity* rule disallowing punitive damages in an arbitration. [Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.](#) (4 NY3d 247 [2005]), upon whose dicta the dissent relies, involved application of the statute of limitations and does not speak to the issue sub judice.

We are aware of no instance in which the language that an agreement is to be "construed [*4]and enforced" in accordance with New York law has been held to displace *Mastrobuono*. Indeed, case law is to the contrary, consistent with the Supreme Court's admonition that the relevant agreement must "specifically exclude" the issue of punitive damages from the purview of the arbitrator in order to be enforceable (*see e.g. Roubik v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 181 Ill 2d 373, 375, 692 NE2d 1167, 1168

[1998] [choice of law clause providing that "agreement and its enforcement shall be governed by the laws of the State of New York," did not preclude an arbitration panel from awarding punitive damages], *cert denied* 525 US 961 [1998]).

Petitioners' motion to stay the arbitration should be denied for the further reason that they have participated in the arbitration, precluding late resort to CPLR 7503(b). CPLR 7503(b) authorizes motions to stay arbitration by parties "who ha[ve] not participated in the arbitration." Petitioners participated in the arbitration process for nearly eight months — selecting arbitrators, participating in preliminary proceedings — before registering an objection to the arbitrability of respondent's claim for punitive damages. Even then, petitioners chose not to move to stay the arbitration, but to make a motion to dismiss the claim, squarely placing the issue of the arbitrability and availability of punitive damages before the arbitrators. Having "charted their own course," in the words of the motion court, they cannot now avail themselves of the mechanisms set forth in CPLR 7503(b) (*see e.g. Nachmani v By Design, LLC*, 74 AD3d 478 [1st Dept 2010] [party participated in arbitration by serving a response advancing a counterclaim and designating an arbitrator]; *Matter of JJF Assoc., LLC v Joyce*, 59 AD3d 296 [1st Dept 2009] [party participated in arbitration by attending a prehearing conference at which a hearing schedule and ground rules were decided upon, and thereafter moving to dismiss the proceeding on the ground it had been improperly brought], *lv denied* 13 NY3d 706 [2009]; *Mark Ross & Co. v XE Capital Mgt., LLC*, 46 AD3d 296 [1st Dept 2007] [party participated in the preliminary stages of the arbitration for seven months without objection]).

The dissent's conclusion that the doctrine of waiver does not pertain under the circumstances is irreconcilable with its acknowledgment that the relevant analysis is a contractual one in which the parties' intentions are determinative. Indeed, by stating that the petitioners cannot waive the *Garrity* rule — even by participating in the arbitration, and even by making a motion to dismiss those very same punitive damages claims — the dissent reverts to the public policy analysis of *Garrity* that has been expressly rejected by the Supreme Court. Since arbitration is a contractual matter, it follows that a party who

actively participates in the arbitration waives its right to contest the arbitrability of punitive damages.

Accordingly, the order of the Supreme Court, New York County (Anil C. Singh, J.), entered October 26, 2012, which, to the extent appealed from as limited by the briefs, denied the petition to stay arbitration of respondent's claims for punitive damages, should be affirmed, without costs.

All concur except Renwick and Andrias, JJ. who dissent in an Opinion by Renwick, J.

RENEWICK, J. (dissenting)

The core issue in this case - an appeal from an order denying petitioners' motion to stay arbitration of claims for punitive damages - relates to the tension between New York State policy against the privatization of punitive damages and the federal policy that there is no such prohibition. Specifically, under New York State law, as expressed by *Garrity v Lyle Stuart, Inc.* (40 NY2d 354 [1976]), the power to award punitive damages is limited to judicial tribunals, and is not within an arbitrator's authority [\[FN1\]](#). Conversely, the federal view, as reflected in the Federal Arbitration Act (FAA), [\[FN2\]](#) which applies to arbitration disputes concerning interstate commerce, generally empowers arbitrators to award punitive damages, absent a contractual intent to the contrary. Unlike the majority, I find that, while the agreement here evidences a transaction involving interstate commerce, the provision stating that the agreement is to be "construed and enforced" in accordance with the laws of New York suffices to invoke the *Garrity* rule. Therefore, I dissent and would grant petitioners' motion to stay arbitration of the claims for punitive damages.

Factual and Procedural Background

This appeal has its genesis in respondent Gretchen Weiss's investment in real estate development entities owned by her two stepsons. She alleges that in 2005, Andrew Weiss and Stephen A. Weiss, Jr. (the Weiss brothers) were losing money and found themselves in desperate need to settle a lawsuit against them individually, as well as against one of

their business ventures, arising from one of their Texas construction projects. They asked their stepmother to invest \$500,000 to help save their business. In return, Gretchen received a 25% partnership interest in two real estate development companies owned by the Weiss brothers □ Flintlock Construction Services, LLC and Basque Construction, LLC.

The parties' relationship was governed by a letter agreement and the operating agreements for Flintlock and Basque. The Flintlock and Basque operating agreements contain identical arbitration provisions, which provide, in relevant part, that "[a]ny controversy or claim [*5]arising out of or relating to this Agreement, or the breach or alleged breach of this Agreement, shall be resolved by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association which are then in effect." The Flintlock and Basque operating agreements also contain identical choice-of-law clauses, providing that the agreements "shall be construed and enforced in accordance with the laws of the State of New York."

In 2011, Gretchen commenced an arbitration against the Weiss brothers, Flintlock and Basque (petitioners) alleging, among other things, fraud and breach of contract, and seeking punitive damages for their alleged failure to pay her money owed and their misstatements to her about the aforementioned companies. Subsequently, she filed an amended demand for arbitration, also containing claims for punitive damages. At that juncture, petitioners moved before the arbitration panel to dismiss several of the claims, including the punitive damages claims. Shortly thereafter, they moved for summary judgment, but the arbitrator denied the motion in its entirety.

Some two months after the arbitration panel's denial of their motion, petitioners commenced a special proceeding in New York County Supreme Court to stay the arbitration of all the claims they had sought to have dismissed, on the ground that the arbitrator panel exceeded its authority, and a ruling that they lacked power to award punitive damages. Gretchen opposed the motion. She argued that the agreements were controlled by the FAA, and thus punitive damages were available. She also argued that petitioners had waived any right to submit the arbitrability of the claims to the courts, and

that the motion was premature, as there had been no final arbitral ruling. Supreme Court denied the petition to stay certain arbitration claims, including punitive damages. The court found that petitioners had waived the right to litigate arbitrability in the courts, as they had fully arbitrated the issue. The Weiss brothers appealed.

Discussion

On this appeal, petitioners concede that the agreement in dispute falls within the scope of the FAA. That does not end the inquiry, however. The FAA ensures that courts enforce arbitration clauses incorporated in contracts involving interstate commerce, thereby "creat[ing] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act" (*Moses H. Cone Memorial Hosp. v Mercury Constr. Corp.*, 460 US 1, 24 [1983]; *see also* 9 USC § 2). The FAA requires that "questions of arbitrability ... be addressed with a healthy regard for the federal policy favoring arbitration," and that "any doubts concerning the scope of arbitrable issues ... be resolved in favor of arbitration" (*Moses H. Cone*, 460 US at 24-25). The federal policy favoring arbitration, however, does not change the long-established principle that "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" (*PaineWebber Inc. v Bybyk*, 81 F3d 1193, 1198 [2d Cir 1996], quoting *AT & T Techs., Inc. v Communications Workers of Am.*, 475 US 643, 648 [1986]). Rather, the FAA requires "arbitration proceed in the manner provided for in [the parties'] agreement" (*Volt Info. Sciences, Inc. v Board of Trustees of Leland Stanford Jr. Univ.*, 489 US 468, 475 [1988], quoting 9 USC § 4). In *Volt*, the Court made clear that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private [*6]agreements to arbitrate" (*id.* at 476).

In this case, as indicated, petitioners argue that by the choice-of-law clause in the agreement, expressly providing that the agreement be both "construed and enforced" under New York Law, the parties evidenced an intent to limit the power of the arbitrator to award punitive damages. Thus, the discrete issue to address is whether such language

constitutes an agreement to adopt the *Garrity* rule's restriction on the remedial power of the arbitrator to award punitive damages.

Unlike the majority, I find that the U.S. Supreme Court's decision in *Mastrobuono v Shearson Lehman Hutton, Inc.* (514 US 52 [1995]) is not dispositive on this issue. *Mastrobuono* held that a general choice-of-law provision, included in a contract that also contained an arbitration clause, was not sufficiently specific to incorporate the chosen state's - New York - prohibition against arbitrators awarding punitive damages. The contract in *Mastrobuono* provided that it "shall be governed by the laws of the State of New York," and that any dispute arising out of the contract " shall be settled by arbitration' in accordance with the rules [then in effect] of the National Association of Securities Dealers, Inc. [NASD] . . ." (*id.* at 59). An arbitration panel, convened under the arbitration clause and under the FAA, awarded punitive damages. The lower courts disallowed the award of punitive damages, following the *Garrity* rule that only courts, not arbitrators, may award such damages (*id.*).

The Supreme Court reversed. The Court began its analysis by underlining the contractual basis of arbitration and the FAA's sweeping effect in terms of contract enforcement (*id.* at 56). Thus, the Court noted that the FAA would permit parties to either expressly agree to include or agree to exclude punitive damages if they so desired, notwithstanding any state arbitration rule on the subject (*id.*). Moreover, if there were no express choice-of-law provisions in the contract, or if a contract provision were nothing more than a substitute for a conflicts-of-laws analysis leading to the application of New York substantive law, "punitive damages would be allowed because, in the absence of contractual intent to the contrary, the FAA would pre-empt the *Garrity* rule" (*id.* at 59).

Given the existence of the New York choice-of-law provision in the contract, however, the Court examined whether the clause referred only to New York substantive law, or to both substantive law and the *Garrity* rule barring punitive arbitration awards (*id.* at 59-60). To discern the scope of the choice-of-law clause, the Court turned to the rest of the contract to see what the parties intended.

In addition to the New York choice-of-law clause, the contract contained an arbitration clause that made reference to the "rules" of the NASD (*id.* at 59). The applicable NASD rules merely stated that arbitrators could award "damages and other relief" (*id.* at 61)^[FN3]. This terse phrase was not much with which to work, but the Court found that the incorporation of this rule, [*7]"[w]hile not a clear authorization of punitive damages . . . appears broad enough at least to contemplate such a remedy" (*id.* at 61). Thus, the reference to NASD "rules" was sufficient to create "ambiguity" about the intention of the parties regarding punitive damages (*id.* at 62).

In the face of this ambiguity, the Court offered two grounds for resolving it in favor of the plaintiffs. Crucially, both grounds were based not on federal arbitration law emanating from the FAA, but rather on state-law rules of contract interpretation (*id.* at 61 n 7). First, the Court cited a common-law rule that ambiguous contract language should be construed against the drafter - here Shearson Lehman Hutton. (*id.* at 62). Second, the Court relied on a state contract-law rule of construction that a contract "should be read to give effect to all its provisions and to render them consistent with each other" (*id.* at 63). Supreme Court concluded that:

"[T]he best way to harmonize the choice-of-law provision with the arbitration provision is to read the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other" (*id.* at 63-64).

As this succinct summary of *Mastrobuono* illustrates, nothing in the Supreme Court's decision challenged the parties' power to agree to select the substantive and/or procedural laws of any State over the FAA. On the contrary, *Mastrobuono* simply holds that even where the FAA applies to an agreement, courts should enforce the parties' intentions as determined by an interpretation of the parties' agreement. If the parties expressly agree to allow arbitral awards of punitive damages, the courts should enforce the agreement. If the parties expressly contract for no arbitral punitive damages, this should also be enforced.

In cases like *Mastrobuono*, where the choice-of-law provision creates an ambiguity, federal policy favoring arbitration requires resolving the ambiguity in favor of arbitration (i.e., FAA rules).

The question *Mastrobuono* left unanswered is just what language is necessary to unequivocally apply New York's law that limits the power of arbitrators to award punitive damages. The answer to that question was delivered by the Court of Appeals in the seminal case of [*Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.* \(4 NY3d 247, 252 \[2005\]\)](#). In *Diamond*, the petitioner challenged the arbitrability of its statute of limitations defense. Given that the FAA applied, the Court considered what language in the agreement would be sufficient to invoke not just New York's substantive law, but also New York's limitations on the power of arbitrators. The Court concluded that a choice-of-law provision stating that New York law shall govern both "the agreement and its enforcement, adopts as binding New York's rule that threshold [s]tatute of [l]imitations questions are for the courts" (*id.* at 253 [internal quotation marks omitted]; [see also *CSAM Capital, Inc. v Lauder*, 67 AD3d 149, 154 \[1st Dept 2009\]](#)). However, in *Diamond*, like *Mastrobuono*, the Court found that the clause used to select the particular state's law by which the contract would be governed was not sufficiently specific as to avoid ambiguity and thus did not give rise to the application of New York's rule (CPLR art 75.) that threshold statute of limitations questions are for the courts.

Subsequently, in [*N.J.R. Assoc. v Tausend* \(19 NY3d 597 \[2012\]\)](#), the Court of Appeals reaffirmed *Diamond* when it reiterated that the FAA approach of leaving timeliness issues to arbitrators is inapplicable "if the agreement so provides." As the Court explained:

"A contract may be governed by the FAA yet subject to the New York rule if the agreement between the parties so provides. We have explained that a contract specifying that New York law shall govern both "the agreement and its enforcement[]" adopts' the New York rule that threshold statute of limitations issues are resolved by the courts and not arbitrators (*Diamond Waterproofing*, 4 NY3d at 253, quoting *Matter of Smith Barney*,

Harris Upham & Co. v Luckie, 85 NY2d 193, 202 [1995], *cert denied sub nom. Manhard v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 516 US 811[1995]).

"It is unnecessary for us to decide whether the contract at issue is subject to the FAA or New York law because under either analysis, the proper forum is arbitration. Assuming that the partnership agreement affects interstate commerce and is governed by the FAA, this document does not include the critical "enforcement" language identified in *Diamond Waterproofing* it states that This Agreement shall be governed by, and construed in accordance with, the laws and decisions of the State of New York.' Since the agreement fails to unequivocally invoke the New York standard, the timeliness question must be resolved by an arbitrator under FAA principles" (*N.J.R. Assoc.*, 19 NY3d at 602).

Thus, *Diamond* and its progeny make clear that, even if the FAA applies to an agreement, the parties may still limit the arbitrator's power by invoking New York law. To do so, however, the parties must not only make the agreement subject to New York law, but must also make its "enforcement" subject to New York law. By using such language, the parties "unequivocally" invoke the limitations on arbitration under New York State law.

The majority, however, finds it significant that the language at issue here, that "an agreement is to be construed and enforced' in accordance with New York law, has [never] been held to displace *Mastrobuono*." The majority finds that *Diamond* is not controlling here because it "involved application of the statute of limitations and does not speak to the issue sub judice." The majority's refusal to acknowledge that *Diamond* is controlling here appears to be based upon a fundamental difference in its approach to distinguishing between substantive and procedural law. The procedural law establishes whether the arbitrators have the power to address punitive damages claims, while the substantive law establishes whether certain circumstances are proper for granting such remedy.

For example, in an international commercial arbitration case with the situs of New York and with a general choice-of-law clause providing for New York law, New York law would be the substantive law for the dispute, and the FAA would be the procedural law governing the arbitration. New York's procedural rule would not be the proper procedural

law for the aforementioned scenario, absent the critical language limiting the power of the arbitrator. Thus, [*8]the *Garrity* rule prohibiting arbitrators from awarding punitive damages would not be part of the procedural rule governing this international arbitration. In this hypothetical, the arbitrator would have the power to award punitive damages. As New York law is the substantive law for the case, however, New York law would be applied by the arbitrator to determine whether punitive damages are warranted.

The majority's position is further weakened by *Mastrobuono*, the same case upon which it relies. As noted, *Mastrobuono* held that the clause invoking the "laws of the State of New York" was a general choice-of-law provision, which did not give rise to the application of New York's arbitration rules, which, unlike the FAA rules, did not permit punitive damages. That is, in *Mastrobuono*, the Supreme Court found that the choice-of-law provision invoked only the application of New York's substantive laws, and not the authority of the arbitrators.

Finally, the majority finds that the motion to stay arbitration of punitive damages should be denied because petitioners "have participated in the arbitration, precluding late resort to CPLR 7503(b)." I disagree. The grant of a permanent stay of respondent's claim for punitive damages would not interfere with the ongoing arbitration proceeding. Moreover, a waiver is akin to an implicit agreement [\[FN4\]](#). Indeed, there can be no implicit agreement to submit punitive damages to an arbitrator where the parties' "unequivocal choice-of-law provision" is intended to incorporate the *Garrity* rule.

For foregoing reasons, I would reverse, vacate the arbitration ruling insofar as it holds that the arbitrators may determine the claims for punitive damages, and permanently stay the arbitration of said claims.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered October 26, 2012, affirmed, without costs.

Opinion by Manzanet-Daniels, J. All concur except Renwick and Andrias, JJ. who dissent in an Opinion by Renwick, J.

Acosta, J.P., Renwick, Andrias, Saxe, Manzanet-Daniels, JJ.

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 14, 2014

CLERK

Footnotes

Footnote 1: Garrity's rationale is that "[p]unitive damages is a sanction reserved to the State" (*Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 356 [1976]). "The law does not and should not permit private persons to submit themselves to punitive sanctions of the order reserved to the State. The freedom of contract does not embrace the freedom to punish, even by contract" (*id.* at 360).

Footnote 2: The FAA (9 USC § 1 *et seq.*), applies to any arbitration agreement evidencing a transaction involving interstate commerce (*see* 9 USC § 2). The U.S. Supreme Court has interpreted the term involving commerce in the FAA as the functional equivalent of the more familiar term "affecting commerce" — words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power" (*Citizens Bank v Alafabco, Inc.*, 539 US 52, 56 [2003]; *see also Allied-Bruce Terminix Cos. v Dobson*, 513 US 265 [1995]; [*N.J.R. Assoc. v Tausend*, 19 NY3d 597](#), 601 [2012]).

Footnote 3: The NASD rules have contained an express prohibition against broker-dealer contracts that limit a customer's access to legally available remedies since 1989; however, the *Mastrobuono* contract was signed in 1985.

Footnote 4: A waiver, the intentional relinquishment of a known right, may be accomplished by express agreement or by such conduct or failure to act as to evince an

intent not to claim the purported advantage (5 Williston, Contracts [3d ed] § 725; *see also Hadden v Consolidated Edison Co. of N.Y.*, 45 NY2d 466 [1978]).

MACROBUTTON DoFieldClick [Return to Decision List]

Binding Third Parties

Under the arbitration statutes, including the FAA and the New York Arbitration Act, an arbitration agreement need be written, but need not be signed by any of the parties, even the one against whom enforcement is sought. However, one cannot require a party to arbitrate simply because that party is directly involved in an arbitrable dispute between other parties. For instance, where a contractor properly initiates arbitration against an owner for additional expenses attributed to faulty specifications from the owner's architect, the owner cannot implead his architect into the arbitration absent an agreement to arbitrate with that architect.

There are times, however, when a so-called "non-signatory" (third party) to an agreement may nonetheless be deemed bound by a contract containing an arbitration clause. This typically implicates traditional principles of corporate, contract or agency law.

1. **Successors-In-Interest.** By virtue of a de jure or de facto merger, a company acquiring the stock and/or assets of another entity may be deemed a successor-in-interest to that entity's outstanding contractual obligations, including obligations to arbitrate.
2. **Delegation With Assumption.** An entity may sometimes delegate its duties under a contract to a third party which expressly or impliedly assumes those duties. If one of those duties is to arbitrate, the third-party is bound to do so at the behest of the counterparty.
3. **Incorporation.** A contract may expressly incorporate the provisions of another contract, made between different parties. If one such provision is an arbitration provision, the parties to the incorporating contract are subject to it.
4. **Agency.** Where an agent contracts on behalf of a principal so that the latter is bound by the contract, the principal is bound by any arbitral provision in that contract.
5. **Third-Party Beneficiary.** A third-party beneficiary to a contract can avail of its arbitral provision. This is fairly commonplace when a clearing broker, seeking to arbitrate against a customer, claims third party beneficiary status under a Customer Agreement between the customer and the introducing broker or the converse. Less frequently, a third- party beneficiary can have an arbitral provision enforced against it. Case law regarding third-party beneficiary status is complex and inconsistent.
6. **"Piercing."** Under "piercing of a corporate veil," a parent can sometimes be bound by an arbitral undertaking of its subsidiary.

§ 4.02 BINDING THIRD PARTIES

We have seen that arbitral statutes require written arbitral agreements, not ones *signed by* the parties or either of them. Still, that is a very different question than that of permitting or requiring third parties to arbitrate even though they are not party to the contract setting forth the undertaking to arbitrate. Such third parties will have some sort of relationship with at least one of the parties to the arbitral agreement.

Contract law governs here. Despite a pro-arbitrability bent, courts will not require a party to arbitrate who has not agreed in fact or by operation of law to do so. The fact that it would be efficient to bring an involved third party into an arbitration, in an impleader situation for example, is by no means enough to do so. Nonetheless, arbitral entitlements are relatively routinely extended to third-party beneficiaries and to those with “derivative” entitlements. Also, under principles of “piercing the corporate veil,” a party may find itself obligated to honor the arbitral undertaking of a dominated closely held company or that of a highly controlled subsidiary. As a general proposition, it appears easier for a related third party to enforce an agreement to arbitrate than it is to enforce such an agreement against a related third party which does not wish to arbitrate. Can you see why?

Confusingly, cases sometimes reference third parties who may become bound to arbitrate as “non-signatories.” It would be better to reference them as “non-parties” to the contract containing the agreement to arbitrate. The lack of signature, we have seen, is not really the issue.

Thomson-CSF v. American Arbitration Ass'n
 United States Court of Appeals, Second Circuit, 1995.
 64 F.3d 773.

▪ ALTIMARI, CIRCUIT JUDGE.

Plaintiff-appellant Thomson-CSF, S.A. (“Thomson”) appeals from a judgment entered in the United States District Court for the Southern District of New York (Keenan, J.), denying its request for declaratory and injunctive relief and granting defendant-appellee Evans & Sutherland Computer Corporation’s (“E & S”) cross-motion to compel arbitration. Thomson asserts that the district court improvidently compelled it to arbitrate against E & S based upon an arbitration agreement between E & S and Thomson’s subsidiary, to which Thomson was not a signatory. Because, under ordinary principles of contract and agency law, Thomson cannot be said to have voluntarily submitted to arbitrate its disputes with E & S, we reverse the judgment of the district court and remand for proceedings consistent with this opinion.

BACKGROUND

Rediffusion Simulation Limited (“Rediffusion”) was a British company engaged in the business of building flight simulators for the training of pilots. In 1986, Rediffusion entered into a “Working Agreement” with E & S, located in Salt Lake City, Utah. Under the Working Agreement, Rediffusion agreed to purchase computer-generated image equipment (the computer “brain” of the flight simulator) exclusively from E & S and to use its best efforts to market those systems containing E & S equipment; in return, E & S agreed to supply its imaging equipment only to Rediffusion.

Subsequent to entering into the Working Agreement, Rediffusion was sold to Hughes Aircraft Company. Hughes amended and extended the Working Agreement between Rediffusion and E & S. On December 31, 1993, Hughes sold Rediffusion to Thomson, which renamed it Thomson Training and Simulation Limited. Prior to purchasing Rediffusion, Thompson maintained a division engaged in the business of building flight simulation equipment (the Training and Simulation Systems Division) into which it began integrating Rediffusion.

At the time Thomson began publicly contemplating the acquisition of Rediffusion, E & S informed Thomson that, if it purchased Rediffusion, E & S intended to bind Thomson and its flight simulation division to the Working

Agreement. Specifically, E & S told Thomson that upon purchasing Rediffusion both Rediffusion and Thomson's Training and Simulation Systems Division would be required to purchase all needed computer-generated image equipment from E & S. In response, Thomson wrote to E & S seeking to have it waive those provisions of the Working Agreement that E & S believed to be binding upon Thomson. Thomson did not, however, concede that it would be bound by Rediffusion's Working Agreement. In fact, when it became clear that Thomson and E & S could reach no agreement prior to Thomson's acquisition of Rediffusion, Thomson explicitly informed E & S that it was not adopting the Working Agreement and did not consider itself bound by Rediffusion's Agreement which it had neither negotiated nor signed.

DISCUSSION

Arbitration is contractual by nature--"a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). Thus, while there is a strong and "liberal federal policy favoring arbitration agreements," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (quotations omitted), such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract. "It does not follow, however, that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision." *Fisser v. International Bank*, 282 F.2d 231, 233 (2d Cir. 1960); see also *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, U.S., 9 F.3d 1060, 1064 (2d Cir. 1993). This Court has made clear that a nonsignatory party may be bound to an arbitration agreement if so dictated by the "ordinary principles of contract and agency." *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2d Cir. 1980); see also *A/S Custodia v. Lessin Int'l, Inc.*, 503 F.2d 318, 320 (2d Cir. 1974).

A. Traditional Bases for Binding Nonsignatories.

This Court has recognized a number of theories under which nonsignatories may be bound to the arbitration agreements of others. Those theories arise out of common law principles of contract and agency law. Accordingly, we have recognized five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel. The district court properly rejected each of these traditional theories as sufficient justification for binding Thomson to the arbitration agreement of its subsidiary.

1. Incorporation by Reference.

A nonsignatory may compel arbitration against a party to an arbitration agreement when that party has entered into a separate contractual relationship with the nonsignatory which incorporates the existing arbitration clause. As the district court noted, E & S has not attempted to show that the Working Agreement was incorporated into any document which Thomson adopted. Thus, Thomson cannot be bound under an incorporation theory.

2. Assumption.

In the absence of a signature, a party may be bound by an arbitration clause if its subsequent conduct indicates that it is assuming the obligation to arbitrate. See *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir.) (flight attendants manifested a clear intention to arbitrate by sending a representative to act on their behalf in arbitration process), cert. denied, 502 U.S. 910 (1991); *Keystone Shipping*, 782 F. Supp. at 31; *In re Transrol Navegacao S.A.*, 782 F. Supp. 848, 851 (S.D.N.Y. 1991). While Thomson was aware that the Working Agreement purported to bind it as an “affiliate” of Rediffusion, at no time did Thomson manifest an intention to be bound by that Agreement. In fact, Thomson explicitly disavowed any obligations arising out of the Working Agreement and filed this action seeking a declaration of non-liability under the Agreement. Accordingly, it cannot be said that Thomson assumed the obligation to arbitrate.

3. Agency.

Traditional principles of agency law may bind a nonsignatory to an arbitration agreement. See *Interbras Cayman Co. v. Orient Victory Shipping Co., S.A.*, 663 F.2d 4, 6–7 (2d Cir. 1981). Because the Working Agreement was entered into well before Thomson purchased Rediffusion, Thomson could not possibly be bound under an agency theory.

4. Veil Piercing/Alter Ego.

In some instances, the corporate relationship between a parent and its subsidiary are sufficiently close as to justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other. As a general matter, however, a corporate relationship alone is not sufficient to bind a nonsignatory to an arbitration agreement. Nonetheless, the courts will pierce the corporate veil “in two broad situations: to prevent fraud or other wrong, or where a parent dominates and controls a subsidiary.” *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int’l, Inc.*, 2 F.3d 24, 26 (2d Cir. 1993); see also *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 138–39 (2d Cir. 1991) (“Liability . . . may be predicated either upon a showing of fraud or upon complete control by the dominating corporation that leads to a wrong against third parties.”). While the district court below noted that, “[c]ounsel for E & S also denied at oral-argument that its claim was properly articulated as veil-piercing,” E & S now asserts that an alter ego relationship between Thomson and Rediffusion may exist. While E & S concedes that it can make no showing of fraud, it argues that Thomson sufficiently dominated Rediffusion as to justify veil piercing.

Veil piercing determinations are fact specific and “differ[] with the circumstances of each case.” *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir.). This Court has determined that a parent corporation and its subsidiary lose their distinct corporate identities when their conduct demonstrates a virtual abandonment of separateness. See *Carte Blanche*, 2 F.3d at 29 (“No bank accounts, offices, stationery, transactions, or any other activities were maintained or carried on in the name of [the subsidiary].”); *Wm. Passalacqua*, 933 F.2d at 139 (corporate veil is pierced where, among other things, parent and subsidiary 1) share common office and staff; 2) are run by common officers; 3) intermingle funds; 4) do not deal at arm’s length with each other; and 5) are not treated as separate profit centers); see also *Walter E. Heller & Co. v. Video Innovations, Inc.*, 730 F.2d 50, 53 (2d Cir. 1984) (absence of corporate formalities relevant factor in piercing corporate veil). “[T]he factors that determine the

question of control and domination are less subjective than ‘good faith’; they relate to how the corporation was actually operated.” *Carte Blanche*, 2 F.3d at 28–29.

E & S has not demonstrated that Thomson exerted the degree of control over Rediffusion necessary to justify piercing the corporate veil. While the district court found that “Thomson has common ownership with [Rediffusion]; that Thomson actually controls [Rediffusion]; . . . [and] that Thomson incorporated [Rediffusion] into its own organizational and decision-making structure,” the district court did not find an abandonment of the corporate structure. E & S has not shown an absence of corporate formalities, nor has it shown an intermingling of corporate finances and directorship. Rather, as the district court found, Rediffusion continued to function as a distinct entity closely incorporated into the existing corporate structure of its parent company, Thomson. Accordingly, in light of the totality of the circumstances, Thomson cannot be bound by Rediffusion’s arbitration agreement under a veil piercing/alter ego theory.

5. Estoppel.

The circuits have been willing to estop a *signatory* from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed In the line of cases discussed above, the courts held that the parties were estopped from avoiding arbitration because they had entered into written arbitration agreements, albeit with the affiliates of those parties asserting the arbitration and not the parties themselves. Thomson, however, cannot be estopped from denying the existence of an arbitration clause to which it is a signatory because no such clause exists. At no point did Thomson indicate a willingness to arbitrate with E & S. Therefore, the district court properly determined these estoppel cases to be inapposite and insufficient justification for binding Thomson to an agreement that it never signed.

* * * *

B. *The District Court’s Hybrid Approach.*

Despite properly determining that E & S’s claims did not fall within any of the traditional theories for binding a nonsignatory, the district court stated, “[n]evertheless, E & S asserts that the Court may bind Thomson based on its conduct in ‘voluntarily bec[oming] . . . an affiliate,’ on the degree of control Thomson exercises over [Rediffusion], and on the interrelatedness of the issues.

This Court agrees.” (citations omitted). In so doing, the district court improperly extended the law of this Circuit and diluted the protections afforded nonsignatories by the “ordinary principles of contract and agency.” *McAllister*, 621 F.2d at 524. A nonsignatory may not be bound to arbitrate except as dictated by some accepted theory under agency or contract law.

* * * *

The district court below improperly extended the limited theories upon which this Court is willing to enforce an arbitration agreement against a nonsignatory. The district court’s hybrid approach dilutes the safeguards afforded to a nonsignatory by the “ordinary principles of contract and agency” and fails to adequately protect parent companies, the subsidiaries of which have entered into arbitration agreements. Anything short of requiring a *full* showing of some accepted theory under agency or contract law imperils a vast number of parent corporations.

CONCLUSION

Accordingly, the judgment of the district court is reversed and remanded for proceedings consistent with the foregoing.

NOTE:

1. Had Rediffusion been merged into Thomson, Thomson would, by operation of law, become a successor in interest to Rediffusion’s outstanding contractual obligations, including that of having to arbitrate under the contract at issue. Where one entity purchases another’s assets but there is no actual merger, the purchaser, under limited circumstances, may still be a successor in interest. This is covered by the “de facto merger” doctrine. *See generally*, *Cargo Partners AG v. Albatrans, Inc.*, 352 F.3d 41 (2d Cir. 2003).

Shaffer v. Stratton Oakmont, Inc.

United States District Court, N.D. Ill., 1991.
765 F. Supp. 365.

▪ NORGLER, DISTRICT JUDGE.

Before the court is the motion of defendants Stratton Oakmont, Inc. and Robert Koch for a stay pending arbitration and for a protective order staying

discovery. For the reasons discussed below, this motion is denied.

FACTS

In February of 1990, plaintiff John E. Shaffer ("Shaffer") opened an account with Stratton Oakmont, Inc. ("Stratton"), a securities broker and dealer, through Robert Koch ("Koch"), an employee of Shaffer. Unlike those securities brokers known in the industry as "self-clearing" brokers, Stratton is an "introducing" broker (also known as a "corresponding" broker), and does not perform its own "clearing" services. Stratton must contract with a "clearing broker" in order to consummate the securities transactions which it recommends to its customers. Pursuant to opening his account with Stratton, Shaffer signed a brokerage account agreement (the "Brokerage Agreement") provided by Ameritrade, Inc., Stratton's clearing broker.

The Brokerage Agreement consists of several pages of pre-printed forms. The top of the first page of the Brokerage Agreement contains Ameritrade's name in large letters and bold print and provides a space for identification of the introducing broker. This space, however, is left blank on the form. On the bottom of the page, immediately above the signature line on which Shaffer's signature appears, is printed: "This brokerage account agreement contains a pre-dispute arbitration clause in form AM-9-89, section 1, paragraph 7." The arbitration clause referred to in this notice appears subsequently in the agreement, and reads, in relevant part:

Any controversy between *Ameritrade, Inc. and me* arising out of or relating to this Agreement or the breach thereof may be settled by arbitration

Neither defendant's name appears anywhere in the agreement.

* * * *

Plaintiff contends that on June 27, 1990, without his express consent, defendants purchased 30,000 shares of Ventura Motion Picture Group Stock on his account, at \$8 per share. Defendants contend that plaintiff had agreed to purchase the stock but failed to make a timely margin deposit payment in order to secure the acquisition. Defendants then sold the stock at \$7 per share, resulting in a loss of \$30,000 on the deal. In order to cover the loss, defendants liquidated the remaining stocks in plaintiff's account and returned to plaintiff the remaining balance.

DISCUSSION

The parties agree that the sole question at issue here is whether defendants Stratton and Koch have standing to compel plaintiff to arbitrate his grievances with them pursuant to the arbitration provision in the Ameritrade Brokerage Agreement. In the memorandum in support of its motion for stay, defendants acknowledge that there is some division of authority on this question. They argue that the better rule resolves all doubts in favor of arbitration. Defendants further argue that they should be permitted to invoke the arbitration provision under either an agency theory or a third party beneficiary theory. Plaintiff, on the other hand, argues that the defendants are not parties to the Brokerage Agreement and have no standing to benefit from its arbitration provision. He cites to a number of cases in which courts have refused to apply the third party beneficiary doctrine or the principles of agency to permit an introducing broker to benefit from an arbitration agreement signed only by the clearing broker and the investor. As a policy issue, plaintiff also argues that it would be unfair for the court to compel him to arbitrate his dispute with defendants when he never consented to relinquish his right to be heard in federal court.

* * * *

Although all relevant authorities will not compel arbitration absent evidence of the parties' agreement to arbitrate, they appear somewhat divided on whether to imply such an agreement in the absence of an express contract or understanding. Most courts addressing this issue have held that a securities investor will not be deemed to have agreed to arbitration (and thus, to have waived its right to federal jurisdiction) absent evidence of its actual intent to be so bound. Other courts, however, appear to hold that consent may be implied in law, either because the introducing broker is deemed to be the disclosed agent of the clearing broker, *see Okcuoglu*, or because the introducing broker is viewed as a third party beneficiary to the written agreement between the investor and the clearing broker. See *Cauble v. Mabon, Nugent & Co.*, 594 F. Supp. 985 (S.D.N.Y. 1984).

In the present case, there has been no showing that Shaffer knowingly consented to give Stratton and Koch the power to compel arbitration which it gave to Ameritrade. The fact that Shaffer never communicated directly with Ameritrade does not establish that Shaffer intended for the terms of the Ameritrade Brokerage Agreement, which made no mention of defendants, to apply equally to them. Significantly, nothing in defendants' pleadings indicates an *intention* by Shaffer to consent to arbitrate his disputes with defendants.

Rather, defendants merely argue that constructive consent must be implied from defendants' relationship with Ameritrade. Significantly, none of the cases cited by defendants support the position that a court may imply constructive consent in the absence of an investor's actual intention (either express-i.e., a written or oral statement, or implied-i.e., from conduct) to be bound by arbitration. Because an agreement to arbitrate entails the abrogation of an investor's important procedural right to be heard in federal court, the court will not imply an investor's "constructive" consent based solely upon the relationship between the introducing and clearing brokers.

* * * *

* * * *

Although all relevant authorities will not compel arbitration absent evidence of the parties' agreement to arbitrate, they appear somewhat divided on whether to imply such an agreement in the absence of an express contract or understanding. Most courts addressing this issue have held that a securities investor will not be deemed to have agreed to arbitration (and thus, to have waived its right to federal jurisdiction) absent evidence of its actual intent to be so bound. Other courts, however, appear to hold that consent may be implied in law, either because the introducing broker is deemed to be the disclosed agent of the clearing broker, *see Okcuoglu*, or because the introducing broker is viewed as a third party beneficiary to the written agreement between the investor and the clearing broker. See *Cauble v. Mabon, Nugent & Co.*, 594 F. Supp. 985 (S.D.N.Y. 1984).

In the present case, there has been no showing that Shaffer knowingly consented to give Stratton and Koch the power to compel arbitration which it gave to Ameritrade. The fact that Shaffer never communicated directly with Ameritrade does not establish that Shaffer intended for the terms of the Ameritrade Brokerage Agreement, which made no mention of defendants, to apply equally to them. Significantly, nothing in defendants' pleadings indicates an *intention* by Shaffer to consent to arbitrate his disputes with defendants. Rather, defendants merely argue that constructive consent must be implied from defendants' relationship with Ameritrade. Significantly, none of the cases cited by defendants support the position that a court may imply constructive consent in the absence of an investor's actual intention (either express-i.e., a written or oral statement, or implied-i.e., from conduct) to be bound by arbitration. Because an agreement to arbitrate entails the abrogation of an investor's important procedural right to be heard in federal court, the court will not imply an investor's "constructive" consent based solely upon the relationship between the introducing and clearing brokers.

IT IS SO ORDERED.

Arbitrability

Arbitrability is a multi-faceted concept dealing with whether a particular agreement requires a particular party to arbitrate a particular dispute.

A. Type of Controversy

For years, as the scope of arbitration expanded, there were issues as to whether the dispute was the *type of controversy* which, as a matter of public policy, should be subject to compulsory arbitration.

For roughly 50 years after adoption of the so-called “modern” arbitration statutes, virtually all arbitrated disputes were commercial in nature. This was not surprising because arbitration had its most important early origins in connection with trade guild activity during the Industrial Revolution. When the FAA was enacted in 1925, most of the federal statutes giving rise to private causes of action did not even exist, so little thought was given to whether statutory claims of any sort might be arbitrated. In the 1970s, the United States Supreme Court began to expand arbitrability under the FAA to encompass statutory disputes of an international character, this in part to avoid forum-shopping and so that foreign business entities, sometimes quasi-governmental in nature, did not have to submit to the sovereignty of another country’s judicial system. Years before, in 1958, the United Nations adopted the so-called New York Convention requiring signatories to enforce arbitral undertakings in international agreements and to enforce foreign arbitral awards.

Also at work was the United States Supreme Court’s perception that arbitral procedures and practices were becoming increasingly adequate to protect so-called “public” statutory rights. In the past three decades or so, the United States Supreme Court has ruled that all federal statutory claims are arbitrable under the FAA except in those very rare instances where the statute expressly provides otherwise, underlying legislative history provides otherwise, or arbitration would be “inconsistent with the underlying statutory scheme,” such as with respect to so-called “core” bankruptcy claims which should all be adjudicated in the same Bankruptcy Court forum to permit efficient administration of the bankrupt’s estate. Under the cases, antitrust, securities fraud, employment discrimination, consumer protection, and various sorts of intellectual property disputes are all arbitrable.

At the state court level, as has been explained here, preemption requires state courts to permit arbitration of any and all state law claims as long as the “interstate commerce” predicate of the FAA is satisfied, which is virtually always. Not even state public policy can provide a dent in this sort of preemption. While there has sometimes been debate amongst the justices, the United States Supreme Court reaffirmed this sweeping use of preemption late in 2012 in *Nitro-Lift Technologies v. Howard*, 568 U.S.

B. Scope of Agreement to Arbitrate

The most common arbitrability question is whether a particular dispute falls within the *scope of a particular clause*. Under so-called “broad” clauses calling for something like arbitration of “all disputes arising under or relating to” a contract, there is a virtually overriding presumption in favor of arbitrability of any dispute relating at all to the subject matter of the contract, whether it be a claim of breach, a claim in tort, or a statutory claim arising from the contractual relationship. It is only under a so-called “narrow” clause which specifies which claims are arbitrable to the exclusion of others that the issue of whether a particular dispute is within the clause might become a weighty one under the principle that a party cannot be compelled to arbitrate unless it has agreed to do so.

C. The Legal Enforceability of the Agreement to Arbitrate

There may also be an arbitrability issue based on the *enforceability of a particular arbitral provision*. Under the express wording of section 2 of the FAA, but also impliedly under those arbitration statutes which do not expressly so provide, arbitration clauses are subject to traditional state law defenses applicable to contracts generally, including that of unconscionability. The fact that an arbitral provision is in a contract of adhesion does not make it unconscionable, and the United States Supreme Court has cautioned against applying heightened conscionability requirements to such provisions. Hence, unconscionability typically has to involve some sort of fundamental unfairness in the procedures embraced in the arbitration clause or used by the arbitral forum designated by the clause. Arbitral provisions are, in general, subjected to heightened scrutiny in cases involving assertion of “public” statutory protections.

D. “Procedural” Obstacles

A fourth category of arbitrability issues contains those which are essentially “*procedural*” in nature—this category potentially includes whether the right to arbitration has been waived, whether claims time barred, and whether conditions precedent to arbitration have been satisfied?

Who decides questions of arbitrability, judge or arbitrator? With respect to the types of arbitrability issues identified, is it up to the court or arbitrator to decide? The first point here is that a court only gets involved with arbitrability when it is asked by a party to do so, typically in the context of a motion/application to stay a case in favor of arbitration and/or to compel arbitration. The arbitration statutes provide for these procedures. Once a matter is in arbitration, it is the arbitrator who passes on all arbitrability issues both because the rules of arbitral tribunals typically so provide, and because of general recognition that arbitrators have the power to pass on their own jurisdiction, subject to very limited judicial review.

The next point is that when asked to do so, courts have traditionally discharged so-called “gateway” functions relating to arbitrability. Normally, the court will decide whether a particular type of claim is

arbitrable, whether a particular claim falls within the scope of an arbitral provision, and whether a particular arbitral provision passes legal muster. In the latter connection, there is a key principle of *separability*. A fraud, unconscionability, duress or some other contract law defense aimed at the contract containing the arbitral provision, rather than at the arbitral provision itself, is for the arbitrator to decide, not the court. It is in this sense that the arbitral provision is “separable” from the rest of the contract containing it. This is said to stop the courts from prejudging the merits of particular disputes—if a court were empowered to find that an entire contract containing an arbitral provision is tainted by fraud, there would be little if anything left to arbitrate. Most judicial challenges to the enforcement of arbitral provisions are based on unconscionability grounds.

An essential exception to “gateway” issues being for the court involves certain so-called “procedural” matters, such as satisfaction of conditions precedent to arbitration (i.e., submitting to mediation first etc.). There are inconsistencies here, however. Under the so-called federal law of arbitration under the FAA, statute of limitations issues are “procedural” and hence for the arbitrator, but the New York statute allocates statute of limitations issues to the court. This can create confusion, because, while principles of preemption have been held to negate the New York rule in all FAA cases, New York’s state courts sometimes do address statute of limitations issues in such cases. The cases also say that the issue of whether a party has waived the right to arbitrate by pursuing a claim in court is “procedural,” and hence for the arbitrator. In practice, however, courts often pass on waiver issues.

Increasingly, however, the parties can take “gateway” issues of arbitrability away from the court by specific provision reserving such issues for the arbitrator. Such has long been the case with arbitrability issues based on whether a particular arbitral provision embraces a particular dispute. Notably, in a 2010 case in your materials called *Rent A Center*, the United States Supreme Court has gone way beyond this and has now held that even issues as to the conscionability of an arbitral provision may be allocated by express provision to the arbitrator. This decision is confusing, and its full impact unclear. Full implementation of this approach would arguably remove an essential protective layer by leaving arbitrators in charge of determining the legality of the very arbitral agreements which authorize them to function.

Chapter 6

THE ALLOCATION OF POWERS BETWEEN COURTS AND ARBITRATORS

Thinking back to the *Prima Paint* case decided by the United States Supreme Court in 1967, and found at page 122, *supra*, we see that the federal law of arbitration has traditionally left matters concerning arbitrability to the courts, and all other matters concerning the dispute, especially its substance, to the arbitrators. Hence, in *Prima Paint*, it was determined that while a claim of fraud addressed to securing of the agreement to arbitrate was a threshold judicial matter, a claim of fraudulent inducement going to the entire contract would be for the arbitrators. A judicial decision as to the avoidability of the entire contract would obviously directly impact on, and perhaps resolve, party claims on their merits. That sort of judicial immersion in the merits would, in turn, defeat the purpose of providing for arbitration. We have also seen that the principles under which courts construe and apply arbitral provisions are designed to avoid having courts pass on the merits of the underlying dispute.

The arbitral matters which were traditionally reserved for the courts were said to be substantive “gateway” matters relating, one way or the other, to whether there was an obligation to arbitrate. Such matters typically arose in connection with judicial applications designed to force particular matters into arbitration, often by staying an attempted court action on what was said to be an arbitrable claim. Hence it could be said that “arbitrability was for the court.”

The concept of arbitrability is multi-faceted. Most common are issues of interpretation and construction of arbitral provisions to determine whether a particular type of dispute is covered by the language employed by the parties. We

have seen that parties often employ “broad” arbitral provisions which carry with them a strong presumption of coverage so long as the dispute has any sort of “reasonable relationship” to the general subject matter of the underlying contract. Still, issues of this sort can arise, and the typical arbitration statute appears to vest the power to make such determinations with the Court. *See, e.g.*, sections 3 and 4 of the FAA.

In Chapter 2, we saw that most types of claims, including all sorts of statutory ones, are now arbitrable. Still, on occasion, there is an issue as to whether the type of claim being pressed, as a matter of policy, should be subject to arbitration. That is another sort of arbitrability question which has been traditionally reserved for the courts.

Then, there are challenges to arbitrability based on neither the scope of the arbitral agreement nor whether disputes of a certain sort should ever be arbitrable. Even if a claim is found to fall within the scope of an arbitral provision, and to be arbitrable as a matter of policy, there can be assertions that a particular clause is subject to contract law defenses such as fraud, duress, illegality and unconscionability. Section 2 of the FAA expressly provides that arbitral provisions, while to be enforced as contracts, are still subject to “such grounds as exist in law or equity for the revocation of any contract.” Throughout this book, we have seen instances of courts passing on defenses to the enforcement of arbitration provisions. This is another subspecies of determinations going to arbitrability.

Finally, there are various other matters which speak to arbitrability, such as whether conditions precedent to arbitration set by the parties (such as prior submission to mediation) have been satisfied. Authorities conflict as to whether such questions are for the court as a matter of first instance, or only for the arbitrator. We shall see that, under some state law systems, including New York’s, statute of limitations questions are for the court; the opposite is true in the federal courts. Another “procedural” issue in this category is that of whether there has been a waiver of a right to arbitrate by pursuing an otherwise arbitrable claim in court.

Under the leadership of the United States Supreme Court, more and more of the traditional judicial “gateway” functions can now be allocated to the arbitrators by express party agreement and, sometimes, by tribunal rules incorporated by the parties as well. The typical issue is not whether arbitrators can pass on objections to their own jurisdiction – they can, and this is now made

explicit by the rules of the major tribunals. For instance, Rule 7(a) of the AAA Commercial Rules provides that “The arbitrator shall have the power to rule on his own or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.” Rather, there are difficult issues posed as to when a court asked by a party resisting arbitration to resolve a “gateway” matter as to arbitrability should defer completely to the arbitrator to determine, in effect, her own jurisdiction. We have seen that, in general, judicial review of arbitral determinations, once made, is very limited.

§6.01 DETERMINING WHETHER THE ARBITRAL PROVISION COVERS A PARTICULAR DISPUTE

First Options of Chicago, Inc. v. Kaplan
 Supreme Court of the United States, 1995.
 514 U.S. 938.

• BREYER, J.

The case concerns several related disputes between, on one side, First Options of Chicago, Inc., a firm that clears stock trades on the Philadelphia Stock Exchange, and, on the other side, three parties: Manuel Kaplan; his wife, Carol Kaplan; and his wholly owned investment company, MK Investments, Inc. (MKI), whose trading account First Options cleared. The disputes center on a “workout” agreement, embodied in four separate documents, which governs the “working out” of debts to First Options that MKI and the Kaplans incurred as a result of the October 1987 stock market crash. In 1989, after entering into the agreement, MKI lost an additional \$1.5 million. First Options then took control of, and liquidated, certain MKI assets; demanded immediate payment of the entire MKI debt; and insisted that the Kaplans personally pay any deficiency. When its demands went unsatisfied, First Options sought arbitration by a panel of the Philadelphia Stock Exchange.

The first question—the standard of review applied to an arbitrator’s decision about arbitrability—is a narrow one. To understand just how narrow, consider three types of disagreements present in this case. First, the Kaplans and First Options disagree about whether the Kaplans are personally liable for MKI’s debt to First Options. That disagreement makes up the merits of the dispute.

Second, they disagree about whether they agreed to arbitrate the merits. That disagreement is about the arbitrability of the dispute. Third, they disagree about who should have the primary power to decide the second matter. Does that power belong primarily to the arbitrators (because the court reviews their arbitrability decision deferentially) or to the court (because the court makes up its mind about arbitrability independently)? We consider here only this third question.

Although the question is a narrow one, it has a certain practical importance. That is because a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. See, e.g., 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953) (parties bound by arbitrator's decision not in “manifest disregard” of the law), overruled on other grounds, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Hence, who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration.

We believe the answer to the “who” question (i.e., the standard-of-review question) is fairly simple. Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question “who has the primary power to decide arbitrability” turns upon what the parties agreed about that matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. See *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986) (parties may agree to arbitrate arbitrability); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 583, n. 7 (1960) (same). That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. See, e.g., 9 U.S.C. § 10. If, on the other hand, the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently. These two answers flow inexorably from the fact that arbitration is simply a matter of

contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.

We agree with First Options, therefore, that a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration. Nevertheless, that conclusion does not help First Options win this case. That is because a fair and complete answer to the standard-of-review question requires a word about how a court should decide whether the parties have agreed to submit the arbitrability issue to arbitration. And, that word makes clear that the Kaplans did not agree to arbitrate arbitrability here.

When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts. See, e.g., *Mastrobuono*, supra, at 62–63, and n. 9; *Volt*, 489 U.S. at 475–76; *Perry v. Thomas*, 482 U.S. 483, 492–93, n. 9 (1987); G. Wilner, 1 *Domke on Commercial Arbitration* § 4:04, p. 15 (rev. ed. Supp. 1993) (hereinafter *Domke*). The relevant state law here, for example, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration.

This Court, however, has (as we just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is “clea[r] and unmistakeabl[e]” evidence that they did so. *AT & T Technologies*, supra, at 649; see *Warrior & Gulf*, supra, at 583, n. 7. In this manner the law treats silence or ambiguity about the question “who (primarily) should decide arbitrability” differently from the way it treats silence or ambiguity about the question “whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement”—for in respect to this latter question the law reverses the presumption. See *Mitsubishi Motors*, supra, at 626 (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”) (quoting *Moses H. Cone*, 460 U.S. at 24–25); *Warrior & Gulf*, supra, at 582–83.

But, this difference in treatment is understandable. The latter question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did not want to arbitrate a related matter. On the other hand, the former

question—the “who (primarily) should decide arbitrability” question—is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the “who should decide arbitrability” point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

NOTE:

1. The Court in the last case reasons that the typical party would expect an issue of whether a given dispute falls within an arbitral provision to go to a court. However, the Court reminds that arbitration is a creature of contract, and permits delegation of this sort of arbitrability issue to the arbitrator as long as it is “clear and unmistakable,” placing the burden of expression on the party seeking such an arrangement. There is law in the Second Circuit that where the parties provide for arbitration pursuant to the rules of a tribunal which empower the arbitrator to determine her own jurisdiction, that satisfies the “clear and unmistakable” requirement so as to strip the court of its gateway function of determining whether a particular dispute is arbitrable. *Contee Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205, 209 (2d Cir. 2005). Does that make sense? As discussed in this last noted case, it is far more common for international tribunals to decide their own jurisdiction as a motto of first instance, but such determinations are subject to full judicial review. There is domestic case law that if jurisdictional issues are delegated to the arbitrators, such determinations carry the same presumption of correctness as do awards.

§ 6.02 “PROCEDURAL” MATTERS

**Karen Howsam, Individually and as Trustee for the E. Richard Howsam, Jr.
v. Dean Witter Reynolds, Inc.**

Supreme Court of the United States
123 S.Ct. 588 (2002)

▪ **BREYER, J.**

This case focuses upon an arbitration rule of the National Association of Securities Dealers (NASD). The rule states that no dispute “shall be eligible for submission to arbitration . . . whenever six (6) years have elapsed from the occurrence or event giving rise to the . . . dispute.” NASD Code of Arbitration Procedure § 10304(1984) (NASD Code or Code). We must decide whether a court or an NASD arbitrator should apply the rule to the underlying controversy. We conclude that the matter is for the arbitrator.

The underlying controversy arises out of investment advice that Dean Witter Reynolds, Inc. (Dean Witter), provided its client, Karen Howsam, when, some time between 1986 and 1994, it recommended that she buy and hold interests in four limited partnerships. Howsam says that Dean Witter misrepresented the virtues of the partnerships. The resulting controversy falls within their standard Client Service Agreement’s arbitration clause, which provides:

“[A]ll controversies ... concerning or arising from ... any account ..., any transaction ... or ... the construction, performance or breach of . . . any . . . agreement between us ... shall be determined by arbitration before any self-regulatory organization or exchange of which Dean Witter is a member.”

To obtain NASD arbitration, Howsam signed the NASD’s Uniform Submission Agreement. That agreement specified that the “present matter in controversy” was submitted for arbitration “in accordance with” the NASD’s “Code of Arbitration Procedure.” *Id.*, at 24. And that Code contains the provision at issue here, a provision stating that no dispute “shall be eligible for submission ... where six (6) years have elapsed from the occurrence or event giving rise to the ... dispute.” NASD Code § 10304.

The Courts of Appeals have reached different conclusions about whether a

court or an arbitrator primarily should interpret and apply this particular NASD rule. We granted Howsam's petition for certiorari to resolve this disagreement. And we now hold that the matter is for the arbitrator.

This Court has determined that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); see also *First Options, supra*, at 942-943, 115 S.Ct. 1920. Although the Court has also long recognized and enforced a "liberal federal policy favoring arbitration agreements," *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), it has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the "*question of arbitrability*," is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise." *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (emphasis added); *First Options, supra*, at 944, 115 S.Ct. 1920. We must decide here whether application of the NASD time limit provision falls into the scope of this last-mentioned interpretive rule.

Linguistically speaking, one might call any potentially dispositive gateway question a "question of arbitrability," for its answer will determine whether the underlying controversy will proceed to arbitration on the merits. The Court's case law, however, makes clear that, for purposes of applying the interpretive rule, the phrase "question of arbitrability" has a far more limited scope.

The Court has found the phrase "question of arbitrability" *not* applicable where parties would likely expect that an arbitrator would decide the gateway matter. Thus *procedural* questions which grow out of the dispute and bear on its final disposition" are presumptively *not* for the judge, but for an arbitrator, to decide. Following this precedent, we find that the applicability of the NASD time limit rule is a matter presumptively for the arbitrator, not for the judge. The time limit rule closely resembles the gateway questions that the Court has found not to be "questions of arbitrability." *E.g.*, *Moses H. Cone Memorial Hospital, supra*, at 24-25, 103 S.Ct. 927 (referring to "waiver, delay, or a like defense"). . . .

Moreover, the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it. In the absence of any statement to the contrary in the arbitration agreement, it is reasonable to infer that the parties intended the agreement to reflect that

understanding. And for the law to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy—a goal of arbitration systems and judicial systems alike.

We consequently conclude that NASD’s time limit rule falls within the class of gateway procedural disputes that do not present what our cases have called “questions of arbitrability.”

NOTES:

1. Does it make sense to equate “procedural” status with a presumed party intent to have the arbitrator decide the matter at issue? Do parties, particularly lay ones, really consider whether court or arbitrator will decide statute of limitations and related timeliness issues? What has the Supreme Court said about any idea that parties can be determined to have specifically contemplated an involvement of interstate commerce? *See Allied Bruce* case, *supra* at page 131. How is use of a “party contemplation” test any different here?
2. The Court here says issues of waiver of the right to arbitrate are also “procedural” and hence for the arbitrator. The fact is that, in the context of motions to compel arbitration, courts pass on the issue of waiver all the time. There are numerous such cases decided post-*Howsam*.
3. As stated, the *Howsam* approach is applied by the federal courts with respect to statutes of limitations in general, but the New York rule is that a statute of limitations defense may be asserted before the court on resisting arbitration. *See* CPLR 7502(b).
4. Should the New York approach permitting statute of limitations to be raised as a threshold matter with the court be preempted in an FAA case, at least absent party provision that the New York law of arbitration shall govern the arbitration? Yes, at least when a case is in federal court. *Goldman, Sachs & Co. v. Griffin*, appearing *supra* at 172.

**§ 6.03 DETERMINING WHETHER THE ARBITRAL PROVISION IS SUBJECT
TO CONTRACT LAW DEFENSES**

Howsam and several other Supreme Court cases provide, not surprisingly, that threshold issues as to a clause’s legal enforceability are “substantive,” and hence for the court. This can be seen as critical, because the judicial application of unconscionability safeguards, particularly in adhesory party relationships, can be an important safeguard. Can this safeguard be circumvented by party provision?

Rent-A-Center, West, Inc., v. Jackson

Supreme Court of the United States, 2010.
130 S. Ct. 2772 (2010).

▪ SCALIA, J.

We consider whether, under the Federal Arbitration Act (FAA or Act), 9 U.S.C. §§ 1–16, a district court may decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator.

On February 1, 2007, the respondent here, Antonio Jackson, filed an employment-discrimination suit under 42 U.S.C. § 1981, against his former employer in the United States District Court for the District of Nevada. The defendant and petitioner here, Rent-A-Center, West, Inc., filed a motion under the FAA to dismiss or stay the proceedings, 9 U.S.C. § 3, and to compel arbitration, § 4. Rent-A-Center argued that the Mutual Agreement to Arbitrate Claims (Agreement), which Jackson signed on February 24, 2003 as a condition of his employment there, precluded Jackson from pursuing his claims in court. The Agreement provided for arbitration of all “past, present or future” disputes arising out of Jackson’s employment with Rent-A-Center, including “claims for discrimination” and “claims for violation of any federal . . . law.” It also provided that “[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.”

Jackson opposed the motion on the ground that “the arbitration agreement

in question is clearly unenforceable in that it is unconscionable” under Nevada law. Rent-A-Center responded that Jackson’s unconscionability claim was not properly before the court because Jackson had expressly agreed that the arbitrator would have exclusive authority to resolve any dispute about the enforceability of the Agreement. It also disputed the merits of Jackson’s unconscionability claims.

The District Court granted Rent-A-Center’s motion to dismiss the proceedings and to compel arbitration. The court found that the Agreement “‘clearly and unmistakably [sic]’” gives the arbitrator exclusive authority to decide whether the Agreement is enforceable, and, because Jackson challenged the validity of the Agreement *as a whole*, the issue was for the arbitrator. The court noted that even if it were to examine the merits of Jackson’s unconscionability claims, it would have rejected the claim that the agreement to split arbitration fees was substantively unconscionable under Nevada law. It did not address Jackson’s procedural or other substantive unconscionability arguments.

Without oral argument, a divided panel of the Court of Appeals for the Ninth Circuit reversed in part, affirmed in part, and remanded. 581 F.3d 912 (2009). The court reversed on the question of who (the court or arbitrator) had the authority to decide whether the Agreement is enforceable. It noted that “Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator,” but held that where “a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court.”

The FAA reflects the fundamental principle that arbitration is a matter of contract. Section 2, the “primary substantive provision of the Act,” *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), provides:

“A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

9 U.S.C. § 2.

The FAA thereby places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). Like other contracts, however, they may be invalidated by “generally applicable contract defenses, such as fraud, duress, or unconscionability.” *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

The Act also establishes procedures by which federal courts implement § 2’s substantive rule. Under § 3, a party may apply to a federal court for a stay of the trial of an action “upon any issue referable to arbitration under an agreement in writing for such arbitration.” Under § 4, a party “aggrieved” by the failure of another party “to arbitrate under a written agreement for arbitration” may petition a federal court “for an order directing that such arbitration proceed in the manner provided for in such agreement.” The court “shall” order arbitration “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.” *Ibid.*

The Agreement here contains multiple “written provision[s]” to “settle by arbitration a controversy,” § 2. Two are relevant to our discussion. First, the section titled “Claims Covered By The Agreement” provides for arbitration of all “past, present or future” disputes arising out of Jackson’s employment with Rent-A-Center. Second, the section titled “Arbitration Procedures” provides that “[t]he Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.” The current “controversy” between the parties is whether the Agreement is unconscionable. It is the second provision, which delegates resolution of that controversy to the arbitrator, that Rent-A-Center seeks to enforce. Adopting the terminology used by the parties, we will refer to it as the delegation provision.

The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. We have recognized that parties can agree to arbitrate “gateway” questions of “arbitrability,” such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other. The additional agreement is valid under § 2 “save upon such

grounds as exist at law or in equity for the revocation of any contract,” and federal courts can enforce the agreement by staying federal litigation under § 3 and compelling arbitration under § 4. The question before us, then, is whether the delegation provision is valid under § 2.

There are two types of validity challenges under § 2: “One type challenges specifically the validity of the agreement to arbitrate,” and “[t]he other challenges the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract’s provisions renders the whole contract invalid.” In a line of cases neither party has asked us to overrule, we held that only the first type of challenge is relevant to a court’s determination whether the arbitration agreement at issue is enforceable. See *Prima Paint* 388 U.S. 395 (1967). That is because § 2 states that a “written provision” “to settle by arbitration a controversy” is “valid, irrevocable, and enforceable” *without mention* of the validity of the contract in which it is contained. Thus, a party’s challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate

But that agreements to arbitrate are severable does not mean that they are unassailable. If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4. In *Prima Paint* for example, if the claim had been “fraud in the inducement of the arbitration clause itself,” then the court would have considered it. 388 U.S., at 403–04. “To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract,” *id.*, at 404, n. 12. In some cases the claimed basis of invalidity for the contract as a whole will be much easier to establish than the same basis as applied only to the severable agreement to arbitrate. Thus, in an employment contract many elements of alleged unconscionability applicable to the entire contract (outrageously low wages, for example) would not affect the agreement to arbitrate alone. But even where that is not the case--as in *Prima Paint* itself, where the alleged fraud that induced the whole contract equally induced the agreement to arbitrate which was part of that contract--we nonetheless require the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene.

Here, the “written provision . . . to settle by arbitration a controversy,” 9 U.S.C. § 2, that Rent-A-Center asks us to enforce is the delegation provision--the provision that gave the arbitrator “exclusive authority to resolve any dispute

relating to the . . . enforceability . . . of this Agreement.” The “remainder of the contract,” is the rest of the agreement to arbitrate claims arising out of Jackson’s employment with Rent-A-Center. To be sure this case differs from *Prima Paint*, *Buckeye*, and *Preston*, in that the arbitration provisions sought to be enforced in those cases were contained in contracts unrelated to arbitration In this case, the underlying contract is itself an arbitration agreement. But that makes no difference. Application of the severability rule does not depend on the substance of the remainder of the contract. Section 2 operates on the specific “written provision” to “settle by arbitration a controversy” that the party seeks to enforce. Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator.

The District Court correctly concluded that Jackson challenged only the validity of the contract as a whole. Nowhere in his opposition to Rent-A-Center’s motion to compel arbitration did he even mention the delegation provision

The arguments Jackson made in his response to Rent-A-Center’s motion to compel arbitration support this conclusion. Jackson stated that “the *entire agreement* seems drawn to provide [Rent-A-Center] with undue advantages should an employment-related dispute arise.” At one point, he argued that the limitations on discovery “further support[t] [his] contention that the *arbitration agreement as a whole* is substantively unconscionable.” And before this Court, Jackson describes his challenge in the District Court as follows: He “opposed the motion to compel on the ground that the *entire arbitration agreement*, including the delegation clause, was unconscionable.”

Jackson’s other two substantive unconscionability arguments assailed arbitration procedures called for by the contract--the fee-splitting arrangement and the limitations on discovery--procedures that were to be used during arbitration under *both* the agreement to arbitrate employment-related disputes *and* the delegation provision. It may be that had Jackson challenged the delegation provision by arguing that these common procedures *as applied* to the delegation provision rendered *that provision* unconscionable, the challenge should have been considered by the court. To make such a claim based on the discovery procedures, Jackson would have had to argue that the limitation upon the number of depositions causes the arbitration of his claim that the Agreement is unenforceable to be unconscionable. That would be, of course, a much more difficult argument to sustain than the argument that the same limitation renders arbitration of his factbound employment-discrimination claim unconscionable.

Likewise, the unfairness of the fee-splitting arrangement may be more difficult to establish for the arbitration of enforceability than for arbitration of more complex and fact-related aspects of the alleged employment discrimination. Jackson, however, did not make any arguments specific to the delegation provision; he argued that the fee-sharing and discovery procedures rendered the *entire* Agreement invalid.

- STEVENS, J. (dissenting, with whom GINSBURG, J., BREYER, J., and SOTOMAYOR, J., join).

* * * *

Neither petitioner nor respondent has urged us to adopt the rule the Court does today: Even when a litigant has specifically challenged the validity of an agreement to arbitrate he must submit that challenge *to the arbitrator* unless he has lodged an objection to the particular line in the agreement that purports to assign such challenges to the arbitrator—the so-called “delegation clause.”

The Court asserts that its holding flows logically from *Prima Paint* 388 U.S. 395 (1967), in which the Court held that consideration of a contract revocation defense is generally a matter for the arbitrator, unless the defense is specifically directed at the arbitration clause. We have treated this holding as a severability rule: When a party challenges a contract, “but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract.” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446. The Court’s decision today goes beyond *Prima Paint*. Its breezy assertion that the subject matter of the contract at issue—in this case, an arbitration agreement and nothing more—“makes no difference,” is simply wrong. This written arbitration agreement is but one part of a broader employment agreement between the parties, just as the arbitration clause in *Prima Paint* was but one part of a broader contract for services between those parties. Thus, that the subject matter of the agreement is exclusively arbitration makes *all* the difference in the *Prima Paint* analysis.

Under the Federal Arbitration Act (FAA), parties generally have substantial leeway to define the terms and scope of their agreement to settle disputes in an arbitral forum. “[A]rbitration is,” after all, “simply a matter of contract between the parties; it is a way to resolve those disputes-but only those disputes-that the parties have agreed to submit to arbitration.” *First Options of*

Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995). The FAA, therefore, envisions a limited role for courts asked to stay litigation and refer disputes to arbitration.

Certain issues—the kind that “contracting parties would likely have expected a court to have decided” —remain within the province of judicial review. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, (2002); see also *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plurality opinion); *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986). These issues are “gateway matter[s]” because they are necessary antecedents to enforcement of an arbitration agreement; they raise questions the parties “are not likely to have thought that they had agreed that an arbitrator would” decide. *Howsam*, 537 U.S., at 83. Quintessential gateway matters include “whether the parties have a valid arbitration agreement at all,” *Bazzle*, 539 U.S., at 452 (plurality opinion); “whether the parties are bound by a given arbitration clause,” *Howsam*, 537 U.S., at 84; and “whether an arbitration clause in a concededly binding contract applies to a particular type of controversy,” *ibid.* It would be bizarre to send these types of gateway matters to the arbitrator as a matter of course, because they raise a “ ‘question of arbitrability.’ ” See, e.g., *ibid.*; *First Options*, 514 U.S., at 947.

“[Q]uestion[s] of arbitrability” thus include questions regarding the existence of a legally binding and valid arbitration agreement, as well as questions regarding the scope of a concededly binding arbitration agreement. In this case we are concerned with the first of these categories: Whether the parties have a valid arbitration agreement. This is an issue the FAA assigns to the courts. Section 2 of the FAA dictates that covered arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. “[S]uch grounds,” which relate to contract validity and formation, include the claim at issue in this case, unconscionability.

* * * *

Rather than apply *First Options*, the Court takes us down a different path, one neither briefed by the parties nor relied upon by the Court of Appeals. In applying *Prima Paint*, the Court has unwisely extended a “fantastic” and likely erroneous decision. 388 U.S., at 407 (Black, J., dissenting).

As explained at the outset, this case lies at a seeming crossroads in our arbitration jurisprudence. It implicates cases such as *First Options*, which address

whether the parties intended to delegate questions of arbitrability, and also those cases, such as *Prima Paint*, which address the severability of a presumptively valid arbitration agreement from a potentially invalid contract. The question of “Who decides?”—arbitrator or court—animates both lines of cases, but they are driven by different concerns. In cases like *First Options*, we are concerned with the parties’ intentions. In cases like *Prima Paint*, we are concerned with *how* the parties challenge the validity of the agreement.

Under the *Prima Paint* inquiry, recall, we consider whether the parties are actually challenging the validity of the arbitration agreement, or whether they are challenging, more generally, the contract within which an arbitration clause is nested. In the latter circumstance, we assume there is no infirmity per se with the arbitration agreement, i.e., there are no grounds for revocation of the arbitration agreement itself under § 2 of the FAA. Accordingly, we commit the parties’ general contract dispute to the arbitrator, as agreed.

* * * *

Prima Paint and its progeny allow a court to pluck from a potentially invalid *contract* a potentially valid *arbitration agreement*. Today the Court adds a new layer of severability—something akin to Russian nesting dolls—into the mix: Courts may now pluck from a potentially invalid *arbitration agreement* even narrower provisions that refer particular arbitrability disputes to an arbitrator. I do not think an agreement to arbitrate can ever manifest a clear and unmistakable intent to arbitrate its own validity. But even assuming otherwise, I certainly would not hold that the *Prima Paint* rule extends this far.

* * * *

The Court, however, reads the delegation clause as a distinct mini-arbitration agreement divisible from the contract in which it resides—which just so happens also to be an arbitration agreement. Although the Court simply declares that it “makes no difference” that the underlying subject matter of the agreement is itself an arbitration agreement, that proposition does not follow from—rather it is at odds with—*Prima Paint*’s severability rule.

* * * *

It would seem the Court reads *Prima Paint* to require, as a matter of course, infinite layers of severability: We must always pluck from an arbitration agreement the specific delegation mechanism that would—but for present judicial review—commend the matter to arbitration, even if this delegation clause is but

one sentence within one paragraph within a stand alone agreement. And, most importantly, the party must identify this one sentence and lodge a specific challenge to its validity. Otherwise, he will be bound to pursue his validity claim in arbitration.

Even if limited to separately executed arbitration agreements, however, such an infinite severability rule is divorced from the underlying rationale of *Prima Paint*. The notion that a party may be bound by an arbitration clause in a contract that is nevertheless invalid may be difficult for any lawyer-or any person-to accept, but this is the law of *Prima Paint*. It reflects a judgment that the “ ‘national policy favoring arbitration,’ ” *Preston*, 552 U.S., at 353, outweighs the interest in preserving a judicial forum for questions of arbitrability—*but only when questions of arbitrability are bound up in an underlying dispute*. *Prima Paint*, 388 U.S., at 404. When the two are so bound up, there is actually no gateway matter at all: The question “Who decides” is the entire ball game. Were a court to decide the fraudulent inducement question in *Prima Paint*, in order to decide the antecedent question of the validity of the included arbitration agreement, then it would also, necessarily, decide the merits of the underlying dispute. Same, too, for the question of illegality in *Buckeye*; on its way to deciding the arbitration agreement’s validity, the court would have to decide whether the contract was illegal, and in so doing, it would decide the merits of the entire dispute.

In this case, however, resolution of the unconscionability question will have no bearing on the merits of the underlying employment dispute. It will only, as a preliminary matter, resolve who should decide the merits of that dispute. Resolution of the unconscionability question will, however, decide whether the arbitration agreement *itself* is “valid” under “such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. As *Prima Paint* recognizes, the FAA commits those gateway matters, specific to the arbitration agreement, to the court. 388 U.S., at 403–04. Indeed, it is clear that the present controversy over whether the arbitration agreement is unconscionable is *itself severable* from the merits of the underlying dispute, which involves a claim of employment discrimination. This is true for all gateway matters, and for this reason *Prima Paint* has no application in this case.

§ 6.04 **DEFINING THE SUPERVISORY ROLE OF THE COURTS OVER THE
COMMERCIAL ARBITRATION PROCESS**

In the last case, you undoubtedly focused on the concerns voiced by the four dissenters that a court enforcing a clear “delegation” to the arbitrator of the traditional judicial function of deciding the enforceability of the arbitration clause is an unfortunate abdication of judicial responsibility and one not contemplated nor permitted by the FAA.

As to this latter point, do not sections 3 and 4 of the FAA, and similarly worded state statutes, specifically state that it is for the court to determine whether a dispute must be sent to arbitration? Section 3 empowers a court to stay a court action “upon being satisfied that the issue involved in such suit is referable to arbitration....” Section 4 provides that a court must compel arbitration “upon being satisfied that the making of the agreement to arbitrate or the failure to comply therewith is not in issue....” If parties may enforceably delegate the determination required by sections 3 and 4 to the arbitrator, just what are courts to do when asked to act with respect to claims asserted before them? What, if anything, is left for them to decide before staying a claim (section 3) and/or compelling its arbitration (section 4)? The formulations of these sections would seem to reserve to the courts determinations with respect to state law contract defenses under section 2 of the FAA. The *Prima Paint* case further supports the conclusion that contract law defenses directed at the arbitral provision itself must go to the courts once they are raised there by a resisting party.

It is somewhat surprising that, in the face of mounting concerns about use of arbitration in adhesory contexts, the Supreme Court would continue to erode “gateway” protections that even arguably ought to be within the sphere of judicial controls. Does any provision of the FAA permit or contemplate delegating the issue of the conscionability of the agreement to arbitrate to the arbitrator? What if the objections underlying unconscionability protestations are based on arbitral forum ground rules? Is the arbitrator likely to condemn the tribunal under whose auspices she has been appointed? Moreover, what does the majority in *Rent-A-Center* mean by the concept of permitting courts to hear unconscionability objections to the “delegation” itself? How would one establish such a thing without reference to unconscionability of other aspects of the arbitral process at issue? Put another way, does it make sense to extend the concept of severability

to different portions of an agreement to arbitrate? Also, if an unconscionably issue goes directly to the arbitrator, is it subject to judicial review post-award? Under what standard? “Manifest disregard?”

As a matter of policy, perhaps, one can argue that permitting delegation of gateway matters to the arbitrator is pro-arbitration in that it cuts down on court applications designed to delay arbitration. For instance, attempts to forestall arbitration on the theory that the dispute is not covered by a broad clause are often specious. How might such attempts be discouraged without permitting delegation?

The Evolving Landscape for Enforcement of International Arbitral Awards in the United States

Lea Haber Kuck



Timothy G. Nelson



Skadden, Arps, Slate, Meagher & Flom LLP

Introduction

Parties seeking to enforce international arbitration awards in the United States should be aware of two potential procedural defences that may be available to parties seeking to resist such enforcement. Although the United States is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) and the 1975 Inter-American Convention on International Commercial Arbitration (“Panama Convention”),¹ which limit the grounds on which courts may decline recognition and enforcement of international arbitral awards, several U.S. federal courts have held that confirmation may also be refused (1) on the grounds that the court lacks jurisdiction over either the debtor or the debtor’s assets, or (2) on the basis of the doctrine of *forum non conveniens*. This chapter discusses the current state of the law with respect to these two evolving issues.

The Personal Jurisdiction Requirement

Several federal appellate courts have held that in order to satisfy the requirements of the Due Process Clause of the U.S. Constitution, a court must possess jurisdiction over either the debtor (personal jurisdiction) or the debtor’s property (*quasi in rem* jurisdiction) as a prerequisite to the enforcement of an international arbitral award. These courts have distinguished between the substantive grounds for recognition set forth in the New York Convention and the procedural prerequisites that must be satisfied for a U.S. court to exercise its authority.

As the Ninth Circuit has explained, “neither the [New York] Convention nor its implementing legislation removed the district courts’ obligation to find jurisdiction over the defendant in suits to confirm arbitration awards”.² Thus, the Courts of Appeals for the Second, Third, Fourth, Fifth, Ninth and D.C. Circuits have all held that the federal courts must have jurisdiction over the defendant in order for the courts to confirm or recognise an award under the New York Convention.³

The U.S. Supreme Court’s Most Recent Articulation of the Test for Personal Jurisdiction over Corporate Entities

In order to comply with the Due Process Clause, it has long been established that a defendant must have “certain minimum contacts” with the forum “such that maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’”.⁴ In 2014, in

its landmark decision in *Daimler AG v. Bauman*,⁵ the U.S. Supreme Court provided guidance on how this standard must be applied to determine whether the Due Process Clause has been satisfied for corporate entities.

In *Daimler*, a group of 22 Argentine residents brought tort and statutory claims against Daimler AG (a German company) in the U.S. District Court for the Northern District of California, alleging that they and/or their relatives were victims of mistreatment and torture by Argentine police and military forces.⁶ These plaintiffs alleged that Daimler AG’s Argentinian subsidiary, Mercedes-Benz Argentina, collaborated with state security forces to injure the plaintiffs and/or their relatives.⁷

The *Daimler* plaintiffs attempted to establish general personal jurisdiction over Daimler AG in California, based on alleged contacts that one of its U.S. subsidiaries had with California.⁸ That U.S. subsidiary was incorporated in Delaware with its headquarters in New Jersey.⁹ The plaintiffs contended, however, that because the U.S. subsidiary undertook the distribution and sale in California of Mercedes-Benz vehicles allegedly manufactured by Daimler AG, the U.S. subsidiary was the “agent” in California of Daimler AG, and thus Daimler AG itself should be viewed as being present in California.¹⁰

Notably, the *Daimler* plaintiffs were seeking to establish *general* jurisdiction over Daimler AG. Thus, even though the case involved “events occurring entirely outside the United States”, the plaintiffs claimed that Daimler AG had a sufficient connection with California such that it could literally be subject to “any” claims in that forum.¹¹ The Supreme Court flatly rejected this theory.

In its opinion rendered on January 14, 2014, the Court unanimously held that the exercise of jurisdiction over Daimler AG by the California courts was “barred by due process constraints on the assertion of adjudicatory authority”.¹² In order to reach this conclusion, the Court rejected the “doing business test” that had been in place for more than 50 years and that permitted courts to exercise general jurisdiction over a foreign corporation in any state where it “engages in a substantial, continuous, and systematic course of business”.¹³

The Court instead established a new test for ascertaining whether general jurisdiction exists over corporate entities. That test requires a U.S. court to inquire whether the corporation must be viewed as “‘essentially at home’” in the forum state; that is, a state court may exercise general jurisdiction over a foreign corporation “only when the corporation’s affiliations with the State in which suit is brought are so constant and pervasive ‘as to render [it] essentially at home in the forum State’”.¹⁴ Under the new *Daimler* test, except in the “exceptional case” which the

Court did not clearly define, a defendant is “at home” only in the state where it is incorporated and in the state where it maintains its principal place of business.¹⁵

In the final section of its opinion, the Court discussed “the transnational context of th[e] dispute” and was plainly conscious that the previously expansive position taken by the U.S. courts on the issue of general jurisdiction was out of step with the views of other nations.¹⁶ Indeed, *Daimler* should be seen as part of an ongoing effort by the Supreme Court to curtail the use of the U.S. courts in cases by foreign plaintiffs trying to gain redress from foreign defendants for events that took place outside of the United States.¹⁷

Implications for Enforcement of International Arbitral Awards

Because of the requirement that proceedings for confirmation or recognition under the New York Convention are subject to the Due Process limitations, *Daimler* may have a significant impact on such cases and limit parties’ ability to confirm foreign awards in the United States. The impact is illustrated by the Second Circuit’s decision in *Sonera Holding B.V. v. Çukurova Holding A.Ş.*¹⁸ in which, only a few months after the *Daimler* decision, the Second Circuit applied the new *Daimler* test to dismiss an action seeking enforcement and recognition of a foreign arbitral award for lack of personal jurisdiction over the party against whom the award was entered.

The *Sonera* dispute arose from a \$932 million arbitration award obtained by Sonera, a Dutch corporation, against Çukurova, a Turkish company headquartered in Turkey, from an ICC arbitral tribunal in Geneva, Switzerland.¹⁹ Sonera sought enforcement of the Geneva award in several jurisdictions around the world, including the U.S. District Court for the Southern District of New York.²⁰ The district court held, prior to the *Daimler* decision, that it had general jurisdiction over Çukurova based on alleged contacts with New York by certain of its affiliates. Those contacts included the use of an office in New York by two affiliates of the debtor and statements on the website of one of those affiliates that it had been “[f]ounded in New York City in 1979” and was Çukurova’s “gateway to the Americas”.²¹ The district court not only confirmed the award, but also granted post-judgment discovery in aid of judgment enforcement and enjoined Çukurova from engaging in certain property or assets transfers.²²

Reversing in light of *Daimler*, the Second Circuit noted that “only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there”.²³ Under the new *Daimler* test, the Second Circuit concluded that Çukurova had insufficient contacts with New York because “even a company’s ‘engage[ment] in a substantial, continuous, and systematic course of business’ is alone insufficient to render it at home in a forum”, and, therefore, the exercise of general jurisdiction over Çukurova violated the Due Process Clause.²⁴ The result of finding that Çukurova was not subject to personal jurisdiction was that the Geneva award could not be enforced in New York courts.

Should other courts follow the Second Circuit’s lead, U.S. courts will no longer provide a vehicle for many creditors to obtain the type of broad discovery and relief in aid of enforcement that was ordered by the lower court in *Sonera* prior to *Daimler*.

Application of the *Forum Non Conveniens* Doctrine

Even where a court has personal jurisdiction over the parties in an action, it may use its discretion to decline jurisdiction on the ground of *forum non conveniens*, a common law doctrine by which courts may, in some circumstances, decline jurisdiction. The U.S. Supreme Court has described the doctrine as “essentially, ‘a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined’”.²⁵ Several federal courts in the United States have accepted the argument that actions to confirm an international arbitral award may be dismissed under this doctrine, but in their application of the doctrine, the outcomes of the cases have been mixed.

The Second Circuit has denied enforcement of arbitral awards in two cases on the basis of *forum non conveniens*. In *Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, a case involving an \$88 million award rendered in Moscow, the Second Circuit held that the doctrine of *forum non conveniens*, “a procedural rule”, may be applied in enforcement actions under the New York Convention; it rejected the argument that Article V of the New York Convention “sets forth the only grounds for refusing to enforce a foreign award” and noted that Article III of the Convention “allow[s] for the application of the ‘rules of procedure where the award is relied upon’”.²⁶ Because the U.S. Supreme Court has classified *forum non conveniens* as “procedural rather than substantive”, the Second Circuit concluded that the doctrine “may be applied under the provisions of the Convention”.²⁷ It then affirmed the district court’s dismissal because the creditor’s choice of forum deserved little deference – an alternative forum (Ukraine) was available – and private as well as public interests weighed in favour of dismissal.²⁸

In *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, the Second Circuit again considered the applicability of *forum non conveniens* to actions to enforce foreign awards, and the court’s majority held that the district court erred in refusing dismissal on this ground.²⁹ *Figueiredo* involved a Peruvian arbitration award directing an agency of the Peruvian government to pay the creditor, a Brazilian company, \$21 million.³⁰ The decisive factor with respect to the “public interest” at stake was a Peruvian statute that imposed a “limit” of three percent of the budget of a government entity on the amount the entity may pay annually to satisfy a judgment.³¹ Although it was undisputed that the statute did not apply to Peru’s assets located in the United States,³² the majority stated that “the cap statute is a highly significant public factor warranting [*forum non conveniens*] dismissal”.³³

The dissenting judge, however, argued that “a strong case can be made” that the United States made *forum non conveniens* inapplicable to enforcement actions because it does not appear as a defence to enforcement in the New York or Panama Conventions.³⁴ In his view, the doctrine is inconsistent with the Conventions because the Conventions sought to unify the standards for non-enforcement in signatory countries; *forum non conveniens* “introduces a highly significant inconsistency into the international regime of reciprocal enforcement” and “would seem to dramatically undermine this country’s obligations under the treaties to grant enforcement in most cases”.³⁵ Further, he noted that “we should be especially wary of applying that doctrine expansively or in novel ways that suggest that enforcement plaintiffs should be referred back to the very courts they sought to avoid in resorting to arbitration”.³⁶

The Courts of Appeals for the Sixth, Ninth and D.C. Circuits have also considered the applicability of *forum non conveniens* in

actions to enforce international arbitral awards. The D.C. Circuit has both granted and refused dismissal when presented with this issue. In *TMR Energy Ltd. v. State Property Fund of Ukraine*, it affirmed a judgment enforcing a Swedish award against an entity which the court held was an “agent” of the State of Ukraine.³⁷ The court rejected the argument that the enforcement action should be dismissed on the ground that the debtor had no property in the United States, concluding that “[e]ven if the [debtor] currently has no attachable property in the United States, however, it may own property here in the future, and [creditors] having a judgment in hand will expedite the process of attachment”.³⁸

The D.C. Circuit then affirmed dismissal of an enforcement action in *TermoRio S.A. E.S.P. v. Electranta S.P.*³⁹ In that case, the appellate court upheld the district court’s refusal to enforce an award that had been set aside at the seat (Colombia), but it did not decide whether the action “might have been dismissed on the ground of *forum non conveniens*, the alternative basis announced by the District Court”.⁴⁰ The district court had indeed granted dismissal on that ground, noting that “[t]his matter is a peculiarly Colombian affair, and should properly be adjudicated in that country”.⁴¹

In *Venture Global Engineering LLC v. Satyam Computer Services, Ltd.*,⁴² the Sixth Circuit affirmed enforcement of an award rendered in England and refused to dismiss on the basis of *forum non conveniens*. Specifically, the Sixth Circuit appeared to endorse the district court’s reasoning that no public interest of India (the purported adequate alternative forum) outweighed the interest in having the case resolved in Michigan: the debtor was a Michigan company, the award involved the transfer of the assets of a Michigan company, and the agreements at issue were governed by Michigan law.⁴³

On the other hand, a majority of a Ninth Circuit panel affirmed dismissal of an enforcement action in *Melton v. Oy Nautor Ab.*⁴⁴ Because the defendant had not challenged the application of *forum non conveniens* in the district court, the majority found that the argument had been waived, and it issued its decision assuming that the doctrine was applicable, noting that “[o]ur decision is limited to the application of the doctrine of *forum non conveniens* to the specific facts of this case. We express no opinion as to interpretation of the [New York Convention]”.⁴⁵ Upholding dismissal, the judges noted that an alternative forum existed (Finland, the seat of arbitration) and held that the district court did not abuse its discretion in concluding that the private and public interest factors weighed in favour of dismissal.⁴⁶

The dissent, however, disagreed with the majority’s refusal to consider the applicability of the doctrine. The dissenting judge then expressed his view that “[i]t seems unwise to apply *forum non conveniens* to an action to enforce a foreign arbitration award under the Convention, in the absence of any law that *forum non conveniens* applies to cases arising under the Convention”.⁴⁷ He concluded that dismissal based on *forum non conveniens* was not appropriate, recognising that in a “summary proceeding to confirm an arbitration award . . . the proof and logistics factors attendant to trial are non-existent”.⁴⁸

The application of *forum non conveniens* in this context has been widely criticised by bar associations and commentators.⁴⁹ And even if the doctrine is applied, it does not necessarily result in dismissal even within the circuits in which the Courts of Appeals have found it applicable. For example, in *Thai-Lao Lignite (Thailand) Co. v. Government of the Lao People’s Democratic Republic*,⁵⁰ a district court in the Southern District of New York acknowledged that the creditor’s choice of forum was “entitled to a presumption of validity”; that despite the existence of an adequate alternative

forum, the private and public interests weighed against dismissal because enforcement “is typically a summary proceeding”; and the case was “connected to the forum” (the parties had travelled to preliminary conferences in New York, retained New York counsel and did not identify any foreign law to be applied to decide the case).⁵¹ As another example, in *Higgins v. SPX Corporation*, the U.S. District Court for the Western District of Michigan stayed an action pending *vacatur* proceedings in Brazil, but refused to dismiss on the basis of *forum non conveniens*.⁵² That court acknowledged that “there will remain a second aspect of this suit, enforcement of the arbitration award, which will nevertheless be proper following the presumed confirmation of the arbitration award. In other words, Michigan, because of the location of [debtor’s] assets, may be a proper and convenient forum for Plaintiff to enforce the arbitration award upon successful completion of the nullification suit”.⁵³

Conclusion: Other Avenues for Enforcement

While a lack of personal jurisdiction or the *forum non conveniens* doctrine may present hurdles for enforcement of certain international arbitral awards in the United States, they are not insurmountable. First, with some foresight, parties may dispose of these potential obstacles by specifically providing in their arbitration agreements for consent to the jurisdiction of the U.S. courts for purposes of recognition and enforcement of any arbitral award, and for a waiver of any defence of *forum non conveniens* in connection with any enforcement proceedings. The U.S. courts are likely to respect such an agreement between the parties. At the time of enforcement, the parties may also explore whether the potential defendant has taken some other action, or engaged in activities, that make it susceptible to general or specific jurisdiction in a particular U.S. forum.

Secondly, parties seeking to enforce an award may attempt to determine what assets a debtor may have in the jurisdiction and, assuming that there are some assets, whether the particular U.S. jurisdiction will consider the presence of those assets sufficient to satisfy the jurisdictional requirement.

Finally, a party seeking recognition might be able to circumvent these hurdles by converting its award to a judgment in a foreign jurisdiction and then seeking recognition of that foreign judgment in the United States. This may be possible because of an anomaly of U.S. law in certain jurisdictions in which a lack of personal jurisdiction and *forum non conveniens* may be invoked to prevent enforcement of foreign arbitral awards in the federal courts, but they are not applicable defences to the enforcement of foreign judgments in a state court.⁵⁴

Endnotes

1. See New York Convention art. V, *opened for signature* June 10, 1958, 330 U.N.T.S. 3; Panama Convention art. 5, 1438 U.N.T.S. 249 (entered into force June 16, 1976).
2. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1121 (9th Cir. 2002).
3. See *Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009); *Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 177-79 (3d Cir. 2006), *cert. denied*, 549 U.S. 1206 (2007); *Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminum Factory”*, 283 F.3d 208, 213 (4th Cir. 2002), *cert. denied*, 537 U.S. 822 (2002); *First Inv. Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 748-52 (5th Cir.

- 2012); *GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 817 (D.C. Cir. 2012). See also *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1303-05 (11th Cir. 2000) (assuming without discussion that personal jurisdiction is required).
4. *Frontera*, 582 F.3d at 396 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).
5. 134 S. Ct. 746 (2014).
6. *Id.* at 750-51.
7. *Id.* at 751.
8. *Id.*
9. *Id.*
10. *Id.* at 752.
11. As the Supreme Court discussed in *Daimler*, U.S. courts may exercise either "specific" jurisdiction or "general" jurisdiction over a party. See *id.* at 753-58. Specific jurisdiction may be exercised where the lawsuit arises out of or relates to the defendant's contacts with the forum; general jurisdiction may be exercised when a foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities". *Id.* at 754 (quoting *Int'l Shoe*, 326 U.S. at 318) (alteration in original).
12. *Id.* at 751.
13. *Id.* at 761.
14. *Id.*
15. *Id.* at 761 n.19.
16. *Id.* at 762-63.
17. Such cases have become known as "F-cubed" cases. In 2010, the Supreme Court limited the extraterritorial reach of the Exchange Act in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), to preclude F-cubed actions in the securities law context. In its 2012 decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), it dismissed on subject matter jurisdiction grounds a series of Alien Tort Act claims against Royal Dutch/Shell arising out of alleged human rights abuses in Nigeria. The Court then addressed the F-cubed issue again a year later in *Daimler*, but because it decided the case based on the constitutional limitations of personal jurisdiction, *Daimler* has far broader implications than the earlier cases that involved setting limitations on the reach of particular federal statutes.
18. 750 F.3d 221 (2d Cir. 2014), *cert. denied*, 134 S. Ct. 2888 (2014).
19. *Id.* at 223.
20. *Id.*
21. *Id.* at 223-24.
22. *Id.* at 223.
23. *Id.* at 225 (quoting *Daimler*, 134 S. Ct. at 760).
24. *Id.* at 226.
25. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429-30 (2007) (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994)).
26. 311 F.3d 488, 496 (2d Cir. 2002) (quoting New York Convention art. III) (alteration added). The Second Circuit stated that "the items listed in Article V as the exclusive defenses . . . pertain to substantive matters rather than procedure". *Id.*
27. *Id.* at 495, 496 (quoting *Am. Dredging*, 510 U.S. at 453).
28. *Id.* 498-501. The court noted, *inter alia*, that a trial might be required on the issue of the State of Ukraine's potential liability as a non-signatory and that "[t]he case before us simply has no connection with the United States other than the fact that the United States is a Convention signatory". *Id.*
29. 665 F.3d 384, 386 (2d Cir. 2011).
30. *Id.* at 386-87.
31. *Id.* at 387.
32. *Id.* at 389.
33. *Id.* at 392.
34. *Id.* at 397 (Lynch, J., dissenting).
35. *Id.* at 397-98.
36. *Id.* at 402.
37. 411 F.3d 296, 300-03 (D.C. Cir. 2005), *reh'g en banc denied* Aug. 29, 2005.
38. *Id.* at 303; *accord Belize Social Development Ltd. v. Gov't of Belize*, 5 F. Supp. 3d 25, 34 (D.D.C. 2013), *appeal filed* Jan. 14, 2014.
39. 487 F.3d 928 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1038 (2007).
40. *Id.* at 932.
41. *TermoRio S.A. E.S.P. v. Electranta del Atlantico S.A. E.S.P.*, 421 F. Supp. 2d 87, 103 (D.D.C. 2006), *aff'd*, 487 F.3d 928 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1038 (2007).
42. 233 F. App'x 517 (6th Cir. 2007).
43. *Id.* at 521.
44. 161 F.3d 13 (9th Cir. 1998) (unpublished).
45. *Id.* at *1.
46. *Id.*
47. *Id.* at *2.
48. *Id.* (also quoted in *Figueiredo*, 665 F.3d at 402 (Lynch, J., dissenting)).
49. See, e.g., ABA Resolution 107C (adopted by the House of Delegates Aug. 12-13, 2013) (affirming that the "U.S. common law doctrine of *forum non conveniens* is not an appropriate basis for refusing to confirm or enforce arbitral awards that are subject to the provisions of the [New York Convention] or the [Panama Convention] and that refusal on that basis is not consistent with U.S. treaty obligations under these Conventions and U.S. supporting implementing legislation"); Report of the International Commercial Disputes Committee of the Association of the Bar of the City of New York, *Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards* (April 2005) (expressing the view that *forum non conveniens* should not be a ground for dismissal of an action to confirm or enforce an arbitral award because a convenient forum is not a requirement for constitutional due process); GARY B. BORN, 3 INTERNATIONAL COMMERCIAL ARBITRATION 2985 & n.508 (2d ed. 2014) (agreeing with *Figueiredo* dissent, and stating, *inter alia*, that it is "both inconsistent with the [New York] Convention and unjust to more broadly rely on the *forum non conveniens* doctrine to deny recognition of foreign awards where there are assets of an award-debtor within the recognition forum or reasonable grounds for believing that assets might be transferred to or through the recognition forum in the future"). See also RESTATEMENT OF THE LAW OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-29(a) (Tentative Draft No. 3 Apr. 16, 2013) ("An action to confirm a U.S. Convention award or enforce a foreign Convention award is not subject to a stay or dismissal in favour of a foreign court on *forum non conveniens* grounds").
50. No. 10 Civ. 5256 (KMW), 2011 WL 3516154 (S.D.N.Y. Aug. 3, 2011), *aff'd*, 492 F. App'x 150 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1473 (2013).

51. *Id.* at 9-12 (internal quotation marks and citation omitted). See also *Constellation Energy Commodities Grp. Inc. v. Transfield ER Cape Ltd.*, 801 F. Supp. 2d 211, 218-21 (S.D.N.Y. 2011) (refusing to dismiss under *forum non conveniens* where award creditor was incorporated in the United States and adequate alternative fora were available in the United Kingdom and Hong Kong).
52. No. 1:05-CV-846, 2006 WL 1008677, at *4 (W.D. Mich. Apr. 18, 2006).
53. *Id.*
54. See, e.g., *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Fin. Servs. Co.*, 117 A.D.3d 609, 611 (1st Dep't 2014) (affirming an order for the recognition and enforcement of a \$40 million English judgment and holding that under New York law, a judgment creditor need not establish a basis of personal jurisdiction over the judgment debtor and rejecting application of *forum non conveniens* doctrine); *Lenchyslyn v. Pelko Elec., Inc.*, 281 A.D.2d 42, 50-51 (4th Dep't 2001) (holding that a party seeking recognition of a foreign money judgment need not establish a basis for personal jurisdiction over the debtor).



Lea Haber Kuck

Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, NY 10036
USA

Tel: +1 212 735 2978
Fax: +1 917 777 2978
Email: lea.kuck@skadden.com
URL: www.skadden.com

Lea Haber Kuck is a partner at Skadden, Arps, Slate, Meagher & Flom LLP, and a member of its International Litigation and Arbitration Group based in New York. She concentrates her practice on the resolution of complex disputes arising out of international business transactions, representing clients in federal and state courts in the United States, as well as in international arbitrations conducted under UNCITRAL, ICC, ICDR, LCIA and other arbitration rules.

Ms. Kuck regularly advises clients on a variety of issues relating to international dispute resolution, including forum selection, jurisdiction, service of process, extraterritorial discovery, enforcement of judgments and drafting of arbitration and choice-of-court clauses. She is a member of the Skadden team that was named the 2013 "Law Firm of the Year: Dispute Resolution" by *Chambers Global*.

Ms. Kuck frequently writes and speaks on international arbitration and cross-border litigation topics.

For Ms. Kuck's full biography please visit www.skadden.com/professionals/lea-haber-kuck.



Timothy G. Nelson

Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, NY 10036
USA

Tel: +1 212 735 2193
Fax: +1 917 777 2193
Email: timothy.g.nelson@skadden.com
URL: www.skadden.com

Timothy G. Nelson is a New York partner of Skadden, Arps, Slate, Meagher & Flom LLP, practising international litigation and arbitration. He represents corporate clients from a broad range of sectors, including energy, mining, cement, finance, insurance, pharmaceuticals, telecommunications, hotels and property investment, as well as sovereign entities. He has appeared as counsel before ICSID, ICDR, AAA, ICC, HKIAC and UNCITRAL tribunals, as well as U.S. federal and state courts. His cases include contractual, corporate and accounting disputes as well as investment treaty/expropriation claims against foreign governments. Within the U.S. courts, he has been involved in numerous disputes arising under the New York and Panama Conventions, the Hague Service and Evidence Conventions, the Foreign Sovereign Immunities Act, the Alien Tort Act and "Section 1782" (the cross-border discovery statute). He holds law degrees from the University of New South Wales and Oxford University.

For Mr. Nelson's full biography please visit www.skadden.com/professionals/timothy-g-nelson.



The International Litigation and Arbitration Group of Skadden, Arps, Slate, Meagher & Flom LLP and affiliates ("Skadden") specialises in the resolution of international disputes, including claims of expropriation and other investor/state disputes, enforcement proceedings and disputes involving more than one jurisdiction or dispute resolution forum. Our lawyers have appeared before every major international arbitral institution and in *ad hoc* arbitrations. We have represented individuals and companies in industries as varied as power and energy, metals and mining, oil and gas, construction, manufacturing, telecommunications, banking, auditing and securities.

With approximately 1,700 attorneys in 23 offices on five continents, Skadden serves clients in every major financial centre. Our strategically positioned U.S. and international locations allow us proximity to our clients and their operations and ensure a seamless and unified approach at all times.

VACATING AN INTERNATIONAL ARBITRATION AWARD RENDERED IN THE UNITED STATES: DOES THE NEW YORK CONVENTION, THE FEDERAL ARBITRATION ACT OR STATE LAW APPLY?

By

Lea Haber Kuck and Amanda Raymond Kalantirsky*

I. INTRODUCTION

When an international arbitration award is issued in the United States, and one party wants to have the award confirmed, enforced or vacated, three different bodies of law are potentially implicated: (1) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"),¹ (2) the Federal Arbitration Act ("FAA"),² and (3) state law. A recent decision by the United States Court of Appeals for the Third Circuit in *Ario v. Underwriting Members of Syndicate 53 at Lloyds*³ highlights the complex interaction of these laws in the context of an attempt to vacate an international award. The case demonstrates both why the parties' selection of the seat of an arbitration is critical and why parties must take care in drafting arbitration clauses.

This article begins by examining the relevant provisions of the Convention, the FAA, and the role of state law. For an illustration of the interplay of these provisions, it then discusses the Third Circuit's decision in *Ario*, where the Third Circuit held that the grounds for vacatur of an international arbitration award issued in the United States are the same grounds as those applied to a domestic arbitration award. By this decision, the Third Circuit joined other circuits that have

* Lea Haber Kuck is a partner in the International Litigation and Arbitration Group of Skadden, Arps, Slate Meagher & Flom LLP. Amanda Raymond Kalantirsky is an associate in the group. Any views expressed herein are solely those of the authors and are not necessarily those of their firm or the firm's clients.

¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

² 9 U.S.C. §§ 1-16, 201-08, 301-07 (2011).

³ *Ario v. Underwriting Members of Syndicate 53 at Lloyds*, 618 F.3d 277 (3d Cir. 2010).

held that the grounds for vacatur set forth in the FAA applicable to domestic arbitration awards also apply to international arbitration awards rendered within the United States. However, a few courts have held that a motion to vacate an international award rendered in the United States should be decided only under the New York Convention's more limited grounds for review. The result of this split in the case law is that parties and practitioners must be aware of the jurisdiction within the United States where a motion to vacate an award is likely to be brought. As discussed below, whether the New York Convention or the FAA governs also has important implications with respect to certain procedural rules that apply to the application to vacate.

II. THE THREE BODIES OF LAW IMPLICATED BY A MOTION TO VACATE

A. *The New York Convention*

The New York Convention, which has been in force in the United States for almost 40 years and has been ratified or acceded to by more than 140 countries, provides a relatively straightforward and effective mechanism for the enforcement of arbitral awards throughout the world. The goal of the New York Convention is "to encourage the recognition and enforcement of *international* arbitration awards and agreements";⁴ its "underlying theme . . . as a whole is clearly the autonomy of international arbitration."⁵

The New York Convention applies to (a) arbitral awards that are made in a country which is a party to the Convention other than the country where enforcement is sought, or (b) awards that are "not considered as domestic awards

⁴ *Jacada (Europe) Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 705 (6th Cir. 2005).

⁵ *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 512 F.3d 742, 746 (5th Cir. 2008) (quoting PHILIPPE FOUCHARD, EMMANUEL GAILLARD & BERTHOLD GOLDMAN, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION para. 250 (Emmanuel Gaillard & John Savage eds., 1999)).

in the [country] where their recognition and enforcement is sought."⁶ Thus, whether an award is considered international or domestic is determined by the law of the country where recognition or enforcement is sought, rather than the Convention.

B. *The FAA*

In the United States, the New York Convention is implemented through the FAA. As the Supreme Court has explained, "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'"⁷ The FAA consists of three chapters. Chapter 1⁸ contains "a set of default rules 'designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate'";⁹ Chapter 2 implements the New York Convention and governs international or non-domestic awards;¹⁰ and Chapter 3 provides for the enforcement of the Inter-American Convention on International Commercial Arbitration, also known as the Panama Convention,¹¹ and sets forth the interplay between the New York Convention and the Panama Convention.¹²

⁶ New York Convention, *supra* note 1, art. I, 21 U.S.T. at 2519. This approach was adopted to accommodate a divergence of opinion between civil law countries, which considered "the nationality of an award [to be] determined by the law governing the procedure," *Jacada (Europe)*, 401 F.3d at 705 (quoting *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 931 (2d Cir. 1983)), and common law countries, which "favored a simple rule under which an award was domestic in the country it was entered and foreign elsewhere." *Id.*

⁷ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (alterations in original) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

⁸ 9 U.S.C. §§ 1-16.

⁹ *Ario v. Underwriting Members of Syndicate 53 at Lloyds*, 618 F.3d 277, 288 (3d Cir. 2010) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989)).

¹⁰ 9 U.S.C. §§ 201-208.

¹¹ Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, S. Treaty Doc. No. 97-12, O.A.S.T.S. No. 42, 14 I.L.M. 336 [hereinafter *Panama Convention*]. The following states have ratified the Panama Convention: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, United States, Uruguay and Venezuela. The only OAS

Chapter 2 defines what awards constitute international or non-domestic arbitration awards and are thus covered by the New York Convention:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial . . . falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.¹³

Application of Chapter 2 of the FAA is not limited to awards rendered outside the United States. Rather, under the FAA, an arbitration award issued in New York, in a commercial dispute governed by New York law, in favor of a New York citizen, would nevertheless be considered an international award if another party to the arbitration was not a U.S. citizen, or alternatively, if it involved a dispute relating to property or performance outside of the United States.¹⁴

The FAA also provides, however, that "Chapter 1 [of the FAA, governing domestic disputes,] applies to actions and proceedings brought under [Chapter 2] to the extent that chapter is not in conflict with [Chapter 2] or the Convention as

member states that have not ratified the Convention are the Dominican Republic and Nicaragua.

¹² 9 U.S.C. §§ 301-307.

¹³ 9 U.S.C. § 202.

¹⁴ *See, e.g.*, *Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476-78, 481-82 (7th Cir. 1997) (award issued in New York in dispute between two U.S. firms for distribution of U.S.-manufactured products in Poland found to be non-domestic under 9 U.S.C. § 202). *See also* *Zeiler v. Deitsch*, 500 F.3d 157, 164 (2d Cir. 2007) (arbitration was non-domestic, even though it took place in New York, where assets were located in Israel, some parties resided in Israel and governing law was based on a foreign system).

ratified by the United States."¹⁵ Thus, the federal law governing domestic arbitrations may also be implicated in connection with the judicial review of an international award. Then, as a result, state law may also come into play because, as discussed below, the FAA also permits parties to agree that state arbitration law will apply to certain aspects of their arbitration.

C. Recognition or Enforcement of an Award Under the New York Convention

As discussed above, the New York Convention may apply to arbitration awards issued in the United States because some of these awards will be considered to be international or non-domestic under the FAA.¹⁶

While the New York Convention sets forth the grounds on which a court may refuse to recognize or enforce an international award, it does not explicitly deal with the grounds that are available on a motion to vacate or set aside an arbitral award. The New York Convention provides that a court "shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon"¹⁷ unless the party against whom the award is invoked provides "proof" that one of seven limited grounds for non-recognition exists.¹⁸ One of the seven grounds set forth in Article V(1)(e) is

¹⁵ 9 U.S.C. § 208.

¹⁶ See 9 U.S.C. § 202; New York Convention, *supra* note 1, art. I(1), 21 U.S.T. at 2519.

¹⁷ New York Convention, *supra* note 1, art. III, 21 U.S.T. at 2519.

¹⁸ See *id.*, art. V, 21 U.S.T. at 2520. Article V provides:

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

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

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the

that the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."¹⁹

Article V(1)(e) appears to draw a distinction between courts of the country "in which, or under the law of which, that award was made,"²⁰ and courts of countries where enforcement of the award is sought. This divide has been recognized as creating a distinction between courts with "primary" jurisdiction (i.e., jurisdiction to set aside or vacate an arbitral award), and "secondary" jurisdiction (i.e., without jurisdiction to set aside or vacate an award, but with jurisdiction to deny enforcement of an award). As the Fifth Circuit has recognized,

arbitration proceedings or was otherwise unable to present his case; or

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

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

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

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

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

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

Id. The grounds to refuse recognition of a foreign award under the New York Convention are identical to the grounds contained in the Panama Convention. *See* Panama Convention, *supra* note 12, art. 5.

¹⁹ New York Convention, *supra* note 1, art. V(1)(e), 21 U.S.T. at 2520; *see also* 9 U.S.C. § 207.

²⁰ New York Convention, *supra* note 1, art. V(1)(e), 21 U.S.T. at 2520.

"[o]nly a court in a country with primary jurisdiction over an arbitral award may annul that award."²¹

The Convention contains no description of or limitation on the capacity of the jurisdiction where the award was rendered to apply its own law vacating the award.²² This means that the parties' choice of the seat of arbitration can have significant consequences for any judicial review of the award. According to one scholar, the Convention "entrusts the place of arbitration with significant power to enhance, or to impair, the international effectiveness of an award rendered within its territory. The ways courts at the arbitral seat exercise, or fail to exercise, their power to set an award aside generally will determine the award's international currency."²³

D. Vacating an Arbitral Award in the United States

For the reasons discussed above, in order for a party to invoke Article V(1)(e) of the New York Convention as a ground for denying enforcement of the award, an international award made in the United States would need to be vacated by a U.S. court under U.S. law.²⁴ Under U.S. law, a threshold question arises as to whether a motion to vacate an award is governed by the FAA standards for vacatur or by the arbitration law of the state in which the award was made, or of the state whose law governs the parties' contract. Although the Supreme Court held in a

²¹ *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir. 2004); *See also* *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 849 (6th Cir. 1996) ("We hold . . . that such a motion to vacate may be heard only in the courts of the country where the arbitration occurred or in the courts of any country whose *procedural* law was specifically invoked in the contract calling for arbitration of contractual disputes.").

²² *See* William W. Park, *The International Currency of Arbitral Awards*, in *INTERNATIONAL ARBITRATION* 2007 309, 333 (PLI Litig. & Admin. Practice, Course Handbook Series No. 756, 2007); *see also* George A. Bermann, *Jurisdiction: Courts vs. Arbitrators*, in *INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK* 135, 169 (James H. Carter & John Fellas eds., 2010).

²³ WILLIAM W. PARK, *INTERNATIONAL FORUM SELECTION* 127 (1995).

²⁴ *See* *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 21-23 (2d Cir. 1997).

case involving a domestic arbitration that, as a general matter, the FAA does not preempt state law,²⁵ in this specific context, the FAA standards for vacatur are widely recognized to preempt state grounds for vacatur unless the parties clearly provide otherwise in their agreement.²⁶

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*,²⁷ the Supreme Court expressly left open the possibility that parties may select state law to govern enforcement or vacatur of an arbitral award, stating:

The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11 [of the FAA], deciding nothing about other possible avenues for judicial enforcement of arbitration awards.²⁸

Several Courts of Appeals have also contemplated that parties may displace the federal standard for vacatur with a state law standard, but only if they do so explicitly in their agreements.²⁹

²⁵ See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1989) ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration").

²⁶ See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2565 (2009) ("It is well-settled that federal standards for vacatur under the FAA are preemptive under U.S. law, superseding more expansive grounds for vacatur under state law."); *Ario v. Underwriting Members of Syndicate 53 at Lloyds*, 618 F.3d 277, 292 (3d Cir. 2010) ("[T]he FAA standards control 'in the absence of contractual intent to the contrary.'" (alteration in original) (quoting *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 296 (3d Cir. 2001) (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995))))).

²⁷ *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

²⁸ *Id.* at 590.

²⁹ See, e.g., *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 292-93 (3d Cir. 2010); *Jacada (Europe) Ltd. v. Int'l Mktg.*

Assuming that the parties have not explicitly chosen a state law regime for vacatur, parties may move to vacate arbitral awards made in the United States under Section 10 of the FAA,³⁰ which provides the exclusive grounds for vacatur of awards under the FAA.³¹ Under Section 10, a court may vacate an award for the following reasons:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.³²

These grounds to vacate under the FAA overlap to a large extent with the grounds to deny enforcement contained in Article V of the Convention, but are also

Strategies, Inc., 401 F.3d 701, 711-12 (6th Cir. 2005) (generic choice of law clause was not sufficient evidence to demonstrate that the parties intended to displace the federal standard for vacatur); *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 342-43 (5th Cir. 2004) (holding that agreement at issue's "choice-of-law provision [did] not express the parties' clear intent to depart from the FAA's vacatur standard").

³⁰ 9 U.S.C. § 10.

³¹ See *Hall St. Assocs.*, 552 U.S. at 583-84. In *Hall Street Associates*, the Court held that parties could not expand the scope of judicial review under the FAA by contract. See *id.* at 583-84 & n.5, 586-87.

³² 9 U.S.C. § 10(a).

somewhat broader.³³ For example, the FAA authorizes vacatur of an award for an arbitrator's refusal to postpone a hearing or refusal to hear pertinent evidence.³⁴ By contrast, the New York Convention permits a court to deny recognition only where "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."³⁵ The inability to present one's case is a somewhat narrower ground than the ground for vacatur enunciated in the FAA.³⁶ Additionally, while there is currently a debate about whether "manifest disregard for the law" remains a viable ground for vacatur under the FAA after the Supreme Court's decision in *Hall Street Associates*,³⁷ it is undoubtedly not a ground on which to deny enforcement under the Convention.³⁸

³³ See *Ario*, 618 F.3d at 290 n.9.

³⁴ 9 U.S.C. § 10(a)(3).

³⁵ New York Convention, *supra* note 1, art. V(1)(b), 21 U.S.T. at 2520.

³⁶ On the other hand, because the grounds for vacating an arbitral award under the FAA and denying the recognition and enforcement of an award under the New York Convention are similar in some respects, whether the FAA or the New York Convention govern a motion to vacate may not have significant practical consequences in certain cases. See John V.H. Pierce & David N. Cinotti, *Challenging and Enforcing International Arbitral Awards in New York Courts*, in INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 357, 396 (James H. Carter & John Fellas eds., 2010).

³⁷ Some courts have taken the view that "manifest disregard" is a non-statutory ground for review which is inconsistent with *Hall Street Associates*. See, e.g., *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 418-19 (6th Cir. 2008). Others have concluded that "manifest disregard" refers collectively to the grounds for review in the FAA, and is therefore a "judicial gloss" on the statutory grounds for review which is no longer viable after *Hall Street Associates*. See, e.g., *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94-95 (2d Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1758 (2010).

³⁸ See, e.g., *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 850-51 (6th Cir. 1996); *Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, No. 09-791 (RBW), 2011 WL 192517, at *8-13 (D.D.C. Jan. 21, 2011). As the United States District Court for the District of Columbia has recently observed:

It should be no surprise, then, that [respondent] DynCorp has failed to cite any case law where the "manifest disregard for the law" standard has been considered an express or implied basis for *denying recognition* of an arbitral award under the New York Convention. Instead, the cases that DynCorp cites . . . all involve arbitral awards that have been rendered in the United States, thereby allowing the non-prevailing parties in those cases to seek *vacatur* of the award under Article V(1)(e) of the Convention.

In addition, Section 12 of the FAA contains other rules governing a notice of a motion to vacate an award. Importantly, Section 12 requires that notice of a motion to vacate an award "must be served upon the adverse party or his attorney within three months after the award is filed or delivered."³⁹

III. INTERPLAY BETWEEN THE NEW YORK CONVENTION AND U.S. DOMESTIC LAW

A. *The Third Circuit's Decision in Ario*

The Third Circuit's recent decision in *Ario v. Underwriting Members of Syndicate 53 at Lloyds*⁴⁰ illustrates the interplay between the principles discussed above as well as the importance of carefully drafting arbitration agreements.⁴¹ The case involved four reinsurance contracts, or "treaties," between two Pennsylvania insurance companies (the "Insurers") and the Underwriting Members of Syndicate 53 at Lloyd's for the 1998 Year of Account (the "Reinsurers"), who were mostly British.⁴² At the time of the lawsuit, the Insurers were in liquidation and represented by Joel Ario, the Insurance Commissioner of the Commonwealth of Pennsylvania as statutory liquidator.⁴³

The arbitration clause provided that "[a]rbitration hereunder shall take place in Philadelphia, Pennsylvania unless both parties otherwise agree. Except as hereinabove provided, the arbitration shall be in accordance with the rules and procedures established by the Uniform Arbitration Act as enacted in Pennsylvania."⁴⁴ The arbitrators issued an "unreasoned award" rescinding three of the four reinsurance treaties, which did not provide a rationale or identify the

Int'l Trading & Indus. Inv. Co., 2011 WL 192517, at *11.

³⁹ 9 U.S.C. § 12.

⁴⁰ 618 F.3d 277 (3d Cir. 2010).

⁴¹ *See id.* at 288-96.

⁴² *Id.* at 283 & n.2.

⁴³ *Id.* at 283.

⁴⁴ *Id.* at 284.

evidence on which it was based.⁴⁵ The Insurers then filed a motion to confirm in part and vacate in part the award in Pennsylvania state court. The Reinsurers removed the case to federal district court and filed a motion to confirm the award.⁴⁶ The parties agreed that the award was subject to the New York Convention, but they disagreed about the applicability of the FAA and Pennsylvania state law.⁴⁷

Ario argued that the parties had opted out of the FAA entirely by their choice of the rules and procedures established by the Pennsylvania Uniform Arbitration Act (“PUAA”)⁴⁸ to govern the arbitration, and that the federal court thus lacked subject matter jurisdiction.⁴⁹ The district court held that it had jurisdiction over the case because the case related to an arbitration award falling under the Convention.⁵⁰ After the district court denied his motion to remand, Ario argued that his motion to vacate was governed by the standards in PUAA rather than the more stringent vacatur standards in the FAA. The district court concluded that its review was governed by the FAA rather than PUAA, denied the motion to vacate, and confirmed the award.⁵¹

The Third Circuit affirmed, with one dissent, the judgment confirming the award,⁵² holding that (1) parties may not “opt out” of the FAA, but the FAA permits the parties to waive the right of removal as long as they do so in “clear and unambiguous language” (although the court concluded the parties did not do so in this case);⁵³ and (2) that the FAA, rather than the Convention or PUAA, provided the standards for vacatur.⁵⁴

⁴⁵ *Ario*, 618 F.3d at 286.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 42 PA. CONS. STAT. ANN. §§ 7301-7320 (West 2007).

⁴⁹ *Ario*, 618 F.3d at 286.

⁵⁰ *Id.*

⁵¹ *Id.* at 287.

⁵² It reversed, however, the district court's award of sanctions under Federal Rule of Civil Procedure 11 against Ario and his counsel. *Id.* at 283.

⁵³ *Id.* at 288-90.

⁵⁴ *Ario*, 618 F.3d at 290-95.

On the first point, the Third Circuit quoted the Supreme Court's statement that "when 'parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA.'" ⁵⁵ Thus, it held:

An agreement by parties to apply the rules and procedures of state law operates neither as an "opt out" of the domestic FAA nor as an "opt out" of the Convention's implementing legislation. It is federal law that allows the parties to make and enforce agreements that fall under the FAA or the Convention. ⁵⁶

It held that "although *Volt* [and a later Supreme Court decision] addressed only the domestic FAA, the principles undergirding those decisions apply to the Convention's implementing legislation." ⁵⁷ However, because of the "'strong and clear preference for a federal forum,'" the Third Circuit applied a "strict standard," requiring "'clear and unambiguous language'" evidencing a waiver of the right to remove. ⁵⁸

After concluding that the parties in the case before it did not "clearly and unambiguously" agree to waive the right of removal, the Third Circuit considered whether the FAA "domestic" vacatur standards applied to a "Convention award rendered and enforced in the United States." ⁵⁹ It recognized that "if vacatur is limited to the grounds listed in the Convention, *Ario* would have little chance of success." ⁶⁰

⁵⁵ *Id.* at 288 (quoting *Volt Info. Scia., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)).

⁵⁶ *Id.* at 289.

⁵⁷ *Id.*

⁵⁸ *Id.* (quoting *Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 158 (3d Cir. 2000)).

⁵⁹ *Ario*, 618 F.3d at 290-92.

⁶⁰ *Id.* at 291.

The Third Circuit adopted the reasoning and holding of the Second Circuit in *Yusuf Ahmed Alghanim & Sons Co., W.L.L. v. Toys "R" Us, Inc.*,⁶¹ the seminal case on the issue of the law applicable to a motion to vacate a non-domestic arbitration award rendered in the United States. *Toys "R" Us* has been widely cited for the proposition that a motion to vacate an international or non-domestic arbitral award rendered in the United States is governed by Chapter 1 of the FAA.⁶²

In *Toys "R" Us*, the Second Circuit reasoned: "We read Article V(1)(e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award."⁶³ The Second Circuit summarized the framework of the New York Convention by concluding that the Convention:

mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.⁶⁴

⁶¹ *Yusuf Ahmed Alghanim & Sons Co., W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15 (2d Cir. 1997) [hereinafter *Toys "R" Us*].

⁶² The *Toys "R" Us* case arose out of a contract between Toys "R" Us and a Kuwaiti company, Yusuf Ahmed Alghanim & Sons Co., W.L.L. ("Alghanim"), to open Toys "R" Us stores around the Middle East. When a dispute arose after Toys "R" Us attempted to terminate the agreement, the parties initiated arbitration under the auspices of the American Arbitration Association. The arbitrator rendered an award in favor of Alghanim. Alghanim petitioned the district court to confirm the award under the New York Convention, and Toys "R" Us cross-moved to vacate or modify the award. *Id.* at 17-18.

⁶³ *Id.* at 21.

⁶⁴ *Id.* at 23.

It drew support from scholarly literature interpreting Article V(1)(e), noting that “[t]here appears to be no dispute among these authorities that an action to set aside an international arbitral award, as contemplated by Article V(1)(e), is controlled by the domestic law of the rendering state.”⁶⁵ The court also reasoned from the history of the New York Convention that it was not meant “to deprive the rendering state of its supervisory authority over an arbitral award, including its authority to set aside that award under domestic law.”⁶⁶

In *Ario*, the Third Circuit agreed with the Second Circuit that Article V of the Convention specifically contemplates that the country in which the award is made is free to vacate or set aside an arbitral award in accordance with its domestic

⁶⁵ *Id.* at 21; *see also id.* at 22 (“[T]he Convention is not applicable in the action for setting aside the award.” (quoting ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 20 (1981))); *id.* (“[T]he fact is that setting aside awards under the New York Convention can take place only in the country in which the award was made.” (quoting Jan Paulsson, *The Role of Swedish Courts in Transnational Commercial Arbitration*, 21 VA. J. INT’L L. 211, 242 (1981))); *id.* at 22-23:

[Article V(1)(e)] fails to specify the grounds upon which the rendering State may set aside or suspend the award. While it would have provided greater reliability to the enforcement of awards under the Convention had the available grounds been defined in some way, such action would have constituted meddling with national procedure for handling domestic awards, a subject beyond the competence of the Conference.

quoting Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1070 (1961).

⁶⁶ *Toys “R” Us, Inc.*, 126 F.3d at 22. The Second Circuit reaffirmed its holding *Zeiler v. Deutsch*, 500 F.3d 157 (2d Cir. 2007). In *Zeiler*, the court reviewed a district court decision vacating certain arbitration awards and confirming other awards made by the same tribunal. The lower court appeared to have considered only Article V in its decision. On review, the Second Circuit commented on the “double role” of the reviewing court where the court was asked to confirm a non-domestic arbitration award falling under the Convention, as well as serving as an authority under Article V(1)(e) “authorized under Chapter 1 of the FAA to vacate arbitration awards entered in the United States.” *Id.* at 165 n.6. The Second Circuit explained that the district court should not have vacated the awards on the basis of Article V(1)(d) because neither the Convention nor Chapter 2 of the FAA grant the power to vacate non-domestic awards. *Id.* Rather, the lower court should have analyzed the vacatur motion under Section 10 of the FAA. *Id.*

arbitration law.⁶⁷ Because Article V(1)(e) incorporates the domestic FAA with respect to motions to set aside awards, the court concluded that there is no conflict between the Convention and the FAA.⁶⁸

The Third Circuit then turned to the question of whether, under the FAA, the parties could displace the federal vacatur standards with the state law standards in the PUA. As the dissent recognized, the answer to this question was significant. The dissent explained: The FAA standards still rigorously limit judicial intervention, requiring challengers to show the award was “completely irrational,” a near prohibitive burden. Under the PUA by contrast, a court may modify or correct an award that is “contrary to the law.”⁶⁹

The Third Circuit ruled that parties could do so: [T]he domestic FAA allows parties to agree to apply state law enforcement mechanisms in lieu of the FAA default rules. Of course, “[t]he FAA is not the only way into court for parties wanting review of arbitration awards,” and parties “may contemplate enforcement under state statutory or common law.”⁷⁰ It held, however, that in order to displace the “FAA standards [which] control in the absence of contractual intent to contrary[,]”⁷¹ it would “require the parties to express a ‘clear intent’ to apply state law vacatur standards instead of those of the FAA.”⁷²

⁶⁷ *Ario*, 618 F.3d at 292.

⁶⁸ *Id.* at 292.

⁶⁹ *Id.* at 298 (Aldisert, J., dissenting in part) (citations omitted) (citing *Mut. Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co.*, 868 F.2d 52, 56 (3d Cir.1989); 42 Pa. Cons.Stat. Ann. §§ 7301(d)(2) & 7314(a)). The Third Circuit recognized that in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008), the “Supreme Court addressed only the narrow question of whether the parties could agree to modify the FAA’s confirmation, vacatur and modification standards [set forth in 9 U.S.C. §§ 9, 10 and 11], concluding that they ‘provide exclusive regimes for the review provided by statute,’ and thus could not be altered by the parties.” *Id.* at 292 n.11 (majority opinion) (quoting *Hall St. Assocs.*, 522 U.S. at 590). The court in *Ario* held, however, that “*Hall Street* says nothing about using the alternate avenue of 9 U.S.C. § 205 for judicial enforcement of an arbitration award falling under the Convention, and does not support *Ario*’s arguments that the FAA is entirely displaced.” *Id.*

⁷⁰ *Id.* at 292 (second alteration in original) (quoting *Hall St. Assocs.*, 522 U.S. at 590).

⁷¹ *Id.* (quoting *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 296 (3d Cir. 2001)).

⁷² *Ario*, 618 F.3d at 293 (citing *Roadway Package Sys.*, 257 F.3d at 288, 293, 295).

The majority of the court then determined that the arbitration agreement in issue did not evince a “clear intent” to apply the vacatur standards in the PUAA to the exclusion of the FAA.⁷³ It concluded that while “there is a plausible argument that the parties may have agreed to apply PUAA standards, it falls short of the ‘clear intent’ we demand.”⁷⁴ It interpreted the arbitration provisions, which stated that the arbitration “shall be in accordance with the rules and procedures established by the Uniform Arbitration Act as enacted in Pennsylvania,”⁷⁵ “[to be] concerned with only the conduct of the arbitration itself, not judicial enforcement of a resulting award.”⁷⁶ The dissent agreed with the majority’s recitation of the law, but disagreed with the majority’s interpretation of the arbitration agreement, reasoning that the PUAA’s “rules and procedures” included rules of judicial vacatur.⁷⁷

B. Ario Reflects the Majority View

The holding of the Third Circuit in *Ario* and the Second Circuit in *Toys “R” Us* that a motion to vacate an international award rendered in the United States is governed by the domestic standards for vacatur set forth in Chapter 1 of the FAA reflects the majority view.

The Sixth Circuit likewise decided in *Jacada (Europe) Ltd. v. International Marketing Strategies, Inc. (Europe)*⁷⁸ that the FAA grounds for domestic vacatur development company from the United Kingdom and a marketing firm from Michigan. After arbitration in Michigan under the auspices of the American Arbitration Association, the tribunal issued an award in which it expressly disregarded a limitation on liability provision in the contract and issued

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 284.

⁷⁶ *Id.* at 294.

⁷⁷ *Ario*, 618 F.3d at 299 (Aldisert, J., dissenting in part).

⁷⁸ 401 F.3d 701 (6th Cir. 2005).

an award in favor of IMS.⁷⁹ Jacada filed a petition to vacate the award in state court, and a few hours later IMS filed a petition to confirm the award in federal court.⁸⁰ The federal case was stayed, and the state case was transferred and then removed to federal district court.⁸¹

The federal district court ruled that the Convention was applicable to the dispute and therefore that the action was properly removed, a decision upheld by the Sixth Circuit.⁸² The court then addressed Jacada's petition to vacate the award. It began its analysis with the language of Article V(1)(e) and held that "[b]ecause this award was made in the United States, we can apply domestic law, found in the FAA, to vacate the award."⁸³

The Sixth Circuit distinguished its prior holding in *M & C Corp. v. Erwin Behr GmbH & Co., KG*,⁸⁴ which "held that a party seeking to vacate an arbitral award was limited to raising the exclusive grounds found in Article V of the Convention because the FAA does not apply to cases under the Convention if the FAA is 'in conflict' with the Convention or its implementing legislation."⁸⁵ The court distinguished this holding on the grounds that *M & C* dealt with an award that had been rendered in the United Kingdom. In *Jacada*, the award was rendered in the United States and Article V(1)(e) therefore authorized the application of domestic law.⁸⁶

Other circuits have stated in dicta that motions to vacate international arbitral awards are reviewed under the FAA vacatur standards, rather than under the grounds in Article V of the New York Convention for denying enforcement of

⁷⁹ *Id.* at 703-04.

⁸⁰ *Id.* at 704.

⁸¹ *Id.*

⁸² *Id.* at 704-09.

⁸³ *Id.* at 709.

⁸⁴ 87 F.3d 844 (6th Cir. 1996).

⁸⁵ 401 F.3d at 709 n.8.

⁸⁶ *Id.* The court also addressed whether the parties had agreed to "opt out" of the FAA in favor of Michigan's law, which provided a "more thorough standard of review," and concluded that the "generic choice-of-law provision" in the contract was insufficient to opt out of the federal vacatur standard of review. *Id.* at 710.

an award. For example, the Seventh Circuit noted in passing in *Lander Co. v. MMP Investments, Inc.* that the New York Convention "contemplates the possibility of the award's being set aside in a proceeding under local law."⁸⁷

The Fifth Circuit Court addressed the interaction of the New York Convention and the FAA in greater detail in the *Gulf Petro Trading Co.* case.⁸⁸ That case involved a dispute over a joint venture between Nigerian National Petroleum Corporation (NNPC), owned by the government of Nigeria, and Petrec, a division of a U.S. company.⁸⁹ The arbitral tribunal rendered two decisions: a "Partial Award" finding that Petrec had standing to submit its claims and that NNPC had not fulfilled its obligation under the joint venture agreement, and a "Final Award," finding that Petrec in fact did not have standing to sustain its claims against NNPC.⁹⁰ Petrec made an application before the Swiss Federal Court to set aside the Final Award, but the Swiss court confirmed the award.⁹¹ Petrec then filed a claim in the Northern District of Texas to enforce the Partial Award and set aside or modify the Final Award. The district court determined that by seeking to enforce the Partial Award, Petrec was really seeking to annul the Final Award, because the findings of the Partial Award had been essentially vacated by the arbitral tribunal in the Final Award. Because the New York Convention does not authorize secondary jurisdictions – i.e., jurisdictions other than the jurisdiction where the award was made – to vacate or annul awards, the district court held that it was precluded from granting the relief sought by Petrec.⁹² The district court held that "United States federal courts cannot set aside or modify an arbitral award

⁸⁷ 107 F.3d 476, 478 (7th Cir. 1997).

⁸⁸ *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 512 F.3d 742 (5th Cir. 2008); *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 288 F. Supp. 2d 783 (N.D. Tex. 2003), *aff'd*, 115 F. App'x 201 (5th Cir. 2004).

⁸⁹ *Gulf Petro Trading Co.*, 512 F.3d at 744.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Gulf Petro Trading Co.*, 288 F. Supp. 2d at 792.

made in another nation," and therefore do not have subject matter jurisdiction over such claims.⁹³

After the Fifth Circuit upheld the district court's determination that it could not set aside or modify the Final Award because it had only secondary jurisdiction, Petrec filed suit in the Eastern District of Texas, claiming that the arbitral award was the result of bribery and fraud,⁹⁴ and asserting statutory claims under the U.S. Racketeer Influenced and Corrupt Organizations Act (RICO) and the Texas Deceptive Trade Practices Consumer Protection Act, and common law claims for fraud and civil conspiracy.⁹⁵ The district court determined, and the Fifth Circuit agreed, that all of Gulf Petro's claims in this second lawsuit constituted a collateral attack on the Final Award, because the harm that Gulf Petro suffered was a result of the arbitral award against it, not the alleged bribery itself.⁹⁶ Because a "court sitting in secondary jurisdiction lacks subject matter jurisdiction over claims seeking to vacate, set aside, or modify a foreign arbitral award," the Fifth Circuit dismissed all of Gulf Petro's claims.⁹⁷

Finally, the D.C. Circuit held in *TermoRio S.A. E.S.P. v. Electranta S.P.* that "[u]nder the [New York] Convention, the power and authority of the local courts of the rendering state remain of paramount importance."⁹⁸ It noted that the New York Convention did not ""provide any international mechanism to insure the validity of the award where rendered. This was left to the provisions of local law. The Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration.""⁹⁹

⁹³ *Id.*

⁹⁴ *Gulf Petro Trading Co.*, 512 F.3d at 745.

⁹⁵ *Id.* at 749.

⁹⁶ *Id.* at 750.

⁹⁷ *Id.* at 747.

⁹⁸ *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 939 (D.C. Cir. 2007) (quoting *Alghanim*, 126 F.3d at 22).

⁹⁹ *Id.* (quoting *Alghanim*, 126 F.3d at 22).

C. *The Eleventh Circuit's Contrary View*

The Eleventh Circuit has taken a different approach than the cases discussed above. In *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*,¹⁰⁰ it considered an appeal from a denial of a motion to vacate the arbitral award made in the United States that it concluded was a non-domestic award governed by the Convention because one of the parties was a non-U.S. party.¹⁰¹

The court then addressed the appellant's three theories for why the award should be vacated, and used the terminology for *vacating* an award and *denying enforcement* of an award interchangeably. Although the appeal was of the denial of a motion to *vacate* an award, the court began its analysis by stating: "The Tampa panel's arbitral award *must be confirmed* unless appellants can successfully assert one of the seven defenses against enforcement of the award enumerated in Article V of the New York Convention."¹⁰²

The Eleventh Circuit declined to vacate the arbitral award because the ground advanced by the party seeking vacatur was not contained in Article V of the Convention.¹⁰³ The court analyzed the distinction between the regime governing vacatur of domestic arbitration awards and non-domestic awards. It concluded that the reasons for vacatur of domestic awards included the four grounds enumerated in the FAA and two non-statutory defenses against enforcement, namely that an award is "arbitrary and capricious" or enforcement would be against public policy.¹⁰⁴ The court contrasted this regime for vacatur with the defenses against enforcement of an award contained in the Convention, and quoted the Second Circuit's opinion in *Toys "R" Us* for the proposition that the grounds to deny enforcement of an award "enumerated in Article V of the

¹⁰⁰ *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998).

¹⁰¹ *Id.* at 1441.

¹⁰² *Id.* (emphasis added).

¹⁰³ *Id.* at 1445.

¹⁰⁴ *Id.* at 1445-46.

Convention are the only grounds available for setting aside an arbitral award."¹⁰⁵ It held that "the Convention's enumeration of defenses is exclusive," and that Chapter 1 of the FAA was inapplicable to a motion to vacate an arbitral award that falls under the New York Convention.¹⁰⁶

A district court within the Eleventh Circuit has noted that *Industrial Risk Insurers* and *Toys "R" Us* appear to be at odds with each other.¹⁰⁷ The court noted that *Toys "R" Us* recognized "that grounds other than those set forth in the New York Convention may apply to a motion to set aside or vacate a foreign arbitral award rendered in the United States," but declined to rely on *Toys "R" Us* because it was "not binding law . . . and appears to be contrary to [*Industrial Risk Insurers*]."¹⁰⁸

Another federal district court sitting in Virginia similarly held, in *RZS Holdings AVV v. PDVSA Petroleos S.A.*,¹⁰⁹ that Chapter 1 of the FAA does not apply to international awards rendered in the United States. The court was presented with a petition to vacate an award on the basis that one or both parties had received a draft of the award prior to its publication, one of the arbitrators attended a conference with an attorney from the prevailing party, and the prevailing party paid the entire cost of the arbitration.¹¹⁰ The court denied the petition because none of the grounds presented in support of the petition were contained in Article V of the Panama Convention, which is nearly identical to Article V of the New York Convention.¹¹¹ It held that there was a conflict between Chapter 1 and Chapter 3 of the FAA, which implements the Panama Convention, based upon its "reading of the language of 9 U.S.C. § 207 that indicates that the

¹⁰⁵ *Id.* at 1446 (quoting *Toys "R" Us*, 126 F.3d at 20).

¹⁰⁶ *Id.*

¹⁰⁷ See *Nicor Int'l Corp. v. El Paso Corp.*, 318 F. Supp. 2d 1160, 1168 n.7 (S.D. Fla. 2004).

¹⁰⁸ *Id.*

¹⁰⁹ *RZS Holdings AVV v. PDVSA Petroleos S.A.*, 598 F. Supp. 2d 762 (E.D. Va. 2009), *aff'd*, 383 F. App'x 281 (4th Cir. 2010).

¹¹⁰ *Id.* at 768.

¹¹¹ *Id.* at 767.

reasons enumerated in Article V of the [Panama] Convention provide the exclusive list of grounds to vacate international arbitration awards."¹¹²

D. Practical Considerations in Seeking To Vacate an Award: The Timing Trap

The FAA contains a strict three-month deadline for parties to move to vacate arbitral awards: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."¹¹³ If Chapter 1 of the FAA applies to awards covered by the New York Convention, then this limitations period likewise applies.¹¹⁴ Many state statutes also have very short deadlines for seeking vacatur.¹¹⁵ This is in contrast to the three years permitted under the Convention for a party to seek confirmation of an award.¹¹⁶

If a party does not move to vacate an award within the three-month time frame, it cannot seek to do so later when faced with a motion to confirm the award.¹¹⁷ Accordingly, a party who intends to seek to vacate an international award rendered in the United States must move quickly and may not wait until the prevailing party seeks confirmation of the award.

If a party chooses not to vacate or misses the deadline, then its only option is to wait for the opposing party to attempt to confirm or enforce that award under the New York Convention, and attempt to resist confirmation or enforcement. As discussed above, however, under the New York Convention, a court must confirm

¹¹² *Id.* at 766-67.

¹¹³ 9 U.S.C. § 12.

¹¹⁴ *See* Republic of Arg. v. BG Group PLC, 715 F. Supp. 2d 108, 120 n.10 (D.D.C. 2010).

¹¹⁵ *See, e.g.*, 42 PA. CONS. STAT. ANN. § 7314(b) (2007) (30 days); FLA. STAT. § 682.13(2) (2003) (90 days); N.Y. C.P.L.R. § 7511(a) (McKinney Supp. 2011) (90 days).

¹¹⁶ 9 U.S.C. § 207 ("Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration.").

¹¹⁷ *See* Lander Co. v. MMP Invs., Inc., 107 F.3d 476, 478 (7th Cir. 1997); *see also* Taylor v. Nelson, 788 F.2d 220, 225 (4th Cir. 1986); Florasynth v. Pickholz, 750 F.2d 171, 174-77 (2d Cir. 1984).

the award unless the party opposing confirmation proves "one of the grounds for refusal or denial of recognition or enforcement of the award specified" in the New York Convention exists.¹¹⁸ If a party does not move to vacate an award within the three-month time limit, then it would only have available the Article V grounds to resist enforcement of the award, not the Chapter 1 grounds under the FAA to vacate the award.

Moreover, it is not necessary for a party to confirm the award in the United States before seeking to enforce the award elsewhere.¹¹⁹ As the Second Circuit has explained: "While the distinction between vacation of an arbitration award and refusal to confirm an award may be of negligible significance within the United States, it can affect the remaining force of an unconfirmed award outside this country, if a party seeks to confirm and enforce the award under the Convention abroad."¹²⁰

IV. CONCLUSION

Parties choosing the United States as the place of their international commercial arbitrations need to understand the interplay between the Convention, the FAA and state law and to consider the issues discussed above both at the time they draft their arbitration agreements and after an award is entered. Parties who are not aware of these issues may lose their opportunity to have an award entered against them vacated based on grounds in the FAA, or on more lenient state law grounds, which may not be available under the New York Convention.

¹¹⁸ See 9 U.S.C. § 207.

¹¹⁹ See, e.g., *Oriental Commercial & Shipping Co., (U.K.), Ltd. v. Rosseel, N.V.*, 769 F. Supp. 514, 516-17 (S.D.N.Y. 1991). In *Oriental Commercial*, the court noted that parties obtaining an international arbitral award in the United States have two options. They can seek to have the award confirmed by a U.S. court and enforce it elsewhere as a foreign judgment. Alternatively, they can go directly to a court outside of the United States and seek enforcement of the award under the New York Convention. *Id.*

¹²⁰ *Zeiler v. Deitsch*, 500 F.3d 157, 165 n.6 (2d Cir. 2007).

New York Dispute Resolution Lawyer



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



Interim, Provisional and Conservatory Measures in U.S. Arbitration

By Steven Skulnik

A longer version of this Practice Note was first published by Practical Law Litigation web service at <http://us.practicallaw.com/0-587-9225>. For more information about Practical Law, visit us.practicallaw.com.

U.S. Legal Framework for Arbitration

Arbitration in the U.S. is governed by both federal and state law. The main source of U.S. arbitration law is the Federal Arbitration Act (“FAA”),¹ which applies in the state and federal courts of all U.S. jurisdictions. The FAA applies to all arbitrations arising from maritime transactions or to any other contract “involving commerce,” which is defined broadly. This effectively means that the FAA applies to all international arbitrations and most domestic arbitrations seated in the U.S.

Seeking Interim Relief Before Courts and Arbitrators

Arbitration governed by institutional rules such as the American Arbitration Association (“AAA”) Commercial Arbitration Rules (as amended on September 9, 2013, for arbitrations that commence on or after October 1, 2013) (“AAA Rules”) and the International Centre for Dispute Resolution (“ICDR”) International Arbitration Rules as amended and effective June 1, 2014 (“ICDR Rules”) specify that the arbitrators have the power to grant interim, provisional and conservatory measures and specify procedures for obtaining relief even before the tribunal is constituted.²

Provisional relief is often necessary before arbitration when:

- A party has evidence that is relevant to the dispute but this evidence is likely to be destroyed, damaged or lost absent an interim order protecting it.
- A dispute is concerned with the ownership of perishable goods that may deteriorate before the dispute can be determined. An interim order requiring the sale of the goods (with the sale proceeds to be held pending the final award), or requiring the goods to be sampled, tested or photographed before the sale is often granted in this case.

Who May Provide Relief

Interim, provisional and conservatory relief in aid of arbitration may be provided by:

- The arbitral tribunal;
- An “emergency arbitrator” appointed by an administering body;
- A federal or state court.

The precise scope of the powers of each of these to act depends on:

- The arbitration agreement;
- Applicable arbitration rules;
- Applicable federal and state law.

Court-imposed Limits

Under the FAA, a court may grant interim relief pending arbitration.³ The question of whether a federal court should grant preliminary injunction is generally one of federal law even in diversity actions, but state law issues are sometimes considered.⁴

Court-issued interim orders generally last only until the arbitrators have the opportunity to consider the request for emergency or injunctive relief.⁵ In effect, restraints issued by courts often serve the same function as temporary restraining orders.

While some U.S. courts have held that they lack power to grant interim relief where the underlying dispute is subject to an arbitration agreement governed by the New York Convention⁶ other courts have rejected this approach.⁷ In *Sojitz Corp. v. Prithvi Info. Solutions Ltd.*, 921 N.Y.S.2d 14, 17 (1st Dep’t 2011), for example, the court held that a creditor can attach assets, for security purposes, in anticipation of an award that will be rendered in an arbitration seated in a foreign country, even where there is no connection between the arbitral dispute and the state, as long as there is a debt owed by a person or entity in the state to the party against whom the arbitral award is sought.

Where admiralty jurisdiction is invoked, federal law governs attachments of ships and other assets.⁸ In proceedings begun by libel and seizure of vessels or other properties in admiralty proceedings, Section 8 of the FAA provides the federal courts with jurisdiction to direct the parties to proceed with arbitration and to enter a decree on the award.

Procedure under State Law

Outside of admiralty, state law governs the availability of the provisional remedy of attachment in federal court.⁹ Most state laws authorize provisional remedies in aid of arbitration.¹⁰ Some state statutes that have adopted the UNCITRAL Model Law expressly allow for applications for interim measures of protection in aid of an arbitration.¹¹

Whether to Apply to the Arbitral Tribunal or the Court

Parties generally can apply either to a court or to arbitrators for interim relief. Parties should consider applying to the court when:

- The arbitral tribunal has not yet been constituted and therefore cannot yet act. In these cases, unless the applicable arbitral rules contain emergency arbitrator provisions, an application to the court is necessary.
- The party seeking interim relief needs judicial compulsion. Although arbitrators can impose negative consequences on parties (for example, drawing adverse inferences if a party does not produce evidence), they have no ability to make a party carry out their orders and no power that can be applied to non-parties.
- The party needs *ex parte* relief. Under most institutional rules, a party seeking emergency measures of protection must notify the other parties.¹² Notice of the application gives the party an opportunity to dissipate the evidence or assets that are the subject of the application. By the time the tribunal makes an order, it can be too late. By contrast, federal courts and most state courts (*e.g.*, California and New York) permit an applicant to proceed without notice in urgent cases.
- The matter is urgent and the arbitrator does not act timely or does not provide an adequate remedy.¹³ Absent a showing of urgency, under the RUAA parties may seek relief only from the arbitrator after the arbitrator is appointed and is authorized and able to act.
- The arbitrator may not have the power to grant the relief sought. For example, arbitrators may not have the authority to appoint a receiver.¹⁴

Parties should consider applying to the arbitral tribunal for interim relief when:

- The tribunal has been constituted and is available on short notice;
- The applicant is satisfied that the other party will respect orders issued by the tribunal;
- The federal or state courts at the place of arbitration are reluctant to grant provisional remedies in aid of arbitration;
- The parties' agreement or the applicable institutional rules empower the arbitral tribunal to grant broader interim relief than would be available in court.¹⁵

Interim Relief from the Arbitral Tribunal

Institutional Rules

Interim relief is available under, *inter alia*, the:

- AAA Rules;
- ICDR Rules;
- JAMS Arbitration Rules (effective July 1, 2014);
- The International Institute for Conflict Prevention & Resolution (CPR) Administered Arbitration Rules (effective July 1, 2013).

This section summarizes the interim relief available under the AAA and ICDR Rules. A review of the other institutions is included in the online version of this practice note at <http://us.practicallaw.com/0-587-9225>.

AAA Rules

Under the AAA Rules:

- The tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
- Interim measures may take the form of an interim award and the tribunal may require security for the costs of the interim measures.¹⁶

AAA Rule 38 provides that where a party requires emergency relief before the tribunal has been formed, the AAA appoints an "emergency arbitrator." The emergency arbitrator has the power to order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order, giving reasons in either case.¹⁷ The authority of the emergency arbitrator ceases once the panel has been constituted.¹⁸

The rules also provide for parties to seek temporary relief in court, stating that:

A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate.¹⁹

ICDR Rules

Under the ICDR Rules:

- At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
- Interim measures may take the form of an interim award and the tribunal may require security for the costs of the interim measures.²⁰

Furthermore, the rules expressly permit the tribunal to apportion the costs of the application in any interim award or in the final award.²¹ In many cases it is prefer-

able for costs to be dealt with globally at the end of the arbitration, rather than at the application itself.

The rules further provide that where a party requires emergency relief before the tribunal has been formed, the ICDR appoints an “emergency arbitrator.”²² The emergency arbitrator has the power to order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order, giving reasons in either case.²³ The authority of the emergency arbitrator ceases once the tribunal has been constituted.²⁴

The rules also provide for parties to seek temporary relief in court, stating that:

A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.²⁵

When to Apply

As a general principle, applications for interim and conservatory relief should be made as early as possible. This is because:

- Failure to apply early may prejudice the application for practical reasons. Evidence or assets may be disposed of or property may deteriorate.
- Delay in applying may be taken into account by the tribunal. If the matter is not urgent enough to cause a party to seek relief promptly, a tribunal may decide that the relief is not necessary.

How to Apply

The procedure for applying to the tribunal depends in the first instance on the arbitration agreement or any applicable rules. However, the following points are generally applicable to arbitration under any institution’s rules:

- **Apply in writing.** In the absence of any particular procedural requirements, most applications to the tribunal for interim measures should be made in writing.
- **Submit evidence.** The applicant should provide evidence in support of its position. For example, if a party is seeking conservatory orders in relation to property, it should identify the property and its whereabouts, and provide evidence that establishes why the relief sought is necessary. If the applicant is seeking to enforce an employee non-compete agreement, provide affidavits establishing the employer’s business interest in enforcing the non-compete and the potential harm to the employer if the tribunal does not issue an order preserving the *status quo*. The applicant should also brief the applicable law regarding its entitlement to the relief sought.

- **Specify relief sought.** State the precise order sought clearly in the application. Do not apply for an order that is too broad in scope. Provide a carefully formulated draft order so that the tribunal can easily see what is being requested and why.

Ex Parte Applications to Arbitrators

The rules of the major arbitral institutions prohibit applications for interim relief being made without notice. In any event, proceeding before an arbitrator on an *ex parte* basis would be ill-advised because:

- Most arbitral tribunals are extremely reticent about proceeding without giving both parties an opportunity to address them.
- Any steps taken without notice may affect the enforceability of the ultimate award. *Ex parte* evidence submitted to an arbitration panel that disadvantages any of the parties in their rights to submit and rebut evidence violates the parties’ rights and is grounds for vacatur of an arbitration award.²⁶

No Power to Bind Fully Constituted Arbitral Tribunal

Under the institutional rules considered here, the emergency arbitrator does not have the power to bind the full arbitral tribunal. The fully constituted tribunal has the power to vacate, amend or modify any order, award or decision by the emergency arbitrator.

The usual default position is that the emergency arbitrator cannot become a member of the full arbitral tribunal unless the parties agree otherwise.

Enforcing Preliminary Relief Awarded by Arbitrators in Court

Courts have held that they do not have the power to review an interlocutory ruling by an arbitration panel,²⁷ but have relaxed this rule when parties seek confirmation of provisional remedies awarded by arbitrators.²⁸

In *Yahoo! Inc. v. Microsoft Corp.*, the court confirmed an award issued by an emergency arbitrator appointed under the AAA rules to grant emergency relief “until the matter can be fully and fairly decided by a three arbitrator panel of industry experts following discovery.”²⁹ The *Yahoo!* case shows how quickly interim relief can be obtained in arbitration. The emergency arbitrator held two days of evidentiary hearings starting 11 days after Microsoft commenced arbitration and issued a decision six days after conclusion of those hearings. The next day, *Yahoo!* moved in court to vacate the award and Microsoft cross-moved to confirm. The court ruled for Microsoft less than a week later. In going from commencement to judicial confirmation in merely 25 days, the *Yahoo!* case demonstrates that even where the tribunal is not constituted, the use of emergency procedures provided by arbitral institutions can provide expeditious and effective relief. Moreover, the court respected the parties’ agreement to keep proceedings confidential. The motion

papers were filed under seal and the only part of the proceeding that was made public was the judge's decision.

More recently, in *Companion Property & Casualty Insurance Co. v. Allied Provident Insurance, Inc.*, the arbitrators issued an interim award requiring the respondent to post security.³⁰ When the respondent ignored the interim award, the claimant made a motion in court to confirm it. The court reviewed the case law that supports the court's power to confirm interim awards of security and noted that "[w]ithout the ability to confirm such interim awards, parties would be free to disregard them, thus frustrating the effective and efficient resolution of disputes that is the hallmark of arbitration." Having concluded that it had the power to confirm the interim award, the court noted that it should confirm as long as there is a "barely colorable justification." On that standard, the court confirmed the award because the agreement between the parties required that the respondent provide collateral for its obligations.³¹

Where, on the other hand, a court is asked to vacate an interim award issued by arbitrators, the same considerations may not apply. In *Chinmax Med. Sys. Inc. v. Alere San Diego, Inc.*, the court refused a request to vacate an emergency arbitrator's interim order for certain conservatory measures under the ICDR Rules.³² In *Chinmax*, the court in addressing a challenge to the interim order found that it did not have jurisdiction to vacate the order because it was not final and binding for the purposes of the New York Convention. The order itself stated that it would be subject to the consideration of the full arbitration tribunal, and on this basis the court refused to grant the motion to vacate.

Courts will only enforce that part of the interim relief that requires judicial intervention at that stage of proceedings. To determine whether to enter grant relief, a court must consider:

- The likelihood that the harm alleged by the party will ever come to pass.
- The hardship to the parties if judicial relief is denied at this stage in the proceedings.
- Whether the factual record is sufficiently developed to produce a fair adjudication of the merits.³³

Resisting Interim Relief

In response to a request for interim relief, a party should marshal its legal arguments and supporting evidence to convince the tribunal or a court not to grant the requested relief. The opposition should address whether the tribunal or court has the power to grant the request and should give reasons why the application should be denied as a matter of discretion.

In addition to its main argument, the respondent should consider arguing in the alternative that if the relief sought by the applicant is granted, it should be

conditioned on the applicant providing adequate security. Most institutional rules provide for security as a condition of interim relief granted by arbitrators.

Before an Emergency Arbitrator

The respondent should check how long it has under the rules to object to the appointment of the arbitrator and make the relevant objections in the permitted time frame. There may be grounds to resist the granting of emergency relief if the respondent has not been given proper notice of the application, or if the application fails to establish that the award to which the applicant may be entitled may be rendered ineffectual without interim relief.

In its response to the application, the respondent may consider whether it can object to the:

- Jurisdiction of the emergency arbitrator;
- Application on these grounds, among others:
 - the emergency arbitrator provision of the relevant rules do not apply;
 - the applicant is unlikely to succeed on the merits;
 - there is no urgent need for the interim relief to be granted;
 - irreparable harm would be suffered by the respondent if the emergency relief were granted; or
 - greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

Before the Arbitral Tribunal

The respondent should check the applicable rules regarding the power of the tribunal and the procedures for interim relief. In its response to the application, the respondent may consider whether it can object to the application on these, among other grounds:

- The applicant is unlikely to succeed on the merits;
- There is no urgent need for the interim relief to be granted;
- Irreparable harm would be suffered by the respondent if the emergency relief were granted;
- Greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

Before a Court

The respondent should consider:

- Whether federal or state courts in the state where the arbitration is seated have held that they lack power to grant the relief requested.³⁴
- The application can be opposed on the ground that courts should intervene only until the arbitrators

have the opportunity to consider the request for emergency or injunctive relief.³⁵ Where the arbitral tribunal is authorized to grant the equivalent of preliminary injunctive relief, it has been inappropriate for the district court to do so.³⁶

- The applicant is unlikely to succeed on the merits;
- There is no urgent need for the interim relief to be granted;
- Greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

Endnotes

1. 9 U.S.C. §§ 1-16, 201-208, 301-07.
2. See AAA Rules 37 and 38 and Articles 6 and 24, ICDR Rules.
3. See *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 376 (4th Cir. 2012); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 214-15 (7th Cir. 1993) and *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1051-54 (2d Cir. 1990).
4. See *AIM Int'l Trading LLC v. Valcucine SpA.*, 188 F. Supp. 2d 384, 387 (S.D.N.Y. 2002).
5. See *Fairfield Cnty. Med. Ass'n v. United Healthcare of New England, Inc.*, 557 F. App'x 53, 56 (2d Cir. 2014) and *Next Step Med. Co. v. Johnson & Johnson Int'l*, 619 F.3d 67, 70 (1st Cir. 2010).
6. See, e.g., *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1037-38 (3d Cir. 1974) and *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981).
7. See *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990); *Aggarao*, 675 F.3d at 376; *Karaha Bodas Co. v. Perusahan Pertamina Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 365 (5th Cir. 2003); *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazioni v. Lauro*, 712 F.2d 50, 54-55 (3d Cir. 1983).
8. See *Result Shipping Co. v. Ferruzzi Trading USA Inc.*, 56 F.3d 394, 399 (2d Cir. 1995).
9. Federal Rules of Civil Procedure (FRCP) 64 states: "[a]t the commencement of and throughout an action [for attachment in federal district court], every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment."
10. Section 7502(c) of the New York Civil Practice Law and Rules ("CPLR"), for example, provides that to obtain provisional relief, the movant must demonstrate that "the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." CPLR 7502(c) provides that a showing of an ineffectual award is the "sole ground for the granting of the remedy" (compare *JetBlue Airways v. Stephenson*, 932 N.Y.S.2d 761 (Sup. Ct. N.Y. Co. 2010), *aff'd*, 931 N.Y.S.2d 284 (1st Dep't 2011) (denying motion for injunctive relief under CPLR 7502(c) because, although the movant presented arguments regarding the CPLR Article 63 criteria, it ignored the "ineffectual award" requirement) with *Winter v. Brown*, 853 N.Y.S.2d 361 (2d Dep't 2008) (lower court erred when it granted preliminary injunction in favor of seller in breach of contract action where seller failed to satisfy the traditional equitable criteria for preliminary injunctive relief)). CPLR 7502(c) also provides that if an arbitration is not commenced within 30 days of the granting of provisional relief, the order granting relief expires and costs, including reasonable attorneys' fees, are awardable to the respondent.
11. See, e.g., *Bahr Telecomms. Co. v. DiscoveryTel, Inc.*, 476 F. Supp. 2d 176, 184 (D. Conn. 2007) (federal court applying state law of attachment) and *Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, 647 S.E.2d 102, 105 (N.C. App. 2007) (granting preliminary injunction under the Revised Uniform Arbitration Act (RUAA)). States that have adopted this rule include Colorado, Florida, Minnesota and Washington.
12. See AAA Rule 38(b) and Article 6, ICDR Rules.
13. See section 8 of the RUAA.
14. Compare *Stone v. Theatrical Inv. Corp.*, No. 14 CIV. 6494 PAE, 2014 WL 6790262, at *12 (S.D.N.Y. Dec. 2, 2014), *reconsideration denied*, No. 14 CIV. 6494 PAE, 2015 WL 195848 (S.D.N.Y. Jan. 14, 2015) (arbitrator has the power to appoint receiver as part of a final award) with *Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. v. Lowenstein Sandler, P.C.*, 839 A.2d 52, 57-58 (N.J. Super. Ct. App. Div. 2003) and *Pursuit Capital Management, LLC v. Claridge Associates, LLC*, No. 654301/12 (Sup. Ct. N.Y. Co. Mar. 21, 2013) (unpublished) (arbitrators may not appoint a receiver as a provisional remedy).
15. See, e.g., *CE Int'l Res. Holdings LLC v. S.A. Minerals Ltd. Pship*, No. 12 CIV. 8087 CM, 2012 WL 6178236, at *3-5 (S.D.N.Y. Dec. 10, 2012).
16. AAA Rule 37.
17. AAA Rule 38(e).
18. AAA Rule 38(f).
19. AAA Rule 38(h).
20. Article 24, ICDR Rules.
21. Article 24.4, ICDR Rules.
22. Article 6(2), ICDR Rules.
23. Article 6(4), ICDR Rules.
24. Article 6(5), ICDR Rules.
25. Article 24(3), ICDR Rules.
26. See *Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1025 (9th Cir. 1991).
27. See *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980).
28. See *Sperry Int'l Trade v. Gov't of Isr.*, 532 F. Supp. 901, 909 (S.D.N.Y. 1982), *aff'd*, 689 F.2d 301 (2d Cir. 1982) (confirming an arbitrator's order to place a disputed \$15 million letter of credit in escrow pending a decision on the merits, finding that the award would be rendered a meaningless exercise of the arbitrator's power if the order were not enforced); *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1059 (6th Cir. 1984) (upheld the confirmation of the award that preserved the status quo, reasoning that the injunction issued by the arbitral tribunal would be meaningless absent judicial confirmation of it) and *S. Seas Navigation Ltd. v. Petroleos Mexicanos*, 606 F. Supp. 692, 694 (S.D.N.Y. 1985) (holding that if "an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made").
29. 983 F. Supp. 2d 310 (S.D.N.Y. 2013).
30. No. 13-CV-7865, 2014 WL 4804466, at *3 (S.D.N.Y. Sept. 26, 2014).
31. *Zurich Am. Ins. Co. v. Trendsetter HR, LLC*, 2016 WL 4453694 (N.D. Ill. Aug. 24, 2016) (confirming interim award requiring insured to post security for insurance carrier's claims) and see also *Ecopetrol S.A. v. Offshore Exploration & Prod. LLC*, 46 F. Supp. 3d 327, 337 (S.D.N.Y. 2014) (enforcing interim awards requiring seller to tender certain amounts to purchaser with funds not derived from amounts in escrow).
32. No. 10CV2467 WQH NLS, 2011 WL 2135350 (S.D. Cal. May 27, 2011).
33. See *Draeger Safety Diagnostics, Inc. v. New Horizon Interlock, Inc.*, No. MC 11-50160, 2011 WL 653651, at *4 (E.D. Mich. Feb. 14, 2011).
34. See, e.g., *McCreary Tire*, 501 F.2d at 1037-38, see also *Bowers v. N. Two Cayes Co. Ltd.*, 2016 WL 3647339, at *3 (W.D.N.C. July 7, 2016) (confirming arbitrator's grant of injunctive relief ordering a percentage of the sale of certain real estate to be placed in an escrow account pending the outcome of the arbitration but denying confirmation of arbitrator's ruling that that the arbitration is binding on the parties).
35. See, e.g., *Next Step Med.*, 619 F.3d 67 at 70.
36. See, e.g., *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999).

Alternatives

TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute for Conflict Prevention & Resolution

VOL. 35 NO. 8 SEPTEMBER 2017

Neutrals

The Arbitration from Hell and How the New York Courts Got It Wrong

BY NORMAN SOLOVAY

This article follows-up on the author's reporting, which explained why the New York state's Appellate Division, First Department, was wrong in 2012 when it unanimously upheld a New York lower court's vacatur of an arbitrator's sanctions award against Jack J. Grynberg in *Matter of Jack J. Grynberg et al., Respondents, v. BP Exploration Operating Co. Ltd. et al., Appellants*, 92 A.D.3d 547, 938 N.Y.S.2d 439 (2012) (available at <http://bit.ly/2x7FXpj>).

The earlier work, a *New York Law Journal* article by this author, titled "Step Back in Time: Curtailing Arbitrators' Authority to Award Sanctions," *N.Y.L.J.* 7 (Aug. 6, 2012) (available with a subscription at <http://bit.ly/2v4U7Wn>), examined the vacatur of the arbitrator's award of sanctions against Grynberg, which is referred to in this article as the "Sanctions Issue."

This article will explain why the First Department was wrong again in 2015 when it unanimously affirmed a lower court's decision in the same case, but on a different issue, referred to in this article as the "Signature Bonus Issue." *Matter of Grynberg v. BP Exploration Operating Co. Ltd.*, 127 A.D.3d 553, 7 N.Y.S.2d 125 (2015).

The Sanctions Issue and the Signature Bonus Issue were only two of the 13 issues that were resolved in arbitrations that Grynberg commenced in 2002 against a subsidiary of BP Plc and Statoil ASA pursuant to the terms

of two identical settlement agreements that Grynberg entered into with each of those companies in 1999.

Until recently, the court records in the 2015 New York case were not publicly available because they were filed under seal by the New York courts. But as a result of a Sept. 8, 2016, decision of the U.S. District Court for the District of Columbia (referred to above and throughout the article as the "DC Case"), all of the relevant documents that were filed under seal are now publicly available on Pacer as Exhibits in the DC Case (DC Court Index No. 1:08-cv-00301), fully captioned *Jack J. Grynberg, et al. v. BP P.L.C., et al.*, Civil Action No. 08-301 (JDB), 205 F.Supp.3d 1 (2016).

Thus, the whole story of this case, which Grynberg characterized in his Declaration in the DC Case as "The 13-Year Arbitration from Hell," can now be told.

The key player in this marathon arbitration was, and still is, Jack J. Grynberg, a Denver-based geologist and professional engineer who amassed a multimillion dollar fortune in the oil and gas business. Grynberg, who speaks Russian fluently, developed a relationship with Kazakh President Nursultan Nazarbayev when he hosted him on a U.S. tour.

Grynberg then brokered an agreement

(continued on page 117)

NEUTRALS	113
ADR BRIEF	114
INDUSTRY PRACTICE	115
THE MASTER MEDIATOR	123



The author, a Columbia Law School graduate, where he was an editor of the *Law Review*, and thereafter a law secretary to New York State Court of Appeals Chief Judge Charles D. Breitel when Breitel sat in the Appellate Division, describes himself as a "reformed litigator." Now the principal shareholder of the Solovay Practice in New York, he is the author of books and articles advocating increasing and improved use of alternative dispute resolution practices to replace and avoid the long drawn-out trials in which he used to be involved.

Neutrals

(continued from front page)

between the Republic of Kazakhstan and a consortium of seven international oil and gas companies, one of which was BP. Under the agreement, the consortium obtained valuable rights to develop oil and gas reserves in the Kashagan Field in the Caspian Sea area of Kazakhstan.

Pursuant to the agreement with the Kazakh government, BP, as well as the other consortium members, was required to make payments to the Kazakhstan government in the

nature of an up-front license fee, referred to as "Signature bonuses," in connection with obtaining those development rights.

In 1993, Grynberg filed suit against BP in New York's Southern District federal court claiming that BP breached a 1990 agreement to pay him a carried interest in the profits it would earn as a consortium member.

That suit was settled in 1996 in a mediation in which Stephen A. Hochman, a well-known and highly regarded New York-based arbitrator/mediator, served as the court-appointed mediator.

The settlement's substantive terms were set forth in a two-page handwritten preliminary

settlement agreement, the "PSA." The PSA provided that the parties would embody those substantive terms in a definitive settlement agreement that was to be based on a similar settlement agreement that Grynberg previously entered into with another member of the consortium.

At the request of both parties, Hochman agreed to serve as the sole arbitrator to resolve any and all disputes that may arise under the PSA or the definitive Settlement Agreement pursuant to the following provision in the PSA:

Any dispute hereunder or as to the terms

(continued on next page)

Neutrals

(continued from previous page)

of the definitive settlement agreement shall be resolved in accordance with N.Y. law by binding arbitration in NYC before Stephen A. Hochman in accordance with the commercial arbitration rules of the American Arbitration Association. [2013 New Award, p. 4 [see citation below]; DC Case, Exhibit 7.]

In January 1999, after lengthy negotiations, the parties reached agreement on the terms of a definitive settlement agreement. Because Statoil was the beneficial owner of one-third of BP's one-seventh interest in the consortium—i.e., 14.28%—there were two identical settlement agreements involving Grynberg: one with BP relating to its two-thirds share of its total one-seventh interest in the consortium, and the other with Statoil relating to its one-third interest. Thus, BP owned a 9.52% interest in the consortium, and Statoil owned a 4.76% interest.

The Signature Bonus Issue arose because the settlement agreements provided that Grynberg was entitled to a 15% carried interest in the net profits that each of BP and Statoil earned from being consortium members.

The settlement agreements also provided that BP's and Statoil's net profits were to be determined by an independent auditor. The independent auditor confirmed that the Signature Bonuses were paid via a wire transfer from BP's bank account and thus treated them as an expense in the computation of BP's net profits.

Grynberg, however, argued to the auditor that the Signature Bonus payments should not be treated as costs in calculating his 15% share of BP's net profits—even if those payments represented actual costs that reduced BP's profits—because the wire transfer payments were made to an intermediary and then remitted to Kazakh government officials instead of the Kazakhstan government, thus constituting bribes that violated the U.S. Foreign Corrupt Practices Act.

After the auditor rejected Grynberg's claim, he made the same argument to Arbitrator Hochman, who also rejected it, stating in what was denominated his Final Decision and Award (the "2010 Original Award") that:

If it were not for those Signature Bonus payments (whether they were legal or illegal), BP, as well as Statoil and the other members of the Consortium, may not have had the opportunity to earn the profits they derived from their participation in the Consortium. Because 15% of BP's profits, as well as 15% of Statoil's profits, inured to the benefit of Claimants (a total of over \$40,000,000), Claimants would not have suffered any damages even if the Signature Bonus payments could be proven to have been illegal bribes.

Simply put, Claimants' request for an evidentiary hearing on the bribery issue was

No End in Sight

The case: A 1993 suit. A 1996 mediation settlement that included arbitration. An arbitration starting in 1999. Into the courts in 2010.

The result: There is none. The arbitrator defied a court determination, a move that this article strongly backs. Then the arbitration award was overturned. The appealing party took the case to another federal circuit to avoid arbitration and have a court decide the issue.

The future: Will the players live long enough to see an outcome? At press time, no ADR proceedings were scheduled.

denied because the issue of whether the Signature Bonuses were or were not bribes is not a relevant issue. The relevant issue is whether the independent auditor was wrong to deduct them in his calculation of BP's Net Sales Proceeds. The auditor cannot decide the issue of whether the Signature Bonus payments violated the U. S. Foreign Corrupt Practices Act, but he can decide whether the payments should be

deducted in computing BP's Net Sales Proceeds, and he did decide that issue. [2010 Original Award, p. 19, DC Case, Exhibit 4.]

TRIAL COURT VACATES

New York state Supreme Court Justice Jane S. Solomon vacated Hochman's sanctions award against Grynberg in her 2010 decision. *Grynberg v. BP Exploration*, N.Y. Sup. Ct. slip opinion 116840-04 (Dec. 8, 2010); DC Case, Exhibit 5.

The ground for vacating the award by the Supreme Court, which is the New York trial-level court and the state's first judicial stop for confirming an arbitration award, was that arbitrators have no power to award sanctions under New York law—which, as indicated in the above-referenced *N.Y. Law Journal* article, ignored the applicable and controlling Federal Arbitration Act.

Justice Solomon, however, confirmed Hochman's award on the Signature Bonus Issue, stating:

Based on his determination that the sole relevant issue was whether BP paid the signature bonuses, he confirmed the auditor's findings without pursuing the avenue of inquiry that the petitioners wanted. This determination does not violate any public policy concerns. Similarly Hochman's denial of the evidentiary hearing and his discussion of the proper standard for burden of proof are irrelevant to his reliance on the fact that the payments were made. [Citation omitted.]

On Feb. 21, 2012, the New York Appellate Division's First Department overturned Solomon's confirmation of Hochman's award on the Signature Bonus Issue, stating:

The arbitrator's failure to determine the nature of the disputed payment warrants the vacatur. ... Petitioners claim that this payment constituted a bribe. Respondents assert it was a bona fide cost of doing business. We remand for the arbitrator to determine the nature of the payment. Contrary to the arbitrator's finding, deducting a payment intended to be a bribe to a public official is unenforceable as violative of public policy (see *Matter of New York State*

Correctional Officers & Police Benevolent Assn v. State of New York, 94 N.Y.2d 321, 326 (1999); *Matter of Crosstown Operating Corp. [8910 5th Ave. Rest.]*, 191 AD2d 384 (1993); Penal Law art 200).

In the Matter of Jack J. Grynberg, et al., Appellants-Respondents, v. BP Exploration Operating Co. Ltd., et al., Respondents-Appellants, 92 A.D.3d 547, 938, N.Y.S.2d 439 (2012); DC Case, Exhibit 6.

ARBITRATOR'S DILEMMA

The Appellate Division's remand of the Signature Bonus Issue to Arbitrator Hochman, ordering him to decide whether BP's Signature Bonus payment was a bribe, faced him with a dilemma because he believed—correctly—that the decision was wrong.

What some would consider the easy and safe choice for him would have been to follow the instructions of the First Department and hold evidentiary hearings on the bribery issue, even though he and the independent auditor previously determined it to be irrelevant in the context of computing BP's net profits.

But as the arbitrator noted in what was denominated his "Decision and Award after Remand" (the "2013 New Award"), that safe choice would have been inconsistent with his ethical duties as set forth in Canon I.A of the Code of Ethics for Arbitrators in Commercial Disputes (available at <http://bit.ly/2vaYXBr>), which states:

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

Before issuing his 2013 New Award, Arbitrator Hochman sent the parties a draft in which he explained why he believed holding the hearings ordered by the First Department would be inconsistent with his ethical duties.

He noted in that New Award that he had received a list of the numerous non-parties whom Grynberg stated he would subpoena to testify and a list of the extensive documents that he would subpoena from those parties in

'In furtherance of my ethical responsibility to the process of arbitration, I must respectfully refuse to comply with the [New York state Appellate Division] First Department's Remand Order to determine the nature of the Signature Bonus payments.'

his attempt to prove his claim that the Signature Bonus payments were bribes.

Hochman also explained that holding such extensive hearings on the bribery issue would result in interminable delay and substantial cost and expense to the parties inconsistent with the goal of arbitration, which is for the arbitrator to decide all issues in accordance with applicable law but in a quicker, less costly, and more efficient process than litigation. *Id.*

After the parties received Hochman's draft of the 2013 New Award, BP and Statoil proposed a solution to his dilemma that would not be inconsistent with his ethical duties: namely, to summarily dismiss the Signature Bonus bribery claim because it was not plausible under the federal pleading standard announced by the U.S. Supreme Court in *Iqbal v. Ashcroft*, 556 U.S. 662 (2009). D.C. Case, Exhibit 10, p. 5.

They argued that the bribery claim was implausible because the FCPA criminal indictment of the intermediary who allegedly transmitted the Signature Bonus payments to the Kazakh government officials was dismissed.

But Hochman rejected that proposal since an award based on such a summary dismissal could risk being vacated because it would deprive Grynberg of the opportunity to prove his bribery claim, and thus might constitute a refusal to hear evidence pertinent and material to the controversy—a statutory ground for vacatur under Federal Arbitration Act Section 10.

Hochman could have resolved the arbitrator's dilemma by taking the easy way out by complying with the First Department's remand order. He would have been paid his hourly rate to hold extensive evidentiary hearings on the bribery issue, even though it is unlikely that Grynberg would be able to meet his burden of proof that the wire transfers from BP's bank account ultimately went to Kazakh government officials instead of the Kazakhstan government.

But Hochman, in rejecting that easy way out, explained in his 2013 New Award that:

In furtherance of my ethical responsibility to the process of arbitration, I must respectfully refuse to comply with the First Department's Remand Order to determine the nature of the Signature Bonus payments. That is because the remand was based on the Court's erroneous holding in reliance on one of New York's two non-statutory grounds for vacating an arbitral award rather than on the only non-statutory ground for vacating an arbitral award under the FAA, which is manifest disregard of the law, a much stricter standard than either of the New York standards.

GRYNBERG'S BELATED BIAS CLAIM

When the New York Appellate Division First Department overturned Justice Solomon's lower court opinion confirming Hochman's decision on the Signature Bonus Issue, Grynberg went back to the lower court and claimed, for the first time, that Hochman should be removed for bias.

Specifically, on March 12, 2012, soon after the appellate court issued its Feb. 21, 2012, decision ordering Hochman to hold evidentiary hearings on the bribery issue that he previously ruled in 2010 was irrelevant, Grynberg made a motion to the lower court to remove Hochman for bias.

Undoubtedly, Grynberg made this belated bias claim because he knew perfectly well that Hochman would, as a matter of principle, rule the same way on the Signature Bonus Issue after the First Department remanded that issue to him in 2012 as he did in his 2010 Original Award.

After his first belated attempt to remove Hochman for bias was denied, the ever-persistent Grynberg made many additional attempts, all of which also were unsuccessful.

(continued on next page)

Neutrals

(continued from previous page)

His fifth failed attempt was in a Dec. 11, 2012, appeal to the First Department. That court, however, held that “by failing to make any argument as to the arbitrator’s alleged partiality during the confirmation proceeding [in 2010 before Justice Solomon], petitioners waived that challenge.”

The First Department appeals court also noted that it found “petitioners’ contention that the arbitrator exhibited either actual bias or the appearance of bias [to be] without merit.”

Because Arbitrator Stephen Hochman made the same ruling on the Signature Bonus Issue in his 2013 New Award as he did in his 2010 Original Award, Grynberg went back to the lower court, this time before then-Supreme Court Justice Cynthia S. Kern with motions to vacate the 2013 New Award and remove Hochman as the arbitrator because he refused to follow the First Department’s remand order to hold hearings on the bribery issue.

Grynberg’s application included a motion that Hochman be replaced by a three-person AAA arbitration panel because the Settlement Agreements provided an AAA panel be substituted for Hochman if he is “unable or unwilling to serve.” DC Case, Exhibits 2 and 3, §10.04 of both Settlement Agreements.

KERN ON THE SIGNATURE BONUS

On April 2, 2014, Justice Kern—who in June was appointed to the appellate bench by New York Gov. Andrew Cuomo—granted Grynberg’s motions to vacate the 2013 New Award, remove Hochman as the decider of the Signature Bonus Issue and substitute a new three-person AAA arbitration panel to decide that issue. *Jack J. Grynberg, et al., v. BP Exploration Operating Co. Ltd. and Statoil, ASA*, N.Y. Sup. Ct. slip opinion 116840-04 (April 2, 2014); D.C. Case, Exhibit 8.

‘I believe my ethical duty to the arbitration process includes doing whatever I can to enhance the reputation of the New York courts for expertise in commercial matters and for making legally correct decisions on arbitration issues.’

That April 2014 decision related only to the Signature Bonus Issue in the arbitration that was the subject of the 2010 Original Award (referred to below as the “First Arbitration”), which related to the audit that determined BP’s net profits.

Because the audit by the independent auditor to determine Statoil’s net profits had not been completed when the 2010 Original Award was issued, the parties had agreed that any claims or issues that may arise relating to the Statoil audit would be resolved in a separate arbitration (the “Statoil Arbitration”).

Although the Statoil audit involved the same Signature Bonus Issue that the arbitrator decided in the First Arbitration, it also involved several other important issues relating to the computation of Statoil’s net profits.

Justice Kern explained that her decision to remove Hochman in the First Arbitration was not based on bias but rather on her conclusion that he exceeded his powers. The Kern opinion stated that “the arbitrator exceeded a specifically enumerated limitation on his powers when he issued the New Award ... [and] explicitly failed to follow the unambiguous directive of the First Department that he make a determination as to whether the signature bonus payment was a bribe.”

Although noting that it is “within a court’s discretion whether to remit an arbitration matter to the same or a different arbitrator,” Justice Kern based her decision to remit the Signature Bonus Issue to the AAA panel on the fact that Hochman made it clear in his 2013 New Award that, if she remitted the matter to him, he would comply with his ethical obligation to avoid the unnecessary costs, expenses and delay that would ensue if he were to follow the First Department’s direction to hold hearings on the bribery issue that he previously ruled was irrelevant.

ARBITRATOR REJECTS RECUSAL REQUEST

Soon after Justice Kern issued her April 2014 decision removing Hochman as the decider

of the Signature Bonus Issue in the First Arbitration, Grynberg requested that Hochman recuse himself as the arbitrator in the Statoil Arbitration, although it was well under way and close to a decision. In an April 21, 2014 email response to that request, Hochman gave the following reasons for refusing:

Although I have not finally ruled on any of the claims asserted in the Statoil Arbitration, I have devoted a substantial amount of time in considering the extensive briefs submitted by the parties and in drafting and sending the parties a tentative award on several of those claims. In your 9-page letter dated July 2, 2013, you summarized the voluminous exchanges of emails, letters and other documents and communications relating to the issues in the Statoil Arbitration, including some new issues that you had properly raised. That letter also pointed out that you had brought to my attention and convinced me that Statoil’s \$60,253 breach of contract claim was time barred under CPLR § 215, thus requiring Statoil to resort to an equitable estoppel argument in its attempt to collect its claim for arbitration fees against Claimants relating to the First Arbitration. It would be unfair to both parties if I were to shirk my responsibilities by requiring them to start over with a new panel of three arbitrators, especially after so much time and money has already been invested in this Statoil Arbitration. [D.C. Case, Exhibit 9, p. 1-2.]

THE ARBITRATOR FURTHER EXPLAINS ...

Then, four days later on April 25, 2014, Arbitrator Hochman sent a six-page email memorandum to all parties that, in addition to supplementing the reasons he believed Justice Kern’s April 2014 decision was wrong and that his 2013 New Award should be reinstated, explained why it would also be wrong for her to remove him in the Statoil Arbitration. D.C. Case, Exhibit 10.

After reminding the parties that he was not charging arbitration fees for the time he spent in researching and writing the “legal briefs” in his 2013 New Award and his subsequent emails to the parties, Hochman explained what he viewed as his ethical duties to the arbitration process:

I believe my ethical duty to the arbitration process includes doing whatever I can to enhance the reputation of the New York courts for expertise in commercial matters and for making legally correct decisions on arbitration issues. The email that I sent to all counsel on September 27, 2012 referring to the Solovay Article [*New York Law Journal*, supra] was motivated solely by my duty to the arbitration process and desire to increase the likelihood that the Court of Appeals will correct what I believe was the First Department's erroneous decision relating to the Sanctions Award.

My primary duty as an arbitrator is to correctly decide all claims presented to me, based on the applicable law (which includes the FAA to the extent applicable), and to do so as impartially and objectively as would an ideal judge who always made the right decision. As the Original Award made clear, I decided all of the 13 arbitration claims based solely on the applicable law even though the Arbitration Agreement incorporated the AAA's Rules that empowered me to grant remedies that exceeded the remedies that a court could grant. Because the Settlement Agreements did not provide for attorneys' fees to a prevailing party, I denied Respondents' motions for attorneys' fees (which aggregated approximately \$14 million) even though I had the authority to award them pursuant to the AAA Rules.

Although I did not award Respondents \$14 million in attorneys' fees, I awarded them a total of \$3 million in sanctions against Grynberg individually, who represented himself in the arbitration pro se, because it approximated the attorneys' fees incurred by Respondents in defending against Grynberg's claims that I found were not made in good faith. The fact that my decision on the legal fee issue was helpful to Claimants is as irrelevant as the fact that my advising the parties of the Solovay Article might be helpful to Respondents. As Justice Solomon noted, "Hochman had the discretionary power to award costs and attorneys' fees (Award, 24). He affirmatively elected to not use that power. ..."

The holdings should be reviewed by New York's top court. They signal that New York courts are hostile to arbitration and unwilling to enforce arbitration agreements in accordance with their terms.

Notwithstanding the fact that the AAA Rules incorporated in the Arbitration Agreement gave me the power to grant any remedy or relief that I deemed just and equitable, even if it exceeded the power that the law gives to judges, I did not exercise that power because I believe that most parties who agree to arbitration, including the parties to this arbitration, do not want arbitrators to disregard the law and decide issues based on their own subjective notions of justice and equity rather than on the objective and thus predictable standards of the applicable law that courts are required to follow. When the parties agreed to name me as their sole arbitrator of any and all future disputes, they evidenced their intention to have me make a final and binding decision based on the applicable law—i.e., their intent was to choose arbitration **instead** of litigation, not arbitration **and** litigation.

To increase the likelihood that I will decide all legal issues correctly, my practice is, and has been in this arbitration, to let the parties know which way I am leaning on an issue in order to give the party that I am leaning against an opportunity to convince me that my tentative position is not correct. Thus, before issuing a final award, I send the parties a draft of my proposed award to give them an opportunity to suggest corrections or argue against my tentative decision on any issue. Not only does that minimize the risk that I may make an incorrect ruling, it also saves the parties time and expense by focusing them on the issues that I consider relevant to my goal to make a legally correct decision. Also, in the interest of complying with the intentions and needs of the parties for an efficient arbitral process as well as legally correct decisions, I refuse to permit evidentiary hearings on irrelevant issues or depositions to hear testimony that could more efficiently be heard at a hearing.

In support of his duty to keep the arbitral process efficient, Hochman also explained his reluctance to order depositions in arbitrations after Grynberg, representing himself pro se, made numerous requests to take the depositions of various witnesses. In an email response to one of Grynberg's requests, copied to all parties, Hochman stated that:

depositions are not appropriate in arbitration except in unusual circumstances (e.g., where a witness may die before a hearing can be scheduled)..., [and] the proper forum to present evidence in arbitration is in an evidentiary hearing at which the arbitrator can keep the questioning focused on the relevant issues in an attempt to keep the arbitration process efficient. Depositions are not only duplicative of the evidence that can be obtained at a hearing, they can lead to costly discovery disputes and lengthy unfocused questioning (and sometimes even witness harassment) that is inconsistent with the goal that arbitration should be more efficient than litigation. [D.C. Case Exhibit 29.]

It is ironic that, but for Hochman's view of his ethical duties to the arbitration process, Grynberg could have been required to pay BP and Statoil a total of \$14 million in legal fees instead of only \$3 million in sanctions.

Thus, Hochman's decisions, which led to his removal as the arbitrator in that case, might well come under the heading of "No Good Deed Shall Go Unpunished."

STATOIL DECISION

After Hochman refused to recuse himself from the pending Statoil Arbitration, Grynberg moved to (1) reopen Justice Kern's April 2014 proceeding; (2) disqualify Hochman from any further Statoil Arbitration participation; (3) consolidate the Statoil Arbitration with the First Arbitration, and (4) discharge Hochman from participation as an arbitrator in any of the

(continued on next page)

Neutrals

(continued from previous page)
parties existing or future disputes.

On July 17, 2014, Justice Kern, in the trial court, granted Grynberg's motion to consolidate the pending Statoil Arbitration with the First Arbitration so that the same AAA arbitration panel that would decide the Signature Bonus Issue in that completed arbitration would also decide the same issue in the pending Statoil Arbitration.

Although the Signature Bonus Issue was only one of the many issues in the Statoil Arbitration, Justice Kern noted that it was the most significant dollar issue in that arbitration and that the Settlement Agreements did not contemplate "two separate arbitrations to be conducted before different arbitrators." Thus, there was no provision "which would allow Mr. Hochman to be the arbitrator on some issues but not on others." *Jack J. Grynberg, et al. v. BP Exploration Operating Co. Ltd. and Statoil*, ASA, N.Y. Sup. Ct. slip opinion 116840-04 (July 17, 2014); D.C. Case, Exhibit 11, p.7.

Despite the fact that Grynberg's motion was to remove Hochman as the arbitrator in all future as well as existing disputes, Kern granted this motion to discharge Hochman only from participation in the parties' existing disputes.

She refused to make any ruling "with respect to any future disputes between the parties which do not yet exist as such a ruling would constitute an advisory opinion which this court is not willing to render." *Id.*

KERN AFFIRMED

On April 16, 2015, the First Department unanimously affirmed Justice Kern's April 2014 and July 2014 decisions, because the arbitrator failed to follow the "clear directive" of the Court's 2012 order to determine whether the Signature Bonus payments were bribes.

Notwithstanding the fact that the Statoil Arbitration involved several significant issues in addition to the Signature Bonus Issue and was almost completed, the First Department confirmed Justice Kern's consolidation of the Statoil Arbitration with the First Arbitration. The appeals court noted that "Statoil did not meet its burden to show that consolidation would prejudice its substantial rights."

FIRST DEPARTMENT: WRONG AGAIN

Despite the fact that (1) arbitration is a creature of contract; (2) arbitrators have an ethical duty to the process of arbitration as well as to the parties, and (3) the Federal Arbitration Act preempts state arbitration law that permits an arbitrator's award to be vacated on a non-statutory ground other than manifest disregard of the law, the First Department's unanimous confirmation of Justice Kern's decisions on the Signature Bonus Issue assumed that the First Department had the power to do the following:

- a) Override the parties' arbitration agreement by limiting the broad powers that the parties gave their chosen arbitrator, including the power to exclude evidence on a factual issue that he determined was irrelevant to the issue in dispute, by ordering him to hold hearings on that irrelevant issue that would have resulted in additional and unnecessary delay and costs to the parties;
- b) Vacate the award of the arbitrator based on a non-statutory ground for vacatur that is available only where the dispute has no effect on interstate commerce (such as disputes under a collective bargaining agreement between a New York employer and a New York union); and
- c) Remove the parties' chosen arbitrator because he followed the parties' order to decide the dispute in accordance with applicable law instead of following the First Department's order which was based on New York arbitration law, which is inconsistent with and hostile to the FAA's pro-arbitration policy.

BP & STATOIL'S MOVE FOR LEAVE TO APPEAL

On Sept. 1, 2015, the Court of Appeals dismissed—but did not deny—the motions of BP and Statoil for leave to appeal the First Department's unanimous 2015 decision because, under the New York Constitution, the Court of Appeals—the state's highest court—does not have jurisdiction to grant leave to appeal until *all* issues between the parties have been finally decided.

Although it had been finally decided that an AAA panel will be substituted for Hoch-

man as the decider of all existing disputes, the Signature Bonus Issue—whether Grynberg is entitled to additional profit payments from BP and Statoil—will not be decided until the AAA panel decides that issue.

Irrespective of how the AAA panel decides the Signature Bonus Issue, once that issue is finally decided, then, and only then, will the Court of Appeals have jurisdiction to grant a motion by BP and/or Statoil for leave to appeal the First Department's decisions on both the Sanctions Issue and the Signature Bonus Issue, the only clearly existing issues between the parties.

But there are significant dollar amounts at stake in those two issues. As noted above, the arbitrator's award of sanctions against Grynberg in favor of BP and Statoil totaling \$3 million was reversed. Also, \$4,166,667 is at stake depending on the outcome of the Signature Bonus Issue (which is 15% of the \$27,777,778 in Signature Bonus payments made by BP on behalf of itself and Statoil), two-thirds of which (\$2,777,778) were treated as expenses of BP, and one-third of which (\$1,388,889) as expenses of Statoil.

GRYNBERG'S D.C. FOLLY

In Grynberg's Dec. 29, 2015, motion to the U.S. District Court for the District of Columbia, he argued in his declaration that the D.C. court should decide the Signature Bonus Issue instead of an AAA panel.

Grynberg asserted that the court should decide the case since he is the key fact witness who can prove that the Signature Bonus payments were bribes and, because he was then 84 years old, he might not live long enough to prove his bribery claim in the AAA arbitration.

On Sept. 8, 2016, the D.C. court issued a 22-page decision dismissing Grynberg's motion to reopen that Court's 2008 decision that the Signature Bonus Issue should be decided by the arbitrator. Although Grynberg moved to appeal the D.C. District Court's decision to the D.C. Circuit Court of Appeals, that appeal was dismissed on Jan. 30, 2017, based on a stipulation of all parties.

When and how will this story end?

It is now more than two years after Gryn-

berg made his motion to the D.C. court. Still, it is not yet known when the proceedings before the AAA arbitration panel will begin or what the outcome will be, assuming it follows Justice Kern's unanimously confirmed order that the AAA panel should decide all existing issues—presently the Sanctions Issue and the Signature Bonus Issue.

We can only guess how long that arbitration will take. And it would not be surprising if the losing party on those significant dollar issues moves to vacate the AAA panel's award in favor of the winner, in which case it may be a long time before both of those issues are finally decided—a condition that must be met before the Court of Appeals will have jurisdiction to grant or deny leave to appeal the unanimous and erroneous 2012 and 2015 decisions of the First Department, Appellate Division.

There is also the possibility that the parties may decide to settle their existing disputes, either prior to or during the AAA arbitration proceeding—in which case the New York Court of Appeals will never get an opportunity to correct the First Department's errors.

Those holdings should be reviewed by New York's top court. They signal that New York courts are hostile to arbitration and unwilling to enforce arbitration agreements in accordance with their terms.

This may be a wakeup call to amend the New York State Constitution to give the Court of Appeals jurisdiction to grant leave to appeal a final decision on any issue that has been finally decided by the appellate court even if there remains issues that have not yet been finally decided.

It is ironic that if the First Department had,

in its 2012 decision, unanimously confirmed—instead of having unanimously overturned Justice Solomon's 2010 decision confirming Hochman's decision on the Signature Bonus Issue in his 2010 Original Award that held the bribery issue was irrelevant—the Court of Appeals would have had jurisdiction to grant leave to appeal the First Department's erroneous 2012 unanimous decision confirming Justice Solomon's vacatur of Hochman's sanctions award. (See the author's *New York Law Journal* article cited in this article's second paragraph for a fuller explanation of why the First Department was wrong in 2012 when it unanimously upheld Justice Solomon's lower court vacatur of Hochman's sanctions award against Grynberg.)

Hopefully, Grynberg and all others having an interest in the outcome of this case will live long enough to see how this story ends. ■



**AWARDS OF INTEREST IN INTERNATIONAL COMMERCIAL
ARBITRATION:
NEW YORK LAW AND PRACTICE**

COMMITTEE ON INTERNATIONAL COMMERCIAL DISPUTES

June 21, 2017

Interest on damages awarded by an arbitral tribunal can be a significant component of a prevailing party's total recovery in international commercial arbitration. Uncertainty exists, however, with respect to the criteria that international arbitrators should apply in determining pre-award and post-award interest. One question that arises in domestic and international arbitrations governed by New York substantive law and seated in New York is whether the prejudgment interest provisions contained in Sections 5001, 5002 and 5004 of the New York Civil Practice Law and Rules ("N.Y.C.P.L.R." or "C.P.L.R.") apply to the determination of pre-award or post-award interest. The answer to the question whether arbitrators are obligated to (or should) apply New York's nine percent statutory prejudgment interest rate can have a substantial economic impact on the parties in an arbitration.

Part I of this report sets forth an executive summary.

Part II provides a discussion of the standards applicable to interest determinations in international commercial arbitrations, with a focus on arbitrations that are both governed by New York substantive law and seated in New York.¹

Appendix A sets forth summaries of pre-award and post-award interest determinations of arbitral tribunals in approximately 45 international commercial arbitrations governed by New York substantive law.

Appendix B sets forth summaries of New York federal and state court decisions reviewing arbitral awards of interest in post-award proceedings brought under Chapter 1 of the Federal Arbitration Act, 9 U.S.C. §§ 1–16; the United Nations Convention on the Recognition

¹ This report proposes a step-by-step approach that international arbitrators may apply to the determination of interest in international commercial arbitrations generally, and not merely in international commercial arbitrations governed by New York substantive law and seated in New York. This report does not address, however, the choice of law issues that may arise when the arbitral law of the seat of arbitration may conflict on the question of interest with the substantive law governing the dispute because no such conflict exists between New York arbitral law and New York substantive law. The report addresses the law of the seat of arbitration principally as a factor that arbitrators may wish to consider as one indication of party intent.

and Enforcement of Foreign Arbitral Awards, enacted as Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201–208 (the “New York Convention”); or New York State’s arbitration statute, C.P.L.R. Article 75.

I. Executive Summary

International arbitrators have discretion to apply or not to apply New York’s statutory prejudgment interest provisions to the determination of pre-award and post-award interest in an international commercial arbitration governed by New York substantive law and seated in New York, in the Committee’s view, for several reasons. First, the text of C.P.L.R. Sections 5001 and 5002 contains numerous terms (including references to “the court’s discretion,” “the cause of action,” “the jury,” and “the clerk of the court”) indicating that these sections are intended to apply only to court proceedings, not arbitration. Second, the legislative history of C.P.L.R. Section 5004, which sets the prejudgment interest rate applicable under Sections 5001 and 5002, indicates that the New York State Legislature (the “NY Legislature”) adopted a fixed rate of nine percent in part in consideration of factors that are not directly related to the compensatory purpose of an award of interest and that arbitrators may or may not deem relevant to the award of interest in international arbitration. In particular, the NY Legislature’s adoption of a fixed rate in 1972 reflected its desire to simplify the calculation of interest by the courts; in 1981, after market rates of interest had risen into the high teens, the NY Legislature increased the fixed rate from six to nine percent in part to discourage defendants from using delay tactics in court proceedings. Third, although New York’s highest court has not had occasion to address squarely the applicability, or not, of New York’s prejudgment interest provisions to international or domestic arbitration, the State’s Appellate Divisions have held that these provisions do not necessarily

apply to arbitrations and that an arbitral tribunal's decision on this question is not subject to review by the courts.²

New York courts acknowledge that, in the absence of express party agreement on the interest rate to be applied, arbitrators have discretion to determine interest based on a broad range of considerations. It may be appropriate for an arbitral tribunal to determine pre-award and post-award interest in accordance with New York's prejudgment interest provisions if, by way of example only: evidence exists that the parties intended for the statutory prejudgment interest rate to apply, or no case is made in favor of applying a different rate, or the choice of interest rate would not have a significant economic impact one way or another. Arbitrators also have discretion to take into consideration that, as already noted, the NY Legislature adopted a fixed rate in part for the administrative convenience of the courts. Moreover, arbitrators may choose to consider to what extent New York's nine percent rate differs from market rates prevailing during the pre-award period and/or economic factors specific to the parties such as their cost of funds. However arbitrators may choose to exercise their discretion to determine interest, in order to facilitate international enforcement the Committee recommends that the tribunal set forth clearly in its award the basis for its interest determination.

In the Committee's view, thoughtful consideration of two guiding principles common to New York law and to international arbitration – the freedom of contracting parties to agree on the terms of their relationship, and the compensatory purpose of interest – should guide arbitrators in prioritizing the many factors that they may consider in awarding interest in a particular case. Generally, the more clearly a factor reflects the intent of the parties, the higher the priority an arbitral tribunal should give to that factor. A focus on party intent generally leads

² See, e.g., *Penco Fabrics, Inc. v. Bogopulsky, Inc.*, 146 N.Y.S.2d 514, 515 (1st Dep't 1955); *Dermigny v. Harper*, 6 N.Y.S.3d 561, 562 (2d Dep't 2015); *Rothermel v. Fidelity & Guarantee Ins. Underwriters, Inc.*, 721 N.Y.S.2d 565, 566 (3d Dep't 2001).

to an examination of key factors in the following order: (a) contractual stipulations on interest rates to be applied to one or more aspects of the contract; (b) guidance that may be found in the arbitration rules chosen by the parties regarding the award of interest; (c) the substantive law governing the merits of the case; and (d) the arbitration law of the seat of the arbitration. An arbitral tribunal should consider these indicators of party intent in light of the underlying compensatory purpose of interest awards subject to narrow exceptions based on public policy.

An arbitral tribunal engaged in the reasonable exercise of its discretion may seek guidance in appellate court decisions that set forth guidelines for trial courts to follow in exercising their discretion to award prejudgment interest in federal question and admiralty cases. For example, the guidelines set forth by the federal Court of Appeals for the Seventh Circuit call upon the district courts to award prejudgment interest at the market rate, which may be either (a) the actual rate that the losing party must pay to borrow money or (b) the U.S. prime rate, which is a market-based estimate.³ Counsel may wish to alert arbitrators to this case law and/or to the various approaches that economists employ in calculating the amount of prejudgment (or pre-award) interest necessary to compensate the prevailing party for the loss of use of its money.

Summaries of arbitral awards set forth in Appendix A to this report suggest that uncertainty exists with respect to the criteria that international arbitrators should apply in determining pre-award and post-award interest. International arbitrators generally give effect to contractual stipulations on interest; however, arbitral practice varies with respect to the determination of interest in the absence of such stipulations. Arbitrators in a significant minority of the surveyed awards expressly determined that New York's nine percent prejudgment interest

³ *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331-35 (7th Cir. 1992).

provisions do not apply to the determination of interest in international arbitration.⁴ A majority of the awards surveyed awarded interest, typically with little or no analysis, in accordance with New York's prejudgment interest provisions.⁵ The Committee hopes that this report will serve to enhance consistency and predictability in the analysis underpinning the award of interest in international arbitrations governed by New York substantive law.

II. Standards Governing the Award of Interest by International Arbitrators

Generally, interest on amounts awarded in arbitration may accrue during three periods: (a) the period from the date the prevailing party's claim arose to the date of the award (pre-award interest); (b) the period from the date of the award to the date of entry of judgment enforcing the award (post-award, prejudgment interest); and (c) the period from the date of entry of judgment to the date of payment (post-judgment interest).

The confidentiality of the arbitral process presents an obstacle to the collection of reliable statistics. The summaries of awards set forth in Appendix A indicate, however, that commercial arbitrators grant pre-award interest to the prevailing party as a matter of course and sometimes grant post-award, prejudgment interest.

A. Pre-Award Interest

Recent commentaries on the award of interest in international arbitration illustrate the complexity of the subject and prompt this Committee to propose that, in international commercial arbitration governed by New York substantive law, arbitrators apply a step-by-step approach to their determination of pre-award interest.⁶

⁴ See Appendix A, rows 1 to 8.

⁵ See *id.*, rows 17 to 42.

⁶ See, e.g., GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3105 (2014) ("The interplay between differing national laws dealing with interest, as well as national characterizations of interest rules and national choice-of-law rules, can be metaphysical in their theoretical complexity."); Thierry J. Senechal & John Y. Gotanda, *Interest as Damages*, 47 COLUMBIA J. TRANSNAT'L L. 491 (2009); Andrea Giardina, *Issues of Applicable*

The standards that govern the pre-award interest determination in any given arbitration will depend on factors including (a) the terms of the parties' contract, (b) the applicable arbitration rules, (c) the law governing the merits, and/or (d) the applicable arbitration law. The Committee proposes that arbitrators prioritize these factors according to how clearly and directly each factor reflects the intent of the parties as to the principles that should govern in the event of an arbitrated dispute between them. The recommended order of priority acknowledges and gives effect to (a) the contracting parties' broad autonomy, under the law of international commercial arbitration applicable in New York, to agree on the law and procedures that apply to their dispute, and (b) the emphasis in the New York law of contract interpretation on construing agreements in accordance with the parties' intent as expressed in the language of their agreement.⁷

Each step in the Committee's suggested methodology is explained *seriatim* below. The last subsection (subsection II.A.5) provides general guidelines that arbitrators may decide to follow in exercising the discretion that they will often possess with respect to the determination of pre-award interest in arbitrations governed by New York substantive law.

Law and Uniform Law on Interest: Basic Distinctions in National and International Practice, in INTEREST, AUXILIARY AND ALTERNATIVE REMEDIES IN INTERNATIONAL ARBITRATION 129 (Filip de Ly & Laurent Lévy eds., 2008); Matthew Secomb, *A Uniform, Three-step Approach to Interest Rates in International Arbitration*, in INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION 431 (Stefan M. Kröll et al. eds., 2011). See also J. Martin Hunter & Volker Triebel, *Awarding Interest in International Arbitration: Some Observations Based on a Comparative Study of the Laws of England and Germany*, 6(1) J. INT'L ARB. 7 (1989); David J. Branson & Richard E. Wallace, *Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach*, 28 VA. J. INT'L L. 919 (1988); J. Gillis Wetter, *Interest as an element of damages in the arbitral process*, 5 INT'L FIN. L. REV. 20 (1986).

⁷ See, e.g., BORN, *supra* note 6 at 102 (noting the New York Convention's "emphatic recognition of the predominant role of party autonomy in the arbitral process"); *Sec. Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 325 (2d Cir. 2004) (Federal Arbitration Act "requires arbitration proceed *in the manner provided for in the parties' agreement*") (internal quotation marks, alteration and citation omitted; emphasis in original); *Greenfield v. Phillis Records, Inc.*, 98 N.Y.2d 562, 569 (2002) ("The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent.") (citation omitted); *Slatt v. Slatt*, 64 N.Y.2d 966, 967 (1985) ("In adjudicating the rights of parties to a contract, courts . . . are required to discern the intent of the parties[.]").

1. Contractual Stipulations on Interest

The first step in the Committee’s suggested methodology is for arbitrators to determine whether the parties’ contract establishes how interest is to be assessed in the arbitration. Subject to limited exceptions discussed below, contractual stipulations governing the assessment of interest on the damages awarded by a court or tribunal are valid and enforceable under the laws of most jurisdictions (including New York).⁸

Contracts occasionally include a clause that specifically sets the rate of interest on damages or on a particular category of damages.⁹ If the contract contains such a clause, and if the clause applies to the damages awarded, it is appropriate for arbitrators to determine pre-award interest in accordance with it, subject to the considerations discussed below. More often, the parties’ contract will contain a “late payment” clause or other similar type of clause stipulating how interest is to be assessed on amounts past due under the contract.¹⁰ Such a clause typically addresses such matters as when interest begins to accrue on an amount due, the rate at which it accrues, whether the interest is simple or compound, and, if it is compound, the compounding period.

In the Committee’s view, generally it is appropriate for arbitrators to apply a late payment or other similar clause if the losing party’s breach consists of a failure to make or delay

⁸ See, e.g., *NML Capital v. Republic of Argentina*, 17 N.Y.3d 250, 258 (2011) (*NML I*) (“When a claim is predicated on a breach of contract, the applicable rate of prejudgment interest varies depending on the nature and terms of the contract.”); 10 JACK B. WEINSTEIN, HAROLD L. KORN & ARTHUR R. MILLER, *NEW YORK CIVIL PRACTICE* ¶ 5004.01a, at 50-79 (2016) (“The parties may establish, by contract, the rate of interest to be paid until entry of judgment[.]”); English Arbitration Act 1996, § 49(1) (“The parties are free to agree on the powers of the tribunal as regards the award of interest.”).

⁹ Following is an example of a clause addressing the assessment of interest on a particular category of damages: “[Any amount of unpaid Seller Damages] that is ultimately determined to have been due on any Damages Due Date shall bear interest at the Default Rate . . . from such Damages Due Date until the date of payment.”

¹⁰ Following is an example of a late payment clause: “Unless otherwise specified, all sums due under the Contract shall be paid within forty five (45) days from the date on which the obligation to pay was incurred. All sums due by one Party to the other under the Contract shall, for each day such sums are overdue, bear interest compounded daily at the applicable LIBOR plus two (2) percentage points.”

in making a required payment under the contract. Arbitrators should exercise caution, however, in deciding whether to grant pre-award interest in accordance with a late payment clause on damages awarded for breaches of contract not involving non-payment or late payment.¹¹ If an arbitral tribunal decides that an interest rate in a late payment clause is not relevant to the determination of pre-award interest on damages awarded for other kinds of breaches, the arbitrators should proceed to the next step in the methodology suggested herein.

In certain limited circumstances, arbitrators may decline to award interest in accordance with a contractual stipulation. For example, if a contractual stipulation on interest is invalid under the usury law of the jurisdiction whose law governs the parties' contract, arbitrators should decline to enforce the stipulation and consider other methods of calculating interest.¹² Usury laws may be subject, however, to exceptions rendering them inapplicable to pre-award and post-award interest. For example, New York's civil usury law, which prohibits charging more than sixteen percent interest per year, does not preclude applying a contractually stipulated rate to pre-award and post-award interest in a commercial dispute because the usury law does not apply to interest on defaulted obligations.¹³

¹¹ See, e.g., *Allenby, LLC v. Credit Suisse AG*, 25 N.Y.S.3d 1, 6 (1st Dep't 2015) (contractual stipulation on interest applied only to delayed settlement, not damages awarded by court for breach of contract); *Ross v. Ross Metals Corp.*, 976 N.Y.S.2d 485, 487-88 (2d Dep't 2013) (contractual stipulation on interest was basis for calculating monthly payments due under contract, but did not apply to damages awarded by court for defendant's breach of its obligation to make such payments); *NML I*, 17 N.Y.3d at 261-62 (clause in bond documents providing that interest would accrue at specified rate "until the principal is paid" applied to damages awarded by court for Argentina's breach of its obligation to make bi-annual interest payments to bondholders). In drafting a late payment or other similar clause, contract drafters may wish to make clear whether the clause is intended to apply to the determination of interest on the damages awarded for a contractual breach not consisting of a failure to make a required payment or of a delay in making a required payment.

¹² The validity of a contractual stipulation on interest is generally determined by the law governing the parties' contract. See Restatement (Second) Conflict of Laws § 207 cmt. e (1971) ("[The law governing the parties' contract] determines the validity of an express contractual provision for the payment of a stipulated rate of interest."); DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS (15th ed.) § 7-089 ("[W]hether an express undertaking to pay interest is lawful or whether it is made invalid wholly or partly by legislation referring to usury or money-lending depends on whether that legislation forms part of the law applicable to the contract.").

¹³ See, e.g., *Bloom v. Trepma Constr. Corp.*, 289 N.Y.S.2d 447, 448 (2d Dep't 1968), *aff'd*, 23 N.Y.2d 730 (1968) (provision in note fixing interest due after default at rate in excess of statutory maximum was valid and

In addition, the public policy of some countries may prohibit the charging of any interest or the charging of interest at a high rate.¹⁴ If an arbitration is seated in such a country, or if enforcement is likely to be sought in such a country, the tribunal may decline to give effect to an otherwise valid contractual stipulation on interest in order to minimize the risk that its award will be vacated (annulled) by a court of the seat or denied enforcement in other courts on public policy grounds.¹⁵ Alternatively, arbitrators may issue a partial award granting the principal amount of damages and a separate partial award granting interest as a possible device to insulate the former award from vacatur at the seat or a refusal to enforce on public policy grounds.¹⁶

2. Arbitration Rules

The second step in the Committee’s suggested methodology, to be followed if the parties’ contract does not contain a provision governing the assessment of interest on damages awarded,

enforceable); *Manfra, Tordella & Brookes, Inc. v. Bunge*, 794 F.2d 61, 63 n.3 (2d Cir. 1986) (“the [New York] usury laws do not apply to defaulted obligations”). New York’s civil usury law also does not apply if the principal amount involved is greater than \$250,000, and it cannot be interposed as a defense by corporations or other business entities. See N.Y. Gen. Oblig. Law §§ 5-501(1), (2), (6)(a), 5-521 (McKinney 2016); N.Y. Banking Law § 14a-(1) (McKinney 2016). New York’s criminal usury law (which prohibits charging more than 25% interest per year) does not apply to defaulted obligations or if the principal amount involved is greater than \$2.5 million. See N.Y. Penal Law §§ 190.40, 190.42; N.Y. Gen. Oblig. Law § 5-501(6)(b); *Bristol Inv. Fund, Inc. v. Carnegie Int’l Corp.*, 310 F. Supp. 2d 556, 563-64 (S.D.N.Y. 2003).

¹⁴ For example, the public policy of some countries prohibits the charging of any interest on the ground that it violates Islamic law. See ABDUL HAMID EL-AHDAB & JALAL EL-AHDAB, *ARBITRATION WITH THE ARAB COUNTRIES* 632 (2011) (“contracts relating to interest . . . are considered to be against [Saudi Arabian] public policy”). New York’s public policy against usury is coterminous with its usury laws. Accordingly, the charging of interest at a high rate does not violate New York public policy unless it runs afoul of New York’s usury laws. See *NML Capital v. Republic of Argentina*, 621 F.3d 230, 238-39 (2d Cir. 2010) (*NML II*) (enforcement of 101% annual interest rate on notes issued by Argentina in principal amount of \$102 million did not violate New York public policy because New York’s civil and criminal usury laws do not apply where the principal amount involved exceeds \$250,000 and \$2.5 million, respectively).

¹⁵ Article 50(2) of Saudi Arabia’s Arbitration Law (promulgated on April 16, 2012) provides that “[t]he competent court shall, on its own initiative, annul an arbitral award if it includes anything contrary to the rules of Islamic law and the laws of the Kingdom.” See also, e.g., UNCITRAL Model Law on International Commercial Arbitration, Art. 34(2)(b)(ii) (court at seat of arbitration may set aside award if it finds that “the award is in conflict with the public policy of [the seat]”); New York Convention, Art. V(1)(e) (court in country where recognition and enforcement is sought may refuse recognition and enforcement if award “has been set aside . . . by a competent authority of the country in which . . . that award was made”).

¹⁶ Article V(2)(b) of the New York Convention provides that a court may refuse to recognize or enforce a foreign award if “recognition or enforcement of the award would be contrary to the public policy of [the] country [where recognition and enforcement is sought].”

is for arbitrators to look to the arbitration rules chosen by the parties for any provisions regarding the award of interest. The rules of several leading international arbitral institutions grant arbitrators discretion to award such interest as they consider appropriate.¹⁷ For example, Article 31(4) of the International Arbitration Rules (the “Rules”) of the American Arbitration Association’s International Centre for Dispute Resolution (the “ICDR”) (“ICDR Article 31(4)”) provides as follows: “[T]he tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law(s).” By contrast, the UNCITRAL Arbitration Rules and the rules of several other leading institutions, including the ICC, Hong Kong International Arbitration Centre (the “HKIAC”) and Swiss Chambers, are silent with respect to the award of interest.

In view of the frequent use of the ICDR Rules in international commercial arbitrations governed by New York substantive law, the requirement under ICDR Article 31(4) that the tribunal “tak[e] into consideration the contract and applicable law(s)” in exercising its discretion to award interest raises three noteworthy issues.¹⁸ First, arbitrators might well ponder the meaning of “taking into consideration the [parties’] contract.” In the Committee’s view, if the contract contains a clause that specifically addresses the assessment of interest on the amounts

¹⁷ See ICDR International Arbitration Rules, Art. 31(4) (quoted in text); LCIA Arbitration Rules, Art. 26.4 (“Unless the parties have agreed otherwise, the Arbitral Tribunal may order that simple or compound interest shall be paid by any party on any sum awarded at such rates as the Arbitral Tribunal decides to be appropriate (without being bound by rates of interest practised by any state court or other legal authority) in respect of any period which the Arbitral Tribunal decides to be appropriate ending not later than the date upon which the award is complied with.”); SIAC Arbitration Rules, Rule 32.9 (“The Tribunal may award simple or compound interest on any sum which is the subject of the arbitration at such rates as the parties may have agreed or, in the absence of such agreement, as the Tribunal determines to be appropriate, in respect of any period which the Tribunal determines to be appropriate.”); WIPO Arbitration Rules, Art. 62(b) (“The Tribunal may award simple or compound interest to be paid by a party on any sum awarded against that party. It shall be free to determine the interest at such rates as it considers to be appropriate, without being bound by legal rates of interest, and shall be free to determine the period for which the interest shall be paid.”); JAMS International Arbitration Rules, Art. 35.7 (same as Article 31(4) of ICDR Rules); DIFC-LCIA Arbitration Rules, Art. 26.4 (same as Article 26.4 of LCIA Rules).

¹⁸ This language is repeated in the September 2016 revisions to the JAMS International Arbitration Rules. See JAMS International Arbitration Rules, Art. 35.7.

awarded, respect for party autonomy typically would suggest that arbitrators determine interest in accordance with that clause rather than exercise their discretion under ICDR Article 31(4), at least in part because “specific terms [of a contract] . . . are given greater weight than general language.”¹⁹ The reference to “taking into consideration” the parties’ contract in ICDR Article 31(4) appears to acknowledge that an arbitral tribunal has discretion to consider whether to determine interest in accordance with a contractual stipulation on interest, such as a late payment clause, that does not strictly apply, by its terms, to damages awarded for reasons other than late payment.²⁰

Second, arbitrators may wish to consider what laws are included within the term “applicable law(s)” in ICDR Article 31(4). In the Committee’s view, the term includes the substantive law(s) governing the parties’ contract.²¹ The Committee considers that the term “applicable laws(s)” may be understood also to include the arbitration law of the arbitral seat when it addresses an arbitral tribunal’s remedial powers.²² In addition, arbitrators exercising discretion under ICDR Article 31(4) may take into consideration the public policies of the arbitral seat and of any jurisdiction where the award is likely to be enforced, even though such

¹⁹ RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (1981). *See generally County of Suffolk v. Long Island Lighting Co.*, 266 F.3d 131, 139 (2d Cir. 2001) (“It is axiomatic that courts construing contracts must give specific terms and exact terms greater weight than general language.”) (internal quotation marks, ellipsis and citations omitted).

²⁰ *See, e.g.*, ICC Award No. 7622, ICC International Court of Arbitration Bulletin 15(1) (2004), at 79 (applying contract rate even though it did not apply to damages awarded); ICC Award No. 6219, ICC International Court of Arbitration Bulletin 3(1) (1992), at 22 (same). *See also* Secomb, *supra* note 6, at 432.

²¹ Paragraph (1) of Article 31 provides in pertinent part that “[t]he arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute.” Prior to the 2014 revisions to the ICDR Rules, the predecessor article to ICDR Article 31(4) required that the tribunal take into consideration the contract and “applicable law” (singular). *See* ICDR International Arbitration Rules (as amended and effective June 1, 2009), Art. 28(4). No commentary on the 2014 revisions to the Rules addresses the change from the singular to the optional plural in the interest provision.

²² *See* subsection II.A.4 below.

public policies might not be viewed as falling within the ordinary meaning of “applicable law(s).”

Third, when “taking into consideration the . . . applicable law(s)” in accordance with ICDR Article 31(4), arbitrators may wish to consider what effect they should give to the law governing the parties’ contract.²³ As discussed in subsection II.A.3 below, many jurisdictions have enacted statutory provisions specifying how interest shall be assessed on the damages component of court judgments. Arbitrators exercising their discretion under ICDR Article 31(4) may deliberate on the meaning of “taking into consideration” such statutory provisions. The question takes on practical significance when the statutory provisions call for the application to court judgments of a rate of interest that materially overcompensates or undercompensates the prevailing party in light of prevailing market rates of interest or the prevailing party’s actual cost of funds.²⁴

In the Committee’s view, ICDR Article 31(4) allows an arbitral tribunal, in the exercise of its discretion, to determine pre-award and post-award interest wholly or partially in accordance with the statutory prejudgment interest provisions applicable to court judgments

²³ The same question could be asked with respect to the arbitration law of the seat. As discussed in subsection II.A.4 below, however, all of the arbitration laws surveyed that address the awarding of interest either (a) grant the tribunal discretion to award such interest as it considers appropriate or (b) provide that the tribunal may award interest, without addressing the standard that the tribunal should apply in making such an award. Accordingly, no conflict generally will arise between the standard for awarding interest under Article 31(4) of the ICDR Rules and the standard for awarding interest under the arbitration law of the seat.

²⁴ New York’s statutory prejudgment interest rate of nine percent, enacted by the NY Legislature when market rates were even higher, exceeds market rates of interest generally prevailing in the United States at the time of this report. By contrast, the statutory interest rates of some other jurisdictions may be set below commercially available rates. For example, the French Civil Code allows for the award of simple interest at the “legal rate,” which is fixed by the French Minister of Economy every six months based on the European Central Bank’s benchmark rate and commercial lending rates in France. See CODE CIVIL [C. CIV.] art. 1231-7 (Fr.); Decree No. 2014-947 of August 20, 2014 Relating to the Legal Rate of Interest (amending Article L. 313-2 of the Monetary and Financial Code). As of June 2017, the French legal rate was only 0.90% per year. Some jurisdictions have adopted a statutory prejudgment interest rate that continuously floats by reference to a benchmark rate. For example, the Delaware Code provides for a “legal rate” of five percent over the Federal Reserve discount rate. See DEL. CODE ANN. tit. 6, § 2301(a). The Delaware courts generally award prejudgment interest at the legal rate defined by Section 2301(a). See, e.g., *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 226 (Del. 2005) (“the legal rate [defined by Section 2301(a)] has historically been considered as the ‘benchmark’ for prejudgment interest”).

under the law governing the parties' contract. For example, if interest only begins to accrue under that law from the date of a formal demand for payment, arbitrators would have discretion to award interest from that date; at the same time, they could determine the interest rate based on commercial considerations and without regard for any statutory prejudgment interest rate under the applicable law.

An arbitral tribunal would also have discretion, in the Committee's view, to award interest under ICDR Article 31(4) based exclusively on commercial considerations and without any regard for statutory interest provisions applicable to court judgments under the law governing the parties' contract.²⁵ In the Committee's view, an award of interest based exclusively on commercial considerations would be in accord with party expectations that reasonably arise (subject to specific evidence to the contrary) from ICDR Article 31(4)'s grant of discretion to the tribunal to award such interest "as it considers appropriate."

3. Law Governing the Merits

Courts have held that the purpose of pre-award interest is to compensate the prevailing party for the loss of use of money that the prevailing party was entitled to receive from the date its claim arose until the date of the award.²⁶ Because pre-award interest is an element of

²⁵ Subsection II.A.5 below sets forth general guidelines that a tribunal may choose to follow in determining an appropriate interest rate, whether interest is simple or compound, and, if compound, the compounding period.

²⁶ See, e.g., *NML I*, 17 N.Y.3d at 266 ("[T]he function of prejudgment interest is to compensate the creditor for the loss of use of money the creditor was owed during a particular period of time.") (internal citations omitted); *Kassis v. Teachers' Ins. & Annuity Ass'n*, 786 N.Y.S.2d 473, 474 (1st Dep't 2004) ("The purpose of prejudgment interest is to compensate parties for the loss of the use of money they were entitled to receive, taking into account the time value of money.") (internal quotation marks and citation omitted).

complete compensation for the claim,²⁷ the Committee's view is that it should generally be determined in accordance with the same law that governs liability and damages.²⁸

This choice-of-law approach accords with New York's choice-of-law rules.²⁹ It also accords with Comment (e) to Section 207 of the Restatement (Second) of Conflict of Laws, which provides that the law governing the parties' contract "determines whether plaintiff can

²⁷ See, e.g., *West Virginia v. United States*, 479 U.S. 305, 310 (1987) ("Prejudgment interest is an element of complete compensation."). In the international context, see 2010 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS ("UNIDROIT PRINCIPLES") Art. 7.4.2(1) ("The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance.").

²⁸ Most international arbitration rules grant arbitrators discretion to apply the law or rules of law they determine to be appropriate, in the absence of party agreement as to the applicable law. See, e.g., ICDR Arbitration Rules, Art. 31(1) ("Failing such an agreement by the parties [on the substantive law(s) or rules of law applicable to the dispute], the tribunal shall apply such law(s) or rules of law as it determines to be appropriate."); ICC Arbitration Rules, Art. 21(1) ("In the absence of any such agreement [on the rules of law applicable to the merits of the dispute], the arbitral tribunal shall apply the rules of law which it determines to be appropriate."). International arbitrators reasonably may conclude that a generic choice-of-law clause specifying the law governing the parties' contract does not encompass an agreement that that law shall govern the determination of pre-award interest, given that interest is generally considered as incidental to the damages awarded on the main claim. Cf. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58-64 (1995) (interpreting generic choice-of-law clause referring to "the laws of the State of New York" as encompassing New York's substantive rights and obligations, but not its prohibition on the award of punitive damages by arbitrators). Nonetheless, as explained in this subsection, it would generally be appropriate for international arbitrators to determine pre-award interest in accordance with the law governing the parties' contract, because interest is an element of complete compensation for the main claim.

Gary Born distinguishes, for choice-of-law purposes, between an arbitral tribunal's authority to award interest and the standards governing the exercise of that authority. BORN, *supra* note 6 at 3103-06. According to Professor Born, "the better view appears to be that, absent contrary agreement, questions concerning the arbitrators' authority to award interest are better regarded as subject to the law of the arbitral seat" because "[i]t is that law which is generally regarded as having the closest connection to questions concerning the tribunal's powers." *Id.* at 3104. As discussed in subsection II.A.4.a below, both federal and New York arbitral law grant arbitrators broad remedial powers that include the power to award interest, absent party agreement to the contrary. Professor Born further suggests that international arbitrators should "apply the law of the currency in which any award is made to determine the substantive standards, including the applicable interest rates, for any award of interest," although he recognizes that "arbitrators have in practice generally looked to the substantive law governing the parties' underlying claims for standards regarding interest." *Id.* at 3105-06.

²⁹ See, e.g., *Schwimmer v. Allstate Ins. Co.*, 176 F.3d 648, 650 (2d Cir. 1999) ("Under New York choice of law rules, the law of the jurisdiction that determines liability governs the award of pre-judgment interest."); *Davenport v. Webb*, 11 N.Y.2d 392, 394-95 (1962) (prejudgment interest is substantive issue controlled by law governing merits); *Sirie v. Godfrey*, 196 A.D. 529, 539 (1st Dep't 1921) (entitlement to prejudgment interest was governed by French law, which was law governing parties' contract). The choice-of-law rules of some other jurisdictions may treat prejudgment interest as a procedural matter governed by the law of the forum. See BORN, *supra* note 6, at 3105.

recover interest, and, if so, the rate, upon damages awarded him for the period between the breach of contract and the rendition of judgment.”³⁰

a. New York Substantive Law Relating to the Award of Interest by International Arbitrators

If New York substantive law governs the merits of the parties’ dispute, international arbitrators should consider what standards, if any, that law imposes on the award of interest in international arbitration. One question that frequently arises in practice is whether New York’s prejudgment interest provisions contained in C.P.L.R. Sections 5001, 5002 and 5004 apply to the determination of interest in arbitration. For the reasons set forth in this subsection, it is the Committee’s view that international arbitrators (a) are not bound to apply these provisions and (b) have discretion under New York’s substantive common law to award such interest as they consider appropriate.

i. Inapplicability of New York’s Prejudgment Interest Provisions to International Arbitration

C.P.L.R. Sections 5001, 5002 and 5004 provide for mandatory prejudgment interest, at an annual rate of nine percent and on a simple-interest basis, upon any sum awarded by a New York State court for breach of contract.³¹ Although these provisions are found in the Civil Practice Law and Rules, state and federal courts have found them to be substantive for choice-of-law and *Erie* purposes.³² Whether these statutory prejudgment interest provisions apply in arbitration

³⁰ RESTATEMENT (SECOND) CONFLICT OF LAWS § 207 cmt. e (1971). *See also id.* § 171 cmt. c (law governing tort liability and damages “determines whether the plaintiff can recover interest and, if so, at what rate for a period prior to the rendition of judgment as part of the damages for a tort”).

³¹ N.Y.C.P.L.R. §§ 5001(a), 5002, 5004 (McKinney 2016); *Long Playing Sessions, Inc. v. Deluxe Labs., Inc.*, 514 N.Y.S.2d 737, 738 (1st Dep’t 1987) (court may award only simple interest under C.P.L.R. §§ 5001 and 5004).

³² *See, e.g., Davenport*, 11 N.Y.2d at 394-95 (prejudgment interest is substantive issue controlled by law governing merits); *Paine Webber Jackson & Curtis, Inc. v. Winters*, 579 A.2d 545, 551-53 (Conn. App. Ct. 1990) (N.Y.C.P.L.R. § 5001 is rule of substantive law to be applied by Connecticut courts if New York law governs merits); *Schwimmer*, 176 F.3d at 650 (prejudgment interest is substantive issue for *Erie* purposes). *See also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 207 cmt. e (1971); *id.* § 171 cmt. c. Under the *Erie* doctrine, a U.S. federal court hearing a claim brought under state law must apply state rules that the court considers “substantive”

does not turn, however, on whether they are characterized as substantive or procedural for purposes of determining their applicability in state or federal court.³³ Rather, the Committee considers the key question to be whether the provisions are directed to the determination of interest not only by a court, but also by arbitrators. As shown by the summaries of awards in Appendix A of this report, arbitrators have not always considered this question or answered it in a consistent manner.

In the Committee’s view, based upon the statutory language and New York case law, New York’s statutory prejudgment interest provisions are binding only in court proceedings and not in arbitration. Several sections of the C.P.L.R. support this conclusion. First, C.P.L.R. Section 101 provides that the Civil Practice Law and Rules “shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges.”³⁴ The inclusion of New York’s prejudgment interest provisions in a statute that governs civil proceedings in the courts of the state and before “all judges” indicates that the NY Legislature intended for the interest provisions to be applicable in court proceedings, not in arbitration. The C.P.L.R. does address certain limited aspects of arbitration in its Article 75, generally considered to be the first

under federal law, while applying federal rules that it considers “procedural” under federal law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). It is beyond the scope of this report to address whether courts outside the United States apply New York’s prejudgment interest provisions if New York substantive law governs the merits of the parties’ dispute.

³³ One reason courts have characterized statutory prejudgment interest provisions as substantive for choice-of-law and *Erie* purposes is to discourage forum shopping by plaintiffs, who otherwise might choose to sue in a particular court to take advantage of that forum’s statutory prejudgment interest rate. *See, e.g., Jarvis v. Johnson*, 668 F.2d 740, 745 (3d Cir. 1982) (“[I]f [Pennsylvania’s prejudgment interest statute] is not applied in the federal courts, an incentive for forum shopping in diversity actions may well result. We can readily foresee that many plaintiffs would sue in Pennsylvania state court to take advantage of [Pennsylvania’s prejudgment interest statute] and thus to recover considerable additional damages.”). This anti-forum-shopping rationale does not support the application of statutory prejudgment interest provisions in arbitration, however, because the parties to an arbitration agreement cannot shop for a forum after the agreement to arbitrate has been signed. And unlike the rules that govern court jurisdiction, the parties’ choice of a seat of arbitration in international arbitration frequently reflects a determination that the seat has *no* connection with the parties or the dispute. There is, therefore, little reason for an arbitral tribunal to reach the same result that a court at the seat would reach.

³⁴ N.Y.C.P.L.R. Section 105(d) defines “civil judicial proceeding” as “a prosecution, other than a criminal action, of an independent application to a court for relief.”

arbitration statute in the United States and a model used in the drafting of the Federal Arbitration Act.³⁵ Article 75 makes no reference, by cross-reference or otherwise, to the issue of interest awards in arbitration.

Second, New York's prejudgment interest provisions are part of C.P.L.R. Article 50, entitled "Judgments Generally." N.Y.C.P.L.R. Section 5011 defines "judgment" as "the determination of the rights of the parties in an action or special proceeding and may be either interlocutory or final." Arbitration does not qualify as an "action" or as a "special proceeding" under the N.Y.C.P.L.R.³⁶ The inclusion of the prejudgment interest provisions in an article relating to "judgments" is a further indication that the NY Legislature intended for the interest provisions to apply only to civil proceedings in New York State's courts.

Third, N.Y.C.P.L.R. Sections 5001 and 5002 contain numerous terms indicating that they are intended to apply only in court proceedings. Subdivision (a) of Section 5001 provides, in full, as follows:

Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

Subdivision (a) thus refers to "action[s]" both in its title and in its text. As already noted, arbitration does not qualify as an "action" under the C.P.L.R. The reference to the "court's discretion" to award interest in equitable actions further suggests that the NY Legislature, in its enactment of Section 5001, considered only court proceedings. So, too, do the references in subdivisions (b) and (c) of Section 5001 and in Section 5002 to "the cause of action," "the jury," "the court," "motion," "the clerk of the court" and "any action."

³⁵ See *Southland Corp. v. Keating*, 465 U.S. 1, 34 (1984).

³⁶ See, e.g., N.Y.C.P.L.R. §§ 103(b), 105(b), 304, 7502(a).

The legislative history of C.P.L.R. Section 5004, which fixes the prejudgment interest rate applicable under Sections 5001 and 5002 at nine percent, further supports the conclusion that these sections are intended to apply only in court proceedings, not in arbitration. The NY Legislature adopted the fixed nine percent rate in part for reasons not directly related to the compensatory purpose of an interest award and not necessarily relevant to the award of interest in international arbitration.

The highest court of the State of New York, the New York Court of Appeals (“NY Court of Appeals”) explained as follows:

Prior to 1972, CPLR 5004 provided that “[i]nterest shall be at the legal rate, except where otherwise prescribed by statute.” The “legal rate” was then based upon the variable rate of interest on the loan or forbearance of money as set by the Banking Board, or, if no rate had been prescribed by the Banking Board, the rate of 6% per annum (see, 1972 Report of NY Law Rev Commn, 1972 NY Legis Doc No. 65 [C], reprinted in 1972 McKinney’s Session Laws of NY, at 3226). However, in its review of the provision, the Law Revision Commission recommended that the rate be fixed at 6% based upon the following reasons: (1) 6% was the historical rate from 1879; (2) the interest rate for a loan or forbearance was not logically or necessarily related to the rate for judgments; (3) a fixed rate would facilitate the administrative act of entering judgments with interest “without possible controversy over different rates for different periods;” and (4) the power of the Banking Board to set such rates was due to expire later that year. Accordingly, in 1972, CPLR 5004 was amended to set a fixed interest rate on judgments at “six per centum per annum” (L 1972, ch 358).

However, in the years that followed, interest rates soared in an inflationary market. The 1981 Report of the Advisory Committee on Civil Practice noted reports where defendants had exploited the system by investing and accruing interest on funds which would otherwise have been used to pay judgment creditors (1981 McKinney’s Session Laws of NY, at 2658). Increased returns were facilitated through such delaying tactics as “the prosecution of unmeritorious appeals and eschewing reasonable settlements” (Mem of Assemblyman Goldstein, 1981 NY Legis Ann, at 148). Although arguments had been made “to reinstate the market rate under CPLR 5004” (1981 McKinney’s Session Laws of NY, at 2658; see also, Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 5004), the Advisory Committee then recommended increasing the fixed rate payable on judgments from 6 to 9%. The recommendation was enacted in 1981 (see, L 1981, ch 258) and the rate has remained unchanged since.

Rodriguez v. New York City Housing Authority, 91 N.Y.2d 76, 78-79 (1997). The NY Legislature thus appears to have adopted a fixed rate of six percent in 1972 based upon a complex set of public policy goals not all of which were directly related to determining an appropriate level of compensation in a particular case.³⁷ In 1981, after market rates had risen into the high teens, the NY Legislature increased the fixed rate from six percent to nine percent, in part, to discourage defendants from using delay tactics in court proceedings.³⁸

The NY Court of Appeals has not had occasion to address squarely the applicability, or not, of New York State's prejudgment interest provisions to international or domestic arbitration. It can reasonably be surmised that this is due, at least in part, to the very limited grounds available to challenge an arbitral award or to resist its enforcement. New York's courts have consistently rejected, however, applications to modify an award or to grant pre-award interest in circumstances where the award allegedly did not comply with New York's prejudgment interest provisions.

The leading case in this area is *Penco Fabrics, Inc. v. Bogopulsky, Inc.*, 146 N.Y.S.2d 514 (1st Dep't 1955), in which the Appellate Division, First Department, held that "[t]he right to interest involves questions of fact and law that are within the purview of the arbitrators." *Id.* at 515. The arbitral tribunal had awarded damages for breach of contract, but it had not granted any pre-award interest, even though Section 480 of the then Civil Practice Act, the predecessor to C.P.L.R. Section 5001, provided for mandatory prejudgment interest in breach of contract

³⁷ The six percent rate adopted in 1972 was close to the market rates in effect at the time. During 1972, the U.S. prime rate ranged from 4.50% to 6.00%. See http://www.fedprimerate.com/wall_street_journal_prime_rate_history.htm.

³⁸ During 1981, the U.S. prime rate ranged from 15.75% to 21.50%. See *id.*

actions.³⁹ The Appellate Division denied the award-creditor's request for pre-award interest, reasoning as follows:

The mere fact that the award was silent on the question did not mean that the arbitrators did not consider the question and did not operate to enable the court to allow such interest. Provisions of law applicable to judicial actions and proceedings do not necessarily apply to arbitrations. Parties who submit their controversies to arbitration forego those provisions and leave all questions of law and fact to the arbitrators.

Id. The Appellate Division characterized the grant of pre-award interest as a mixed question of law and fact for the tribunal to decide and held that a tribunal's decision on that question is not subject to review by the courts.⁴⁰

Three Appellate Division cases holding that a domestic arbitral tribunal's power to grant pre-award interest stems from its broad remedial powers under New York arbitral law (without any mention of C.P.L.R. Section 5001) support the conclusion that New York State's prejudgment interest provisions do not apply in arbitration.⁴¹ *Levin & Glasser, P.C. v. Kenmore Property, LLC*, 896 N.Y.S.2d 311 (1st Dep't 2010), is typical of these three cases. The award-creditor in *Levin & Glasser* requested that the court grant pre-award interest on the damages

³⁹ Section 480 of the then Civil Practice Act provided as follows:

In every action wherein any sum of money shall be awarded by verdict, report, or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum, whether theretofore liquidated or unliquidated, and shall be added to and be a part of the total sum awarded.

N.Y. Civil Practice Act § 480 (as amended in 1927).

⁴⁰ In subsequent cases, the Appellate Division has reaffirmed that “in a contract dispute brought before an arbitrator[,] the question of whether interest from the date of the breach of the contract should be allowed in an arbitration award is a mixed question of law and fact for the arbitrator to determine.” *Levin & Glasser, P.C. v. Kenmore Property, LLC*, 896 N.Y.S.2d 311, 312 (1st Dep't 2010) (internal quotation marks, alteration and citation omitted). See also, e.g., *Dermigny v. Harper*, 6 N.Y.S.3d 561, 562 (2d Dep't 2015) (“[B]ecause the arbitration award did not include a provision awarding the defendant [pre-award] interest, the court was without power to award [such] interest.”); *Rothermel v. Fidelity & Guarantee Ins. Underwriters, Inc.*, 721 N.Y.S.2d 565, 566 (3d Dep't 2001) (“the question as to whether pre-award interest is to be allowed is for the arbitrator to determine”); *Gruberg v. Cortell Group, Inc.*, 531 N.Y.S.2d 557, 558 (1st Dep't 1988).

⁴¹ See *Levin & Glasser, P.C. v. Kenmore Property, LLC*, 896 N.Y.S.2d 311 (1st Dep't 2010); *West Side Lofts, Ltd. v. Sentry Contracting, Inc.*, 751 N.Y.S.2d 475, 476 (1st Dep't 2002); *Rosenblum v. Aetna Cas. & Sur. Co.*, 439 N.Y.S.2d 482, 483 (3d Dep't 1981).

awarded by the tribunal, contending that the tribunal had lacked the authority to award interest under the arbitration rules of New York's Fee Dispute Resolution Program, which are silent on this issue. *Id.* at 312-13. The Appellate Division rejected this contention on the ground, *inter alia*, that a tribunal's "broad authority to resolve disputes" under New York arbitral law includes the power to award interest. *Id.* The fact that the court rested its decision on a tribunal's broad remedial powers under New York arbitral law rather than on C.P.L.R. Section 5001 suggests that the court did not consider Section 5001 in the context of arbitration.⁴²

Three New York federal district courts appear to have assumed, notwithstanding several reported Appellate Division decisions, that New York State's prejudgment interest provisions apply in domestic arbitration.⁴³ In each case, the award-creditor claimed that the tribunal had "manifestly disregarded" the law by failing to grant pre-award interest in accordance with C.P.L.R. Section 5001. The district courts rejected this argument in each of the three cases on grounds other than the non-applicability of C.P.L.R. Section 5001 in arbitration (a point that does not appear to have been argued).⁴⁴ In view of (a) the principle that, in order to establish manifest

⁴² See also *West Side Lofts*, 751 N.Y.S.2d at 476 (arbitrator did not exceed his powers by awarding interest; court did not refer to C.P.L.R. § 5001 but instead cited *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 308 (1984), which held that arbitrator "may do justice as he sees it"); *Rosenblum*, 439 N.Y.S.2d at 483 (arbitrators had power to rule on pre-award interest based on their broad power to fashion awards to achieve just results).

⁴³ See *Sayigh v. Pier 59 Studios, L.P.*, No. 11-CV-1453, 2015 U.S. Dist. LEXIS 27139, at *33-*36 (S.D.N.Y. Mar. 5, 2015); *Shamah v. Schweiger*, 21 F. Supp. 2d 208, 217 (E.D.N.Y. 1998); *Nicoletti v. E.F. Hutton & Co.*, 761 F. Supp. 312, 315 (S.D.N.Y. 1991).

⁴⁴ In *Sayigh*, the district court held that the tribunal had not manifestly disregarded the law because (1) the petitioner's claim arose under a human rights statute and (2) C.P.L.R. Section 5001(a) requires the award of interest only on sums awarded for breach of contract or interference with property. *Sayigh*, 2015 U.S. Dist. LEXIS 27139, at *35. In *Shamah*, the district court concluded that both arbitral tribunals and federal district courts exercising diversity jurisdiction have discretion to award interest at a rate lower than the applicable state statutory prejudgment interest rate, although it erroneously based that conclusion on a Second Circuit decision which held only that in the narrow circumstances of that particular case, the district court had not abused its discretion by using a rate lower than the applicable Vermont statutory prejudgment interest rate. See *Shamah*, 21 F. Supp. 2d at 217 (citing *Chandler v. Bombardier Capital, Inc.*, 44 F.3d 80, 84 (2d Cir. 1994)). In *Nicoletti*, the district court reasoned that "[a]lthough petitioner's claim sounded in contract, the arbitrators may have concluded that [his] entitlement was equitable rather than contractual, and that therefore interest was discretionary [under C.P.L.R. Section 5001(a)]." *Nicoletti*, 761 F. Supp. at 315.

disregard of the law, “[t]he governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable”,⁴⁵ (b) the text of the C.P.L.R.; and (c) the Appellate Division’s observation in *Penco Fabrics* that New York’s prejudgment interest provisions “do not necessarily apply to arbitrations,” 146 N.Y.S.2d at 515, counsel for the award-debtor in each of the three cases had available, in opposition to the manifest disregard challenge, a further argument that C.P.L.R. Section 5001 is not “clearly applicable.”⁴⁶

ii. Pre-Award Interest Under New York’s Substantive Common Law

In the Committee’s view, New York’s substantive common law allows an arbitral tribunal to award interest as an element of damages on the main claim(s).⁴⁷ After the enactment of New York’s first prejudgment interest statute in 1920, New York courts have held that they may award prejudgment interest only on the basis of specific statutory authority.⁴⁸ Prior to the

⁴⁵ *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 934 (2d Cir. 1986).

⁴⁶ In *Moran v. Arcano*, No. 89 Civ 6717, 1990 U.S. Dist. LEXIS 9349 (S.D.N.Y. July 27, 1990), Judge Haight of the District Court for the Southern District of New York stated in *dictum* and without referring to C.P.L.R. Section 5001 that “[w]hether interest is taxed on a claim prior to the entry of an arbitration award is within the discretion of the arbitrators.” *Id.* at *6. Judge Haight thus appears to have concluded, *sub silentio*, that C.P.L.R. Section 5001 does not apply in arbitration. However, neither of the two cases that he cited in support of this statement so held. See *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 63 (3d Cir. 1986) (holding that district court should have granted post-award, prejudgment interest because, while arbitrators had included pre-award interest in their award, they “lacked authority to decide the entirely separate question of prejudgment interest on the amount confirmed by the district court judgment”); *Brandeis Intsel Ltd. v. Calabrian Chemicals Corp.*, 656 F. Supp. 160, 170 (S.D.N.Y. 1987) (confirming award that included pre-award interest granted by arbitrators under English law; arbitration seated in London and parties’ contract governed by English law).

A Massachusetts appellate court has held squarely that, under Massachusetts law, “[a]n arbitrator’s award of interest, when made as a component of an award, is an integral part of the total remedy that he fashions and, as such, is not subject to the statutory provisions which apply to court-awarded interest on contract claims.” *Blue Hills Reg’l Dist. Sch. Comm. v. Flight*, 409 N.E.2d 226, 235 (Mass. App. Ct. 1980). The Massachusetts statutory prejudgment interest provisions are worded similarly to the New York provisions. See MASS. GEN. LAWS ch. 231, § 6C (2016) (“In all actions based on contractual obligations, upon a verdict, finding or order for judgment for pecuniary damages, interest shall be added by the clerk of the court to the amount of damages, at the contract rate, if established, or at the rate of twelve percent per annum from the date of the breach or demand.”).

⁴⁷ Some commentators argue that, as a general matter, “[c]laimants would be more accurately compensated for the loss of use of their money if they received interest as damages, as opposed to interest on damages.” SENECHAL & GOTANDA, *supra* note 6 at 514. See also SECOMB, *supra* note 6, at 443-44.

⁴⁸ See, e.g., *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 851 (2d Cir. 1992) (“The right to interest [under New York law] is purely statutory and in derogation of the common law and it cannot be extended beyond

enactment of that statute, New York common law allowed courts to award prejudgment interest in breach of contract actions with interest running from the date on which the defendant could have ascertained the damages with reasonable certainty.⁴⁹ The Committee believes that, because New York's prejudgment interest provisions do not apply in arbitration, the proscription on non-statutory interest under New York law also does not apply in arbitration. Moreover, the availability of pre-award interest under New York's substantive common law accords both with (a) the historical allowance of prejudgment interest under the common law and (b) the compensatory purpose of such interest.⁵⁰

In addition, as discussed in subsection II.A.4.a below, federal and New York arbitral law both grant arbitrators broad remedial powers that include the discretionary power to award interest on damages. In the Committee's view, an arbitral tribunal may consider the law regarding its remedial powers, including its discretionary power to award interest, to be substantive law for purposes of choice-of-law analysis, particularly if the tribunal is seated in a jurisdiction that treats arbitrators' remedial powers as a question of substantive law.⁵¹

the statutory regulations or limitations.”) (internal quotation marks and citation omitted); *Two Clinton Square Corp. v. Computerized Recovery Sys., Inc.*, 446 N.Y.S.2d 663, 664 (4th Dep't 1981) (“interest should not be awarded without specific legislative authority”); *United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868, 878 (2d Cir. 1976) (“This Court has repeatedly held that since CPLR § 5001 is obviously phrased in mandatory terms, New York law does not permit the trial court to exercise any discretion with regard to prejudgment interest determinations.”).

⁴⁹ See, e.g., *Faber v. City of New York*, 222 N.Y. 255, 262 (1918) (“[I]f a claim for damages [on account of breach of contract] represents a pecuniary loss, which may be ascertained with reasonable certainty as of a fixed day, then interest is allowed from that day.”).

⁵⁰ In 1927, the New York State Legislature amended the State's prejudgment interest statute to allow the courts to award prejudgment interest on the principal amount of damages “whether theretofore liquidated or unliquidated.” Shortly thereafter, the NY Court of Appeals held that retrospective application of the amendment to contracts entered into before its enactment did not violate the non-impairment clause of the U.S. Constitution because the amendment “prevents an escape . . . from the real obligation to make full compensation for breach of contract” and “vindicates a preexisting right to compensation for breach of contract.” *J.B. Preston Co. v. Funkhouser*, 261 N.Y. 140, 145 (1933).

⁵¹ See BORN, *supra* note 6, at 3068 (“[I]n many jurisdictions, the arbitrators' remedial powers are treated as an aspect of the substantive dispute between the parties.”).

One question that may arise is whether an international arbitral tribunal, in exercising discretion to award interest under New York law, should apply New York's prejudgment interest provisions even though they are not directed to the determination of interest by arbitrators. Given that C.P.L.R. Section 5001 has been characterized as substantive for choice-of-law and *Erie* purposes, one might argue that an award of interest under this section ordinarily would accord with the parties' reasonable expectations if they have chosen New York law as the law governing their relationship. Moreover, the Appellate Division recently stated that New York's "statutory nine percent rate [is] presumptively fair and reasonable, irrespective of the lower interest rate in the current market," although it made this statement in an equitable action in which it upheld the trial court's awarding of six percent interest.⁵²

Arbitrators have discretion to determine interest based primarily on commercial considerations and to consider New York's statutory prejudgment interest provisions in the light of commercial realities, for three main reasons.

First, as discussed above, the NY Legislature adopted a fixed nine percent prejudgment interest rate in part for reasons not directly related to the compensatory purpose of an interest award and not necessarily relevant to the award of interest in international arbitration.

Second, the award of nine percent simple interest in accordance with New York's statutory prejudgment interest provisions may materially overcompensate or undercompensate the prevailing party for the loss of use of its funds.⁵³

⁵² *Gourary v. Gourary*, 943 N.Y.S.2d 80, 82 (1st Dep't 2012).

⁵³ In some cases, even in the current low rate environment, the award of nine percent interest in accordance with New York's statutory prejudgment interest provisions may *undercompensate* the prevailing party for the loss of use of its funds. As noted above, a court may award only simple interest under C.P.L.R. Sections 5001 and 5004. In the commercial world, however, interest on a debt is almost always compounded; for this reason, an arbitral tribunal exercising its discretionary power to award interest under New York's substantive common law may choose to award interest on a compound basis. Depending on various factors such as the compounding interval and the length of the pre-award period, compound interest calculated at today's low market rates may exceed simple interest

Third, given the broad remedial powers of arbitrators under both federal and New York arbitral law and the many uncertainties at the time of contract regarding possible future disputes, commercial parties and their counsel may reasonably expect an arbitral tribunal to exercise discretion to award such interest as it considers appropriate. Of course, if for any reason the parties express a different expectation, for example by fixing the pre-award interest rate in advance, they are free to do so in their contract or in a stipulation entered during arbitration.⁵⁴

During a period when New York's statutory prejudgment interest rate is substantially higher or lower than market rates, factors that may weigh in favor of application of the statutory rate in a specific case may include, in the judgment of the tribunal, a showing of party intent that the statutory prejudgment interest rate be applied; the absence of any case made in favor of applying a different rate; or a lack of significant economic impact on the interest calculation in a particular case. Moreover, if both parties argue that New York's statutory prejudgment interest provisions govern their respective claims for pre-award interest, a tribunal could reasonably infer agreement between the parties that the statutory prejudgment interest rate applies in their arbitration.⁵⁵

On the other hand, arbitrators have discretion to consider factors that may weigh against application of New York's statutory prejudgment interest rate in a time of low market interest rates, including the NY Legislature's desire to set the prejudgment interest rate at a level close to or below the market rates at the time the statutory rate was chosen; the NY Legislature's concern

calculated at New York's nine percent statutory prejudgment rate. In the Committee's view, this possibility confirms that it may be appropriate for arbitrators to award interest based on commercial considerations.

⁵⁴ See subsection II.A.1 *supra*.

⁵⁵ Arbitrators may also exercise their discretion to apply New York's statutory prejudgment interest provisions if they take the view that it would be desirable, as a general matter, that the relief granted coincide precisely with the relief that a court hearing the same claim would grant. In the Committee's view, a tribunal may consider how a court would decide the same question but retains discretion, under well-settled federal and New York State arbitral law, to consider other factors in shaping the tribunal's remedy. See subsection II.A.4.a below.

for easing administrative burdens on the courts; and the extent to which current market rates of interest may adequately discourage the use of delay tactics in arbitration.⁵⁶

iii. Inapplicability of Section 5-501(1) of New York’s General Obligations Law to Pre-Award Interest

An arbitral tribunal may also wish to consider whether it would be appropriate to award interest at New York’s statutory default rate of interest for loan obligations, as established by Section 5-501(1) of the State’s General Obligations Law (“G.O.L.”). G.O.L. Section 5-501(1) provides that “[t]he rate of interest, as computed pursuant to this title, upon the loan or forbearance of any money, goods, or things in action . . . shall be six per centum per annum unless a different rate is prescribed in section fourteen-a of the banking law.”

In *Sedlis v. Gertler*, 554 N.Y.S.2d 614 (1st Dep’t 1990), the Appellate Division held that an arbitrator should have granted pre-award interest at the six percent rate set by G.O.L. Section 5-501(1) because the parties’ contract provided that late payments would bear interest at New York’s “legal rate.” *Id.* at 616. Relying on C.P.L.R. Section 7511(c)(1), which provides that the court shall modify an award if “there was a miscalculation of figures . . . in the award,” the Appellate Division modified the arbitrator’s award (which granted twelve percent pre-award interest) to provide for interest at the six percent rate. *Id.* The Appellate Division’s modification

⁵⁶ New York’s maintenance of the nine percent statutory prejudgment interest rate in the current low rate environment may also be intended to encourage defendants to settle claims brought against them. *See Oden v. Schwartz*, 71 A.3d 438, 457 (R.I. 2013) (upholding constitutionality of Rhode Island’s statutory prejudgment interest rate of twelve percent in medical malpractice actions on ground that this rate is “rationally related to a legitimate state interest of promoting settlement as well as compensating an injured plaintiff for the loss of the use of money to which he or she is legally entitled”). However, any possible state interest in promoting settlement of claims appears to be related to the efficient administration of justice by the courts and does not reflect a substantive policy favoring plaintiffs over defendants. *See Paine Webber*, 579 A.2d at 551 (court held that Connecticut’s “offer of judgment” rule, which “provides an economic incentive for parties to settle disputes before trial,” was “procedural rule, punitive in nature, and enacted to promote fair and reasonable pretrial compromises of litigation,” and that it therefore applied to action in Connecticut state court even though New York law governed substantive issues in dispute). In view of the many and varied social policies underlying statutory prejudgment interest rates, arbitrators reasonably may conclude that a statutory prejudgment interest rate binding on courts may or may not be appropriate in a particular case but should not dictate the determination of interest in arbitration.

of the award appears anomalous in the sense that it involved the reversal of a substantive ruling, not the correction of a mere computational error.⁵⁷ The court’s interpretation of G.O.L. Section 5-501(1) as establishing a legal rate of interest of six percent under New York law would appear to support the application of this rate to pre-award interest in arbitration irrespective of whether or not the parties specifically so agreed in their contract.

Three factors militate against the application of the six percent rate established by G.O.L. Section 5-501(1) to pre-award interest in arbitration, absent party agreement that this rate will apply. First, G.O.L. Section 5-501(1) provides that the rate set by that section applies to a “loan or forbearance,” a phrase that does not encompass damages owed by a breaching party.⁵⁸ Accordingly, the text of the statute provides no basis for arbitrators to award interest at the six percent rate, absent party agreement to the contrary.

Second, the majority of courts to have addressed the issue have concluded that the six percent rate set forth in G.O.L. Section 5-501(1) is “superseded” by New York’s maximum interest rate of sixteen percent set by Section 14-a of the Banking Law.⁵⁹ The latter is a usury rate and does not reflect the NY Legislature’s calculation of what rate would make an injured party whole. Accordingly, it would not be appropriate, in the Committee’s view, for arbitrators to award interest at the sixteen percent rate set by Section 14-a, absent clear evidence of party intent that it apply in the circumstances.

Third, to the extent that the six percent rate mentioned in G.O.L. Section 5-501(1) retains any validity, the Committee is not aware of any precedent or other authority supporting the

⁵⁷ See, e.g., *Madison Realty Capital, L.P. v. Scarborough-St. James Corp.*, 25 N.Y.S.3d 83, 85 (1st Dep’t 2016) (“CPLR 7511(c)(1) only authorizes modification of computational errors . . . , not reversal of substantive rulings”).

⁵⁸ See, e.g., *Manfra, Tordella & Brookes*, 794 F.2d at 63.

⁵⁹ See, e.g., *La Barbera v. A.F.C. Enters.*, 401 F. Supp. 474, 479-80 (S.D.N.Y. 2005) (collecting cases); *Rachlin & Co. v. Tra-Mar, Inc.*, 308 N.Y.S.2d 153, 158 (1st Dep’t 1970).

award of interest in accordance with G.O.L. Section 5-501(1) in arbitration, absent party agreement that New York's "legal rate" is applicable. Arbitrators therefore should not presume, solely on the basis of the parties' choice of New York law as the law governing their contract, that parties intended for the six percent rate to apply to the award of interest.

b. International Arbitrators Should Align the Rate of Interest With the Currency of the Award

As already noted, many jurisdictions (including New York, in the case of a court judgment) have enacted statutory provisions specifying how interest shall be assessed on damages, including the rate at which it shall accrue.⁶⁰ For reasons set forth above, the Committee takes the view that neither the New York prejudgment interest provisions (C.P.L.R. §§ 5001, 5002 and 5004) nor G.O.L. Section 5-501(1) are binding in international arbitration. For purposes of this discussion, the Committee assumes that, under some circumstances, the statutory interest provisions of other jurisdictions may be deemed applicable, as a question of local law or public policy, in a particular international arbitration.

In accordance with the choice-of-law analysis discussed above, the law governing the parties' contract generally should determine whether the prevailing party may recover interest on damages and, if so, how much.⁶¹ An award of interest in accordance with these provisions may not be appropriate, however, if (a) the governing law specifies a legal rate of interest and (b) the arbitral tribunal assesses damages and issues its award in the currency of another jurisdiction. For example, a contract may provide for arbitration in New York, French governing law, and payment in U.S. dollars. If, as would be expected, the arbitral tribunal assesses damages and

⁶⁰ See, e.g., C. CIV. art. 1231-7 (Fr.) (interest on damages accrues at "legal rate"); Decree No. 2014-947 of August 20, 2014 Relating to the Legal Rate of Interest (amending Article L. 313-2 of the Monetary and Financial Code) (legal rate fixed by French Minister of Economy every six months).

⁶¹ See *supra* notes 26-30 and accompanying text.

issues its award in U.S. dollars, the grant of pre-award interest at the French legal rate may not make commercial sense because that rate reflects, *inter alia*, material changes in the value of the Euro over time.⁶² In fairly foreseeable circumstances, therefore, application of the French legal rate to an arbitral award in U.S. dollars could significantly undercompensate or overcompensate the prevailing party for the loss of use of its money.⁶³

Arbitral tribunals may wish to consider at least two factors as they seek to avoid anomalies in the interest rate used to calculate pre-award interest. First, arbitrators may consider whether, as a matter of statutory construction, the legal rate under the governing law does not apply to damages assessed in a foreign currency. As explained by Professor Pierre Mayer:

The arbitrator's sense of equity can suggest to him that the rule expressed in the applicable law only deals with domestic situations, which allows him to formulate himself the rule that is supposed to apply to international situations. This last device has been used to set aside provisions, which can be found in many national laws, which fix the rate of interest at a certain percentage, regardless of the place of payment and of the currency in which the debt was expressed; indeed, such provisions lead to absurd results when applied to international contracts.⁶⁴

In the event an arbitral tribunal should determine that the legal rate of interest under the governing law does not apply, the arbitrators may consider assessing interest at a rate appropriate to the currency of the award through the exercise of any discretion that they possess in determining damages under the governing substantive law or the arbitral law of the seat.

⁶² In the international context, particularly in the absence of an express provision in the parties' contract, an arbitral tribunal may have discretion in determining the currency in which the award is rendered. *See* UNIDROIT PRINCIPLES Art. 7.4.12 ("Damages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate.").

⁶³ The 2012 U.S. Model Bilateral Investment Treaty recognizes the importance of matching the interest rate to the currency of the award. Article 6(3) of the Model Treaty provides that if the fair market value of an expropriated investment is denominated in a freely usable currency, the arbitral tribunal shall grant pre-award and post-award interest "at a commercially reasonable rate for that currency[.]" *See also* 2012 U.S. Model Bilateral Investment Treaty, Art. 6(4) (specifying compensation payable if fair market value of expropriated investment is denominated in currency that is not freely usable).

⁶⁴ Pierre Mayer, *Reflections on the International Arbitrator's Duty to Apply the Law*, 17(3) ARB. INT'L 235, 244 (2001). *See also* Secomb, *supra* note 6, at 440.

Alternatively, international arbitrators reasonably may conclude that the choice-of-law approach, holding that interest should be determined in accordance with the same law that governs liability and damages, is subject to an exception in an international case if the value of the currency of the governing law changes at a materially different rate from the value of the currency of the award.⁶⁵ In such circumstances, the Committee believes that it would be appropriate for a tribunal to determine the entitlement to interest and the period during which interest accrues in accordance with the law governing the contract, while determining the interest rate, whether the interest is simple or compound, and (if it is compound) the compounding period in accordance with general principles of law.⁶⁶ Such general principles include the prevailing party's right to full compensation for the loss of use of money it was entitled to receive from the date when interest begins to accrue under the governing law until the date of the award.⁶⁷ An international arbitration tribunal possesses discretion under general principles of law to assess

⁶⁵ Section 10 of the Restatement (Second) Conflict of Laws expressly recognizes that “[t]here may . . . be factors in a particular international case which call for a result different from that which would be reached in an interstate case.” The Reporters Notes to Section 10 of the Restatement observe that “[s]ome questions can arise only in international conflicts, [such] as questions involving . . . the conversion of one currency into another.”

⁶⁶ This recommended choice-of-law rule is similar to the approach followed by the English courts, which determine liability to pay prejudgment interest in accordance with the law governing the merits, while determining the rate of interest in accordance with English law. See DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS (15th ed.) § 7R-082, Rule 20(2). English law authorizes the High Court to award prejudgment interest on a simple-interest basis “at such rate as the court thinks fit[.]” Senior Courts Act, 1981, § 35A(1). In the exercise of its discretion under English law, the High Court “will, *prima facie*, award the rate applicable to the currency in which the debt is expressed.” DICEY, MORRIS & COLLINS, *supra*, § 7R-082, Rule 20(3) (footnotes omitted). See also, e.g., *Miliangos v. George Frank (Textiles) Ltd.*, [1977] Q.B. 489, 497 (“while you look to the proper law of the contract to see whether there is a right to recover interest by way of damages, you look to the *lex fori* to decide how much”; court awarded damages in Swiss francs and held that claimant was entitled to prejudgment interest on a simple-interest basis “at a rate at which someone could reasonably have borrowed Swiss francs in Switzerland at simple interest”).

⁶⁷ See UNIDROIT PRINCIPLES Art. 7.4.10 (“Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues from the time of non-performance.”).

pre-award interest at a market rate appropriate to the currency of the award and on a compound basis.⁶⁸

Comment (e) to Section 823 of the Restatement (Third) of the Foreign Relations Law of the United States addresses the awarding of prejudgment interest by U.S. state and federal courts in international cases as follows:

The date for commencement of interest on an obligation or a judgment is determined by the law of the forum, including its rules on choice of law. When a statutory rate of interest is applicable in the forum, that rate must be applied, even if the judgment is given in foreign currency. If no statutory rate of interest is applicable, the court may, in appropriate cases, order interest to be based on the interest rate applicable at the principal financial center of the state issuing the currency in which the judgment is payable.⁶⁹

In accordance with the first sentence of this comment, read together with Comment (e) to Section 207 of the Restatement (Second) of Conflicts of Law, the law governing the merits of the parties' dispute should determine the date for commencement of prejudgment interest. The second sentence appears to provide that a U.S. court must apply the forum's statutory prejudgment interest rate, if any, in assessing prejudgment interest in an international case, "even if the judgment is given in foreign currency." This approach to the applicable interest rate can

⁶⁸ See, e.g., UNIDROIT PRINCIPLES Art. 7.4.9(2) (providing that interest on late payments shall be payable at "the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment"); ICC Award No. 8769, ICC International Court of Arbitration Bulletin 10(2) (1999), at 75 (awarding interest at "commercially reasonable interest rate" in accordance with Article 7.4.9(2) of UNIDROIT Principles). International investment tribunals, applying international law, often assess pre-award interest at a market rate appropriate to the currency of the award and on a compound basis. A recent survey of pre-award interest determinations in 63 investment awards rendered between January 2000 and March 2016 found that 18 of the 63 awards surveyed (approximately 30%) assessed pre-award interest at a rate based on LIBOR, most often with an uplift of two percentage points. See Tiago Duarte-Silva & Jorge Mattamouros, *Prejudgment interest – a mere afterthought?*, 11(5) GLOBAL ARB. REV. 30, 31 (2016). LIBOR is a benchmark rate that the leading banks in London charge each other for short-term loans. Sixteen of the awards surveyed (25%) assessed interest at a rate not linked to any benchmark, most often from four to six percent, while nine of the awards (14%) assessed interest at a rate based on U.S. Treasury yields. *Id.* at 31-32. In the majority of recent awards, international investment tribunals have assessed interest on a compound basis. See RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 298 (2012).

⁶⁹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 823 cmt. e (1987).

give rise to anomalies for at least two reasons.⁷⁰ First, if a statutory prejudgment interest rate is to be applied, the presumptively applicable interest rate in an international case generally is not the forum's statutory rate, but the statutory rate under the governing substantive law.⁷¹ Second, a court or arbitral tribunal should consider the impact, if any, of the currency in which damages are to be awarded. If the value of the currency of the governing substantive law changes at a materially different rate than the value of the currency of the award, it may be inappropriate, as a general matter, for a court or arbitral tribunal to grant one of the parties a windfall by applying a statutory prejudgment interest rate that has no relevance to the loss incurred as a result of delay in recovery of compensation.⁷²

4. Law of the Arbitral Seat

The next step in the Committee's suggested approach is for arbitrators to look to the law of the arbitral seat governing the arbitral process.⁷³

⁷⁰ To the Committee's knowledge, no U.S. court has ever cited or applied the second sentence of Comment (e) to Section 823 of the Restatement (Third) of the Foreign Relations Law of the United States. *See, e.g., Amoco Cadiz*, 954 F.2d at 1333 ("Rules for prejudgment interest . . . usually come from the law defining the elements of damages. . . . One would think, therefore, that prejudgment interest on the French plaintiffs' claims depends on French law[.]").

⁷¹ *See* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 207 cmt. e (1971).

⁷² In an article published in 1985, Professor Ronald Brand proposed that Section 823 of the draft Restatement (Third) of the Foreign Relations Law of the United States then under consideration be revised to include the following provision:

In giving judgment on a foreign currency obligation, a court may award both pre-judgment and post-judgment interest at such rate or rates as may be appropriate, taking into consideration the statutory rate of interest, if any, otherwise applicable and the rate of interest generally available in the market on investments made in terms of the currency in which judgment is made.

Ronald A. Brand, *Restructuring the U.S. Approach to Judgments on Foreign Currency Liabilities: Building on the English Experience*, 11(1) YALE J. INT'L L. 139, 184 (1985). As Professor Brand explained, this provision was "directed at the problem of matching the interest rate to the currency of judgment. Without such a rule, it is possible that a court would render judgment in one currency and apply the interest rate relevant to another currency[.]" *Id.* at 189. Professor Brand's proposal was not adopted.

⁷³ The choice of a seat almost invariably leads to the application of its arbitration law, and so parties should expect that their selection of a seat will affect numerous aspects of the arbitral process, potentially including the standards applicable to the awarding of interest. *See, e.g., BORN, supra* note 6, at 2052 ("[T]he law of the arbitral seat can directly govern a number of distinct legal issues affecting any international arbitration, many of which can be highly important."). An arbitral tribunal, in considering an award of interest, may decide, in the face of evidence

As discussed in subsection (a) below, the law of the arbitral seat, when the seat is New York, accords with New York substantive law relating to the award of interest by international arbitrators. If, in a particular case, the law of the arbitral seat conflicts with the applicable substantive law relating to the award of interest by international arbitrators, the tribunal will need to determine how to reconcile the conflict. No such conflict exists when New York is the arbitral seat and New York substantive law governs the dispute. This Committee does not express a view as to how such conflicts might be addressed in arbitrations seated in other jurisdictions.

a. International Arbitrators' Broad Remedial Powers Under Federal Arbitral Law

The Federal Arbitration Act and C.P.L.R. Article 75, New York's arbitration statute, are silent with respect to the award of interest. It is well-settled, however, as a matter of federal and New York arbitral law that, "[w]here an arbitration clause is broad . . . arbitrators have the discretion to order remedies they determine appropriate, so long as they do not exceed the power granted to them by the contract itself."⁷⁴

In the Committee's view, the broad remedial powers of international arbitrators under federal arbitral law include at least the same discretionary power to award interest that the New

in a specific case that the contracting parties carefully considered the arbitration law of the seat, that the arbitration law of the seat be given greater weight in that case than the law governing the merits. However, contracting parties frequently select the seat of arbitration primarily or exclusively for reasons of logistical convenience and without regard to its arbitration law. Under the latter, more typical scenario in commercial cases, principles of party autonomy and respect for the intent of the parties arguably weigh in favor of giving the arbitration law of the seat lower priority than the law governing the merits of the parties' dispute. Following the same logic, when parties neglect to designate the seat and, as a consequence, the seat is designated for the parties, arbitrators reasonably may decide not to give weight to the law of the seat as reflective in any way of party intent as to interest awards.

⁷⁴ *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 262 (2d Cir. 2003) (federal law). See also, e.g., *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 902 (2d Cir. 2015) ("Like federal law, New York law gives arbitrators substantial power to fashion remedies that they believe will do justice between the parties and under New York law, arbitrators have power to fashion relief that a court might not properly grant.") (internal quotation marks, ellipsis and citation omitted); *Bd. of Educ. of Norwood-Norfolk Cent. Sch. Dist. v. Hess*, 49 N.Y.2d 145, 152 (1979) ("[T]o achieve what the arbitration tribunal believes to be a just result, it may shape its remedies with a flexibility at least as unrestrained as that employed by a chancellor in equity."); *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 308 (1984) (arbitrator "may do justice as he sees it"); *Benedict P. Morelli & Assocs., P.C. v. Shainwald*, 854 N.Y.S2d 133, 134 (1st Dep't 2008) ("Arbitrators are free to shape a remedy with unrestrained flexibility in order to achieve a just result.").

York courts possess in equitable actions. In equitable actions, the New York courts enjoy discretion under C.P.L.R. Section 5001(a) to determine whether to award any interest and, if so, how much.⁷⁵ As explained by the Appellate Division in *Rosenblum v. Aetna Casualty & Surety Co.*, 439 N.Y.S.2d 482 (3d Dep’t 1981),

[I]t is . . . well settled that the inclusion of interest in recoveries in actions of an equitable nature is left to the sound discretion of the court (see CPLR 5001, subd [a]) and that arbitrators are empowered to fashion awards to achieve just results and may shape remedies with a flexibility at least as unrestrained as that employed by a chancellor in equity.

Id. at 483 (internal quotation marks, ellipsis and citation omitted). Although the underlying claim in *Rosenblum* was equitable, the Appellate Division’s conclusion that a tribunal’s broad remedial powers under New York law include the discretionary power to award interest applies equally regardless of whether the claim in the arbitration is characterized as legal or equitable.⁷⁶ An international arbitral tribunal seated in New York has discretion, therefore, to award such interest as it considers appropriate.

b. International Arbitrators’ Power to Award Interest Under Other National Arbitration Laws

The arbitration statutes of England and several predominantly British Commonwealth jurisdictions expressly grant to arbitral tribunals discretion to award such interest as they

⁷⁵ N.Y.C.P.L.R. § 5001(a) (“ . . . in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court’s discretion”). By contrast, in actions of a legal nature, courts generally have no discretion under New York law with regard to prejudgment interest determinations. *See, e.g., United Bank*, 542 F.2d at 878 (“This Court has repeatedly held that since CPLR § 5001 is obviously phrased in mandatory terms, New York law does not permit the trial court to exercise any discretion with regard to prejudgment interest determinations.”).

⁷⁶ *See Levin & Glasser*, 896 N.Y.S.2d at 312 (tribunal’s “broad authority to resolve disputes” includes power to award interest; nature of underlying claim in arbitration not specified); *West Side Lofts*, 751 N.Y.S.2d at 476 (arbitrator did not exceed his powers by granting pre-award interest; nature of underlying claim in arbitration not specified); *Grobman v. Chernoff*, No. 024250/98, 2008 N.Y. Misc. LEXIS 10792, at *3 (Sup. Ct. Nassau County 2008) (“an arbitrator’s power includes pre-award interest as part of a decision”; sole issue in arbitration was amount of damages owed for personal injuries).

consider appropriate.⁷⁷ For example, Section 49(3) of the English Arbitration Act 1996 provides that “[t]he tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case . . . on the whole or part of any amount awarded by the tribunal[.]”

The House of Lords’ well-known decision in *Lesotho Highlands Development Authority v. Impregilo SpA*, [2005] UKHL 43, establishes that a tribunal seated in England has discretion to award interest under Section 49(3) of the English Arbitration Act even if the law governing the merits specifies how interest shall be calculated on damages. The dispute in that case arose under a contract governed by the law of Lesotho and providing for arbitration in London. The law of Lesotho included statutory interest provisions, but the tribunal disregarded those provisions in exercising its discretion to award interest under Section 49(3) of the Arbitration Act. The Court of Appeal held that the tribunal had exceeded its powers, reasoning that “there is no room for any discretionary procedural power” under Section 49(3) where the law governing the merits confers a substantive right to interest.⁷⁸ The House of Lords reversed on the ground, *inter alia*, that Section 49 of the Arbitration Act allows an arbitral tribunal to award interest either by exercising its discretionary power under Section 49(3) or by applying the law governing the merits pursuant to Section 49(6).⁷⁹

⁷⁷ See, e.g., ENGLISH ARBITRATION ACT 1996 § 49; SINGAPORE INTERNATIONAL ARBITRATION ACT 2012 §§ 12(5)(b), 20; HONG KONG ARBITRATION ORDINANCE, Art. 34D; BERMUDA INTERNATIONAL CONCILIATION AND ARBITRATION ACT 1993 § 31; BRITISH COLUMBIA INTERNATIONAL COMMERCIAL ARBITRATION ACT § 31(7); AUSTRALIAN INTERNATIONAL ARBITRATION ACT 1974 §§ 25-26; INDIAN ARBITRATION AND CONCILIATION ACT 1996 § 31(7)(a); IRISH ARBITRATION ACT 2010 § 18. Several U.S. states that enacted arbitration statutes based on the UNCITRAL Model Law on International Commercial Arbitration added a section providing that unless otherwise agreed by the parties, the arbitral tribunal “may award interest.” See CALIFORNIA CIV. PROC. CODE § 1297.317 (2017); 710 ILLINOIS COMP. STAT. 30/25-20(g) (2017); OREGON REV. STAT. § 36.514(6) (2017); TEXAS CIV. PRAC. & REM. CODE § 172.144 (2017). These U.S. state statutes do not address the standard that the tribunal should apply in awarding interest.

⁷⁸ *Lesotho Highlands Development Authority v SPA*, [2003] EWCA Civ 1159, at [48]-[49].

⁷⁹ *Lesotho Highlands Development Authority v. Impregilo SpA*, [2005] UKHL 43, at [38]-[39].

5. General Guidelines for the Exercise of Discretion in Awarding Interest

Federal case law with respect to the awarding of prejudgment interest by the federal district courts in federal question and admiralty cases may provide useful guidance for international arbitrators in the exercise of any discretion they possess with respect to the awarding of pre-award interest in arbitration, whether by virtue of the applicable arbitration rules, the applicable substantive law (or rules of law), or the applicable arbitration law. The federal district courts have broad discretion as to the awarding of prejudgment interest in such cases.⁸⁰ Each Circuit has developed somewhat different guidelines for the exercise of this discretion. The Seventh Circuit Court of Appeals has set forth perhaps the clearest and most comprehensive set of guidelines. *See In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331-35 (7th Cir. 1992). In a *per curiam* opinion, Chief Judge Bauer and Judges Easterbrook and Fairchild set forth the following guidelines:

- A district court should award prejudgment interest at the market rate, because interest at this rate “puts both parties in the position they would have occupied had compensation been paid promptly.” *Id.* at 1331.
- The market rate is “the minimum appropriate rate for prejudgment interest, because the involuntary creditor [*i.e.*, the prevailing party] might have charged more to make a loan.” *Id.*
- “Any market rate reflects three things: the social return on investment (that is, the amount necessary to bid money away from other productive uses), the expected change in the value of money during the term of the loan (*i.e.*, anticipated inflation), and the risk of nonpayment. The best estimate of these three variables is the amount the defendant must pay for money, which reflects variables specific to that entity.” *Id.* at 1332.
- A district court need not try to determine the actual rate that the defendant must pay to borrow money. *Id.* If the court chooses not to engage in such “refined rate-setting,” it should award prejudgment interest at the U.S. prime rate, which is “the rate banks charge for short-term unsecured loans to credit-worthy

⁸⁰ See, e.g., *Wickham Contracting Co. v. Local Union No. 3, Int’l Bhd. of Elec. Workers, AFL-CIO*, 955 F.2d 831, 833-34 (2d Cir. 1992) (federal question case); *Indep. Bulk Transp., Inc. v. Vessel “Morania Abaco”*, 676 F.2d 23, 25 (2d Cir. 1982) (admiralty case).

customers.” *Id.*⁸¹ While the prime rate “may miss the mark for any particular party, . . . it is a market-based estimate.” *Id.*

- The relevant market rate is the rate in effect during the prejudgment period, “not the going rate at the end of the case.” *Id.* If the market rate fluctuated during the prejudgment period, the district court should calculate interest at the different rates in effect during this period. *Id.* at 1333. Alternatively, it may use an average rate during the period. *Id.* at 1335.
- The “norm” in federal litigation is to award prejudgment interest on a compound basis because (1) the defendant would have had to pay interest on unpaid interest if it had borrowed the amount of the damages and (2) the plaintiff could have earned interest on interest if it had invested or loaned that amount. *Id.* at 1331-32.

The Seventh Circuit’s guidelines are broadly similar to those developed by the other federal courts of appeals. For example, the Second Circuit held, in *Mentor Insurance Company (U.K.) Ltd. v. Norges Brannkasse*, 996 F.2d 506 (2d Cir. 1993), that the district court may award prejudgment interest at a rate that “reflects the cost of borrowing money, if measured for example by the average prime rate or adjusted prime rate[.]” *Id.* at 520.⁸² Judge Jacobs, writing for the panel, concluded that “[t]he award of compound interest . . . was within the district court’s broad discretion.” *Id.* Unlike the Seventh Circuit in *Amoco Cadiz*, the Second Circuit in *Mentor Insurance* held that (a) the district court may award interest at a short-term, risk-free rate, rather than the market rate, and (b) “a prevailing party is not entitled to a calculation of prejudgment interest at the interest rates at which it actually borrowed money during the period in question since consideration of the precise credit circumstances of the victim would inject a needless variable into these cases.” *Id.* (internal quotation marks and citation omitted).

⁸¹ As of the date of this report (June 2017), the U.S. prime rate is 4.25%. If the tribunal assesses damages and issues its award in a currency other than the U.S. dollar, the Committee considers that it would generally be appropriate for it to use a market rate appropriate to the currency of the award. See subsection II.A.3.b *supra*.

⁸² See also, e.g., *Cont’l Transfert Technique Ltd. v. Fed. Gov’t of Nigeria*, 603 Fed. Appx. 1, 5 (D.C. Cir. 2015) (“This court has repeatedly concluded that the use of the prime rate in the award of prejudgment interest reflects an appropriate exercise of the district court’s discretion.”).

An arbitral tribunal may find guidance in judicial opinions that set forth guidelines intended to ensure that the prevailing party is fully compensated for its loss. Arbitral tribunals generally differ from most trial courts in being able to bring to bear whatever resources the parties consider appropriate in order to take into account the particular circumstances of the parties including, in appropriate cases, engaging in a “refined rate-setting” exercise. *See Amoco Cadiz*, 954 F.2d at 1332. In other cases they may choose to award interest at an appropriate market rate or at a risk-free rate. *See Mentor Ins.*, 996 F.2d at 520.

Economists differ as to how pre-award (or prejudgment) interest should be calculated in order to compensate the prevailing party for the loss of use of money it was entitled to receive from the date its claim arose until the date of the award.⁸³ For example, some economists espouse the “coerced loan” theory, which holds that pre-award interest should be calculated at the rate that the losing party would have paid a voluntary creditor because the losing party, by not immediately compensating the prevailing party for its harm, in effect forced the prevailing party to make a loan to the losing party equal in value to the prevailing party’s harm.⁸⁴ Other economists argue that pre-award interest should be calculated at a rate equal to the prevailing party’s opportunity cost of capital.⁸⁵ Several other approaches for determining the pre-award

⁸³ See Aaron Dolgoff & Tiago Duarte-Silva, *Prejudgment Interest: An Economic Review of Alternative Approaches*, 33(1) J. INT’L ARB. 99 (2016).

⁸⁴ See, e.g., Michael S. Knoll & Jeffrey M. Colon, *The Calculation of Prejudgment Interest* (2005), in PENN LAW: LEGAL SCHOLARSHIP REPOSITORY.

⁸⁵ See, e.g., Manuel A. Abdala et al., *Invalid Round Trips in Setting Pre-Judgment Interest in International Arbitration*, 5(1) WORLD ARB. & MEDIATION REV. 1 (2011). In a number of industries and economic sectors, commercial enterprises have an opportunity cost of capital equal to or in excess of nine percent per annum. In those circumstances, at least, adoption of an “opportunity cost of capital” approach to calculating pre-award interest would tend to support the award of interest at New York’s nine percent statutory prejudgment interest rate as an appropriate estimate of the prevailing party’s opportunity cost of capital. On the other hand, a number of economists criticize the opportunity cost of capital approach to calculating pre-award interest on the ground, *inter alia*, that the prevailing party does not actually put any investment at risk; rather, the only risk that the prevailing party assumes is the risk that the losing party will not satisfy the award, and this risk may be compensated by requiring the losing party to pay interest at the rate that it would have paid a voluntary creditor. See, e.g., Dolgoff & Duarte-Silva, *supra* note 83 at 101 (“[T]here is an inconsistency introduced by applying *ex ante* cost of capital rates

interest rate also exist.⁸⁶ It will generally be up to the parties in the arbitration to argue to the arbitral tribunal what rate is appropriate in the particular circumstances of their dispute.

The Seventh Circuit awarded the plaintiffs in the *Amoco Cadiz* case prejudgment interest at the average U.S. prime rate compounded annually, although it did not address the appropriate compounding period in its decision.⁸⁷ It would not be inappropriate for arbitrators, in exercising their discretion, to award compound interest and to base the compounding period on factors specific to the parties and their industry.

Finally, the Committee believes that it is generally appropriate for pre-award interest to begin to accrue from the date of the non-performing party's breach, except that interest upon damages incurred thereafter should generally begin to accrue from the date the damages were incurred. Subject to any countervailing equitable considerations, the awarding of interest until the date of the award generally appears to be necessary to provide full compensation to the prevailing party for the loss of use of its money.⁸⁸

to an *ex post* calculation of compensation. The opportunity cost of capital is also inappropriate because the claimant has not actually put any investments at risk to earn such a return.”); Don Harris et al., *A Subject of Interest: Pre-award Interest Rates in International Arbitration* (2015), at <http://www.brattle.com> (“Pre-award interest at the claimant’s cost of capital would compensate the claimants for a favourable outcome to the alternative investment, while ignoring the chances that they could have lost. Moreover, if the alternative project was really so fantastic, then the claimant should have been able to find sources of funding for it other than the amounts owed by respondent.”); Knoll & Colon, *supra* note 84 at 9 (“Given th[e] assumption [that the plaintiff had access to the capital markets], the defendant’s actions cannot plausibly be said to have prevented the plaintiff from foregoing any attractive investment opportunities and thus to have missed out on the resulting return.”).

⁸⁶ See Dolgoff & Duarte-Silva, *supra* note 83.

⁸⁷ See *Amoco Cadiz*, 954 F.2d at 1331-32; *Cement Div., Nat’l Gypsum Co. v. City of Milwaukee*, 950 F. Supp. 904, 910-11 (E.D. Wis. 1996).

⁸⁸ This pre-award period coincides with the periods specified in C.P.L.R. Section 5001(b) and UNIDROIT Principles Article 7.4.10. See N.Y.C.P.L.R. § 5001(b) (“Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.”); UNIDROIT PRINCIPLES Art. 7.4.10 (“Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues from the time of non-performance.”).

B. Post-Award, Prejudgment Interest

Parties sometimes request not only that arbitrators include pre-award interest as part of the total compensation due under the award, but also that the arbitral tribunal order the losing party to pay interest on the total amount of the award from the date the award is issued until the date it is paid. The Committee is also aware that there have been instances in which the ICC International Court of Arbitration, following its review of a tribunal's draft award under Article 33 of the ICC Rules, has asked the tribunal to modify its award to address the granting of post-award interest, even if the prevailing party did not request such interest in its pleadings.

Increasingly, the practice is for arbitral tribunals to order the award-debtor to pay post-award interest if it does not satisfy the award within a specified time period. In U.S. courts, post-award interest ordered by an arbitral tribunal generally accrues from the date of the award (or the date on which payment is due under the award) until the date of a U.S. federal or state court judgment enforcing the award, even if the award provides that such interest shall accrue until the date the award is paid. Under the so-called merger doctrine, when an award is enforced through a U.S. federal or state court judgment, the debt created by the award merges with the judgment, such that the award debt is extinguished and, in the jurisdiction that rendered the judgment, only the judgment debt survives.⁸⁹ Accordingly, "post-award" interest ordered by an arbitral tribunal comprises only post-award, prejudgment interest; post-judgment interest is separately determined in accordance with the law of the enforcement forum. In cases potentially involving enforcement proceedings in a forum that has not adopted a merger doctrine analogous to the

⁸⁹ See, e.g., *Marine Mgmt, Inc. v. Seco Mgmt, Inc.*, 574 N.Y.S.2d 207, 208 (2d Dep't 1991), *aff'd*, 80 N.Y.2d 886 (1992); *Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 102 (2d Cir. 2004); *Tricon Energy Ltd. v. Vinmar Int'l, Ltd.*, 718 F.3d 448, 457 (5th Cir. 2013); *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 387 F.3d 1021, 1024 (9th Cir. 2004); *Newmont U.S.A. Ltd. v. Ins. Co. of N. Am.*, 615 F.3d 1268, 1275-77 (10th Cir. 2010); *Parsons & Whittemore Ala. Mach. & Servs. Corp. v. Yeargin Constr. Co.*, 744 F.2d 1482, 1484 (11th Cir. 1984); *Bayer CropScience AG v. Dow Agrosciences LLC*, No. 2016-1530, 2017 U.S. App. LEXIS, at *30 (Fed. Cir. Mar. 1, 2017).

doctrine prevailing in the United States, there may be good practical reasons for the arbitral tribunal to award interest until the date the award is paid.

In the Committee's view, it is generally appropriate for an arbitral tribunal to follow the same step-by-step methodology to identify the standards governing the award of post-award, prejudgment interest that an arbitral tribunal follows to determine the standards for pre-award interest. The fundamental guiding principles remain the same: respect for the intent of the parties and the compensatory purpose of interest. Not surprisingly, all of the arbitration rules that address the awarding of interest grant the arbitral tribunal discretion to award such pre-award and post-award interest as it considers appropriate.⁹⁰

Accordingly, an arbitral tribunal, in exercising discretion with respect to post-award, prejudgment interest, may follow the guidelines set forth in subsection II.A.5 above for pre-award interest. Notwithstanding the arguably secondary purpose to encourage an award-debtor to satisfy an award promptly, the awarding of post-award, prejudgment interest at a rate higher than the rate of pre-award interest may be deemed an unenforceable penalty in some jurisdictions.⁹¹

C. Post-Judgment Interest

As noted above, "post-award" interest ordered by an arbitral tribunal only accrues until the date of a U.S. federal or state court judgment enforcing the award, because the debt created

⁹⁰ See, e.g., ICDR International Arbitration Rules, Art. 31(4); LCIA Arbitration Rules, Art. 26.4; SIAC Arbitration Rules, Rule 32.9. One circumstance in which the governing standards for pre-award interest and post-award, prejudgment interest would differ is where the parties' contract contains a clause specifically addressing the assessment of interest on any damages "until the date of award," rather than "until the date of payment."

⁹¹ See *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063, 1068-69 (N.D. Ga. 1980) (declining to enforce that portion of award assessing post-award interest at rates higher than rate of pre-award interest on ground that post-award rates were penal rather than compensatory). The Indian Arbitration and Conciliation Act (as amended in 2015) provides that, unless otherwise ordered by the arbitral tribunal, post-award interest shall accrue at a rate two percent higher than the Indian legal rate in effect on the date of the award. See INDIAN ARBITRATION AND CONCILIATION ACT 1996 § 31(7)(b).

by the award is deemed to merge into the judgment under the merger doctrine prevailing in the United States.⁹² Interest on the judgment, or “post-judgment interest,” is separately determined in accordance with the law of the enforcement forum. For U.S. federal court judgments, 28 U.S.C. Section 1961 specifies that interest shall be calculated from the date of entry of the judgment, “at a rate equal to the weekly average 1-year constant maturity Treasury yield . . . for the calendar week preceding the date of the judgment,” and that it shall be compounded annually.⁹³

It may be possible, under some circumstances, for parties to override the general merger rule and to specify a post-judgment interest rate, if the parties use “clear, unambiguous, and unequivocal” language indicating their intent that interest will accrue at this rate after the entry of a judgment.⁹⁴ Contractual language stating that interest will accrue at a particular rate “until the principal is paid,” or other similar language, has been held not to meet this high standard.⁹⁵

Where the parties have agreed to a broad arbitration clause, the question whether they have sufficiently contracted for their own post-judgment rate is a determination reserved for the arbitral tribunal.⁹⁶ Nevertheless, an award ordering that interest shall accrue at a particular rate “until the award is paid,” or other similar language, does not override the general rule on merger.⁹⁷ Rather, the arbitral tribunal must use words that make crystal clear its intent to award

⁹² See, e.g., *Marine Mgmt.*, 574 N.Y.S.2d at 208; *Westinghouse*, 371 F.3d at 102; *Tricon*, 718 F.3d at 457; *Fid. Fed. Bank*, 387 F.3d at 1024.

⁹³ See 28 U.S.C. § 1961(a), (b). See also N.Y.C.P.L.R. §§ 5003, 5004 (providing for 9% interest upon New York State court judgments).

⁹⁴ *Marine Mgmt.*, 574 N.Y.S.2d at 209; *Westinghouse*, 371 F.3d at 102; *Tricon*, 718 F.3d at 457; *Fid. Fed. Bank*, 387 F.3d at 1024.

⁹⁵ *Marine Mgmt.*, 574 N.Y.S.2d at 208-09; *Tricon*, 718 F.3d at 459.

⁹⁶ *Tricon*, 718 F.3d at 457; *Newmont*, 615 F.3d at 1276-77.

⁹⁷ *Tricon*, 718 F.3d at 459-60; *Fid. Fed. Bank*, 387 F.3d at 1022, 1024.

post-judgment interest.⁹⁸ The Committee is aware of only one case in which an arbitral tribunal's award was interpreted as awarding post-judgment interest.⁹⁹

International Commercial Disputes Committee
Richard L. Mattiaccio, Chair

June 2017

⁹⁸ *Tricon*, 718 F.3d at 459-60.

⁹⁹ *See Newmont*, 615 F.3d at 1273, 1276-77 (tribunal's award "provided for pre- and post-judgment interest at rate of 1.5% per month").

APPENDIX A

Arbitrators' Pre-Award and Post-Award Interest Determinations in International Commercial Arbitrations Governed by New York Substantive Law

<u>Key: Arbitral Institutions and Relevant Rules</u>	
Arbitral Institution	Relevant Rules on Interest
<u>ICC</u> : (International Chamber of Commerce)	The ICC Arbitration Rules are silent with regard to interest.
<u>ICDR</u> : International Centre for Dispute Resolution	The ICDR International Arbitration Rules provide, at Article 31(4), that a tribunal “may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law(s).”
<u>IUSCT</u> : Iran- U.S. Claims Tribunal	The IUSCT Arbitration Rules, which are adapted from the 1976 UNCITRAL Arbitration Rules, are silent regarding interest.
<u>LCIA</u> : London Court of International Arbitration	The LCIA Rules provide, at Article 26.4, that “the arbitral tribunal may order that simple or compound interest shall be paid by any party on any sum awarded at such rates as the arbitral tribunal decides to be appropriate (without being bound by rates of interest practised by any state court or other legal authority).”

No.	Case	Case Details	Rate Applied	Approach to Interest
<u>Awards Granting Interest at a Market Rate</u>				
Some arbitral tribunals granted pre-award interest and/or post-award interest at a market rate, rather than at New York’s statutory prejudgment interest rate. The law governing the merits in all of these arbitrations was New York law. Some of the arbitrations were seated in jurisdictions other than New York. Awards declining to apply the New York statutory prejudgment interest rate tend to contain the most thorough and searching analysis with respect to the awarding of interest.				
1	<i>Veolia Propreté v. Valores Ecologicos S.A. de C.V.</i> , ¶¶ 259–60, 279(a)-(c)	- <u>Institution</u> : ICC - <u>Seat</u> : New York	5%	The tribunal considered that a grant of pre-award interest was appropriate, and acknowledged that the CPLR rate was 9%. Nonetheless, the tribunal granted simple pre-award interest at a

A-1

No.	Case	Case Details	Rate Applied	Approach to Interest
	(available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Law</u>: New York - <u>Year</u>: 2007 		<p>rate of 5%, describing this rate as “market based.”</p> <p>The tribunal undertook a comparatively lengthy analysis of the applicability of the CPLR to pre-award interest. It concluded that while there was no doubt that New York law governed the contract at issue, “[t]his agreement by the parties does not extend to their joint agreement as to the applicability of Section 5004 of the Civil Practice Law and Rules (CPLR) of the State of New York.”</p> <p>The tribunal found that the CPLR was meant to govern “the civil procedure in the courts of New York” and <i>not</i> arbitration proceedings taking place in New York, other than as provided for under CPLR Article 75. Accordingly, the tribunal did not feel “compelled to apply the CPLR interest rate of 9%”.</p> <p>The tribunal considered that since the 9% interest rate under the CPLR had been fixed by statute over 20 years prior, it is a rate that “inevitably bears no relation to existing market rates.”</p> <p>For post-award interest, the tribunal granted interest at a 5% rate, <i>or</i> the applicable rate in the jurisdiction where enforcement of the award was sought.</p>
2	<p><i>Grove Skanska v. Lockheed International</i> A.G., ICC Case No. 3903</p> <p>(excerpted in David J. Branson & Richard E. Wallace, <i>Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach</i>, 28 Va. J. Int'l L. 919 (1987))</p>	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: Geneva - <u>Law</u>: New York - <u>Year</u>: 1981 	Unspecified “realistic rate”	<p>The contract at issue in this case provided that a party’s failure to make payments on time would carry the penalty of interest, but did not specify any particular interest rate. The contract had an unusual governing law clause which explicitly provided that “the law of the State of New York, U.S.A. (procedural and substantive) shall govern the interpretation of the Agreement.”</p> <p>The prevailing party contended that interest should be computed at market rates (LIBOR +1%). LIBOR had been as high as 20% during the pre-award period. The losing party argued that interest should be set at the New York statutory prejudgment rate, which at that time was 6%.</p> <p>The tribunal first noted that, under New York case law, the question of interest is deemed substantive. However, the tribunal declined to apply the CPLR interest provisions on the ground that</p>

No.	Case	Case Details	Rate Applied	Approach to Interest
				<p>they only pertained to court actions and not to international arbitrations. The tribunal noted the “truly international flavor” of the dispute and stated that “in international commercial arbitrations it is generally accepted that arbitrators are entitled and indeed expected to award a realistic rate of interest.”</p> <p>The tribunal performed its own analysis of the CPLR, noting that the separate section dealing with arbitration (Article 75) does not cross-reference the CPLR pre-judgment interest provisions, whereas it does explicitly refer to other portions of the CPLR such as the prescription rules found in Article 2. The tribunal stated that “[w]e approach §§ 5001 and 5004 on the footing that the rate of interest laid down may have the characteristic of a rule of practice to be applied in certain circumstances but not necessarily of universal application to all tribunals charged with the duty of deciding issues in accordance with the law of the State of New York.”</p> <p>The arbitrators conceded that if there was some indication that New York law was intended to limit interest rates in all contexts, it would control. Absent some clear indicia of such an intent, however, the tribunal did not believe that New York law had such a broad application.</p> <p>Ultimately, the tribunal granted interest at what it called a “realistic rate,” but did not give an indication of what it considered this to be. Instead, the tribunal expressed the hope and expectation that the parties would be able to agree on a mutually-acceptable, appropriate rate.</p>
3	<p><i>Daum Global Holdings Corp. v. Ybrant Digital Ltd.</i>, ¶¶ 56–61 (available via Westlaw Arbitration Materials)</p>	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: Singapore - <u>Law</u>: New York - <u>Year</u>: 2013 	Unspecified	<p>In this case, the tribunal found that although New York law governed the merits of the parties’ dispute, interest was governed by Singapore law, as the <i>lex arbitri</i>. Section 20(1) of the Singapore Arbitration Act 2012 expressly grants to arbitral tribunals the authority to “award simple or compound interest from such date, at such rate and with such rest as the arbitral tribunal considers appropriate. . .”</p> <p>The tribunal further explained that CPLR Article 50 is “concerned</p>

No.	Case	Case Details	Rate Applied	Approach to Interest
				<p>with New York court proceedings.”</p> <p>The tribunal noted that it had wide discretion as to the awarding of interest, but it held that it had insufficient information to make a suitable award of interest at the time. Instead, it reserved the question for a later award.</p>
4	<p><i>NTT Docomo, Inc. v. Ultra D.O.O.</i>, ¶ 85 (available via Westlaw Arbitration Materials)</p>	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2010 	<p>U.S. Prime (3.25% - 4.25%)</p>	<p>The tribunal first noted that Docomo was entitled to pre-award and post-award interest at the New York statutory prejudgment interest rate pursuant to CPLR § 5001. However, it chose not to grant interest at this rate.</p> <p>Rather, the tribunal applied the U.S. Prime rate for pre-award interest, to run as of three separate dates for separate breaches. Similarly, the tribunal granted simple post-award interest at the Prime rate, to run until the award was paid or reduced to judgment.</p> <p>The tribunal did not provide a detailed explanation as to why it chose to apply the Prime rate over the New York statutory prejudgment interest rate. However, one factor that was likely relevant is that Docomo only claimed interest at the Prime rate, and Ultra made no submission in response.</p>
5	<p>ICC Case No. 10888 (excerpt available via ICC Dispute Resolution Library)</p>	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: Paris - <u>Law</u>: New York - <u>Year</u>: 2002 	<p>U.S. Risk-Free</p>	<p>The tribunal had previously granted pre-award interest at a risk-free interest rate computed by an expert. Said interest was to run from the date of breach to the date of the award.</p> <p>Claimant applied for correction of the award, asserting that the tribunal should have awarded interest at the 9% New York statutory prejudgment interest rate.</p> <p>The tribunal rejected the application, noting that an international arbitral tribunal acting under the ICC Rules and seated in Paris was not bound to apply a rule on interest that was intended for the courts of New York State.</p> <p>The tribunal expressed concern that employing the New York rate would hinder the enforceability of its award, and instead chose the</p>

No.	Case	Case Details	Rate Applied	Approach to Interest
				“U.S. risk-free prejudgment interest rate,” which it viewed as more reflective of the economic reality.
6	<i>Al Maya Trading Establishment v. Global Export Marketing Co., Ltd.</i> , ¶ 88 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2016 	U.S. Prime (3.25%)	<p>The tribunal acknowledged that New York law prescribes 9%. However, it found that “in an international arbitration such as this, where the parties have not specifically agreed to any particular interest rate and no evidence was presented as to actual borrowing costs, we believe that the better course is to apply a commercial rate in the relevant currency.”</p> <p>Notably, the tribunal cited to the <i>Grove Skanska</i> case in support of its proposition that “CPLR Article 50 . . . concerns court judgments.”</p> <p>The tribunal thus granted pre-award interest at the U.S. Prime Rate.</p>
7	<i>Butzel Long v. Valtech, S.A.</i> , ¶¶ 7.1–7.7 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: London - <u>Lex Arbitri</u>: England - <u>Law</u>: France, New York - <u>Year</u>: 2010 	5%	<p>The sole arbitrator concluded that interest was governed by the English Arbitration Act as the <i>lex arbitri</i>. Under Section 49 of that Act, an arbitral tribunal has broad discretion to fix the rate of interest.</p> <p>The sole arbitrator granted pre-award interest at 5%, in accordance with English court practice. While “this rate may be in excess of the interest rate at which Valtech could borrow from a bank,” it was “designed to encourage Valtech to resist the temptation to delay payment to Chesapeake of the sums due it, in effect using Chesapeake as its de facto banker.” For post-award interest, the Arbitrator similarly applied a rate of 5% both for damages and costs, with a three-week grace period for the latter. This interest was to be compounded quarterly.</p>
8	<i>PepsiCo, Inc. v. Iran</i> (available at Yearbook of Commercial Arbitration, Vol. XII, Page 253 (1987))	<ul style="list-style-type: none"> - <u>Institution</u>: IUSCT - <u>Seat</u>: The Hague - <u>Law</u>: New York - <u>Year</u>: 1986 	10%	<p>In this case, the tribunal applied LIBOR +3% for damages relating to most of the contractual breaches found. For one breach, the tribunal applied a 10% rate, deeming this “reasonable.”</p> <p>Notably, neither party argued for the application of the New York statutory prejudgment interest rate, even though New York law</p>

No.	Case	Case Details	Rate Applied	Approach to Interest
				governed the underlying contract.
<p align="center"><u>Awards Granting Interest at the Contractual Rate</u></p> <p>Usually, contractual interest rates apply, by their terms, only to the late payment of money owed under the contract. However, tribunals have often applied such contractual rates to the award of damages.</p>				
9	<i>Sullivan & Cromwell, LLP v. Justice</i> , ¶¶ 128–32 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: AAA - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2016 	8%	<p>The parties' contract (an attorney-client fee agreement) provided that the client could elect to make certain payments due under the contract over a period of 10 calendar quarters at an annual interest rate of 8%. The tribunal held that this provision was not directly applicable to the amount due by the client and considered the contract ambiguous as to whether the parties intended the 8% contractual rate or the 9% statutory rate to apply to this amount.</p> <p>The tribunal rejected the law firm's request for 9% pre-award interest, noting that "[u]nder New York law, where a contract provides that interest will be paid at a specific rate until the principal has been paid, the contract rate governs, not the statutory rate, and interest is due until payment of the principal is made or until the contract is merged into a judgment." The tribunal further noted that "[a]mbiguous provisions in attorney-client fee agreements are to be construed in a manner most favorable to the client."</p>
10	<i>PDV Sweeny, Inc. v. ConocoPhillips Co.</i> , ICC Case No. 16982, Final Award of 18 August 2014, ¶¶ 31–32 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York - <u>Law</u>: New York, Venezuela - <u>Year</u>: 2014 	Default Rate (4.875%)	<p>The relevant contract in this case was unusual, in that it provided for an interest rate that was specifically to be applied to damages. It read, in relevant part: "[Seller Damages] shall bear interest at the Default Rate pursuant to Section 4.2 from such Damages Due Date until the date of payment."</p> <p>The tribunal had previously rendered a Partial Award in which it awarded respondent Seller Damages under the contract. The parties had agreed that pre-award interest should be granted at the Default Rate (4.875%), and that it should run from the date when Seller Damages became due until the date of the Partial Award.</p> <p>Respondents sought the 9% statutory prejudgment interest rate for</p>

No.	Case	Case Details	Rate Applied	Approach to Interest
				post-award interest, arguing that the contract did not specify a rate for post-award interest. The tribunal held that this provision was tantamount to a post-award interest provision, given that it specified that interest was to run “until the date of payment.” The tribunal thus awarded post-award interest at the Default Rate of 4.875%, reasoning that applying the New York statutory prejudgment interest rate would be contrary to the parties’ agreement.
11	<i>Travis Coal Restructured Holdings v. Essar Global Fund, Ltd.</i> , ¶¶ 711–23 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2014 	10%	<p>The contract in this case provided for a “pre-default” interest rate of 8% on the principal balance due, and a 10% “default” rate once the claimant had made a demand for payment. The contract further provided that any amount to be paid by respondent “shall bear interest at the Default Rate or the maximum rate permitted by applicable Requirements of Law, whichever is less” This contract was more in line with the norm, in that it provided that the contractual rates applied to late payments and not to damages.</p> <p>The tribunal construed the term “Requirements of Law” as addressing only those laws that set upper limits on interest, such as usury statutes. To hold otherwise, the tribunal reasoned, would be to needlessly abridge the parties’ freedom to contractually agree on an interest rate of their choice.</p> <p>The tribunal further concluded that the interest rates specified under the contract were not prohibited by New York’s anti-usury laws. As such, the tribunal granted simple pre-award interest at 8% up until the “default date,” and 10% interest thereafter.</p> <p>The tribunal also granted simple post-award interest at 10%.</p>
12	<i>CIMC Raffles Offshore Ltd. v. Schahin Holdings, S.A.</i> , ¶ 81(1)(a)-(c) (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York (?) - <u>Year</u>: 2012 	LIBOR +2%	<p>The contract included an interest rate of LIBOR +2%.</p> <p>The tribunal granted pre-award interest at the contractual rate. However, the tribunal granted post-award interest at the statutory 9% rate, which was to run beginning 30 days after the rendering of the award.</p> <p>The tribunal did not explain why it decided to apply different rates</p>

No.	Case	Case Details	Rate Applied	Approach to Interest
				to pre-award and post-award interest.
13	<i>Thales Alenia Space France v. Globalstar, Inc.</i> , ¶¶ 124, 126. (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2012 	EURIBOR + 400 basis points	<p>The contract stipulated an interest rate of EURIBOR + 400 basis points for late payments.</p> <p>The tribunal granted pre-award interest at the contractual EURIBOR rate. For post-award interest, the tribunal awarded 5% simple interest to run on unpaid amounts beginning 30 days from the issuance of the award until payment in full. The tribunal noted that this 5% rate corresponded closely to the rate that the parties agreed to in the contract (EURIBOR +400 basis points).</p>
14	<i>Amaprop Ltd. v. Indiabulls Financial Services Ltd.</i> , ¶¶ 155–56 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York, India - <u>Year</u>: 2011 	12%	<p>The agreement between the parties provided that the respondent would pay 12% interest per annum on all amounts borrowed.</p> <p>The tribunal, invoking the contract as well as equitable considerations and arbitral practice, awarded pre-award and post-award interest at the 12% contractual rate.</p>
15	<i>Agrera Investments, Ltd. v. Palant</i> , ¶ 68 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2011 	12%	<p>The contract provided for a 12% interest rate on payments for purchase of shares, pursuant to a contractual stock purchase option.</p> <p>The tribunal applied the contractual rate, in light of the fact that claimant sought damages for breach of the very contractual provision that provided for the 12% interest rate.</p>
16	<i>Westminster Securities Corp. v. Petrocom Energy Ltd.</i> (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2010 	12%	The tribunal granted pre-award interest on damages as well as on the fees and costs awarded. The tribunal did not specify the interest rate it was applying, although claimant had requested interest at the contractual rate applicable to late payments (12%).
17	<i>KWV Int'l (Pty) Ltd. v. Peter Andrew LLC</i> , pp. 12–13	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR 	7%	One of the contracts at issue provided for an interest rate of 7% on overdue payments; the other was silent on interest.

No.	Case	Case Details	Rate Applied	Approach to Interest
	(available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2008 		Despite the fact that “[b]oth parties have requested pre and post award interest at the New York statutory rate of 9% per annum,” the sole arbitrator concluded that the contractual interest provision reflected what the parties had deemed an appropriate rate of interest for their business arrangement and accordingly awarded interest at the 7% contractual interest rate, to run from the date of breach until the date of payment.

No.	Case	Case Details	Approach to Interest
<u>Awards Granting Interest at the New York Statutory Prejudgment Interest Rate (Reasoned Decisions)</u>			
In arbitrations where the contract between the parties was silent on the issue of interest, arbitral tribunals have often granted pre-award and/or post-award interest at the 9% New York statutory prejudgment interest rate. Those tribunals that have issued (often perfunctory) reasoned decisions on this issue have generally relied on the parties’ choice of New York law as the law governing the contract.			
18	<i>Organizacion Ideal, S. de R.L. de C.V. v. FHR Mexico Management Company, S.A. de C.V.</i> , ¶¶ 484–500 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: AAA - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2017 	<p>The sole arbitrator granted pre-award interest at the 9% statutory rate. In this case, the parties apparently agreed that CPLR §§ 5001 and 5004 governed the grant of interest.</p> <p>The dispute related solely to whether the grant of pre-award interest on an award of lost profits would constitute double recovery and a windfall for the award creditor. The sole arbitrator considered that New York law did not bar the grant of prejudgment interest on lost profits.</p>
19	<i>Digitelcom Ltd. v. Tele2 Sverige AB</i> , ¶ 457 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2011 	<p>The tribunal granted post-award interest on costs, to run beginning 15 days from the rendering of the award.</p> <p>It applied the New York 9% statutory prejudgment interest rate, holding that it was appropriate given that New York law governed the contract and New York was the seat of arbitration.</p>
20	<i>Kailuan Int’l Co., Ltd v. Sino East Minerals Ltd.</i> , ¶¶ 136–37 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York 	The tribunal, citing the CPLR, granted pre-award interest at the statutory 9% rate, stating that “[w]e find this rate appropriate” because New York law governed the contract. The tribunal further granted post-award interest at 9%, to run beginning 30

No.	Case	Case Details	Approach to Interest
	Materials)	<ul style="list-style-type: none"> - <u>Law</u>: New York - <u>Year</u>: 2016 	days after the rendering of the award.
21	<i>Logic, S.P.A. v. L-3 Communications Corp.</i> , ¶ 111 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2015 	<p>This decision is notable in that the tribunal explicitly found that it was not bound to apply the New York statutory prejudgment interest rate. However, citing to CPLR §§ 5001 and 5004, it found the 9% rate “appropriate” because it was the rate applied to New York court judgments and therefore “may be used by arbitral tribunals for guidance.”</p> <p>The tribunal granted simple pre-award interest at 9%, running from the date of breach. It also granted 9% post-award interest until the date the award was paid.</p>
22	<i>Sexton v. Karam et al.</i> , ¶¶ 218–222 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2014 	<p>The tribunal did not grant pre-award interest, as it had rejected the claimant’s claims and there were no counterclaims. However, it did grant post-award interest on its award of costs and fees.</p> <p>The tribunal noted that Article 28(4) of the ICDR Rules allowed it to “award such . . . post-award interest . . . as it considers appropriate, taking into consideration the contract and applicable law.”</p> <p>The tribunal further indicated that the “New York CPLR does not set forth a post-award interest rate for international arbitrations seated in New York and does not mandate the application of its post-judgment interest rate to such arbitrations. Further, it is generally accepted in international arbitration that neither the statutory post-judgment interest rate at the seat of arbitration nor the statutory post-judgment interest rate of the law governing the contract mandatorily applies. Instead, arbitrators generally have wide discretion to determine the applicable interest rate, and the ICDR Rules reflect this principle.</p> <p>In exercise of its discretion, the tribunal nonetheless chose to apply the 9% CPLR rate “that would apply to a judgment rendered by a New York state court as of the date of this Final Award.”</p>
23	<i>Barracuda and Caratinga Leasing Co., B.V. v. Kellogg Brown & Root, LLC</i> , at Part K(A) (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: LCIA (UNCITRAL Rules) - <u>Seat</u>: New York 	<p>This arbitration, while administered by the LCIA, was conducted pursuant to the 1976 UNCITRAL Arbitration Rules, which are silent as to the award of interest.</p> <p>The tribunal declined to grant any pre-award interest, noting that the claimant did not request such interest and that the claimant had not incurred additional replacement</p>

No.	Case	Case Details	Approach to Interest
	Materials)	<ul style="list-style-type: none"> - <u>Law</u>: New York - <u>Year</u>: 2011 	costs that would warrant the grant of pre-award interest. With respect to post-award interest, the tribunal granted the New York statutory prejudgment interest rate because New York law was the “law applicable to the arbitration” and the contract. This post-award interest was applied both to damages and to the costs awarded by the tribunal.
24	<i>Aconcagua Investing Ltd. v. Ingaseosas International Co.</i> , ¶¶ 165–66 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: Miami - <u>Law</u>: New York - <u>Year</u>: 2008 	<p>The sole arbitrator granted pre- and post-award interest at the 9% statutory prejudgment interest rate, reasoning that “no interest rate was stipulated” in the contract.</p> <p>The sole arbitrator determined that pre-award statutory interest would run from the date of breach as determined by the arbitrator. Post-award interest would begin accruing if payment of the amount awarded was not made within 30 days.</p>
<u>Awards Granting Interest at the New York Statutory Prejudgment Interest Rate (Unreasoned Decisions)</u>			
Many awards that have granted interest at the 9% statutory prejudgment interest rate have done so without any analysis.			
25	<i>Life Insurance Fund Elite Trust v. Avon Capital, LLC</i> (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: AAA - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2016 	The sole arbitrator granted 9% pre-award interest pursuant to CPLR §§ 5001 and 5004. The sole arbitrator did not provide any reason for this award other than that the claimant was “entitled” to statutory interest.
26	<i>Moses & Singer LLP v. Cleveland Heart, Inc.</i> , ¶¶ 1–7 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: AAA - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2015 	The sole arbitrator granted 9% interest pursuant to CPLR § 5004 to each of seven sums due under seven separate invoices.
27	<i>Travelers v. Idas Celik Enerji Tersane ve Ulasim Sanayi A.S.</i> (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York 	For pre-award interest, the tribunal simply awarded a lump sum amount. For post-award interest, the tribunal granted interest at the New York statutory prejudgment interest rate to run on any amounts unpaid within 30 days of issuance of the arbitral award.

No.	Case	Case Details	Approach to Interest
		- <u>Year</u> : 2015	
28	<i>Hard Way, LLC v. Roc Fashions, LLC</i> , p. 2 (available via Westlaw Arbitration Materials)	- <u>Institution</u> : ICDR - <u>Seat</u> : New York - <u>Law</u> : New York - <u>Year</u> : 2014	The tribunal granted a fixed figure for pre-award interest (\$68,219.18 interest through June 18, 2014 plus \$4.28 per day through date of award). For post-award interest, the tribunal granted 9% statutory interest, to run beginning 30 days after the rendering of the award.
29	<i>Caldera Resources, Inc. v. Global Gold Mining, LLC</i> , ICDR Case No. 50 2010 00674, p. 40 (available via Westlaw Arbitration Materials)	- <u>Institution</u> : ICDR - <u>Seat</u> : New York - <u>Law</u> : New York (?) - <u>Year</u> : 2014	The tribunal neither granted nor discussed pre-award interest. It granted post-award interest at New York's statutory prejudgment interest rate of 9% on most categories of damages awarded, running from the date of award.
30	<i>Garcia v. Ridge C.C.</i> , ¶¶ 66, 82 (available via Westlaw Arbitration Materials)	- <u>Institution</u> : ICC - <u>Seat</u> : New York - <u>Law</u> : New York - <u>Year</u> : 2014	The tribunal granted 9% simple pre-award and post-award interest. The pre-award interest was to run from the date of breach. The tribunal opted to grant simple interest despite a contractual provision that allowed it discretion to grant compound interest.
31	<i>Schulte, Roth & Zabel, LLP v. China North Oil East Petroleum Holdings Ltd.</i> , p. 8 (available via Westlaw Arbitration Materials)	- <u>Institution</u> : ICDR - <u>Seat</u> : New York - <u>Law</u> : New York (?) - <u>Year</u> : 2014	The sole arbitrator granted pre-award interest at the 9% statutory prejudgment interest rate, to run from date of breach. There was no discussion of post-award interest.
32	<i>GlobeOp Financial Svcs. LLC v. Titan Capital Group</i> , p. 51 (available via Westlaw Arbitration Materials)	- <u>Institution</u> : ICDR - <u>Seat</u> : New York - <u>Law</u> : New York - <u>Year</u> : 2014	The sole arbitrator referenced the contractual choice of New York law and noted that “under New York law, interest is normally allowed and awarded as a matter of course.” He granted pre-award interest at 9%. He also granted post-award interest at the statutory prejudgment interest rate.

No.	Case	Case Details	Approach to Interest
33	<i>CE Int'l Resources Hldgs, LLC v. S.A. Minerals Ltd. Partnership</i> , ¶ 75 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2013 	The sole arbitrator granted 9% statutory interest, to run from the approximate date of breach. This interest was to run until award-debtor received payment in full.
34	<i>Toshiba Corp. v. Nat'l Film Laboratories, Inc.</i> (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2012 	The sole arbitrator granted post-award interest at the statutory prejudgment interest rate on attorney's fees and costs, to begin running immediately after the rendering of the award. There was no mention of pre-award interest.
35	<i>Colt Int'l Ltd. v. Altpower, Inc.</i> (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2012 	The sole arbitrator granted pre-award interest at the statutory prejudgment interest rate, to run from a date fixed after the commencement of the arbitration. There was no mention of post-award interest.
36	<i>Oakley Fertilizer, Inc. v. Hagrpota For Trading & Distribution, Ltd.</i> , ¶ 136 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2011 	The tribunal granted simple 9% statutory interest, running from the date of breach. It made no express finding with respect to post-award interest.
37	<i>Amri Rensselaer, Inc. v. Borregaard Industries Ltd.</i> , ¶ 3 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2010 	<p>The sole arbitrator cited to the CPLR, and granted pre-award interest at the statutory prejudgment interest rate. The interest was to run from the date on which claimant received notice of the termination of the contract at issue.</p> <p>The sole arbitrator also granted post-award statutory interest at 9%, to run until date of payment.</p>
38	<i>A.G.k. SARL v. A.M. Todd Co.</i> , ¶ 17 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR 	The tribunal granted pre-award interest at the 9% statutory prejudgment interest rate. The interest was to run from the date the arbitration commenced, given the extreme

No.	Case	Case Details	Approach to Interest
	Materials)	<ul style="list-style-type: none"> - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2010 	<p>longevity of the dispute.</p> <p>The tribunal also granted post-award interest at the 9% statutory prejudgment interest rate, to run until payment in full.</p>
39	<i>Lizton Trading, Ltd. v. ATM Lenders, LLC</i> , ¶¶ 190–91, 194 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: LCIA - <u>Seat</u>: London - <u>Law</u>: New York - <u>Year</u>: 2008 	<p>With respect to pre-award interest, the tribunal stated that it would exercise “its discretion to apply the New York rate of interest of 9% to the principal sums awarded.” This was to be a simple interest rate, running from the date of breach.</p> <p>Similarly, for post-award interest, the tribunal granted simple interest at New York’s statutory prejudgment interest rate. This was uncontested.</p> <p>The tribunal awarded interest at a rate of LIBOR +2% on the costs of the arbitration if not paid within 14 days.</p>
40	<i>Navneet Publications India Ltd. v. American Scholar, Inc.</i> , ¶¶ 5.2-5.3 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: Unclear - <u>Year</u>: 2008 	<p>The sole arbitrator granted the claimant 9% pre-award interest running from the date of breach, and 9% post-award interest on any unpaid amounts to begin running 30 days from the date the award was rendered.</p>
41	<i>Colonial Oil Industries, Inc. v. Masefield America, Inc.</i> , ¶ 5.3 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2007 	<p>The tribunal granted both pre-award and post-award interest at the 9% statutory prejudgment interest rate.</p>
42	<i>Lubiam Modo per l’Uomo SPA v. Chesapeake Int’l Ltd.</i> , ¶ 19 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2007 	<p>The tribunal granted pre-award interest “at the legal rate of interest permitted under the law of New York.” The interest was to run until the date of payment.</p>
43	<i>Esso Exploration and Prod. Chad Inc. v.</i>	<ul style="list-style-type: none"> - <u>Institution</u>: ICC 	<p>In this case, the applicability of the 9% statutory prejudgment interest rate was uncontested. The sole arbitrator granted pre-award interest, to run from “an</p>

No.	Case	Case Details	Approach to Interest
	<i>Taylor's Int'l Svcs. Ltd.</i> , ¶¶ 58, 60 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2006 	appropriate midpoint of the various dates on which Esso Chad incurred the losses suffered by it.” Post-award interest at the 9% rate was granted on both damages and the costs and fees awarded by the tribunal. It was to run starting 1 month and 1 week after the rendering of the award.
44	<i>Capital India Power Mauritius I v. Mahashtra Power Dev't Corp. Ltd.</i> , ICC Award No. 12913/MS, pp. 34–36 (available via italaw.com)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2005 	The tribunal granted 9% simple pre-award interest, to run from the date of the destruction of claimant's equity in an investment project in breach of a Shareholders Agreement. The tribunal invoked its discretion to decline to grant pre-award interest on arbitration costs. The tribunal also granted 9% simple post-award interest.
45	<i>Chemical Overseas Hldgs, Inc. v. Uruguay</i> , ¶¶ 64–65, 68(a) and 68(h) (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2004 	Invoking the CPLR, the tribunal held that claimants were entitled to simple 9% interest “from the earliest ascertainable date the cause of action existed.” The tribunal also granted simple post-award interest at the statutory 9% rate.
46	<i>ICC Case No. 9839</i> , ¶ 63 (excerpt available in 2004 Y.B. Com. Arb. 66)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: Unclear - <u>Law</u>: New York - <u>Year</u>: 1999 	The tribunal held that, under CPLR § 5001, the petitioner was owed 9% interest from the earliest possible date its cause of action existed. This 9% interest was to run until petitioner received full payment of the sum awarded.
47	<i>White Westinghouse Int'l Co. v. Bank Sepah</i> , IUSCT Case No. 14 (7-14-3), (summarized in 1983 Y.B. Com. Arb. 320)	<ul style="list-style-type: none"> - <u>Institution</u>: IUSCT - <u>Seat</u>: The Hague - <u>Law</u>: Unclear - <u>Year</u>: 1982 	In this case, a check issued by the respondent to claimant remained unpaid due to a presidential order of 14 November 1979, freezing respondent's U.S. assets. A consent judgment was filed in the New York Court Clerk's office on 28 February 1980. Before the Iran-U.S. Claims Tribunal, the claimant sought the principal amount of this judgment plus interest running from 14 November 1979. For its part, the respondent claimed that no interest should be payable on the principal amount because its funds in the U.S. were frozen. The tribunal noted evidence that respondent's U.S. funds had yielded interest during the period in question, and therefore respondent could not be exempted from paying New York statutory interest.

No.	Case	Case Details	Approach to Interest
			<p>The tribunal applied §§ 5003 and 5004 of the CPLR in its analysis. The application of § 5003, which deals with post-judgment interest, was a product of the unusual circumstances of this case, <i>i.e.</i> that the tribunal was dealing with an award that followed a New York state court judgment.</p> <p>The tribunal granted pre-award interest at 6% up to and including 24 June 1981. After that date, pre-award interest was raised to 9% to match the increase in the CPLR rate. This interest was to run from the date of the consent judgment.</p> <p>No post-award interest was granted.</p>

APPENDIX B

New York Federal and State Court Decisions Reviewing Arbitrators' Awards of Interest

No.	Case Citation	Approach to Interest
	<u>Federal Court Decisions Reviewing Arbitrators' Interest Awards</u>	
	Federal courts have consistently held that the question of whether to grant pre-award interest is for the arbitrators to determine and that courts are powerless to award such interest if the arbitrators have not done so. By contrast, federal courts have discretion to grant post-award, prejudgment interest if the arbitral tribunal has not granted such interest in its award. Where arbitral tribunals have granted post-award interest, federal courts will confirm the award of interest for the post-award, prejudgment period. There appears to be no difference between the federal courts' approach to domestic and international arbitral awards.	
1	<i>Waterside Ocean Navigation Co. v. International Navigation Ltd.</i> , 737 F.2d 150 (2d Cir. 1984)	<p>In this New York Convention case, the lower court had confirmed the tribunal's award without granting post-award, prejudgment interest, stating that it did not have jurisdiction to "go beyond confirmation" of the award.</p> <p>On appeal, the Second Circuit held that whether to grant post-award, prejudgment interest in cases arising under federal law has, in absence of statutory directive, been placed in the "sound discretion" of the district courts. The court noted that there is a presumption in favor of the award of prejudgment interest, and that the facts did not indicate that award of prejudgment interest would be inappropriate in this case.</p> <p>The case was thus remanded to the district court for computation of post-award, prejudgment interest at a "appropriate rate."</p>
2	<i>Manios v. Zachariou</i> , No. 14CV4331-LTS-DCF, 2015 U.S. Dist. LEXIS 42537 (S.D.N.Y. 2015)	<p>In this proceeding to vacate an international arbitral award under Chapter 2 of the Federal Arbitration Act ("FAA"), the award-creditor argued that the arbitrators had manifestly disregarded the law by granting pre-award interest on a distribution of assets in an estate settlement case. The award-creditor contended that the terms of CPLR § 5001 only allow for interest upon "a sum awarded."</p> <p>The court rejected the award-creditor's "manifest disregard" claim, holding that where parties agree to submit a dispute to AAA arbitration (such as in the instant case), the AAA Commercial Rules are incorporated into the underlying agreement. Because the AAA Rules grant arbitrators the authority to award interest at such rate and from such date as they may deem appropriate, the tribunal did not manifestly exceed its authority by granting pre-award interest in this case.</p> <p>Accordingly, the award-debtor was not entitled to vacatur of the arbitral tribunal's award under the FAA.</p>
3	<i>Sayigh v. Pier 59 Studios</i> , No. 11-CV-1453-RA, 2015 U.S. Dist. LEXIS 27139, at *37 (S.D.N.Y.	In this proceeding to modify or vacate an arbitral award, the award-creditor argued that the arbitrator manifestly disregarded New York law by not granting her pre-award interest.

No.	Case Citation	Approach to Interest
	Mar. 5, 2015)	<p>The court rejected this argument, first noting that CPLR § 5001 (providing that interest shall be recovered on a sum awarded for breach of contract) was inapplicable, as the underlying dispute concerned an alleged act of employment discrimination.</p> <p>The court further held that, “where an arbitrator could have awarded pre-award prejudgment interest but did not, the court may not do so when entering judgment on an arbitration award.”</p> <p>The court, applying CPLR § 5002, granted “post-award prejudgment interest at an annual rate of 9%” as well as post-judgment interest at the rate provided for in 28 U.S.C. § 1961(a).</p>
4	<p><i>Local Union No. 1 of the United Assn. of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. v. Bass Plumbing & Heating Corp.</i>, 2014 U.S. Dist. LEXIS 183085 (E.D.N.Y. Oct. 28, 2014)</p>	<p>In this proceeding to confirm a domestic arbitral award, the arbitral tribunal had not granted post-award, prejudgment interest. Petitioner sought, along with confirmation of its award, to obtain interest from the date of the award.</p> <p>Magistrate judge Viktor Pohorelsky found that where an award is silent as to prejudgment interest, a court is not entitled to award such interest. He therefore recommended that Petitioner’s request for interest be denied. This recommendation was adopted, and a judgment was entered in <i>Local Union No. 1 of the United Assn. of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. v. Bass Plumbing & Heating Corp.</i>, 2015 U.S. Dist. LEXIS 37932 (E.D.N.Y. Mar. 25, 2015).</p> <p>This judgment is at odds with the weight of New York federal case law, which provides that courts have discretion to grant post-award, prejudgment interest where the arbitral award is silent as to such interest. The outcome of this case appears to have resulted from the Magistrate Judge’s misreading of certain precedents (<i>see Shamah v. Schweiger</i> and <i>Moran v. Arcano</i>, below) which had referred to pre-award interest as “prejudgment” interest.</p>
5	<p><i>PremiereTrade Forex, LLC v. FXDirectDealer, LLC</i>, No. 12 CIV. 7006 PAC, 2013 WL 2111286 (S.D.N.Y. May 16, 2013)</p>	<p>In this proceeding to confirm a domestic arbitral award, the tribunal in the underlying arbitration had granted post-award interest at the New York statutory prejudgment interest rate of 9%, to begin running 30 days after the award.</p> <p>During the confirmation proceeding, the award-creditor sought a separate, additional award of prejudgment interest at 9% per annum, on top of the arbitrators’ award of post-award interest.</p> <p>The court denied the award-creditor’s request for duplicative post-award, prejudgment interest, noting that “confirmation of the award will include post-award interest at a rate of 9% specified in the arbitrators’ opinion”. The court further noted that, to the extent the award-creditor’s request for prejudgment interest referred to pre-award interest, “the Court will not grant interest that the arbitrators in this action explicitly denied.”</p>

No.	Case Citation	Approach to Interest
6	<i>Ganfer & Shore, LLP v. Witham</i> , 2011 U.S. Dist. LEXIS 2622 (S.D.N.Y. 2011)	<p>In this proceeding to confirm a domestic arbitral award, the court held that where an arbitral tribunal does not grant pre-award interest, a court cannot award such interest on a motion to confirm the arbitration award.</p> <p>By contrast, the court held that it was required to grant post-award, prejudgment interest “absent circumstances warranting the contrary” and that post-judgment interest was similarly “mandatory.”</p>
7	<i>Finger Lakes Bottling Co. v. Coors Brewing Co.</i> , 748 F.Supp.2d 286, 292-93 (S.D.N.Y. 2010)	<p>In this proceeding to confirm a domestic arbitral award, the court first noted that, where arbitrators have authority to grant pre-award interest, courts cannot grant such interest in post-award proceedings.</p> <p>However, in this case the issue of interest was beyond the scope of the parties’ narrowly-worded and limited arbitration agreement. New York law governed the granting of pre-award interest, because this was a diversity case and New York law governed the arbitration agreement.</p> <p>The award-creditor was not entitled to interest at the 9% statutory prejudgment interest rate because it did not assert a claim for breach of contract. Rather, because the proceeding was one of an equitable nature, the court had discretion to grant pre-award interest under CPLR § 5001. The court ultimately granted interest at the treasury bill rate, reasoning that the New York statutory prejudgment interest rate was not in line with actual market conditions.</p>
8	<i>Petrie v. Clark Moving & Storage, Inc.</i> , No. 09-CV-06495, 2010 U.S. Dist. LEXIS 48460 (W.D.N.Y. 2010)	<p>In this proceeding to confirm a domestic arbitral award, the award-creditor requested that the court grant pre-award interest at the 9% rate specified in CPLR § 5004.</p> <p>The court rejected the award-creditor’s claim, noting that arbitrators may provide for pre-award interest as part of their award, but if the award is silent on pre-award interest courts may not grant it.</p> <p>Because the “court is not entitled to award an amount relating to such prejudgment interest . . . the parties must determine the applicable interest rate and calculate the amount due.”</p>
9	<i>Coastal Caisson Corp. v. E.E. Cruz/NAB/Frontier-Kemper</i> , 2007 U.S. Dist. LEXIS 58114 (S.D.N.Y. Aug. 10, 2007)	<p>In this proceeding to confirm a domestic arbitral award, the award-creditor moved to modify the award to add prejudgment interest. The award-creditor sought 9% prejudgment interest pursuant to the CPLR, from the date the contract balance was due.</p> <p>The arbitral tribunal had held that “[a]lthough prejudgment interest may be required by the CPLR, we find that we have discretion under the applicable rules of the American Arbitration Association not to award pre-award interest Given the vast uncertainties concerning the amounts due and the reasons for those uncertainties . . . we think it is highly inappropriate to award interest and we decline to do so.”</p> <p>In denying the award-creditor’s motion to modify the award, the court noted that “the arbitrators did not</p>

No.	Case Citation	Approach to Interest
		<p>disregard law in exercising their discretion to deny [award-creditor] prejudgment interest.” The court noted that the parties had selected the American Arbitration Association Construction Industry Rules and New York law to govern their dispute. The former, at Rule 44(d), grant arbitrators discretion to award such interest as they may deem appropriate. The latter, at CPLR § 5001, provides that “interest may be required by law.”</p> <p>Ultimately, the court concluded that “[g]iven the tension between Rule 44(d) and Section 5001, it is appropriate to refrain from vacating an arbitral award and to defer to the arbitrators’ judgment.</p> <p>This case was partially reversed on unrelated grounds in <i>E.E. Cruz v. Coastal Caisson Corp.</i>, 346 Fed. Appx. 717 (2d Cir. 2009).</p>
10	<p><i>P.M.I. Trading Ltd. v. Farstad Oil, Inc.</i>, 2001 U.S. Dist. LEXIS 227 (S.D.N.Y. 2001)</p>	<p>In this New York Convention case, the court, citing <i>Waterside Ocean Nav.</i>, held that, absent persuasive evidence to the contrary, post-award, prejudgment interest is available for judgments rendered under the New York Convention and is presumed to be appropriate.</p> <p>The court held that “[t]he mere fact that arbitrators chose not to award post-award, prejudgment interest does not control this analysis.”</p> <p>It granted post-award, prejudgment interest, as well as post-judgment interest, at the federal post-judgment rate specified by 28 U.S.C. § 1961(a).</p>
11	<p><i>Shamah v. Schweiger</i>, 21 F.Supp.2d 208 (E.D.N.Y. 1998)</p>	<p>In this proceeding to confirm a domestic arbitral award, the award-creditor moved to modify the amount of the award to include pre-award interest at the New York statutory prejudgment interest rate of 9%. It asserted that the tribunal’s grant of 6% interest was a “material miscalculation” that necessitated modification.</p> <p>The court denied the motion, noting that courts “have rejected motions to vacate or modify arbitration awards which have failed to provide prejudgment interest.” The court also cited <i>Moran v. Arcano</i> for the proposition that arbitrators may grant pre-award interest, but when their award is silent with regard to such interest, courts may not grant it in the arbitrators’ stead.</p> <p>The court considered that, in awarding 6% interest, the tribunal could have been using the federal post-judgment interest rate. Accordingly, there was no evidence that the pre-award interest component of the arbitral award was miscalculated. The court denied the award-creditor’s request for modification.</p>
12	<p><i>Nicoletti v. E.F. Hutton & Co.</i>, 761 F.Supp. 312 (S.D.N.Y. 1991)</p>	<p>The award-creditor moved to modify a domestic arbitral award on the ground that the tribunal had manifestly disregarded the law in failing to grant him pre-award interest under CPLR § 5001.</p> <p>The court denied the motion, noting that the award-creditor had cited to no case in which an arbitration</p>

No.	Case Citation	Approach to Interest
		award was vacated or modified for failure to award prejudgment interest. Although the award-creditor's claim sounded in contract, the arbitrators may have determined that his entitlement was equitable rather than contractual, and that interest was therefore discretionary under CPLR § 5001(a).
13	<i>Jamaica Commodity Trading Co. v. Connell Rice & Sugar Co.</i> , No. 87 CIV. 6369 (JMC), 1991 WL 123962 (S.D.N.Y. July 3, 1991)	<p>In this New York Convention enforcement proceeding, the arbitral tribunal had granted post-award, prejudgment interest “in the amount of 10% per year from the date of the award until the award is fully paid or reduced to judgment.”</p> <p>In addition to confirming the principal amount of the award, the court expressly noted that it was confirming the arbitrators’ award of prejudgment interest pursuant to <i>Waterside Ocean Nav.</i></p>
14	<i>Moran v. Arcano</i> , 1990 U.S. Dist. LEXIS 9349 (S.D.N.Y. 1990)	<p>In this proceeding to confirm a domestic arbitral award, the award-creditor claimed pre-award and post-award, prejudgment interest. The court held that whether interest is taxed on a claim prior to the entry of an arbitration award (<i>i.e.</i>, pre-award interest) is within the discretion of the arbitrators (although neither of the two cases that it cited in support of this proposition so held).</p> <p>The court held that if the award is silent as to pre-award interest, a court is not entitled to grant it. By contrast, it held that “the award of post-award prejudgment interest is a matter left with the district court.”</p>
15	<i>Brandeis Intsel, Ltd. v. Calabrian Chemicals Corp.</i> , 656 F.Supp. 160 (S.D.N.Y. 1987)	<p>In this proceeding to confirm an international arbitral award under the New York Convention, the award-debtor cross-moved for vacatur, <i>inter alia</i> on the ground that the tribunal’s award of 11.5% pre-award interest was penal and therefore contrary to U.S. public policy.</p> <p>The court denied the cross-motion, holding that the award-debtor had not shown that the arbitrators’ chosen rate of 11.25% per annum was penal as a matter of English law, which governed the parties’ contract. Moreover, the award-debtor had not pointed to any other expression of accepted public policy which would weigh against confirming the arbitrators’ award of interest. 28 U.S.C. § 1961(a), which refers to post-judgment interest, was inapposite.</p>
16	<i>UCO Terminals, Inc. v. Apex Oil Co.</i> , 583 F. Supp. 1213 (S.D.N.Y. 1984)	<p>In this proceeding to confirm a domestic arbitral award, the award-debtor cross-moved to vacate the award, in part on the ground that the tribunal’s calculation of post-award interest was incorrect and unauthorized. The tribunal had granted post-award interest at a rate of 12%, to run beginning 30 days after the award was rendered.</p> <p>The court rejected the award-debtor’s argument that this grant of interest was unauthorized, noting that “[p]ost-award interest is an entirely rational arrangement established by the arbitrators to compensate [award creditor] for its loss. . . . Absent some express limitation on such an award, the Court can discern</p>

No.	Case Citation	Approach to Interest
		<p>no disregard of applicable law or of the [underlying contract] here.”</p> <p>The court further rejected the award-debtor’s argument that the annual rate of 12% established in the arbitral award should be set aside, as there was no indication that the tribunal disregarded the law in granting such a rate of interest.</p>
17	<p><i>A/S Siljestad v. Hideca Trading, Inc.</i>, 541 F. Supp. 58 (S.D.N.Y. 1981)</p>	<p>In this confirmation proceeding, the award-debtor moved to vacate the arbitral tribunal’s grant of pre-award interest at 14%, as said interest was omitted from the arbitral award itself and was only later added as an “Appendix B.” The award-debtor argued that this amounted to an impermissible reconsideration of the tribunal’s ruling.</p> <p>The court rejected the award-debtor’s claim, holding that the tribunal had not considered the issue of interest in its initial award, and therefore retained discretion to subsequently add pre-award interest in the form of Appendix B.</p> <p>The grant of interest was thus confirmed. The court, applying federal maritime law, granted post-award, prejudgment interest, also at 14%.</p>
18	<p><i>United States use of Groisser & Schlager Iron Works, Inc. v. Walsh</i>, 240 F. Supp. 1019 (N.D.N.Y. 1965)</p>	<p>In this case, the award-debtor moved to vacate a prior judgment confirming an arbitral award. The prior judgment had granted pre-award interest to the award-creditor notwithstanding that (a) the tribunal had not granted pre-award interest, and (b) the issue of interest had not been placed before the arbitral tribunal.</p> <p>The court held that, under CPLR §§ 5001, 5002 and 5003, the award-creditor was entitled to interest as a matter of right. The court noted that while the issue of interest was not submitted to the tribunal in the demand for arbitration, the parties specifically agreed in their arbitration agreement to arbitrate their dispute “as to balance due, together with appropriate interest.” Further, the award-creditor had demanded interest in the complaint it submitted to the district court.</p> <p>Thus, even though the arbitral tribunal had not granted pre-award interest, the court rejected the award-debtor’s argument that the court’s grant of pre-award interest was improper and merited vacatur or modification of the prior judgment.</p> <p>N.B. This case appears at odds with the weight of subsequent case law, which unambiguously holds that courts may not grant pre-award interest if the arbitrators have not done so.</p>
<p><u>New York State Court Decisions Reviewing Arbitrators’ Interest Awards</u></p> <p>New York state case law mirrors federal case law with regard to the review of arbitrators’ awards of interest.</p>		

No.	Case Citation	Approach to Interest
19	<i>Dermigny v. Harper</i> , 6 N.Y.S.3d 561 (2d Dep’t 2015)	<p>In this appeal, the award-creditor sought to reinstate a vacated lower court judgment that had confirmed an arbitral award and granted pre-award interest. The lower court had vacated its own judgment on the ground that the award-creditor had misrepresented to the clerk of the court that he was entitled to pre-award interest.</p> <p>The Appellate Division noted that, because the arbitration award did not include a provision granting pre-award interest to the award-creditor, the court was without power to grant such pre-award interest. Post-award, prejudgment interest and post-judgment interest were granted pursuant to CPLR 5002 and 5003, respectively.</p>
20	<i>Esrey v. Ernst & Young, LLP</i> , 133 A.D.3d 539 (1st Dep’t 2015)	<p>In this case, the award-creditors appealed from a lower court ruling denying a motion to vacate an arbitral award on the ground that the tribunal had manifestly disregarded the law by granting prejudgment interest at a rate lower than the CPLR rate.</p> <p>The First Department affirmed the trial court’s ruling, noting that (a) the parties’ agreement limited the prevailing party’s damages to the actual damages suffered and (b) the tribunal had found that the award-creditors were “fully compensated” by reduced prejudgment interest.</p>
21	<i>Peters v. Collazo Florentino & Keil LLP</i> , 117 A.D.3d 432 (1st Dep’t 2014)	<p>In this case involving a domestic arbitral award, the award-creditor appealed from a decision confirming an arbitral award which granted prejudgment interest at a rate of 2% per annum.</p> <p>The First Department, reviewing the award under CPLR Article 75, denied the appeal and held that (a) the award-creditor failed to timely move to modify the award to raise the prejudgment interest rate to 9%, and (b) in any event, the arbitrator properly set the prejudgment interest rate at 2%.</p> <p>It is not entirely clear why the court felt that the 2% rate was proper. The court cited to CPLR § 5001(a), suggesting that it may have viewed the dispute as one of an equitable nature rather than for breach of contract. CPLR § 5001(a) provides that “in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be <i>in the court’s discretion</i>.”</p>
22	<i>Kingdon Capital Mgt., LLC v. Kaufman</i> , 110 A.D.3d 648 (1st Dep’t 2013)	<p>In this case involving a domestic arbitral award, the award-debtor appealed from the lower court’s judgment granting the award-creditor the sum and prejudgment interest rate set by the award.</p> <p>The First Department unanimously affirmed the lower court judgment, noting that there was no basis for modifying the rate of prejudgment interest awarded.</p>
23	<i>Levin & Glasser, P.C. v. Kenmore Property, LLC</i> ,	<p>In this case involving a domestic arbitral award, the award-debtor appealed from the lower court’s</p>

No.	Case Citation	Approach to Interest
	896 N.Y.S.2d 311 (1st Dep't 2010)	<p>judgment granting the award-creditor pre-award interest pursuant to CPLR § 5001.</p> <p>The Appellate Division vacated the lower court's judgment, holding that the lower court had erred in granting pre-award interest. It reasoned that, in contract disputes before an arbitral tribunal, the question of whether interest from the date of breach of contract should be allowed in the arbitral award is a mixed question of law and fact that is for the arbitrator to determine.</p> <p>Because the award-creditor could have sought pre-award interest from the arbitral tribunal, it was now barred from seeking such interest from the court.</p>
24	<i>Grobman v. Chernoff</i> , 881 N.Y.S.2d 458 (2d Dep't 2009)	<p>The award-creditor appealed from a lower court order that disallowed pre-award interest. The circumstances of this case were unusual, in that the arbitration was focused solely on the issue of damages after the award-debtor's liability had been determined in a prior jury trial.</p> <p>The Appellate Division observed that in a personal injury action in which the trial is bifurcated, interest on damages runs from the date liability is determined. Therefore, the court held that the award-creditor was entitled to "pre-award" interest, <i>i.e.</i> interest running from the date of the jury verdict that preceded the arbitration.</p> <p>Thus, the Appellate Division granted the award-creditor interest on her personal injury award from the date the award-debtor's liability was determined, notwithstanding the tribunal's silence with regard to pre-award interest. This decision was affirmed by the Court of Appeals in <i>Grobman v Chernoff</i>, 15 N.Y.3d 525 (2010).</p>
25	<i>West Side Lofts, Ltd. v. Sentry Contr., Inc.</i> , 300 A.D.2d 130 (1st Dep't 2002)	<p>In this case involving a domestic arbitral award, the award-debtor appealed from a lower court ruling confirming an arbitral award, including pre-award interest.</p> <p>The First Department affirmed the lower court's judgment. It held that, [g]iven a broad arbitration clause and the absence of a contractual provision specifically prohibiting preaward interest, the award of preaward interest cannot be successfully challenged as beyond the arbitrator's power simply because the parties' contract contains no provision therefor and petitioner made no such demand in the arbitration."</p>
26	<i>Rothermel v. Fidelity & Guarantee Ins. Underwriters Inc.</i> , 721 N.Y.S.2d 565 (3d Dep't 2001)	<p>In this case involving a domestic arbitral award, the award-creditor appealed from a lower court ruling denying his request for pre-award interest. The arbitral tribunal had also refused to grant pre-award interest.</p> <p>The Appellate Division affirmed the lower court's ruling, holding that the question as to whether pre-award interest is to be awarded is for the arbitrator to determine and, if the arbitrator does not award any pre-award interest, the court is powerless to do so.</p>

No.	Case Citation	Approach to Interest
		<p>The court added that even if the arbitrator had committed an error of fact or law in denying the award-creditor pre-award interest, the lower court would have lacked the authority to correct such an error.</p>
27	<p><i>Excelsior 57th Corp. v. Kern</i>, 283 A.D.2d 209 (1st Dep’t 2001)</p>	<p>The award-creditor appealed from a lower court judgment vacating so much of an arbitration award as granted pre-award interest.</p> <p>The Appellate Division affirmed the lower court, holding that the arbitrators exceeded their authority in awarding pre-award interest on the back rent they found due, because (a) the parties’ narrow arbitration clause only covered specifically-mentioned issues of fact and (b) the parties did not agree to submit the issue of interest to the arbitrators. The court also declined to use “judicial discretion” to award interest under CPLR 5001, criticizing the award-debtor’s conduct in the underlying arbitration.</p>
28	<p><i>State Farm Mut. Auto. Ins. Co. v. Cordes</i>, 662 N.Y.S.2d 140 (2d Dep’t 1997)</p>	<p>In this appeal, the Second Department reversed a lower court order that granted pre-award interest, in spite of the arbitral tribunal’s failure to do so.</p> <p>The Second Department noted simply that “[t]he court lacked the power to award pre-arbitration award interest.”</p>
29	<p><i>Aetna Casualty and Surety Co. v. Rosen</i>, 650 N.Y.S.2d 29 (2d Dep’t 1996)</p>	<p>In this appeal from a lower court judgment confirming an arbitral award, the Appellate Division modified the lower court’s ruling so as to omit the court’s award of pre-award interest.</p> <p>The Appellate Division explained that the lower court was powerless to grant pre-award interest (as presumably the tribunal had not provided for such interest). Rather, upon confirmation of an arbitrator’s award, interest should be calculated from the date of the award.</p>
30	<p><i>Sedlis v. Gertler</i>, 554 N.Y.S.2d 615 (1st Dep’t 1990)</p>	<p>In this appeal from a lower court judgment confirming a domestic arbitral award, the tribunal had granted pre-award interest and post-award interest at a rate of 12%. The award-creditor requested that the court vacate the award or modify the interest the interest portion of the award.</p> <p>The parties’ contract provided that late payments would bear interest at the rate specified or at the “legal rate” at the award-creditor’s place of business, which was New York.</p> <p>The First Department held that, as no interest rate was specified in the parties’ contract, prejudgment interest should be calculated at the rate of 6% per annum set by General Obligations Law § 5-501(1).</p> <p>In modifying the award, the First Department relied on CPLR § 7511(c)(1), which provides that the court shall modify an arbitral award if “there was a miscalculation of figures . . . in the award.” This appears to have been in error, given that CPLR § 7511(c)(1) only authorizes modification of computational errors and not reversal of substantive rulings. The arbitrators’ award of interest involved a decision on a substantive</p>

No.	Case Citation	Approach to Interest
		issue, and not a mere miscalculation.
31	<i>Gruberg v. Cortrell Group, Inc.</i> , 143 A.D.2d 39 (1st Dep’t 1988)	<p>In this case involving a domestic arbitral award, the award-creditor appealed from a lower court judgment that had denied pre-award interest.</p> <p>The Appellate Division upheld the lower court’s decision to deny pre-award interest, but modified the date from which post-award interest was to run to correct a computational error by the arbitrator.</p> <p>The Appellate Division noted that in a contract dispute brought before an arbitrator, the question of whether interest from the date of breach of contract should be allowed is a mixed question of law and fact for the arbitrator to determine. Further, in a motion under CPLR § 7510 to confirm an arbitral award, the arbitrator’s award is deemed conclusive as to all matters of law and fact, unless some ground for modification or vacatur exists under CPLR § 7511.</p> <p>In this case, since the tribunal’s award was silent as to pre-award interest, the lower court did not have the authority to grant such interest.</p>
32	<i>Rosenblum v. Aetna Casualty & Surety Co.</i> , 439 N.Y.S.2d 482 (3d Dep’t 1981)	<p>The award-creditor appealed from a lower court judgment confirming an arbitral award that omitted pre-award interest. The award-creditor had moved under CPLR § 7511 to modify the award to include pre-award interest, but this motion was denied.</p> <p>The Appellate Division considered it “well settled” that arbitrators are empowered to fashion awards to achieve just results and “may shape remedies with a flexibility at least as unrestrained as that employed by a chancellor in equity.” Accordingly, the award should not be disturbed.</p>
33	<i>Penco Fabrics, Inc. v. Bogopulsky, Inc.</i> , 146 N.Y.S.2d 514 (1st Dep’t 1955)	<p>In this proceeding involving a domestic arbitral award, the Appellate Division held that the question of whether interest is to be allowed from the date of breach was for the arbitrators to determine. The court was powerless to award interest from the date of breach. The mere fact that the award was silent on interest did not mean that the arbitrators did not consider this question.</p> <p>Additionally, the court noted that provisions of law applicable to judicial actions and proceedings do not necessarily apply to arbitrations. Parties who submit their disputes to arbitration forego these provisions and leave all questions of law and fact to the arbitrators. The right to interest involves questions of law and fact that were within the arbitrators’ purview.</p>
34	<i>Taborsky v. Bayes</i> , No. 09-9562, 2016 N.Y. Misc. LEXIS 592 (Sup. Ct. Suffolk Co. Feb. 23, 2016)	<p>In this proceeding to confirm an arbitral award pursuant to CPLR Article 75, the award-creditor moved to modify the award to add pre-award interest, pursuant to CPLR § 5001.</p> <p>Citing <i>Dermigny and Rothemel</i>, the court noted that the arbitration award “did not include a provision</p>

No.	Case Citation	Approach to Interest
		granting the [award-creditor] pre-arbitration award interest; consequently, the court is without power to award such interest.”
35	<i>Chamois v. Countrywide Home Loans, Inc.</i> , 863 N.Y.S.2d 897 (Sup. Ct., Orange Co., 2008)	<p>In this proceeding to confirm a domestic arbitral award in a labor dispute, the award-creditors claimed that they were entitled to pre-award interest on their back pay award as a matter of law, despite the fact that the tribunal had not granted such interest.</p> <p>The court, applying the review standards contained within CPLR Article 75 and the Federal Arbitration Act, concluded that “judicial review of arbitration awards is extremely limited.”</p> <p>In particular, the court noted that arbitrators may provide for pre-award interest as part of their award, and that courts have rejected motions to vacate or modify arbitration awards which have failed to provide pre-award interest. It also noted that where an award is silent on pre-award interest, a court may not grant it.</p> <p>Thus, because pre-award interest was not mentioned in the arbitral award, the award-creditors’ request was denied.</p>
36	<i>DeMartini v. Bertram Garden Apartments</i> , 138 N.Y.S.2d 659 (Sup. Ct. Queens Co. 1955)	<p>In this case involving a domestic arbitration, the arbitral tribunal had rendered an award, a judgment had been entered thereon, and the award-debtor had made payment in full. Nevertheless, the award-creditor contended that he was still entitled to continue a proceeding to enforce a mechanic’s lien for pre-award interest on the arbitral award. The arbitrator’s award had not provided for pre-award interest.</p> <p>The court noted that “interest was an incident of the award and arose out of the contract between the parties” because all matters arising out of that contract were within the scope of the parties’ arbitration agreement. It followed that the arbitral award and the judgment entered thereon stood as a bar to enforcement of the mechanic’s lien.</p> <p>The court thus granted summary judgment dismissing the award-creditor’s attempt to enforce the mechanic’s lien.</p>

NEW YORK CITY BAR

Committee on International Commercial Disputes

Richard Mattiaccio, Chair

Cheryl H. Agris
Christian Paul Alberti
Olivier P. Andre
George A. Bermann
*James H. Carter**
Thomas C. Childs**
Stephanie L. Cohen
Robert B. Davidson
S. Gale Dick
Rocio Digon
Louis Epstein*
John L. Gardiner
Erin Gleason Alvarez
Marc Joel Goldstein
Evan W. Gray
Thomas D. Halket

Grant Aram Hanessian*
John J. Hay
Sherman Kahn
Jean E. Kalicki
Louis B. Kimmelman*
D. Brian King
Hon. John G. Koeltl
Kim J. Landsman
Erika Sondahl Levin
Emma Lindsay
David M. Lindsey
Dana MacGrath
Richard L. Mattiaccio
Mark C. Morril
*Joseph E. Neuhaus**
Peter J. Pettibone*

John V.H. Pierce*
Daniel S. Reich
Jay G. Safer
Ank A. Santens
Daniel Schimmel
Peter J.W. Sherwin
Richard H. Silberberg
Linda J. Silberman*
Robert L. Sills
Robert Hugh Smit*
Edna Rubin Sussman
Jami Mills Vibbert*
Thomas William Walsh
Gretta Walters
Alexander A. Yanos

** Indicates drafting subcommittee chair

* Indicates drafting subcommittee member

Italics indicates affiliate non-voting committee member

Ethics and Cybersecurity

**New York State Bar Association
Commercial Arbitration Training
June 2019**

Speakers:

Stephanie Cohen, Independent Arbitrator

Diana Didia, Senior Vice President/CIO, AAA-ICDR

Mark C. Morril, Independent Arbitrator & Mediator

Ethics and Cybersecurity for Arbitrators - Resources

- ABA Formal Opinion 477R (May 22, 2017), [Securing Communication of Protected Client Information](#)
- ABA Formal Opinion 483 (Oct. 17, 2018), [Lawyers' Obligations After an Electronic Data Breach or Cyberattack](#)
- NYC Bar Formal Opinion 2017-5: An Attorney's Ethical Duties Regarding U.S. Border Searches of Electronic Devices Containing Clients' Confidential Information at https://s3.amazonaws.com/documents.nycbar.org/files/2017-5_Border_Search_Opinion_PROETHICS_7.24.17.pdf
- The ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals (2d ed. 2018)

Cybersecurity in International Arbitration

- [ICCA-CPR-New York City Bar Association Draft Cybersecurity Protocol for Arbitration](#) – 2019 revision forthcoming
- [Debevoise Protocol to Promote Cybersecurity in International Arbitration](#) (July 2017)
- 2018 CPR Non-Administered Arbitration Rules, Rule 9.3(f) – at the administrative conference, parties may consider “the possibility of implementing steps to address issues of cybersecurity and to protect the security of information in the arbitration”
- HKIAC Administered Arbitration Rules, Article 3.1(e) – recognized means of communication may include “any secured online repository that the parties have agreed to use”
- Stephanie Cohen & Mark Morril, [A Call to Cyberarms—The International Arbitrator's Duty to Avoid Digital Intrusion](#), 40 Fordham International Law Journal 981 (2017)

Cross-Border Data Privacy Compliance in International Arbitration

- [ICC Note to Parties and Arbitral Tribunals on the Conduct of Arbitration under the ICC Rules of Arbitration](#), effective 1 January 2019, includes new guidance on data protection (see ¶¶ 80-91) which the ICC summarized as follows in its [announcement to the press](#):

“An entire new section of the Note is devoted to compliance with European Union General Data Protection Regulation (GDPR) regulations. In particular, the Note clarifies that by accepting to participate in an ICC Arbitration, parties, their representatives, arbitrators, the administrative secretary, witnesses, experts and any other individuals that may be involved in any capacity in the arbitration accept that their personal data will be collected, transferred, archived and as the case may be, published.

The Note further reminds parties of their duty to ensure that said individuals are aware and accept the use of their personal data. Arbitral tribunals shall to that effect, at an appropriate time in the arbitration, remind the parties and other participants in the arbitration that their data may be used, as well as of their right under the GDPR Regulation to seek the correction or suppression of the same. It is in particular encouraged to include a clause to the effect in the Terms of Reference and the Secretariat is available to recommend a model clause.”

- Press Release, [ICCA and IBA Establish Task Force on Data Protection](#) (Feb. 2019)
- Kathleen Paisley, [It's All About the Data: The Impact of the EU General Data Protection Regulation on International Arbitration](#), 41 Fordham International Law Journal 841 (2018)
- Transnational Dispute Management, Stephanie Cohen and Mark Morril, Editors, Special Issue on Cybersecurity in International Arbitration (2019) at <https://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=85> (subscription required)

Previously published as "A Call to Cyberarms: The International Arbitrator's Duty to Avoid Digital Intrusion", in 40 FORDHAM INTERNATIONAL LAW JOURNAL (981) (2017).
Copyright © 2017 by the authors



ISSN : 1875-4120
Issue : Vol. 16, Issue 3
Published : May 2019

This paper is part of the TDM Special Issue on **"Cybersecurity in International Arbitration"** prepared by:



Stephanie Cohen
Independent Arbitrator
[View profile](#)



Mark C. Morril
MorrilADR
[View profile](#)

Terms & Conditions

Registered TDM users are authorised to download and print one copy of the articles in the TDM Website for personal, non-commercial use provided all printouts clearly include the name of the author and of TDM. The work so downloaded must not be modified. **Copies downloaded must not be further circulated.** Each individual wishing to download a copy must first register with the website.

All other use including copying, distribution, retransmission or modification of the information or materials contained herein without the express written consent of TDM is strictly prohibited. Should the user contravene these conditions TDM reserve the right to send a bill for the unauthorised use to the person or persons engaging in such unauthorised use. The bill will charge to the unauthorised user a sum which takes into account the copyright fee and administrative costs of identifying and pursuing the unauthorised user.

For more information about the Terms & Conditions visit www.transnational-dispute-management.com

© Copyright TDM 2019
TDM Cover v7.0

Transnational Dispute Management

www.transnational-dispute-management.com

A Call to Cyberarms: The International Arbitrator's Duty to Avoid Digital Intrusion by Taking Reasonable Cybersecurity Measures

by S. Cohen and M.C. Morril

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

A CALL TO CYBERARMS: THE INTERNATIONAL ARBITRATOR'S DUTY TO AVOID DIGITAL INTRUSION BY TAKING REASONABLE CYBERSECURITY MEASURES*

*Stephanie Cohen** & Mark Morril****

I. Introduction	2
II. Data Security Threats in International Arbitration.....	6
III. Sources of the Arbitrator's Duty to Avoid Intrusion	10
A. Duty of Confidentiality	10
B. Duty to Preserve and Protect the Integrity and Legitimacy of the Arbitral Process.....	15
C. Duty of Competence.....	18
D. Global Data Protection Laws and Regulations	23
IV. Nature and Scope of the Arbitrator's Duty to Avoid Intrusion	25
A. An Umbrella Obligation.....	25
B. An Interdependent Landscape with Independent Duties.....	26
C. Personal Accountability	27
D. Continuous and Evolving.....	30
E. Bounded by Reasonableness	31
V. Implementing the Duty to Avoid Intrusion.....	33

* **PREVIOUSLY PUBLISHED AS** *A Call to Cyberarms: The International Arbitrator's Duty to Avoid Digital Intrusion*, in 40 FORDHAM INTERNATIONAL LAW JOURNAL (981) (2017). Copyright © 2017 by the authors. The authors welcome comments addressed to cohen@cohenarbitration.com and mark.morril@morriladr.com.

** Stephanie Cohen is a Canadian arbitrator of international and domestic commercial disputes based in New York City (www.cohenarbitration.com). Prior to establishing her practice as an arbitrator, she was Counsel in the international arbitration group at White & Case LLP.

*** Mark Morril is an independent arbitrator and mediator based in New York City who focuses on complex commercial disputes (www.morriladr.com). Previously, he served as General Counsel of the publisher Simon & Schuster, then the world's largest English language publisher, as Deputy General Counsel of the global media company Viacom and as a law firm partner.

A. Keeping Abreast of Developments in Relevant Technology and Understanding Associated Benefits and Risks.....	35
B. Implementing Baseline Security	36
C. Taking a Thoughtful Approach to Assets and Architecture.	37
D. Planning for a Data Breach	39
E. Case Management Considerations	40
VI. Looking to the Future	41

I. INTRODUCTION

International commercial arbitration rests on certain fundamental attributes that cut across the different rule sets and cultural and legal systems in which it operates. There is common ground that any international commercial arbitration regime must encompass integrity and fairness, uphold the legitimate expectations of commercial parties, and respect essential elements of due process such as equal treatment of the parties, a fair opportunity for each party to present its case and neutral adjudicatory proceedings, untainted by illegal conduct.¹

The system and its integrity depend substantially on the role of the arbitrator. As Professor Rogers has stated: “[T]he authoritative nature of adjudicatory outcomes, as well as their existence within a larger system, imposes on adjudicators an obligation to preserve the integrity and legitimacy of the adjudicatory system in which they operate.”² Cyberbreaches of the arbitral process, including intrusion

1. See e.g., UNCITRAL MODEL LAW ON INT’L COM. ARB., art. 18 (1985) [hereinafter UNCITRAL Model Law], (“The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(b) (1958) (party inability to present case is grounds to refuse recognition and enforcement of an award); ENGLISH ARBITRATION ACT 1, § 33 (1996) (general duty of tribunal); LONDON CT. OF INT’L ARB., LCIA ARBITRATION RULES (2014) [hereinafter LCIA RULES] art. 14.4 (conduct of proceedings); William Park, *Arbitrators and Accuracy*, 1 J. OF INT’L DISP. SETTLEMENT 43, note 89 (2010) (arbitrators rejecting complicity with money laundering, fake arbitrations, and other illicit schemes.); LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION 485 (Lawrence W. Newman & Richard D. Hill eds., 3d ed., 2014); Klaus Peter Berger & J. Ole Jensen, *Due Process Paranoia and the Procedural Judgment Rule: a Safe Harbour for Procedural Management Decisions by International Arbitrators*, 32 (3) ARB. INT’L 415 (2016).

2. CATHERINE ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 283 (2014).

into arbitration-related data and transmissions, pose a direct and serious threat to the integrity and legitimacy of the process.³ This article posits that the arbitrator, as the presiding actor, has an important, front-line duty to avoid intrusion into the process.

The focus here on cyberintrusion into the arbitral process does not imply that international arbitration is uniquely vulnerable to data breaches, but only that international arbitration proceedings are not immune to increasingly pervasive cyberattacks against corporations, law firms, government agencies and officials and other custodians of large electronic data sets of sensitive information.⁴ Similarly, our focus on the role and responsibilities of the arbitrator should not obscure that cybersecurity is a shared responsibility and that other actors have independent obligations.⁵ Arbitrators are not uniquely vulnerable to data breaches and are not guarantors of cybersecurity.⁶ In the highly interdependent landscape of international commercial arbitration, data associated with any arbitration matter will only be as secure as the weakest link. Since data security ultimately depends on

3. Though we focus primarily on the threat of data breaches, the analysis here is generally applicable to other forms of unauthorized digital intrusion in proceedings, such as surreptitious surveillance of a hearing or of arbitration counsel in their offices, or the inadvertent recording and disclosure of an otherwise private conversation between members of the tribunal.

4. See *infra* Part II.

5. Most notably, counsel have ethical duties to protect client confidentiality and to keep abreast of the risks and benefits of technology related to their practice. Further, all actors in the process may have contractual or regulatory obligations to protect sensitive personal or commercial information. See *infra* Sections III.A and III.C.

6. High profile examples of arbitration-related cyberattacks or data breaches have involved arbitral institutions, counsel, and parties as targets. See Zachary Zaggar, *Hackers Target Anti-Doping, Appeals Bodies Amid Olympics*, LAW360.COM, (Aug. 12, 2016), <https://www.law360.com/articles/827962/hackers-target-anti-doping-appeals-bodies-amid-olympics> (reporting that hackers attempted to infiltrate the website of the Court of Arbitration for Sport during the Rio Olympic Games); Alison Ross, *Tribunal Rules on Admissibility of Hacked Kazakh Emails*, GLOBAL ARBITRATION REV., (Sept. 22, 2015), <http://globalarbitrationreview.com/article/1034787/tribunal-rules-on-admissibility-of-hacked-kazakh-emails> (reporting that privileged e-mails between a government and its arbitration counsel were disclosed by hackers of the government's internal network); Alison Ross, *Cybersecurity and Confidentiality Shocks for PCA*, GLOBAL ARBITRATION REV., (July 23, 2015), <http://globalarbitrationreview.com/article/1034637/cybersecurity-and-confidentiality-shocks-for-the-pca> (reporting that the Permanent Court of Arbitration website was hacked during a hearing of China-Philippines arbitration and counsel in a Russia-related arbitration received "Trojan downloaders" that, if opened, would have enabled hackers to listen in on conversations).

the responsible conduct and vigilance of individuals, any individual actor can be that weak link, whatever their practice setting, whatever the infrastructure they rely upon, and whatever role they play in an arbitration.⁷

We explore in Part II the threat that cybersecurity breaches pose to international commercial arbitrations, using some examples of high-profile breaches that already have occurred.⁸ We analyze in Part III the obligations that underpin the arbitrator's duty to avoid intrusion. That duty, in our view, need not be created anew. Rather, it rests securely on well-established duties of arbitrators to safeguard both the confidentiality and the legitimacy and integrity of proceedings, as well as to be competent to handle each individual matter.⁹ In an era of significant cyberthreats to the international commercial arbitration process, the duty to avoid intrusion is an inherent duty that follows as a matter of necessity from these earlier identified duties.

We then discuss, in Part IV, the nature and scope of the arbitrator's duty to avoid intrusion, which is bounded and fulfilled by taking reasonable measures to prevent unauthorized digital access to

7. The impact of individual conduct on cybersecurity has been highlighted in recent high profile security breaches. See, e.g., Gregory Krieg & Tal Kopan, *Is This the Email That Hacked John Podesta's Account?*, CNN (Oct. 28, 2016), <http://www.cnn.com/2016/10/28/politics/phishing-email-hack-john-podesta-hillary-clinton-wikileaks/index.html>; Eric Lipton, et al., *The Perfect Weapon: How Russian Cyberpower Invaded the United States*, N.Y. TIMES (Dec. 13, 2016), <https://www.nytimes.com/2016/12/13/us/politics/russia-hack-election-dnc.html>; Tom Vanden Brook & Michael Winter, *Hackers Penetrated Pentagon E-mail*, USA TODAY (Aug. 7, 2015), <http://www.usatoday.com/story/news/nation/2015/08/06/russia-reportedly-hacks-pentagon-email-system/31228625>; Tom Fox-Brewster, *Sony Needed to Have Basic Digital Protection. It Failed*, THE GUARDIAN (Dec. 20, 2014), <https://www.theguardian.com/commentisfree/2014/dec/21/sony-hacking-north-korea-cyber-security>.

8. Although the focus of this article is on international commercial arbitration, many of the considerations discussed here will apply as well in investor-state and public international arbitration. Notably, some of the high profile data security breaches discussed in this article occurred in those contexts. See *supra* note 6. At the same time, however, there may be important differences between the scope of the arbitrator's duty to avoid intrusion in the two regimes owing to the public interest in investor-state arbitration and initiatives to increase transparency in the settlement of investor-state disputes. See, e.g., UN Convention on Transparency in Treaty-Based Investor-State Arbitration (2015).

9. See William Park, *The Four Musketeers of Arbitral Duty: Neither One-For-All No All-For-One*, 8 ICC DOSSIERS 24 (2011).

arbitration-related information. There is no bright line list of measures that will fulfill the duty. Rather, assessment of the cybersecurity necessary in international commercial arbitration is an ongoing, risk-based process that requires all participating individuals to understand data security threats in context. As threats evolve, participants must know their own digital architecture and security vulnerabilities (including those that arise from their personal day-to-day work habits) in order to implement protective measures responsive to the threats that apply to their data landscape and individual matters.

The specific protective measures required to satisfy the duty will depend on an analysis of the security risks and on the measures that are practically available, as both will undoubtedly evolve from time to time. They will also depend upon considerations of convenience, cost and efficiency, as the arbitrator may need to balance the duty to avoid intrusion against other duties, including the duty to conduct proceedings in an expeditious and cost-effective manner¹⁰ and, in the absence of overriding considerations, consistent with the parties' choices.¹¹

Finally, in Part V, we address some practical considerations for arbitrators as they determine what measures to implement to avoid intrusion and, in Part VI, suggest for future dialogue some ways in which all participants in the international commercial arbitration system may collaborate to address the ongoing threats. The

10. See INT'L CHAMBER OF COMMERCE [ICC], RULES OF ARBITRATION (2017) [hereinafter ICC RULES], art. 22(1) (tribunal shall make every effort to conduct the arbitration in an expeditious and cost-effective manner); INT'L CTR. FOR DISP. RES., INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION INTERNATIONAL ARBITRATION RULES (2014) [hereinafter ICDR RULES], art. 20(2) ("The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute"); LCIA RULES, *supra* note 1, at art. 14.4(ii) (tribunal's general duty to adopt suitable procedures, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute).

11. See, e.g., UNCITRAL Model Law, *supra* note 1, at art. 34(2)(a)(iv) (award may be set aside if "the arbitral procedure was not in accordance with the parties' agreement, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate"); LCIA RULES, *supra* note 1, at art. 14.2 ("The parties may agree on joint proposals for the conduct of their arbitration for consideration by the Arbitral Tribunal. They are encouraged to do so in consultation with the Arbitral Tribunal and consistent with the Arbitral Tribunal's general duties . . ."); ICDR RULES, *supra* note 10, at 1 (rules apply "subject to modifications that the parties may adopt in writing" except that "where any rule[] is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail").

fundamentals of effective cybersecurity management are accessible and not unduly burdensome. The arbitrator who keeps abreast of risks and benefits of technology in the arbitration process, is conscious of his or her digital assets and infrastructure, and who implements reasonable protective measures, will readily meet the obligation to avoid intrusion.

II. DATA SECURITY THREATS IN INTERNATIONAL ARBITRATION

Cyberintrusion, or hacking as it is more commonly known, is often in the news in respect to geo-politics¹² and major corporate and government records data breaches.¹³ Law firms, too, are increasingly

12. See, e.g., U.S. Federal Bureau of Investigation and U.S. Department of Homeland Security, Joint Analysis Report, *GRIZZLY STEPPE-Russian Malicious Cyber Activity*, JAR-16-20296A (2016), https://www.us-cert.gov/sites/default/files/publications/JAR_16-20296A_GRIZZLY%20STEPPE-2016-1229.pdf (providing technical details regarding the tools and infrastructure used by the Russian civilian and military intelligence services to compromise and exploit networks and endpoints associated with the US election); David E. Sanger & Mark Mazzetti, *U.S. Had Cyberattack Plan if Nuclear Dispute Led to Conflict*, N.Y. TIMES (Feb. 16, 2016), <https://www.nytimes.com/2016/02/17/world/middleeast/us-had-cyberattack-planned-if-iran-nuclear-negotiations-failed.html>.

13. See, e.g., Vindu Goel and Nicole Perlroth, *Yahoo Says 1 Billion Accounts Were Hacked*, N.Y. TIMES (Dec. 14, 2016), <https://www.nytimes.com/2016/12/14/technology/yahoo-hack.html> (stating that following a September 2016 disclosure that sensitive personal information associated with 500 million users was stolen in late 2014 in an apparently state-sponsored attack, Yahoo disclosed that a separate 2013 attack compromised more than one billion users.); Kevin McCoy, *Cyber Hack Got Access to Over 700,000 IRS Accounts*, USA TODAY (Feb. 26, 2016), <http://www.usatoday.com/story/money/2016/02/26/cyber-hack-gained-access-more-than-700000-irs-accounts/80992822/>; James Billington, *Hackers Carry Out \$55M Cyber Heist From Boeing Aerospace Parts Manufacturer*, INT'L BUS. TIMES (Jan. 27, 2016), <http://www.ibtimes.co.uk/hackers-carry-out-55m-cyber-heist-boeing-aerospace-parts-manufacturer-1540455>; Ahiza Garcia, *Target Settles for \$39 Million Over Data Breaches*, CNN (Dec. 2, 2015), <http://money.cnn.com/2015/12/02/news/companies/target-data-breach-settlement/> (noting that the 2013 hack of Target database compromised roughly forty million customers); Julie Hirschfield Davis, *Hacking of Government Computers Exposed 21.5 Million People*, N.Y. TIMES (July 9, 2015), <https://www.nytimes.com/2015/07/10/us/office-of-personnel-management-hackers-got-data-of-millions.html>; Anna Wilde Mathews, *Anthem: Hacked Database Included 78.8 Million People*, WALL ST. J. (Feb. 24, 2015), <http://www.wsj.com/articles/anthem-hacked-database-included-78-8-million-people-1424807364>. See generally Verizon, 2016 Data Breach Investigations Report [hereinafter Verizon Report], <http://www.verizonenterprise.com/verizon-insights-lab/dbir/2016/> (last visited Jan. 22, 2017) (analyzing a dataset provided by security service providers, law enforcement, and government agencies of more than 100,000 security incidents in 2015,

reported as having fallen victim to cyberattacks.¹⁴ As awareness increases that corporations and players in the legal sector are attractive targets for cybercriminals, the multiple players involved in international private commercial arbitrations should realize that they too are vulnerable to cybercriminals.¹⁵ International commercial arbitrations routinely involve sensitive commercial and personal information, including information that is not publicly available and that has a potential to move markets or impact competition. Conveniently for hackers, this information is culled together in large data sets, ranging from pleadings and documents produced in disclosure, documentary evidence, witness statements, expert reports, memorials, transcripts, attorney work product, tribunal deliberation materials, and case management data. As the multiple players involved often live in different countries, the information is frequently exchanged and stored in electronic form, making it vulnerable to malevolent outside actors.

Data custodians, who hold sensitive data to varying degrees, include arbitral institutions, counsel, the parties and members of the

revealing 3,141 confirmed data breaches in eighty-two countries); PricewaterhouseCoopers, Key Findings from the Global State of Information Security Survey (2017), <http://www.pwc.com/gx/en/issues/cyber-security/information-security-survey/assets/gsis-report-cybersecurity-privacy-possibilities.pdf> [hereinafter PWC Report]; Sarah Kuranda, *New Federal Budget Proposal Raises Government Security Spending* (Feb. 9, 2016), <http://www.cnn.com/news/security/300079648/new-federal-budget-proposal-raises-government-security-spending-ops-opportunity-for-vars.htm> (referencing hacks of United States Office of Personnel Management records and email accounts of the Director of the CIA and the Secretary of Homeland Security).

14. See, e.g., Nate Raymond, *U.S. Accuses Chinese Citizens of Hacking Law Firms, INSIDER TRADING* (Dec. 28, 2016), <http://www.reuters.com/article/us-cyber-insidertrading-idUSKBN14G1D5>; Michael Schmidt and Steven Lee Myers, *Panama Law Firm's Leaked Files Detail Offshore Accounts Tied to World Leaders*, N.Y. TIMES (Apr. 3, 2016), <https://www.nytimes.com/2016/04/04/us/politics/leaked-documents-offshore-accounts-putin.html> (reporting that 11.5 million documents leaked from Panama law firm exposed the offshore accounts of 140 politicians and public officials). See also New York State Bar Ass'n Ethics Opinion 1019 (Aug. 2014) ("Cyber-security issues have continued to be a major concern for lawyers, as cyber-criminals have begun to target lawyers to access client information, including trade secrets, business plans and personal data. Lawyers can no longer assume that their document systems are of no interest to cyber-crooks.").

15. For an overview of the major cyber risks in the practice of international arbitration and the tradecraft of the principal threat actors (hacktivists, state actors, and criminals), see James Pastore, *Practical Approaches to Cybersecurity in Arbitration*, 40 FORDHAM INT'L L.J. 1023 (2017). See also Verizon Report, *supra* note 13.

arbitral tribunal (along with their respective support staff), as well as experts and vendors, including court reporters, translation services, couriers, and information technology (“IT”) professionals, among others. Hackers may attack individual actors directly¹⁶ or the digital infrastructure of their organizations.¹⁷ Moreover, each smartphone, tablet, laptop, thumb drive, other digital device, and cloud service used for the transmission or hosting of arbitration-related data offers a potential portal for unauthorized outsiders to gain access.

The participants in international commercial arbitrations are, to a large degree, digitally interdependent, in that the process typically involves the transmission and hosting of data and collaborative elements such as communications relating to the arbitration. Consequently, any break in the custody of sensitive data has the potential to affect all participants. Indeed, since participants will frequently play host not only to their own sensitive data, but also to the sensitive data of others, intrusion into data held by one participant may injure another more than the one whose data security was compromised.

16. A prevalent method of attack that capitalizes on human error is ransomware, a form of malware frequently distributed through spear phishing e-mails sent to targeted individuals. The FBI explains:

[V]ictims—upon seeing an e-mail addressed to them—will open it and may click on an attachment that appears legitimate, like an invoice or an electronic fax, but which actually contains the malicious ransomware code. Or the e-mail might contain a legitimate-looking URL, but when a victim clicks on it, they are directed to a website that infects their computer with malicious software. Once the infection is present, the malware begins encrypting files and folders on local drives, any attached drives, backup drives, and potentially other computers on the same network that the victim computer is attached to. Users and organizations are generally not aware they have been infected until they can no longer access their data or until they begin to see computer messages advising them of the attack and demands for a ransom payment in exchange for a decryption key.

FBI, *Cyber Crime*, <https://www.fbi.gov/investigate/cyber> (last visited Jan. 16, 2017).

17. In a July 2015 “watering hole” attack, for example, hackers implanted a malicious Adobe Flash file on the Permanent Court of Arbitration’s website that allowed them to infect the computer systems of website visitors who had not patched a known Adobe Flash security flaw. Luke Eric Peterson, *Permanent Court of Arbitration Website Goes Offline, with Cyber-Security Firm Contending that Security Flaw was Exploited in Concert with China-Philippines Arbitration*, IA REP. (July 23, 2015), <http://www.iareporter.com/articles/permanent-court-of-arbitration-goes-offline-with-cyber-security-firm-contending-that-security-flaw-was-exploited-in-lead-up-to-china-philippines-arbitration>.

Unauthorized access of sensitive data may result in the disclosure, or even acceptance into evidence of, illegally obtained, confidential, or privileged matter in ways that undermine fundamental elements of the adjudicatory process and its baseline due process elements.¹⁸ Disclosure of commercially sensitive information, trade secrets, or personal information may violate laws or contractual commitments in business-to-business or customer agreements, cause serious reputational and economic harm to individuals or businesses,¹⁹ trigger regulatory sanctions²⁰ or negligence claims,²¹ and impact the integrity of public securities markets.²² Further, since the parties, counsel and arbitrators frequently reside in different countries and may be subject to differing data security law, privacy regimes and ethical standards, the legal effect of a data breach may be uncertain and complex.²³ Last, and not least, data security breaches, particularly those resulting from a failure to implement reasonable security protocols, threaten to undermine public confidence in the very

18. See Alison Ross, *Tribunal Rules on Admissibility of Hacked Kazakh Emails*, GAR (Sept. 22, 2015) (reporting on unpublished order in *Caratube International Oil Co. LLP and Devinci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, admitting into evidence certain documents obtained from the public disclosure of documents hacked from Kazakhstan's government computer network, yet excluding other documents on the basis of privilege).

19. See, e.g., Michael Cieply and Brooks Barnes, *Sony Hacking Fallout Includes Unraveling of Relationships in Hollywood*, N.Y. TIMES (Dec. 18, 2014), <https://www.nytimes.com/2014/12/19/business/media/sony-attack-is-unraveling-relationships-in-hollywood.html>.

20. See, e.g., *FINRA Fines Lincoln Financial Sub \$650,000 for Cybersecurity Shortcomings*, NAT'L L. REV. (Nov. 24, 2016), <http://www.natlawreview.com/article/finra-fines-lincoln-financial-sub-650000-cybersecurity-shortcomings>.

21. See, e.g., Robert Burnson, *Yahoo's Massive Data Breach Draws Negligence Suits by Users*, BLOOMBERG TECH. (Sept. 23, 2016), <https://www.bloomberg.com/news/articles/2016-09-23/yahoo-s-massive-data-breach-draws-negligence-lawsuit-by-user>; See also *Shore et al. v. Johnson & Bell, Ltd.*, No. 1:16-cv-04363 (Verified Complaint) (N.D. Ill. Apr. 15, 2016) (class action alleging a Chicago law firm was negligent and engaged in malpractice by using security practices that left client information vulnerable to hacking, including, for example, a ten year-old time-entry system that had not been updated with security patches).

22. Nate Raymond, *U.S. Accuses Chinese Citizens of Hacking Law Firms*, INSIDER TRADING (Dec. 28, 2016), <http://www.reuters.com/article/us-cyber-insidertrading-idUSKBN14G1D5> (reporting criminal charges for trading on confidential corporate information obtained by hacking into networks and servers of law firms working on mergers).

23. See *Cybersecurity and Arbitration: Protecting Your Documents and Ensuring Confidentiality*, NYSBA INSIDE (2016).

institution of international private commercial arbitration. We explore the latter consequence further below.

III. SOURCES OF THE ARBITRATOR'S DUTY TO AVOID INTRUSION

The arbitration rules, ethical codes, practice guidelines, and national laws that govern international commercial arbitration do not, by and large, establish an express duty for arbitrators or any other participant in the arbitral process to implement cybersecurity measures.²⁴ Why, then, does the arbitrator bear responsibility to avoid cybersecurity breaches? In our view, the arbitrator's duty to avoid intrusion rests on well-established arbitral duties: (i) the duty to protect the confidentiality and privacy of the proceedings, which will vary in different arbitrations, but exists to some degree in all proceedings; (ii) a fundamental duty to preserve and protect the integrity and legitimacy of the arbitral process; and (iii) a duty to be competent. In addition to these general duties, some arbitrators may have express or implied cybersecurity obligations by virtue of attorney codes of conduct, national data protection laws or regulations, or agreement with the parties.

A. Duty of Confidentiality

It is by now well-established that although parties generally have a right to keep international commercial arbitrations private (i.e., to exclude third parties from hearings),²⁵ it cannot be assumed that they

24. See Section III.C for a discussion of the ethical obligations of lawyers under the ABA Model Rules of Professional Conduct, which regulate attorney conduct.

25. See Simon Crookenden, *Who Should Decide Arbitration Confidentiality Issues?* 25 ARB. INT'L 603, 603 (2009) ("The privacy of arbitration proceedings is generally recognised internationally."); see also, e.g., ICC RULES, *supra* note 10, at art. 26(3): (" . . . Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted."); ICDR RULES, *supra* note 10, at art. 23(6) ("Hearings are private unless the parties agree otherwise or the law provides to the contrary."); LCIA RULES, *supra* note 1, at art. 19.4: ("All hearings shall be held in private, unless the parties agree otherwise in writing."); SINGAPORE INT'L ARB. CTR., ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE (2016) [hereinafter SIAC RULES], art. 24.4 ("Unless otherwise agreed by the parties, all meetings and hearings shall be in private, and any

have a general duty or right to keep arbitration-related information confidential (i.e., to refrain from disclosing, and to keep others from disclosing, such information to third parties).²⁶ Arbitrators are on slightly different footing. Although applicable law,²⁷ governing arbitration rules,²⁸ and party agreement may vary in the extent to which they obligate an arbitrator to keep *all* aspects of an arbitration proceeding confidential, it is uncontroversial that the arbitrator has a

recordings, transcripts, or documents used in relation to the arbitral proceedings shall remain confidential.”).

26. UNCITRAL Notes on Organizing Arbitral Proceedings, ¶ 50 (2016) [hereinafter UNCITRAL Notes] (“there is no uniform approach in domestic laws or arbitration rules regarding the extent to which participants in an arbitration are under a duty to observe the confidentiality of information relating to the arbitral proceedings”); L. Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 ARB. INT’L 131 (1999); Leon Trakman, *Confidentiality in International Commercial Arbitration*, 18 ARB. INT’L 1 (2002).

27. More often than not, whether an arbitrator has a duty of confidentiality is not addressed by national legislation. See BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2003 (Wolters Kluwer, 2d ed. 2014); see also Joshua Karton, *A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards*, 28 ARB. INT’L 447, 450 (2012).

28. Although they differ in scope, most institutional international arbitration rules, with the notable exception of the ICC Rules, impose an express obligation of confidentiality on arbitrators. See, e.g., ICDR RULES, *supra* note 10, at art. 37(1) (“Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator [T]he members of the arbitral tribunal . . . shall keep confidential all matters relating to the arbitration or the award.”); LCIA RULES, *supra* note 1, at art. 30.2 (“The deliberations of the Arbitral Tribunal shall remain confidential to its members”); SIAC RULES, *supra* note 25, at art. 39.1 (“Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator . . . shall at all times treat all matters relating to the proceedings and the Award as confidential. The discussions and deliberations of the Tribunal shall be confidential.”), art. 39.3 (“ . . . matters relating to the proceedings” includes the existence of the proceedings, and the pleadings, evidence and other materials in the arbitral proceedings and all other documents produced by another party in the proceedings or the Award arising from the proceedings, but excludes any matter that is otherwise in the public domain”); JAMS FOUNDATION, JAMS INTERNATIONAL ARBITRATION RULES (2016), art. 17.1 (“Unless otherwise required by law, or unless the parties expressly agree, the Tribunal, the Administrator and JAMS International will maintain the confidentiality of the arbitration.”), art. 17.2 (“Unless otherwise required by law, an award will remain confidential, unless all of the parties consent to its publication.”); INT’L INST. FOR CONFLICT PREVENTION & RES., CPR 2014 RULES FOR ADMINISTERED ARBITRATION OF INTERNATIONAL DISPUTES (2014) [hereinafter CPR RULES], art. 20 (“Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related disclosure and the decisions of the Tribunal, as confidential”). But see ICC RULES, *supra* note 10, at app. I, art. 6 (“The work of the [ICC] Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity.”).

fundamental duty to keep at least *certain aspects* of a proceeding confidential. Gary Born takes a broad view of the confidentiality obligation, stemming from the arbitrator's adjudicatory role:

Even where confidentiality obligations are not imposed upon the parties by either their agreement or applicable national law, the arbitrators are subject to separate confidentiality obligations by virtue of their adjudicative function. One element of the arbitrator's role is the duty to maintain the confidentiality of the parties' written and oral submissions, evidence and other materials submitted in the arbitration. It is generally inconsistent with the arbitrator's mandate to disclose materials from the arbitration to third parties.²⁹

The AAA/ABA *Code of Ethics for Arbitrators in Commercial Disputes* is consistent with this view. Canon VI provides that “[a]n arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.”³⁰ In particular, the arbitrator has a duty to “keep confidential all matters relating to the arbitration proceedings and decision” and “[i]n a proceeding in which there is more than one arbitrator, . . . [not to] inform anyone about the substance of the deliberations of the arbitrators.”³¹ Less comprehensively, the *IBA Rules of Ethics for Arbitrators* specify that the “deliberations of the arbitral tribunal and the contents of the award itself, remain confidential in perpetuity unless the parties release the

29. BORN, *supra* note 27, at 2004.

30. Similarly, the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members (Oct. 2009) provides: “A member shall abide by the relationship of trust which exists between those involved in the dispute and (unless otherwise agreed by all the parties, or permitted or required by applicable law), both during and after completion of the dispute resolution process, shall not disclose or use any confidential information acquired in the course of or for the purposes of the process.” CHARTERED INST. OF ARBITRATORS, THE CHARTERED INSTITUTE OF ARBITRATORS CODE OF PROFESSIONAL AND ETHICAL CONDUCT FOR MEMBERS (Oct. 2009) [hereinafter CIARB ETHICS CODE], Rule 8.

31. AAA/ABA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon VI (B), (C). *See also* Canon I (I) (“An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.”).

arbitrators from this obligation.”³² At the same time, however, they encapsulate a general duty of confidentiality by stating that arbitrators should be “discreet.”³³

In contrast to arbitrators, who are thus bound by a duty of confidentiality,³⁴ the parties themselves may not have a *duty* to keep arbitration proceedings or certain aspects of them confidential. Nonetheless, there is a common *expectation* among users of international commercial arbitration³⁵ that the overall process will be

32. INT’L BAR ASSOC., IBA RULES OF ETHICS FOR ARBITRATORS, article 9. The IBA Rules of Ethics are not binding, but are deemed to reflect internationally acceptable guidelines developed by practicing lawyers from all continents. *Id.* at Introductory Note.

33. *Id.*

34. We note that while many arbitrators are lawyers and will have professional ethical obligations to preserve client confidentiality, by their terms, such obligations apply only when a lawyer is acting in a representative capacity for a client and not when serving as an arbitrator, who does not represent any party but has equal duties to all. BORN, *supra* note 27 at 1970; CPR-Georgetown Commission on Ethics and Standards in ADR, Proposed New Model Rule of Professional Conduct Rule 4.5: The Lawyer as Third-Party Neutral (2002), Rule 4.5.2, comments [1], [3]. Nonetheless, to the extent that lawyers’ duties of confidentiality have been updated to take account of cyberthreats, analysis of those duties may inform how the international arbitrator should view the nature and scope of his or her duty to avoid intrusion. *See, e.g.*, U.K. Information Commission Office, Monetary Penalty Notice under the Data Protection Act 1998, Supervisory Powers of the Information Commissioner (Mar. 10, 2017), <https://ico.org.uk/media/action-weve-taken/mpns/2013678/mpn-data-breach-barrister-20170316.pdf> (fining UK family law barrister for failing to take “appropriate technical measures against the unauthorised or unlawful processing of personal data” in relation to confidential client files where the barrister failed to encrypt such files on her home computer and her husband inadvertently made the files accessible on an online directory while attempting to update software, noting that the Bar Council and barrister’s chambers had issued guidance to barristers that a computer used by family members or others may require encryption of files to prevent unauthorized access to confidential material by shared users).

35. Notably, expectations of privacy and confidentiality may differ in investor-state arbitration. As explained in the UNCITRAL Notes on Organizing Arbitral Proceedings: [t]he specific characteristics of investor-State arbitration arising under an investment treaty have prompted the development of transparency regimes for such arbitrations. The investment treaty under which the investor-State arbitration arises may include specific provisions on publication of documents, open hearings, and confidential or protected information. In addition, the applicable arbitration rules referred to in those investment treaties may contain specific provisions on transparency. Further, parties to a treaty-based arbitration may agree to apply certain transparency provisions.

UNCITRAL Notes, *supra* note 26, at ¶ 55.

confidential.³⁶ More specifically, parties and institutions expect that the arbitrator will maintain the confidentiality of the arbitration.³⁷ Moreover, in the adversarial and adjudicatory context, each actor in arbitration has legitimate expectations of privacy as to the data that defines or supports its role in the process. Irrespective of the extent to which the proceeding as a whole is entirely confidential or in some respects public, counsel and clients expect that they alone will have access to their communications and case strategy, for example, while arbitrators expect that no one else will have access to their deliberations or draft adjudicative documents and other work product. Those who intrude on these boundaries by hacking or other unauthorized access may break the law³⁸; at a minimum, they will threaten legitimate expectations as to privacy in any adjudicatory process and the integrity of the process as a whole. In sum, since

36. Paul D. Friedland, *Arbitration Clauses for International Contracts* 21 (Juris, 2d ed. 2007) (“Notwithstanding the usual absence of prohibitions on party disclosure, there is an expectation and tradition of confidentiality in arbitration, which a party violates at its own peril vis-à-vis the arbitrators.”); Queen Mary Univ. of London Sch. of Int’l Arb., 2010 International Arbitration Survey: Choices in International Arbitration, at 29, <http://www.arbitration.qmul.ac.uk/docs/123290.pdf>, 29 (Fifty percent of corporations indicated that they “consider that arbitration is confidential even where there is no specific clause to that effect in the arbitration rules . . . or agreement”); Int’l Inst. for Conflict Prevention & Res., General Commentary for CPR Rules for Administered Arbitration of International Disputes, available at <https://www.cpradr.org/resource-center/rules/international-other/arbitration/international-administered-arbitration-rules> (“Parties that choose arbitration over litigation of an international dispute do so primarily to avoid the unfamiliarity and uncertainty of litigation in a foreign court; also out of a need or desire for a proceeding that is confidential and relatively speedy.”); ICC International Court of Arbitration, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, ¶ 27 (July 13, 2016) (“The [ICC] Court endeavors to make the arbitration process more transparent in ways that do not compromise expectations of confidentiality that may be important to parties.”)

37. UNCITRAL Notes, *supra* note 26, at ¶ 53 (“Whereas the obligation of confidentiality imposed on the parties and their counsel may vary with the circumstances of the case as well as the applicable arbitration law and arbitration rules, arbitrators are generally expected to keep the arbitral proceedings, including any information related to or obtained during those proceedings, confidential.”) (emphasis added); LCIA Notes for Arbitrators, ¶ 6 (June 29, 2015) (“Parties to arbitrations are entitled to expect of the process a just, well-reasoned and enforceable award. To that end, they are entitled to expect arbitrators: . . . to maintain the confidentiality of the arbitration. . . .”) (emphasis added).

38. In the United States, for example, certain federal laws criminalize hacking and most states have computer crime laws that address unauthorized access. *See* Computer Fraud and Abuse Act, 18 U.S.C. § 1030; National Conference of State Legislatures, Computer Crime Statutes (Dec. 5, 2016), <http://www.ncsl.org/research/telecommunications-and-information-technology/computer-hacking-and-unauthorized-access-laws.aspx>.

cyberintrusion undermines or negates the legitimate expectations of confidentiality that exist in international commercial arbitration as well as the legitimate expectations of privacy that exist to some degree in all adjudicatory proceedings, it follows that the arbitrator's special duty to protect confidentiality extends to an obligation to avoid intrusion by non-participants who are determined to defeat those expectations.³⁹

B. Duty to Preserve and Protect the Integrity and Legitimacy of the Arbitral Process

The arbitrator's duty to avoid intrusion also rests on a duty to protect the integrity and legitimacy of the arbitral process. Unauthorized intrusion by hackers or other malevolent actors threatens more than confidentiality: it is a direct threat to the fair, neutral, and orderly process that underlies all arbitrations and to public trust in the arbitral process. If we accept that hacking threatens the integrity of the process, it follows that the arbitrator's obligation to protect the integrity of the process encompasses some form of duty to avoid such intrusion.

Our premise that the arbitrator has a duty to avoid intrusion does not require resolution of the ongoing debate as to whether a commercial arbitrator is a mere independent service provider to the parties or if the arbitrator has a broader, adjudicative role with responsibilities also to society and the rule of law.⁴⁰ Recognizing the deference to party autonomy that characterizes international commercial arbitration, it is well-established that arbitrators also have important and independent responsibilities to maintain their own reputations and probity, to support the interests of society and to

39. See UNCITRAL Notes, *supra* note 26, at ¶ 58(b).

40. See ROGERS, *supra* note 2; Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 392 (1978) (common features of the power to adjudicate delegated by the state to judges and by consent of the parties to arbitrators); Panel Discussion, *Arbitrator Ethics Through the Lens of Arbitrator Role: Are Arbitrators Adjudicators or Service Providers?*, 10 WORLD ARB. & MED. REV. 3, 309 (2016); Margaret Moses, *The Role of the Arbitrator: Adjudicator or Service Provider?*, 10 WORLD ARB. & MED. REV. 3, 367 (2016).

uphold the legitimacy and integrity of the arbitral process.⁴¹ Even the most articulate and well-respected proponents of the arbitrator as service provider model recognize that there are limits to party autonomy and to arbitrators' fidelity to the parties' instructions.⁴²

There is little doubt that the use in an arbitration of data illegally obtained by or on behalf of a party would irreparably taint proceedings.⁴³ Different issues arise when external actors compromise the data security of arbitration-related information. Here, the participants are victims of the intrusion and the matter presumably may proceed, with such corrective or ongoing protective steps as the tribunal may deem appropriate.⁴⁴ Nonetheless, such an incident, particularly if it follows from a failure to adequately secure data, inevitably will erode the confidence and trust of participants, and potentially the public, in the international private commercial

41. See e.g., Julie Bédard, Timothy Nelson and Amanda Kalantirsky, *Arbitrating in Good Faith and Protecting the Integrity of the Arbitral Process*, 3 PARIS J. INT'L ARB. 737, 749 (2010); ABA/AAA CODE OF ETHICS FOR ARBITRATORS IN COM. DISPUTES, Canon 1 ("An arbitrator should uphold the integrity and fairness of the arbitration process An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved."); ICC RULES, *supra* note 10, at art. 5 ("[T]he emergency arbitrator shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case"); JAMS FOUNDATION, JAMS ARBITRATOR ETHICS GUIDELINES, 1 ("[A]n arbitrator should uphold the dignity and the integrity of the office of the arbitration process"); CIARB ETHICS CODE, *supra* note 30, at Part 2, Rule 2 ("A member shall maintain the integrity and fairness of the dispute resolution process.").

42. See Luca G. Radicati di Brozolo, *Party Autonomy and the Rules Governing the Merits of the Dispute in Commercial Arbitration*, in LIMITS TO PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION, 339 (Juris, 2016); see also Teresa Cheng, *panelist, The Theory and Reality of the Arbitrator: What is an International Arbitrator?* 7 WORLD ARB. & MED. REV. 4, 639 (2013) (commenting at the 25th Annual Workshop of the Institute for Transnational Arbitration that although arbitrators are independent service providers, there is also a duty to oneself as well as a duty to the arbitral process); ROGERS, *supra* note 2; ILA REPORT, *infra* note 47, at 17; Park, *Arbitrators and Accuracy*, *supra* note 1, at n.59 (stating faithfulness to the agreement would not justify violation of international public policy).

43. ILA REPORT, *infra* note 47, at 18; Bernard Hanotiau, *Misdeeds, Wrongful Conduct and Illegality in Arbitral Proceedings*, in INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS, 285 (Kluwer Law International, 2003); REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 5.76 (5th ed., 2009).

44. See *Caratube*, *supra* note 18 (considering the admissibility of illegally obtained evidence, accepting some and excluding some).

arbitration process.⁴⁵ The arbitrator, along with the parties, counsel, and other actors in the process, is in a position to take reasonable protective measures to avoid that risk.

While much attention has been focused on the implied *powers* of arbitrators to fill in gaps in institutional rules or the parties' agreement where necessary to protect due process and the legitimacy of the process, less attention has been paid to the scope of the arbitrator's *duties*.⁴⁶ The ILA Arbitration Committee's *Final Report on The Inherent Powers of Arbitrator in International Commercial Arbitration* noted that the implied powers necessary to protect the core functions of arbitration amount to affirmative arbitral duties:

It is in such situations that a third and final category of non-enumerated powers becomes relevant, encompassing that authority which can be said to be truly inherent, namely those powers necessary to safeguard a tribunal's jurisdiction and the integrity of its proceedings. Stated differently, these powers are

45. See Jan Paulsson, *Metaphors, Maxims and Other Mischief, The Freshfields Arbitration Lecture 2013*, 30 ARB. INT'L 4, 630 (2014) ("[P]ublic confidence is perforce at stake in the arbitral context as well [as in the judicial process], because arbitration cannot thrive without the support of the general legal system."); Charles Brower, *Keynote Address: The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator*, 5 BERKELEY J. OF INT'L L. PUBLICIST, 1 (2010) ("[A]rbitrators and arbitral institutions also have an interest in maintaining legitimacy, both for the mutual acceptance of their awards by the parties before them and for broad public acceptance of the entire law-based system of which they are a part.").

46. Two widely cited cases involving the appearance of new counsel after an ICSID tribunal was constituted focused on the arbitrator's role in preserving the integrity of the arbitration proceedings. Although the tribunals reached differing results on applications to disqualify counsel and had differing views on the nature and extent of an arbitrator's inherent powers, both stated that the arbitrators had some inherent power, and presumably some obligation, to protect the essential integrity of the proceeding. See *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, 15, (2008) (Tribunal's Ruling Regarding the Participation of David Mildon QC in further Stages of the Proceeding); *Rompetrol Group NV v. Romania*, ICSID Case No. ARB/06/03, 5-6 (2008) (Decision of the Tribunal on the Participation of a Counsel); see also Bédard, et al., *supra* note 41 at n.69. Similarly, in *Caratube*, although the tribunal found that the claimants failed to prove the respondent had engaged in any threatening or intimidating action that could cause an irreparable harm to the claimants' rights in the arbitration, including a right to the "integrity and the legitimacy of the arbitration," the tribunal implicitly recognized its authority to take measures to preserve the integrity of the arbitration insofar as it stressed the "[p]arties' general duty, arising from the principle of good faith, not to take any action that may aggravate the present dispute, affect the integrity of the arbitration and the equality of the Parties" *Caratube supra* note 18, at ¶¶ 111, 154.

those required to decide a legal dispute fairly and in a manner consistent with at least the minimal requisites of due process and public policy. They trace their roots most clearly to the original notion of inherent powers as protecting jurisdiction and curtailing procedural abuses, and their exercise may justify overriding party preferences. . . . Such powers are so core to the function of arbitration that they might be more properly termed arbitral duties, the fulfillment of which is a necessary function of serving as a competent arbitrator.⁴⁷

We conclude, then, that the arbitrator's duty to uphold the legitimacy and integrity of the arbitral process, and to ensure confidence and trust in arbitration, further supports the premise that the arbitrator has a duty to avoid intrusion.

C. Duty of Competence

It is commonly accepted that an arbitrator has a duty of competence.⁴⁸ Various arbitrator ethics codes expressly require arbitrators to be "competent." Canon 1 of the *ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes*, which requires an arbitrator to uphold the integrity and fairness of the arbitration process, provides that an arbitrator should accept appointment in a particular matter only if fully satisfied that he or she is "competent to serve." The *IBA Rules of Ethics for International Arbitrators* provide a more general requirement that "international arbitrators should be . . . competent" in addition to a specific requirement that the arbitrator be competent to determine the issues in dispute in a particular matter.⁴⁹

47. INTERNATIONAL LAW ASSOCIATION, REPORT FOR THE BIENNIAL CONFERENCE IN WASHINGTON, D.C., April 2014 (final report 2016) [hereinafter ILA REPORT], at 17, <http://www.ila-hq.org/download.cfm/docid/04ED7050-5C2A-4A56-92FCF1857A094C8B> (last visited Jan. 22, 2017).

48. See Henry Gabriel and Anjanette H. Raymond, *Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards*, 5 WYO. L. REV. 453 (2005); ILA REPORT, *supra* note 47 (stating the duty to protect integrity of the proceeding is core to necessary function of serving as a competent arbitrator).

49. See Introductory Note and Rule 2.2; see also CIARB ETHICS CODE, *supra* note 30, at Part 2, Rule 4 "Competence" ("A member shall accept an appointment or act only if appropriately qualified or experienced.").

While the arbitrator ethics codes do not define competence, important context and definition of the meaning of the term may be drawn from the evolution of lawyer ethics codes in recent years. Recognizing the need to provide some definition of competence and to update ethical codes to reflect the rise of globalization and technology, governing bar associations and disciplinary authorities have amended lawyer ethical codes to provide explicit linkage between general competence requirements and the need to keep abreast of technology.⁵⁰ For example, the American Bar Association (“ABA”) *Model Rules of Professional Conduct*, first introduced by the ABA in 1983, and adopted over time in various forms by most states in the United States,⁵¹ provide the following lawyer competence requirement:

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Notably, ABA Model Rule 1.1 is limited by its terms to the lawyer serving in a representational function. However, the Preamble to the Model Rules notes that a lawyer may serve in other roles, including “as a third party neutral, a non-representational role helping the parties to resolve a dispute or other matter,” and goes on to state that,

50. Lawyer ethics rules obviously do not bind non-lawyer arbitrators. Indeed, some of the rules are limited to the context of client representation and thus do not expressly apply even to lawyers who, when serving as arbitrators, are not representing clients. For example, ABA Model Rule 1.1, standing alone in the form quoted in the accompanying text, does not apply directly to arbitrators, even if they are lawyers practicing in a jurisdiction where this version of the Model Rules applies. In France, the Règlement Intérieur National, the French code of ethics for lawyers, contains a general competency requirement in respect to client work in Article 1.3 (“L’avocat . . . fait preuve, à l’égard de ses clients, de compétence . . .”), <http://codedeonto.avocatparis.org/acces-article>; see also UK SOLICITORS REGULATORY AUTHORITY, SRA CODE OF CONDUCT 2011 (Version 18, 2016) [hereinafter UK SRA CODE OF CONDUCT] at 0-1.5 (“[t]he service you provide to clients is competent . . .”), <http://www.sra.org.uk/solicitors/handbook/code/content.page>.

51. A notable exception is California, which maintains its own Rules of Professional Conduct. California Rule 3-110 (A) provides a general competence requirement (“A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.”).

“[i]n all professional functions a lawyer should be competent, prompt and diligent.”⁵²

New York State did not adopt the Model Rules until 2009 and did not adopt the Preamble quoted above. However, Model Rule 1.1 as adopted in New York added a more general competency requirement, in addition to the client-oriented rule: “A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle”⁵³ Thus, at least as to lawyers working as arbitrators in jurisdictions that have adopted the ABA Preamble or who have adopted a rule similar to Rule 1.1(b) as in effect in New York State, there is a direct ethical obligation of competence.⁵⁴ From 2009 to 2013, the ABA Commission on Ethics 20/20 recommended proposed amendments to the Model Rules to account for, among other things, rapid changes in technology

52. AM. BAR. ASSOC., PREAMBLE: A LAWYER’S RESPONSIBILITIES, ¶ 4. By referring to “professional functions,” the Preamble is broad enough to avoid the debate over whether participants are engaged in the practice of law. *See* Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 17 Cal.4th 119 (Cal. 1998), *cert den.*, 525 U.S. 920 (1998); Schiff Hardin LLP, *Arbitration and the Unauthorized Practice of Law*, 13 ARIAS QUARTERLY U.S. 1, 16-19 (2006), <http://www.schiffhardin.com/Templates/Media/files/archive/binary/spector-arbitration.pdf>.

53. NY Judiciary Law (Appendix: Code of Prof. Resp. §1200, Rule 1.1 (b)); The New York State Bar Association Committee on Standards of Professional Conduct (“COSAC”) 2007 Report recommending the adoption of the Model Rules noted that the new rules were beneficial in describing competent representation as requiring the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,” in contrast to the previous Lawyer’s Code of Professional Responsibility that “did not define or describe competent representation.” New York State Bar Association Proposed Rules of Professional Conduct 11 (2007), available at <http://www.nysba.org/workarea/DownloadAsset.aspx?id=26635>; New York City Bar Association Professional Responsibility Committee Report on COSAC Proposals Rules 1.1-1.4, 3.1, 3.2, 3.5-3.9, and 8.1-8.4 (2006) available at <http://www.nycbar.org/pdf/report/Prof Resp COSAC 506.pdf> (proposed Rule 1.1 “helpfully fleshes out the definition of ‘competent representation’”). Notably also, in adopting Model Rule 1.1 (b), New York State intended to preserve the concept in prior Disciplinary Rule 6-101 (competent representation) and its accompanying Ethical Consideration 6-2 that a lawyer should attain and maintain competence by keeping abreast of current legal literature and developments. *Id.*

54. Also useful by analogy is *The Code of Conduct for Lawyers in the EU*, issued by the Council of Bars and Law Societies of the European Union, which bridges the gap from the regulation of lawyers working in a representational capacity in the judicial system to those working in arbitration by providing that “[t]he rules governing a lawyer’s relations with the courts apply also to his relations with arbitrators.” CCBE, CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN UNION (2002) at art. 4.5, available at http://www.idhae.org/pdf/code2002_en.pdf.

affecting the practice of law. In 2012, the ABA House of Delegates adopted a revised Comment 8 to Model Rule 1.1, to provide in respect to competency, that “to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with technology.” In amending Comment 8, the ABA took the position that the revised language did not impose any new obligations on lawyers, but, rather, simply reminded lawyers that in the current environment, an awareness of technology, including the benefits and risks associated with it, is part of the lawyer’s general ethical duty to remain competent.⁵⁵ The same may be said in respect to an arbitrator’s competence obligation.

In its 2014 report recommending that New York adopt the revised comment 8 to Model Rule 1.1, the New York State Bar Association Committee on Standards of Professional Conduct noted that:

. . . to keep abreast of changes in law practice, a lawyer needs to understand the risks and benefits of technology relevant to the lawyer’s particular practice. For example, if a lawyer’s clients are communicating with the lawyer by web-based document-sharing technology or by social media, the lawyer should have some understanding of how to ensure that confidential communications remain confidential. The proposed amendment impresses upon lawyers the key role that technology plays in law practice and creates the expectation that lawyers will keep abreast of the benefits and risks associated with the technology relevant to their own legal practice.⁵⁶

55. See Karin Jenson, Coleman Watson, & James Sherer, *Ethics, Technology, and Attorney Competence*, available at <http://www.law.georgetown.edu/cle/materials/ediscovery/2014/frimordocs/ethicsinediscoverybakerhostetler.pdf> (last visited Jan. 14, 2017); see also The State Bar Of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion Interim No. 11-0004 (2014) (“An attorney’s obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law.”); INT’L BAR ASSOC., IBA INTERNATIONAL PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION (2011), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=BC99FD2C-D253-4BFE-A3B9-C13F196D9E60> (“Competence . . . includes competent and effective client, file and practice-management strategies.”).

56. Report of The New York State Bar Association Committee On Standards Of Attorney Conduct (“COSAC”) Proposed Amendments to the New York Rules of Professional

Whether or not adopted in the form encompassing the more general obligation provided in the New York version of the rules, the Model Rules, and particularly Comment 8 to Model Rule 1.1 as it now reads, are relevant to inform and define the meaning of competence as applied to arbitrators, as well as in their direct regulation of lawyer conduct.⁵⁷

Achieving digital literacy, including an understanding of the measures reasonably necessary to avoid cyberintrusion in an arbitration, is also closely related to the attention institutions, users, and counsel have paid in recent years to the role of the arbitrator in case management.⁵⁸ In the highly digitized and interdependent world

Conduct	and	Related	Comments	10	(2014),
http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=54063 .					

57. See, e.g., In re: Amendments to Rules Regulating the Florida Bar 4-1.1 and 6-10.3, No. SC16-574 (Sept. 29, 2016), at <http://www.floridasupremecourt.org/decisions/2016/sc16-574.pdf> (amending the comment to rule on competence to address technology); Law Society of Upper Canada, Technology Practice Management Guideline, Guideline 5.5 (“Competent Use of Information Technologies. Lawyers should have a reasonable understanding of the technologies used in their practice or should have access to someone who has such understanding”) & 5.10 (“Security Measures. Lawyers should be familiar with the security risks inherent in any of the information technologies used in their practices including unauthorized copying of electronic data, computer viruses which may destroy electronic information and hardware, hackers gaining access to lawyers’ electronic files, power failures and electronic storms resulting in damage to hardware or electronic information, theft of vast amounts of electronic information stored in stolen hardware. Lawyers should adopt adequate measures to protect against security threats and, if necessary, to replace hardware and reconstruct electronic information.”), available at <https://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/Technology/Technology-Practice-Management-Guideline/> (last visited Jan. 22, 2017); Canadian Bar Association, *Legal Ethics in a Digital World* (Sept. 2, 2015), <https://www.cba.org/getattachment/Sections/Ethics-and-Professional-Responsibility-Committee/Resources/Resources/2015/Legal-Ethics-in-a-Digital-World/guidelines-eng.pdf>; Philippe Doyle Gray, *The Pillars of Digital Security*, BAR NEWS: J. OF THE NEW SOUTH WALES BAR ASSOCIATION (Summer 2014), <http://www.philipppedoylegray.com/content/view/56/45/> (although the Law Society of New South Wales has not adopted professional conduct rules addressing technology, it has published guidelines for lawyers about the use of technology such as cloud computing and social media); E-Law Committee of the Law Society of South Africa, LSSA Guidelines on the Use of Internet-Based Technologies in Legal Practice (2015), <http://www.lssa.org.za/legal-practitioners/resources-for-attorneys>; see also UK SRA CODE OF CONDUCT, *supra* note 50, at O-4.5 (“You have effective systems and controls in place to enable you to identify risks to client confidentiality”); O-7.5 (“You comply with . . . data protection legislation.”); IB-7.5 (“Identifying and monitoring . . . IT failures and abuses.”).

58. See, e.g., ICC RULES, *supra* note 10, at app. IV (case management techniques); LCIA RULES, *supra* note 1, at art. 14 (conduct of the proceedings); ICDR RULES, *supra* note 10, at art. 20.2 (conduct of the proceedings) (“In establishing procedures for the case, the

of international arbitration, management of technology and baseline data security competence manifestly have become critical components of an arbitrator's competence to organize and conduct arbitration proceedings.⁵⁹

D. Global Data Protection Laws and Regulations

In any given arbitration matter, data held by an arbitrator may be subject to specific cybersecurity obligations arising from international or national data protection laws and regulations that govern how certain information can be collected, stored, and transferred.⁶⁰ While there is no universal international approach to data protection, nearly 110 countries⁶¹ have enacted laws aimed at protecting personal information by regulating categories of data or industry sectors, such as the financial and health care industries.⁶² As the key players in

tribunal and the parties may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings.”); College of Commercial Arbitrators, *Protocols for Expeditious, Cost-Effective Commercial Arbitration* (2010) 69 (arbitrators should take control of the arbitration and actively manage it from start to finish); ICC Commission Report, *Controlling Time and Costs in Arbitration* (2d. ed. 2012); Christopher Newmark, *Controlling Time and Costs in Arbitration*, in *LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION* *supra* note 1.

59. The UNCITRAL Notes on Organizing Arbitral Proceedings (2016) urge that arbitrators consider issues relating to the means of communication to be used during the proceedings at the outset, noting that the parties and the tribunal “may need to consider issues of compatibility, storage, access, data security as well as related costs when selecting electronic means of communication.” UNCITRAL Notes, *supra* note 26, at ¶¶ 56, 58.

60. See UNCTAD, *Data Protection Regulations and International Data Flows: Implications for Trade and Development*, UNCTAD/WEB/DTL/STICT/2016/1/iPub, http://unctad.org/en/PublicationsLibrary/dtlstict2016d1_en.pdf (last visited Jan. 9, 2017) (overview of international and national laws and regulations) (“UNCTAD on Data Protection”); see also European Union Data Protection Directive (95/46/EC) (implemented in each of the twenty-eight EU Member States through national data protection law).

61. See UNCTAD on Data Protection at 42 (108 countries have either comprehensive data protection laws or partial data protection laws).

62. In the United States, for example, there is no omnibus privacy or data protection legislation, but a patchwork of federal privacy laws that generally regulate security breach notification statutes by sector and state. See, e.g., Health Insurance Portability and Accountability Act, 42 U.S.C. § 1301 *passim* [hereinafter HIPPA] (health information); Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (consumer protection); Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6827 (financial information); National Conference of State Legislators, *Security Breach Notification Laws* (Jan. 4, 2016), <http://www.ncsl.org/research/telecommunications-and-information-technology/security->

international arbitrations frequently reside in different countries, resulting in continuous cross-border exchanges of information, it follows that the same data may be subject to multiple, and potentially inconsistent, laws. For example, the legal concept of “personal information” or “personally identifiable information” subject to reasonable protection from unauthorized access is defined more broadly under EU law than it is under US law.⁶³

While it is beyond the scope of this article to address the complex conflict-of-law issues that may arise in these situations,⁶⁴ the global proliferation of data protection laws indicates that: (i) participants in international arbitrations who share the sensitive information of others may have legal obligations to ensure that arbitrators, acting in the capacity of service providers, safeguard that information by complying with certain security standards⁶⁵; and (ii) increasingly, both participants and non-participants in an arbitration may have legally enforceable interests (or rights)⁶⁶ in the way that arbitrators secure and handle e-mail correspondence, witness statements,⁶⁷ and other electronically-exchanged documents that routinely disclose personally identifiable information. Moreover,

[breach-notification-laws.aspx](#) (forty-seven states have enacted legislation entitling individuals to notice of breaches of information of personally identifiable information).

63. See Practical Law, Expert Q&A on Data Security in Arbitration (Dec. 1, 2016) (stemming from the concept in EU countries that privacy is a fundamental human right, a person’s name and place of employment can be considered protected information).

64. Although not the focus of this article, we note that the potential for the application of disparate data protection laws strongly favors early discussions between opposing counsel about how arbitration-related data will be handled as well as discussion of data security with the tribunal by at least the first case management conference.

65. For example, an individual or organization that must comply with health information privacy rules under HIPPA is required to have any “business associate” it engages to help carry out its functions agree to comply with those rules as well. HIPPA, *supra* note 62. See also EU Directive 2016/1148 (July 6, 2016).

66. See, e.g., Charter of Fundamental Rights of the European Union (2012/C 326/02), art. 7 (“Everyone has the right to respect for his or her private and family life, home and communications”) & 8(1) (“Everyone has the right to the protection of personal data concerning him or her.”).

67. See INT’L BAR ASSOC., IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010), art. 4(5) (specifying personal information to be included in fact witness statements).

when security incidents occur, a web of breach notification obligations may be triggered.⁶⁸

Although it is not evident that the obligations or legal interests that may arise under the current global data protection regime create a bright-line duty, independent of any specific case, for arbitrators to avoid cyberintrusion, their prevalence at least supports the notion that to maintain user confidence in international arbitration process, arbitrators must not only be prepared and competent to handle sensitive information securely, but also appear to the public to be so prepared. Global data protection laws thus behoove arbitrators to be proactive (and not merely reactive, on a case-by-case basis) in dealing with cybersecurity.

IV. NATURE AND SCOPE OF THE ARBITRATOR'S DUTY TO AVOID INTRUSION

This article posits that the arbitrator's duty in relation to cybersecurity is one of avoiding intrusion, which we define as the duty to take reasonable measures to prevent unauthorized digital access to arbitration-related information. In the following sections, we first explore the nature and scope of the duty and then discuss some practical measures that will assist the arbitrator in fulfilling the duty.

A. An Umbrella Obligation

As we have shown above, the arbitrator's duty in relation to cybersecurity is not a new, independent obligation, but rather a natural extension in the digital age of an arbitrator's existing duties to keep arbitration-related information confidential, to preserve and protect the integrity and legitimacy of the arbitral process, and to be competent. By grouping the implied cybersecurity responsibilities arising under each of these duties under the new umbrella of the "duty to avoid intrusion," we recognize the unique challenges that cyberthreats pose to the practice of international arbitration in the digital age.

This is a matter of substance, not just terminology. Recognition of the threat and each actor's acceptance of responsibility to take part

68. Practical Law, *supra* note 63.

in addressing it are key building blocks to effective cybersecurity in the international commercial arbitration regime. In this article, which focuses on the arbitrator's role, we emphasize that the fulfillment of existing arbitrator duties in the digital age encompasses a duty to be proactive and vigilant in guarding against cyberintrusion.

B. An Interdependent Landscape with Independent Duties

Since the data arbitrators are entrusted to keep confidential generally originates in the arbitration from the parties and their counsel, it may be tempting for arbitrators to view cybersecurity as an issue for the parties, and particularly counsel, to address on a case-by-case basis. Parties and their counsel indisputably do have legal and ethical responsibilities to safeguard the data that they import into an arbitration.⁶⁹ In many instances, they will be uniquely positioned to secure that data and to advise the arbitrator regarding specific security precautions necessary in the case or required by law. Any view that purports to isolate any one particular participant in the arbitration process as having sole responsibility for cybersecurity, however, or to relieve the arbitrator from any responsibility for cybersecurity outside of the bounds of individual cases, ignores the interdependent digital landscape discussed above and is shortsighted. Since any break in the custody of sensitive data may affect all participants in the arbitral process, cybersecurity is an inherently shared responsibility.

While interdependent with other actors, the arbitrator's cybersecurity duty also stands alone. The arbitrator who takes the view that others are primarily responsible abjures the arbitrator's special role as adjudicator as well as the arbitrator's underlying duties to safeguard the integrity and legitimacy of the process and the confidentiality of arbitration-related information. The obligations of other players in the arbitral process (including the parties, counsel, arbitral institutions and third party service providers among others) may be governed by differing standards and other legal regimes, only some of which overlap with those governing arbitrators.

69. See *supra* Section III.D (discussing national data protection laws and regulations); Section III.C (discussing cybersecurity obligations arising from attorney ethical codes).

Moreover, the arbitrator's day-to-day data security architecture and practices pre-exist individual matters and persist after the matter is concluded. Thus, the strength of the arbitrator's routine cybersecurity practices will impact the overall security of arbitration-related data from the first moment the arbitrator becomes involved with a case, before counsel or the parties have an opportunity to address security protocols that may be appropriate for the specific data involved in the matter, and will continue after the matter ends as the arbitrator maintains at least some data for conflicts or other record-keeping purposes.

C. Personal Accountability

As arbitrators are appointed for their personal qualifications and reputational standing,⁷⁰ it is broadly accepted in international arbitration that the arbitrator's mandate is personal and cannot be delegated.⁷¹ While this notion is raised most often in discussions about impermissible delegation of decision-making responsibilities to arbitral secretaries, the personal nature of the arbitrator's mandate has implications for cybersecurity as well. In particular, it is important for arbitrators to recognize that even if the security of their digital infrastructure is established and monitored by IT personnel, or they work in a large law firm setting where they have little to no influence over firm-wide security policies, they cannot assume that their responsibilities in relation to cybersecurity have been met.

First, effective security depends on individual choices and conduct.⁷² Hackers' most valuable currency is human carelessness.⁷³

70. BORN, *supra* note 27, at 2013. ("Arbitrators are almost always selected because of their personal standing and reputation . . .").

71. See Eric Schwartz, The Rights and Duties of ICC Arbitrators, in ICC International Court of Arbitration Bulletin, Special Supplement, The Status of the Arbitrator (1995) at 86; see also BORN, *supra* note 27, at 1999. ("An arbitrator's obligations include the duty not to delegate his or her responsibilities or tasks to third parties. . . . Most fundamentally, an arbitrator cannot delegate the duty of deciding a case, attending hearings or deliberations, or evaluating the parties' submissions and evidence to others: these are the essence of the arbitrator's adjudicative function and they are personal, non-delegable duties.").

72. To highlight the fundamental role played by individuals in protecting confidential information, whether reliance is placed on notepads, mobile telephones, or the cloud, Philippe Doyle Gray shares this anecdote:

Even if an arbitrator operates in an environment with the digital architecture of Fort Knox, important security actions will always remain in the arbitrator's personal control. Law firm or IT policy may dictate to an arbitrator, for example, that strong, complex passwords be used on all laptops and other devices and that passwords be changed regularly. However, an arbitrator risks completely undermining that security protocol by conveniently storing a reminder of the password du jour on a post-it note stuck to the cover of a laptop,⁷⁴ and then working away on the laptop in an airport lounge or other public environment, or, worse, forgetting the laptop in the security line or the airplane seat pocket after a long international

I regularly walk from the Supreme Court of New South Wales down King Street to stop at the intersection with Elizabeth Street. So too do other lawyers. When it's raining we huddle under the awning of the Sydney University Law School, but in fine weather we gather around the traffic lights waiting for the signal that it's safe for pedestrians to cross. Usually, I see paper files or lever-arch folders neatly stating the names of the clients concerned, and sometimes the nature of their confidential affairs. Often, I can't help but overhear a colleague talking about his matter. A few times, sensitive material was inadvertently broadcast to passers-by that happened to include me. Once, I even overheard a colleague—speaking on his mobile phone—discuss settlement negotiations during a mediation that had adjourned over lunch: he openly discussed not only the parties' respective offers, but his own client's bottom line. The real security problems lie not in CLOUD COMPUTING, but in ourselves.

Gray, *supra* note 57. See also *Harleysville Ins. Co. v. Holding Funeral Home*, Case No. 1:15cv00057 (W.D. Va., Feb. 9, 2017), <http://bit.ly/2mSkyuu> (court held that insurer's attorney-client privilege was waived where entire claims file was loaded onto a cloud service and made accessible to anyone via hyperlink without password protection, stating this was the "cyber world equivalent of leaving its claims file on a bench in the public square").

73. In December 2015, The Wall Street Journal reported that "[w]eeks after J.P. Morgan Chase & Co. was hit with a massive data breach that exposed information from 76 million households, the country's biggest bank by assets sent a fake phishing email as a test to its more than 250,000 employees. Roughly 20% of them clicked on it, according to people familiar with the email." Robin Sidel, *Banks Battle Staffers' Vulnerability to Hacks*, WALL ST. J., (Dec. 21, 2015), <https://www.wsj.com/articles/the-weakest-link-in-banks-fight-against-hackers-1450607401>. See Int'l Chamber of Commerce [ICC], *Cyber Security Guide for Business*, at 8, ICC Doc. 450/1081-5 (2015) ("35% of security incidents are a result of human error rather than deliberate attacks. More than half of the remaining security incidents were the result of a deliberate attack that could have been avoided if people had handled information in a more secure manner.").

74. According to Verizon's 2016 Data Breach Investigations Report, "63% of confirmed data breaches involved weak, default or stolen passwords." Verizon Report, *supra* note 13, at 20. See also Fox-Brewster, *supra* note 7 (Sony hack revealed chief executive's password was "guessable to any semi-skilled hacker" and that passwords to internal accounts were stored in a file marked "passwords").

flight.⁷⁵ Similarly, although IT policy may dictate that no USB drive can be used in a networked computer before it is manually scanned for viruses by the IT department, an arbitrator sitting in a hearing in Vienna may decide before the flight home to take the USB drive handed out at a recent arbitration conference and use it to transfer notes from deliberations stored on her laptop to a public computer in the hotel business center for printing.

Second, there is danger in complacency. Arbitrators understandably want to spend time on the practice of arbitration, not on routine practice management. However, an arbitrator who dismisses cybersecurity as an “IT issue” and who assumes that “others are taking care of it” fails to appreciate how a failure to heed cybersecurity may undermine his or her ability to keep arbitration-related information confidential as well as user trust and confidence in the integrity of the international arbitration regime. Notwithstanding the steady flow of news reports about cyberbreaches, it appears that “many [attorneys and law firms] are not using security measures that are viewed as basic by security professionals and are used more frequently in other businesses and professions.”⁷⁶ Arbitrators who rely on IT personnel to support their practice should thus bear in mind that their existing data security framework and digital architecture may well require an upgrade or adaptation to the unique aspects of international arbitration. Indeed, just as an arbitrator should not entrust (but may be aided by) the conflicts department in his or her law firm to determine whether he or she is bound to make any disclosures in an arbitration,⁷⁷ an arbitrator may be assisted by, but

75. Laptops and other devices are reportedly lost over 100 times more frequently than they are stolen. Verizon Report, *supra* note 13, at 44.

76. David G. Ries, *Security*, ABA TECHREPORT 2016, 1-2, https://www.americanbar.org/groups/law_practice/publications/techreport/2016.html (reporting on 2016 survey of attorneys and law firms about security incidents and safeguards). See also Matthew Goldstein, *Citigroup Report Chides Law Firms for Silence on Hackings*, N.Y. TIMES (Mar. 26, 2015), <https://nyti.ms/1NkjfKo> (In March 2015, Citigroup’s internal cyberintelligence team advised bank employees to be “mindful that digital security at many law firms, despite improvements, generally remains below the standards for other industries.”).

77. See, e.g., *Ometto v. ASA Bioenergy Holding A.G. et al.*, 12 Civ. 1328(JSR), 2013 WL 174259 (S.D.N.Y. Jan. 7, 2013).

should not entrust, an IT department to fulfill the duty to avoid intrusion.⁷⁸

D. Continuous and Evolving

The duty to avoid intrusion is a continuous obligation, which is not limited in time. In part, this follows from the nature of the arbitrator's duty of confidentiality. Since arbitrators may maintain digital information from their cases beyond the lifetime of an individual matter, ranging from case administration data (including as part of conflicts or billing systems), correspondence, procedural decisions, awards, and parties' evidentiary submissions, parties and other participants have a reasonable expectation that arbitrators will continue to safeguard the confidentiality of such information once a case ends.⁷⁹ Furthermore, as we have discussed above, because arbitrators accept appointments in new matters with a digital architecture and certain security practices already in place, parties and other participants have a reasonable expectation that arbitrators will heed cybersecurity from the time of appointment (and necessarily before).

The ongoing nature of the arbitrator's duty to avoid intrusion also flows from the underlying duty to be competent. Because cyberthreats are constantly evolving alongside advancing technology, an arbitrator cannot take effective steps to avoid intrusion unless he or she keeps abreast of the changing nature and scope of cyberrisks. Otherwise, the arbitrator will not be in any position to analyze risks and weigh appropriate responses, including, for example, with respect

78. The importance of "executive-level" attention to effective cyberrisk management is frequently emphasized by cybersecurity experts. *See, e.g.,* ICC, *Cyber Security Guide for Business*, *supra* note 73, at 4 (2015); Tucker Bailey et al., *Why Senior Leaders Are the Front Line Against Cyberattacks*, MCKINSEY & CO. (June 2014), <https://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/why-senior-leaders-are-the-front-line-against-cyberattacks>.

79. Int'l Law Ass'n, *Draft Report of the Committee on International Commercial Arbitration for the 2010 Hague Conference, Confidentiality in International Arbitration*, at 18 (2010), <http://www.ila-hq.org/en/committees/index.cfm/cid/19> (although there is uncertainty regarding the duration of duties of confidentiality in arbitration, the "fact that the duty of confidentiality usually covers the award seems to point to an expectation that the regime of confidentiality should outlive the arbitral proceedings and that the obligations will not cease after the end of the arbitration.").

to whether new or additional security measures may be warranted, what work-arounds might be acceptable when complying with an established security protocol proves to be impossible or impractical, or whether a new product or service is adequately secure.

E. Bounded by Reasonableness

Cybersecurity professionals routinely advise that in today's environment of ever-escalating data breaches, there is no longer any question of *if* one's digital infrastructure and data will be hacked, but only *when*.⁸⁰ As a practical reality, it follows that the arbitrator cannot guarantee that arbitration-related information will remain safe from hackers,⁸¹ but can only take steps to mitigate the risks of cyberintrusion. In *LabMD, Inc. v. Federal Trade Commission*, the U.S. Federal Trade Commission ("FTC") explained why "reasonableness," assessed "in light of the sensitivity and volume of consumer information [a company] holds, the size and complexity of its business, and the cost of available tools to improve security and reduce vulnerabilities," is an appropriate touchstone for determining whether a company has implemented appropriate data security measures:

[The FTC] has made clear that it does not require perfect security; reasonable and appropriate security is a continuous process of assessing and addressing risks; there is no one-size-

80. U.S. Attorney Preet Bharara recently made such a pronouncement in announcing criminal indictments of hackers who traded on confidential law firm information, saying, "This case of cyber meets securities fraud should serve as a wake-up call for law firms around the world: you are and will be targets of cyber hacking, because you have information valuable to would-be criminals." Nate Raymond, *U.S. Accuses Chinese Citizens of Hacking Law Firms, Insider Trading*, REUTERS, (Dec. 28, 2016), <http://www.reuters.com/article/us-cyber-insidertrading-idUSKBN14G1D5>. See also, e.g., Verizon Report, *supra* note 13, at 3 ("No locale, industry or organization is bulletproof when it comes to the compromise of data."); ICC, *Cyber Security Guide for Business*, *supra* note 73, at 10 ("Even the best protected enterprise will at some point experience an information security breach. We live in an environment where this is a question of when, not if.").

81. ICC, *Cyber Security Guide for Business*, *supra* note 73, at 4 (2015) ("[A]ll business managers including executives and directors must recognize that cyber risk management is an on-going process where no absolute security is, or will be, available.").

fits-all data security program; and the mere fact that a breach occurred does not mean that a company has violated the law.⁸²

Notably, reasonableness, not perfection, also bounds the lawyer's confidentiality duty under the ABA Model Rules to protect information relating to the representation of a client from unauthorized access.⁸³

A risk-based approach, bounded by reasonableness, is similarly appropriate as we examine the scope and boundaries of the arbitrator's duty to avoid the ever-evolving threats of cyberintrusion in international commercial arbitration. It follows from the conclusion there is no one-size-fits-all data security program for consumer-facing corporations that there is no one-size fits-all data security program for international commercial arbitrators; any such program would risk obsolescence and fail to account for significant contextual differences. Furthermore, as Pastore argues, a de-contextualized approach to data security may be counterproductive "in that it over-designates [sensitive] information (desensitizing practitioners to the truly critical information) and results in overly cumbersome processes for information that, in reality, needs little to no additional protections."⁸⁴

In addition, a standard of reasonableness under the circumstances is familiar in the law, particularly in areas where the facts and circumstances vary widely and evolve over time. The reasonableness approach enables consideration of the trade-offs that will sometimes exist between increased security measures and other interests.⁸⁵ To the extent the arbitrator's duty to avoid intrusion is in tension with other important values such as conducting the proceedings expeditiously and cost-effectively and in accordance with

82. *LabMD, Inc.*, F.T.C. No. 9357, 2016 WL 4128215 (F.T.C. July 28, 2016). California's Attorney General notes in her Breach Report 2016 that "reasonable security" is the general standard for information security adopted not only in California but also the major United States federal data security laws and regulations. *See infra*, note 111.

83. Model Rule 1.6(c) provides "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." MODEL RULES OF PROF'L CONDUCT, r. 1.6(c) (AM. BAR ASS'N, 1983). (emphasis added)

84. Pastore, *supra* note 15.

85. *See generally* Pastore, *supra* note 15.

the parties' preferences,⁸⁶ arbitrators should be entitled to weigh all of the relevant circumstances to determine the correct balance.⁸⁷ Arbitrators, institutions, users, and counsel should be able to understand and embrace such a standard for cybersecurity.

Accordingly, it is appropriate to limit the arbitrator's duty to an obligation to take such measures to protect digital security as he or she deems reasonable in light of the relevant facts and circumstances, including developments in technology and evolving security risks, the arbitrator's individual practice setting and digital architecture, the sensitivity of the data to be protected, and any party preferences or other case-specific factors present in the matters over which the arbitrator presides.

V. IMPLEMENTING THE DUTY TO AVOID INTRUSION

In the absence of a detailed roadmap for data security, the challenge for international arbitrators is to determine what specific measures they should implement to avoid intrusion, in their own infrastructure and in arbitrations over which they preside, given that what constitutes "reasonable" measures will vary based on a risk assessment of the arbitrator's individual digital architecture and data assets, the prevalent data security threats, available protective measures and, in relation to individual matters, case-specific factors.⁸⁸ Although it is by no means comprehensive, in this Part, we aim to highlight certain practical measures and general principles that are likely to be relevant for all international arbitrators, regardless of

86. *See supra* note 10.

87. The UNCITRAL Notes on Organizing Arbitral Proceedings (2016) note that data security is but one factor to be considered when deciding whether to use electronic means of communication for proceedings. Other factors to be considered may include compatibility, storage, access and related costs. *See* UNCITRAL Notes, *supra* note 26.

88. Security framework standards are generally directed at organizations rather than business professionals. *See generally* NAT'L INST. OF STANDARDS AND TECH., SPECIAL PUBLICATION 800-53 REVISION 4, SECURITY AND PRIVACY CONTROLS FOR FEDERAL INFORMATION SYSTEMS AND ORGANIZATIONS (2013); FRAMEWORK FOR IMPROVING CRITICAL INFRASTRUCTURE CYBERSECURITY (2014), available at www.nist.gov; INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, ISO/IEC 27002:2013 *Information Technology, Security Techniques, Code of Practice for Information Security Controls*, available at www.iso.org (last visited Jan. 22, 2017); Center for Internet Security, *Critical Security Controls for Effective Cyber Defense*, Version 6 (Oct. 15, 2015), www.cisecurity.org/.

practice setting and individual risk profile.⁸⁹ In doing so, we further aim to show that the fundamentals of effective cyberrisk management need not be overwhelming or unduly burdensome. In addition, since cyberintrusion in the arbitral process can potentially arise from both intentional, targeted attacks on arbitral participants⁹⁰ and from the inadvertent⁹¹ disclosure or compromise of arbitration-related information (e.g., by way of a weak password, lost mobile device, or other human error),⁹² we discuss below potential responses to external threats and safeguards to prevent or mitigate damage if data security is compromised.

89. A recent working paper from the Washington Legal Foundation suggests eight data security best practices based on an analysis of FTC enforcement actions:

- Limit the collection, retention, and use of sensitive data;
- Restrict access to sensitive data;
- Implement robust authentication procedures;
- Store and transmit sensitive information securely;
- Implement procedures to identify and address vulnerabilities;
- Develop and test new products and services with privacy and security in mind;
- Require service providers to implement appropriate security measures;
- Properly secure documents, media, and devices.

Kurt Wimmer, Ashden Fein, Catlin M. Meade & Andrew Vaden, *Data Security Best Practices Derived From Ftc § 5 Enforcement Actions*, at 6 (Washington Legal Foundation Paper No. 199, 2017).

90. See *supra* notes 13-14.

91. Even a single misdirected e-mail—within an arbitration proceeding—can have serious consequences for the perceived integrity and legitimacy of proceedings. In *Horndom Ltd. v. White Sail Shipping, Optima Shipping and Integral Petroleum* (SCC Arbitration V094/2011), the respondents challenged their own appointee to the tribunal after he accidentally copied one of the parties’ lawyers on an e-mail complaining that counsel were getting “above their station” and that he was “rather sick of these parties.” While the arbitrator admitted that disagreement over the hearing date resulted in his “frustration with procedural matters” and “intemperate expression,” according to the respondents, the inadvertent disclosure of this otherwise private exchange among tribunal members revealed the arbitrator’s “personal animosity” toward counsel and raised justifiable doubts about his impartiality. See also Alison Ross, *Accidental cc Triggers Double Arbitrator Challenge in Stockholm*, GLOB. ARB. REV. (Oct. 17, 2016), <http://globalarbitrationreview.com/article/1069329/accidental-cc-triggers-double-arbitrator-challenge-in-stockholm>.

92. An episode of the popular CBS TV show *The Good Wife* was based on the disclosure of confidential information resulting from an open feed when a video camera was mistakenly left on after a teleconferenced deposition. *THE GOOD WIFE*, (CBS, 2014), http://www.cbs.com/shows/the_good_wife/episodes/213197/.

A. Keeping Abreast of Developments in Relevant Technology and Understanding Associated Benefits and Risks

There are readily accessible resources for arbitrators to educate themselves as to the evolving nature and scope of major data security threats, with a view to understanding the significance and effectiveness of specific security protocols, such as standards for passwords. These resources have been developed by bar associations, law firms, and others.⁹³ For example, the ABA has taken the lead internationally in developing guidance for legal practitioners in responding to the challenges of the digital world and regularly posts short, digestible articles online on topics such as ransomware and encryption, in addition to offering educational webinars and seminars.⁹⁴ Such resources frequently highlight ethical opinions from state bar associations on the responsible use of technology in the legal profession. One particularly noteworthy resource, available only to ABA members, are e-mail alerts from the FBI about evolving cyber risks and threats targeting law firms.

Other bar associations worldwide, such as the Law Society of Upper Canada, also have developed helpful online resources.⁹⁵ For the most part, such resources are available for free online (i.e., to members and non-members alike) and can assist arbitrators in finding quick, practical answers to technical questions written for legal professionals (such as what are the risks of public wifi and what alternatives are available for mobile wifi access). Meanwhile, to keep a handle on evolving data protection obligations internationally, now that most major law firms have a dedicated data privacy or cybersecurity practice group, arbitrators may also find it helpful to sign up for e-mail alerts from several law firms based in different jurisdictions.

93. See, e.g., *supra* note 88 and accompanying text.

94. *Law Technology Resource Center*, AMERICAN BAR ASSOCIATION https://www.americanbar.org/groups/departments/offices/legal_technology_resources.html (last visited Jan. 20, 2017).

95. See *Technology Practice Tips*, LAW SOCIETY OF UPPER CANADA <http://www.lsuc.on.ca/technology-practice-tips-podcasts-list/> (podcasts on “everything you ever wanted to know about technology, but were afraid to ask” including “[p]ractical and important information about passwords, encryption, social media, smartphone security, websites and much more . . . in an accessible, conversational manner.”).

B. Implementing Baseline Security

Cybersecurity experts agree that good cyber “hygiene”—basic everyday habits relating to technological use—is essential to a strong, baseline defense.⁹⁶ Significantly, these are habits that every arbitrator, regardless of practice setting, can readily implement, with minimal cost and without the need for IT support. Basic cyber hygiene best practices include:

- creating access controls, including strong, complex passwords⁹⁷ and two-factor authentication when available⁹⁸;
- guarding digital “perimeters” with firewalls, antivirus and antispyware software, operating system updates and other software patches⁹⁹;
- adopting secure protocols such as encryption for the storage and transmission of sensitive data¹⁰⁰;
- being mindful of public internet use in hotel lobbies, airports, coffee shops, and elsewhere and considering making use of personal cellular hotspots and virtual private networks¹⁰¹; and
- being mindful of what one downloads.¹⁰²

96. See, e.g., FED. TRADE COMM’N, *START WITH SECURITY: A GUIDE FOR BUSINESS, LESSONS LEARNED FROM FTC CASES* (June 2015), <https://www.ftc.gov/system/files/documents/plain-language/pdf0205-startwithsecurity.pdf>; Wimmer et. al., *supra* note 89.

97. On some devices, including many phones and tablets, biometric authentication technologies such as fingerprint scanners now are available to perform the authentication and access control function. See PWC Report, *supra* note 13, at 9-12.

98. Many services and sites that store sensitive information, including cloud storage and e-mail providers, offer two-factor authentication whereby access requires a password plus something else that you have; typically, a security code that is either sent by text message or e-mail to a separate device or generated via an app that works offline such as Google Authenticator, or a biometric like a fingerprint. See *Two-Factor Authentication for AppleID*, APPLE, <https://support.apple.com/en-us/HT204915> (last visited Jan. 22, 2017); *Google Two-Step Verification*, GOOGLE, <https://www.google.com/landing/2step/> (last visited Jan. 22, 2017); Seth Rosenblatt & Jason Cipriani, *Two-Factor Authentication (What You Need to Know)*, CNET, (June 15, 2015), <https://www.cnet.com/news/two-factor-authentication-what-you-need-to-know-faq/>.

99. See *Protections, How to Protect Your Computer*, FBI, <https://www.fbi.gov/investigate/cyber> (last visited Jan. 20, 2017).

100. See e.g., Alex Castle, *How to Encrypt Almost Anything*, PC WORLD, (Jan, 18, 2013), <http://www.pcworld.com/article/2025462/how-to-encrypt-almost-anything.html>.

101. Pastore, *supra* note 15.

102. See *supra* note 99.

C. Taking a Thoughtful Approach to Assets and Architecture

As Pastore explains, determining what cybersecurity should be implemented turns on knowledge of one's "assets" and "architecture."¹⁰³ That is, what sensitive information do you have (e.g., customer lists of a client, sensitive trade secrets developed through substantial R&D expenditures, or potentially market-moving information about future business plans), and where do you store it (e.g., with a third-party cloud provider, on portable (and easily lost) external media like thumb drives, or on networks accessible by other practitioners in the firm without regard to whether the need access to such data).¹⁰⁴ This exercise will be relevant in respect to the arbitrator's own practice-related data, such as conflicts and billing records, closed case records, as well as the data received in matters where the arbitrator is presiding. If the arbitrator works in an organizational setting, it will also be relevant in respect to the arbitrator's use of personal devices, which are often not subject to established security protocols.¹⁰⁵

Once the arbitrator knows and classifies the sensitivity of the different data he or she holds and knows where it is located, the arbitrator will be in a position to assess what protocols may be appropriate for storage and transfer of the information.¹⁰⁶ In addition, the arbitrator will be in a position to consider what steps can be taken to reduce the risk that sensitive data will be compromised in a cyberattack or following human error. For example:

- Though the arbitrator may own both a tablet and laptop, do arbitration-related documents need to be accessible on both devices, or is it sufficient that they are loaded on one? (Here,

103. In this article, we frequently refer synonymously to one's digital "infrastructure."

104. Pastore, *supra* note 15.

105. According to the ABA TechReport 2016, most lawyers (74%) use a personal rather than firm-issued phone for their legal work and a majority (51%) use a tablet for legal work, the vast majority of which (81%) are personal devices. Nonetheless, "only 43% of lawyers reported having a mobile technology policy for their firm, meaning the majority of law firms don't even have a policy for how mobile devices should be used and how client data should be stored and transmitted on them." Aaron Street, *Mobile Technology*, ABA TECHREPORT (2016),

https://www.americanbar.org/groups/law_practice/publications/techreport/2016/mobile.html.

106. Pastore discusses this analysis in greater detail. See Pastore *supra* note 15.

an important consideration is whether the data really needs to be loaded onto a portable device and subjected to the enhanced risks of travel.)

- Can the arbitrator enable notifications for e-mail¹⁰⁷ or cloud services¹⁰⁸ when unauthorized data access may have occurred and remotely revoke that access or wipe data?
- When working at home, does the arbitrator use a separate device in lieu of a shared family computer? If not, are there other steps the arbitrator can take to segregate business data (e.g., by using separate computer logins)?

By the same token, at the conclusion of a case, the arbitrator should seek to avoid holding onto case-related data longer than is necessary.¹⁰⁹ With a view to developing an individualized document retention policy, the arbitrator should give thought to what information will be kept, why, for how long, where case information resides now (across which devices and in what applications/programs), and where the materials will be stored. At a minimum, the arbitrator will want to retain basic case administration data for the purposes of future conflicts checks. Otherwise, the arbitrator may wish to consider questions such as:

- During the life of a case, can the arbitrator use file-naming conventions to facilitate identifying and segregating types of documents, such as pleadings and exhibits, that the arbitrator is unlikely to have any interest in retaining after a case ends?
- Does applicable law preclude the arbitrator from retaining certain data or mandate that it be stored or disposed of in any particular fashion?

107. Such measures are generally not available for free consumer e-mail services. Thus it is generally preferable to use paid professional versions of these services, which have more robust security protocols.

108. Numerous lawyer ethics opinions have considered whether the use of cloud services is compatible with an attorney's obligation to maintain confidentiality. The decisions generally have concluded that lawyers may use the services, provided that they take reasonable steps to select a reliable vendor, implement available security and address the potential risks. *See* Cloud Ethics Opinions Around the U.S., AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html.

109. Pastore, *supra* note 15.

- To the extent that it is desirable and appropriate to retain arbitrator work product, such as procedural orders and awards, for personal future reference, would it be workable to retain anonymized Word documents in lieu of final PDF copies?
- If the arbitrator practices in an organizational setting that has a document retention policy, are documents kept longer than necessary to comply with rules applicable to the attorney-client relationship, which do not apply to service as an arbitrator?

D. Planning for a Data Breach

Separate from considering data breach protocols for individual cases, there are a number of useful reasons for the arbitrator to consider more generally how he or she would respond to a data breach if and when one arises. First, by thinking through what steps should be taken in the event of various scenarios, the arbitrator may be able to identify and remediate security vulnerabilities that he or she had not considered. Second, the arbitrator will be in a better position to react quickly to control or limit the damage that flows from a security incident, and possibly avoid triggering duties to notify data owners, regulators, insurers, law enforcement, or others that a security incident occurred.¹¹⁰ This exercise is particularly important for international arbitrators for whom international travel is a fact of life, as travel creates special risks of inadvertent data loss and vulnerability to unlawful intrusion.

110. See, e.g., U.S. Department of Health & Human Services, *Guidance Regarding Methods for De-identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA)*, https://www.hhs.gov/hipaa/for-professionals/privacy/special-topics/de-identification/#_edn1 (last accessed Jan. 21, 2017) (explaining that there is often a safe harbor for data breach notification if sensitive information has been encrypted or otherwise de-sensitized); Kamala D. Harris, Attorney General California, Department of Justice, Breach Report 2016, available at <https://oag.ca.gov/sites/all/files/agweb/pdfs/dbr/2016-data-breach-report.pdf> (last accessed Jan. 21, 2017) (explaining major differences between state notification statutes); See Cal. Civil Code § 1798.82 (demonstrating that in 2016, California amended its data breach notification law effective January 1, 2017 to trigger notification obligations not only if unencrypted data is compromised, but also if encrypted data is breached along with any encryption key that could render the data readable or useable).

The prospect of a lost laptop, for example, may prompt an arbitrator to consider:

- Is the laptop protected by a strong password?
- Is full disk encryption enabled?¹¹¹
- Can the arbitrator make use of location tracking and/or remote data wiping to minimize potential disclosure of sensitive information?¹¹²
- Can the arbitrator provide the police with the serial number for the laptop?
- Can the arbitrator avoid lost productivity by restoring information on the laptop from a back-up?
- Is there sensitive data on the laptop that could trigger breach notification duties? If so, could that data be handled differently (e.g., securely destroyed or encrypted)?

E. Case Management Considerations

In our view, the arbitrator must be attuned to data security issues in the organizing phase of the arbitration. Taking into account such factors as the size and complexity of the case, the likelihood that confidential or sensitive data will be stored or transmitted, the parties' resources, sophistication, and preferences, as well as potential legal obligations arising under applicable law or rules in relation to data privacy or confidentiality, the arbitrator should consider whether to raise the topic of data security at the initial case management or procedural conference.¹¹³ Thereafter, the continuing scope of the arbitrator's duty will depend on factors such as the extent to which the parties or their counsel assume responsibility for data security and the arbitrator's own assessment of the ongoing risks and the measures he

111. See *Turn On Full Disk Encryption (Windows 10)*, MICROSOFT, <https://support.microsoft.com/en-us/instantsanswers/e7d75dd2-29c2-16ac-f03d-20cfd54202f/turn-on-device-encryption>; see also *Use FileVault to Encrypt the Start-Up Disk on Your MAC*, APPLE, <https://support.apple.com/en-us/HT204837>.

112. These measures are available for Apple devices including laptops, for example, but only if the "find my iPhone" feature has been activated first.

113. See UNCITRAL Notes, *supra* note 26. Consistent with the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings, we do not intend to suggest a binding requirement for the tribunal or parties to act in any particular manner.

or she can reasonably implement in addition to or in lieu of measures other actors are undertaking.

The arbitrator may also seek the cooperation of the parties and counsel in avoiding the unnecessary transmission of sensitive data to the tribunal. For example, at the outset of an arbitration, the arbitrator may consider telling counsel that, apart from reliance documents submitted with the parties' memorials, the arbitrator is not to be copied on, or provided with, any pre-hearing disclosure that the parties may otherwise exchange. Likewise, if the arbitrator can anticipate that sensitive personal information (such as tax returns) or commercial information (such as pricing information or trade secrets) will be exchanged, consideration may be given to having irrelevant information redacted (e.g., to show only the last four digits of a social security number). Alternatively, it may be possible to aggregate or anonymize data before it is provided to the arbitrator without diminishing either party's ability to fairly present its case.

VI. LOOKING TO THE FUTURE

We conclude this article with the well-worn maxim that "it takes a village." We hope that the challenge we present to arbitrators will stimulate discussion in the international commercial arbitration community and prompt other participants to focus on their own responsibilities and how their individual security architecture and practices may undermine or support the security measures taken by others. As awareness of cybersecurity risks in arbitration increases, we hope to see dialogue around questions such as the following:

- Should arbitral institutions amend their rules to flag data security for consideration in the initial organizing phase of an arbitration, as their rules now do with respect to other important topics,¹¹⁴ and/or should they expressly establish

114. See e.g., ICC RULES, *supra* note 10, at art. 22, (effective case management) and Appendix IV (case management techniques); ICDR RULES, *supra* note 10, at art. 20(2) (noting that the tribunal and the parties may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings) and art. 20(7) (establishing the parties' duty to avoid unnecessary delay and expense and the tribunal's power to "allocate costs, draw adverse inferences, and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration"); LCIA RULES, *supra* note 1, at art. 14 (avoiding unnecessary delay and expense) and art. 30 (confidentiality).

duties for the parties, counsel, institution and arbitrators to implement reasonable measures to avoid intrusion?

- Should counsel be charged with developing a data security plan in individual arbitration matters¹¹⁵ and/or providing a secure platform for the transmission and storage of data in each matter?
- How should tribunals resolve party conflicts about appropriate security measures, breach notification obligations, and related costs?
- Should arbitrators routinely disclose their data security practices to parties and counsel (e.g., in relation to cloud computing or post-award document retention) and should those practices be subject to the parties' comments and consent?
- Should arbitral institutions or other participants develop shared secured platforms for data storage and transmission that would be available to parties as a non-exclusive choice?
- What kinds of training and education programs should be developed for parties, counsel, arbitrators, and other participants to provide baseline knowledge, as well as updated information on evolving data security threats and updates on available protective measures?
- Should institutions that maintain rosters of arbitrators require their arbitrators to complete mandatory cybersecurity training?
- Should arbitrator ethical codes be updated to define competence to include an obligation to keep abreast of new developments in arbitration and its practice, and to consider the benefits and risks associated with technology?
- Should professional organizations like the International Bar Association or the Chartered Institute of Arbitrators develop cybersecurity checklists or guidance notes for arbitrators, counsel, or other participants?

115. See David J. Kessler, et al., *Protective Orders in the Age of Hacking*, NYLJ, (Mar. 16, 2015), reprint at 1 (“In the age of cyber attacks, hacking, and digital corporate espionage... [p]rotective orders should be upgraded to require reasonable levels of security to protect an opponents' data and more stringent notification requirements if unauthorized access does occur . . .”).

There will no right answer to these and other relevant questions, but we are confident that dialogue will be constructive. What will constitute a reasonable data security program and what reasonable measures individual participants in the process should take will continue to evolve. Our hope is that increased awareness will ensure that a process will emerge in every arbitration to identify data security risks and develop a response, having regard to the nature and scope of the risks, the desires and resources of the parties, and other relevant factors.

Fordham International Law Journal

Volume 41, Issue 4

2018

Article 4

2017 FORDHAM INTERNATIONAL ARBITRATION & MEDIATION
CONFERENCE ISSUE

It's All About the Data: The Impact of the EU General Data Protection Regulation on International Arbitration

Kathleen Paisley*

*

Copyright ©2018 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <https://ir.lawnet.fordham.edu/ilj>

ARTICLE

IT'S ALL ABOUT THE DATA:

THE IMPACT OF THE EU GENERAL DATA
PROTECTION REGULATION ON INTERNATIONAL
ARBITRATION*Kathleen Paisley**

ABSTRACT

This Article addresses the application of the EU General Data Protection Regulation (GDPR) to international commercial arbitration. The GDPR has a broad reach and where applicable imposes significant obligations on the processing of personal data during arbitrations. The GDPR imposes potential criminal liability and fines of up to the higher of 4% of global gross revenue or EU €20 million, as well as granting data subject's individual rights of action for damages, which means the risks of non-compliance are steep.

The GDPR covers all data custodians with an EU establishment or that target EU data subjects, including the parties, their counsel, arbitral institutions, members of the arbitral tribunal, experts and vendors, each of whom has individual liability for GDPR compliance. Furthermore, the purposefully broad definitions of what constitutes both personal data and data processing mean that literally all arbitral activities involving data that either identifies or could identify an individual are likely to be caught by the regulation (including evidence (e.g., emails, contracts, lab notebooks, construction logs), memorials, witness statements, expert reports, and the award itself).

* Kathleen Paisley, www.amboslaw.be, a U.S. national, is a New York and DC qualified international arbitrator, mediator, and counsel, with extensive experience in IP, technology and data, including providing expertise concerning the complex data and technology issues affecting international arbitration, as well as finance, accounting, and damages issues. She is based in Brussels, and splits her time with New York, London, and Miami. (JD (Yale, 1986), CPA exam (Florida, 1986), MBA, Finance (FAU, 1984), BS, (FSU, 1981)).

The GDPR prohibits the processing of personal data and its transfer outside the European Union, including during an arbitration, except under certain limited conditions. When personal data processing is permitted, it must be undertaken in a manner that is legitimate, fair and transparent, data minimization and adequate cybersecurity measures are required, and data retention is circumscribed. The GDPR also grants other significant rights to data subjects, which includes anyone identifiable from a document or the evidence, including the right to transparent information (which may include data privacy notices) and to review and to rectify data, among other things. This could cover literally hundreds of individuals in a complex case.

Needless to say, reconciling these broad-ranging rights and obligations with the cross-border, consensual, decision-making function of international arbitration will be challenging, whereas EU courts are largely exempt from the GDPR. This is further complicated by the fact that the GDPR's most strenuous obligations fall on "controllers" of data, which is defined in a manner that includes virtually everyone involved in an arbitration, thereby creating overlapping and potentially conflicting obligations with corresponding liability attaching to each.

This Article reviews the GDPR's legal framework as it applies to international commercial arbitration, and its practical application to the arbitral process. The Author stresses the importance of addressing data protection early through the adoption of a data protection protocol or other measure to address compliance, and considers the GDPR's potential impact on data disclosure. Furthermore, given the complexities and the significant risk, the Author suggests that the international arbitration community should consider creating increased certainty by proactively addressing the application of the GDPR to international arbitration with the relevant regulators to develop an agreed framework for GDPR compliance within the arbitral process.

ABSTRACT.....	841
I. INTRODUCTION	845
II. BACKGROUND TO EU DATA PROTECTION.....	849
A. Change to a Regulation	850

2018]	<i>EU GENERAL DATA PROTECTION REGULATION</i>	843
	B. Internal Compliance Requirements.....	851
	C. One-Stop Shop	852
	D. Global Reach.....	854
	E. Sanctions	855
III.	GENERAL APPLICATION OF THE GDPR TO INTERNATIONAL ARBITRATION.....	856
	A. What does the GDPR apply to in the context of international commercial arbitration?	861
	B. What “Personal Data” is Typically Reviewed in the Context of an International Arbitration?	862
	C. When and How Does the Arbitral Process Constitute the “Processing” of Personal Data?.....	863
	D. Who is Covered?	865
	E. What Obligations Apply?.....	867
	1. Controllers Versus Processors	867
	2. General Application to International Arbitration.....	869
	F. Principles Applicable to Data Processing	870
	G. When Processing Personal Arbitral Data Is Lawful.....	872
	1. Consent	874
	2. Necessary for Compliance with Legal Obligation.....	875
	3. Legitimate Interest	875
	H. When Personal Arbitral Data Can Be Lawfully Transferred Outside the European Union.....	876
	1. Transfers Ordered by Tribunals	877
	2. General Third Country Transfer Restrictions	878
IV.	PRACTICAL IMPACT OF THE GDPR ON THE ARBITRAL PROCESS.....	882
	A. Pre-Dispute Framework	883
	1. Secondary Processing for Arbitration.....	884
	2. Data Retention for Future Disputes	885
	3. Consent to Processing for Future Disputes	887
	4. Contractual Arrangements and Arbitration Agreements	888
	B. Commencing the Arbitration.....	889
	1. Consulting with the Data Protection Compliance Team	890
	2. Data Mapping.....	891
	3. Engaging External Counsel.....	891

844 *FORDHAM INTERNATIONAL LAW JOURNAL* [Vol. 41:841

4. Notice of Arbitration or Reply to Notice	892
5. Selection of the Arbitrator	892
C. Proceedings	893
1. Who Controls the Personal Arbitral Data Processed During an Arbitration?	893
a. Parties	894
b. External Counsel.....	895
c. Data Analysts.....	896
d. Independent Experts	897
e. Arbitral Institution	897
f. Arbitral Tribunal.....	898
g. Summary Re Controllers	899
2. What Rules Apply to the Processing of Personal Arbitral Data?.....	899
a. Cybersecurity.....	900
b. Data Minimization.....	902
c. Pseudonymized Personal Data.....	903
d. Data Rectification	904
e. Rights to Erasure or “Right to be Forgotten” and to Restrict Processing.....	905
f. Data Retention	906
g. Data Transparency (Including Data Privacy Notices).....	907
h. Third Country Transfers	909
i. Data Breach Notification	910
j. Right to Data Portability.....	911
3. How will GDPR Compliance Impact the Arbitral Process and How Can This be Managed?.....	911
a. Data Protection Protocols	911
b. Document Disclosure.....	914
V. CONCLUSION.....	918
APPENDIX A.....	921
APPENDIX B	923
APPENDIX C	926
APPENDIX D.....	931

I. INTRODUCTION

Data processing is an essential component of modern international arbitration. The confluence of three factors over the last two decades has changed (or will change) international arbitration: (1) globalization has caused a dramatic increase in the importance of international commercial arbitration as a dispute settlement mechanism; (2) digitalization has created a significant increase in the amount and complexity of data processed during a typical international commercial arbitration; and (3) led by the European Union¹ the data protection laws potentially applicable to that data have proliferated and, with the adoption of the EU General Data Protection Regulation (“GDPR”),² have become key compliance imperatives. The result is that access to, and processing of, digital data is key to the efficient and effective resolution of complex commercial disputes through international arbitration.³ Therefore, while international commercial arbitration’s function remains to decide disputes according to a binding and often confidential process

1. The current twenty-eight EU Member States are: Austria, Belgium, Bulgaria, Cyprus, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the Netherlands and the United Kingdom. *EU Member Countries in Brief*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/countries/member-countries_en (last updated Mar. 18, 2018). The General Data Protection Regulation (“GDPR”) will initially apply to the European Union and will then be implemented into the Agreement on the European Economic Area (the “EEA Agreement”) at which point its application will be extended to the entire European Economic Area (“EEA”). The EEA Agreement encompasses the 28 EU Member States and the three EEA EFTA states (Iceland, Liechtenstein and Norway), establishing an internal market governed by the same basic rules regarding free movement of goods, services, persons and capital. EU acts such as the GDPR that are deemed to be EEA Relevant are incorporated into the EEA Agreement. A draft Joint Committee Decision (JCD) is under consideration by the European Union and the EEA EFTA States with the goal that the GDPR will be incorporated into the EEA Agreement on June 1, 2018. See *Incorporation of the GDPR into the EEA Agreement*, EUROPEAN FREE TRADE ASSOCIATION (Apr. 13, 2018), <http://www.efta.int/EEA/news/Incorporation-GDPR-EEA-Agreement-508041> [<https://perma.cc/V8XC-262J>] (archived Apr. 27, 2018). Therefore, all references in this Article to “European Union” or “EU” should be read to include the 31 EEA countries after implementation of the GDPR into the EEA Agreement is completed. The Article was finalized in May 2018, and the information is current as of that date.

2. See generally Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. L 119/1 [hereinafter GDPR].

3. This Article is focused solely on international commercial arbitration, although the principles addressed herein impact investor-State arbitration and domestic arbitration when EU personal data is processed therein.

agreed to by the parties, it has also become a data management exercise requiring data to be processed, often across borders, and requiring compliance with relevant data protection laws, including the GDPR.

While many of these laws have been in place for decades, this issue is currently coming to the fore because an increasing number of entities both within and without the European Union are subject to EU-style data protection obligations and, at least in the case of the GDPR, the risk of noncompliance has become significant and is expected to take a seat in the board room alongside antitrust and anticorruption.⁴ This has been aptly referred to by a leading EU data protection expert as the “Brussels Effect,”⁵ and has led Fortune 500 companies to spend an estimated EU€8 billion in efforts to comply with the GDPR even before it has come into effect.⁶ However, Brussels Effect notwithstanding, at the moment there is very little dialogue between the data protection and international arbitration communities. The application of the data protection laws to the taking of evidence in international arbitration is not expressly addressed by the highly influential 2010 International Bar Association Rules on the Taking of Evidence in International Arbitration (“IBA Rules”) nor any of the protocols that address the exchange of evidence in international arbitration.⁷ Furthermore, while the principles contained in the GDPR apply to arbitration, the GDPR does not directly address how it is to be applied to arbitration, which has created significant

4. See Mark Scott & Laurens Cerulus, *Europe’s New Data Protection Rules Export Privacy Standards Worldwide*, POLITICO (Jan. 31, 2018, 12:00 PM), <https://www.politico.eu/article/europe-data-protection-privacy-standards-gdpr-general-protection-data-regulation/> [https://perma.cc/6FT8-BM3T] (archived Mar. 19, 2018) [hereinafter Scott & Cerulus].

5. *Id.* (referencing a conversation with Christopher Kuner, co-chair of the Brussels Privacy Hub at the Vrije Universiteit Brussel).

6. See Mehreen Khan, *Companies Face High Cost to Meet New EU Data Protection Rules*, FINANCIAL TIMES (Nov. 19, 2017), <https://www.ft.com/content/0d47ffe4-ccb6-11e7-b781-794ce08b24dc>.

7. See generally IBA RULES ON THE TAKING OF EVIDENCE IN INT’L ARBITRATION (INT’L BAR ASS’N, 2010) [hereinafter IBA RULES]; ICDR GUIDELINES FOR INFORMATION DISCLOSURE AND EXCHANGE IN INTERNATIONAL ARBITRATION PROCEEDINGS (INT’L CTR. FOR DISPUTE RESOLUTION, 2008); CPR PROTOCOL ON DISCLOSURE OF DOCUMENTS AND PRESENTATION OF WITNESSES IN COMMERCIAL ARBITRATION (INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION, 2008); PROTOCOL FOR E-DISCLOSURE IN INTERNATIONAL ARBITRATION (CHARTERED INST. OF ARBITRATORS, 2008).

confusion and uncertainty within the international arbitration community about what it needs to do to comply.⁸

This confusion and uncertainty is enhanced by the fact that Member States have taken different approaches to the regulation of the data that may be covered during an arbitration, leading to potentially conflicting regulatory frameworks even within the European Union.⁹ The GDPR's impact on arbitration will therefore be an iterative process as data custodians covered by its terms receive further guidance from the EU institutions, Member State laws implementing the GDPR, and Member State data protection authorities. However, as the GDPR becomes effective immediately, arbitral data custodians falling within its scope will need to make a good faith attempt to apply its provisions to the arbitrations in which they are involved or risk fines and other criminal or civil sanctions.¹⁰

This Article addresses the impact of the GDPR on international arbitration and the custodians of the data exchanged during the arbitral process, including the parties, their counsel, arbitral institutions, counsel, members of the arbitral tribunal,¹¹ experts and vendors,¹² and the support staff working for each of them (referred to as "Arbitral Data Custodians"). The Article is geared at making an initial attempt to bridge the knowledge gap between international arbitration practitioners and data protection specialists.¹³ It is not intended as either a treatise on international arbitration or the GDPR,

8. See GDPR, *supra* note 2, recital 52 at 10 (stating that special categories of data may be processed "where necessary for the establishment, exercise or defence of legal claims, whether in court proceedings or in an administrative or out-of-court procedure." This reference to "out-of-court procedure" is used only two times in the GDPR and is not defined.)

9. Cf. German Act to Adapt Data Protection Law to Regulation (EU) 2016/679 and to Implement Directive (EU) 2016/680 (DSAnpUG-EU) (June 30 2017) with Irish Data Protection Bill 2018 (No. 10b of 2018) [hereinafter Irish DP Bill]

10. See generally *Guidelines on the Application and Setting of Administrative Fines for the Purposes of the Regulation 2016/679*, (Article 29 Data Protection Working Party, 17/EN WP 253, 2017) [hereinafter *Guidelines on Fines*]. Because the EDPB is not yet established, Working Party 29 issued these preliminary guidelines.

11. The term arbitral tribunal or tribunal is used to refer to the arbitrators who decide the case, whether it be a sole arbitrator or a panel of three.

12. Vendors may include e-discovery experts, information technology ("IT") professionals, court reporters, translation services, couriers and among others.

13. For an excellent discussion of the policy considerations underpinning the issues addressed in this article, see CHRISTOPHER KUNER & DANIEL COOPER, *DATA PROTECTION LAW AND INTERNATIONAL DISPUTE RESOLUTION*, VOLUME 382 *RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE*, HAGUE ACADEMY OF INTERNATIONAL LAW (BRILL/NIJHOFF) 9-174 (2017) [hereinafter KUNER & COOPER].

but rather seeks to provide a broad understanding of how the two may work together going forward, with the caveat that at the time the Article was written, the GDPR was just coming into force and many of the laws implementing it into Member State law are yet to be finalized.

The Article begins by providing a general background to EU data protection laws, with a focus on the GDPR and the changes it brings from the Data Protection Directive (“DP Directive”) previously in place.¹⁴ The Article then describes the legal framework established by the GDPR and its potential impact on international arbitration.¹⁵ Given the significant uncertainty about the application of the GDPR in practice, and the lack of any specific guidance on its application to arbitration, the focus is on raising the relevant questions to be considered, with the realization that the solutions to these questions are highly case and party specific and will vary depending on the nature and location of the data and the data custodians who will process it. The final section of the Article analyzes how the data protection principles found in the GDPR have the potential to affect the management of data in a complex international commercial arbitration by posing some of the relevant legal questions raised and how they are likely to be resolved based on the most relevant precedent promulgated under the previous DP Directive, again with an understanding that this is a work in progress. The principles discussed herein are applicable under the data protection laws of many countries, however, this Article focuses on the application of the GDPR because of its sweeping application and broad-ranging implications.¹⁶

14. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. L 281/31 [hereafter DP Directive]. For an excellent overview of European data protection law under the DP Directive, much of which carries over to the GDPR, see EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HANDBOOK ON EUROPEAN DATA PROTECTION LAW (2014) [hereinafter EU Handbook].

15. For interesting discussions of some of the issues addressed in this article in the context of the DP Directive, see Karin Retzer & Sherman Khan, *Balancing Discovery with EU Data Protection in International Arbitration Proceedings*, 3 N.Y. DISP. RESOL. L., (Spring 2010), at 47; Markus Burianski & Martin Reindl, *Truth or Dare? The Conflict Between E-discovery in International Arbitration and German Data Protection Rules*, 2010 Zeitschrift für Schiedsverfahren [SchiedsVZ] 187, 187-200. [hereinafter Burianski & Reindl]

16. See Scott & Cerulus, *supra* note 4.

II. BACKGROUND TO EU DATA PROTECTION

The right to privacy was first espoused by Samuel Warren and Louis Brandeis in their seminal article aptly entitled “The Right to Privacy” published in the *Harvard Law Review* in 1890.¹⁷ The modern era of data protection law, which is similar to, but not the same as, the right to privacy,¹⁸ started just over two decades ago with the European Union’s adoption of the DP Directive in 1995, which was recently replaced by the GDPR.¹⁹ The DP Directive led the way for more than 100 countries (including EU Member States) to adopt data protection or privacy regimes “enshrining” an individual’s rights in his or her personal data and providing data subjects with broad ranging protections and corresponding obligations.²⁰ Many of these laws are based in large part on the DP Directive.²¹

The DP Directive covered a very broad range of “personal data” and included detailed rules on if, and if so, when, where, and how personal data could be processed and placed obligations on data “controllers” and “processors” for compliance with its terms.²² Although counterintuitive in a digital environment, the premise of the DP Directive (and the GDPR) is that the processing of personal data by a third party is prohibited unless expressly allowed by the GDPR. It is necessary to make this mind shift in order to understand how the GDPR operates and how it applies to international arbitration. Many of the principles established by the DP Directive are unchanged in the GDPR.²³ However, important new rights have been added (including for example the right to rectification and erasure) and significant changes have been made to the procedure by which the rules are

17. See Samuel Warren and Louis Brandeis, *The Right to Privacy*, 4 HARVARD L. REV. 193 (1890).

18. The right to privacy set forth by Warren and Brandeis is closely related to the data protection principles set forth in the DP Directive and the GDPR and discussed in this Article, but they are not the same in that privacy focuses more on the individuals’ right and data protection refers to legal rules that govern the processing of the data. See KUNER & COOPER, *supra* note 13, at 25.

19. See generally GDPR *supra* note 2; DP Directive *supra* note 14.

20. See KUNER & COOPER, *supra* note 13, at 33 (citing Graham Greenleaf, *Global Data Privacy Laws 2015: 109 Countries, with European Laws Now a Minority*, 133 PRIVACY L. & BUS. INT’L REP. (Jan. 30, 2015)).

21. See *id.* at 33.

22. See DP Directive, *supra* note 14 at 38-39.

23. See generally GDPR, *supra* note 2; DP Directive, *supra* note 14.

enforced.²⁴ Furthermore, the sanctions for noncompliance have been enhanced including individual rights of action by data subjects, criminal sanctions and greatly increased penalties, the largest of which apply to unlawful data transfer outside the European Union (an issue that is often raised in international arbitration).²⁵

A. Change to a Regulation

The first principle to be understood about the GDPR is that it is a regulation rather than a directive and how this impacts its enforcement under EU law. As a directive, the DP Directive had to be implemented into a Member State's national law to become effective, which left significant room for differences in the Member States' implementation of certain of its provisions.²⁶ This led to fragmentation in how data was regulated across the European Union with resulting difficulties in compliance and concerns about digital market disruption caused by the unclear playing field.²⁷ Furthermore, when the DP Directive was being drafted and debated, use of the internet was in its infancy, hence its provisions were not originally drafted with a complete understanding of how they would be applied in a digital landscape.²⁸ Furthermore, the lack of serious fines and other adverse consequences for breach caused some to refer to the DP Directive as a "toothless tiger."²⁹

In an attempt to address these and other concerns, after four years of debate and compromise, the European Union adopted the GDPR in 2016, which replaced the DP Directive on May 25, 2018.³⁰ As a regulation, the GDPR is a law enforceable across the European

24. See GDPR, *supra* note 2, arts. 16-17, at 43-44; (defining the rights of rectification and erasure); arts. 51-76, at 65-79 (describing roles and responsibilities of supervisory authorities)

25. See *id.*, arts. 77-84, at 80-83 (addressing fines and penalties).

26. See Communication from the Commission to the European Parliament and the Council, Stronger Protection, New Opportunities – Commission Guidance on the Direct Application of the General Data Protection Regulations as of 25 May 2018, COM (2018) 43 final, at 2-3 (Jan. 24, 2018) [hereinafter 2018 Communication].

27. See *id.*

28. Public access to internet can be traced back to the release of the World Wide Web software by the European organization for Nuclear Research ("CERN") in 1993. *The Birth of the Web*, CERN, <https://home.cern/topics/birth-web> [<https://perma.cc/M3E8-MZPC>] (archived Apr. 27, 2018). The DP Directive was adopted in 1995. See DP Directive, *supra* note 14. The author was also directly involved in lobbying the DP Directive.

29. See, e.g., Brian Mahoney, *Data Protection Law – No longer a Toothless Tiger*, GDPR Forum (2017).

30. See GDPR, *supra* note 2, arts. 94(1), 99, at 86-87.

Union without the need for Member State implementing legislation.³¹ However, the enactment of the GDPR does not mean that the Member States will cease having data protection laws, indeed, Member States are in the process of amending their existing laws implementing the DP Directive to bring them in line with the GDPR.³²

The GDPR also includes a number of areas where Member States are expressly allowed to derogate from its terms, and important differences have already been observed in the ways that existing Member State data protection laws are being brought into line with the GDPR.³³ This includes the right to exempt “judicial proceedings” and “the enforcement of civil law claims” from the application of some of the more strenuous rights and obligations imposed by the GDPR provided other safeguards are put in place.³⁴ Some Member States, for example Ireland, have applied this exemption broadly in a manner that exempts certain types of data that is typically processed during an arbitration from these rights, although the other provisions of the GDPR remain applicable. It remains to be seen if other Member States will follow suit and whether the European Union will take a position on these exemptions.³⁵ The GDPR also includes a broad right to derogate with respect to employee data, which is also likely to impact international arbitration.³⁶

B. Internal Compliance Requirements

The GDPR also moves away from the notification system established by the DP Directive, whereby data custodians could gain comfort from notifying their data protection operations to their local data protection authority, to a largely self-regulation system.³⁷ For

31. 2018 Communication, *supra* note 26, at 2-3.

32. See Lokke Moerel, *GDPR Conundrums: The GDPR Applicability Regime – Part 1: Controllers*, PRIVACY TRACKER (Jan. 29, 2018), <https://iapp.org/news/a/gdpr-conundrums-the-gdpr-applicability-regime-part-1-controllers/> [https://perma.cc/F3A8-BSHS] (archived May 30, 2018) [hereinafter *GDPR Conundrums Part I*]; Lokke Moerel, *GDPR Conundrums: The GDPR Applicability Regime – Part 2: Processors*, PRIVACY TRACKER (Feb. 6, 2018), <https://iapp.org/news/a/gdpr-conundrums-the-gdpr-applicability-regime-part-2-processors/> [https://perma.cc/6YP9-XX27] (archived May 30, 2018).

33. See *GDPR Conundrums Part 1*, *supra* note 32.

34. See GDPR, *supra* note 2, art. 23 at 46–47.

35. See Irish DB Bill, *supra* note 9, art. 161 at 136-137.

36. GDPR, *supra* note 2, art. 88, at 84.

37. See generally, GDPR, *supra* note 2. This fundamental change from a notification system to one of self-regulation can broadly be analogized to the changes made to EU competition laws over the last two decades, with the European Union moving from a

entities with large and potentially risky data processing operations, this self-regulatory system requires appointing an independent and autonomous data protection officer (“DPO”) to monitor compliance and others may voluntarily appoint a DPO in which case the same rules apply.³⁸ Formal data protection impact assessments will be required where data processing is undertaken that “is likely to result in a high risk to the rights and freedoms of natural persons.”³⁹ Furthermore, data protection principles must be imbedded into all new data processing operations from the outset (*e.g.* data minimization) either through so-called “privacy by design” or by default to the strictest measures.⁴⁰

To help ensure these rules are followed, the GDPR makes the data controller accountable for compliance and requires the controller to be able to “demonstrate” compliance.⁴¹ This means keeping records of what decisions were made with respect to the protection of personal data and why, and being able to produce those records if requested. Importantly for arbitrators and smaller law firms, the GDPR’s strict record keeping requirements typically do not apply to small and medium-sized enterprises having fewer than 250 employees (“SMEs”), although SME’s still need to demonstrate compliance.⁴² This means that, as a practical matter, from the outset of an arbitration where personal data covered by the GDPR may be impacted, steps will need to be undertaken to ensure that data protection principles are properly respected during the arbitral process and to be able to demonstrate compliance.

C. One-Stop Shop

With respect to the regulatory structure, the GDPR moves from the decentralized regulatory framework established by the DP Directive - whereby each Member State supervisory authority had broad authority to enforce its national data protection laws - towards a

competition law system based primarily on notifications to one based increasingly on self-assessments. *See, e.g.,* Gianfranco Rocca, *Regulation 1/2003: A Modernised Application of EC Competition Rules*, COMPETITION POL. NEWSL. (Eur. Commission, Brussels), Spring 2003, 3, http://ec.europa.eu/competition/publications/cpn/2003_1_3.pdf [https://perma.cc/HV5Y-BD6V] (archived May 30, 2018).

38. *See* GDPR, *supra* note 2, art. 37-39, at 55-56.

39. *Id.*, art. 35, at 53.

40. *See id.*, art. 25, at 48.

41. *Id.*, art. 5(2), at 36; art. 30, at 57-58.

42. *Id.*, art. 30(5), at 58.

one-stop-shop style system. Under this system, for certain cross-border data processing within the European Union, a lead supervisory authority (the “Lead SA”) is given the authority to enforce the GDPR for data custodians having their sole or “main establishment” as defined by the GDPR in that country.⁴³ The European Union hoped to establish a real one-stop shop whereby one supervisory authority would have exclusive competence,⁴⁴ but in the end a compromise was reached whereby issues can typically be raised with the Lead SA or with any “supervisory authority concerned,” and a system is established for coordination between the Lead SA and the concerned supervisory authority where necessary.⁴⁵ The effect of these rules should be that only one decision is reached on any issue, but who renders it depends on the application of the principles contained in the GDPR, with deference typically given to the Lead SA, if it so requests. When data protection issues affect only one Member State, that country’s supervisory authority has authority.⁴⁶ Furthermore, when an entity does not have an EU establishment, it must designate in writing a representative in the Union.⁴⁷ However, any supervisory authority within the European Union has regulatory authority over that entity without reference to a Lead SA.⁴⁸

As a practical matter, early data mapping will enable parties and their advisors to anticipate what data protection laws will apply, what data protection authority will be the Lead SA, and what other concerned supervisory authorities might be for different aspects of the arbitration and for different data custodians. This will allow the

43. See GDPR, *supra* note 2, art. 60 at 72; *Guidelines for Identifying a Controller or Processor’s Lead Supervisory Authority* 10 (Article 29 Data Protection Working Party, 16/EN WP 244 rev. 01, 2017). [hereinafter “Lead SA Guidelines”]

44. See Konrad Lischka & Christian Stocker, *Data Protection: All You Need to Know. About the EU Privacy Debate*, SPIEGEL ONLINE (Jan. 18, 2013, 10:15 AM), <http://www.spiegel.de/international/europe/the-european-union-closes-in-on-data-privacy-legislation-a-877973.html>. [<https://perma.cc/G7AN-HJGQ>] (archived May 30, 2018).

45. “Supervisory authority concerned” is defined as a supervisory authority which is concerned by the processing of personal data because:

- (a) the controller or processor is established on the territory of the Member State of that supervisory authority;
- (b) data subjects residing in the Member State of that supervisory authority are substantially affected or likely to be substantially affected by the processing; or
- (c) a complaint has been lodged with that supervisory authority.

See GDPR, *supra* note 2, Art. 4 (22) at 35.

46. See *id.*

47. See GDPR, *supra* note 2, art. 27(1), at 48.

48. See Lead SA Guidelines, *supra* note 43.

parties and others subject to the GDPR to foresee how those laws and authorities are likely to address the data protection issues that may arise during the arbitration. This information will enable the development of an overall approach to minimize the data protection risks and for managing them during the arbitral process.

D. Global Reach

Due to the inherently trans-border nature of international arbitration, the issue that has received the most attention to date from the international arbitration community to the EU data protection laws are the measures restricting the transfer of personal data outside the European Union. The European Commission has stated that its intent is not to keep EU data in the European Union, but rather to export EU data protection standards by ensuring that the protections move with the data and by encouraging other countries to adopt similar laws so that data moves freely but with an adequate level of protection and data subject rights.⁴⁹ Therefore, while the GDPR is obviously not of universal application, the European Union has declared its intent for the GDPR to become the *de facto* international standard for the protection of personal data, through the following general approach:

- (1) the use of transfer restrictions to impose GDPR-style obligations whenever EU data is transferred to third countries outside the European Union (referred to as “third countries”);
- (2) the potential imposition of substantial penalties for violations to ensure compliance;
- (3) the extension of the GPDR to the processing of data relating to EU data subjects in third countries where the controller or processor is not based in the European Union but has purposefully targeted the provision of goods and services within the European Union or engaged in monitoring of EU data subjects; and
- (4) the insistence on trading partners adopting adequate data protection regimes as a condition of EU trade deals—the European Commission has recently said “the

49. See Communication from the Commission, Exchanging and Protecting Data in a Globalized World, COM (2017) 7 final (Jan. 2017). [hereinafter Commission Communication].

protection of personal data is non-negotiable in trade agreements.”⁵⁰

The European Union has been surprisingly successful in this endeavor, with the major holdouts being the United States (except for the Data Privacy Shield), China, and Russia.⁵¹

Specifically concerning the data transfer restrictions in the GDPR, the European Commission’s view is that “the EU regime on international data transfers . . . provides a broad and varied toolkit to enable data flows in different situations while ensuring a high level of protection.”⁵² The GDPR “toolkit” referred to is discussed in the following Section of this Article in the context of data transfers to third countries during international arbitration.⁵³ The impact of these restrictions is that, when data transfer is permissible, which may or may not be the case, it is always necessary to ensure that adequate safeguards are in place to protect the data after it is transferred either by operation of law or by agreement.⁵⁴

E. Sanctions

Although the DP Directive allowed Member States to access appropriate fines, the fines imposed were not sufficient to create a culture of compliance. This has changed dramatically under the GDPR and is the most important driver behind the unprecedented focus on GDPR compliance.⁵⁵ The potential fines set forth in the GDPR are up to the higher of four percent of a violator’s worldwide revenue or EU€20 million for the most serious violations and half of that for less serious infractions.⁵⁶ Data subjects also have the right to enforcement before courts and regulatory authorities and to obtain damages, and there is a possibility of criminal sanctions.⁵⁷

A set of guidelines on the assessment of fines under the GDPR has already been issued, which is helpful in understanding how fines will be assessed.⁵⁸ During the initial stages of GDPR implementation,

50. *Id.*

51. See Scott & Cerulus, *supra* note 4.

52. See Commission Communication, *supra* note 49, at 6.

53. See *supra* Section III.H.

54. See GDPR, *supra* note 2, art. 44 at 60.

55. See generally, Scott & Cerulus, *supra* note 4.

56. See GDPR, *supra* note 2, art. 83, at 82.

57. See *id.*, arts. 79, 82, at 80-81.

58. See generally Guidelines on Fines, *supra* note 10.

large fines are not expected absent serious violations and provided good faith efforts at compliance are undertaken. However, the threat of such fines and other sanctions together with the compliance imperative that has developed around the GDPR means that senior management and directors of companies are now increasingly focused on GDPR compliance. In turn, this means that parties will start to proactively manage the GDPR risk arising from international arbitration. Furthermore, the fact that all Arbitral Data Custodians (including arbitrators) are potentially caught within the GDPR's reach means that everyone has a compliance incentive. The combined impact of these factors means that, when the GDPR is applicable, data protection compliance will become part of the arbitral process. The following Section of this Article addresses the legal framework established by the GDPR and how this applies to international commercial arbitration, followed by a Section addressing the GDPR's potential practical impact on arbitration.

III. GENERAL APPLICATION OF THE GDPR TO INTERNATIONAL ARBITRATION

The GDPR grants data subjects extensive rights with respect to their personal data.⁵⁹ Many of these rights are difficult to reconcile when applied to international arbitration because of its decision-making function and other characteristics (often including confidentiality). It is important to note that the same concerns arise in the context of court litigation, which is why the GDPR excludes Member State courts and other judicial authorities from supervision by the data protection supervisory authority to preserve their independence. The GDPR suggests instead that the judicial authorities themselves regulate the data used in the judicial capacity.⁶⁰ Recital 20 of the GDPR provides as follows:

While this Regulation applies, inter alia, to the activities of courts and other judicial authorities, Union or Member State law could specify the processing operations and processing procedures in relation to the processing of personal data by courts and other judicial authorities. The competence of the supervisory authorities should not cover the processing of personal data when courts are acting in their judicial capacity, in order to safeguard

59. See generally GDPR, *supra* note 2, art. 12-22, at 39-46.

60. See *id.*, recital 20, at 4.

the independence of the judiciary in the performance of its judicial tasks, including decision-making. It should be possible to entrust supervision of such data processing operations to specific bodies within the judicial system of the Member State, which should, in particular ensure compliance with the rules of this Regulation, enhance awareness among members of the judiciary of their obligations under this Regulation and handle complaints in relation to such data processing operations.⁶¹

The language refers to “processing of data by courts and other judicial authorities.”⁶² While the general reference to “judicial authorities” could conceivably cover arbitration, which has a decision-making function similar to a court, this exemption from oversight by the Member State supervisory authority is replaced by enforcement by the Member State court system, which courts do not supervise arbitration. Article 55 of the GDPR provides that “Supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity,” without any reference to arbitration.⁶³ Therefore, this general exemption from the supervisory authority does not apply to arbitration nor does it apply to non-EU courts.⁶⁴ Furthermore, the exemption of Member State courts from oversight by the supervisory authority does not mean that the GDPR does not apply to the courts, rather it means that the rules are enforced by the judicial authorities themselves rather than the supervisory authorities.

However, Article 23 of the GDPR does grant the Member States the right to exempt certain activities from the application of many of the specific rights granted to data subjects. This right for Member States to grant exemptions applies “when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard,” among other things, “the protection of judicial independence and judicial proceedings” and “the enforcement of civil law claims.” This is subject to the proviso that the Member States puts in place adequate safeguards to protect the data subject rights that have been exempted.⁶⁵ As mentioned above, Ireland is an example of a Member

61. *Id.*

62. *Id.*

63. *Id.*, art. 55, at 67.

64. Burianski & Reindl, *supra* note 15, at 187 (authors reach a similar conclusion under the DP Directive).

65. See, e.g., GDPR, *supra* note 2, art. 23(2), at 47.

State that has relied on Article 23 to exempt certain data subject rights, to the extent that the restrictions are “necessary and proportionate,” for the processing of personal data “in contemplation of or for the establishment, exercise or defence of, a legal claim, prospective legal claim, legal proceedings or prospective legal proceedings whether before a court, statutory tribunal, statutory body or an administrative or out-of-court procedure.”⁶⁶ The references in the Irish exemption to “out-of-court procedure” covers arbitration.

Application of the Article 23 exemption (including the Irish DP Bill) does not mean the data is excluded from the GDPR, but rather that certain of the data subject rights do not apply. The data subject rights that can be exempted (and which Ireland has exempted) include the rights of the data subject to transparent information (potentially including data privacy notices) (Articles 12, 13 and 14), access to data (Article 15), rectification and erasure (Articles 16 and 17), to restrict further processing (Article 18), data portability (Article 20) and the rights to object and to automated decision making (Articles 21 and 22).⁶⁷ These rights are particularly difficult to apply to an arbitration, and can be inconsistent with the arbitrator’s decision-making function, including the interactions among arbitrators, and with the institution. The exemption of these rights makes the GDPR more consistent with international arbitration, while at the same time protecting the fundamental goal of the GDPR to protect the personal data of data subjects. It is beyond the scope of this Article to analyze each of the GDPR’s provisions in light of the exemptions adopted by the 28 Member States, many of which have yet to be finalized at the time of writing. This Article therefore focuses on the text of the GDPR and the precedents established under the previous DP Directive as they would apply to international commercial arbitration, however, in practice, it will be important to consider Member State laws as well (as well as third country laws).

In addition to the right granted to Member States to exempt certain data and data processing under Article 23, the GDPR itself already contains express exemptions from some provisions for data that is “necessary for the establishment, exercise or defence of legal claims”, which, although subject to interpretation with respect to what

66. See Irish DP Bill, *supra* note 9, art. 60 (3)(a)(iv), at 46; see also Irish DP Bill, *supra* note 9, art. 161, at 136-137.

67. See, e.g., GDPR, *supra* note 2, arts 12-22, at 39-46.

is “necessary”, applies to arbitration.⁶⁸ The GDPR explains in a recital that, at least in the context of special categories of data, processing should be allowed “where necessary for the establishment, exercise or defence of legal claims, whether in court proceedings or in an administrative or out-of-court procedure” and similar language is included in another recital in the context of data transfers.”⁶⁹ “Out-of-court procedure” is not defined and the text of the GDPR does not further illuminate what is covered by data processing that is “necessary for the establishment, exercise or defence of legal claims” but on any definition arbitration includes the processing of data “necessary for the establishment, exercise or defence of legal claims” (sometimes referred to herein as the “legal claims exemption”).⁷⁰

The legal claims exemption in the GDPR itself applies only to allow the processing of special categories of data, and to exempt data processing from the data subject rights to erasure and to restrict processing (Articles 17 and 18) and the right to object to further processing (Article 21), and as a basis to allow data transfer to third countries. However, Article 23 allows Member State exemption of a much broader category of rights for “the protection of judicial independence and judicial proceedings” and “the enforcement of civil law claims.” The other rights covered by Article 23 (especially the rights to data transparency, access to data, and rectification) are difficult to apply to international arbitration and potentially inconsistent with its decision-making function, which led Ireland and potentially other Member States to exempt out-of-court procedures from them. International commercial arbitration has a decision-making function, which is of a judicial character. Reconciling these rights with international arbitration will be challenging, and argues in favor of exempting data subject rights that are inconsistent with the cross-border, consensual, decision-making function of international commercial arbitration, and taking into consideration the fact that it is often confidential.

The remainder of this Section will address each of these questions under the legal framework adopted by the GDPR. The main source of guidance about the application of the data protection rules under the existing system established under the DP Directive is the

68. See, e.g., *id.*, recital 52, at 10.

69. See *id.*, recital 111, at 21 (emphasis added).

70. See, e.g., *id.*, art 18, at 43.

Article 29 Working Party (“WP29”).⁷¹ The Working Party was established under Article 29 of the EU Data Protection Directive, hence its name. It is made up of Member State data protection authorities and relevant EU officials and provide guidance on the application of the DP Directive. The GDPR will replace WP29 with the European Data Protection Board (the “EDPB”).⁷² The EDPB is empowered to issue guidelines, recommendations, and best practices to encourage consistent application of the GDPR and in the setting of administrative fines.⁷³ However, the EDPB has yet to be established, therefore, the initial guidelines on the application of the GDPR have also been established by WP29.

WP29 has never addressed the application of the DP Directive or the GDPR to arbitration, although it has addressed the application of the DP Directive to cross border data disclosure for purposes of US litigation.⁷⁴ In this context, WP29 has provided a set of guidelines focused primarily on data transfers necessary to comply with US discovery requests (the “Disclosure Guidelines”).⁷⁵ Given the lack of direct guidance about the application of the GDPR to arbitration, the Disclosure Guidelines and other relevant guidance issued by WP29 under the DP Directive provide useful resources on how these issues may be addressed in the context of international arbitration and will be discussed throughout this Article.⁷⁶ However, it remains to be seen how this will actually operate under the GDPR (as opposed to the DP

71. See DP Directive, *supra* note 14, art. 29; *Composition & Structure*, EUROPEAN COMMISSION (Oct. 6, 2017), http://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=605262 [<https://perma.cc/J9N6-R9LN>] (archived on Apr. 27, 2018).

72. See GDPR, *supra* note 2, art. 70, at 76-78.

73. *Id.*

74. For an excellent overview of EU and national laws concerning data disclosure for litigation, see *E-DISCOVERY AND DATA PRIVACY: A PRACTICAL GUIDE* (Catrien Noorda & Stefan Hanlose eds., 2011).

75. See *generally Working Document on Pre-trial Discovery for Cross Border Civil Litigation*, (Article 29 Data Protection Working Party, 00339/09/EN WP 158, 2009) [hereinafter *Disclosure Guidelines*].

76. The Disclosure Guidelines refer to the work of the highly-regarded Sedona Conference, which issued “International Principles on Discovery, Disclosure & Data Protection in Civil Litigation” and a draft protocol for how these issues should be addressed by a court, but nothing similar has been developed for international arbitration. See *generally* SEDONA CONFERENCE WORKING GROUP, *THE SEDONA CONFERENCE: INTERNATIONAL PRINCIPLES ON DISCOVERY, DISCLOSURE & DATA PROTECTION IN CIVIL LITIGATION (TRANSITIONAL EDITION)*, App. D: Cross-Border Data Safeguarding Process + Transfer Protocol (2017) [hereinafter *SEDONA PROTOCOL*]. The Sedona Protocol for U.S. litigation is set forth in Appendix C of this Article.

Directive) and whether the same principles will be applied to commercial arbitration (as opposed to US litigation) given that arbitration is different from a court proceeding in many ways, including, among other things, that it is often confidential and always consensual. Furthermore, as previously addressed, although it is a regulation, the GDPR will be enacted into Member State laws, which may exempt certain data and data processing during an arbitration from coverage, which means that any consideration of the application of data protection to an arbitration will always begin with applicable law.

A. What does the GDPR apply to in the context of international commercial arbitration?

The GDPR applies to:

- the “processing” of “personal data” in the context of the activities of an establishment of a controller or a processor in the Union, whether or not the processing takes place in the Union; and
- to the “processing” of “personal data” of data subjects who are in the Union by a controller or processor not established in the Union where the processing relates to the offering of goods or services (whether free or paid for) or the monitoring of behavior which takes place within the European Union.⁷⁷

Appreciating the potential application of the GDPR to arbitration therefore requires understanding:

- What “personal data” is typically reviewed during the context of an international arbitration;
- When and how does the arbitral process constitute the “processing” of personal data;
- Who is covered;
- What obligations apply to covered parties;
- What principles apply to the processing;
- When processing is lawful;
- When can data be transferred to third countries; and
- What this means for international arbitration.⁷⁸

⁷⁷ See GDPR, *supra* note 2, art 3, 32-33.

⁷⁸ GDPR, *supra* note 2, art. 3, at 32-33.

The following discussion will consider each of these questions separately in the context of international commercial arbitration.

B. What “Personal Data” is Typically Reviewed in the Context of an International Arbitration?

With the proliferation of the internet, email, and other forms of digital communication, the data reviewed during the course of an arbitration by the parties, experts, institution, and the arbitrators has become increasingly vast and almost exclusively digital. This data is covered by the GDPR whenever it contains “personal data.” The GDPR defines “personal data” as any information relating to an identified or identifiable natural person, who is referred to as the “data subject.”⁷⁹ An identifiable person is one “who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person.”⁸⁰ The European Commission has provided the following examples of personal data:

- a name and surname;
- a home address;
- an email address such as name.surname@company.com;
- an identification card number;
- location data (for example the location data function on a mobile phone);
- an Internet Protocol (IP) address;
- a cookie ID;
- the advertising identifier of [a] phone;
- data held by a hospital or doctor, which could be a symbol that uniquely identifies a person.⁸¹

The following examples of data are not considered personal data:

79. *See id.*, Art 4(1), at 33

80. *Id.*

81. *See What is Personal Data?*, EUROPEAN COMMISSION https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-personal-data_en [<https://perma.cc/CJ52-ZQVB>] (archived May 31, 2018).

- a company registration number
- an email address such as info@company.com;
- anonymized data.⁸²

These examples demonstrate that it is irrelevant to the application of the GDPR that covered personal information is contained in a business-related document (such as work emails, lab notebooks, agreements, construction logs, *etc.*) provided that an individual is identified or identifiable, as exemplified by the Commission's express inclusion of an individual's business email address as one of the listed items constituting personal data.⁸³

This means that all business-related information exchanged during a typical arbitration containing information by which an individual is, or could be, identified is "personal data" as defined by the GDPR. This includes whether that information is contained in a single document or any combination of documents.⁸⁴ Needless to say, this covers much of the data exchanged during a typical international arbitration. While the evidence submitted and exchanged is typically thought of as being the source of potential data protection concerns, the memorials, witness statements, expert reports, and the award itself are also likely to identify individuals. Therefore, they are also likely to contain personal data covered by the GDPR. Any material of any nature containing personal data covered by the GDPR will be referred to herein as "Personal Arbitral Data."

C. *When and How Does the Arbitral Process Constitute the "Processing" of Personal Data?*

The GDPR covers all "processing" of Personal Arbitral Data and defines "processing" broadly to include the "collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction,

82. *Id.*

83. *See id.*

84. *See* GDPR, *supra* note 2, recital 26, at 5. The GDPR applies to all data by which an individual is identifiable and in determining whether a natural person is identifiable, "account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly." *Id.*

erasure or destruction of personal data.”⁸⁵ The GDPR further clarifies that its application is “technologically neutral” and does not depend on the techniques used to process the data and that it applies to the processing of personal data by automated means, as well as to manual processing.⁸⁶ The European Commission has also provided a list of examples of what it considers to constitute processing:

- staff management and payroll administration;
- access to/consultation of a contacts database containing personal data;
- sending promotional emails;
- shredding documents containing personal data;
- posting/putting a photo of a person on a website;
- storing IP addresses or MAC addresses;
- video recording (“CCTV”).⁸⁷

Under such an expansive definition, virtually any activity undertaken during an arbitration relating to documents including Personal Arbitral Data is likely to be considered processing covered by the GDPR, even if it is just shredding documents or taking notes including the names of individuals. During the course of a typical complex international arbitration, the following activities, among others, relating to documents containing Personal Arbitral Data would likely be considered processing covered by the GDPR:

- Document retention;
- Document review;
- Document transfer to a third party engaged to assist during the process, including external providers of electronic data review services, external counsel, or an independent expert engaged by a party;
- Disclosure of materials during the arbitral process to the other party, their counsel or expert, the arbitral

85. See GDPR, *supra* note 2, art. 4(2), at 33. The definition requires “the personal data are contained or are intended to be contained in a filing system. Files or sets of files, as well as their cover pages, which are not structured according to specific criteria should not fall within the scope of this Regulation.” *Id.*, at 3. Given the way that documents are filed in international arbitrations, this exclusion is unlikely to apply.

86. *Id.*, recital 15, at 3.

87. See *What Constitutes Data Processing?*, EUROPEAN COMMISSION, https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-constitutes-data-processing_en [https://perma.cc/Q85B-NJ33] (archived Mar. 19, 2018).

institution or the tribunal (*e.g.* document disclosure, submitted evidence, witness statements, expert reports, memorials);

- Tribunal-ordered disclosure of materials;
- Preparation, exchange and issuance of an award; or
- Document destruction.

The Disclosure Guidelines issued by WP29 under the DP Directive clarify that in the context of data disclosure for US litigation, “there are different stages during the litigation process,” including “retention, disclosure, onward transferring, and secondary processing.”⁸⁸ The use of personal data at each of these stages will amount to processing requiring an appropriate legal basis on which to base the processing.⁸⁹ This means that where the GDPR applies to an Arbitral Data Custodian, compliance obligations apply from the time that it is decided to review or retain potential Personal Arbitral Data for later use in an arbitration until the documents containing Personal Arbitral Data are finally destroyed, and every step in between. Thus, it behooves anyone involved in an arbitration where the GDPR is potentially implicated to understand what potential obligations may apply to them.

D. Who is Covered?

Entities that are established in the European Union are covered by the GDPR with respect to all data processed in the context of their activities.⁹⁰ This means that Arbitral Data Custodians established in the European Union must comply with the GDPR with respect to all the Personal Arbitral Data they process in the context of those activities.⁹¹ For entities established in the European Union, this includes all processing of personal data wherever it is processed and regardless of whether it relates to EU data subjects.

88. Disclosure Guidelines, *supra* note 75, at 7.

89. *See id.*

90. *See* GDPR, *supra* note 2, art. 3(1), at 32.

91. Special rules apply to international organisation institutions, which may include, for example, the Permanent Court of Arbitration and the International Court of Justice. Entities established under international law or by an agreement between countries are treated as though they are outside the European Union such that transfer to them is prohibited absent adequate safeguards. *See* GDPR, *supra* note 2, art 4(26) at 35 (defining international organisations), art. 46 (1) at 62 (addressing transfers to international organisations).

Unlike the DP Directive, the GDPR also applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the European Union where the processing relates to the offering of goods or services (whether free or paid for) or the monitoring of behavior which takes place within the European Union.⁹² Entities falling within this category are required to designate in writing a representative in the Union unless the processing is “occasional, does not include, on a large scale, processing of special categories of data [. . .], and is unlikely to result in a risk to the rights and freedoms of natural persons, taking into account the nature, context, scope and purposes of the processing.”⁹³ This does not mean that anyone who acquires personal data of an EU data subject anywhere in the world in the context of passively offering a good or service within the European Union is governed by the GDPR. Rather it must be shown that the entity intended to offer goods or services to “data subjects in one or more Member States in the Union.”⁹⁴ The “mere accessibility” of a website or an email address from the European Union is:

insufficient to ascertain such intention, factors such as the use of a language or a currency generally used in one or more Member States with the possibility of ordering goods and services in that other language, or the mentioning of customers or users who are in the Union, may make it apparent that the controller envisages offering goods or services to data subjects in the Union.⁹⁵

It is unclear whether this provision applies solely to the processing of EU data in the context of targeted sales of goods and services directly to EU data subjects, which does not include legal entities, or also to the processing of EU data where the processing “relates” to a targeted sale of goods or services to an EU business. The language of the recitals would seem to require that the sales must be targeted to EU data subjects, rather than EU businesses, but this is not clear from the text of the regulation itself and it remains to be seen how this will be interpreted.⁹⁶ This distinction could impact the extent

92. GDPR, *supra* note 2, art. 3, at 33.

93. *Id.*, art. 27(1)-(2), at 48.

94. *Id.*, recital 23, at 5.

95. *Id.*

96. The language of the recitals to the GDPR support the view that it was only intended to cover sales to, and monitoring of, EU consumers. *See id.* Furthermore, Article 3 states that “this Regulation applies to the processing of personal data of data subjects who are in the

to which the GDPR applies directly to parties, counsel, experts, arbitral institutions, and arbitrators, that are not established in the European Union but that make targeted efforts to encourage EU parties to use their services, for example by translating their rules into EU languages, making EU road shows, visiting potential EU parties, posting information about EU-specific capabilities, sponsoring EU conferences, actively having their names included for consideration as arbitrators by EU institutions, or other similar activities, but do not target EU data subjects as such. Applying the narrower construction, these parties would not be covered by the GDPR, but it remains to be seen how this language will be applied in practice to entities or individuals that target EU businesses as a result of which personal data of EU data subjects is processed (including in the context of international arbitration).

E. What Obligations Apply?

Whenever Personal Arbitral Data is processed by an Arbitral Data Custodian falling within the reach of the GDPR, the mandatory rules of the GDPR apply.⁹⁷ This means that if a party has undertaken the analysis set forth above and has decided that in the context of the arbitration, it will be processing Personal Arbitral Data in a manner covered by the GDPR, the next question is what rules apply to the processing of that data. The discussion in this sub-Section focuses on the nature of the applicable legal framework, the practical impact of which is addressed in the next Section of this Article.⁹⁸

1. Controllers Versus Processors

The primary obligation for compliance with the GDPR rests on the controller of the Personal Arbitral Data, which is defined by the GDPR as “the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the

Union by a controller or processor not established in the Union, where the processing activities are related to:

- (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
- (b) the monitoring of their behavior as far as their behavior takes place within the Union.

See id., art. 3, at 32-33.

97. *See* GDPR, *supra* note 2, arts. 1-3, at 32-33.

98. *See supra* Part IV.

purposes and means of the processing of personal data.”⁹⁹ WP29 has clarified that “the *first and foremost role of the concept of controller* is to determine who shall be responsible for compliance with data protection rules, and how data subjects can exercise the rights in practice. In other words: to *allocate responsibility*.¹⁰⁰ This means that “it is most important to ensure that the responsibility for data processing is *clearly defined* and can be *applied effectively*.”¹⁰¹

A data controller can also delegate the processing of the data under its control to a data “processor” which is defined as “a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.”¹⁰² Under the GDPR, data controllers can only engage data processors who commit to complying with its terms in an enforceable agreement in the manner established in the GDPR.¹⁰³ These agreements must “set out the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects and the obligations and rights of the controller,” and shall “stipulate, in particular, that the processor processes the personal data only on documented instructions from the controller.”¹⁰⁴

Both the data controller and the data processor are liable for compliance with the GDPR, but the data processor’s liability is more limited because it is acting at the behest of the data controller. Given the complexity of modern data processing arrangements, the GDPR also provides for joint controllers of data when more than one entity jointly determines the purpose and means by which the data is to be processed.¹⁰⁵ In cases of joint control, the GDPR requires the joint controllers to enter into a transparent arrangement allocating the compliance obligations and to inform the data subject thereof.¹⁰⁶ Furthermore, data subjects have an independent right of action against each joint controller.¹⁰⁷

99. GDPR, *supra* note 2, art. 4(7), at 33.

100. *Opinion 1/2010 on the Concepts of “Controller” and “Processor”*, at 4 (Article 29 Data Protection Working Party, 00264/10/EN WP 169, 2010) (emphasis in original) [hereinafter *Controller Opinion*].

101. *Id.* at 7.

102. GDPR, *supra* note 2, art. 4(8), at 33.

103. *See id.*, art. 28, at 49.

104. *Id.*, art. 28(3), at 49.

105. *See id.*, art. 26(1), at 48.

106. *See id.*, art. 26(1), at 48.

107. *See id.*, art. 26(3), at 48.

Considering the stringent obligations imposed by the GDPR on data controllers, there may be a tendency towards increased use of data processing agreements. However, this will only be possible when the nature of the activity supports its characterization as “processing” and where the data controller is willing to accept the increased risk created by taking responsibility for the actions of the data processor. Both the GDPR and relevant case law make clear that even if a data processing agreement complying with the terms of the GDPR is in place, the facts could outweigh that agreement, particularly where the facts support a finding that the data processor determined the purpose for all or part of the processing.¹⁰⁸

2. General Application to International Arbitration

As set forth above, the GDPR establishes that the controller of the Personal Arbitral Data exchanged during an arbitration is the entity or individual that either alone or with others has the ability to “determine” the “purpose and means” of the processing of Personal Arbitral Data.¹⁰⁹ When applying these concepts, it is important to recall that it is the ability to determine the purpose and means of the processing itself that is determinative.¹¹⁰ The question is who decides why and how the Personal Arbitral Data is processed in order to undertake its role in the arbitral process, whether it be as a party, a data analyst or lawyer doing an electronic data review to retrieve relevant evidence, counsel preparing a memorial, an independent expert writing a report, a tribunal preparing the award, or an arbitral institution reviewing the award. WP29 has explained that the capacity to “determine” the ways and means of data processing:

would usually stem from an analysis of the *factual* elements or circumstances of the case: one should look at the specific processing operations in question and understand who determines them, by replying in a first stage to the questions ‘why is this processing taking place? Who initiated it?’ Being a controller is primarily the consequence of the factual circumstance that an entity has chosen to process personal data for its own purposes.¹¹¹

108. Controller Opinion, *supra* note 100 at 11.

109. GDPR, *supra* note 2, art. 4(7)

110. *See id.*

111. *See* Controller Opinion, *supra* note 100, at 8 (emphasis in original).

Further, “the concept of controller is a *functional* concept, intended to allocate responsibilities where the factual influence is, and thus based on a factual rather than a formal analysis.”¹¹²

Absent data processing agreements, for purposes of the GDPR, as discussed in detail in the following Section of this Article,¹¹³ all Arbitral Data Custodians are likely to be considered data controllers both because such control is inherent in their function as counsel, expert, arbitral institution, or arbitrator, and because, as a matter of fact, they “determine” the “purpose and means” by which the Personal Arbitral Data is processed in order to perform that function. Arbitral Data Custodians may be able to alter this designation by entering into data processing agreements in certain contexts, but avoiding controller status will be difficult to achieve given the nature of the arbitral process (except for certain data analysts and potentially lawyers performing that function). This means that in arbitrations covered by the GDPR there likely will be a number of different data controllers each with overlapping obligations (for example to provide data privacy notices) and individual legal liability for each controller for failure to comply with these duties.¹¹⁴ For arbitration to be efficient, these overlapping rights and duties will need to be allocated amongst the party that first collected the data during its business operations or from employees, typically a party to the dispute (referred to as the “Initial Data Controller”), and the secondary data controllers in a data protection protocol or other legal instrument (such as is foreseen by the GDPR for joint controllers).

F. Principles Applicable to Data Processing

The GDPR requires the data controller to “implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Regulation.”¹¹⁵ These measures should take into account “the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons.”¹¹⁶ This extent to which this risk-based approach may

112. *Id.* at 9 (emphasis in original).

113. *See supra* Section IV.C.1.

114. GDPR, *supra* note 2, art. 83, at 82.

115. *Id.*, art. 24 (1), at 47.

116. *Id.*

be applied to limit the types of measures that must be employed remains unclear. The text would indicate that the measures adopted should be proportionate to the risk, however, WP29 has clarified that the data subject rights must always be adequately protected regardless of the degree of the risk however, the controller's accountability obligation may vary – “for example where processing is small scale, simple and low risk.”¹¹⁷ In other words, according to WP29, it seems that the data protection measures must always be adequate to protect the data subjects rights, but the means of documenting compliance can be more limited depending on the risk.¹¹⁸ It remains to be seen how this will be applied in practice under the GDPR.

The GDPR establishes the following principles applicable to the processing of personal data covered by its terms:

- (a) [P]rocessed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’);
- (b) [C]ollected for specified, explicit, and legitimate purposes and not further processed in a manner that is incompatible with those purposes (so-called “secondary processing”);
- (c) [A]dequate, relevant, and limited to what is necessary in relation to the purposes for which the data is processed (“data minimization”);
- (d) Accurate and, where necessary, kept up to date;
- (e) Kept in a form that permits identification of data subjects for no longer than necessary given the purposes for which the personal data is processed (which limits data retention);
- (f) Processed in a manner that ensures appropriate security of the personal data, including protection against unauthorized or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organizational measures.¹¹⁹

117. *Statement on the Role of a Risk-Based Approach in Data Protection Legal Frameworks 3* (Article 29 Data Protection Working Party, 14//EN 218 WP 169, 2014).

118. *Id.*

119. See GDPR, *supra* note 2, art. 5(1), at 35-36.

Data controllers are “responsible for, and must be able to demonstrate compliance with,” these principles.¹²⁰ The GDPR contains no exemptions from these basic principles.¹²¹

The GDPR establishes stricter rules for the processing of “special categories” of personal data (previously referred to in the DP Directive as “sensitive data”). Special categories of data are those that reveal “racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation.”¹²² The processing of this data is expressly prohibited except in certain limited circumstances, including where “processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity.”¹²³ Hence “special categories” of data may be processed during an arbitration when “necessary for the establishment, exercise or defense of the claims.” The meaning of necessary in this context is not defined in the GDPR nor is guidance given about how it might be applied.

G. When Processing Personal Arbitral Data Is Lawful

Under the approach adopted by the GDPR, all processing of personal data is prohibited unless it is expressly allowed.¹²⁴ Although counterintuitive in a digital world, this is the way the GDPR and the DP Directive operate. Article 6 of the GDPR provides that:

Processing shall be lawful only if and to the extent that at least one of the following applies:

- (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
- (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
- (c) processing is necessary for compliance with a legal obligation to which the controller is subject;

120. *Id.*, art. 5(2), at 36.

121. *See id.*, art. 23 at 46-47.

122. *Id.* art. 9(1), at 38.

123. *Id.* art. 9(2)(f), at 38.

124. *Id.*, art. 24, at 47.

- (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;
- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.¹²⁵

The Disclosure Guidelines expressly address the lawfulness of data processing for disclosure purposes, among other things. Although not directly on point because they address discovery for US civil litigation, rather than international arbitration, and they were issued under the DP Directive rather than the GDPR, they provide useful guidance on this and other issues.¹²⁶ The Disclosure Guidelines recognized the tension between compliance with EU data protection laws and disclosure obligations and further that parties “have a legitimate interest in accessing information that is necessary to make or defend a claim, but this must be balanced with the rights of the individual whose personal data is being sought.”¹²⁷ With respect to when data may be lawfully processed for purposes of disclosure, the Disclosure Guidelines considered that data processing for disclosure purposes is potentially lawful only when one of three of the exceptions listed in Article 6 of the GDPR is applicable (which were also lawful bases under the DP Directive), namely, the data subject gives consent, the disclosure is necessary for compliance with a legal obligation, or the disclosure is necessary for the legitimate interests of the controller.¹²⁸ Note that the legal claims exemption does not constitute a lawful basis for processing under either the DP Directive

125. *Id.*, art. 6(1), at 36.

126. *See generally* Disclosure Guidelines, *supra* note 75.

127. *Id.* at 2.

128. *See* GDPR, *supra* note 2, arts. 6(a), (d) and (f), at 36-37. Although arbitration is creature of contract, the arbitration agreement is not typically with the data subject whose personal data is included in the Personal Arbitral Data provided by a party to the arbitration. Rather, the agreement to arbitrate is usually between the data subject’s employer or business partner, etc., and a third party. Provisions (b) and (c) allowing processing in the context of contractual arrangement would therefore usually not apply to data processing in an arbitration. *See* GDPR, *supra* note 2, arts. 6 (b)-(c), at 36.

or the GDPR, although it has been added as a lawful basis for transfer under the GDPR (and query how one could transfer without processing).¹²⁹

1. Consent

The Disclosure Guidelines recognized that consent is a lawful basis for data processing under the DP Directive, but took the view that consent alone should not be considered lawful grounds for transferring EU data to the United States for the purposes of litigation unless the controller can produce:

[C]lear evidence of the data subject's consent in any particular case and may [also] be required to demonstrate that the data subject was informed as required. If the personal data sought is that of a third party, for example, a customer, it is at present unlikely that the controller would be able to demonstrate that the subject was properly informed and received notification of the processing.

Similarly, valid consent means that the data subject must have a real opportunity to withhold his consent without suffering any penalty, or to withdraw it subsequently if s/he changes his or her mind. This can be particularly relevant if it is employee's consent that is being sought. As the Article 29 Working Party states in its paper on the interpretation of Article 26(1) of the DP Directive: "relying on consent may . . . prove to be a 'false good solution', simple at first glance but in reality complex and cumbersome."¹³⁰ The Working Party does recognize that there may be situations where the individual is aware of, or even involved in the litigation process and his or her consent may properly be relied upon as a ground for processing.¹³¹

This would seem to mean that individuals who are closely involved in the arbitration (for example senior executives engaged in the underlying transaction that is the subject of the arbitration and potentially other witnesses) sometimes may be able to give valid consent. However, this would be a factual determination and highly fact specific. Furthermore, the GDPR clarifies that consent must be as

129. See GDPR, *supra* note 2, art. 49 (1) (e), at 64-65.

130. See *Working Document on a Common Interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995* (Article 29 Data Protection Working Party, 2093/05/EN WP 114, 2005) [hereinafter *Article 26 Interpretation*].

131. See *supra* Section III (introduction) discussing the Disclosure Guidelines, *supra* note 75, at 8.

easy to withdraw as to give,¹³² which limits its usefulness as a basis for data processing in international arbitration because once the documents have been relied upon they cannot simply be withdrawn.

2. Necessary for Compliance with Legal Obligation

The Disclosure Guidelines clarified, which is now enshrined in the GDPR, that the need to comply with a legal obligation only legalizes data processing where the legal obligation is created under Member State law, not third country law. Further, this only applies where the data transfer is required to comply with such a legal obligation, which would not include a tribunal order to produce documents.¹³³ This means that this ground for lawful processing typically would not apply to international arbitration except perhaps in rare circumstances.

3. Legitimate Interest

The Disclosure Guidelines take the view that the legitimate interests¹³⁴ of the controller or a third party could support the lawfulness of data processing for disclosure purposes, if this interest is not overridden by the interests or fundamental rights and freedoms of the data subject. WP29 has explained as follows:

Clearly the interests of justice would be served by not unnecessarily limiting the ability of an organization to act to promote or defend a legal right. The aim of the discovery process is the preservation and production of information that is potentially relevant to the litigation. The aim is to provide each party with access to such relevant information as is necessary to support its claim or defence, with the goal of providing for fairness in the proceedings and reaching a just outcome.

132. See GDPR, *supra* note 2, art. 7(3), at 37.

133. See Disclosure Guidelines, *supra* note 75, at 9.

134. GDPR, *supra* note 2, recital 47, at 12 (stating that a “legitimate interest could exist for example where there is a relevant and appropriate relationship between the data subject and the controller in situations such as where the data subject is a client or in the service of the controller. At any rate the existence of a legitimate interest would need careful assessment including whether a data subject can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place. The interests and fundamental rights of the data subject could in particular override the interest of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect further processing.”)

Against these aims have to be weighed the rights and freedoms of the data subject who has no direct involvement in the litigation process and whose involvement is by virtue of the fact that his personal data is held by one of the litigating parties and is deemed relevant to the issues in hand, *e.g.* employees and customers.

This balance of interest test should take into account issues of proportionality, the relevance of the personal data to the litigation and the consequences for the data subject. Adequate safeguards would also have to be put in place and in particular, there must be recognition for the rights of the data subject to object [to the processing . . .] and, in the absence of national legislation providing otherwise, there are compelling legitimate grounds relating to the data subject's particular situation.

As a first step controllers should restrict disclosure if possible to anonymised or at least pseudonymised data. After filtering ("culling") the irrelevant data – possibly by a trusted third party in the European Union – a much more limited set of personal data may be disclosed as a second step.¹³⁵

The principles established in the Disclosure Guidelines for the lawfulness of data processing for litigation discovery are likely be applied to the lawfulness of data processing for arbitration, but taking into account the consensual nature of arbitration and any confidentiality provisions. These principles established by the Disclosure Guideline support the lawfulness of the processing under the legitimate interest standard provided the data being processed during the arbitration is proportional, relevant, and adequate safeguards are put in place to protect the data subject, including culling data before disclosure and where possible anonymizing or pseudonymizing the data. This argues in favor of limiting the amount of data being processed in order to comply with this guidance.

H. When Personal Arbitral Data Can Be Lawfully Transferred Outside the European Union

The GDPR prohibits transfers of personal data to third countries unless this is expressly allowed by the GDPR. The GDPR establishes rules allowing third country data transfers where:

135. See Disclosure Guidelines, *supra* note 75, at 9-10.

- (1) a tribunal has ordered the disclosure of documents under a treaty,
- (2) the country has been deemed to provide adequate protections (including the US privacy shield),
- (3) the controller or processor has put in place “appropriate safeguards” to protect the data in one of the means expressly prescribed by the GDPR, or
- (4) one of a list of specified derogations apply, including where the processing is “necessary for the establishment, exercise or defence of legal claims.”¹³⁶

Furthermore, regardless of the means employed by a party to transfer personal data out of the European Union, the recipient of the data must be required by law or by agreement to apply adequate protections, including the main principles of the GDPR, to the data after it is transferred.¹³⁷

1. Transfers Ordered by Tribunals

With respect to transfers of data ordered by a tribunal, the GDPR provides that:

Any judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data may only be recognised or enforceable in any manner *if based on an international agreement, such as a mutual legal assistance treaty*, in force between the requesting third country and the Union or a Member State, without prejudice to other grounds for transfer.”¹³⁸

The GDPR is therefore clear that if the data transfer order is not based on an international treaty, this provision does not apply. Given the lack of an applicable legal instrument for data transfers in support of arbitration, this provision will not apply in international arbitrations except in rare circumstances. Data transfer to third countries in support of arbitration will therefore need to fall under one of the other categories of data transfers generally permitted.

136. See GDPR, *supra* note 2, arts. 45-49, at 61-65

137. See *id.*, art. 44 at 60.

138. *Id.*, art. 48, at 64 (emphasis added).

2. General Third Country Transfer Restrictions

WP29 has explained that the exceptions allowing data transfers follow a cascade approach. Where there is an adequacy decision allowing data transfers to that country, this will apply. When data is to be transferred to a country without an adequacy decision, one of the expressly listed “adequate safeguards,” should be put in place where feasible, rather than reliance on a derogation.¹³⁹ The derogations therefore should be relied upon only when there is no adequacy decision and adequate safeguards are not feasible.¹⁴⁰ Lastly, only when the express derogations are not applicable, may a party rely on its “legitimate interests” as a basis for transfer.

The first question is therefore whether the third country to which data would be transferred has been found to have an adequate level of protection.¹⁴¹ An adequacy decision is when the European Union has decided based on established set of criteria that a country’s data protection laws are adequate, which allows data to be transferred without any further authorization or notice because adequate protections apply as a matter of law.¹⁴² Applying this standard, the European Union has issued favorable adequacy decisions allowing free data transfers to a number of countries, including to the United States where the entity has signed up to the Privacy Shield (only) and Canada for commercial organizations (only).¹⁴³

Where data is to be transferred to a country without an adequacy decision, including to the United States unless the recipient has signed up to the Privacy Shield, the GDPR allows third country data transfers where “appropriate safeguards”¹⁴⁴ are put in place by the controller or processor to ensure protection of the data through a series of mechanisms, including:

- (1) Binding corporate rules, which establish a binding code of conduct for a group of companies or a group of

139. See Article 26 Interpretation, *supra* note 130, at 4-10.

140. *Id.*

141. See GDPR, *supra* note 2, art. 45, at 61.

142. See *id.*, art. 45 (3) at 61.

143. See GDPR, *supra* note 2, art. 45(1), at 61. The European Union considers that the data protection laws of Andorra, Argentina, Canada (commercial organizations only), Faroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland, United States (privacy shield only), and Uruguay are adequate. Japan and South Korea are in the process of adequacy discussions as part of their trade deals with the European Union. See Commission Communication, *supra* note 49 at 7.

144. See GDPR, *supra* note 2, art. 46(1), at 62.

companies engaged in a joint economic activity that they will comply with an approved set of data protection rules;¹⁴⁵

(2) Verbatim adoption of standard contractual clauses that have previously been approved by the European Commission;¹⁴⁶

(3) Binding commitments to adhere to approved codes of conduct or certifications; or

(4) *Ad hoc* contractual arrangements between the EU transferor and the third country recipient of the data that have been approved by a concerned supervisory authority.¹⁴⁷

The GDPR then establishes the approval methods and other procedural safeguards applicable to each mechanism, which vary.¹⁴⁸ To date under the DP Directive, these approval mechanisms have been time consuming and expensive, although the European Commission has issued assurances that this will improve under the GDPR.¹⁴⁹

WP29 recognized that in the context of litigation, adequate safeguards may not be feasible, but safeguards are the preferred route when they are. Where putting adequate safeguards in place is not feasible, the GDPR contains a list of seven derogations where data can permissibly be transferred without an adequacy decision or appropriate safeguards, namely:

(a) the data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfer for the data subject due to the absence of an adequacy decision and appropriate safeguards;

(b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken at the data subject's request;

(c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person;

145. *See id.*, arts. 46-47, at 62-63.

146. *See id.*, arts. 46, 93(2), at 69, 95.

147. *See id.*, arts. 46, 93(2), at 69, 86.

148. *See id.*, arts. 45-49, at 61-65.

149. *See* 2018 Communication, *supra* note 26.

- (d) the transfer is necessary for important reasons of public interest;
- (e) *the transfer is necessary for the establishment, exercise or defence of legal claims*;
- (f) the transfer is necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent;
- (g) the transfer is made from a [public] register.¹⁵⁰

...

The GDPR therefore contains a derogation provision that expressly allows data transfers to third countries where the transfer is “necessary for the establishment, exercise or defence of legal claims.”¹⁵¹ Further, as discussed above,¹⁵² although the language is somewhat opaque, Recital 111 of the GDPR expressly states that the reference to a legal claim applies “regardless of whether in a judicial procedure or whether in an administrative or any out-of-court procedure, including procedures before regulatory bodies.”¹⁵³ This will therefore form a possible basis for third country data transfers of data “necessary for the establishment, exercise or defence of legal claims” in international arbitrations.

Furthermore, where a transfer “could not” be based either on an adequacy decision, an adequate safeguard, or one of the specific seven derogations listed above, the GDPR also allows:

transfer to a third country or an international organisation . . . only if the transfer is not repetitive, concerns only a limited number of data subjects, is necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights of the data subject and the controller has assessed all the circumstances surrounding the data transfer and has on the basis of that assessment provided suitable safeguards with regard to the protection of personal data. The controller shall inform the supervisory authority of the transfer. The controller shall [also] . . . inform the data subject of the transfer and of the compelling legitimate interests pursued.¹⁵⁴

150. See GDPR, *supra* note 2, art. 49(1), at 64 (emphasis added).

151. *Id.*, art. 49(1)(e), at 64.

152. See *infra* Section III (introduction).

153. See GDPR, *supra* note 2, recital 111, at 21.

154. *Id.*, art. 49, at 71.

However, because the GDPR expressly allows transfers that are necessary for the establishment, exercise, or defense of a legal claim, which would apply to certain aspects of an arbitration, the general derogation for legitimate interests would usually not be applicable to data transfers in arbitration (although it could be relied upon for data not covered by the legal claims exemption). Furthermore, because the legitimate interest derogation for third country transfers requires notification of the transfer to a supervisory authority and to the data subject and the derogation for legal claims does not, Arbitral Data Custodians are more likely to rely upon the legal claims derogation where applicable.

The GDPR provides generally that all third country transfer provisions “shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined.”¹⁵⁵ WP29 has reiterated that even when a derogation is relied on for transfer, safeguards must be put in place to ensure that the processing is carried out with an adequate level of protection and the data subject rights are not circumscribed.¹⁵⁶ Further, advance notice of the transfer should be given to the data subject at least when the transfer is undertaken pursuant to the legitimate interest standard.¹⁵⁷

As discussed below, in the context of an arbitration, these safeguards would be based on party agreement where possible, but also would need to be agreed to by the tribunal and the institution with respect to the Personal Arbitral Data they process or transfer cross border.¹⁵⁸ This is likely to be done by agreement of the parties and set forth in a data protection protocol that is implemented through a stipulation or tribunal order signed by everyone receiving Personal Arbitral Data during the course of the arbitration. Among other things, the data protection protocol should set forth the basic standards applied to all parties in the process and establish responsibilities for compliance among Initial Data Controllers and secondary controllers.

155. *Id.*, art. 44, at 60.

156. See Article 26 Interpretation, *supra* note 130, at 9; GDPR, *supra* note 2, art. 44, at 60.

157. See GDPR, *supra* note 2, art. 13(1)(f), at 46; art. 14(1)(f), at 47; art. 49 (1) at 71.

158. See *infra* Section IV.C.

*IV. PRACTICAL IMPACT OF THE GDPR ON THE ARBITRAL
PROCESS*

Multinational companies today have data protection policies and systems in place. However, the possible application of the GDPR's data protection policies to future arbitral disputes was usually not the first consideration when those policies were formulated. Further, the individuals charged with deciding the dispute resolution systems to be employed by the company were rarely focused on how the data protection rules could impact a later arbitration or other legal proceeding. This lack of alignment can lead to unwelcome surprises.

Although the relevant data set reviewed for an international commercial arbitration is typically smaller in international arbitration than it would be in US litigation, in major arbitration cases the amount of data collected and reviewed is significant. This data set is typically collected or assessed voluntarily by the party bringing the claim, before any claim is brought, and is much larger than the data that is used in the arbitration. Where it applies, the GDPR will need to be complied with respect to the processing of all this data.

The issues raised by the document review typically undertaken in a complex international arbitration are not unique, and the principles that have been adopted to deal with these issues when they arise in civil litigation are relevant to international arbitration. However, in the litigation context, these issues have typically arisen mainly in relation to common law litigation, usually in the United States. This is because European civil law systems are typically not document-intensive and do not require significant document disclosure.¹⁵⁹ As others have rightly pointed out, this means that the provisions of the European data protection law are not tailored for the document-intensive nature of today's typical complex international arbitration process and the principles are not always easy to reconcile.¹⁶⁰ Indeed, while the GDPR expressly addresses the legal obligations imposed by Member State law and excludes its application to Member State judicial proceedings, it expressly refers to "out-of-court procedures" only twice, both times in recitals only, and with no explanation of what this covers or what rules would apply. Hence, until the supervisory authorities, EDPB, the Member

159. Burianski & Reindl, *supra* note 15, at 188.

160. *See id.* at 199; KUNER & COOPER, *supra* note 13, at Sections 4.86-4.89, 146-147.

States or the EU provide guidance, the GDPR will be applied to arbitration on an *ad hoc* basis, which creates significant uncertainty about how it will impact arbitral proceedings.

This Section of the Article will consider the potential practical impact of the GDPR on international arbitration. It is divided into three subsections according to the time-line of a potential arbitration. Subsection A addresses the issues that arise before any dispute is raised in putting in place data protection policies that are consistent with international arbitration. Subsection B addresses the data protection implications during the second stage of the arbitral process when the dispute has arisen but before the arbitral tribunal has been appointed. Subsection C addresses how data protection rules may impact the arbitration itself after the tribunal has been appointed, including what data protection rules may apply, the adoption of data protection protocols, and the impact of data protection on disclosure. Appendix A to this Article contains a list of some of the questions that the parties and their counsel may consider asking themselves in planning for the arbitration during stages one and two. Appendix B includes a list of some of the questions that Arbitral Data Custodians could consider during the arbitration. Appendix C includes a sample protocol addressing data protection in the context of US discovery that was developed by the Sedona Conference. Appendix D provides a proposed template of a data protection protocol for arbitrators and the parties to address data protection compliance in international commercial arbitration cases where the GDPR applies (hereinafter “ARBITRAL DATA PROTECTION PROTOCOL”). The issues addressed herein and included in the Appendixes are not intended to be exhaustive.

A. Pre-Dispute Framework

This subsection of the Article addresses the issues that arise before any dispute is raised in putting in place data protection policies that are consistent with international arbitration. Companies subject to the GDPR are currently in the process of constructing and executing a path for compliance with its terms at significant expense, potentially including dispute resolution. From the outset, the individuals tasked with GDPR compliance should work with the in-house and external counsel to consider whether, and if so, how, the GDPR could impact arbitration agreements and existing and future international arbitrations. Where the GDPR is applicable, this includes building

means into the arbitration for ensuring compliance during the arbitral process in a manner that is proportionate to the risk and does not infringe on the due process rights of the parties.¹⁶¹

Companies subject to the GDPR that are likely to be engaged in international arbitration should state in their data protection policies that personal data may be processed during future dispute resolution procedures and providing the legal basis for that processing. If it is possible that the personal data will be transferred outside the European Union as part of the dispute resolution process, this should be included in the policy. The information must be provided to the data subject in a concise, transparent, intelligible, and easily accessible form, using clear and plain language.¹⁶² The GDPR states in this context that “the specific purposes for which personal data are processed should be explicit and legitimate and determined at the time of the collection of the personal data.”¹⁶³

1. Secondary Processing for Arbitration

Most of the Personal Arbitral Data presented during an arbitration will have originally been collected in the context of an employment or business relationship and its original purpose was to fulfill those functions. Now a dispute has arisen, and the issue is whether that data can be processed in the arbitration. This is often referred to as secondary processing and the rules applicable thereto apply.

The GDPR provides in Article 5 that personal data must be processed “in a transparent manner in relation to the data subject”¹⁶⁴ and must be “collected only for specific, explicit and legitimate purposes and may not be further processed in a manner that is inconsistent with those purposes.” Article 6 allows secondary processing for purposes that are “compatible” with the original purpose.¹⁶⁵ In deciding whether the purpose is compatible, the following is to be considered:

161. See generally GDPR, *supra* note 2, art. 25 at 55.

162. *Id.*, art. Art. 12, at 39.

163. *Id.*, recital 39, at 7.

164. *Id.*, art 5 (1) and (b), at 35.

165. *Id.*, art. 6(4), at 37.

- (a) any link between the purposes for which the personal data have been collected and the purposes of the intended further processing;
- (b) the context in which the personal data have been collected, in particular regarding the relationship between data subjects and the controller;
- (c) the nature of the personal data, in particular whether special categories of personal data are processed . . . or whether personal data related to criminal convictions and offences are processed;
- (d) the possible consequences of the intended further processing for data subjects;
- (e) the existence of appropriate safeguards, which may include encryption or pseudonymisation.¹⁶⁶

This is a highly case and fact specific analysis. For example, the use of employee and business-related information in an arbitration of a claim in which the data subject's actions are at issue would often be linked to the purpose for which the data was collected, and, depending on the employee's role, expected in the context in which it was collected. In making this determination, although not determinative, it is helpful that the data subject was informed in advance of the possibility that his or her personal data could be used in a later dispute resolution procedure, and preferably have consented.

2. Data Retention for Future Disputes

Data retention is considered "processing" under the GDPR.¹⁶⁷ The GDPR requires controllers to set retention periods at the time of data collection with the goal of minimizing the data being processed.¹⁶⁸ However, retention is an area where it is potentially difficult to reconcile the requirements of the GDPR with those of international arbitration. Concerning data retention for US litigation, WP29 stated in the Disclosure Guidelines issued under the DP Directive that:

Various issues are raised in relation to retention It is unlikely that the data subjects would have been informed that their personal data could be the subject of litigation whether in their own country or in another jurisdiction. Similarly given the

^{166.} *Id.*

^{167.} See art. 5 (1) (e) at 36; Disclosure Guidelines, *supra* note 75, at 7-8.

^{168.} See GDPR *supra* note 2, art. 5 (1) (b), (c) and (e) at 35-36.

different time limits for bringing claims in different countries, it is not possible to provide for a particular period for retention of data.

Controllers in the European Union have no legal ground to store personal data at random for an unlimited period of time because of the possibility of litigation in the United States however remote this may be. The US rules on civil procedure only require the disclosure of *existing* information. If the controller has a clear policy on records management which provides for short retention periods based on local legal requirements it will not be found at fault with US law. It should be noted that even in the United States there has recently been a tendency to adopt restrictive retention policies to reduce the likelihood of discovery requests.

If on the other hand the personal data is relevant and to be used in a specific or imminent litigation process, it should be retained until the conclusion of the proceedings and any period allowed for an appeal in the particular case. Spoliation of evidence may lead to severe procedural and other sanctions.

There may be a requirement for “litigation hold” or pre-emptive retention of information, including personal data. In effect this is the suspension of the company’s retention and destruction policies for documents which may be relevant to the legal claim that has been filed at court or where it is “reasonably anticipated”.

There may however be a further difficulty where the information is required for additional pending litigation or where future litigation is reasonably foreseeable. The mere or unsubstantiated possibility that an action may be brought before the U.S. courts is not sufficient.

Although in the US the storage of personal data for litigation hold is not considered to be processing, under Directive 95/46 any retention, preservation, or archiving of data for such purposes would amount to processing. Any such retention of data for purposes of future litigation may only be justified under Article 7(c) or 7(f) of Directive 95/46.¹⁶⁹

This language implies that the need to have access to data for a later arbitration may not be a sufficient basis on its own to retain data longer than is otherwise reasonable. On the other hand, an arbitration can take place long after the disputed facts occurred and the decision-

169. Disclosure Guidelines, *supra* note 75, at 7-8.

making based on those facts may be significantly hindered if contemporaneous data is not available about the factual context in which the dispute arose. Data retention therefore will be an area where it is important for the data protection team to have detailed input from the legal department and external counsel before establishing the retention policies, as balances may have to be struck.

3. Consent to Processing for Future Disputes

When possible, companies likely to be engaged in international arbitrations should consider having data subjects give express “freely given, specific, informed, unambiguous,”¹⁷⁰ consent to the processing of his or her data for the purpose of future disputes. This consent should include a complete, understandable description of the potential data protection risks this could entail. If future disputes could involve the transfer of data to third countries, this should be expressly explained in the data protection policy or agreement along with a description of the potential risks that could be raised. When possible, consent should be obtained before any business, contractual or employment relationship is formed, because this increases the chances that consent will be considered freely given.¹⁷¹

As discussed above,¹⁷² the processing of Personal Arbitral Data requires a legal basis, one of which is consent. WP29 has stated that consent is unlikely to be a sufficient basis for large-scale processing of personal data during litigation,¹⁷³ and this rationale is likely to be applied to international arbitration. However, depending on the facts of this dispute, WP29 also left the door open that for the key players in a dispute, consent may be effective, especially when they are somehow involved in the proceeding, although this consent can always be withdrawn. Furthermore, even when consent does not on its own provide a sufficient basis under the GDPR for processing or transfer, consent is helpful to have when applying the other principles contained in the GDPR to arbitration.¹⁷⁴

170. GDPR, *supra* note 2, recital 32, at 6.

171. See Disclosure Guidelines, *supra* note 75, at 7-8.

172. See *supra* Section III.G.

173. See Disclosure Guidelines, *supra* note 75, at 7-8.

174. *Id.*

4. Contractual Arrangements and Arbitration Agreements

Companies and other entities subject to the GDPR are currently in the process of reviewing their agreements to insure compliance. In undertaking that review, companies should consider revisiting how the GDPR affects their existing dispute resolution provisions. Furthermore, consideration should be given in the future to how the GDPR affects dispute resolution obligations in crafting both the underlying agreements and the arbitration agreement.

Where data needs to be transferred outside the European Union during an international arbitration, (for example, because a counterparty or the arbitral institution is not based in the European Union, the arbitration is seated outside the European Union, or an arbitrator or counsel is based outside the European Union or travels outside the European Union and requires access to documents), the first question to be considered is where the data would be transferred and whether the European Union has made an adequacy finding with respect to that country or whether the transferee has signed up to the Privacy Shield in the United States.¹⁷⁵ If that is not the case, an increasing number of agreements will contain express provisions addressing data protection obligations either in the form of the standard contract clauses already approved by the European Commission or on an *ad hoc* basis approved by a competent supervisory authority. If properly crafted, these can be relied upon to transfer Personal Arbitral Data to the counterparty and potentially others if they agree to comply with them.

With respect to the dispute resolution provisions, the parties to an agreement should undertake a data mapping exercise to consider whether any Personal Arbitral Data covered by relevant data protection regimes, including the GDPR, is likely to be exchanged during the arbitration, and, if so, how this affects the potential dispute resolution options and whether this should be reflected in the arbitration agreement. Although third country transfer should be possible for the reasons outlined above, avoiding the additional time, cost, and restrictions this entails may lead EU companies that will need to exchange Personal Arbitral Data to use GDPR compliance risk as a basis to insist on arbitration being seated in the European Union and subject to the rules of an institution established either in

175. GDPR *supra* note 2, art. 45, at 68.

the European Union or in a third country with an adequacy decision.¹⁷⁶

Concerning important arbitration centers outside the European Union, Switzerland has an adequacy decision.¹⁷⁷ Although it remains to be seen, after Brexit it is expected that a system will be put in place to allow free data transfers to the United Kingdom, which means that arbitrators based in London and arbitration in the United Kingdom (including the London Court of International Arbitration) are likely to be covered in some way.¹⁷⁸ Notably, no major Asian arbitral institution is based in a country with an adequacy decision, although New Zealand has an adequacy decision in place and Japan and Korea are currently undertaking adequacy discussions with the European Union as part of their trade deals.¹⁷⁹ Many Asian institutions, including the Hong Kong and Singapore International Arbitration Centers, are based in jurisdictions with data protection regimes, but unfortunately those countries have yet to receive an adequacy decision.

In addition to location, parties should consider including provisions in their arbitration clauses expressly addressing data protection at least generally. For example, in an appropriate agreement a clause could be added providing that:

The Parties agree to apply, and that the tribunal and the institution shall apply, mandatory data protection obligations during the arbitration in a manner that is proportionate to the risk and that adequately protects data subject rights, while preserving the parties' due process rights."

This type of general language may be useful in guiding the parties, counsel, the tribunal and the arbitral institution if data protection issues arise during the course of the arbitration.

B. Commencing the Arbitration

This subsection of the Article addresses the data protection implications during the second stage of the arbitral process when the

176. See *supra* at Section III.H.2.

177. See *supra* note 143.

178. See C. Ructici, *Don't Think that Brexit will Save You from the EU Data Protection Rules*, Computer Weekly (March 2016) <https://www.computerweekly.com/opinion/Dont-think-that-Brexit-will-save-you-from-the-EU-data-protection-rules> [<https://perma.cc/P99T-LEGC>] (archived May 30, 2018).

179. See Commission Communication, *supra* note 49, at 8.

dispute has arisen but before the arbitral tribunal has been appointed. This includes the importance of including the data protection team in planning the arbitration process, data mapping to determine the applicable data protection rules and how they will be enforced, retaining and consulting with external counsel, drafting the arbitration notice, and selecting the arbitrator. Data protection considerations have the potential to impact each of these pre-arbitration steps.

1. Consulting with the Data Protection Compliance Team

The GDPR imposes detailed obligations on companies not only to comply with its provisions but also to be able to demonstrate compliance.¹⁸⁰ This includes documenting the decisions that are taken to ensure GDPR compliance and the rationale for those decisions.¹⁸¹ SMEs are exempted from some of the more strenuous documentation requirements, and Member States are encouraged to take the needs of SMEs into account when enforcing the GDPR, but SMEs still need to be able to show that reasonable and proportionate compliance efforts were undertaken to comply.¹⁸²

Many companies have or will appoint an independent and autonomous DPO either because they are required to or will do so voluntarily.¹⁸³ If a DPO has been appointed, the detailed rules established in the GDPR for consultation with the DPO apply.¹⁸⁴ Thus, if a company has a DPO, that person should be the first stop when arbitration is contemplated. WP29 has issued guidelines on DPOs, which are useful to review in understanding their intended function.¹⁸⁵

The GDPR also requires the preparation of a data protection impact assessment (“DPIA”) for certain types of high risk processing.¹⁸⁶ Absent specific risks, it is unlikely that a DPIA will be required for a typical international commercial arbitration. Nonetheless, this should be considered as part of the documentation of compliance and it is expected that companies may use DPIAs as a

180. See GDPR, *supra* note 2, art. 5(2), at 39.

181. See *id.*, art. 30, at 57.

182. See *id.*, art. 30 (5), at 58.

183. See *id.*, art. 37, at 62.

184. See *id.*, art. 39, at 63.

185. See generally *Guidelines on Data Protection Officers (DPOs)*, (Article 29 Data Protection Working Party, 16/EN WP 243 rev. 01, 2017).

186. See GDPR, *supra* note 2, art. 35, at 60.

means of limiting their exposure even when they are not required by the GDPR.

As a practical matter, this means that from the moment that a dispute starts to percolate where personal data covered by the GDPR may be impacted, in-house counsel responsible for the arbitration will be required to work with the GDPR compliance team to undertake steps to ensure that data protection principles are properly taken into consideration when developing the arbitral process and to document what decisions are taken and why. This will be uncharted territory in many companies and differences of view may be exacerbated as the individuals responsible for dispute resolution and data protection and will each consider their needs to be paramount (*i.e.* winning the arbitration versus avoiding potentially serious compliance risk). Given the attention the GDPR is currently receiving, companies should be careful to not to lean too far in that direction in ways that will unnecessarily hamstring current and future arbitrations. The goal should be to comply with the GDPR, while at the same time ensuring that this does not unnecessarily impact the arbitral process.

2. Data Mapping

Early data mapping of where the data relevant to the dispute is located and where it needs to move is essential to data protection compliance. The data protection and legal teams should work together on this process early on when drafting the arbitration agreement and later when a claim arises but before the arbitration is launched. This collaboration permits strategic long-term decisions to be made with respect to how and where data will be reviewed and transferred, which may impact their choices (including counsel, arbitrator, service providers). For example, the teams could employ creative solutions to allow data review from a data room or onsite. However creative solutions often require early thinking and planning, which favors prompt consideration of these issues.

3. Engaging External Counsel

When disputes arise in a relationship that is subject to an arbitration agreement, companies typically consult with external counsel at an early stage in the dispute resolution process. The selection of external counsel is another area where in the future GDPR compliance may become relevant. Exchanging Personal

Arbitral Data with external counsel is covered by the GDPR, which means, for example, that when Personal Arbitral Data is transferred to a third country for purposes of instructing counsel, the transfer must satisfy one of the criteria allowing for transfer discussed above.¹⁸⁷

Major international law firms will usually have systems in place allowing such transfer (but this is not necessarily the case) and may not be true of smaller or local firms. Moreover, it is easier and less costly for the application of the data protection rules if all the Arbitral Data Custodians have an establishment in the European Union or in a country with an adequacy decision (including the US Privacy Shield) because it will not be necessary to meet the requirements for third country data transfer. Furthermore, parties should be aware that if they voluntarily transfer Personal Arbitral Data out of the European Union, a tribunal may take this into account when deciding whether the data needs to be disclosed to the other side if data protection concerns about the transfer are raised during disclosure. Of course, this decision will depend on the details of each data transfer, but data transfers outside the European Union to countries without either an adequacy decision or adequate safeguards may weigh against prohibiting disclosure of data later in the arbitration due to data protection concerns relating to transfer. In a sense, a party may be considered to have waived the right to object.

4. Notice of Arbitration or Reply to Notice

If a party considers that the GDPR or other applicable data protection laws may have a major impact on the proceedings it may consider including this already in the Arbitration Notice or the Reply. This will put everyone on notice of these concerns early so that they can plan around them from the outset. This will also give credibility to the data protection concerns when they are raised later in the proceedings.

5. Selection of the Arbitrator

In the same way that data protection obligations could play a role in selection of counsel, if a party has serious concerns under the GDPR, it may consider appointing an arbitrator that is established in the European Union or a country with an adequacy decision. The

187. See *infra* Section III.H.2.

recitals to the GDPR state that an establishment implies the effective and real exercise of activity through stable arrangements. The form of the arrangements, for example, whether they are carried out through a branch or a subsidiary, is not relevant. For these purposes, arbitrators from outside the European Union that are associated with an English chambers or other Member State entity, would likely be considered to have an establishment in the European Union for these purposes, particularly if they undertake their services for the arbitration through that chambers. While this would rarely be the deciding factor in an appointment, it might tip the balance between two similarly situated candidates in cases where the transfer of data is expected to be of critical importance.

C. Proceedings

This Section of the Article addresses how the data protection rules contained in the GDPR may impact the arbitration itself after the tribunal has been appointed, including what data protection rules apply, adoption of data protection protocols and the impact of data protection on disclosure. The question of what obligations apply to whom and for which data set is complicated during the arbitral process and is key to understanding the respective responsibilities under the GDPR. This Section of the Article addresses the following issues that may arise during an arbitral proceeding:

- Who controls the Personal Arbitral Data processed during an arbitration?
- What rules apply to the processing of Personal Arbitral Data?
- How will GDPR compliance impact the arbitral process and how can this be managed?

1. Who Controls the Personal Arbitral Data Processed During an Arbitration?

As already briefly discussed above,¹⁸⁸ the obligations contained in the GDPR apply to all Arbitral Data Custodians who are either “controllers” or “processors” of the data. The result of this analysis is that most Arbitral Data Custodians will be considered data controllers subject to the terms of the GDPR, except to the limited extent they

188. See *infra* Section III.E.

may be processors.¹⁸⁹ The parties will typically be the original controllers of the Personal Arbitral Data for the primary purpose for which it was originally collected—doing business, as well as during the course of the arbitration (referred to as the “Initial Data Controllers”). Given the role played by counsel, experts, arbitrators, and the institution in a complex commercial arbitration there are likely to be multiple secondary controllers who engage in secondary processing of the data. The secondary Arbitral Data Custodians will be the controllers or processors only of the Personal Arbitral Data that they actually receive during the course of the arbitration for the secondary purpose of the arbitration itself. This means that the GDPR obligations applicable to them will be limited to the data they process during the course of the arbitration, whereas the Initial Data Controllers will typically control the entire data set.

These overlapping and potentially conflicting commitments of the Arbitral Data Custodians creates complexity and potential confusion in applying the GDPR to the Personal Arbitral Data processed during a complex international commercial arbitration. Interestingly, in the context of data security, WP29 in its Disclosure Guidelines seemed to differentiate the role of the Initial Data Controllers from counsel and other secondary controllers who process the data, but without providing further explanation or guidance as to how these overlapping roles interact. The following discussion will consider the status of each the Arbitral Data Custodians when they process Personal Arbitral Data during an arbitration.

a. Parties

In a typical arbitration, depending on whether one or both of the parties are covered by the GDPR or another data protection law, one or both of the parties will be the Initial Data Controllers of the Personal Arbitral Data under the GDPR. This is because the data will have been originally collected and processed in the context of the party’s business operations that are the subject of the arbitration and for which the party controlled the purpose and means of the original processing of the data typically in the context of a business or employee relationship. This means that the initial obligation for compliance with the GDPR in the context of an arbitration typically falls on the parties as the Initial Data Controllers.

189. *Id.*

b. External Counsel

The function of external counsel in an international arbitration is to represent the parties and to decide how to present their case based on the evidence, which typically includes Personal Arbitral Data. Counsel must determine how and why to process that data, which means that they will control the Personal Arbitral Data provided to them by the parties for the purposes of the GDPR. WP29 has taken this view expressly in the context of a barrister processing data in the course of representing a party based on the following reasoning, which could be applied equally to most Arbitral Data Custodians:

A barrister represents his/her client in court, and in relation to this mission, processes personal data related to the client's case. The legal ground for making use of the necessary information is the client's mandate. However, this mandate is not focused on processing data but on representation in court, for which activity such professions have traditionally their own legal basis. Such professions are therefore to be regarded as independent 'controllers' when processing data in the course of legally representing their clients.¹⁹⁰

Similarly, WP29 has foreseen that accountants will typically be considered data controllers under the GDPR because of the nature of their duties, however, WP29 has also explained that accountants could also be considered processors when they are performing a specific data processing activity under the direction and control of the client.¹⁹¹ Following the same logic, legal counsel covered by the GDPR may try to limit their compliance obligations by entering into data processing agreements when they are asked to review large amounts of data in a function akin to that of the data analyst discussed below.¹⁹² However, limiting counsel's obligations under the GDPR requires the law firm and the client to enter into a data processing agreement as set forth in the GDPR, which may be difficult given the nature of the attorney-client relationship and because of client resistance (although at the end it may be a question of cost and risk).

These issues are not easy to resolve, but counsel concerned about additional risk can reduce the amount of data that they review by having the parties conduct the initial data review and scrub the

190. Controller Opinion, *supra* note 100, at 28.

191. *Id.* at 29.

192. See *infra* Section IV.C.1.c.

data internally or by using data analysts. This limits the data being transferred to them, hence reducing their GDPR compliance risk, but at the same time relinquishes counsel's control over the initial data review. This is happening anyway for cost reasons and as data review becomes increasingly sophisticated through the use of artificial intelligence, but data protection concerns may prove to be an additional driver towards the use of specialized data analysis and e-discovery services.

c. Data Analysts

A data analyst or other e-discovery professional typically processes data on behalf of either the party or its counsel.¹⁹³ The use of data analysts is increasingly becoming the norm in conducting the initial data review to scrub and cull electronic data before it is provided to counsel.¹⁹⁴ Using a data analyst requires a high degree of trust because the analyst will be responsible for reducing the data set provided to counsel and to the parties to review for the arbitration and potentially provide to opposing counsel.

A data analyst will typically be considered a "data processor" under the GDPR, rather than a controller, when it:

- (1) acts under the instruction of the party or the lawyer in undertaking its tasks,
- (2) does not decide the purpose of the data processing and,
- (3) is retained under a GDPR-compliant data processing agreement.¹⁹⁵

This is the view adopted by WP29 in the Disclosure Guidelines.¹⁹⁶ However, there may be circumstances where the data analyst works so closely with the law firm or a party that the data analyst would properly be considered a "joint controller" under the GDPR. Furthermore, even if a data analyst is deemed to be a data processor, WP29 has taken the view in the context of the DP Directive:

193. *E-Discovery: Must-Knows, Landmines, and What the Future Holds*, YOUR ABA (Mar. 2017), <https://www.americanbar.org/publications/youraba/2017/march-2017/e-discovery-specialists-can-provide-competence—oversight-for-la.html> [https://perma.cc/CH78-CYBQ] (archived May 30, 2018).

194. *Id.*

195. See generally Disclosure Guidelines, *supra* note 75.

196. See *id.*

The external service providers will also have to comply with the principles of the [DP] Directive. They shall ensure that the information is collected and processed in accordance with the principles of the Directive and that the information is only processed for the specific purposes for which it was collected. In particular they must abide by strict confidentiality obligations and communicate the information processed only to specific persons. They must also comply with the retention periods by which the data controller is bound. The data controller must also periodically verify compliance by external providers.¹⁹⁷

These principles are now enshrined in the GDPR.

d. Independent Experts

Parties to complex international commercial arbitrations often engage independent experts to address technical or quantum issues. To prepare their opinions, these experts typically require access to evidence, which will likely include Personal Arbitral Data. WP29 suggested in the context of the DP Directive that an expert in a litigation might act as a data processor.¹⁹⁸ However, one wonders whether the defined limits on data processors would be consistent with the function of an independent expert. Similar to the barrister example given by WP29 that was discussed above,¹⁹⁹ if the expert is processing the data to prepare an independent report, how could counsel or a party tell the independent expert the purpose or manner in which it could process the data to prepare that report while maintaining the expert's independence? While it may be possible to construct such an arrangement, in principle this seems inconsistent with the role of an independent expert.

e. Arbitral Institution

The function of an arbitral institution is to administer arbitrations according to the institution's rules and practices, which often require the parties to include the institution on communications exchanged with the tribunal, including all filings.²⁰⁰ The institution determines the purpose and means of the processing of the Personal Arbitral Data uncontrolled by either the parties or counsel; like the barrister in the

197. *Id.* at 13.

198. See Controller Opinion, *supra* note 100, at 13.

199. See *supra* Section IV.C.1.b.

200. See, e.g., London Court of International Arbitration Rules, art. 3.3 (2014).

example above, the arbitral institution is an independent entity and processes the data it receives for its own purposes. Thus, for purposes of the GDPR, the arbitral institution processes the data contained in those communications and filings, which in turn means that the institution is a controller of the Personal Arbitral Data under the GDPR.

While the arbitral institutions located in the European Union are expected to be prepared to comply with their obligations under the GDPR, this may be less true of arbitral institutions outside the European Union that may have direct or indirect compliance obligations when they process Personal Arbitral Data governed by the GDPR. Although many of those institutions are situated in jurisdictions with data protection regimes, it remains to be seen how this will operate in practice. Furthermore, even EU institutions may struggle with certain of the transfer, data transparency (potentially including data privacy notices), and other restrictions contained in the GDPR, particularly as those obligations apply to case work.

f. Arbitral Tribunal

It is inherent in the arbitral tribunal's function that the arbitrators control the purpose and means by which they process the documents and evidence presented by the parties, which in turn means that they control the data they receive from the parties and the institution during the course of the arbitration. This means that the arbitrators are subject to the GDPR with respect to their activities that constitute the processing of Personal Arbitral Data. Further, the arbitrators will be required to comply with all the GDPR's rules that have not been expressly exempted, including for example, data minimization, data transparency (potentially including data privacy notices), data transfer restrictions, cyber security, and respecting the data subjects others rights. Where not exempted by Member State Law, this raises serious concerns particularly, for example, where the data transparency requirements could be interpreted to require the disclosure of confidential communications among the tribunal members or between arbitrators and the institution. This argues in favor of exempting these rights from their application to international arbitration especially to the extent they impact the arbitral tribunal's decision-making function.

Where consistent with the parties' due process rights, this argues in favor of the tribunal limiting the amount of data presented in order

to limit the data protection risk. For example, the latest version of the IBA Rules make optional whether the tribunal is copied on the disclosure it orders, and data protection risk would strongly argue against the tribunal receiving any additional data. Furthermore, data protection argues in favor of limited document review and defined evidentiary requirements.

g. Summary Re Controllers

For the reasons set forth above, when the GDPR applies to the processing of Personal Arbitral Data in an arbitration, the Arbitral Data Custodians generally will be considered controllers of the personal data they process, except the more limited circumstances in which they meet the requirements to be data processors. However, for each Arbitral Data Custodian, the GDPR applies only to the data that it actually processes. This argues in favor of reasonable restrictions on the amount of data being processed. The impact of these rules on the arbitral process is discussed in more detail in the following Section.

2. What Rules Apply to the Processing of Personal Arbitral Data?

The application of the GDPR and other data protection regimes to international commercial arbitration means that whenever Personal Arbitral Data is processed during an arbitration the following will be legally mandated unless exempted by Member State law (among other things): adequate data security, data minimization, transparent data retention policies, transparent processing information (potentially including data privacy notices), third country transfer restrictions, and data breach notifications.²⁰¹ The rights to data portability and to erasure and to restrict processing may also be raised, although these rights do not apply where the legal claims exemption applies.

Respecting these rights requires a coordinated compliance effort in a manner that is proportional to the risk while at the same time ensuring the tribunals' decision-making function and the parties' due process rights are respected. Although not directly on point, the guidance from WP29 in the Disclosure Guidelines is helpful in gaining an understanding of how the corresponding obligations in the GDPR may be applied to the processing of Personal Arbitral Data in the context of international arbitration and is referred to in this

201. GDPR *supra* note 2, arts. 12-22, at 39-46; EU Handbook, *supra* note 14, 105.

discussion where relevant. This will often result in the parties and the tribunal agreeing a data protection protocol addressing these issues, which is discussed below.²⁰²

a. Cybersecurity

Important efforts are underway to implement cybersecurity for international arbitration. This includes the Debevoise & Plimpton *Protocol to Promote Cybersecurity in International Arbitration* launched in 2017²⁰³ and the ICCA/NY Bar/CPR *Draft Cybersecurity Protocol for International Arbitration*, released for consultation in 2018.²⁰⁴ While not directly on point with respect to the data security requirements of the GDPR, together with the Sedona Protocol,²⁰⁵ they will provide a useful starting point for applying a risk-based analysis to cybersecurity, and as a structure for how data protection may be addressed in international arbitration. However, it is important to keep in mind that whenever the GDPR applies to Personal Arbitral Data processed in an arbitration, adequate cyber security is mandatory. The GDPR requires the following measures be taken to secure all data covered by its terms:

1. Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk, including inter alia as appropriate:
 - (a) the pseudonymisation and encryption of personal data;
 - (b) the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;

202. ICCA/NY Bar/CPR *Consultation Draft Cybersecurity Protocol for International Arbitration* Art. 13 (2018) [hereinafter ICCA Cybersecurity Protocol] http://www.arbitration-icca.org/media/10/43322709923070/draft_cybersecurity_protocol_final_10_april.pdf [<https://perma.cc/K52P-MHJL>] (archived May 30, 2018).

203. See Debevoise & Plimpton *Protocol to Promote Cybersecurity in International Arbitration* (2017) https://www.debevoise.com/~media/files/capabilities/cybersecurity/protocol_cybersecurity_intl_arb_july2017.pdf.

204. See ICCA Cybersecurity Protocol, *supra* note 202. See also the excellent discussion the cybersecurity issues raised by international arbitration in Stephanie Cohen and Mark Morril, *A Call To Cyberarms: The International Arbitrator's Duty To Avoid Digital Intrusion*, 40 *FORDHAM INT'L L.J.* 981 (2017).

205. See SEDONA PROTOCOL, *supra* note 76, Appendix C.

(c) the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident;

(d) a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.

2. In assessing the appropriate level of security account shall be taken in particular of the risks that are presented by processing, in particular from accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to personal data transmitted, stored or otherwise processed.²⁰⁶

Similarly, in the specific context of US litigation under the DP Directive, WP29 has said that the data controller shall take all:

reasonable technical and organisational precautions to preserve the security of the data to protect it from accidental or unlawful destruction or accidental loss and unauthorized disclosure or access. These measures must be proportionate to the purposes of investigating the issues raised in accordance with the security regulations established in the different Member States. These requirements are to be imposed not just on the data controller but such measures as are appropriate should also be provided by the law firms who are dealing with the litigation together with any litigation support services and all other experts who are involved with the collection or review of the information. This would also include a requirement for sufficient security measures to be placed upon the court service in the relevant jurisdiction as much of the personal data relevant to the case would be held by the courts for the purposes of determining the outcome of the case.²⁰⁷

It is interesting to note that this language from the Disclosure Notice seems to suppose that the law firm is not an independent data controller in its own right, which conflicts with other advice from WP29.²⁰⁸ Given the significant risk of getting this wrong, the safer course is for lawyers to consider themselves to be controllers in their own right, but this language supports the view that it would be appropriate to use a data protection protocol to allocate these roles and responsibilities in much the same way the GDPR does for joint controllers.

206. GDPR, *supra* note 2, art. 32, at 51.

207. Disclosure Guidelines, *supra* note 75, at 12.

208. See Controller Opinion, *supra* note 100, at 28 (finding barristers to be controllers).

It will be for the parties in the first instance to agree what security measures are required by the GDPR during the arbitration.²⁰⁹ This process of agreeing reasonable data security measures involves a risk analysis of the types and importance of the Personal Arbitral Data being exchanged, the laws applicable to the transfer and processing of the Personal Arbitral Data, the cybersecurity systems and capabilities of all the Arbitral Data Custodians that will be receiving and processing Personal Arbitral Data, the risks if the data were to be exposed, *etc.*²¹⁰ Where parties are not able to agree reasonable and proportionate data protection measures, tribunals will be asked to assist in this process and ultimately may be required to impose such measures where agreement proves allusive.²¹¹

b. Data Minimization

When the GDPR applies to the Personal Arbitral Data being processed during an arbitration, data minimization is mandatory.²¹² This may include data scrubbing for relevant data and to eliminate sensitive data as a first step before the data is even processed for the arbitration, and potentially pseudonymization of the relevant data where feasible. With respect to data minimization, WP29 has explained in the context of US discovery under the DP Directive that:

There is a duty upon the data controllers involved in litigation to take such steps as are appropriate (in view of the sensitivity of the data in question and of alternative sources of the information) to limit the discovery of personal data to that which is objectively relevant to the issues being litigated. There are various stages to this filtering activity including determining the information that is relevant to the case, then moving on to assessing the extent to which this includes personal data. Once personal data has been identified, the data controller would need to consider whether it is necessary for all of the personal data to be processed, or for example, could it be produced in a more anonymised or redacted form. Where the identity of the individual data subject's is not relevant to the cause of action in the litigation, there is no need to provide such information in the first instance. However, at a later stage it may be required by the court which may give rise to

209. See, e.g., ICCA Cybersecurity Protocol, *supra* note 202, art. 13.

210. See generally GDPR, *supra* note 2, recital 4, at 3.

211. See, e.g., ICCA Cybersecurity Protocol, *supra* note 202, art. 13.

212. GDPR, *supra* note 2, recital 39, 7

another “filtering” process. In most cases it will be sufficient to provide the personal data in a pseudonymised form with individual identifiers other than the data subject’s name.

When personal data are needed the “filtering” activity should be carried out locally in the country in which the personal data is found before the personal data that is deemed to be relevant to the litigation is transferred to another jurisdiction outside the EU.²¹³

Special category data should also be culled and not processed unless necessary to decide the dispute.²¹⁴ Although the GDPR allows the transfer of sensitive data when necessary for the establishment, exercise or defense of a legal claim, only the limited data that is deemed to be necessary for that purpose should be transferred.²¹⁵ As discussed below, data minimization will also argue in favour of a careful application of the IBA Rules to limit the amount of data disclosed during the arbitration.²¹⁶

c. Pseudonymized Personal Data

WP29 has made clear in the Disclosure Guidelines that it prefers for data that is going to be processed during a dispute resolution process to be pseudonymized using a coding system especially where it will be transferred to a third country. Pseudomization is when data is coded so that the personal data subject is not identified, but in a manner such that the data can later be decoded. This system allows the data to be matched to the data subject if needed during the arbitral process but at least during the early stages of review, names would not be included. Pseudonymization does not fit well with the arbitral process. Technology, of course, makes pseudonymization possible but at a cost, and it is difficult to see how it would work efficiently and cost-effectively in practice given the highly fact-driven nature of the arbitral process. Parties are expected to resist pseudonymization given the difficulties and cost that will be involved. While not determinative, factors weighing against requiring pseudonymization under a proportionality standard would include that the Personal Arbitral Data exchanged be:

213. Disclosure Guidelines, *supra* note 75, 10-11 (quoting *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987)).

214. *See id.* at 10.

215. *See id.*

216. *See infra* Section IV.C.3.b.

- Minimized and targeted at the issues in dispute (as would be the case if the IBA Rules discussed below are applied carefully);
- Scrubbed to eliminate any sensitive or nonresponsive data; and
- Originally obtained by the arbitral party with the knowledge and preferably consent of the data subject who was placed on notice of the possibility of processing for dispute resolution at the time of data collection.

d. Data Rectification

The GDPR grants data subjects “the right to obtain from the controller without undue delay the rectification of inaccurate personal data concerning him or her. Taking into account the purposes of the processing, the data subject shall have the right to have incomplete personal data completed, including by means of providing a supplementary statement.”²¹⁷ This right does not contain an legal claims exemption and, hence, will apply to international commercial arbitration unless validly exempted by a Member State law. However, WP29 has recognized the tension between this right and the requirements of data discovery in the context of disclosure for US litigation and has said:

[t]hese rights may only be restricted . . . on a case by case basis for example where it is necessary to protect the rights and freedoms of others. The Working Party is clear that the rights of the *data subject continue to exist during the litigation process* and there is no general waiver of the rights to access or amend.

It should be noted however that this right could give rise to a conflict with the requirements of the litigation process to retain data as at a particular date in time and any changes (whilst only for correction purposes) would have the effect of altering the evidence in the litigation.²¹⁸

As WP29 recognized, this right to rectify personal data that has been submitted as evidence in an international arbitration creates tension.²¹⁹ It therefore seems unusual, and problematic, that neither this right, nor the right to data transparency includes an exemption for

217. GDPR, *supra* note 2, art. 16, at 43

218. Disclosure Guidelines, *supra* note 75, at 12 (emphasis added).

219. *Id.*

legal claims, which are exempted from the rights of erasure and to preclude data processing and which raise similar tensions. However, data subjects can be required to include a rationale for the rectification, which would be submitted to the tribunal as a basis for the rectification. This means the tribunal would be aware of the rectification and be able to take it into account in its decision making.

e. Rights to Erasure or “Right to be Forgotten” and to Restrict Processing

The data subject has the right to request erasure of his or her personal data.²²⁰ This right is available when:

- (i) processing is no longer necessary for the intended purpose,
- (ii) the data subject withdraws his or her consent,
- (iii) the data subject objects to the processing and there are no overriding legitimate grounds for the processing,
- (iv) the processing is unlawful, or
- (v) erasure is necessary for compliance with a legal obligation.²²¹

In addition to erasing the data, when a controller has made the personal data public, the controller must take reasonable steps, including technical measures, to inform the controllers processing the data of the data subject’s request to erase this personal data.²²² Alternatively, a data subject can also request a restriction on the processing of his or her personal data when:

- (i) the data subject contests the accuracy of the data,
- (ii) the processing is unlawful and the data subject does not want to exercise the right to erasure,
- (iii) the controller no longer needs the data for the purposes of the processing but the data subject needs the data to defend a legal claim, or
- (iv) (if) a decision on a complaint lodged by the data subject is pending.²²³

220. See GDPR, *supra* note 2, art. 17, at 43; rec. 65, at 12.

221. See *id.*

222. *Id.* art. 18, at 44.

223. *Id.*

Importantly, the rights to erasure, and to data processing restrictions, which would be problematic to apply in the context of international arbitration, contain a legal claims exemption for processing that is “necessary for the establishment, exercise or defence of legal claims. This means that the rights of erasure and to processing restrictions would not be applied to international arbitration where the data is deemed “necessary” to the claims or defences. The question will be what is deemed “necessary,” which is not defined by the GDPR and may be influenced by the applicable Member State law, at least until the EDPB takes a view.

f. Data Retention

Data retention is another area where the GDPR is difficult to reconcile with international arbitration. Arbitration is a highly fact driven process and in a complex case both sides will want to review the record and process Personal Arbitral Data for the time period in question. However, at least in the context of US discovery of EU personal data, WP29 has taken the view that unlimited retention of data for the purpose of later disputes, for example, until the statute of limitations expires, may be unlawful.²²⁴ Applying this logic to arbitration implies that the need to have access to data for a later arbitration is unlikely to be a sufficient basis on its own to retain data longer than would otherwise be reasonable. However, the Disclosure Guidelines were adopted in the context of general litigation discovery in the United States, which is very different to the more limited data disclosure in international arbitration.²²⁵ Furthermore, the data retained for an international commercial arbitration would be limited to the data related to the circumstances surrounding the agreement containing the specific arbitration clause. When there is a specific agreement containing an arbitration clause, retention of the data relating to that contract may be considered more reasonable than the general litigation risk considered in the Disclosure Guidelines.

As a matter of practice, GDPR compliance is likely to necessitate limiting the data retained to that which is considered to be “necessary” for a future arbitration. Data retention therefore may lead to disputes during the arbitral process as parties not subject to the GDPR may retain more robust data than those applying the GDPR

224. See Disclosure Guidelines, *supra* note 75, at 12.

225. See *id.*

and therefore will have more contemporaneous data available to support their claims. On the other hand, companies that retain more data may be required to disclose more data, which the other side may have decided not to retain either for strategic or legal reasons, potentially including data protection risk. This imbalance will need to be addressed and depending on the circumstances may have to be rectified to ensure due process.

g. Data Transparency (Including Data Privacy Notices)

At the time data is collected from a data subject, the data subject must be provided with detailed information about the manner and means by which the data will be processed as described in the GDPR.²²⁶ Similar rights attach when the controller did not collect the data in the first place, which often is the case in international arbitration.²²⁷ For example, the law firm did not originally collect the data that it controls after a party transfers data to it for use in an arbitration. The same is true of the arbitrators. Compliance with the transparency requirements of the GDPR obligates all the controllers of Personal Arbitral Data to ensure that data subjects whose personal data may be disclosed as a part of an arbitration are provided with transparent information complying with Articles 12, 13, and 14 of the GDPR, including, among other things, the purpose and legal basis for the processing, the potential for (or fact of) arbitration, the names and details of any recipient of each data subject's data, how the data subject's data may be used in the arbitration, and whether data transfer outside the European Union is contemplated by the arbitration. In a complex arbitration, if applied literally, this could mean potentially tens of data controllers being required to send multiple data privacy notices to potentially hundreds of individual data subjects named in the evidence. Serious concerns have also been raised about data subjects relying on these rights to request data relating to the confidential tribunal communications, potentially including draft awards.

WP29 has made clear that data subject rights to transparent information about the processing of his or her data, access to that data, and the right to rectify it, continue to apply to data when processed for litigation purposes, which seemingly would also include

226. See GDPR, *supra* note 2, art. 13, at 40-41

227. See *id.* art. 14, at 41.

arbitration.²²⁸ With respect to the access and notice requirements, WP29 said that “in the context of pre-trial discovery, [transparency] would require advance, general notice of the possibility of personal data being processed for litigation. Where the personal data is actually processed for litigation purposes, notice should be given of the identity of any recipients, the purposes of the processing, the categories of data concerned and the existence of their rights.”²²⁹

Therefore, any justification for withholding such notice in the arbitration context would seemingly need to be something unique to arbitration, for example, confidentiality. However, the GDPR provides that confidentiality can only be a basis for not providing the requisite data privacy notice when “the personal data must remain confidential subject to an obligation of professional secrecy regulated by Union or Member State law, including a statutory obligation of secrecy.” This standard will typically not be met by arbitral confidentiality generally, although it may apply to counsel who is subject to legal privilege and to the arbitrator’s duty of confidentiality.

The GDPR provides that only one data privacy notice needs to be sent to a data subject. However, it does not explain how this should work in practice when there are multiple controllers all of whom are potentially liable (as in the case of arbitration). WP29 seemed to differentiate between the “controller” who had originally collected the personal data involved in the litigation and others (like the law firm and the courts), but without providing any further guidance. One possibility, which is indirectly supported by the Disclosure Notice, would be for the Arbitral Data Custodians to agree in a data protection protocol that the parties, as the Initial Data Controllers, will provide the transparent information about the processing including any required data privacy notices, and that the other secondary controllers would rely on those notices. Moreover, arbitrators and the institution should be excluded from any duty of transparency as it relates to the internal workings of the tribunal and its decision-making function.

This is consistent with the approach taken to joint controllers in the GDPR and is sensible as the Initial Data Controllers are the only ones who have any relationship with the data subjects. However, this

228. See Disclosure Guidelines, *supra* note 75, at 12.

229. *Id.*

would not seem to shield the other secondary controllers from liability, which raises the question as to whether the Initial Data Controller should provide indemnities to the other Arbitral Data Custodians, which could also be included in a data protection protocol. It should also be noted that in cases involving extensive records, requiring data privacy notices for all data subjects named in the evidence is not only a significant burden but may also effectively mean that the arbitration is no longer confidential because so many persons will potentially be required to be informed, which is further complicated in sensitive cases when the provision of notice itself could be problematic. Transparent processing information (including data privacy notices) exemplify the problems created by applying the GDPR to arbitration absent a detailed thought-through set of rules for how this is going to work.

h. Third Country Transfers

The third country transfer restrictions apply to any data transfer outside the EU of Personal Arbitral Data during an arbitration by the Arbitral Data Custodians including the parties, counsel, arbitrators, witnesses, data analysts, or the institution. Furthermore, transfer is very broadly interpreted to include, for example, any downloading of a document or an email while outside the European Union, or carrying a lap top storing documents containing Personal Arbitral Data outside the European Union. Each of these transfers of data outside the European Union requires (1) a legal basis and (2) adequate safeguards.²³⁰ This means that when Arbitral Data Custodians are involved in an arbitration that are not established in the European Union (or a country with an adequacy decision) or who would like to access document from outside the European Union (or a country with an adequacy decision), it will be necessary to agree a framework for exactly how and on what basis Personal Arbitral Data will be transferred (including Memorials, witness statements, evidence, expert reports, *etc.*). The basis for transfer may be different for different Arbitral Data Controllers, but it is necessary to have this established in advance of transfer.

Voluntary data transfers between the parties and their counsel, and between opposing counsel, will often be undertaken without involving the tribunal, however, it may be required to give data

230. See, EU Handbook, *supra* note 14, at 133.

subjects and the supervisory authority notice of the transfer depending on the legal basis on which it is made. For transfers of Personal Arbitral Data outside the European Union involving the tribunal or the arbitral institution, it will be necessary to memorialize such transfers in a protocol or other document to be signed by all Arbitral Data Custodians receiving or sending such data outside the European Union. This will likely include the legal basis for the transfer and any restrictions imposed on the processing as a basis for the transfer.

i. Data Breach Notification

The GDPR contains strict notification requirements in the case of a data breach, which are likely to apply to all Arbitral Data Custodians.²³¹ Data controllers are required to notify the supervisory authorities of “a data breach that is likely to result in a risk for the rights and freedoms of the data subject within 72 hours of discovery of the breach.”²³² Data subjects must also be notified of the breach without undue delay if the data breach “presents a high risk for the rights and freedoms of individuals,” whereas if the data breach only presents *some* risk for individuals, only the data protection authority will need to be notified and not the individual data subjects.²³³ The data breach notification must include the cause and nature of the breach (if known) and recommendations for how the potentially affected individuals can mitigate the risks of the breach. The burden to prove the absence of risk in a data breach rests on the controller.²³⁴

It will be very important to agree upfront exactly what will trigger a breach notification and the process for how data breach notifications will be given and to whom. The 72-hour time period is for notification to the DPA, which means that a shorter time line may apply if there are intermediate steps, for example, notification by an arbitrator, counsel, expert, or institution of a data breach to the parties, who will then notify the supervisory authority and potentially the data subjects affected.²³⁵ The fines for violating the data breach notification requirements are up to EU€10 million or two percent of

231. See GDPR, *supra* note 2, arts. 33-34, at 52.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

annual global turnover gross revenue, which argues in favour of a rigorous data breach notification policy.²³⁶

j. Right to Data Portability

When a data subject directly provides a controller with his or her personal data, the data subject must be able to request a copy of the data concerned in a “structured, commonly used and machine-readable format” from the controller, if the data was provided on the grounds of consent or a contractual agreement and is subject to automated processing.²³⁷ This allows the data subject to easily transmit the processed personal data to another controller of his or her choice without hindrance by the controller that collected the data in the first place. In international arbitration, this right would potentially apply only to the Initial Data Controller who originally collected the data and typically would not impact the proceedings. The other Arbitral Data Custodians will typically be not be Initial Data Controllers subject to this obligation.

3. How will GDPR Compliance Impact the Arbitral Process and How Can This be Managed?

a. Data Protection Protocols

Data protection issues should be raised and addressed at the earliest possibility during the arbitral process, typically the procedural conference, if not before.²³⁸ Compliance with the requirements imposed by the GDPR or other data protection regimes may necessitate putting in place a data protection protocol or other agreement at the outset of the arbitration addressing a number of data compliance issues affecting not only the parties, but everyone who processes Personal Arbitral Data during the arbitration.²³⁹ Given the circumstances, this may take the form of a party agreement, a

236. *Id.*, art. 83(4), at 82.

237. *Id.*, art 20, at 45.

238. See ICCA Cybersecurity Protocol, *supra* note 202, art. 14, at 16 (addressing cybersecurity only).

239. Cf. generally ICCA Cybersecurity Protocol, *supra* note 202 (addressing cybersecurity only); with SEDONA PROTOCOL, *supra* note 76, at Appendix C (addressing discovery for litigation only). The ARBITRAL DATA PROTECTION PROTOCOL found at Appendix D provides a template of a data protection protocol created by the Author to provide guidance to arbitrators when addressing these issues under the GDPR in international commercial arbitration cases.

stipulation, or tribunal order (all of which will be referred to herein for simplicity as “data protection protocols” or “protocols”). Depending on the facts, these protocols are likely to cover, among other things, transparent data processing information (potentially including data privacy notices), cybersecurity, third country data transfers, data breach notifications, and the allocation of roles and responsibilities with respect to compliance with the data subject’s other rights.²⁴⁰ These protocols will typically be signed and confirmed by everyone receiving Personal Arbitral Data during the course of the arbitration to insure compliance and will often impact the taking of evidence.²⁴¹

It is preferable for the parties to agree a reasonable data protection protocol, taking into consideration the views of the arbitrators and the institution that will also have to apply them.²⁴² This process of agreeing a data protection protocol involves understanding the applicable data protection laws, the types and importance of the data being exchanged, the cybersecurity systems and capabilities of all the Arbitral Data Custodians that will be receiving and processing Personal Arbitral Data, the risks if the data were to be exposed, *etc.* Where parties are not able to agree reasonable data protection measures, tribunals will be asked to assist in this process and ultimately to decide where agreement is not possible.²⁴³

This is further impacted by the fact that the IBA Guidelines and other rules and protocols potentially applicable to data disclosure in international arbitration do not expressly address how the data protection rules may impact an arbitration, nor do the data protection rules (including the GDPR) contain express provisions addressing their application to international arbitration. While each set of rules may contain provisions that could be used to reconcile the two systems, they are not explicit about their relationship to each other. To leave this for a case-to-case determination allows for tailoring the process given the multitude of conflicting rules applicable to arbitral disclosure and data protection worldwide. However, it also creates significant uncertainty and leaves parties, external counsel,

240. See SEDONA PROTOCOL, *supra* note 76, at Appendix C to this Article (addressing discovery for litigation only); see also ARBITRAL DATA PROTECTION PROTOCOL, Appendix D.

241. See *id.*

242. See ICCA Cybersecurity Protocol, *supra* note 202, art. 13, at 13 (addressing cybersecurity only).

243. See *id.*, at art. 14, at 13 (addressing cybersecurity only).

institutions and arbitrators with the unenviable task of considering in each case how the data protection rules may limit the ways in which they can gather, process, use, transfer, and protect Personal Arbitral Data and the means by which the rights granted to data subjects will be complied with.

In practice, data protection protocols will be agreed to help maximize arbitral efficiency while minimizing data protection risks. This is a highly case specific enquiry, and is likely to lead to different rules being applied in each case and within the same case for different Arbitral Data Custodians and even between data sets. But if properly analysed early in the process, reasonable compliance measures can be put in place to minimize these risks without significantly impacting the arbitral process. Further, while it is beyond the scope of this Article to address liability, the protocol may need to include indemnification provisions where the original data processors agree to comply with the data subject rights (for example, data transparency potentially including data privacy notices) on behalf of other Arbitral Data Custodians (for example, the institution and/or the arbitrators).

This is consistent with the approach adopted by the IBA Rules. While not addressing data protection specifically, the IBA Rules provide in the newly added Article 2 that:

1. The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.
2. The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including:

 (c) the requirements, procedure and format applicable to the production of Documents;
 (d) the level of confidentiality protection to be afforded to evidence in the arbitration; and
 (e) the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence.²⁴⁴

The Official Commentary on the IBA Rules explains that the addition of a mandatory conference on evidentiary issues early in the proceedings was intended to address the needs posed by increasingly

244. IBA Rules, *supra* note 7, art. 2, at 6.

large and complex arbitrations to ensure that evidentiary issues are addressed in a manner that promotes efficient and fair proceedings.²⁴⁵ The items listed for discussion are not intended to be exhaustive.²⁴⁶ The extent to which data protection issues may impact the taking of evidence fits within the types of issues to be addressed early, and if the parties do not put this on the agenda for the procedural conference, the tribunal should do so as the data protection rules potentially apply to the tribunal itself and other Arbitral Data Custodians beyond the parties (and to avoid surprises later).²⁴⁷ In addition to minimizing general data protection risk, this practice fosters compliance and encourages data protection concerns to be voiced at the outset, rather than later on in the proceedings (for example in response to a disclosure request), which could create delays. Further, by giving the parties the opportunity to plan the arbitral process from the outset in a way that minimizes data protection risks, parties are limited in their ability to later claim that these issues were not properly taken into consideration.

b. Document Disclosure

The IBA Rules foresee in Article 3 a system for the voluntary exchange of data between the parties and as ordered by the tribunal when the parties cannot agree.²⁴⁸ The GDPR requires among other things that the processing of personal data be minimized.²⁴⁹ This may impact the amount of documentary evidence to be reviewed and exchanged during the course of the arbitration both voluntarily and as ordered by the tribunal, as well as the evidence submitted to the tribunal. Minimizing the amount of data exchanged in compliance with the GDPR will be assisted by early tribunal input as to the extent and nature of the proof to be submitted in support and defense of the claims. In high value complex disputes, the parties will be inclined to submit as much proof as possible through extensive document review of their own documents and those obtained from the other side, but

245. See COMMENTARY ON THE REVISED TEXT OF THE 2010 IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, at 6 (2010) [hereinafter IBA COMMENTARY ON RULES].

246. *Id.*

247. See, e.g., ICCA Cybersecurity Protocol, *supra* note 202, art. 14.

248. See IBA RULES, *supra* note 7, art. 3.

249. See GDPR, *supra* note 2, art. 17, rec. 65, at 12.

this may increasingly need to be tempered by data protection concerns, including data minimization.

The process foreseen by the IBA Rules provides that each party shall first submit their reliance documents, followed by any production requests for documents from the opposing party. With respect to the production of documents from the opposing party, Article 3 (3) of the IBA Rules²⁵⁰ provides that a Request to Produce should contain:

- (a) (i) a description of each requested Document sufficient to identify it, or
 - (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
- (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
- (c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and
 - ...
 - (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

When objections to the production are raised:

the Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Article

250. IBA RULES, *supra* note 7, art. 3.

9.2 applies; and (iii) the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.²⁵¹

The question is what role data protection issues including data minimization should play in making this determination.

Article 9(2) of the IBA Rules provides further that:

2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:

(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;

(c) unreasonable burden to produce the requested evidence; [or]

...

(g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.²⁵²

Article 9(2) provides that an arbitral tribunal can exclude evidence because of a legal impediment. The Official Commentary to the IBA Rules explains that the legal impediment provision found in Article 9(2)(b) was geared at privileged documents and communications, rather than other legal impediments such as those contained in the GDPR.²⁵³ However, the underlying principle could be applied to GDPR-related legal impediments. Furthermore, data protection restrictions could also be deemed to make the burden of producing the document unreasonable under (9(2)(c) and to be relevant to the tribunal's consideration under 9(2) (g) of "procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling."²⁵⁴

Going forward under the GDPR, one can expect that data protection considerations will increasingly be raised in deciding on disclosure requests. This will require a balancing of the requesting party's need for the documents against the data protection risks created and reasonable means to limit those risks.²⁵⁵ This will

251. *Id.*

252. *Id.* art. 9(2), at 19.

253. See IBA COMMENTARY ON RULES, *supra* note 245, at 25.

254. IBA RULES, *supra* note 7, art. 9, at 19.

255. See generally GDPR, *supra* note 2, Rec. 4, at 2.

typically include establishing a data protection protocol that will form the basis for the disclosure as well as the other processing of Personal Arbitral Data. WP29 has said in the context of US litigation discovery that data protection concerns favor limiting data disclosure as much as reasonable by undertaking local data review and scrubbing before data is disclosed or transferred outside the European Union, as well as pseudonymization where possible.²⁵⁶ However, the narrowly focused nature of disclosure in international arbitration means that the data disclosure requests will be much more limited. Furthermore, the arbitral process is often confidential (or can be made so), which means that the risks created by disclosure are minimized compared with the use of data in court proceedings.

Issues to be considered by the tribunal in balancing these competing concerns may include, among other things, procedures for limiting the data protection exposure through data protection protocols and other procedures limiting the risks, reasonable measures to avoid unnecessary third country data transfers, the objecting party's previous treatment of the data, pseudonymization where feasible, the scope of the compliance risk, and the importance of the data for the arbitration. In deciding these issues, the GDPR applies a risk-based analysis to compliance based on proportionality (as also set forth in Article 9(2)(g) of the IBA Rules above) and taking into account "the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons."²⁵⁷ WP29 has already taken the express view that parties "have a legitimate interest in accessing information that is necessary to make or defend a claim, but this must be balanced with the rights of the individual whose personal data is being sought."²⁵⁸

It is beyond the scope of this Article to address liability issues or how data protection might impact enforcement of the award. However, in measuring the risk of non-compliance, the tribunal will be cognizant of the fact that the GDPR will be enforced primarily by Member State supervisory authorities acting as independent agencies with the authority to investigate and issue significant fines and criminal sanctions, and further that each data controller is independently liable for infractions.²⁵⁹ With serious GDPR violations

256. Disclosure Guidelines, *supra* note 75, at 12.

257. GDPR, *supra* note 2, art. 24(1), at 47.

258. Disclosure Guidelines, *supra* note 75, at 1.

259. See GDPR, *supra* note 2, art. 58, at 69.

(including unlawful transfer) carrying fines of up to EU€20 million or four percent of annual global gross revenue, supervisory authorities carry significant clout, which risk will need to be taken into account in addressing these issues by the parties, their counsel, and the tribunal.²⁶⁰

V. CONCLUSION

The GDPR is of potential application to virtually all data processing in arbitrations with a nexus to the European Union. The GDPR imposes extensive requirements on the processing of data during an arbitration which are challenging to apply in the arbitral context in that they apply across the board to virtually everyone in the process and create overlapping rights and duties. Furthermore, both third countries and all twenty-eight Member States are likely to have somewhat different data protection laws as they apply to arbitration given that the GDPR allows for derogations, some of which apply to arbitrations. The reality is that determining the matrix of data protection laws potentially applicable to a dispute will itself be a complex exercise and will likely result in the application of many countries' laws to the same dispute and the various Arbitral Data Custodians, which could also create overlapping and conflicting obligations (and significant confusion). However, notwithstanding these difficulties, all Arbitral Data Custodians covered by the GDPR should make good faith efforts at compliance because the data protection rules established in the GDPR are of mandatory application and the risk of noncompliance is steep.

Interestingly, while these issues have been considered extensively in the context of litigation, international arbitration is virtually a green field.²⁶¹ The reasons for this are unclear and are likely to be numerous, but the lack of attention may stem in part from the fact that the expansion of data protection laws has been led by the European Union, which, until recently, has for the most part avoided international arbitration. This has now changed and the European Union is highly focused on arbitration at least in the investor-State context. At the same time, the GDPR has become a compliance imperative on par with antitrust and anticorruption for the companies that use international arbitration services. Over time, these companies

260. See, *id.*, art. 83, at 82.

261. See, Burianski & Reindl, *supra* note 15 (taking the same view).

will likely make data protection compliance an imperative for international arbitration in the same way they have for the other aspects of their businesses. Moreover, arbitrators and other Arbitral Data Custodians will all be concerned about their own liability, which itself will create a further compliance incentive.

In deciding what this means in practice, the Sedona Protocol and the Disclosure Guidance issued by WP29 in the context of discovery for US civil litigation provide useful starting points for addressing data protection compliance in international commercial arbitration. However, the issues raised by wide-ranging US discovery demands and the limited data disclosed during an international arbitration are obviously different. In addition to the more limited scope of disclosure in international arbitration, relevant differences include the fact that arbitration is a consensual process based in contract. Further, international commercial arbitration is often confidential, or could be made so, which further lowers the data protection risk.

As addressed herein, this will all need to be taken into account in applying the GDPR to international arbitration. When obligations conflict, decisions will have to be made about how to comply, which should reflect a reasonable good faith effort to comply with GDPR principles and to protect the data subject's rights in line with those principles, within the constraints of the arbitral process and the requirements of due process. The role of the parties, their counsel, and the tribunal is to undertake a careful and practical analysis of the need for the data. This need for the data will then need to be balanced against the data protection risks and how those risks might be mitigated taking into account proportionality. As set forth in Appendix D, this should be reflected when designing and implementing a reasonable data protection protocol and deciding disclosure requests within the context of an arbitration, while at the same time protecting the due process rights of the parties.

The arbitration community should consider whether to engage proactively with the European Data Protection Board (which will replace WP29) and/or Member State supervisory authorities, to address these issues proactively, keeping in mind that, while clarity is preferable, it may come at a price in terms of compliance obligations. One possibility would be the development of an approved Code of Conduct for data processing in international arbitration. The European Union has strongly encouraged the development of such codes generally, which the European Commission has said in the context of

third country data transfers are intended to “allow the development of more tailor-made solutions for international transfers, reflecting, for instance, the specific features and needs of a given sector or industry, or of particular data flows.” Under the DP Directive only one code of conduct has ever been approved, but the European Commission would like this to change under the GDPR.²⁶² However, this will remain a time consuming and arduous process with an uncertain outcome. However, the current uncertainty, combined with the increased compliance risk to all Arbitral Data Custodians, may mean that they will err on the side of caution in ways that are even more damaging to the arbitral process.

In sum, the application of the GDPR to international commercial arbitration will be challenging. It is therefore fortuitous that one of arbitrations many strengths is its flexibility. This should enable the GDPR to be applied to arbitration in a manner that respects both the data subject’s rights under the regulation and the parties’ rights in the arbitration, as well as the arbitrators’ duties. This is subject to the provision that when applying the GDPR to international commercial arbitration the regulators respect its decision-making function, and recognize the cross border, consensual and potentially confidential nature of the arbitral process.

262. See Commission Communication, *supra* note 49; GDPR, *supra* note 2, arts. 40, 46, at 63-64, 69.

APPENDIX A

Data Protection Questions to Pose in Planning an Arbitration

1. Does the arbitration agreement address data protection?
2. What does the applicable data retention policy provide?
3. What does the data protection policy or agreements say about use of the data for dispute resolution?
4. Where is the data?
5. How will the data be collected? Who will collect the data?
6. What kind of data is it?
7. Is the data considered “personal data” or otherwise covered under applicable the data protection laws? If so, where?
8. Is any of the data “special category data” or covered by more stringent data protection laws?
9. Does the collection and use of the data for a potential arbitral claim or defense provide an adequate basis for processing the data under the relevant data protection laws? If not, what needs to be done to ensure compliance?
10. Is the amount of data being collected fair and proportionate to the claim? Have efforts been taken to minimize the amount of data collected? How and where will it be culled? Is pseudonymization feasible?
11. Is it required to send a data privacy notice informing the individual “data subjects” that their data is being collected for use in a potential arbitration or is this already covered by applicable data protection policies? Is this practically possible if data from many individuals are collected? What impact would notification have on any confidentiality of the proceedings (that may have yet to be brought)?
12. Does the proposed method of data collection and review provide adequate data security?
13. Does the data collection and review require the transfer to third countries, and, if so, is this transfer lawful?

14. What external counsel would be best for the case?
Where are they located? Do they have an EU establishment? Are any data transfer restrictions implicated? How will travel be impacted?
15. What would be the preferred candidate for arbitrator?
Where are they located? Do they have an EU establishment? What is their data infrastructure?

*APPENDIX B*Data Protection Questions to Consider in Crafting the
Arbitral Procedure

1. What kinds of Personal Arbitral Data will be processed during the arbitration?
2. Is any Personal Arbitral Data potentially covered by the GDPR or other applicable data protection laws? If so, where? What legal obligations are imposed under the GDPR, Member State law, or third country laws?
3. What kind of activities will be undertaken with the Personal Arbitral Data during the arbitration itself? Where will it be processed? How will it be culled? Who will undertake the data analysis? Is pseudonymization an option?
4. Does the Personal Arbitral Data include special categories of data under the GDPR or the laws or regulations of any other countries? Is it covered by any specific laws or rules (like HIPPA in the United States)?
5. How will any applicable data protection laws potentially impact the processing of the data during the arbitration? What is the legal basis for the processing?
6. How will any applicable data protection laws potentially impact the disclosure of the data for the arbitration? To opposing counsel and experts? The institution? The arbitral tribunal?
7. Will the data be transferred outside the European Union? Can the transfer of Personal Arbitral Data outside the European Union during the arbitral process be minimized? For example, should restrictions be placed on access to documents from outside the European Union? How will travel impact third country data transfer?
8. Are data privacy notices required and if so when? By whom? How will the data privacy notice or other communications with the data subjects address the specifics of the arbitral process (including arbitrator confidentiality)?

9. Before Personal Arbitral Data is transferred or disclosed during the arbitration, what should the disclosing party do to ensure compliance by the transferor with any applicable data protection laws? Will this be implemented through a data protection protocol by agreement or tribunal order?
10. Where is the party to which data may be disclosed located? If necessary could Personal Arbitral Data be lawfully transferred to (1) opposing party, (2) opposing counsel, (3) any experts, (4) the arbitrator(s), (5) the arbitral institution, and (6) amongst arbitrators? What and how will adequate safeguards be implemented?
11. What responsibilities does the party to whom Personal Arbitral Data is disclosed have under the law? By agreement? Through a data protection protocol?
12. What cybersecurity and other legal requirements should be imposed on the processing of Personal Arbitral Data during the arbitration?
13. What rights does the data subject have and how will these rights be respected? To the extent that these rights are overlapping and apply to all the Arbitral Data Custodians, should the Initial Data Controllers (typically the parties) be allocated responsibility for compliance with those rights that require communication with the data subject (*e.g.*, transparency obligations (including any required data privacy and transfer notices), right to review and rectification, *etc.*)? If so, will indemnification obligations will be put in place in the case of breach?
14. What notifications apply if Personal Arbitral Data is breached?
15. Who is legally responsible if the cybersecurity and other legal requirements imposed on the processing of Personal Arbitral Data are violated?
16. What role should the arbitral tribunal play in addressing data protection issues? between the parties? The institution?
17. To what extent do these rules and obligations apply to the arbitral tribunal? The institution? Can this risk be minimized?

2018] *EU GENERAL DATA PROTECTION REGULATION* 925

18. Will a data protection protocol be put in place? Who is responsible for preparing the protocol? Who will sign it? When should it be implemented?
19. Does the potential that the award may be made public during the enforcement stage limit the extent to which reference can be made to Personal Arbitral Data in the award? How should this be addressed?

APPENDIX C

The Sedona Conference Cross-Border
Data Safeguarding Process + Transfer ProtocolUnited States Discovery for Civil Litigation
INSTRUCTIONS

The Sedona Conference Cross-Border Data Safeguarding Process + Transfer Protocol (the “*Protocol*”) has two interrelated purposes. First, it is an ease-of-reference guide that identifies common techniques used to achieve best possible legal compliance with conflicting U.S. eDiscovery rules and extra-U.S. Data Protection Laws when foreign data needs to be processed and transferred for the purposes of U.S. Litigation. Second, the *Protocol* creates a record that can be presented to those with regulatory responsibilities for Data Protection, evidencing the steps taken to best comply with Data Protection Laws. The *Protocol* must be customized to record fully the actions undertaken to maximize legal compliance and should include a detailed explanation of the circumstances and factors taken into account. The following instructions should be used with the chart below:

1. Explain the reasons for preserving or collecting the data. Identify clearly the U.S. proceedings for which the Protected Data is processed and transferred. If the Protected Data is to be preserved or collected for reasons other than litigation, identify the legal proceeding requiring the processing and transfer.
2. Determine whether data required to be preserved, processed, or disclosed in the U.S. is subject to Data Protection Laws and, if so, which laws apply. Assess whether alternative, non-protected, sources of that relevant data exist. To the extent possible, produce non-protected sources of data, making production of relevant Protected Data less necessary. Determine the sources of relevant Protected Data, the methods of preservation, if it has been or will be further processed, and where it will ultimately be transferred.
3. Describe measures taken to minimize the processing and transfer of Protected Data, explaining the methodology

used to filter and eliminate irrelevant Protected Data. These culling activities may begin with a questionnaire or an in-person interview, followed by iterative use of software tools and other processes, creating a subset of relevant and necessary Protected Data for disclosure. Consider compiling Protected Data locally or in a country that is not subject to the transfer restrictions under the applicable Data Protection law. Identify categories of Protected Data potentially affected by the applicable Data Protection Laws.

4. Describe the various categories of Protected Data that will be processed or transferred by type, including personal and sensitive personal data, trade secrets data, restricted data, consumer data, state secrets, etc.
5. If appropriate, consider using the Model U.S. Federal Court Protective Order .. or similar protective orders, or stipulations with data protection language providing agreed-upon or court-ordered restrictions on the use, disclosure, and dissemination of Protected Data. Consider including options to redact and designate Protected Data as “Confidential” or “Highly Confidential.” Further, consider restrictions related to the onward transfer of data once it reaches the U.S.
6. Strive to provide a transparent processing and transfer protocol to the Data Subjects, identifying impacted Data Subjects and the means to communicate to them the purpose for the processing and transfer of Protected Data, the categories of Protected Data at issue, the duties and obligations attendant to that Protected Data, data protection measures that will or have been put in place, and such other factors as may be required or appropriate under the circumstances. Such communications to Data Subjects may include postings, one-on-one meetings, group presentations, or notice and acknowledgement documentation requesting consent and providing question and answer information, in writing or orally, in both English and the local language.
7. Identify steps taken to secure Protected Data by describing the protective measures undertaken by the Data Controller, including, for example, agreements with

third parties, use of a protective order, the nature and type of encryption at rest and in transit, limitations on access to the Protected Data, and any other means of securing the Protected Data. Also describe procedures for responding in the event of a data breach.

8. Describe the efforts undertaken if notice is contemplated or required. Others to be consulted may include the Data Controller's data protection personnel such as data protection officers, data protection authorities with jurisdiction over the Protected Data, or local company organizations such as works councils.
9. Identify mechanism(s) used to legitimize the transfer of Protected Data. For the EU, depending on the U.S. recipient and transfer purpose, these mechanisms typically include the use of Binding Corporate Rules (intra-group transfers only), the new Privacy Shield certification,²⁶³ Model Contracts, or some other means of satisfying transfer safeguard requirements.
10. Document procedures used to destroy or return Protected Data to the Data Controller when it is no longer necessary.
11. Consider identifying those responsible for overseeing preservation, processing, and transfer of the Protected Data and obtaining their signatures to signify that the steps recorded were in fact taken.

263. The new EU/U.S. Privacy Shield came into effect on June 12, 2016, with certification available since August 1, 2016 (*Commission Implementing Decision of 12.7.2016 Pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequacy of the Protection Provided by the EU-U.S. Privacy Shield*, COM (2016) 4176 final (Dec. 12, 2016), available at http://ec.europa.eu/justice/data-protection/files/privacy-shield-adequacy-decision_en.pdf [<https://perma.cc/N2HT-V2B6>] (archived May 30, 2018), replacing the old EU-US Safe Harbor certification after the Commission decision on which it was based was declared invalid by the Court of Justice of the European Union on October 6, 2015.

The Sedona Conference Cross-Border Data Safeguarding Process + Transfer Protocol United States Discovery for Civil Litigation	
ACTION ITEM	INFORMATION
1. Purpose for processing and transfer of Protected Data	Identify the type of legal proceeding for which Protected Data is being processed or transferred (e.g., reasonably anticipated or active civil litigation; government investigation; subpoena) with specific identification information (e.g., case name, docket number, filing location, filing date, description of legal proceeding).
2. Data Protection Laws at issue and specific sources of Protected Data	Identify the country whose Data Protection Laws are at issue, the specific Data Protection Laws implicated, and the significance of each; identify the location of the Protected Data, where it is processed, and the location to which it will be transferred.
3. Measures taken to minimize the processing and transfer of Protected Data	Explain methodology used to narrow and cull Protected Data for processing and transfer purposes to include only relevant and necessary material (e.g., use of preliminary questionnaires and interviews; use of technology and processes to de-duplicate and apply iterative searches; filter and compile information in a country not subject to transfer restrictions under the applicable Data Protection Laws).
4. Categories of Protected Data processed and transferred	Identify categories of Protected Data processed and transferred (e.g., information that is likely to identify the Data Subject, sensitive personal data, trade secret data, restricted data).

5. Limitation on use and dissemination of Protected Data	Identify stipulations or protective orders and their material terms or attach a copy (e.g., <i>Model U.S. Federal Court Protective Order</i> ; general protective order; confidentiality agreement; Data Protection stipulation).
6. Transparency of processes and transfers concerning Protected Data	Identify steps taken (if and as appropriate or feasible) to make information available or to notify Data Subjects of processing, transfer, and onward transfer of Protected Data (e.g., internal communications; posted notice).
7. Steps taken to secure transferred Protected Data	Identify steps taken to secure Protected Data (e.g., third-party agreements, nature and type of encryption, password protection, access limitation and control).
8. Compliance with notification obligations (if any) to others with oversight of data protection	Identify others involved or who may need to be consulted with responsibility for Data Protection implementation (e.g., the company's data protection officer or works council; government data protection authority); explain their involvement and means of notification.
9. Bases upon which Protected Data is transferred	Identify Protected Data transfer mechanisms relied on for each U.S. recipient (e.g., EU/U.S. Privacy Shield Certification, EU Model Contract Clauses, Binding Corporate Rules, or other means of satisfying transfer safeguard).
10. Disposition of transferred Protected Data when no longer needed	Describe disposition of processed and transferred Protected Data (e.g., destruction or return of Protected Data) when no longer needed to fulfill obligations of the specific matter.
11. Person responsible for transfer and processing of Protected Data	Consider identifying the person or persons ultimately responsible for processing and transferring Protected Data and requiring their signed acknowledgement that the steps recorded have been taken.

*APPENDIX D*Template Data Protection Protocol for Arbitrators
Background

When the GDPR applies to an arbitration, compliance inevitably requires the adoption of a data protection protocol. The highly regarded SEDONA PROTOCOL²⁶⁴ set forth in Appendix C of this Article was developed in the context of data transfer for the purposes of discovery for US litigation. The principles contained in the SEDONA PROTOCOL are relevant to disclosure for purposes of international arbitration. However, given that it was adopted in the context of cross border discovery for United States litigation, it requires modification when applied to disclosure for international arbitration.

To assist arbitrators in this process, this ARBITRAL DATA PROTECTION PROTOCOL proposes a template for arbitrators to use as a guideline in developing a data protection protocol for use in international commercial arbitrations governed by the GDPR. Like the SEDONA PROTOCOL, it is intended to provide “an ease-of-reference guide that identifies common techniques used to achieve best possible legal compliance with conflicting” requirements for data processing in international arbitration covered by the GDPR, and at the same time creating “a record that can be presented to those with regulatory responsibilities for Data Protection, evidencing the steps taken to best comply with applicable data protection laws.”²⁶⁵ While the parties may adopt a broader data protection agreement, this template is geared towards the issues that will typically need to be addressed during the arbitral process itself. It will require customization on a case-by-case basis to demonstrate the steps taken to comply with the GDPR and an explanation of the circumstances and factors taken into account in constructing the protocol. The principles set forth in this Article²⁶⁶ and the instructions described Appendix C with respect to the SEDONA PROTOCOL will be helpful in applying the concepts set forth in this ARBITRAL DATA PROTECTION PROTOCOL.

264. See SEDONA PROTOCOL, *supra* note 77, Appendix C of this Article.

265. *Id.*

266. Kathleen D. Paisley, *It's all About the Data: Impact of the EU General Data Protection Regulation*, 41 FORDHAM INT'L L.J. 841 (2018)

Template Data Protection Protocol for Arbitrators ²⁶⁷	
ACTION ITEM	INFORMATION
Data controllers and processors	Identify who will act as controllers and processors of Personal Arbitral Data during the arbitration. Each data controller and processor should sign the ARBITRAL DATA PROTECTION PROTOCOL. Identify the Initial Data Controller who engaged in the original processing of the data (typically a party to the arbitration) and who will be responsible in the first instance for complying with certain data subject rights. Consider the additional obligations of the Initial Data Controllers and any indemnities they should provide to the other secondary controllers. If relevant, identify others who may need to be consulted with responsibility for data protection implementation; explain their involvement and means of notification.
Member State Exemptions	Identify any Member State exemptions being relied upon to limit the data subject rights and which controllers are covered by such exemptions.
Categories of Personal Arbitral Data to be processed during the arbitration	Identify categories of Personal Arbitral Data that will be processed and transferred during the arbitration (<i>e.g.</i> , types information that is likely to identify data subjects (emails, lab notebooks, agreements, construction logs, pleadings, witness statements, awards, <i>etc.</i> and special category data), as well as commercially sensitive and/or restricted or highly confidential data.

267. Originally promulgated by the Sedona Conference, and adapted by the Author for use in international commercial arbitrations governed by the GDPR.

Legal basis for the processing	Identify the legal basis for the processing (typically the legitimate interests of the controller) and what has been done to comply with the requirements imposed by the GDPR ²⁶⁸ on processing for that purpose. If special category data will be processed, provide justification for the processing of that data.
Third-country data transfer	Identify whether any Personal Arbitral Data will be transferred outside the European Union and the legal basis for the transfer (usually the legal claims exemption and/or the legitimate interests of the data controller). Identify what has been done to comply with the legal requirements including notice that may be imposed on transfer. Identify the means by which data may be transferred outside the European Union and whether Personal Arbitral Data can be downloaded, emailed, or stored on computers outside the European Union. Consider the impact of travel on data transfer.
Confidentiality	Identify whether the arbitral process will be confidential and consider entering into confidentiality agreements addressing specific issues. Consider the confidentiality of the award and whether it can/should be redacted to ensure that Personal Arbitral Data will not be made public. Address the confidentiality of arbitrator communications within the tribunal and with the institution.

268. All references in this ARBITRAL DATA PROTECTION PROTOCOL to the GDPR should be deemed to include applicable Member State laws implementing the GDPR.

Cybersecurity	Identify the cybersecurity measures that will be employed to protect the data, including the principles discussed in GDPR and the ICCA Cybersecurity Protocol to the extent consistent with the GDPR (<i>e.g.</i> , use of the cloud, nature and type of encryption, password protection, access limitation and control, <i>etc.</i>). Consider the impact of travel and how Personal Arbitral Data can be stored or retrieved during travel outside the European Union.
Data Minimization	Identify the steps to be undertaken to ensure that only relevant and necessary data is processed during the arbitration. Explain the methodology to be applied to narrow and cull Personal Arbitral Data for processing and transfer during the arbitration to include only relevant and necessary material (<i>e.g.</i> , use of preliminary questionnaires and interviews; use of technology and processes to de-duplicate and apply iterative searches; identification and elimination of special category data where possible, consideration of pseudonymization where possible, filtering and compiling information in an EU country, <i>etc.</i>)
Transparency/Data Privacy Notices	Identify what steps are required to make information available to data subjects about the processing, transfer, and onward transfer of Personal Arbitral Data for purposes of the arbitration (<i>e.g.</i> , internal communications; posted notice). Consider whether additional data privacy notices may be required. Consider whether the Initial Data Controller should be primarily responsible for meeting such transparency requirements and providing any required notices. Consider whether the Initial Data Controller should indemnify the other secondary controllers for failure to provide adequate notice or other rights under its control. Address the

	confidentiality of arbitrator communications within the arbitral tribunal and with the institution and the impact this has on transparency obligations.
Data rectification, erasure, and no further processing	Identify what steps will be undertaken if a data subject exercises its right to rectify, erasure or stop processing of its Personal Arbitral Data. Confirm whether the Initial Data Controller should be primarily responsible for addressing such requests in the first instance and consider how the tribunal will be informed of the request and if the data has been altered as a result. Consider whether the Initial Data Controller should indemnify the other secondary controllers for failure to comply with the data subject rights under its control.
Data retention	Describe how long data will be retained for purposes of the arbitration and how it will be disposed of (<i>e.g.</i> , destruction or return of Personal Arbitral Data) when no longer needed to fulfill obligations of the controllers of the data. The disposal date is likely to differ for each controller given their legal and ethical retention obligations.
Data Breach Notices	Identify the exact process that will be undertaken if a data breach occurs, and the notification deadlines imposed taking into account the very strict 72-hour deadline established in the GDPR for informing the relevant supervisory authorities. Describe exactly what will be considered a data breach.
Indemnification	Consider whether the Initial Data Controllers should provide indemnities to the other secondary controllers for failure to comply with mandatory data subject rights.



the global voice of
the legal profession®

ICCA-IBA Joint Task Force on Data Protection in International Arbitration

Roadmap to Data Protection in International Arbitration

DRAFT

28 February 2019

DRAFT

Introduction

This ICCA/IBA Roadmap to Data Protection in International Arbitration seeks to provide a framework for arbitration professionals to better understand how data protection and privacy principles may affect their activities and what obligations they may have in the context of an arbitration.

While the details of data protection regulation are complex, the underlying principles are not and arbitration professionals and parties should be aware of those principles and to manage each arbitration in a manner that is consistent with them.

The goal of data protection legislation is to protect the privacy of individuals by reducing the volume of personal data that is processed, including in arbitration, and by ensuring that only necessary personal data is processed in a secure manner, during as limited a time frame as possible in light of the purpose of the processing.

This Roadmap aims at fostering a better understanding of data protection principles within the arbitration community in a user-friendly manner with references to checklists and source materials in the Annexes, and with further detail on the main concepts in the Explanatory Notes.

a. Why should you care?

Every participant in an arbitration who has access to personal data (including the parties, their counsel, arbitral institutions, arbitrators, experts, vendors and service providers (e-discovery experts, information technology professionals, court reporters, translation services, etc.) referred to as “**Arbitral Participants**”) should consider for each individual case whether any data protection laws may apply and if so, what that means for them and for the conduct of the arbitration.

It goes beyond the scope of this Roadmap to survey the hundreds of data protection laws in force around the world today. Instead, the General Data Protection Regulation¹ (“**GDPR**”) is used in this Roadmap as the reference to explain how data protection may have an impact on an arbitration. We chose the GDPR because:

- it is the most comprehensive and most onerous data protection regulation in force to date;
- the European approach is widely drawn upon by jurisdictions outside the EU as a basis for their laws, and, as a result, is quickly becoming a global standard;
- it is likely to apply to you either as matter of law or contract whenever you are involved in an arbitration with *any* EU nexus (whether through the parties, the institution, other arbitrators, witnesses, experts or otherwise);
- when it does apply, the GDPR applies broadly to virtually every action (or inaction) in a typical arbitration; and
- it imposes serious potential fines, civil liability (which may be joint and several), criminal penalties, and should also be taken into account for the purposes of ensuring that an arbitral award is enforceable.

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

For your reference, Annex 8 contains a table including a non-exhaustive list of references to some of the national and regional data protection laws of importance to arbitration.

b. What does data protection mean for arbitration?

Although many of the principles underlying the GDPR regime previously applied both in the EU and to arbitration under the Data Protection Directive, the entry into force of the GDPR in May 2018 has put a spotlight on the importance of data protection in arbitration [*see Explanatory Note 1*].

As a result, the users and providers of arbitration services are becoming increasingly aware of their obligations, and data subjects of their rights, whenever personal data is processed, including in the context of arbitrations. This increased awareness comes with increased risk of enforcement and supervision efforts of the regulatory authorities, with potential for non-compliance can add up to 4% of global gross revenue or EUR 20 million, whichever is higher [*see Explanatory Note 1*].

The need for compliance with the GDPR has led companies, which are the primary users of arbitration services, throughout the EU and elsewhere to review their data collection, retention, processing and security policies. For the same reason, all arbitration professionals need to do the same and consider what data they process, where, by what means, with which data security measures, and for how long.

Arbitration plays a major role in the administration of justice in cross-border disputes. Moreover, the processing of personal data (by means of communication, as well as documentary and witness evidence) is an essential component of the arbitral process. The consensual nature of arbitration, the independence of arbitral decision-making and the secrecy of deliberations are fundamental tenets of the arbitration process. Applying the GDPR to arbitration therefore requires balancing the rights and obligations contained in the GDPR with the fundamental rights of defence and due process at stake in every arbitration (Art. 24).

Each arbitration case is different in nature and the application of the GDPR to an arbitration and its participants depends on numerous factors, including (among others) where the Arbitral Participants are established, whether they engage in targeting EU data subjects, where the relevant data is located, where the administering institution is based, and whether the applicable national data protection law(s) contain any relevant exemption or derogation.

The fact-specific application of the GDPR to an arbitration makes it impossible for this Roadmap to provide one-size-fits all solutions. It is the responsibility of every individual Arbitral Participant to ascertain in relation to each arbitration in which he/she is involved what data protection obligations apply and what measures should be taken to comply with those obligations and what risks they face if they don't comply. These are individual responsibilities with individual liability. GDPR violations may result in exposure to administrative fines, civil and/or criminal liability and further sanctions and may even put the enforceability of an award at risk.

c. The structure and limitations of the Roadmap

None of the EU institutions, supervisory authorities or courts have directly addressed the application of the GDPR to arbitration. This Roadmap attempts to fill the void by identifying the issues that may arise when the GDPR's provisions are applied in the arbitration context. This Roadmap identifies solutions that may be considered to ensure that the processing of personal data in arbitration is undertaken in a manner that is consistent with both the GDPR and the parties' fundamental due process rights.

The main source of guidance referred to in this Roadmap are the provisions of the GDPR itself, as well as its recitals. While there is no specific guidance about how data protection applies in arbitration, the European Data Protection Board (the "EDPB") and its predecessor, the Article 29 Working Party (the "Working Party"), have provided useful general guidance about the privacy principles addressed in this Roadmap, which is also referred to herein. Moreover, recent ECJ decisions are important reminders that the ECJ interprets EU data protection laws very broadly, which is worth bearing in mind when applying the GDPR in concrete cases.²

This Roadmap is intended to serve as a concise reference to foster Arbitral Participants' understanding of the application of data protection principles in arbitration. The Roadmap is accompanied by:

- a set of Annexes, providing practical information, a glossary, checklists and references aimed at enabling Arbitral Participants to apply data protection principles in the practice of arbitration; and
- a set of Explanatory Notes, providing greater detail on the issues identified in the Roadmap and examples with references to resources the Arbitral Participants may want to refer to.

The entirety of the Roadmap, its Annexes and Explanatory Notes will necessarily be a living document. On the date of publication of its first edition [month] 2019, there simply is no regulatory guidance or EU case law on the question as to whether and how the GDPR applies in arbitration. It is hoped that over time the supervising authorities and courts will provide clarity on the implications of the GDPR for each category of Arbitral Participants and for the arbitral process as a whole.

It bears noting that the Roadmap consistently refers to the EU, while the scope of application of the GDPR extends to the European Economic Area (EEA), which encompasses in addition to the EU Member States also Iceland, Liechtenstein and Norway. However, as the EU is a notion that is commonly understood worldwide, this Roadmap refers to the EU instead of the EEA, but read EEA.

Lastly, nothing in this Roadmap, its Annexes or the Explanatory Notes can be taken as legal advice. This Roadmap provides information and resources to enable Arbitral Participants to more easily understand their obligations. However, compliance with the applicable data protection regulations in a particular case remains the responsibility of each individual Arbitral Participant. Arbitral Participants should seek legal advice with respect to their compliance with data protection law in the specific circumstances of their data processing, where appropriate.

² See Case C-210/16 *Wirtschaftsakademie Schleswig-Holstein* ; Case C-25/17 *Tietosuojavaltuutettu* ; *CJEU rules on joint controllership – what does this mean for companies?*

TABLE OF CONTENTS

I.	GDPR FOR ARBITRATION IN A NUTSHELL.....	1
a.	Broad Territorial Scope	1
b.	Broad Subject Matter Scope	1
c.	Compliance Standards	2
d.	Key Obligations	4
e.	Derogations	5
f.	Supervision and Sanctions	5
II.	APPLICATION OF THE GDPR TO ARBITRAL PROCEEDINGS.....	7
a.	Processing outside of a specific arbitration	7
b.	Planning arbitration proceedings	7
c.	Data protection principles applicable during arbitral proceedings	9
1.	Lawfulness of the processing of personal data, sensitive data and data transfers	9
2.	Cybersecurity requirements	13
3.	Notification requirements	14
4.	Data retention and destruction	15
5.	Data breach notification	16
6.	Insurance and indemnities	17
d.	Applying data protection principles during arbitral proceedings	18
1.	Risk-based approach and record-keeping	18
2.	Procedural mechanisms	19
3.	Taking of evidence	20
4.	Compliance with data subject rights	21
5.	Arbitral awards	23

I. GDPR FOR ARBITRATION IN A NUTSHELL

a. Broad Territorial Scope

The GDPR applies to the processing of personal data:

- (i) in the context of the activities of an establishment of a controller or a processor in the EU; or
- (ii) where the processing activities are related to the offering of goods or services *in* the EU (regardless of residence or citizenship) (Art. 3)³.

Where even one Arbitral Participant is established in the EU or targets data subjects in the EU, regard must be had to the GDPR by all other Arbitral Participants.

An establishment implies stable arrangements, therefore, in deciding whether the data processing takes places within the context of an EU establishment, the first question is whether the data processor or controller undertakes activities in the EU through stable arrangements, and, if so, whether the data processing activities at issue are being carried out in the “*context*” of those activities. If the answer to both questions is affirmative, those data processing activities are covered by the GDPR wherever they take place in the world.

Where the data processing does not taken place in the context of an EU establishment, the second question is whether it “relates” to the offering of a service that was targeted to EU data subjects. If that test is met, the data processing and all related data processing is also subject to the GDPR.

Lastly, even where the GDPR does not apply as a matter of law, its main provisions may still apply as a matter of agreement, which agreement is required before data can be transferred outside the EU to entities or individuals who are not subject to the GDPR. This leads to significant scope creep, even beyond the already broad territorial reach of the GDPR.

b. Broad Subject Matter Scope

The GDPR applies whenever:

- (i) “personal data” is
- (ii) “processed”

during activities falling within its broad territorial scope or as a matter of agreement. Both of these concepts are broadly defined and would cover most activities in the context of a typical arbitration.

“*Personal data*” under the GDPR means any information relating to a natural person who can be directly or indirectly identified from that information (Art. 4). It is irrelevant to the GDPR’s application that the personal data is contained in a business-related document (such as work

³ Unless otherwise stated, all references to Articles and Recitals are to the GDPR.

files, emails, lab notebooks, agreements, construction logs, etc.). Information that is clearly *about* someone is also likely to constitute personal data. That includes opinions or assessments (for example, as to their credibility as a witness), whether subjective or objective, true or false. The notion of personal data under the GDPR is much wider than the US concept of Personally Identifiable Information (PII), and a substantial portion of information exchanged during a typical international arbitration contains data that qualifies as personal data in the sense of the GDPR [see Explanatory Note 5].

Understanding the concept of “*personal data*” is key to understanding how the GDPR operates in practice because each individual “*data subject*” is granted significant rights, which rights potentially apply to everyone who is identified or could be identified from the documents and evidence submitted in an arbitration. It is then the obligation of virtually everyone who has access to that personal data not only to comply with the GDPR, but also to be able to demonstrate compliance [see Explanatory Notes 15 - 17].

The GDPR imposes a set of rules and other obligations that must be complied with whenever personal data is “*processed*.” “*Data processing*” is defined broadly in the GDPR to include not only active steps such as collecting, using and disseminating data, but also passive operations such as receiving, holding, organising and storing data. The GDPR equally applies to electronically processed information, as well as to the manually processed data of paper files (Rec. 15). Most activities undertaken in a typical arbitration constitute processing [see Explanatory Note 6].

The GDPR thus attaches serious rights and obligations to information that may not traditionally have been thought of in arbitration as confidential or sensitive and to a broad range of activities encompassing most of what occurs during a typical arbitration.

As a result, whether or not the GDPR applies and what its effect is in a specific case is something that should systematically be addressed and considered in any arbitration with any EU nexus at all, even if ultimately, it is determined that the GDPR has no application in that particular case.

c. Compliance Standards

The GDPR imposes different obligations on Arbitral Participants, depending on whether they qualify as a (1) data controller, (2) data processor or (3) joint controller. [Link EN 13]

1. Primary Responsibility of Data Controller

The primary obligation for compliance and for demonstrating compliance with the GDPR rests on the controller of the personal data, which is defined by the GDPR as “*the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data*” (Art. 4(7)).

A data controller is the person who decides *why and how personal data is processed*. The Working Party illustrated the point by reference to the following hypothetical:

A barrister represents his/her client in court, and in relation to this mission, processes personal data related to the client's case. The legal ground for making use of the necessary information is the client's mandate. *However, this mandate is not focused on*

processing data but on representation in court, for which activity such professionals traditionally have their own legal basis. Therefore, that barrister is to be regarded as an independent ‘controller’ when processing data in the course of the legal representation of his/her client.

The data protection supervisory authority for the United Kingdom, the Information Commissioner's Office (“ICO”), similarly concluded that solicitors who determine how data will be processed, qualify as data controllers. [Link EN 13]

It is expected that the same approach would be applied to most Arbitral Participants, with the possible exception of data analysts.

2. Delegation to Data Processor

Data controllers can delegate the processing of data under their control to a data processor, which is defined as “*a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller*” (Art. 4(8)).

Under the GDPR, data controllers can only engage data processors who commit to comply with its terms in an enforceable agreement established in accordance with the GDPR (Art. 28).

A data processor has independent responsibility (and attendant liability) for compliance with the GDPR’s requirements for data security and data transfer and for notifying the data controller in the case of data breach.

In determining whether an Arbitral Participant can be classified as a data processor, the question will be whether the Arbitral Participant:

- (1) acts under the instruction of a data controller in undertaking their tasks;
- (2) does not decide the purpose of the data processing; and
- (3) is retained under a GDPR-compliant data processing agreement.

Whether this standard is met, for example, by data analysts and other e-discovery professionals will depend on who takes the decisions with respect the purpose and means of any and all processing and will be influenced by number of factors, such as whether a GDPR-compliant data processing agreement has been entered into and to whom in their contractual relationship the decision-making power is allocated as to the purpose of the processing.

[Link EN 13]

3. Joint Controllers

In addition to data controllers and data processors, there is the third category of joint controllers, in which Arbitral Participants may potentially find themselves. Joint controllers are those who jointly determine the “purpose and means” of the data processing.

Joint controllership may arise without formal agreement both between independent data controllers and between data processors and data controllers if they are considered to determine jointly the “*purpose and means*” of processing.

Under the GDPR, each of the joint controllers is responsible for protection of data and they are jointly and severally liable for any data protection violation. Data subjects have the right to seek compensation from joint controllers in the same way as from any independent controller. Each joint controller is liable *vis-à-vis* the data subject for the entire damage caused by the processing, unless they can prove that they are not in any way responsible for the event giving rise to the damage. The arrangement made between controllers is irrelevant in relation to the data subject, although it may allow the joint controller to seek compensation from the other joint controller(s). In addition, joint controllers are each fully accountable to the regulatory authorities for any failure to comply with their responsibilities.

Whether Arbitral Participants can be considered joint controllers involves a factual assessment, which turns on whether they can properly be considered to determine jointly the “*purpose and means*” of processing. It appears from recent ECJ case law that the notion of joint controllership is broadly interpreted.

The possibility of Arbitral Participants becoming jointly responsible for data protection and the risk of being exposed to joint and several liability in case of violation, emphasizes the importance of compliance with the GDPR for every Arbitral Participant subject to its terms during every arbitration in which the GDPR applies.

[Link EN 14]

d. Key Obligations

Data controllers, including during an arbitration, are required to comply with the following six principles (Art. 5 GDPR), namely to ensure that all personal data is:

- a. processed lawfully, fairly and in a transparent manner in relation to the data subject (“*lawfulness, fairness and transparency*”);
- b. collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes (“*purpose limitation*”);
- c. adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (“*data minimisation*”);
- d. accurate and, where necessary, kept up to date, meaning that every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay (“*accuracy*”);
- e. kept for no longer than is necessary for the purposes for which the personal data are processed (“*storage limitation*”);
- f. processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures (“*integrity and confidentiality*”). [Link EN 15]

These principles are then implemented through the other provisions of the GDPR. Data controllers are required both to comply with the GDPR and to be able to demonstrate that they

have complied [Link EN 17] (Art. 24). Moreover, data controllers are instructed to apply a risk-based approach to compliance. [Link EN 16].

The following Section II of the Roadmap describes how each of these principles as implemented through the other provisions of the GDPR may apply in the arbitration context.

e. Derogations

The GDPR provides for specific areas, in respect of which Member States are expressly allowed to derogate from its terms. Some Member States have relied on these provisions to exempt certain data and data processing during out-of-court proceedings from coverage in their legislation.

Analysis of the application of data protection in the context of an arbitration may therefore require a consideration of Member State law. [Link EN 3] For example, Ireland has relied on the right to exempt “*judicial proceedings*” and “*the enforcement of civil law claims*” to also exempt out-of-court proceedings from the application of most of the data subject rights imposed by the GDPR (Art. 23). No other Member State has adopted such a broad exception for out-of-court procedures, although, the revised Swiss Data Protection Act (Switzerland being an adequacy country) purports to exempt arbitration altogether.

The GDPR also includes a broad right for Member States to derogate with respect to *employee data*, which is also likely to have an impact on international arbitration.

[Link EN 2]

f. Supervision and sanctions

The GDPR provides that in each Member State, an *independent supervisory authority* will ensure consistent application and enforcement of the GDPR in its territory, handle complaints from data subjects, conduct investigations and adopt standard contractual clauses for data transfers.

Data subjects have the right to complain to the supervisory authority of their country of residence for a rights violation by an Arbitral Participant. The Arbitral Participant can in turn request that the matter be dealt with by its lead supervisory authority. If the lead supervisory authority declines to address the matter, any competent supervisory authority has jurisdiction.

For cross-border data processing within the EU, a lead supervisory authority is entrusted with the enforcement of the GDPR on data controllers having their sole or main establishment in that country. Complaints can be raised with the lead supervisory authority or with any “*supervisory authority concerned*.” Only one decision should be reached on any issue, but which authority renders that decision depends on the circumstances, with deference typically to the lead supervisory authority, if it so requests.

The supervisory authorities also have investigative powers to carry out data protection audits, to order the controller to disclose information and notify the controller of any alleged infringements. They further have corrective powers to issue warnings and reprimands, order the controller or processor to comply with a data subject’s requests, impose a temporary ban on processing, suspend data flows to third countries, and impose administrative fines (Art. 83).

In the exercise of their supervisory powers, authorities can impose administrative fines of up to the higher of EUR 20 million or 4% of an undertaking's world-wide revenue for the violation of most the GDPR's provisions (Arts. 5 to 7, 9, 12 to 22 and 44 to 49) and to the higher of EUR 10 million or 2% of an undertaking's world-wide revenue for lesser violations (Arts. 8, 11, 25 to 39, 42 and 43). It is unlikely that insurance will be available for such fines, although the position is not yet clear.

The GDPR requires Member States to impose criminal penalties for infringements of the GDPR that are not subject to administrative fines. The GDPR further provides that every individual who wants to enforce compliance or has suffered material or non-material damage from an infringement of the GDPR also has the right to bring proceedings against a controller or processor before the courts of the Member State where the data subject resides or where the controller or processor is established (Art. 79).

A data subject also has the right to a remedy before Member State courts against a supervisory authority for a decision rendered or the prolonged inactivity of a supervisory authority.

Under the GDPR data controllers no longer need to register with the supervisory authority in the place where they are established. However, in some countries, like the UK, data controllers have to identify themselves and pay an annual fee.

Furthermore, if an entity does not have an EU establishment but engages in targeting data subjects in the EU, it may need to designate in writing a representative in the EU (Art. 27). Any supervisory authority within the EU has regulatory authority over such an entity without the need to defer to a lead supervisory authority.

The GDPR exempts "*courts acting in their judicial capacity*" from the jurisdiction of the supervisory authority, in favour of supervision by the Member State courts. In Spain, the Constitutional Court held that arbitration is a "*jurisdictional equivalent*" and a similar finding was made in an old German case.⁴ What that means for data protection remains to be seen, although it could be that in those countries, the processing of personal data by arbitrators, when acting in their judicial authority, could be subject to the jurisdiction of the same authority that supervises data processing by the courts (instead of the ordinary supervisory authority). [Link EN 2]

⁴ See Judgement 1/2018, of 11 January 2018 of the Plenary of the Spanish Constitutional Court. [German case to be added].

II. APPLICATION OF THE GDPR TO ARBITRAL PROCEEDINGS

With that whistle-stop tour of the GDPR in mind, the remainder of the Roadmap considers how the GDPR may affect Arbitral Participants either before, during, or after an arbitration. It is organized around the life cycle of an arbitration case. It should be considered together with the Annexes, which contain templates for certain data protection notices and non-exhaustive checklists of issues that parties, counsel, institutions and arbitrators may want to consider in establishing whether the GDPR applies to them and the arbitration proceedings.

a. Processing outside of a specific arbitration

Like everyone else, Arbitral Participants covered by the GDPR should bear in mind that they will have general obligations under the GDPR that apply to all their data processing activities regardless of any involvement in a specific arbitration. These obligations include adopting GDPR-compliant data security measures, data breach procedures and ensuring that data transfers are lawful.

Virtually all EU-based Arbitral Participants will be data controllers with respect to at least some personal data they process. Insofar as they are data controllers, they are obliged to ensure that the data processing is lawful, and that data subjects rights are complied with. This will often include providing a publicly and easily accessible GDPR-compliant data privacy notice, for example on their website, to put data subjects on notice of the processing of their data, and putting in place a mechanism to comply with data subjects' right requests. Annex 2 provides a checklist of issues that Arbitral Participants subject to the GDPR should consider generally with respect to data protection compliance.

To avoid repetition, these issues are addressed below in the context of arbitral proceedings. However, it is important to keep in mind that they will often apply independent of specific proceedings because of the nature of Arbitral Participants' general activities.

b. Planning arbitration proceedings

Data protection should be considered from the time the arbitration agreement is drafted through to the enforcement of any award (and beyond in relation to any potential subsequent disputes). Annex 3 provides a checklist of data protection issues that parties and their counsel may want to consider prior to the commencement of an arbitration.

It is important to be reminded again that whenever any Arbitral Participant is covered by the GDPR, this potentially impacts the entire arbitration. This is because anyone with an EU establishment or that targets EU data subjects will need to comply with the GDPR for their own data-related activities during the course of the arbitration, *even if no one else is covered*. Furthermore, compliance with those obligations will require them to ensure that whenever data is transferred it is subject to the main provisions of the GDPR either by law or by agreement. This stresses the importance of raising data protection early in the process. [Link to EN 13]

Arbitration Agreement. Parties should consider whether to address data protection laws expressly when drafting their arbitration agreement. This could include, for example, a general obligation to comply with applicable data protection laws, especially where some of the parties to the agreement are established in the EU but others are not. It is also worth considering specific language addressing data transfer and legitimate purposes for processing.

Choice of Institution. The choice of institution may be affected by data protection rules as the activities of institutions established in the EU are subject to the GDPR to the extent that the data processing takes place in the context of those activities, whereas institutions outside the EU or organized under international law (like the PCA and ICSID) may not be subject to the GDPR themselves, although the parties to their cases may be. This can create data transfer and other challenges. For example, when parties covered by the GDPR agree to arbitration supervised by institutions established outside the EU, they should consider how data transfer will be achieved and potentially discuss with the institution whether it would be possible to put in place standard contractual clauses should a claim arise. The same issues will arise when EU institutions assign cases to their offices outside the EU or when cases are brought before the PCA or ICSID.

Choice of Arbitrator. Like the choice of institution, the choice of arbitrator may be impacted by data protection rules because the activities of arbitrators established in the EU are subject to the GDPR, whereas those from outside the EU may not be, which can create data transfer and other challenges in transferring data to non-EU arbitrators who are not subject to the GDPR. This means that when parties subject to the GDPR select arbitrators or agree on chairs not otherwise subject to the GDPR, they should address in advance whether the arbitrators are willing to enter into standard contractual clauses as a means of facilitating data transfer. Institutions subject to the GDPR may want to do the same when making arbitral appointments.

Vendor Selection and Management. Vendors may be selected based on their location and ability to assist the Arbitral Participants in complying with their obligations under the GDPR. Vendors will typically want to put in place arrangements that are consistent with being a data processor in the sense of the GDPR, in which case the data controller engaging that vendor should be aware that it is responsible for its compliance.

Preparing the Claim. When a dispute arises, the first thing that parties and their counsel typically do is to review the facts, which requires going back through the chain of events that led to the dispute. This often involves reviewing emails and other contemporary evidence of the relevant events. This evidence, which almost always contains personal data, was typically not created for the purpose of bringing a claim but rather in the ordinary course of business. The personal data would now be collected and processed for the secondary purpose of considering a potential arbitration claim.

Under the GDPR, Arbitral Participants are required to ensure that personal data is processed in compliance with the principles of purpose limitation and data minimisation.

Purpose limitation means that Arbitral Participants who collect and process personal data only process it for specific and legitimate purposes that have been notified to the data subject. Where personal data is processed to prepare for an arbitration (or during an arbitration) by Arbitral Participants who did not originally collect the data, the processing for the arbitration should not be incompatible with the initial purpose, as notified to the data subject (Art. 5(1)(b)). This means that all Arbitral Participants should consider the original purpose of the processing, as notified to the data subject, and take a view as to whether processing for the arbitration is compatible with that original purpose. If this is not the case, an additional notice would be required notifying the data subject of the new purpose.

[Link EN 18]

Data minimisation requires that the amount and type of personal data processed is adequate, relevant and limited to what is necessary for the purpose of the processing. In the context of

arbitration, the Working Party has suggested that data minimization is likely to require the culling of data before it is used as well as the redaction thereof in order to eliminate unnecessary personal data.

[Link EN 19]

These requirements may be applied, together with the legitimate interests standard, requiring the processing of data in the context of preparing for an arbitration (or during an arbitration) to be minimized to what has been notified to the data subject and required to comply with that interest. These issues arise both in preparing the claim and in responding to disclosure requests.

Data Mapping. Data mapping in the arbitration context involves determining where the data that would form the basis for the claim (and the defence) is located and where it would need to be transferred for purposes of the arbitration. This process allows parties and their counsel to develop a strategy to minimise the necessary transfers, and to put in place appropriate safeguards. For example, where data transfer to countries without adequate safeguards is required and it is not feasible to put in place appropriate safeguards, parties and counsel may be required to review, cull and potentially redact personal data in the EU before transferring a more limited data set to parties outside the EU.

c. Data Protection Principles Applicable During Arbitral Proceedings

1. Lawfulness of the Processing of Personal Data, Sensitive Data and Data Transfers

Based on the principle that every individual has the right to decide whether to allow, and to exercise control over, the processing of his/her personal data, the GDPR prohibits the processing of personal data of any data subject, unless specifically permitted on the basis of one of the legal grounds set forth in the GDPR. [Link EN 7]

Moreover, additional requirements apply to the processing of data that is considered sensitive and to data transfers outside of the EU.

Each of these principles applies separately, so, for example, the transfer of sensitive data outside the EU must comply with three separate sets of rules – (i) personal data processing, (ii) sensitive data processing and (iii) data transfer.

Furthermore, when the requirements are met to allow data processing and transfer, the processing must then comply with the mandatory rules the GDPR establishes.

i. Lawfulness of Processing Personal Data

Every data controller, including in the arbitration context, must have a lawful basis for processing the personal data under its control, and must state in its data protection notice what the lawful basis is.

The decision as to which legal basis applies is highly fact driven and case specific. The premise of the GDPR is that the processing of personal data by a third party (including during an arbitration) is prohibited unless expressly allowed by the GDPR, which is important to an understanding of how the GDPR operates and how it applies to international arbitration.

The GDPR contains no express provision allowing processing for arbitration purposes, which means that arbitral data processing will need to be justified under one of the permissible bases set forth in the GDPR.

The decision as to which basis applies is not straightforward. It is highly fact driven and case specific.

The GDPR allows processing the processing of personal data where informed consent has been obtained, but informed consent (which would need to be from the “data subjects” themselves rather than the Arbitration Participant who provides the personal data, if different) is difficult to obtain and easy to withdraw, which makes the application of this lawful basis for processing in the context of an arbitration problematic.

The lawful basis for the processing of personal data that appears best suited to arbitration is the legitimate interest of the data controller (in this case the Arbitral Participant) in processing the personal data, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data” (Art. 6(1)(f)).

This approach has been supported by the Working Party, which has taken the view that the processing of personal data in order to establish legal claims and defenses does fall within the legitimate interest of the data controller when the processing of the personal data is necessary to make out those claims or defenses, although this is not stated in the GDPR.

Where a data controller relies upon its legitimate interest as the lawful basis for processing, including in the arbitration context, it should do a legitimate interest analysis as a basis for identifying and relying on the particular interest in the first place and update that analysis during the course of the processing to ensure that the interest in question still applies to the data processing.

ii. *Lawfulness of Processing of Sensitive Data*

The GDPR applies special rules for the processing of “*special category data*” which is data revealing “*racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or [...] a natural person's sex life or sexual orientation*” (Art. 9). For example, this may include photographs on witness statements or any health information.

The lawful processing of special category data requires a lawful basis for the processing of the personal data *plus* a separate lawful basis for the processing of the sensitive data.

Processing of special category data is allowed based on express informed consent, which is a higher bar than described above for informed consent and accordingly has even more pitfalls (Art. 9(2)(f)).

Another lawful basis for processing special category data is where “*necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity*”, which is likely to be best suited for processing special category data for arbitration. [Link EN 7]

The GDPR refers in several places to processing which is “*necessary for the establishment, exercise or defence of legal claims.*” [Link EN 12] In determining what this means, it bears noting that Recital 111 of the GDPR states that the legal claim necessity is not limited to court or judicial proceedings but also applies in “*administrative or any out-of-court procedure, including procedures before regulatory bodies.*”

The notion of “*out-of-court procedure*” is not defined in the GDPR, but could be construed as encompassing arbitration and other forms of ADR. In an opinion issued in the context of transfers outside the EU, the EDPB indicated that:

The combination of the terms “legal claim” and “procedure” implies that the relevant procedure must have a basis in law, including a formal, legally defined process, but is not necessarily limited to judicial or administrative procedures (“or any out of court procedure”).⁵

According to the EDPB, the word “*necessary*” requires “*a close and substantial connection between the data in question and the specific establishment, exercise or defense of the legal position.*”⁶ ECJ case law (on the Data Protection Directive) indicates that the concept of “*necessity*” must be given its own independent meaning in EU law, to fully reflect the objectives of data protection legislation.⁷ [Link EN 12]

iii. Lawfulness of Data Transfers

The GDPR establishes rules for transfers of personal data to third countries by all Arbitral Participants (whether data processors or data controllers), which apply during the arbitration process. The EU aim of subjecting data transfers to limitations is, in general, to ensure that data is always sufficiently protected, and that the rights of data subjects in relation to their data are not prejudiced by transfer out of the EU.

Before a data processor or controller can transfer personal data outside the EU, including during an arbitration, there must be a legal basis for the data transfer in addition to the lawful basis for processing. It is important to note that transfer is broadly interpreted to include, for example, any downloading of a document or an email while outside the EU.

In the context of an arbitration, data transfer often triggers Arbitral Participants to consider data protection. Whenever any Arbitral Participant is subject to the GDPR, they will have to determine a lawful basis for transfer before sending any materials outside the EU.

The GDPR allows third country data transfers where:

- the country has been deemed by the European Commission to provide adequate data protection;
- the data controller or data processor has put in place “*appropriate safeguards*” to protect the data by one of the means expressly prescribed by the GDPR; or

⁵ Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679, European Data Protection Board, (2018) (“Draft Territorial Guidance”).

⁶ *Id.*

⁷ See Case C-524/06 Heinz Huber v. FRG [2008] ECR I-9705.

- where one of a list of specified derogations apply, including where the processing is “*necessary for the establishment, exercise or defence of legal claims*” provided that the transfer can be considered as “*occasional*” (Arts. 45-49).

Regardless of the means employed by a party to transfer personal data outside the EU, the recipient of the data must be required by law or by agreement to apply adequate protections to the data after its transfer, including the main principles of the GDPR (Art. 44). [FN]

In the arbitration context, it is important to recall that international organisations such as the Permanent Court of Arbitration, the World Bank and the International Court of Justice, which are established under international law or by an agreement between countries, are treated as though they are outside the EU (Art. 4(26) defining international organisations, Art. 46(1) addressing transfers to international organisations). This means that transfer to such organizations will require compliance with the data transfer rules.

The Working Party has indicated that the exceptions allowing data transfers follow a cascade approach, as follows:

- First, transfer may take place if there is an adequacy decision, allowing data transfers to the relevant country;
- Second, if data is to be transferred to a country without an adequacy decision, one of the expressly listed “*adequate safeguards*” must be put in place where feasible;
- Third, in case there is no adequacy decision and adequate safeguards are not feasible either, a specific derogation can be relied on; and
- Lastly, if none of the express derogations is applicable, a party may rely on its “*compelling legitimate interests*” as a basis for transfer, but this is a high standard and requires notification to the data subjects and the supervisory authority.

The same requirements apply to “*onward transfers*” from the first recipient of a data transfer to a third party, even if the two are established in the same third country unless that country is covered by an adequacy decision (Recital 101).

This means that where feasible, the data transfer rules require Arbitral Participants to enter into appropriate safeguards before a transfer is made outside the EU to a country without an adequacy decision.

One of the appropriate safeguards are the so-called standard contractual clauses developed by the EU. These standard clauses must be adopted verbatim to provide a valid legal basis for transfer. By entering into standard contractual clauses, the non-EU entity agrees to be bound by the main provisions of the GDPR as a condition of the transfer.

Where standard contractual clauses or other appropriate safeguards are not feasible, a derogation may be relied upon for transfer if express consent has been obtained or where the transfer is “*necessary*” for establishing, exercising or defending a legal claim, as discussed in the previous Section. Transfers under the legal claims derogation must also be occasional which means that they “*may happen more than once, but not regularly, and would occur outside the*

regular course of actions.”⁸ The standard for occasional transfers may be hard to meet in arbitrations.

The GDPR also requires the application of all third country transfer provisions in a manner that “*ensure[s] that the level of protection of natural persons guaranteed by this Regulation is not undermined*” (Art. 44). The Working Party has reiterated that when a derogation is relied on for transfer, safeguards must be put in place to ensure that the processing is carried out with an adequate level of protection and the data subject rights are not circumscribed (Art. 44). This is not required as an additional step where standard contractual clauses are put in place because the clauses themselves accomplish this.

The application of the data transfer provisions taken as a whole support the of standard contractual clauses as a basis for data transfers in the context of arbitral proceedings, if appropriate.

[Link EN 8]

2. Cybersecurity requirements

The GDPR requires all Arbitral Participants, including both data processors and data controllers, to apply adequate physical and cyber security whenever they process personal data, failing which they risk fines and other enforcement action.

The GDPR requires data controllers and processors to implement appropriate technical and organisational measures to ensure a “*level of security appropriate to the risk*” (Art. 32). This means that whenever the GDPR applies to personal data processed in an arbitration, adequate data security is *mandatory*. However, the GDPR does not define the security measures that are required for compliance.

Article 5(1)(f) of the GDPR concerns the “*integrity and confidentiality*” of personal data. It establishes the principle that personal data shall be “*processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures.*”

Article 32(1) and (2) of the GDPR provides that the following measures are required to secure all data covered by its terms:

1. Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, the controller and the processor shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk, including inter alia as appropriate:
 - a. the pseudonymisation and encryption of personal data;
 - b. the ability to ensure the ongoing confidentiality, integrity, availability and resilience of processing systems and services;
 - c. the ability to restore the availability and access to personal data in a timely manner in the event of a physical or technical incident;

⁸ See Draft Territorial Guidance *supra* note 5.

- d. a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the processing.
2. In assessing the appropriate level of security account shall be taken in particular of the risks that are presented by processing, in particular from accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to personal data transmitted, stored or otherwise processed.

Therefore, in deciding what data security measures to apply, Arbitral Participants should apply a risk based approach.

In the context of an arbitration, each Arbitral Participant including both data controllers and data subjects are required to ensure that their own data security meets the requirements of the GDPR. The GPR imposes no obligation to police the data security measures of other Arbitral Participants, provided the other Arbitral Participants are either subject to the GDPR or have entered into appropriate safeguards as a condition of data transfer. The Standard Contractual Clauses address data security, as should any appropriate safeguards entered into for the purposes of a data transfer under a derogation.

Important initiatives have been undertaken towards ensuring cybersecurity in international arbitration. These include the Debevoise & Plimpton Protocol to Promote Cybersecurity in International Arbitration launched in 2017, the ICCA/NY Bar/CPR Cybersecurity Framework for International Arbitration (2019) and the IBA Cybersecurity Guidelines (2018). While none of these initiatives address the data security requirements of the GDPR directly, they provide a useful resource for applying a risk-based analysis to cybersecurity, and the ICCA/NY City Bar/CPR Cybersecurity Framework for International Arbitration further provides a structure for how data protection may be addressed in international arbitration.

[Link to EN 11]

3. Notification requirements

Unless an exemption applies, the GDPR requires data privacy notices to be provided both by the data controller that originally collects the personal data from the data subject, and by those that receive the personal data subsequently. Most Arbitral Participants fall in the second category. This means that unless exempted, each of the Arbitral Participants will need to provide a notice to all data subjects whose personal data is processed during an arbitration.

Arbitral Participants who do not collect the data but receive from others, which will often be the case in an arbitration (with the exception of the parties), are not required to provide notice where:

- the individual already has the information;
- providing the information to the individual would be impossible;
- providing the information to the individual would involve a disproportionate effort;
- providing the information to the individual would render impossible or seriously impair the achievement of the objectives of the processing;

- the data controller is required by law to obtain or disclose the personal data;
or
- the data controller is subject to an obligation of professional secrecy regulated by EU or EU Member State law that covers the personal data.

[Link to EN 21]

While many of the exceptions to the notification requirement are potentially applicable to secondary processing by Arbitral Participants, especially when the arbitration is confidential, each Arbitral Participant will need to decide this on a case-by-case basis. Views may differ based on where the Arbitral Participant is established, where the personal data was collected, where the data subjects are located and where the data is processed.

One possibility, which has been implicitly supported by the Working Party would be for the Arbitral Participants to agree that the party that originally collected the data will provide the necessary information to the data subjects and that the other, secondary, processors would rely on those notices and potentially receive indemnities.⁹ However, in deciding whether this is appropriate in the context of a specific arbitration, Arbitral Participants should consider that it could increase the risk of a finding of joint controllership, and that care should be taken to minimise the risk of creating a joint controllership that would not otherwise exist, given the potential of joint and several liability of the joint controllers. [Link to EN 14]

Many Arbitral Participants, including parties, law firms and institutions, will already have in place data protection policies and procedures, including data protection notices, with respect to their activities, some of which may address dispute resolution specifically. Other Arbitral Participants, for example independent arbitrators and smaller institutions, may be adopting data protection notices addressing their case work for the first time. Annex 5 provides the structure of a data protection notice for consideration by institutions, and Annex 6 for arbitrators, but notices are highly fact specific and require careful consideration and tailoring to each Arbitral Participant's activities and needs.

4. Data retention and destruction

Data retention and destruction are considered forms of processing under the GDPR. The GDPR requires data controllers, including Arbitral Participants, to notify the data subject at the time of data collection of the applicable retention periods or the basis on which those retention periods will be calculated, with the aim of reducing the period during which data is processed.

Arbitral Participants will need to consider what data retention period is reasonable in light of the purpose of the processing, including the arbitration itself and the enforcement of any award, as well as any attendant processing in light of, for example, undertaking conflict checks and complying with legal and regulatory obligations.

Parties should keep in mind that potential future use in an arbitration or other legal proceedings may not be a sufficient basis for parties to retain data beyond an otherwise reasonable period of time.

⁹ The most relevant of the Working Party guidance for our subject is the *Working Document on Pre-trial Discovery for Cross Border Civil Litigation*, (Article 29 Data Protection Working Party, 00339/09/EN WP 158, 2009) (endorsed by the EPDB) (referred to as the “Document Disclosure Guidance”).

Article 5(1)(e) of the GDPR provides that personal data be:

[K]ept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes ...('storage limitation').

To demonstrate compliance with this principle, organizations with more than 250 employees may need to establish and document standard retention periods for different categories of information held, a system for ensuring they are complied with, and for periodically reviewing retention. Smaller firms, chambers and independent arbitrators will need to be able to demonstrate compliance but will not need to comply with Article 30 (keeping records of processing activities) unless they are engaged in high risk processing. However, they will still be required to regularly review the data held, and to delete (or anonymise) any personal data no longer required for processing.

This means that when deciding how long it can be retained, Arbitral Participants should consider their stated purpose for the processing of the personal data in question. Arbitral Participants can retain personal data for as long as required for the lawful purpose relied on for processing.

Arbitral Participants should also consider whether they need to keep a record of the relationship with the individual once that relationship ends. The data controller may need to keep some information so that it can confirm that the relationship existed – and that it has ended – as well as some of its details. This could apply, for example, for future conflict checks.

Arbitral Participants should also consider any legal or regulatory requirements, for example, for income tax and audit purposes.

The bottom line is that Arbitral Participants, like all data controllers, should take a proportionate approach, balancing their needs with the impact of retention on the data subject. This means that data controllers, including Arbitral Participants, should:

- keep personal data for only as long as required;
- be able to justify how long they keep personal data, which will depend on the purposes for holding the data;
- periodically review the data held, and erase or anonymize it when they no longer need it; and
- carefully consider any challenges to their retention of data.

[Link EN 22]

5. Data breach notification

The GDPR contains strict notification requirements in the case of a data breach, which are likely to apply to all Arbitral Participants (Arts. 33-34) during the course of the arbitration, subject to any exemptions under national law.

Data controllers are required to notify the supervisory authorities of “*a data breach that is likely to result in a risk for the rights and freedoms of the data subject within 72 hours of discovery of the breach*” (Arts. 33-34).

Data subjects must also be notified of the breach without undue delay if the data breach “*presents a high risk for the rights and freedoms of individuals.*” If the data breach only presents “*some risk*” for individuals, only the data protection authority will need to be notified and not the individual data subjects (Arts. 33-34). The data breach notification must include the cause and nature of the breach (if known) and recommendations as to how the potentially affected individuals can mitigate the risks of the breach. The burden to prove the absence of risk in a data breach rests on the data controller (Arts. 33-34). Even where no notification is required, a record of the breach must be kept.

A data breach is the most obvious manner in which arbitration may come to the attention of the supervisory authorities or trigger data subject claims. Considering the tight time lines and large fines, it will therefore be important for Arbitral Participants to consider in advance, before any breach occurs, exactly what will trigger a breach notification and the process for how data breach notifications will be given, by whom and to which authority. Given the impact that data breach may have on the arbitration process, it will be useful for Arbitral Participants to consider in advance how they will be addressed and whether coordination would be helpful.

[Link EN 21]

6. Insurance and indemnities

A personal data breach or other GDPR violation can be expensive. There will be costs involved in investigating and remedying the causes and, to the extent necessary, in notifying and corresponding with the supervisory authorities and affected data subjects. In the event of harm, civil liability may be incurred and damages may have to be paid. In addition, of course, there is the possibility that a regulator or court may impose a regulatory fine.

Hence, it is unsurprising that there are insurance products available, which might help Arbitral Participants mitigate relevant risk. Cover may also be available as part of, or as an add-on to, professional liability insurance of lawyers and others. At this relatively early stage and in the absence of any real claim experience, it is difficult for insurers properly to quantify the risk, and as a result, premiums may vary substantially.

An important point is that there is some debate about whether regulatory fines can be insured against. That is clearly a matter for the relevant national law, but in many jurisdictions, insurance against fines is illegal, or contrary to morals or public policy. It is therefore not uncommon for policies to be sold on the basis that they will cover fines “*to the extent allowed by law*”.

The application of the GDPR to arbitration creates interlinking obligations, and the potential for joint and several liability in the case of joint controllership. As a result, it is important to consider the use of indemnities to allocate and minimize those risks. While there may be arguments against the enforceability of indemnities to pay fines levied against another Arbitral Participant, it would still be prudent to have such clauses in place.

d. Applying Data Protection Principles During Arbitral Proceedings

Data protection issues can arise at any stage between the start and the conclusion of an arbitration. From the moment that a file (containing personal data) is sent to an arbitrator or institution, through documentary disclosure and the filing of witness statements and expert reports, to the eventual issuance and enforcement of an award, it will be important for tribunals and parties to consider the protection of individuals whose data is involved, however tangentially.

In an institutional arbitration or where there is an appointing authority, parties subject to the GDPR should consider raising its potential impact prior to the filing of any request for arbitration with the institution as appointing authority. This would be especially necessary in cases where the filing of the request itself raises data protection concerns, for example where data transfer is required or data security is in doubt.

After the claim is filed, the arbitral institution or appointing authority may address data protection with the parties either at the initiative of the party or at its own motion. Parties may consider informing the institution in its request for arbitration or in the response (or even beforehand) about data protection issues that may arise and indicating how those issues may have an impact on the arbitral process. For their part, institutions and/or appointing authorities may wish to consider the extent to which data protection issues arise in the context of, *inter alia*, the receipt of a request for arbitration, the registration and/or administration of arbitrations, the appointment of arbitrators, the receipt and holding of advances on the arbitration and administrative costs, and the transfer of data to parties, their counsel and arbitrators.

After the arbitral tribunal is constituted, the parties and arbitrators can also raise any data protection issues directly with each other. If data protection has not already been addressed or fully addressed, it is good practice to include the topic on the agenda of the Case Management Conference or first procedural meeting and address the relevant issues at that occasion. This will allow the parties, counsel and the tribunal (where necessary in conjunction with the institution) to consider at the outset of the proceedings how the applicable data protection regime(s) will play out in the context of that particular arbitration. Additional complications may arise with defaulting parties.

1. Risk-based approach and record-keeping

The GDPR requires data controllers, including in the context of arbitration, to apply a risk-based approach to compliance and to be able to demonstrate compliance.

The risk-based approach to compliance with the GDPR will necessarily mean balancing, in the context of an arbitration, a data subject's data protection rights with the parties' fundamental rights, including the right of defence and the right to due process (Arts. 47 and 48 of the Charter of Fundamental Rights of the European Union). The requisite balancing of interests under the GDPR emphasizes the need to consider these issues early so these rights can be catered for in the process. [Link to EN 16]

The GDPR requires that controllers of data not only comply with the GDPR, but that they also retain a record of that compliance. The obligation to document compliance is further detailed in Article 30, which does not apply to SMEs with less than 250 employees. This makes it

important that decisions on data protection issues be documented, including the rationale for the decision. [Link to EN 17]

During the arbitration process (as well as beforehand), it will be up to each Arbitral Participant to ensure that they both comply with their obligations and keep adequate records demonstrating compliance. It may be useful for Arbitral Participants to consider in advance how they will be comply with their record-keeping obligations and whether coordination would be helpful.

The remainder of this section will consider how data protection issues may arise in the context of an arbitration proceeding. Annex 4 provides a checklist of issues all Arbitral Participants should consider during the arbitration process.

2. Procedural mechanisms

After consultation with the parties, where appropriate, language addressing compliance with the applicable data protection laws may be included in:

- the terms of reference (where applicable);
- a first procedural order and/or subsequent orders;
- a data protection protocol or other agreement addressing data compliance issues affecting all Arbitral Participants who process personal data during the arbitration; and/or
- to the extent not covered in the first procedural order, the procedural orders governing the taking of evidence in general and the disclosure phase in particular.

Issues that may be addressed through such procedural mechanisms include, among other things, the necessity for data protection notices, cybersecurity measures, the impact of data protection on the taking of evidence, data breach notifications, and the allocation of roles and responsibilities with respect to compliance with data subject rights. Annex 4 contains a checklist of items to be considered in thinking about how the GDPR may impact the arbitration.

In complex cases, the Arbitral Participants may wish to consider using a data protection protocol. The decision of whether to employ a data protection protocol, and more generally, the extent to which the tribunal should be involved in the management of the Arbitral Participants' respective data protection obligations, should be evaluated taking into account all the circumstances.

In certain circumstances, it may be necessary or appropriate for the arbitral tribunal to become involved in data protection compliance mechanisms. This may also increase the efficiency of the arbitration and ease the Arbitral Participants' compliance burden. However, at the same time, these sorts of arrangements (for example allocating responsibility for providing data protection notices to certain Arbitral Participants) could increase the likelihood that Arbitral Participants are considered to be joint controllers, with attendant joint and several liability. This highlights the importance that such procedural mechanisms include appropriate indemnities, and that potential insurance options are considered.

[Link to EN 14]

3. Taking of evidence

None of the major arbitration rules address the manner in which data protection is to be handled in the context of an arbitration. Neither the 2010 version of the IBA Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”), nor other guidance on the organisation of arbitration proceedings address the impact of data protection rules on the arbitral process. Conversely, data protection rules (including the GDPR) do not expressly deal with their application in international arbitration nor has any guidance been issued in their respect. The recently issued ICC “*Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*” effective as of January 1st, 2019, does address the GDPR generally, but without any specific indication as to how its application might affect the arbitral process.

This leaves Arbitral Participants to decide in each case whether and how applicable data protection rules may limit the ways in which they can gather, process, use, transfer, and protect personal data and the means by which the rights granted to data subjects will be respected, and how those efforts should be documented. A case-by-case determination has the benefit of allowing the process to be tailored to potentially applicable data protection and other laws.

Consistent with the approach adopted in the IBA Rules on the Taking of Evidence in International Arbitration, the question whether and how data protection issues may have an impact on the taking of evidence ought to be addressed early.¹⁰ If not addressed earlier, it is good practice to discuss the issue during the case management conference or first procedural meeting. In addition to minimizing general data protection risks and avoiding surprises, this practice fosters compliance and encourages data protection concerns to be voiced at the outset, rather than later on in the proceedings (for example in response to a disclosure request), which could cause unnecessary costs and delays.

Insofar as personal data is concerned, the GDPR may affect the volume and nature of disclosure, requiring among other things that the processing of personal data be minimized and limited to what is necessary for the purpose of the arbitration. When sensitive data is being disclosed, or insofar as data is being transferred (to a country without an adequacy decision and without appropriate safeguards), the personal data that can be processed or transferred will often be limited to that which is necessary for “*the establishment, exercise or defence of legal claims*” (Art. 17, Recital 65).

In the context of discovery for US litigation, the Working Party has stated that “*there is a duty upon data controllers involved in litigation to take such steps as are appropriate (in view of the sensitivity of the data in question and of alternative sources of the information) to limit the discovery of personal data to that which is objectively relevant to the issues being litigated. There are various stages to this filtering activity including determining the information that is relevant to the case, then moving on to assessing the extent to which this includes personal data. Once personal data has been identified, the data controller would need to consider whether it is necessary for all of the personal data to be processed, or for example, could it be produced in a more anonymised or redacted form.*”¹¹

¹⁰ IBA Rules on the Taking of Evidence in International Arbitration (International Bar Association) 2010; Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (2010).

¹¹ Document Disclosure Guidance, *supra* note 9.

When the GDPR applies to the personal data being processed during an arbitration, data minimization is mandatory (Recital 39). However, it is important to keep in mind that the GDPR is not concerned with the amount and volume of data that is exchanged, just the extent to which it includes personal data. Therefore, this would mean that personal data should be reviewed first for relevance and whether it is “*necessary*” to make out the claim. If so, the question is whether personal data that is not necessary for the arbitration (including names, email addresses, and all other data by which an individual is or could be identified) can be redacted.

The Working Party has expressed the view that parties “*have a legitimate interest in accessing information that is necessary to make or defend a claim, but this must be balanced with the rights of the individual whose personal data is being sought*”¹². Issues to be considered by tribunals in balancing competing interests may include, among others, procedures aimed at limiting data protection exposure through data protection protocols and other risk-reducing procedures, reasonable measures to avoid unnecessary third country data transfers, the objecting party’s previous treatment of data, pseudonymization where feasible, the scope of the compliance risk, and the importance of the data for the arbitration.

The Working Party and the EDPB favour redaction of personal data and encryption. Technology clearly makes both the culling and redaction of personal data feasible. However, even with technological advances, redaction measures may be expensive to apply and time consuming (and hence more costly and slower) to work with. It remains to be seen in practice, following the entry into force of the GDPR, to which extent redaction takes place earlier and becomes more widespread.

It is worth noting that the approach suggested by the Working Party is consistent with the IBA Rules,¹³ but may limit the personal data likely to be disclosed by limiting the disclosure itself and requiring more extensive redaction of personal data (only) when the principles suggested by the Working Party are applied robustly. [Link EN 20]

4. Compliance with Data Subject Rights

During the arbitration process, Arbitral Participants will also be required to respect the data subjects’ rights with respect to their personal data.

The GDPR requires data controllers, including Arbitral Participants, to put in place a system to address any concerns raised by data subjects and to notify them of how these rights can be exercised. Given the impact that the exercise of these rights may have on the arbitral process, it will be useful for Arbitral Participants to consider in advance how they will be addressed and whether coordination would be helpful.

Arbitral Participants may potentially receive requests from data subjects seeking to exercise their rights. These may come from any individual whose personal data is handled during the arbitration process, including but not limited to individual parties, witnesses, experts, or even persons not directly involved in the proceedings but about whom personal data has been adduced (e.g., an employee of a party but who is not involved in the proceedings directly). In order to limit potential disruption during an arbitration, Arbitral Participants may wish to discuss at the outset of the arbitration how GDPR compliant access requests will be handled.

¹² Id. at 1.

¹³ See supra note 11.

The most likely rights to be enforced are the rights of access through so-called data subject access requests and the right to rectify any data that is inaccurate. These data subject rights requests may be aimed at obtaining data to be used in the arbitration and can raise important issues of confidentiality and privilege, among other things.

The GDPR provides that the data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to a broad range of information about that processing. There is a risk that such requests are (ab)used to derail the arbitral process.

Arbitral Participants should be aware that upon receipt of a valid data subject access request, they must provide an individual with access to their personal data that they hold. However, the exercise of that right should not adversely affect the rights or freedoms of others (Art. 15(4)). This may include (but is not necessarily limited to) any potential adverse impact on data protection rights, trade secrets and intellectual property (*see e.g.*, Recital 63).

Therefore, when assessing a data subject access request, Arbitral Participants should consider carefully what impact meeting the request might have on others (both Arbitral Participants and third parties). This may include identifying and implementing steps to reduce any potential adverse impact. For example, where appropriate, Arbitral Participants might redact personal data relating to other individuals or ensure they restrict the documents produced to those (or portions of them) strictly necessary to meet the exact terms of the data subject's request rather than adopting a blanket (and likely less time consuming) approach to responding.

National courts have also suggested that striking a balance between different stakeholders' interests might involve obtaining undertakings to restrict the onward transfer of any information disclosed in response to the subject access request.¹⁴ Adopting a tailored approach balancing different stakeholders' rights can be time consuming, but is the best way to ensure that competing rights are respected while allowing the Arbitral Participant to comply with a data subject access request.

Arbitral Participants should in all cases consult relevant national laws for any relevant derogations from the GDPR with respect to individual data subject rights requests. The GDPR permits derogations in this area and many national laws tailor (and curtail) the GDPR considerably in specific circumstances. For example, Ireland has adopted an exemption from certain individual rights, which covers out-of-court procedures.

Data subject right requests may be particularly problematic if aimed at gaining access to information about the deliberations or decision-making process of tribunals. Applying the balancing of interests in a concrete arbitration, a tribunal may well come to the conclusion that a data subject access request that would breach the secrecy of tribunal communications is to be rejected.

[EN 22]

¹⁴ *B v General Medical Council* [2018] EWCA Civ 1497, 28 June 2018 (UK).

5. Arbitral awards

Arbitral awards are likely to contain personal data. Moreover, even in confidential arbitrations, there is a risk that the award will become public if it is enforced in a country where awards (or parts thereof) become public in the enforcement process. Institutions increasingly publish awards (or excerpts thereof) as a matter of course unless the parties object. Arbitrators should therefore consider the basis and necessity for including personal data in the award and may want to raise this issue with the parties. In some countries it is standard practice to redact personal data even from court decisions.

Depending on the circumstances of a particular case, the alleged failure to comply with mandatory data protection principles could also conceivably form a basis for challenging the award. In the line of cases starting with *Eco Swiss*, the ECJ has taken the view that an EU national court must refuse recognition and enforcement of an arbitral award if the tribunal failed to comply with mandatory EU rules. The ECJ has applied this principle in the competition context, certain aspects of EU agency and distribution law, and consumer protection laws. A similar approach could be taken in relation to the data protection principles enshrined in the GDPR, which find their basis in the European Charter of Fundamental Rights (Case C-126/97 *Eco Swiss* [1999] ECR I-3055; Case C-168/05 *Mostaza Claro* [2006] ECR I-10421).

Therefore, apart from the other issues raised in this Roadmap, a tribunal seeking to render an award that is enforceable should consider the potential impact of procedural decisions on, and the inclusion in the award of, personal data in a manner which complies with the applicable data protection law.

[Link EN 3]



the global voice of
the legal profession®

Cybersecurity Guidelines

By the IBA's Presidential Task Force on Cybersecurity

October 2018



Task Force Chair

Simon Walker, Chair of IBA Online Services Committee, UK

Task Force Members

Anurag Bana, Legal Policy & Research Unit, UK

Sophia Adams Bhatti, Bar Issues Commission, UK

Nazar Chernyavsky, Technology Law Committee, Ukraine

Natasha Chiumya, Bar Issues Commission, Zambia

Luke Dembosky, Cyber Security Practice Lawyer, USA

Bruno Lobato, Law Firm Management Committee, Brazil

Monty Raphael, Criminal Law Committee, UK

Tshepo Shabangu, Bar Issues Commission, South Africa

Meg Strickler, Criminal Law Committee, USA

Graham Wladimiroff, Corporate Counsel Forum, The Netherlands

Valentina Zoghbi, Regulation of Lawyers Compliance Committee, UK

Contents

Introduction	4
Chapter 1: Technology	6
Chapter 2: Organisational Processes	13
Chapter 3: Staff Training	18
Appendix A: Bar Association resources	22
Appendix B: Government resources	23
Appendix C: Corporation and Organisation resources	24
Appendix D: Technology by firm size	25
Appendix E: Organisational processes by firm size	26
Appendix F: Security controls by firm size	27
Appendix G: Awareness and training programme	28
Appendix H: Cybersecurity staff training	30
Appendix I: Endnotes	33

Introduction

Law firms hold large volumes of valuable personal and commercially sensitive information about their firms, employees, case information and clients. This makes law firms of all sizes a highly attractive target for cybercriminals.¹ Breaches of data security can have devastating legal, financial and reputational consequences for a law firm's clients and business, as well as the law firm. As such, it is critical that firms have effective cybersecurity technologies and processes that focus on protecting the confidentiality, integrity and availability of sensitive data.²

The threat of large-scale cyberattacks against law firms is a real risk. It has been reported that attackers have targeted law firms because they hold valuable commercial information and are regarded as 'weak links' because they do not usually take cybersecurity as seriously as their clients³ or do not have the financial capabilities to invest in efficient technologies that protect the firm from cyberattacks. Global law firms have been the subject of targeted attacks by hackers attempting to acquire insider knowledge ahead of major business negotiations and mergers and acquisitions (M&A).⁴ While smaller law firms commonly believe that they are less likely to be a victim of cybercrime,⁵ experts have suggested that hackers target small businesses, including law firms, because they usually have lower cybersecurity defences due to a lack of financial and human resources.⁶ In 2015, it was estimated that up to 50 per cent of small businesses had been a victim of a cyberattack and 60 per cent of those who suffer a significant cyber breach go out of business within six months.⁷ Such attacks will continue with increasing sophistication and frequency.⁸ Consequently, it is essential that law firms of all sizes are aware of cybersecurity threats and have policies and procedures to counter such threats.

This report forms part of the International Bar Association's (IBA's) ongoing work on cybersecurity. The IBA Presidential Task Force on Cybersecurity (the 'Task Force') has the objective of: producing a set of recommended best practices to help law firms: to protect themselves from breaches of data security; assisting their ability to keep operations running if a breach of data security or ransom attack does occur; giving their clients the best possible assurances that their data is protected; and helping protect the reputation of the profession. It will do so by establishing a dialogue with practitioners and experts, both in the legal profession and external bodies, such as information technology (IT) suppliers and cybersecurity consultants. It will take a practical approach, including segmenting the market by financial capacity. The concepts in this report are designed to be easily understood by all lawyers, although some recommendations will require the law firm to call on at least some technical support for assistance. Just as lawyers have to learn new subjects for their work, often with the help of outside experts, they also need to do so here in order to protect their clients and business from cybersecurity threats.

There are many resources that provide information on cybersecurity; some are listed in Appendices A to C and I. The Task Force has assumed that all large law firms will have implemented cybersecurity strategies. Accordingly, while these guidelines are relevant for all law firms, they are particularly relevant for the following:

- single practitioners;
- small firms: up to 20 employees;
- medium-sized firms: from 21 up to 40 employees; and
- intermediate-sized to large firms: from 41 employees.

Indeed, firms of these sizes may face greater exposure to the risk of a security breach as they are less likely to have the infrastructure to protect themselves, unlike larger firms.

We recognise that not all of the recommendations that we make here are applicable, or applicable to the same degree, to solo and small firm practitioners, who may not, for example, see much benefit in a particular recommendation or have the scale of network operations to warrant its use. We therefore include, in Appendices D and E, detailed lists of the same recommendations with suggested applicability based on firm size and the type of issue.

These guidelines can be categorised into the following three broad areas:

1. technology;
2. organisational processes; and
3. staff training.

This report discusses each of these categories in turn.

Chapter 1: Technology

Regardless of a law firm's size, security vulnerabilities in technology can have detrimental effects on its legal practice. As such, it is critical that law firms employ up-to-date and efficient technologies to sufficiently protect the firm's data. Our goal is to convey the security concepts which follow rather than immerse you in the technical details. You will need to work with an IT professional to implement these principles; however, it is important that you know to ask about them and whether – and how – they are being put in place for your firm's protection.

Firms should implement a layered programme of technical defences to mitigate the risk of a cyber incident, including the following:

- **Keep system software updated.** The software that runs your network will often require updating through patches. It is very important to make these updates in a timely manner because they usually fix vulnerabilities that the programmer has found in the code. This is particularly so for law firms that are using legacy systems due to historical factors, such as mergers or even the arrival of a new lawyer. Your IT support should handle firm-wide patching, as opposed to leaving it up to individual lawyers and staff. We encourage you to ask them about the following points:
 - Purchase business-grade antivirus and email filtering software (often bundled).
 - Ensure operating system updates (eg, Windows and Mac OS X) are applied as soon as practicable to mitigate the risk of cybercriminals exploiting vulnerabilities. When updating systems, be cautious and only download updates from trusted sources (eg, Windows' official website). The software should be updated when new versions are released.
 - Ensure that firmware updates are applied not only to individual computers but also physical devices, such as modems and routers.
 - For critical business systems, software updates should be installed and monitored by trained IT or cybersecurity professionals.
 - Autoscans all email attachments – do not leave it up to users.
- **Implement endpoint protection.** The computers and other internet-connected devices that have access to your network are known as 'endpoints'. As they are the gateway in and out of your network from the internet, it is extremely important that they are protected and monitored. We encourage the following:
 - Implement 'endpoint' protection to ensure all interconnected devices that are part of the firm's network comply with the firm's cybersecurity standards.
 - Endpoint protection includes both antivirus software that is designed to identify and stop malicious code (malware), as well as firewalls that filter certain types of network traffic to protect your systems and log the traffic, enabling you to monitor and investigate suspicious traffic.

- Configure the settings of the default macro functions of Microsoft programs, such as Word, Excel and PowerPoint, so that macros from the internet are blocked, and allow only macros from controlled trusted locations and/or digitally signed macros.⁹
- **Use secure internet connections.** Cybercriminals may intercept personal or sensitive information by attacking unsecured Wi-Fi connections (eg, public Wi-Fi locations such as airports and coffee shops). Ensure that devices used to access the firm's network do so using a secure internet connection, including by implementing the following:
 - If staff work remotely (eg, at home, at a client's office and while travelling on business), ensure that the internet connection used is secured through a virtual private network (VPN)¹⁰ and not an unsecured public Wi-Fi network. A VPN connection is an encrypted, virtual tunnel back to your network, and is easily established by ordinary users with a simple software application that your IT support can show them how to use.
- **Secure web browsing and email.** Emails and web browsing (surfing) are the main and most successful attack vectors used, which means they are the most common communication pathways that hackers exploit. You should discuss with your IT support using one or more of the following defences:
 - Deploy at the network's perimeter:
 - a web filtering system to restrict and log web access and to prevent downloading of unwanted content;
 - gateway antivirus/anti-malware;
 - sandbox security, which is a mechanism for separating running programs, to reduce exposure to zero-day attacks, which are unknown vulnerabilities in software; and
 - deep package inspection (DPI) for analysing certain traffic for content that you may not want to come in to or go out of your network.
 - Browsers must always:
 - be updated;
 - have endpoint security solution plug-in and popup blockers enabled;
 - have autocomplete and autofill features disabled; and
 - have the content filter feature enabled, if available.
 - Disable internet access from servers and computers that do not need it.
 - Do not operate on free web-based email accounts (eg, Gmail and Hotmail). Reputable paid web-based services¹¹ are recommended as being appropriately secure.

- **Implement data retention, loss recovery capability.** Data is critical to a law firm's business. Yet data becomes a liability if, as a few examples, you collect data you do not need, you keep large volumes of email in your inboxes or you make it easy to email a file that contains a large volume of data. One email compromise (something rather common) or an email sent by an employee of a large data file can become a significant incident. A data retention policy sets out a strategy for reducing these risks. Similarly, if data is compromised in a cyber incident, then it is essential that it can be restored. Data recovery capability is therefore also extremely important. In light of these considerations, we recommend that you consult your IT support about the following:
 - Implement automatic deletion or archiving of emails and files older than designated dates that you establish. You may need these items for later reference or to meet legal requirements, and you can do that by archiving them in a separate and more tightly secured data repository. Similarly, if lawyers need an older email for an ongoing case, for example, then they can also move a copy of the email to a separate data file specific to that case.
 - Implement database backup technology that automatically backs up data daily. Cloud-based backup services are a highly common and secure backup solution. It is important that firms consider the type of cloud-based backup services they use. For example, OneDrive and similar services only protect against local device failure or theft of the device. If local data is deleted or encrypted (ransomware), then these changes will be replicated (possibly very quickly) to the cloud-based service. Some services, such as Dropbox for Business, allow for the storage of multiple copies of files going back in time, which should allow firms to recover from deletion or ransomware attacks. In addition, it is imperative to read all the fine print from third-party (cloud) vendor contracts/policies to ascertain compliance requirements, and, more importantly, the language regarding security protection.
 - If practicable, also keep on-site and off-site backup copies of data. Give attention to off-site storage's physical distance from the main site. Do not store it too close so that it can be compromised, but do not store it too far away so that it affects restoration time. Keeping periodic backups that are no longer connected to the network is important to allow recovery from a ransomware attack.
 - Consider configuring your system to block the ability to email or otherwise transmit files that contain large volumes of data without certain approval. Your IT support can assist in establishing these types of data loss prevention (DLP) measures.
- **Encrypt data and devices.** Encryption refers to making electronic files unreadable to individuals who do not have the encryption password or key to unlock them. Data in storage may be encrypted or data in transmission may be encrypted (eg, a VPN creates an encrypted, virtual tunnel for the secure transmission of files when an employee is working remotely). Encrypting entire devices, as well as sensitive files, is an extremely important approach to reducing cyber risks. Please consult your IT support about implementing the following steps:
 - Encrypt sensitive stored records and data so that only users with the encryption key or password can access the information.
 - Require encryption on all laptops, tablets and other mobile devices that can store or transmit sensitive data.

- Attempt to limit sensitive data to only the devices/employees that need it.
- **Enable remote erasure.** The loss of a laptop or other mobile device that contains a law firm's data is a common problem with potential for significant liability. Where the device is encrypted (as discussed above), risk is greatly reduced, if not eliminated. Another tool to ensure data on a lost device is not exploited is to erase or wipe the device remotely:
 - Consider installing software that remotely erases sensitive data and/or the entire content of a device. The software will only be able to remotely erase data/content once the device reconnects to the internet, but this will protect confidentiality in the instance of a breach of cybersecurity when a device is lost or stolen, or upon the termination of employment.
 - Consider a mobile device management (MDM) solution, which is a security software solution used by IT support, that can be installed on employees' business or personal mobile phones to secure email, contacts and other types of data.
- **Ensure that the cloud computing provider is secure.** If using cloud computing, it is very important to consider the security features used by the provider. Top cloud computing providers, such as Google, Microsoft and Amazon, are recommended as cost-effective and secure options.
 - When assessing which provider to use consider the following:¹²
 - Does the cloud computing provider physically operate in or outside the law firm's own jurisdiction? Client data should be stored in the jurisdiction in which the firm operates because many jurisdictions allow third parties (notably, government authorities) to review their records (eg, search and seizure laws may apply), which could compromise a client's confidentiality and ability to claim client legal privilege. The question of what happens if data is not stored in the same jurisdiction as that in which the firm operates is something that you should consider from a legal standpoint.¹³
 - What security policies and measures have been implemented by the provider?
 - Has the cloud computer provider obtained information security accreditations, such as ISO 27001?
 - Is the data stored on the cloud encrypted?
 - What authentication procedures are used to access the data stored on the cloud? Is it possible to set up multi-factor authentication processes?
 - Does the provider regularly back up data? What methods of data retention and restoration does the provider use?
 - Carefully read all aspects of the provider's policies and procedures. Where possible, draft a cloud policy that is customised to address the firm's specific needs.

- **Strictly manage access control.** Access control refers both to the rights that you grant certain individuals (administrators) to access all or a portion of your network and particular resources and files it contains. Consider the following steps to reduce risks related to the misuse or exploitation of access controls on computers, systems and networks:
 - Keep administrative accounts (ie, those that have access beyond that of a normal user) reduced to a minimum.
 - Identify elevated access needs and use specific administrative profiles with reduced privileges.
 - Each administrator should have its own account.
 - Restrict access to documents and assets to only users who need it to conduct their professional duties.
 - Promptly terminate the access of employees who depart the firm so that a former employee cannot further access your network remotely and so that hackers do not discover unused accounts available to them.
 - Prevent unauthorised devices from connecting to the network. Consider deploying MAC filtering/restriction on ports of network's switches/routers (may suit best smaller firms) or implementing IEEE 802.1x ('dot1x') on the network (may suit best larger firms). Remember to keep an updated inventory of authorised devices.
- **Create robust network segmentation.** A network with only a perimeter defence and not divided into separate segments means that a hacker who gains access to one portion gains access to the entire network. Discuss with your IT support how to create divisions or rings of security within your network to make it difficult for a hacker to move laterally within your network to reach your most valuable data:
 - Use a segmented virtual local area network (VLAN) to control and restrict access to critical assets. Place them on a separate VLAN with firewall filtering, and control users' access.
- **Implement audit logs.** Monitoring what is and is not occurring within your network on an ongoing basis is important, both to spot suspicious activity early and to identify unused accounts that a hacker could use to its advantage:
 - Audit system, user and application accounts on a frequent basis and disable any account that has no business need.
 - Subject to the law firm's budget:
 - Implement a security information and event management solution (SIEM), which is a software solution that collects logs and events of different sources throughout the network to detect suspicious activity that can compromise corporate data security.
 - Monitor events in real time, generate logs and analyse them periodically to understand what is happening or what has happened in the firm (eg, monitor insider behaviour to identify suspicious activity).

- At a minimum, logging tools should be configured to send alerts automatically whenever pre-defined suspicious activity occurs (eg, security group changes, mass file copy, export or erasure).
- **Consider application whitelisting/blacklisting.** Your network has a foundational software programme (typically a Microsoft or Apple operating system) onto which are added various application software programmes (apps) that perform specific functions. Apps often have code vulnerabilities that pose a security risk in themselves, and must be evaluated and updated on an individual basis. Rather than allowing individual users to install their own apps on your firm devices, discuss the following with your IT support:
 - consider installing systems that will allow only certain types of applications to run (a whitelist) and/or prevent others from running (a blacklist).
- **Secure mobile devices.** There has been a huge increase in mobile device usage, both personal bring your own device (BYOD) and corporate devices, to conduct professional activities. Mobile devices are an integral part of the legal workplace. Smartphones, laptops and tablets are essential for staff and client communication, but they contain both valuable personal and commercially sensitive data. As noted above with respect to the importance of using encryption, this presents a number of cybersecurity risks if the device is lost or stolen, the operating system is faulty or the device provider's IT procedures and policies fail to adequately protect sensitive data. In addition to encrypting mobile devices, consider the following additional steps to reduce these risks:
 - Implement a strict mobile access and BYOD policy that clearly defines the conditions and limits of using mobile devices to conduct business affairs.
 - Deploy a centralised MDM solution to protect corporate data on the go. If possible, prefer solutions that separate user's personal data from corporate data, which is kept in a secure (encrypted) logical container and managed by corporate IT staff.
 - If a personal device is used in any way for business purposes, separate personal and firm data:
 - Firm data must be held and accessed in a sandboxed environment (ie, an isolated environment to perform the testing and running of applications without affecting the main operating system), which will be difficult to achieve if an MDM solution is not used.
 - Define mandatory security settings to ensure a secure working environment (eg, strict password protection, password expiration, lock automatically after a certain time and device encryption).
- **Secure devices that retain data.** Mobile storage devices such as flash or thumb drives present risks both because of the potential loss of the data that they store and because they can become infected with malware that is then transferred to your network when the drive is plugged into a networked computer. Consider the following to reduce these risks:
 - Flash drives or memory cards are an easy way to store, back up and transfer data. Removable devices such as these should be virus scanned and generally used with extreme caution because they could be infected with malware.

- These devices should be kept securely to prevent theft or loss.
- When used, these devices should be encrypted.
- These devices should also be subject to the firm's cybersecurity policy, and the policy must include a procedure for the secure disposal of such devices.
- Firms may consider limiting/blocking the use of removable devices, such as flash drives, at work to prevent the risk of a malware infection.¹⁴

Chapter 2: Organisational processes

The vast majority of successful cyberattacks are due to human error. It is not possible to prevent all attacks; therefore, organisational processes are crucial in defining how the law firm's activities, roles and documentation are used to mitigate the risk of a cyberattack. Processes should assess the firm's cybersecurity risk profile, identify sensitive and valuable data, and enforce cost-effective strategies to mitigate cybersecurity threats. Cybersecurity should be supported by a clear governance structure, which is actively maintained by the partners and senior managers of the firm. As these concepts are much less technical, and more familiar to lawyers and other non-IT personnel, we have provided less background on these points and more specific practical advice for firms.

Organisational processes that a law firm should consider implementing include the following:

- **Implement strong username and password management along with multi-factor authentication:**
 - Implement strong username and password requirements. Complex passphrases are recommended (eg, '50%like2sleepunder@'), but at a minimum, a combination of uppercase, lowercase, digits and symbols are encouraged (eg, SundaYl00%). Automatically require users to change their passwords regularly: every three months is fairly common.
 - It is very important to implement multi-factor authentication that requires users to prove their identity through a second method.
 - Encourage the use of a password manager.
 - Ensure that passwords are not used across multiple systems.
 - For one-off registrations into a system, make up a password of random characters and then use the password reset option if you ever need to return.
- **Allocate roles and define responsibilities:**
 - Staff must understand their roles and responsibilities to ensure cybersecurity and manage associated risks.
 - If practicable, the firm should have a designated cybersecurity officer who enforces the firm's cybersecurity policies.
 - It may also be useful to designate particular roles, such as privacy officer, to particular staff members in order to ensure compliance with local data protection laws, for example, law firms with more than 250 staff who handle data of European Union residents must comply with the General Data Protection Regulation.
- **Identify sensitive data and implement protection protocols:**

- Identify sensitive data (eg, personal information, client information, information about the firm, designs, forecasts, formulas, practices, processes, records, reports, documents, third-party trade secrets and any other information subject to contractual or legal protection) and consider who creates it, where it is stored and with whom it is shared.¹⁵
- Implement special procedures, which should be regularly reviewed, so that the protection of this information is ensured.
- **Conduct cybersecurity risk assessment and periodic system testing:**
 - Identify the firm's benchmarks: what are you comparing the firm to?
 - Consider additional protections for the firm's finance team.
 - To conduct a cybersecurity risk assessment, firms should:
 1. identify the firm's information assets connected to the network, such as a database containing a large volume of sensitive client information, or the human resources database with personal data of your partners and staff;
 2. identify threats: internal and external, accidental and malicious;
 3. identify system vulnerabilities;
 4. consider third-party service providers' access to and responsibility for data;
 5. if possible, engage external threat assessors;
 6. consider the likelihood of an incident; and
 7. consider the financial, legal and reputational impact that an incident would have.
 - What is the state of the firm's technical, procedural and legal protections?
 - Where does the firm need to go to get to an acceptable level of protection?
 - Repeat the risk assessment process periodically (suggested once a year).
 - Do not advertise defences publicly.
 - In addition to a risk assessment, the firm should consider more frequent testing in the form of vulnerability assessments (to search for weaknesses in the firm's technical defences), compromise assessments (to search for existing breaches of the system), and penetration testing (to use a forensic vendor to attempt to hack the network and thereby identify potential gaps to address).
- **Implement a cybersecurity policy document that aligns with identified risks and has minimum standards:**
 - Implement a layered programme of technical defences (ie, strong usernames and passwords, multi-factor authentication, antivirus and malware protection, network segmentation, regular back up of data, data encryption (Pretty Good Privacy (PGP)/Gnu Privacy Guard (GPG) encrypted

attachments¹⁶), regular updating and patching software, and protection of physical devices (encryption) and premises).

- Develop a data retention policy that reduces exposure, consistent with the technical data retention measures discussed above.
- Take measures to identify security risks and breaches, including by implementing an outbreak alert system to ensure that the right people in the firm are notified quickly.
 - Train all personnel.
 - Obtain insurance coverage.
 - The policy document should be widely circulated, readily accessible, consistently followed, and periodically reviewed and updated.
- **Develop business continuity plans:**
 - Segment system backups carefully; practice restoration of files from backups.
 - Develop system resiliency when the main network is unavailable.
 - Identify means of alternative communications outside the network.
 - Ensure that paper copies of your cyber response plan are maintained in the event that the network is unavailable.
 - Consider backup plans to replace or substitute for key vendors who might experience their own disruption from a cyber event.
- **Develop and test a comprehensive incident response plan (IRP):**
 - List the name and emergency contact information of the members of the core team of responders, including, where appropriate, representatives from legal, IT, information security, communications, human resources, operations and client relations, depending on the size and nature of the firm. This team becomes the ‘computer security incident response team’ for the incident.
 - Clearly explain the designated roles and responsibilities for the responders, and include a clear and useable incident triage approach that escalates non-routine incidents for higher-level and cross-functional review by the core team addressed above. Routine incidents should be handled by IT, which should periodically report on trends in the number and types of attempted attacks.
 - Include contact information for external counsel, an outside forensic vendor, a public relations firm (to assist with reputation management) and any other outside experts that the firm is likely to need when responding to an attack.
 - The generally accepted phases of an IRP are:
 1. preparation;
 2. identification;

3. containment;
 4. eradication;
 5. recovery; and
 6. lesson learnt.
- Track the phases of the response:
 - The response team should meet to evaluate the response and identify and document any information that could be beneficial in a future incident.
 - Document the root cause of the incident, business impact and steps taken in response.
 - Continue monitoring these factors and task individuals with specific responsibilities.
 - Learning from the incident is vital. Technical controls should be improved, the IRP should be refined, and monitoring and testing should continue.
 - Test the IRP and core team in a live, simulated training exercise periodically, or at least twice a year, and make adjustments to it based on observations from the exercise.
- **Evaluate legal and regulatory obligations:**
 - Understand and comply with what is required of law firms in your jurisdiction, both legally and by your regulator regarding data protection and breach notifications to data protection authorities, regulators, clients and third parties.
 - Legal and regulatory obligations should be included in the IRP. In addition, consider the jurisdictions of the third-party contractors that your firm engages with who may hold data in an offshore location (eg, the General Data Protection Regulation for companies with an appropriate nexus to the EU).
 - Create a decision tree or notification matrix to allow the firm to identify obligations quickly if the need arises.
 - **Implement vendor and third-party service provider risk management:**
 - Before they are appointed, where practicable, conduct due diligence on all vendors and third parties that handle/store firm data or have access to the firm's systems.
 - Assess all contractual obligations with vendors and third parties, and to the extent possible, require vendors and third parties to adhere to minimum cybersecurity standards. When reviewing contracts, firms should consider the following:
 1. What are the firm's business requirements?
 2. Conduct a risk and compliance analysis.
 3. Is there scope for negotiation?

4. Who is responsible for investigating a data breach that affects your firm's systems or data?
 5. Who is responsible for notification of a data breach as required in the jurisdiction?
- Develop adequate controls and monitoring for vendor and third-party access to systems.
 - Consider sharing criteria for suppliers with other law firms.
 - **Conduct training and testing:**
 - Require regular cybersecurity awareness training of all employees using nationally accredited trainers.
 - Require specialised training updates for IT and information security personnel.
 - Undertake penetration testing and other practical threat assessments (eg, active phishing campaigns) to test the firm's security and response at least once a year.
 - Conduct periodic vulnerability scans and compromise assessments.
 - **Consider cyber liability insurance:**
 - Even if law firms implement the best cybersecurity technologies and processes, firms will still have some level of risk exposure.¹⁷
 - Law firms should assess their risk exposure as outlined and take out adequate cyber insurance as part of the firm's overall cybersecurity risk mitigation strategy.¹⁸
 - Cyber liability coverage can help a law firm to cover the costs related to a data breach, including privacy breach, notification expenses, litigation, loss of income, regulatory fines and penalties, and other expenses.
 - **Participate in cybersecurity information sharing:**
 - Consider participating in an information-sharing system with similar businesses or other organisations (eg, governments, bar associations and cybersecurity companies)¹⁹ to benefit from shared cybersecurity threats and experiences, and in accordance with any local regulatory requirements.
 - Consider what cyberthreat sharing is available through your national and local law enforcement.

The Center for Internet Security (CIS) Controls™ has produced a list of controls that span both the technology and organisational process sections. These are set out in Appendix F, with suggested applicability based on firm size and the type of data at issue. More information on these controls can be found at www.cisecurity.org/controls.

Chapter 3: Staff training

People, due to lack of knowledge or inattentiveness, are usually the weakest link in cybersecurity, which is a fact that cybercriminals exploit. Various types of cyberattacks are designed to appear legitimate but contain malicious links that can obtain sensitive information, such as usernames, passwords and credit card details, are commonly used by hackers because it is more efficient than breaking into a computer's security defences.

For this reason, it is critical that staff understand the common forms of cyberattacks and receive training on how to deal with such attacks. Staff should be educated on the applicable cybersecurity policies, procedures and guidelines of the firm. Staff induction, onboarding, and further education and training provided periodically should all include cybersecurity and cyberattack information sessions to maintain awareness. Where practicable, staff should also be tested by a phishing email campaign with an inert link to monitor organisational compliance. This will help to establish a cybersecurity-conscious culture in law firms, which creates a strong first line of defence.

Staff training should cover the following:

- **What cybersecurity is:**
 - Staff should learn that cybersecurity is the state of being protected against the criminal, unauthorised or negligent use of electronic data, as well as the measures taken to achieve this.
 - Staff should learn that a cyberattack can be both overt (eg, an attempt by an attacker to manipulate, disrupt or destroy a computer network or the information contained within that network, often with the effect of compromising national security or business profitability) and covert (eg, theft of data).
- **Why cybersecurity is important:**
 - Staff should be aware that cybersecurity is important because cyberattacks are becoming increasingly sophisticated and frequent. Simultaneously, the data stored in databases, including those of law firms, is becoming more valuable.
 - Staff should be aware that a lawyer's duty of confidentiality is of paramount importance and breaches of cybersecurity may have legal implications if confidential information is revealed.
 - Staff should also be aware of the reputational and economic risks associated with breaches of cybersecurity.
 - Staff should be trained in how to respond to a cyberattack to mitigate the risk of further loss.
 - Staff should become extremely familiar with the firm's IRP, particularly regarding what types of things to report and to whom.

- **Examples of common threats:**

Staff should be aware of different types of cyberattacks they are likely to face while working at a law firm, including the following:

- malware:
 - malicious software such as viruses, worms, Trojan horses, spyware and adware;
- ransomware:
 - ransomware encrypts or locks valuable data and cybercriminals demand payment for the encryption key to restore access to data;
- phishing/spear phishing/whaling emails:
 - phishing is an attack contained in legitimate-looking emails, which may have links infected with malware or links that attempt to gather personal and financial information from recipients;
 - spear phishing and whaling are targeted forms of phishing;
- denial-of-service (DoS) attacks:
 - cyberattacks designed to overload devices with requests with the intention of making them crash and become unavailable;
- digital identity theft;
 - digital identity is the body of online data information that uniquely describes an individual, organisation or electronic device. It includes unique identifiers, such as an email address, username and password used to prove a person's individuality;
 - cybercriminals might use phishing emails and malware as methods of stealing personal and financial information;
 - cybercriminals might pose as senior employees within a firm by hacking or spoofing their email account and convince someone with financial authority to make a payment;²⁰
- zero-day exploits:
 - vulnerabilities in software unknown to those interested in mitigating the vulnerability (eg, vendor of the software) and able to be exploited by cybercriminals who discover them first.²¹

- **Essential cybersecurity tips and advice:**

Staff should be taught the following key messages:

- Do not click on links you do not recognise.
- Challenge and enquire: do you need more information; does the enquiry/instruction appear usual or uncharacteristic in terms of the sender?

- Protect your personal data.
- Be aware of where you are sending your data.
- Create complex passwords, protect passwords and change them regularly, do not reuse passwords across multiple systems and do not share passwords with colleagues.
- Use multi-factor authentication.
- Do not use public/free Wi-Fi – personal hotspots are safer.
- Be aware of the risks of working from home with extended family/friends having access to the same network.
- Be alert and watch out for common characteristics of phishing/spoof emails (eg, poor or odd spelling, emails that ask for personal or financial information and offers that seem too good to be true).
- Use VPN and dongles (small, removable devices that have secure access to wireless broadband) when travelling.
- If you are concerned about security when travelling, use your phone rather than your desktop.
- When travelling, do not remain logged on to the internet longer than necessary.
- Ensure that you only use apps from a reputable source.
- Uninstall apps you are not using.
- Understand the permissions you are granting to apps (eg, tracking your location and access to your contacts or camera).
- Use a strong, well-regarded browser. Google Chrome is the strongest in industry tests.
- Report all phishing/spear phishing to the person designated to deal with cybersecurity concerns, even if the email is sent to your personal account rather than work.
- Have good awareness of cybersecurity breach trends and attacks.
- It is best to avoid using the consumer versions of public services from Dropbox, Google and so on for sharing business content. If there is a requirement to use these services for any purpose, then it is strongly advised to use the business versions for enhanced data security and support.
- Adopt the practice of having a regular data clear out. Do not retain data or share it (eg, in Dropbox) for longer than is necessary given its purpose, and remove shared access to data when it is no longer needed.
- Be aware of the security implications of using personal devices for professional matters. If practicable, consider requiring staff to encrypt attachments they email if they contain a significant volume of sensitive data.

- Turn on your browser's popup blocker. A popup blocker should be enabled at all times while browsing the internet.
- Check for 'https:' or a padlock icon on your browser's URL bar to verify that a site is secure before entering any personal information.
- Do not use public phone chargers to avoid the risk of 'juice jacking'.

For a guide on the minimum levels of awareness that your staff should have on cybersecurity training, see Appendix G. For a more detailed resource on how to provide staff with cybersecurity training, see Appendix H.

For an example of a cybercrime awareness campaign that law firms can implement in their environment, see that prepared by LexisNexis, which can be found at **www.lexisnexis.com/uk/lexispsl/practicecompliance/document/393739/5CTY-7851-F189-118W-00000-00/Cybercrime_awareness_campaign_for_law_firms**.

APPENDIX A: Bar Association resources

For further information and resources on cybersecurity reading material, see the following:

- Australia: Law Council of Australia²²
- Canada: Canadian Bar Association²³
- China: All China Lawyers Association²⁴
- Europe: Council of Bars and Law Societies of Europe²⁵
- Germany: German Bar Association²⁶
- South Africa: Law Society of South Africa²⁷
- United Kingdom: Law Society of England and Wales²⁸
- United States: American Bar Association²⁹

For an overview of the cybersecurity guidelines available in the above jurisdictions see

www.ibanet.org/Document/Default.aspx?DocumentUId=8B58AEA5-FF20-49B8-B021-2B29CFCC1B0E.

APPENDIX B: Government resources

- Australia: Australian Cyber Security Centre³⁰
- Commonwealth: Commonwealth Cyber Declaration³¹
- Europe: EU International Cyberspace Policy³²
- New Zealand: National Cyber Security Centre³³
- UK: HM Government Cyber Aware,³⁴ National Cyber Security Centre (NCSC)³⁵ and the NSCS Cyber Essentials³⁶
- US: National Institute of Standards and Technology³⁷

APPENDIX C: Corporation and organisation resources

- Google Safety Centre³⁸
- International Organization for Standardization³⁹
- McAfee Threat Center⁴⁰
- Microsoft Office Micro Secure⁴¹
- Norton by Symantec⁴²
- SANS Institute⁴³
- Sophos Knowledge Center⁴⁴
- Wombat Security Awareness Resources⁴⁵

APPENDIX D: Technology by firm size

#	Control Description/Firm Size	Single practitioner	Small	Medium-sized	Large
1	Keep system software updated	E	E	E	E
2	Implement endpoint protection	E	E	E	E
3	Use secure internet connections	A	D	E	E
4	Secure web browsing and email	E	E	E	E
5	Implement data retention, loss recovery capability	A	D	E	E
6	Encrypt data and devices	A	D	D	D
7	Enable remote erasure	D	E	E	E
8	Make sure cloud service provider is secure	A	D	E	E
9	Strictly manage access control	O	D	E	E
10	Create robust network segmentation	O	O	D	E
11	Implement audit logs	O	O	D	D
12	Consider application whitelisting/blacklisting	O	A	D	D
13	Secure mobile devices	E	E	E	E
14	Secure devices that retain data	D	D	E	E

O – Optional; A – Advised; D – Desired; E– Expected

APPENDIX E: Organisational processes by firm size

#	Process Recommendation/Firm Size	Single practitioner	Small	Medium-sized	Large
1	Implement strong username and password management along with multi-factor authentication	D	D	E	E
2	Allocate roles and define responsibilities	O	A	D	E
3	Identify sensitive data and implement protection protocols	E	E	E	E
4	Conduct cybersecurity risk assessment and periodic system testing	A	A	D	E
5	Implement a cybersecurity policy document that aligns with identified risks and has minimum standards	O	A	D	E
6	Develop business continuity plans	A	A	A	D
7	Develop and test a comprehensive IRP	A	A	D	E
8	Evaluate legal and regulatory obligations	E	E	E	E
9	Implement vendor and third-party service provider risk management	A	A	D	E
10	Conduct training and testing	D	D	E	E
11	Consider cyber liability insurance	A	A	D	E
12	Participate in cybersecurity information sharing	A	A	D	D

O – Optional; A – Advised; D – Desired; E– Expected

APPENDIX F: Security controls by firm size*

#	Control Description/Firm Size	Single practitioner	Small	Medium-sized	Large
1	Inventory of authorised and unauthorised devices	A	A	D	E
2	Inventory of authorised and unauthorised software	O	A	D	E
3	Secure configurations for hardware and software on mobile devices, laptops, workstations and servers	A	A	A	E
4	Continuous vulnerability assessment and remediation	A	D	E	E
5	Controlled use of administrative privileges	A	D	E	E
6	Maintenance, monitoring and analysis of audit logs	O	O	A	A
7	Email and web browser protections	E	E	E	E
8	Malware defences	E	E	E	E
9	Limitation and control of network ports, protocols and services	O	A	A	D
10	Data recovery capability	A	D	E	E
11	Secure configurations for network devices	A	E	E	E
12	Boundary defence	O	A	D	E
13	Data protection	E	E	E	D
14	Controlled access based on the need to know	A	D	E	E
15	Wireless access control	D	E	E	E
16	Account monitoring and control	O	A	E	E
17	Security skills assessment and appropriate training to fill gaps	A	A	D	E
18	Application software security	O	O	O	D
19	Incident response and management	O	O	A	E
20	Penetration tests and red team exercises	O	O	E	E

O – Optional; A – Advised; D – Desired; E– Expected

APPENDIX G: Awareness and training programme

#	Description	Single practitioner	Small	Medium-sized	Large
1	Password management awareness.	E	E	E	E
2	Multi-factor authentication on all business and personal accounts.	D	D	D	E
3	Awareness of the dangers (both cyber and ethically) in the use of social media.	E	E	E	E
4	Physical access control: Training on the importance of only allowing authorised personnel to physically access a building. Within the building, access to server equipment should be limited to essential IT staff only. An environment should be created whereby staff members are encouraged to challenge persons that they do not know.	E	E	E	E
5	Logical access control: Computer systems should operate to a standard of least privilege.	D	D	D	E
6	Where appropriate, all portable devices should be fully encrypted. This includes hard drives, USB flash drives, memory cards and optical media. If encryption is not available, then password protected ZIP/RAR files provide an alternative.	E	E	E	E
7	Staff should be encouraged to report suspicious activity on their computer, such as unexpected windows or applications launching, independent mouse movement and unsolicited emails.	E	E	E	E
8	Staff should not click on any links or open any attachments to an unsolicited email. However, rather than simply deleting the email, the organisation should have a mailbox to which suspicious emails can be forwarded (without being opened). This allows the organisation to develop email intelligence, including analysis on why certain emails were not detected by preventative security software.	A	A	D	D
9	Staff should be made aware of when they will be legitimately prompted (after clicking a link) to enter their login credentials.	A	A	A	A
10	Active phishing campaigns should be conducted as a training and educational exercise.	A	A	D	D
11	Tips and reminders about confidential information and policies, such as information security, clean desk policy, BYOD device policy, remote working and removable media policy, document retention policy, MDM policy, privacy policy and social media policy.	A	A	D	D
12	Policies should include protocols on the use of web-based email and storage systems (eg, Dropbox, OneDrive, Gmail and Yahoo! Mail).	A	A	D	D

13	Mobile phones are a potential vulnerability for an organisation. As a guide, staff who use their personal mobile devices for business purposes should ensure that a minimum passcode length is six digits, remove wiping capabilities should be turned on, Apple iOS devices should be configured to wipe after ten unsuccessful login attempts, backups to computers should be encrypted, memory cards (if applicable) should be encrypted, and application and operating system updates should applied as practicable.	E	E	E	E
14	Contractors and third-party suppliers due diligence.	E	E	E	E
15	Awareness raising of current threats and warning signs.	D	D	D	E

O – Optional; A – Advised; D – Desired; E– Expected

APPENDIX H: Cybersecurity staff training

Cybersecurity refers to the protection of electronic systems to maintain the confidentiality, integrity and availability of data. While it is common to consider an external attacker as the greatest threat, it is equally important to consider that internal staff, contractors and third-party suppliers can intentionally, accidentally or negligently cause data loss and damage to systems.

It is recommended that an organisation's staff receive training in the following key areas as well as any organisation-specific training that may be required.

Password management	<p>Training should be provided on the importance of good password management. This should be reinforced as applicable to both business accounts and personal accounts (to reduce social engineering attacks). The following general rules may assist:</p> <ul style="list-style-type: none"> • Passwords should not be recorded on paper and attached to computer equipment. • Passwords should not be shared between users. • Strong passwords should be used. This should comprise numbers, upper and lower case letters, and special characters. Depending on the organisation's network policy, Windows password rule complexity may be insufficient (eg, Sunday1 meets the complexity rules). Staff should be encouraged to use passphrases such as '50%like2sleepunder@*'. • Personally identifiable information such as dates of birth, postcodes, children's or pets' names, should be avoided. • Password reuse, that is, using the same password across multiple systems, should be avoided. Ideally, a password manager should be used where one only needs to remember the master password and the application generates and inputs the rest. • When a password is required to enrol in a system or make a one-time or rare purchase, consider making up a random one-time series of characters and then using the password reset feature if subsequent access is required. • Strongly encourage users to have separate passwords for business and private accounts.
Multi-factor authentication	<p>Multi-factor authentication should be activated on all business and personal accounts. Staff should be made aware that attackers target personal accounts to gather intelligence and to send phishing emails to colleagues for social engineering attacks.</p> <p>Staff should be provided with how-to guides to implement multi-factor authentication on the most common applications, such as LinkedIn, Gmail, Yahoo!, Facebook, Instagram and Apple iCloud.</p>
Social media	<p>Staff should be aware of the dangers (both cyber and ethically) in the use of social media. Social media provides a valuable source of intelligence for potential attackers, including details of potential clients, colleagues and suppliers.</p> <p>Staff should also be trained in the dangers of posting any material to social media accounts (eg, photographs) that could provide a would-be attacker with information about the physical layout of a building.</p>

Physical access control	<p>Training should be provided on the importance of only allowing authorised personnel to physically access a building. Within the building, access to server equipment should be limited to essential IT staff only.</p> <p>An environment should be created whereby staff members are encouraged to challenge persons that they do not know.</p> <p>Staff members must make sure that their access/security cards are kept safely so that no one can use them to access the building. They must also not exchange their security cards with other staff members.</p> <p>Staff should bring old devices that may contain corporate data to IT to be forensically wiped or physically destroyed.</p>
Logical access control	<p>Computer systems should operate to a standard of least privilege. On this basis, staff should only request access to systems and data that they need access to. They should be warned of the dangers of accessing (browsing) systems and data that they do not need access to.</p> <p>Where appropriate, all portable devices should be fully encrypted. This includes hard drives, USB flash drives, memory cards and optical media. If encryption is not available, then password protected ZIP/RAR files provide an alternative.</p>
Suspicious activity	<p>Staff should be encouraged to report suspicious activity on their computer, such as unexpected windows or applications launching, independent mouse movement and unsolicited emails.</p> <p>Staff should not click on any links or open any attachments to an unsolicited email. However, rather than simply deleting the email, the organisation should have a mailbox to which suspicious emails can be forwarded (without being opened). This allows the organisation to develop email intelligence including analysis on why certain emails were not detected by preventative security software.</p> <p>Staff should be made aware of when they will be legitimately prompted (after clicking a link) to enter their login credentials.</p> <p>Active phishing campaigns should be conducted as a training and educational exercise.</p>
Policy awareness	<p>Staff should be aware of the following policies, if applicable, the reason for their implementation and the implications of not following them:</p> <ul style="list-style-type: none"> • appropriate use of IT systems • BYOD device policy • document retention policy • working from home policy • MDM policy • privacy policy • social media policy <p>These policies should include protocols on the use of web-based email and storage systems (eg, Dropbox, OneDrive, Gmail and Yahoo! Mail).</p>

Mobile phones	<p>Mobile phones are a potential vulnerability for an organisation. As a guide, staff who use their personal mobile devices for business purposes should ensure the following:</p> <ul style="list-style-type: none"> • a minimum passcode length should be six digits • remote wiping capabilities should be turned on • Apple iOS devices should be configured to wipe after ten unsuccessful login attempts • backups to computers should be encrypted • memory cards (if applicable) should be encrypted • application and operating system updates should be applied as practicable. <p>Where possible, the organisation should develop and educate staff on a BYOD device policy.</p> <p>Subject to the size of the organisation, an MDM solution may also be appropriate.</p>
Contractors and third-party suppliers	<p>Staff should be made aware of the risk that poorly validated contractors and third-party suppliers can have to the organisation. Staff who engage contractors and third parties should be encouraged to thoroughly review the security credentials of all external parties before being allowed to access IT systems and before sending organisational data to them.</p> <p>All contractors and third parties should be monitored if they are provided with access to the data holdings of the organisation.</p> <p>Unless absolutely essential, contractors and third-party suppliers should not be given administrative-level access to the network.</p>
Continued training	<p>Security awareness training should be delivered on a regular basis. Continued training and the development of a 'cyber aware' culture is paramount to mitigating the ongoing cyberthreat.</p>

APPENDIX I: Endnotes

- 1 See, Camilla Hodgson, 'Law firm cyber breaches could result in huge thefts and insider trading' *Business Insider UK* (London, 19 October 2017) <http://uk.businessinsider.com/cyber-crime-law-firms-vulnerable-2017-10>, accessed 15 June 2018.
- 2 Jill D Rhodes and Robert S Litt, *The ABA Cybersecurity Handbook* (2nd edn, American Bar Association 2017).
- 3 Chloe Smith, 'M&A hack attack on 48 elite law firms' *The Law Society Gazette* (London, 4 April 2016) www.lawgazette.co.uk/practice/manda-hack-attack-on-48-elite-law-firms/5054524.article, accessed 15 June 2018; Nicole Hong and Robin Sidel, 'Hackers Breach Law Firms, Including Cravath and Weil Gotshal' *Wall Street Journal* (New York, 29 March 2016) www.wsj.com/articles/hackers-breach-cravath-swaine-other-big-law-firms-1459293504, accessed 15 June 2018.
- 4 Chloe Smith, 'M&A hack attack on 48 elite law firms' *The Law Society Gazette* (London, 4 April 2016) www.lawgazette.co.uk/practice/manda-hack-attack-on-48-elite-law-firms/5054524.article, accessed 15 June 2018; Nicole Hong and Robin Sidel, 'Hackers Breach Law Firms, Including Cravath and Weil Gotshal' *Wall Street Journal* (New York, 29 March 2016) www.wsj.com/articles/hackers-breach-cravath-swaine-other-big-law-firms-1459293504, accessed 15 June 2018.
- 5 See Cert-UK, 'Cyber threats to the legal sector and implications to UK businesses' www.ncsc.gov.uk/content/files/protected_files/guidance_files/Cyber-threats-to-the-legal-sector-and-implications-to-UK-businesses.pdf, accessed 15 June 2018.
- 6 Mark Smith, 'Huge rise in hack attacks as cyber-criminals target small businesses' *The Guardian* (London, 8 February 2016).
- 7 See the testimony of Dr Jane LeClair, Chief Operating Officer, National Cybersecurity Institute at Excelsior College, before the US House of Representatives Committee on Small Business (22 April 2015) <http://docs.house.gov/meetings/SM/SM00/20150422/103276/HHRG-114-SM00-20150422-SD003-U4.pdf>, accessed 15 June 2018.
- 8 See n 2 above.
- 9 See National Cyber Security Centre, Government Communications Headquarters, 'Macro Security for Microsoft Office' www.ncsc.gov.uk/guidance/macro-security-microsoft-office, accessed 15 June 2018 and Australian Cyber Security Centre, 'Microsoft Office Macro Security'.
- 10 See National Cyber Security Centre, Government Communications Headquarters, 'End user devices: VPNs' 1 August 2017 www.ncsc.gov.uk/guidance/end-user-devices-vpns-1, accessed 15 June 2018.
- 11 Eg, G Suite by Google Cloud <https://gsuite.google.co.uk>, accessed 15 June 2018.
- 12 See National Cyber Security Centre, Government Communications Headquarters, 'Implementing the Cloud Security Principles' www.ncsc.gov.uk/guidance/implementing-cloud-security-principles, accessed 15 June 2018.

- 13 See Brief of the Council of Bars and Law Societies of Europe as Amicus Curiae in Support of Respondent, *United States of America v Microsoft Corporation*.
- 14 Australian Small Business and Family Enterprise Ombudsman, Australian Government ‘Cyber Security: The Small Business Best Practice Guide’ <http://asbfeo.gov.au/sites/default/files/documents/ASBFEO-cyber-security-research-report.pdf>, accessed 15 June 2018.
- 15 See n 2 above
- 16 PGP is used for signing, encrypting and decrypting texts, emails, files, directories and whole disk partitions, and to increase the security of email communications. GPG is a free software replacement for PGP.
- 17 See n 2 above.
- 18 See The Law Society of England and Wales, ‘Cyber insurance guidance for law firms’ 10 October 2016 www.lawsociety.org.uk/support-services/practice-management/cybersecurity-and-scam-prevention/cyber-insurance-guidance-for-law-firms, accessed 15 June 2018 and Association of Corporate Counsel, ‘Model Information Protection and Security Controls for Outside Counsel Possessing Company Confidential Information’ March 2017, item 12 www.acc.com/advocacy/upload/Model-Information-Protection-and-Security-Controls-for-Outside-Counsel-Jan2017.pdf?_ga=2.193324781.1506201640.1512572020-1373712223.1512572020, accessed 15 June 2018.
- 19 See, eg, the Cyber Security Information Sharing Partnership (CiSP) www.ncsc.gov.uk/cisp, accessed 15 June 2018.
- 20 See n 6 above.
- 21 See n 2 above.
- 22 See <http://lca.lawcouncil.asn.au/lawcouncil/cyber-precedent-home>, accessed 15 June 2018.
- 23 See www.oba.org/Professional-Development-Resources/Cyber-Security-in-Law-Firms, accessed 15 June 2018.
- 24 See www.npc.gov.cn/npc/xinwen/2016-11/07/content_2001605.htm, accessed 15 June 2018.
- 25 See www.ccbe.eu/fileadmin/speciality_distribution/public/documents/IT_LAW/ITL_Guides_recommendations/EN_ITL_20160520_CCBE_Guidance_on_Improving_the_IT_Security_of_Lawyers_Against_Unlawful_Surveillance.pdf, accessed 15 June 2018.
- 26 See <https://digital.anwaltverein.de/de/news/details/das-bea-in-der-praxis-neue-broschuere-zum-elektronischen-rechtsverkehr-kopie>, accessed 15 June 2018.
- 27 See www.lssa.org.za/upload/files/Resource%20documents/Information%20Security%20for%20South%20African%20Law%20Firms%20LSSA%20Guidelines%202018.pdf, accessed 15 June 2018.
- 28 See www.lawsociety.org.uk/support-services/practice-management/cybersecurity-and-scam-prevention, accessed 15 June 2018.

- 29 See www.americanbar.org/groups/cybersecurity/resources.html, accessed 15 June 2018.
- 30 See www.acsc.gov.au/index.html, accessed 15 June 2018.
- 31 See http://thecommonwealth.org/sites/default/files/inline/CommonwealthCyberDeclaration_1.pdf, accessed 15 June 2018.
- 32 See https://eeas.europa.eu/topics/eu-international-cyberspace-policy_en, accessed 15 June 2018.
- 33 See www.ncsc.govt.nz, accessed 15 June 2018.
- 34 See www.cyberaware.gov.uk, accessed 15 June 2018.
- 35 See www.ncsc.gov.uk, accessed 15 June 2018.
- 36 See www.cyberessentials.ncsc.gov.uk, accessed 15 June 2018.
- 37 See www.nist.gov/topics/cybersecurity, accessed 15 June 2018.
- 38 See www.google.com/safetycenter/everyone/cybercrime, accessed 15 June 2018.
- 39 See www.iso.org/isoiec-27001-information-security.html, accessed 15 June 2018.
- 40 See www.mcafee.com/uk/threat-center.aspx, accessed 15 June 2018.
- 41 See www.microsoft.com/en-us/security/default.aspx, accessed 15 June 2018.
- 42 See <https://uk.norton.com/cyber-security-insights>, accessed 15 June 2018.
- 43 See www.sans.org, accessed 15 June 2018.
- 44 See www.sophos.com/en-us/security-news-trends/whitepapers.aspx, accessed 15 June 2018.
- 45 See www.wombatsecurity.com/resource-center, accessed 15 June 2018.



the global voice of
the legal profession®

To view online, visit: www.ibanet.org/LPRU/LPRU-Cybersecurity.aspx

To find out more, email: LPRU@int-bar.org

DRAFT CYBERSECURITY PROTOCOL
FOR INTERNATIONAL ARBITRATION

CONSULTATION DRAFT

Announcement of Cybersecurity Protocol Consultation

International arbitration in the digital landscape warrants consideration of what constitutes reasonable cybersecurity measures to protect the information exchanged during the process.

Recognizing this need, the International Council for Commercial Arbitration (ICCA), the International Institute for Conflict Prevention and Resolution (CPR) and the New York City Bar Association have established a Working Group on Cybersecurity in Arbitration (the “Working Group”). The Working Group has promulgated a Draft Cybersecurity Protocol for International Arbitration (the “Protocol”) and is now pleased to proffer this draft Protocol for public consultation. The draft Protocol is attached hereto.

The consultative period will last until 31 December 2018. All interested parties are encouraged to provide detailed thoughts and comments on the draft protocol, or to provide general feedback. The Working Group will hold a number of public workshops in different parts of the world to solicit and discuss the views of interested parties. In addition, the Working Group welcomes written comments from interested parties which should be submitted no later than 30 September 2018, through the Working Group’s page on ICCA’s website at <<http://www.arbitration-icca.org/projects/Cybersecurity-in-International-Arbitration>>.

In anticipation of the public consultation, which the Working Group anticipates will include input from a variety of sources with differing views, the draft Protocol refrains in Schedule A from offering specific cybersecurity measures for possible inclusion in arbitration agreements or procedural orders. Instead the Protocol suggests a procedural framework for developing specific cybersecurity measures within the context of individual cases, recognizing that what constitutes reasonable cybersecurity measures will vary from case-to-case based on a multitude of factors. Depending on the feedback received, the final Protocol may or may not include such proposed measures in Schedule A.

Following the consultation period, the Protocol will be revised, refined, and finalized in accordance with the input and comments received. After that time, the Working Group anticipates that there will be an ongoing review and revision process, as cybersecurity issues will evolve with changing technology, new cyberthreats, changing laws and regulatory schemes, and emerging consensus as to best practices.

The Working Group is chaired by Brandon Malone (Chairman of the Scottish Arbitration Centre and the principal of Brandon Malone & Company). Its members include Olivier André (CPR), Paul Cohen (4-5 Gray’s Inn Square Chambers), Stephanie Cohen (independent arbitrator), Hagit Elul (Hughes Hubbard & Reed), Lea Haber Kuck (Skadden, Arps, Slate, Meagher & Flom LLP), Micaela McMurrough (Covington & Burling), Mark Morril (independent arbitrator), Kathleen Paisley (Ambos Law) and Eva Y. Chan (Skadden, Arps, Slate, Meagher & Flom LLP) as Secretary to the Working Group.

Draft Cybersecurity Protocol for International Arbitration*

I. Introduction: Importance of Cybersecurity in Arbitration

- A. Most exchanges of information¹ today are digital, including in international arbitration and other forms of dispute resolution.
- B. Parties expect that the providers of dispute resolution services and other participants in the dispute resolution process will take reasonable measures to protect non-public exchanges of information, including reasonable cybersecurity measures, to safeguard digital information from unauthorized access and disclosure.
- C. Cybersecurity may be legally mandated when the information at issue is personal or industry-regulated data, or if the information is relevant to national security or other matters of public interest.
- D. In an increasingly digital landscape, the credibility of any dispute resolution system, including arbitration, depends on maintaining a reasonable degree of protection of the digital information exchanged during the process, except where the parties intend for the information to become public. Arbitration proceedings are not immune to increasingly pervasive cyberattacks against businesses, law firms, governmental actors, educational institutions and other custodians of large electronic information repositories. This means that attention to cybersecurity is required in international arbitration as it is in other sectors.
- E. Arbitration has the benefit over other dispute resolution processes of enabling parties to maintain the confidentiality of the dispute resolution process itself where they want to, and the information exchanged within it. Reasonable cybersecurity measures are essential to ensure that international arbitration maintains this advantage.
- F. Even where an arbitration has not been made confidential by agreement of the parties or by application of arbitration rules or law, maintaining the legitimacy of the process may require that certain aspects of the arbitral process remain confidential. For example, interactions between an administering institution and the parties, tribunal deliberations, and draft awards are generally intended to remain private and secure.
- G. Although a reasonable degree of cybersecurity is critical for international arbitration in the digital world, what is reasonable in any given circumstance depends on various factors discussed herein.

* Proposed by the Working Group on Cybersecurity in Arbitration established by the International Council for Commercial Arbitration (ICCA), the International Institute for Conflict Prevention and Resolution (CPR) and the New York City Bar Association. Pending a period of public consultation, the Protocol is being issued as a draft for debate and comment. The Working Group anticipates that a final version of the Protocol will be released in 2019.

1. This Protocol uses the broad term “information” to include all types of electronic and non-electronic information of any type and in any form, including both commercial and personal information. When referring to personal information specifically, we use the term “personal data” employed in many data protection laws and regulations. This is also a very broad term and typically includes all information of any nature whatsoever that individually or collectively could be used to identify an individual (including for example, work-related emails, lab notebooks, agreements, handwritten notes, etc.).

DRAFT CYBERSECURITY PROTOCOL FOR INTERNATIONAL ARBITRATION

- H. Cybersecurity is a shared responsibility of all Participants² in the international arbitration process. Security of information ultimately depends on the responsible conduct and vigilance of individuals. Many breaches arise from individual conduct; any individual actor can be the “weak link”, no matter how robust the security of its infrastructure.
- I. The Participants in international arbitrations are, to a large degree, digitally interdependent, because the process typically involves the transmission and hosting of information and collaborative elements such as communications relating to the arbitration. Consequently, any break in the custody of arbitral information has the potential to affect all Participants. Indeed, since Participants will frequently host not only their own arbitral information, but also the information of others, intrusion into the information held by one Participant may injure another more than the one whose information security was compromised.
- J. All Participants should take into consideration their own, regular cybersecurity practices and digital infrastructure as a threshold matter, because Participants’ day-to-day security practices and infrastructure pre-exist individual arbitrations, and therefore have an immediate and continuing impact on the security of arbitration-related information. Schedule C hereto highlights general cybersecurity practices that all Participants in an international arbitration should take into consideration.

II. Cybersecurity Risks in International Arbitration

- A. Cybersecurity refers to the means employed to protect digitally stored information from intrusion by threat actors not authorized to have access to that information.
- B. As a matter of good practice, reasonable cybersecurity measures should be employed whenever large amounts of digital information are processed. This includes international arbitration.
- C. While not unique, the need for reasonable cybersecurity measures in international arbitrations is highlighted by:
 - 1. the litigious backdrop, which can lead to targeting of information;
 - 2. the high-value, high-stakes nature of disputes, which increases the risk of breaches and the likelihood that those breaches will cause significant loss;
 - 3. the exchange of information that is often sensitive or high-value confidential commercial information and/or regulated personal or other data; and
 - 4. the cross-border nature of the process, which creates heightened challenges in complying with applicable legal requirements and makes the consequences of a breach more substantial.

2. The term “Arbitral Participants” or “Participant” refers to anyone who receives information that s/he would not otherwise have as a result of the arbitral process. Hence, it includes the parties, counsel, arbitrators, arbitral institutions, experts, and Vendors. Capitalized terms not otherwise defined herein are defined in the Glossary attached as Schedule D, which also includes a general glossary of terms relevant to cybersecurity that are not used in this Protocol.

CONSULTATION DRAFT

- D. The specific consequences that may result include:
1. economic loss to parties, arbitrators, institutions, witnesses or other persons/entities whose commercial information or personal data is compromised;
 2. reputational damage to arbitral institutions, arbitrators and counsel, as well as to the system of arbitration overall; and
 3. potential liability under applicable laws and other regulatory frameworks.
- E. With respect to the legal and regulatory framework, the vast amounts of digital information available today have led to increasing regulation of the security and use of information, particularly personal data. These data protection regimes require, among other things, reasonable cybersecurity measures whenever personal data is exchanged. This legal infrastructure has the potential to apply to, and shape how, information is managed in international arbitrations.
- F. Applicable law may vary from jurisdiction to jurisdiction, and non-compliance with applicable law may result in substantial penalties and/or litigation risk. Furthermore, data protection enforcement and other legislative risk may be inconsistent in different jurisdictions and create obstacles to trans-border information exchanges and indirectly international arbitration.
- G. However, the determination of what law(s) apply(ies) in a particular arbitration may be a complex issue and it may be difficult to reconcile requirements of different jurisdictions.
- H. Given the substantial risk of non-compliance, we can expect that parties will increasingly drive data protection compliance in all fields, including international dispute resolution, with the starting point being that reasonable cybersecurity may be required as a matter of law, whenever personal or other regulated data is exchanged, and good practice, whenever important information is exchanged during an arbitration. The baseline reasonableness standard will ensure consideration of the facts and circumstances of individual cases, including the parties' preferences and resources.

III. Purpose of the Cybersecurity Protocol

- A. The Draft Cybersecurity Protocol for International Arbitration set forth in Section IV (the "Cybersecurity Protocol" or the "Protocol") is intended to encourage Participants in international arbitration to become more aware of cybersecurity risks in arbitration and to provide guidance that will facilitate collaboration in individual matters about the cybersecurity measures that should reasonably be taken, in light of those risks and the individualized circumstances of the case to protect information exchanged in the arbitral process.
- B. The Protocol is intended to provide a framework that parties and arbitrators can consult in order to determine reasonable cybersecurity measures for their individual matters. The Protocol will not apply in any given case unless it is adopted by agreement of the parties or an arbitral tribunal determines that it will apply.
- C. Although following the Protocol may assist in identifying applicable legal requirements, it does not supersede applicable laws or regulations which may require that specific cybersecurity measures be implemented. Furthermore, it is solely addressed at cybersecurity and does not attempt to address any other potentially applicable data protection or other measures that may be required.

DRAFT CYBERSECURITY PROTOCOL FOR INTERNATIONAL ARBITRATION

- D. The Protocol therefore purposefully does not adopt a one-size-fits-all approach, but rather guides parties and arbitrators in undertaking a risk-based approach to determine reasonable cybersecurity measures for a particular matter.
- E. Rather than obligating the parties to follow a specific and immutable set of cybersecurity measures, the Protocol provides flexibility to accommodate party preferences and risk tolerance in light of the individual circumstances of each case.
- F. It is expected that the Protocol will necessarily evolve over time in light of:
 - 1. Changing technology;
 - 2. New and prevalent cyberthreats;
 - 3. New laws/regulations;
 - 4. Any consensus that might emerge as to reasonable measures/arbitration best practices; and
 - 5. New cybersecurity initiatives by institutions or others.
- G. Although the Protocol is drafted with international commercial arbitrations in mind, Arbitral Participants may find it a useful starting point for domestic arbitration matters and/or investor-state arbitrations.

IV. Cybersecurity Protocol for International Arbitration

- A. The Cybersecurity Protocol is structured as follows:
 - 1. Articles 1-3 address general issues;
 - 2. Articles 4-6 address the tribunal's authority to order cybersecurity measures and the potential scope of such measures;
 - 3. Articles 7-12 address the factors to be considered when determining what cybersecurity measures to adopt;
 - 4. Articles 13-17 suggest a procedural framework for adopting cybersecurity measures during an arbitration;
 - 5. Article 18 addresses cybersecurity breaches; and
 - 6. Article 19 clarifies what is not covered.

General Provisions

1. This Cybersecurity Protocol governs issues of information security in an arbitration where the parties have agreed to follow it, or the arbitral tribunal has determined to employ it.

Commentary to Article 1

- (a) Article 1 recognizes the importance of party autonomy in the conduct of international arbitrations, as well as the important role played by the tribunal in determining what cybersecurity measures are reasonable in any given case. Among other things, the arbitral tribunal may have to interpret any agreements reached by the parties, resolve any conflicts with applicable arbitration rules or mandatory provisions of law, consider the interests of other Participants such as third parties or administering arbitral institutions, and fulfill its own responsibility to maintain the integrity and legitimacy of the adjudicatory process.
 - (b) Subsequent Articles more fully address the role played by Arbitral Participants. In particular, Article 4 addresses the tribunal's authority over issues of cybersecurity in the arbitration, and Article 13 addresses when and how parties are recommended to enter into an agreement addressing cybersecurity.
 - (c) The Protocol has been prepared as a unified set of guidelines and is not intended or recommended to be applied in a piecemeal fashion.
2. The Protocol does not supersede applicable law, regulations, professional or ethical obligations.

Commentary to Article 2

- (a) The Protocol is not intended to ensure compliance with any applicable law or regulation and adherence to the Protocol does not provide any liability shield or presumptions.
- (b) Article 11 reminds Participants that, in determining what cybersecurity measures are reasonable for their individual matter, applicable law and regulations should be taken into account.
- (c) There are multiple sources of mandatory cybersecurity regimes including those contained in many of the more than 100 national data protection laws, regulations, and industry norms applicable across the globe to certain types of personal data and data of public importance, including, for example, the European Union General Data Protection Regulation ("GDPR") and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") in the United States.
- (d) The GDPR, for example, includes a broad-reaching set of mandatory legal requirements applicable to the collection and processing of individuals' personal data. There is no exception for arbitrations and the penalties for breach may be substantial.
- (e) The Protocol is limited to cybersecurity, and purposefully does not address the broader subject of how the application of data protection rules to any personal or other data exchanged in an arbitration will impact the process. However, while the security required differs among jurisdictions, to the extent personal data is exchanged during an arbitration, under the GDPR and virtually all extant data protection regimes, keeping that information secure, including implementing reasonable and proportionate cybersecurity adequate to such purpose, is mandatory.

DRAFT CYBERSECURITY PROTOCOL FOR INTERNATIONAL ARBITRATION

- (f) Legal requirements may apply to all who either process or control the information, including personal data, which may include all Arbitral Participants.
 - (g) It is therefore important in each case for all the Arbitral Participants to understand their obligations under the law(s) that may be applied to the processing of the information, including personal data. Counsel's obligations in some instances may extend to informing other relevant actors of applicable legal requirements and how they will be addressed.
 - (h) It is also important for counsel and arbitrators to be aware of any ethical and professional obligations of their own that have implications for cybersecurity.
3. The Protocol does not establish any liability standard for any purpose, including, but not limited to, liability in contract, for professional malpractice, or negligence.

Commentary to Article 3

- (a) Article 3 makes clear that the Protocol is not intended to establish any liability standard.
- (b) The Protocol proposes a mechanism for the adoption of reasonable case-specific cybersecurity measures, rather than providing what those measures should be.
- (c) Article 3 is not intended to limit the rights of the parties to make agreements with respect to cybersecurity as set forth in Article 13 or the right of the arbitral tribunal to issue directives regarding cybersecurity as set forth in Article 4.

Authority to Order Cybersecurity Measures and their Potential Application

4. The arbitral tribunal has the authority to determine what security measures, if any, are reasonable in the circumstances of the case, taking into account the views of the parties (and the other Arbitral Participants, to the extent the tribunal considers to be appropriate) and to order the implementation of such measures.

Commentary to Article 4

- (a) Article 4 recognizes the tribunal's express authority to determine the cybersecurity measures, if any, that are reasonable in the case. This authority is implied in the tribunal's general powers, but is expressly recognized in Article 4.
- (b) In making any determination on cybersecurity, the tribunal shall take the parties' views into account.
- (c) As further set forth in Article 13, in cases of party agreement, the tribunal should respect the parties' agreement on the cybersecurity measures to be employed, unless other significant countervailing factors exist that in the tribunal's view outweigh the significant weight to be given to party autonomy.
- (d) Article 4 also recognizes that in some cases, third parties as well as Arbitral Participants other than the parties, also may have an interest in the cybersecurity measures to be employed, and recognizes the tribunal's right to take such views into account where appropriate.

CONSULTATION DRAFT

5. In administered arbitrations, counsel and the arbitral tribunal should consider whether the application of certain cybersecurity measures may depend upon the consent of the arbitral institution or may need to be adapted to respond to the institutional rules, practices or capabilities.

Commentary to Article 5

- (a) If an arbitration is administered by an institution, it may be necessary for the parties and the arbitral tribunal to consult and coordinate with that institution prior to adopting cybersecurity measures, in order to ensure that the measures are consistent with, and can be implemented pursuant to, the institution's rules, practices and technical capabilities.
 - (b) Depending on the degree of confidentiality of the information involved, it may be necessary to coordinate with the institution when the arbitration is being commenced (e.g., to determine whether the secure notification of a request for arbitration or request for emergency relief can be made or if a more limited filing is appropriate initially; or, to request institutional attention to the secure handling of confidential information by potential arbitrators.)
 - (c) As cybersecurity receives increasing attention, some arbitral institutions may adopt their own rules or practices relating to information security. For example, an institution might adopt or endorse a hosting platform for some or all of the information related to arbitrations they administer, such as a secure hosting platform for the transmission of communications and documents between the parties, the tribunal and the institution.
 - (d) The institution's rules and practices may or may not be deemed mandatory by the institution.
6. In determining what information security measures will be adopted in the arbitration, consideration may be given to establishing procedures for the following:
 - i. the transmission of communications, pleadings, disclosure materials and evidence by the parties;
 - ii. communications among arbitrators and between the arbitrators and any administering institution;
 - iii. storage of arbitration-related information;
 - iv. sharing arbitration-related information with authorized third parties such as experts, interpreters, stenographers, and tribunal secretaries;
 - v. vulnerability monitoring and breach detection;
 - vi. security breach notification and risk mitigation; and
 - vii. post-arbitration document retention and destruction.

Commentary to Article 6

- (a) With respect to the transmission of communications, pleadings, disclosure materials and evidence, the following measures, among others, may be considered:
 - (i) limiting all exchanges and transfers of confidential commercial information and personal data in relation to the arbitration;

DRAFT CYBERSECURITY PROTOCOL FOR INTERNATIONAL ARBITRATION

- (ii) without prejudice to disclosure obligations, limiting the disclosure of confidential commercial information and personal data (i.e., in addition to the narrow standard generally applied to document exchange in international arbitration, the parties may consider protective measures such as redaction, pseudonymization, or anonymization of information before it is exchanged);
 - (iii) restricting access to arbitration-related information on a least privilege and need-to-know basis, or limiting certain information to attorneys' eyes only (e.g., under ordinary circumstances, disclosure material need not be shared with the arbitral tribunal or the institution, except in respect to disclosure disputes, in which event the material shared should be limited to what is relevant to the tribunal's resolution of the dispute); and
 - (iv) the method of transmission (e.g., e-mail, third-party platform or virtual data room, USB drive or other portable storage device) and corresponding protective measures (e.g., encryption; procedure for transmitting the password for a portable storage drive separately from the drive itself).
- (b) If a third-party data storage platform is being considered, counsel should seek to agree on the party or other individual or entity that will host it, who will have access to the platform, and for how long.
 - (c) In considering which data storage platform to use, if any, counsel should consider the nature and amount of information, the amount of time it will need to be stored, whether it includes personal or other regulated data or confidential commercial information, and other issues related to the data being stored.
 - (d) Security breaches are addressed in Article 18 and accompanying Commentary.
 - (e) Issues to be considered with respect to post-arbitration document retention and destruction may include:
 - (i) whether to require that arbitration-related information be returned or safely disposed of (or certified as having been safely disposed of); and
 - (ii) the timing of any such requirement, with due consideration for applicable legal or ethical obligations, award recognition/enforcement proceedings, and legitimate interests in retaining work product.

Factors to be Considered in Developing Cybersecurity Measures

7. The cybersecurity measures to be adopted for the arbitration shall be those that are reasonable, taking into consideration: the nature of the information at issue; the potential security threats and consequences of a potential information breach; the available security capabilities of Arbitral Participants; applicable rules and legal obligations; the Purpose of the Protocol as set forth in Section III *supra*, and other relevant circumstances of the case.

Commentary to Article 7

- (a) Article 7 sets out the elements of a risk-based approach to determining what cybersecurity measures are reasonable in individual arbitration matters. Articles 8-12 provide more detailed guidance as to each aspect of the risk analysis.
 - (b) By assessing risk according to the individual circumstances of a case and adopting a standard of reasonableness, Article 7 recognizes that there is no one-size-fits-all approach to cybersecurity in arbitration matters.
 - (c) The reasonableness standard adopted by the Protocol is consistent with an emerging global trend in favor of requiring “reasonable”, “reasonable and proportionate”, or “appropriate” cybersecurity measures when attention to cybersecurity is legally or ethically required.
 - (d) This approach provides flexibility to accommodate changes in technology, best practices and threats current at the time of an actual dispute, rather than obligating the parties to follow a specific and immutable set of steps.
 - (e) This individualized approach recognizes that implementation of cybersecurity measures entails balancing potentially competing considerations (such as cost and convenience) and that similarly situated parties may make different but equally legitimate choices based on their own preferences, including considerations of cost and proportionality, risk tolerance and technical capabilities, among others.
 - (f) Article 7 recognizes that there will exist categories of cases where enhanced data security protection will be necessary in light of the sensitivity of information, legal considerations, special risks or other factors. Provided it is legally permissible, there may also be cases in which parties consider that information security protection somewhat below a baseline standard is sufficient and appropriate (e.g., due to the parties’ lack of resources or infrastructure or the low-value nature of the case).
8. With respect to the nature of the information in the arbitration, the following factors, among others, may be considered:
- i. what information is likely to be relevant and material in the arbitration;
 - ii. whether confidential commercial information will be exchanged;
 - iii. whether personal data will be exchanged;
 - iv. how much confidential commercial information and personal data is likely to be exchanged in the arbitration;
 - v. who has or should have access to the information exchanged during the arbitration;
 - vi. who “owns” the information;
 - vii. where the information is stored; and
 - viii. whether the confidential commercial information and/or personal data is subject to express confidentiality agreements or other relevant obligations, such as legal/regulatory restrictions relating to data protection/privacy, cross-border data transfer, breach notification, and/or privilege.

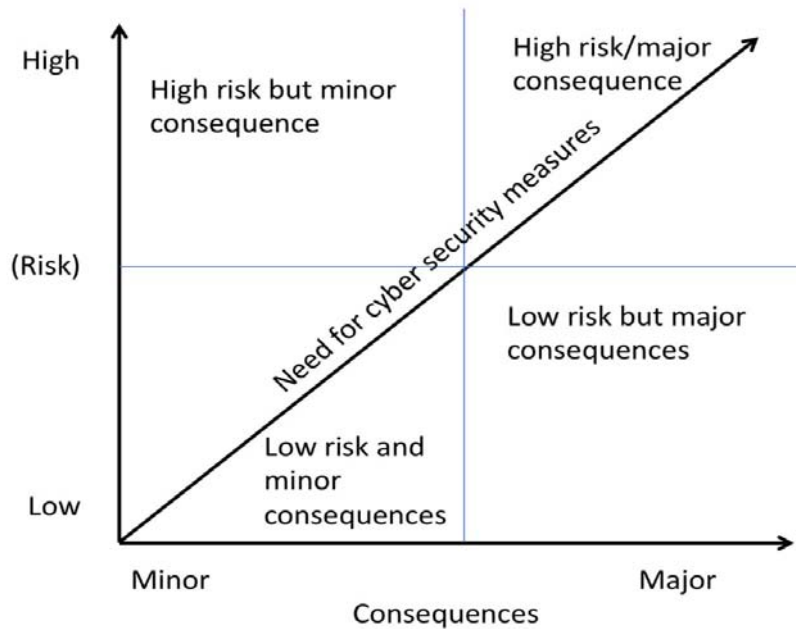
DRAFT CYBERSECURITY PROTOCOL FOR INTERNATIONAL ARBITRATION

Commentary to Article 8

- (a) Article 8 seeks to identify what information might be vulnerable to cyberthreats or increased legal risk in an arbitration.
 - (b) Consideration of what information is likely to be relevant and material in the arbitration can be useful in identifying types of data that are likely to be exchanged by the parties in the case.
 - (c) Examples of types of confidential commercial information and/or personal data that may require special care include:
 - (i) intellectual property;
 - (ii) trade secrets or other commercially sensitive information;
 - (iii) health or medical information;
 - (iv) payment card information;
 - (v) non-payment card financial information;
 - (vi) personal data, which is also referred to as personally identifying information (“PII”);
 - (vii) information subject to professional legal privilege;
 - (viii) information related to or belonging to a government or governmental body (including classified data and politically sensitive information); and
 - (ix) information that is subject to express confidentiality agreements or other relevant obligations, such as legal/regulatory restrictions relating to data privacy, cross-border data transfer, breach notification, and/or privilege.
9. With respect to the potential cybersecurity threats and consequences of a potential breach, the following factors, among others, may be considered:
- i. further to the analysis conducted under Article 8, the nature of the information likely to be involved in the arbitration;
 - ii. the identity of the parties, key witnesses, and other Arbitral Participants;
 - iii. the industry/subject matter of the dispute;
 - iv. the size and value of the dispute;
 - v. the prevalence of cyberthreats;
 - vi. the nature and frequency of international travel likely to be required for the arbitration; and
 - vii. the severity of potential consequences if there is a breach of information security.

Commentary to Article 9

- (a) Article 9 sets out some factors that may be relevant in analyzing information security risk in the arbitration. The risk is a function of the likelihood of a cybersecurity breach and the consequences of that breach. Typically, parties and/or the tribunal will wish to determine whether the risk of a cyberattack or other information security breach in the particular circumstances of the arbitration is high or low, and whether the consequences of a breach are likely to be minor, moderate, or severe.
- (b) The threat of a cyberattack and consequent desirability of cybersecurity measures can be plotted on a chart as follows:



- (c) A case with a large counsel team, for example, will have more points of vulnerability and may necessitate stricter cybersecurity measures.
- (d) Some issues to consider in analyzing the information security risk that may attach to the identity of the parties, key witnesses, and other Arbitral Participants (including the arbitral institution, experts, and counsel) include:
- (i) Whether the matter involves a party or other Arbitral Participant with a history of being targeted for cyberattacks;
 - (ii) Whether the matter involves parties that handle large amounts of high-value confidential commercial information and/or personal data;
 - (iii) Whether the matter involves a public figure, high-ranking official or executive, or a celebrity; and
 - (iv) Whether the matter touches upon any government, government information, or government figure.

DRAFT CYBERSECURITY PROTOCOL FOR INTERNATIONAL ARBITRATION

- (e) Travel tends to increase information security risk. Consideration should be given to how often and to where Participants are likely to travel with arbitration-related information and whether there are particular risks associated with a particular destination. Some jurisdictions may assert the right to access information on portable devices as a condition of entry, for example. Consideration should also be given to how arbitration-related information is likely to be transported (e.g., whether it will be downloaded on portable devices or accessed via a secure server).
 - (f) Some questions to consider in analyzing the consequences and severity of a potential breach of information security may include:
 - (i) The value of the information to the parties;
 - (ii) The value of the information to third parties;
 - (iii) The nature, type, and amount of personal data being processed and whether it is legally regulated;
 - (iv) Potential embarrassment or damage caused by public disclosure of the information;
 - (v) Whether and how the information could be (mis)used by a third party (e.g., politically, for extortion purposes, for insider trading purposes, or to obtain a competitive advantage).
 - (g) In addition to considering the potential impact of a breach on the Arbitral Participants, consideration should be given to the potential impact on persons outside of the arbitration process, including but not limited to the persons to whom personal data relates. An information breach suffered by one Arbitral Participant may cause injury to other Participants or third parties.
10. With respect to the available security capabilities, the existing digital infrastructure of Arbitral Participants and any potential technical impediments to implementing cybersecurity measures should be considered.

Commentary to Article 10

- (a) Once parties and the tribunal have assessed the seriousness of the cybersecurity threat in the circumstances of the particular arbitration and the desirability of cybersecurity measures, it is then necessary to weigh the degree of cybersecurity measures suggested by the threat against practical considerations, including what measures are proportionate to the size and value of the dispute.
- (b) Article 10 recognizes that the Arbitral Participants, including the parties, counsel, the arbitrators, and administering institutions, may have differing technical resources and constraints on their technical capacity that will influence what may be reasonable in a particular case.
- (c) General cyber awareness by the Participants, including their day-to-day security practices and digital infrastructure, may also determine what security measures may be warranted in any given arbitration matter. For example, when all Participants already employ a high level of cybersecurity, additional measures may not be needed. Schedule C highlights general cybersecurity practices that all Arbitral Participants should take into consideration.
- (d) While the limitations of a party's resources are an important factor, consideration also should be given to the security needs of the case, the accessibility and affordability of security resources, and measures that may be taken without significant expenditure.

CONSULTATION DRAFT

11. Applicable rules and legal obligations may dictate that certain types of cybersecurity measures be adopted regardless of the threat inherent in the individual circumstances of the arbitration. Among the factors that may be considered are the following:
 - i. contractual obligations such as confidentiality agreements;
 - ii. relevant arbitration rules;
 - iii. ethical and professional obligations; and
 - iv. regulatory obligations including those that are industry-related (e.g., HIPAA) and those that are information-related, including those applicable to personal data (e.g., GDPR and other data protection laws and other privacy rights).

Commentary to Article 11

- (a) As discussed in the Commentary to Article 2, the Protocol is not intended to assure compliance with, and does not supersede, applicable law, regulations, professional or ethical obligations.
 - (b) Arbitrators and parties may also be faced with differing or conflicting mandatory obligations. The arbitral tribunal will have to determine how to harmonize such obligations, taking into consideration the consequences of non-compliance as well as due process considerations for all concerned.
12. Other relevant considerations in determining what measures are reasonable may include, but are not limited to:
 - i. workflow needs and preferences;
 - ii. cost;
 - iii. proportionality;
 - iv. burden/relative resources; and
 - v. efficiency.

Commentary to Article 12

- (a) Article 12 recognizes that if proposed cybersecurity measures would be so onerous as to prevent the arbitration from proceeding in an orderly fashion, then the balance of “reasonableness” may weigh against their adoption.
 - (b) In particular, cybersecurity measures that are too strict or difficult: (i) risk being ignored or evaded; and (ii) may have a negative impact on the ability of Participants to accomplish necessary tasks.

Procedural Considerations When Adopting Cybersecurity Measures

13. In the first instance, the parties should attempt to agree on reasonable cybersecurity measures, if any. Any agreement is subject to approval by the arbitral tribunal.

Commentary to Article 13

- (a) Article 13 recognizes the importance of party autonomy. Normally, counsel should be responsible in the first instance to meet and confer on the information security protection measures to be implemented in a particular arbitration, taking into account existing cybersecurity measures already employed by the Arbitral Participants.
 - (b) Issues that counsel should consider discussing with their clients and opposing counsel may overlap with issues ordinarily considered in the context of disclosure and document preservation.
 - (c) In principle, where possible, the parties should agree on the cybersecurity measures to be employed, which should be reasonable taking into account the factors discussed above in Articles 7-12.
 - (d) Notwithstanding the principle of party autonomy, the parties cannot bind the arbitral tribunal. Nor can the parties bind the institution administering the arbitration. Any preliminary agreement should be formalized only after consultation with the tribunal and, where appropriate or required, the arbitral institution.
14. The tribunal should consider issues of cybersecurity, including any agreement that may have been reached by the parties, as early as practicable, which ordinarily will not be later than the first case management conference.

Commentary to Article 14

- (a) The expectation generally is for issues of cybersecurity to be discussed with the parties in preparation for, and during, the initial case management conference or procedural hearing, and then to be incorporated in a procedural order.
- (b) However, in certain cases, the initial hearing or conference may either be too late or too early; hence, any party may raise cybersecurity measures for consideration at any time.
- (c) At the initial conference, the arbitral tribunal should be prepared to:
 - (i) discuss the ability and willingness of its members to adopt specific security measures;
 - (ii) engage counsel in a discussion about reasonable cybersecurity measures;
 - (iii) resolve any disputes about reasonable cybersecurity measures;
 - (iv) express its own interests in preserving the integrity of the arbitration process, taking into account the parties' concerns and preferences, the capabilities of any administering institution and other factors discussed in this Protocol; and
 - (v) render an appropriate order or include cybersecurity provisions in an early procedural order.

CONSULTATION DRAFT

- (d) Cybersecurity measures may also be set forth in a stipulation of the parties approved by the tribunal.
 - (e) Ordinarily the tribunal should defer to the parties' agreement, but there may be circumstances for departure. Such circumstances may include but are not limited to:
 - (i) measures to protect third-party interests, including other Arbitral Participants or third-party witnesses;
 - (ii) applicability of mandatory legal and regulatory requirements and other rules;
 - (iii) capabilities of the arbitrators and administering institution;
 - (iv) the tribunal's own interest in protecting the integrity of the process, including the security of its own communications and deliberations.
 - (f) The procedures adopted at the outset of the arbitration should allow for modification as necessary throughout the course of the proceeding, including updates as to: (i) what qualifies as the nature of the information being processed; (ii) required procedures based on the specific circumstances of the case as it develops; and (iii) changed circumstances, such as changes in applicable law, risks in the proceeding, institutional rules/requirements, or technological developments. Such updates should be made after consultation with the parties and any administering arbitral institution.
 - (g) The tribunal may modify the measures previously agreed to by the parties or determined by the tribunal at the reasoned request of any party, or on its own initiative in light of the evolving circumstances of the case.
15. Arbitral Participants and fact witnesses should be informed of the cybersecurity measures in place and shall agree in writing to comply with such measures before receiving any arbitration-related information, provided that where an essential third-party expert, fact witness or Vendor is unable or unwilling to comply with the agreed standards, the matter shall be referred to the tribunal for consideration, and, if necessary, direction.
16. The technical capability of Vendors should be no less than the minimum requirements designated by the parties.

Commentary to Articles 15-16

- (a) Third parties present a difficult area for the protection of confidential information in general and electronically stored information in particular. They are not under the control of the tribunal and may not suffer directly from the consequences of a cybersecurity breach. Nevertheless, there is little point in agreeing to stringent cybersecurity measures for the parties, counsel, the tribunal and institution if the same information is to be sent to third parties without adequate safeguards. Further, to the extent that legal requirements apply, these may require third parties to agree to adequate safeguards before the information is shared.
- (b) Where possible, counsel should obtain the written agreements of third parties to abide by cybersecurity measures that have been agreed or ordered by the tribunal.
- (c) Where third parties either cannot or will not agree to comply, the tribunal shall be informed and direction given where appropriate.

DRAFT CYBERSECURITY PROTOCOL FOR INTERNATIONAL ARBITRATION

17. Cybersecurity is the shared responsibility of all Arbitral Participants involved in an arbitration. Arbitral Participants are responsible for ensuring that all personnel directly or indirectly involved in an arbitration are aware of, and follow, cybersecurity measures being adopted in a proceeding as well as the potential impact of a cybersecurity breach.

Commentary to Article 17

- (a) The security of information in an arbitral proceeding ultimately depends on the decisions and actions of all individuals involved, and any individual actor can be the cause of a cybersecurity breach. Many security breaches result from individual conduct rather than a breach of systems or infrastructure.
- (b) In a case with multiple parties and large counsel teams, for example, it is necessary for Arbitral Participants to make persons directly or indirectly involved aware of any cybersecurity measures, and of their agreement to be bound by them, whether by express agreement or as part of their employment conditions or consulting agreement.
- (c) The Arbitral Participant providing access to arbitral information covered by cybersecurity measures is responsible for ensuring that the persons with whom it is shared are aware of those measures and agree to follow them.
- (d) This may involve a large number of people, each of whom could prove to be the weak link.
- (e) Arbitral Participants should identify the various team members who support them and have access to digital information. For example, counsel appearing on behalf of a party in an arbitration may be supported in the background by additional lawyers who are not known to the other party or tribunal, administrative staff, and legal assistants or law clerks.
- (f) Similarly, within an arbitral institution, case administration may involve a team of case management personnel, administrative support staff, and members of the institution's standing court of arbitration practitioners. To mitigate the risk of data breaches, cybersecurity awareness must permeate organizational structures and extend beyond the core Participants in the arbitral process to such team members and support personnel.

Cybersecurity Breaches

18. The cybersecurity measures adopted for the arbitration may address material issues related to possible information security breaches, including, among other things:
- i. what constitutes a security breach;
 - ii. who shall be notified of a breach;
 - iii. timing of the notification; and
 - iv. specific steps to be taken to mitigate any information breach.

Commentary to Article 18

- (a) Steps that may be taken to mitigate any information security breach may include, depending on the circumstances:
 - (i) implementing measures to identify the specific source of the breach;
 - (ii) taking steps to correct any weaknesses in security systems in order to mitigate the impact of a breach and/or prevent further breaches;
 - (iii) informing all affected parties that a breach occurred, consistent with any applicable legal obligations, in a timely manner and in a manner best preserving the confidentiality of the arbitration;
 - (iv) if appropriate, taking systems and applications offline to prevent further loss of information;
 - (v) taking steps to retrieve lost information and to ensure that unauthorized recipients delete or return information;
 - (vi) if appropriate, enlisting Vendors to manage effects of breach; and
 - (vii) if appropriate, involving law enforcement.
- (b) Applicable laws may dictate the required procedures for addressing cybersecurity breaches. The GDPR, for example, includes strict mandatory 72-hour breach notification requirements. Some U.S. states have also adopted harm triggers; for example, if a lost laptop has full-disk-encryption-enabled, no notification would be required.
- (c) There may also be a need to assess the nature of the breach, whether there has been unauthorized access to information, and whether there is an urgent need to take corrective action to prevent further breaches.
- (d) Until a breach occurs, it may not be possible to determine what breach notification obligations exist as a matter of law even if compliance may require swift action.

Matters Not Covered by the Protocol

19. The following matters are beyond the scope of this Protocol:
- i. the allocation of costs arising from the implementation of the Protocol and/or from any data breach or alleged failure to implement information security measures as directed by the arbitral tribunal; and
 - ii. the nature and scope of any authority of the arbitral tribunal to impose sanctions in the event of a data breach or alleged failure to implement information security measures as directed by the arbitral tribunal.

Commentary to Article 19

- (a) The Protocol purposefully does not address either the allocation of costs or the tribunal's authority to order sanctions arising from data breaches or an alleged failure to implement information security measures as directed by the arbitral tribunal.
- (b) However, while the Protocol does not expressly address such issues, it is not intended to negate authority otherwise available to the tribunal to allocate costs or impose sanctions.

CONSULTATION DRAFT

Schedule A

Arbitration Agreement

It is not recommended that parties specify particular cybersecurity measures in their arbitration agreement because technology may change materially by the time the dispute arises, and the circumstances of the subsequent dispute may inform the cybersecurity measures that the parties choose to adopt. However, the parties may want to provide generally in their arbitration agreement that the arbitration shall be conducted in a secure manner in line with the Cybersecurity Protocol for International Arbitration. The following language would be appropriate for inclusion in the arbitration agreement:

The parties agree that the arbitration shall be conducted in a secure manner as determined by the arbitral tribunal, taking into consideration the views of the parties and the Cybersecurity Protocol for International Arbitration.

Schedule B

Model Language for Specific Cybersecurity Measures^{*}

Article 13 of the Protocol provides that parties should in principle agree on the cybersecurity measures to be employed, but that these measures should not be adopted without the approval of the tribunal. Further, Article 14 provides that the tribunal should typically adopt such language into a procedural order or by stipulation of the parties after the first case management conference, to be updated as the case proceeds.

The language set forth below providing for specific cybersecurity measures and related issues may be considered for inclusion in party agreements and/or tribunal orders. The adoption of case-specific cybersecurity measures whether by agreement of the parties, which will typically require tribunal approval, or by tribunal order, may include the language set forth below or some variation thereof depending on the circumstances.

1. [Model Language Re: Baseline Cybersecurity Measures]
2. [Model Language Re: Enhanced Cybersecurity Measures]
3. [Model Language Re: No Additional Cybersecurity Measures]
4. [Model Language Re: Notification of Data Breach and/or Breach of the Cybersecurity Measures]
5. [Model Language Re: Cybersecurity Dispute Resolution]
6. [Model Language Re: Use of Special Expert on Cybersecurity Issues]
7. [Model Language Re: Damages for Breach of Cybersecurity Measures]
8. [Model Language for inclusion in Vendor Agreements]
9. [Model Language Re: Agreement to Share Expenses of Cost of Enhanced Cybersecurity Measures]
10. [Possible Model Procedural Order (standard provisions subject to adaptation in individual cases)]

^{*} Inclusion of Model Language to be considered based on feedback from the Consultation Process.

Schedule C

General Cybersecurity Practices

1. Because the Participants in international arbitration are, to a large degree, digitally interdependent, all Participants (including counsel, witnesses, experts, arbitrators, Vendors and arbitral institutions) involved in the arbitration should be conscious of good general cybersecurity practices for storing and processing information obtained during the arbitral process.
2. All Participants should be conscious of their own, regular cybersecurity practices and digital infrastructure as a threshold matter, because Participants' day-to-day security practices and infrastructure pre-date individual arbitrations, and therefore have an immediate and continuing impact on the security of arbitration-related information.
3. Depending on the circumstances, examples of good general cybersecurity practices may include:
 - (a) Creating access controls, such as strong, complex passwords and multi-factor authentication when appropriate and secure password storage and controls.
 - (i) Access controls, including user account management, passwords, and multi-factor authentication, determine who has authority to access information and what privileges s/he has to use it.
 - (ii) In June 2017, the National Institute of Science and Technology ("NIST") substantially revised longstanding password guidance (see NIST Special Publication 800-63B). Key recommendations include that passwords should be based on unique passphrases, at least 8 characters long, and easily remembered ("memorized secrets"). In addition, common dictionary words, past passwords, repetitive or sequential characters, and context-specific words (such as derivatives of the service being used) should be avoided, and mixtures of different character types are unnecessary. The NIST further recognizes that in many cases, password managers increase the likelihood that users will choose stronger memorized secrets.
 - (iii) Multi-factor authentication allows a user to safeguard a digital account (such as an e-mail account) from unauthorized access by requiring that the user provide additional proof of identity beyond a password. Given the frequency with which Participants in international arbitrations travel, to the extent they consider it is warranted to use multi-factor authentication, they may wish to ensure that any method they use is available offline.
 - (b) Guarding digital "perimeters" using measures such as firewalls, antivirus and antispyware software, operating system updates and other software patches.
 - (c) Adopting secure protocols, such as encryption for the storage and transmission of arbitral information, that are reasonable, taking into account the nature of the data and its required use within the arbitral process.
 - (i) Arbitral information should generally be protected during transmission using industry-standard encryption technology, which prevents communications from being intercepted and read as they travel from end-to-end. It may also be appropriate under certain circumstances and depending on the nature of the data to encrypt individual file attachments.

DRAFT CYBERSECURITY PROTOCOL FOR INTERNATIONAL ARBITRATION

- (ii) To guard against unauthorized access of digital information due to loss or theft of a laptop or other mobile devices, it may be reasonable to enable full disk encryption (which is often built into device operating systems) to protect all data stored on the device while it is at rest.
 - (iii) If information is stored in the cloud, depending on the nature of the information, it may sometimes be appropriate to encrypt the information before it is uploaded and to keep control of the encryption key out of the hands of the cloud provider.
- (d) Being mindful of public internet use in hotels, airports, coffee shops and elsewhere and considering protective measures such as personal cellular hotspots or virtual private networks (VPNs) where warranted in light of encryption and other measures being employed. Public Wi-Fi may provide hackers with access to unsecured devices on the same network, allow them to intercept password credentials, or to distribute malware. As an alternative to public Wi-Fi, Arbitral Participants may wish to use a mobile hotspot to establish an internet connection. Where appropriate, other protective measures could include using a VPN to encrypt communications traveling on the unsecured network connection and/or avoid connecting to any websites that fail to use HTTPS security.
 - (e) Being mindful to download programs and digital content only from legitimate sources and not to open attachments from unknown email senders.
 - (f) Keeping mobile devices close and making use of available protective measures in case of loss or theft, possibly including full disk encryption and remote tracking and wiping.
 - (g) Making routine secure and redundant data back-ups. Redundant data back-ups allow users to recover information in the event data is lost or corrupted due to human error, hardware failure, ransomware attack, or otherwise. One possible approach is to follow the so-called 3-2-1 rule, which means there should be 3 copies of the data, 2 should be stored locally on different storage media, and 1 copy should be stored offsite.
 - (h) Knowing one's data security infrastructure, including professional and personal networks, computers and portable devices, cloud services, software program and apps, remote access tools and back-up services.
 - (i) Implementing document and data preservation policies to minimize storage of data no longer required.
 - (j) Making reasonable on-going efforts to be educated about evolving cybersecurity risks and best practices.
4. All Arbitral Participants should have an understanding (if not a written inventory) of where data resides in, and flows through, their digital infrastructure, in order that appropriate controls and safeguards may be implemented. An arbitrator who regularly uses a personal tablet to review pleadings and exhibits, for example, should know whether the documents will be stored locally on the tablet by default, on servers for the application(s) used to review the documents, and/or personal cloud storage.
 5. Once Arbitral Participants are cognizant of their own digital architecture, they can take steps to mitigate the risk of data breaches from basic security vulnerabilities. More often than not, data breaches arise from malicious actors who look for and find security vulnerabilities to exploit rather than from targeted attacks. Many of these security vulnerabilities arise from a failure to implement and/or maintain basic, well-established security practices that do not require any significant financial resources, technological support, or infrastructure investment.

Schedule D

Glossary

(Please note that not all of the terms defined below appear in the draft document.)

Access Control – The process of granting or denying specific requests to: (i) obtain and use information and related information processing services; and (ii) enter specific physical facilities.

Antispyware Software – A program that specializes in detecting both malware and non-malware forms of spyware.

Antivirus Software – A program specifically designed to detect many forms of malware and prevent them from infecting computers, as well as cleaning computers that have already been infected.

Attribution – The process of tracking, identifying and laying blame on the perpetrator of a cyberattack or other hacking exploit.

Authentication [includes multi-factor authentication and dual-factor authentication] – Verifying the identity of a user, process, or device, often as a prerequisite to allowing access to resources in an information system.

Backing Up – The act of making a copy of files and programs to facilitate recovery, if necessary. (See also *Data Backup*.)

Breach Notification – Notification of the unauthorized movement or disclosure of sensitive information to a party, usually outside the organization, that is not authorized to have or see the information.

Business Continuity Management – The documentation of a predetermined set of instructions or procedures that describe how an organization's mission/business processes will be sustained during and after a significant disruption.

Chief Information Security Officer (CISO) – The individual responsible for overseeing and implementing an entity's cybersecurity program and enforcing its cybersecurity policies.

Cloud – A model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.

Computer Forensics – The application of computer science and investigative procedures involving the examination of digital evidence – following proper search authority, chain of custody, validation with mathematics, use of validated tools, repeatability, reporting, and possibly expert testimony.

Cyberattack – An attack, via cyberspace, targeting an enterprise's use of cyberspace for the purpose of disrupting, disabling, destroying, or maliciously controlling a computing environment/infrastructure; or destroying the integrity of the data or stealing controlled information.

Cybersecurity – The ability to protect or defend the use of cyberspace from cyberattacks.

Cyber Exercise – A simulation of an emergency designed to validate the viability of one or more aspects of an IT plan. (See also *Information Technology (IT)*.)

DRAFT CYBERSECURITY PROTOCOL FOR INTERNATIONAL ARBITRATION

Cyber Incident – Actions taken through the use of an information system or network that result in an actual or potentially adverse effect on an information system, network, and/or the information residing therein.

Cyber Incident Response Plan – The documentation of a predetermined set of instructions or procedures to detect, respond to, and limit consequences of a cyber incident involving an organization's information system(s).

Cyber Risk – The potential of loss or harm related to technical infrastructure or the use of technology within an organization.

Data Backup – A copy of files and programs made to facilitate recovery, if necessary.

Data Breach – The unauthorized movement or disclosure of sensitive information to a party, usually outside the organization, that is not authorized to have or see the information.

Data Integrity – The property that data has not been altered in an unauthorized manner. Data integrity covers data in storage, during processing, and while in transit.

Data Loss – The exposure of proprietary, sensitive, or classified information through either data theft or data leakage.

Data Privacy – Assurance that the confidentiality of, and access to, certain information about an entity or individual is protected.

Data Recovery – The process of restoring data that has been lost, accidentally deleted, corrupted or made inaccessible.

Data Storage – Retrievable retention of data. Electronic, electrostatic, or electrical hardware or other elements (media) into which data may be entered, and from which data may be retrieved.

Data Transfer – The act of electronically sending information from one location to one or more other locations.

Data Wiping – Overwriting media or portions of media with random or constant values to hinder the collection of data.

Decryption – The process of transforming ciphertext into plaintext using a cryptographic algorithm and key.

Denial of Service – Actions that prevent a system from functioning in accordance with its intended purpose. A piece of equipment or entity may be rendered inoperable or forced to operate in a degraded state; operations that depend on timeliness may be delayed.

Digital Perimeter – A physical or logical boundary that is defined for a system, domain, or enclave, within which a particular security policy or security architecture is applied.

Document Destruction – Destroying, overwriting, deleting, or otherwise rendering digital, electronic, or physical documents unusable.

Document Retention – The identification, storage, retrieval, and maintaining of digital, electronic, or physical documents, files, or records pursuant to legal, specific contract, or other obligations.

Encryption – Any procedure used in cryptography to convert plaintext into ciphertext to prevent anyone but the intended recipient from reading that data.

CONSULTATION DRAFT

Endpoint Monitoring – Automated tools, software, and procedures that track and ensure the security of network devices and systems.

Firewall – A gateway that limits access between networks in accordance with local security policy.

Full Disk Encryption – The process of encrypting all the data on the hard drive used to boot a computer, including the computer's operating system, and permitting access to the data only after successful authentication with the full disk encryption product.

General Disruption – An unplanned event that causes an information system to be inoperable for a length of time (e.g., minor or extended power outage, extended unavailable network, or equipment or facility damage or destruction).

Hacker – Unauthorized user who attempts to or gains access to an information system.

Hacking – The act of gaining unauthorized access to a digital device, network, system, account or other electronic repository. (See also *Hacker*.)

Identity Theft – Wrongfully obtaining and using another person's personal data in some way that involves fraud or deception, typically for economic gain.

Incident Response – The documentation of a predetermined set of instructions or procedures to detect, respond to, and limit consequences of a cyber incident involving an organization's information systems(s). (See also *Cyber Incident Response Plan*.)

Information Technology (IT) – Any equipment or interconnected system or subsystem of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by an entity or individual. The term information technology includes computers, ancillary equipment, software, firmware, and similar procedures, services (including support services), and related resources.

Intrusion Detection System (IDS) – A security service that monitors and analyzes network or system events for the purpose of finding, and providing real-time or near real-time warning of, attempts to access system resources in an unauthorized manner.

Intrusion Prevention System (IPS) – A system that can detect an intrusive activity and can also attempt to stop the activity, ideally before it reaches its targets.

Keyboard Logger (also "Keylogger") – A program designed to record which keys are pressed on a computer keyboard, often used to obtain passwords or encryption keys and thus bypass other security measures.

Malware – A computer program that is covertly placed onto a computer with the intent to compromise the privacy, accuracy, or reliability of the computer's data, applications, or operating system. Common types of malware threats include viruses, worms, malicious mobile code, Trojan horses, rootkits, and spyware.

Managed Services – A service provider that remotely manages a customer's IT infrastructure and/or end-user systems, typically on a proactive basis and under a subscription model.

Multi-Factor Authentication (MFA) Proxy Server – Authentication using a server that services the requests of its clients by forwarding those requests to other servers and uses two or more different factors to achieve

DRAFT CYBERSECURITY PROTOCOL FOR INTERNATIONAL ARBITRATION

authentication. Factors include: (i) something you know (e.g., password/PIN); (ii) something you have (e.g., cryptographic identification device, token); or (iii) something you are (e.g., biometric).

Password – A string of characters (letters, numbers, and other symbols) used to authenticate an identity or to verify access authorization.

Payment Card Industry (PCI) – Commonly refers to the Payment Card Industry Data Security Standard (PCI DSS), which is a set of policies and procedures developed to protect credit, debit, and cash card transactions and prevent the misuse of cardholders' personal information. PCI DSS compliance is required by all card brands.

PCI Forensic Investigator (PFI) – Companies, organizations or other legal entities charged with investigating cyber incidents related to Payment Card Industry information; organizations in compliance with all PFI Company requirements (as defined by the Payment Card Industry Security Standards Council (PCI SSC)) and have been qualified as PFI Companies by PCI SSC for purposes of performing PFI Investigations.

Personal Cellular Hotspot – A mobile hotspot is an *ad hoc* wireless access point created by a dedicated hardware device or a smartphone feature that shares the cellular data.

Personally Identifying Information (PII) – Information which can be used to distinguish or trace the identity of an individual (e.g., name, social security number, biometric records, etc.) alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual (e.g., date and place of birth, mother's maiden name, etc.).

Phishing – Tricking individuals into disclosing sensitive personal information by claiming to be a trustworthy entity in an electronic communication.

Ransomware – A type of malware that is a form of extortion. The malware works by encrypting a victim's hard drive, thus denying the victim access to encrypted files. The victim must then pay a ransom to obtain a key to decrypt the files and gain access to them again.

Remote Desktop Protocol (RDP) – Provides remote display and input capabilities over network connections for Windows-based applications running on a server. RDP is designed to support different types of network topologies and multiple Local Area Network (LAN) protocols.

Remote Tracking – A tool designed to help remotely and proactively monitor mobile devices, laptops, or other systems.

Server Message Block (SMB) – A network protocol used by Windows-based computers that allows systems within the same network to share files. It allows computers connected to the same network or domain to access files from other local computers as easily as if they were on the computer's local hard drive.

Software Patch – A software component that, when installed, directly modifies files or device settings related to a different software component without changing the version number or release details for the related software component.

Spoofing – Faking the sending address of a transmission to gain illegal entry into a secure system.

Spyware – Software that is secretly or surreptitiously installed into an information system to gather information on individuals or organizations without their knowledge; a type of malicious code.

CONSULTATION DRAFT

Trojan Horse – A computer program that appears to have a useful function, but also has a hidden and potentially malicious function that evades security mechanisms, sometimes by exploiting legitimate authorizations of a system entity that invokes the program.

Virtual Private Network (VPN) – A restricted-use, logical (i.e., artificial or simulated) computer network that is constructed from the system resources of a relatively public, physical (i.e., real) network (such as the internet), often by using encryption (located at hosts or gateways), and often by tunneling links of the virtual network across the real network.

Vulnerability – Weakness in an information system, system security procedures, internal controls, or implementation that could be exploited by a threat source.

Worm – A computer program that can run independently, can propagate a complete working version of itself onto other hosts on a network, and may consume sources destructively.

THE BRAINS BEHIND MEDIATION: REFLECTIONS ON NEUROSCIENCE, CONFLICT RESOLUTION AND DECISION MAKING

*Daniel Weitz**

INTRODUCTION

On September 13, 1848, an explosives charge sent a three-foot tamping iron about an inch in diameter through the head of Phineas Gage.¹ Although Gage survived, the tamping iron, which entered just under the left eye and exited through the frontal portion of his head, destroyed his prefrontal cortex.² Prior to the accident, Gage was a popular foreman of a railroad construction crew.³ After the accident, he was a tactless, profane, and impulsive man with a dramatically altered personality.⁴

It is through extreme examples of severe deficits in the brain that scientists were able to develop our earliest descriptions of how the brain affects behavior. Today, advances in neuroscience have given us unprecedented insights into the workings of the human brain.⁵ A great deal has been discovered in disciplines ranging from cognitive-behavioral psychology and neuropsychology to molecular biology. To what extent these discoveries impact other fields, including the dispute resolution profession, is now a hotly-pursued topic. While a quick survey of recent studies of the brain produces a flood of connections to the practice of mediation, even neuroscientists caution against the certainty of their findings.⁶ There is still more research to be done and many of these studies provide evidence of correlation but not necessarily causation. Perhaps we should resist the temptation to champion a long sought-after scientific basis for all that we do as mediators. However, there is no denying the fascination with what we are learning about the human brain, how it guides our behaviors, and how it impacts the way we make decisions. At a minimum, it is cause for great reflection.

I. OUR NEGATIVE VIEW OF CONFLICT

* Dan Weitz is the Statewide ADR Coordinator for the NYS Unified Court System and an Adjunct Clinical Professor at The Benjamin N. Cardozo School of Law. The views expressed in this article are his alone and do not reflect those of the Unified Court System or Cardozo School of Law.

¹ See *The Phineas Gage Information Page Maintained By Malcolm Macmillan*, www.deakin.edu.au/hbs/GAGEPAGE (last visited Feb. 14, 2010).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ For a great explanation of functional magnetic resonance imaging (fMRI), see MARCO IACOBONI, *MIRRORING PEOPLE, THE SCIENCE OF EMPATHY AND HOW WE CONNECT WITH OTHERS* 59 (2009). For a description of transcranial magnetic stimulation (TMS), see *id.* at 90.

⁶ See Edward Gandolf, *Cautions About Applying Neuroscience to Batter Intervention* 3 (citing NEUROSCIENCE AND THE LAW: BRAIN, MIND, AND THE SCALES OF JUSTICE (Brent Garland & Mark Frankel, eds. 2004)), available at <http://www.nationalcenterdvtraumamh.org/lib/File/Neuroscience%20and%20batterer%20programs-FINAL.pdf> (last visited Mar. 6, 2011); see also Nigel Eastman & Colin Campbell, *Neuroscience and Legal Determination of Criminal Responsibility*, 7 NATURE REV. NEUROSCIENCE 311 (Apr. 2006), available at <http://www.nature.com/nrn/journal/v7/n4/full/nrn1887.html>.

Mediation training programs often begin with a conflict word association exercise to explore the nature of conflict. Trainees typically produce a list of similarly negative words including argue, fight and disagreement. This list propels a lively discussion of why we tend to view conflict as something that is always negative. We point to television, our past experiences and even our parents. After encouraging reflection, sometimes through small group exercises, mediation trainers ask whether anything positive ever comes from conflict. Trainees list a number of positives including clarity, recognition, understanding, and improved relationships. The trainer then hopes the group will come to appreciate that conflict is not inherently good or bad but that the nature of conflict often depends on how it is handled.

Recent discoveries in the field of neuroscience shed even greater light on our predominantly negative view of conflict. In *Nurture Shock*, Po Bronson and Ashley Merryman discuss the work of Dr. E. Mark Cummings at the University of Notre Dame.⁷ Cummings studied the impact that everyday parental conflict may have on children. Cummings found that the typical married couple had about eight disputes each day and that spouses were roughly three times more likely to express anger to each other as they were to show affection.⁸ Children are witnesses to these conflicts forty-five percent of the time.⁹ Cummings staged experiments to see what impact this type of conflict had on children. Ultimately, what he found was that witnessing the conflict itself did not result in any negative change in the child's behavior, provided the child was allowed to see the resolution of the argument.¹⁰ It was only when the argument was stopped in the middle before resolution that it had a negative effect on the child's behavior.¹¹ Cummings has even shown that being exposed to marital conflict can be good for children provided it is constructive and resolved with affection.¹²

Think for a moment about our own childhood experiences with conflict. Did our parents fight? If so, was it constructive conflict? And as to a more subtle point, as Bronson and Merryman highlight, did our parents ironically make matters worse by taking the fight upstairs or into the other room, thus sparing us the exposure? If so, did they remember to tell us that they worked it all out?

Bronson and Merryman also point to a body of research on the nature of conflict among siblings.¹³ Dr. Hildy Ross of the University of Waterloo found only about one in every eight conflicts between siblings ends in compromise or reconciliation.¹⁴ In the other seven conflicts, the siblings withdraw usually after the older child bullied or intimidated the younger child.¹⁵ Scottish researcher Dr. Samantha Punch concluded "Sibship is a relationship in which the boundaries of social interaction can be pushed to the limit. Rage and irritation need not be suppressed, whilst politeness and toleration can be neglected."¹⁶ Children made seven times as

⁷ PO BRONSON & ASHLEY MERRYMAN, *NURTURE SHOCK* 184 (2009).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ BRONSON & MERRYMAN, *supra* note 7, at 120.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 121.

many more negative and controlling statements to their siblings as they did to their friends, according to Dr. Ganie DeHart of SUNY Geneseo in New York.¹⁷

Bronson and Merryman wonder what siblings learn from the thousands and thousands of interactions that they have with each other when, no matter how the conflict is handled, they will still be together the next day. They suggest perhaps that children learn poor social skills from those interactions, just as often as they learn good ones. They learn of conflict, but not necessarily constructive conflict.¹⁸

Bronson and Merryman also provide support for those who claim that we get our negative view of conflict, and perhaps our poor conflict resolution skills, from children's television. Citing studies involving comparisons of educational television with more violent children's shows, we now know that while children may be less violently aggressive after watching educational television, they are far more relationally aggressive.¹⁹ Bronson and Merryman explain that while physical aggression can include pushing or hitting, and verbal aggression often involves name calling, relational aggression involves ignoring or telling lies about another child. The more children watched educational television, the more controlling, manipulative and bossier they became. Bronson and Merryman point out that one possible explanation for this phenomenon may be that educational television spends most of its time establishing conflict between characters and very little time resolving it. Preschoolers, for example, are said to be less able to connect the information from the end of the show to what happened earlier. They tend to learn from the individual behaviors shown rather than the overall lesson.²⁰

Bronson and Merryman not only provide us with insights into our views on conflict, but they also provide us with food for thought on why we behave the way we do in conflict.²¹ For example, significant research has been done on the importance of sleep, which supports the position that we consolidate learning and store memory during sleep.²² Bronson and Merryman report that according to these studies, negative memories are stored in the amygdala (an area of the brain associated with strong emotions such as fear) while neutral and positive memories are stored in the hippocampus (an area of the brain associated with storage of memory and conversion of short term to long term memory).²³ Furthermore, lack of sleep is harder on the hippocampus than it is on the amygdala, so we may remember negative feelings and events more so than neutral or positive ones. Could this explain why we so often seem to judge people in conflict by their most negative potential? Other studies have shown that stress can cause a similar effect on the hippocampus.²⁴ During situations of stress, hormones called glucocorticoids are released in the brain.²⁵ Glucocorticoids are known to cause damage to the hippocampus. In fact, under extreme conditions, glucocorticoids can kill brain cells in the hippocampus.²⁶ This suggests that stress, and the brain chemistry connected with it, is not only related to our negative

¹⁷ *Id.* at 120-21.

¹⁸ *Id.* at 119.

¹⁹ BRONSON & MERRYMAN, *supra* note 7, at 180.

²⁰ *Id.*

²¹ *Id.* at 35.

²² *Id.* at 33-35.

²³ *Id.* at 35.

²⁴ JOHN MEDINA, BRAIN RULES 178 (2009).

²⁵ *Id.* at 179.

²⁶ *Id.* See also NORMAN DOIDGE, THE BRAIN THAT CHANGES ITSELF 248 (2007).

view of conflict but perhaps our negative view of those with whom we have conflict and how we interact with them.

What can we learn from the field of neuroscience and these studies of the brain, conflict and even educational television? The above research suggests that our predominantly negative view of conflict is shaped by our experience dating back to early childhood. This further suggests that our negative view of conflict is perhaps a conditioned response. Did any of us have positive role models for dealing constructively with conflict when we were children? And even if we did, were those lessons as frequent or as powerful as the negative ones?²⁷ Did our parents let us watch educational television thinking we were learning something good about conflict resolution? The jury may still be out on exactly what it was we were learning, but it appears evident in the way in which so many of us behave in conflict situations that we developed more destructive than constructive skills. Furthermore, our negative view of conflict undoubtedly impacts how we approach it and increases the likelihood that we will adopt a competitive style when a collaborative style would be optimal. The perception that conflict is inherently negative quite possibly precludes many disputing parties from even trying mediation when it would otherwise be helpful to them. However, if our negative view of conflict is indeed largely a conditioned response, perhaps we can change it. If our destructive behavior in conflict is further influenced by the unconscious effects of stress or lack of sleep, perhaps we can mitigate these effects by simply becoming aware that they exist. Therefore, the integration of mediation and neuroscience not only provides help with resolving the conflict at hand, it provides an opportunity to develop constructive conflict resolution approaches and skills that can be used well into the future.

II. NEUROPLASTICITY AND REASON FOR HOPE

During much of the twentieth century, the prevailing theory was that our brains, at least for the most part, were almost completely formed and unchanging after childhood.²⁸ However, recent discoveries have provided evidence of neuroplasticity, which challenges the assumption that our brains are done developing once we reach adulthood.²⁹ For example, studies have shown that exercise can improve cognitive function and even brain physiology.³⁰ Exercise also appears to stimulate a protein known as Brain Derived Neurotrophic Factor ("BDNF"), which aids in the development of healthy tissue.³¹ In *Brain Rules*, molecular biologist John Medina refers to BDNF as having a powerful fertilizer-like growth effect on certain neurons in the brain.³² According to Medina, BDNF not only keeps neurons young and healthy, rendering them much more willing to connect with one another, but it also encourages the formation of new cells in the brain.³³

Another revolutionary scientific discovery is the neural insulator known as myelin. In *The Talent Code*, Daniel Coyle describes how myelin wraps itself around the nerve fibers in our

²⁷ For an interesting discussion of the psychological phenomenon of "negativity bias," which means that the human mind is wired to magnify the negative, see JONAH LEHRER, *HOW WE DECIDE* 81 (2009).

²⁸ DOIDGE, *supra* note 26, at i.

²⁹ DOIDGE, *supra* note 26, at xix.

³⁰ See MEDINA, *supra* note 24, at 7–27. See also DOIDGE, *supra* note 26.

³¹ See MEDINA, *supra* note 24, at 22.

³² *Id.*

³³ *Id.*

brain that serve as the basis of skill, making them stronger and faster.³⁴ The thicker it gets, the better it insulates and the faster and more accurate our movements and thoughts become. Coyle tell us that we continue to grow myelin well into our fifties and beyond, after which we still make myelin even though we start to lose more than we make.³⁵

These are amazing discoveries. No matter how prior experience may have shaped our perception of conflict, if we can always acquire new skills and improve our brain function, it is not a far stretch to believe we can improve the way in which we perceive and deal with conflict. As Coyle puts it, maybe you *can* teach an old dog new tricks; it just takes “deep practice.”³⁶

III. MEDIATOR SKILLS AND DECISION MAKING

In my journey through numerous books and studies dealing with neuroscience, a number of associations with conflict resolution and mediation emerged. Studies of the brain have produced major insights into how we make decisions. When viewing these insights from the perspective of a conflict resolution professional, it does not take much to connect aspects of mediation and mediator skills to neuroscience and what we have been learning about the brain.

Fundamental mediator skills include the delivery of an opening statement, framing negotiable issues, and generating movement between parties who are stuck in their positions.³⁷ The utility of these skills can be connected to a number of findings including the psychological phenomenon of “priming,” “the framing effect,” the role of mirror neurons, and the functions of the left and right hemispheres of the brain as they impact cooperation, empathy, and problem solving.³⁸ Additional studies in behavioral economics and cognitive-behavioral psychology provide explanations for how our adult views of conflict are shaped, discussed *supra*, and reasons why mediator skills and reflective practice are so helpful to people in conflict.

Malcolm Gladwell wrote in *Outliers* that, “[p]lane crashes are much more likely to be the result of an accumulation of minor difficulties and seemingly trivial malfunctions.”³⁹ The same is true for any discussion of the impact of specific mediator skills. Focus on the use of any one skill or nuance of process will not by itself typically change the nature of the dialogue between the parties in mediation. The true difference between whether or not the parties’ conflict lands safely or crashes to the ground is the accumulation of skills and nuances of process that may seem trivial when viewed in isolation.

IV. THE PSYCHOLOGICAL PHENOMENON OF PRIMING AND MEDIATOR OPENING STATEMENTS

³⁴ See generally DANIEL COYLE, *THE TALENT CODE* (2009).

³⁵ *Id.* at 6.

³⁶ *Id.* at 47–53. “Deep practice” as used by Coyle is comparable to the term “deliberate practice” used by psychologist Anders Ericsson, who described deliberate practice as “working on technique, seeking constant critical feedback, and focusing ruthlessly on shoring up weaknesses.” *Id.* at 51. Ericsson is known in part for his groundbreaking work, which included the central tenet that “every expert in every field is the result of around ten thousand hours of committed practice.” *Id.* See also MALCOLM GLADWELL, *OUTLIERS* 40 (2008).

³⁷ See *Mediation Training Curriculum Guidelines*, New York State Unified Court System, http://www.nycourts.gov/ip/adr/Part146_Curriculum.pdf (last visited Mar. 6, 2011) [hereinafter *Mediation Training Guidelines*].

³⁸ See *infra* Part IV.

³⁹ GLADWELL, *OUTLIERS*, *supra* note 36, at 183.

Most mediators begin the initial meeting with an opening statement. This is particularly true of mediators who deal with interpersonal conflict including divorce, community, or workplace mediation.⁴⁰ The goals of an opening statement include educating the parties about the process, developing rapport and trust, and setting the tone for a collaborative negotiation. Despite the apparent benefits of providing an opening statement, some mediators question its utility.⁴¹ Critics of a mediator opening statement say it takes too long and much of it is a waste of time as the parties are too distracted to absorb the content. However, the research of John Bargh on the “priming effect” may provide new insights.

John Bargh, a psychology professor at Yale University, has published many books and papers on the “priming effect,” in which prior presentation of a word or concept can influence behavior.⁴² One of the most well known priming studies involves two groups of undergraduate students at New York University who were asked to read a long list of words.⁴³ Everyone was given a list of five-word sets and asked to make a grammatically correct four-word sentence out of each set. These are called scrambled sentence tests. For example, students are presented with the following: “feels weather the hot patience.” This five-word set could be unscrambled to read “the weather feels hot.” However, students in this experiment were actually given one of two different lists containing words meant to “prime” them to behave in a specific way. Mixed into one list were words associated with being polite; mixed into the other list were words associated with being rude. When the students were soon placed in an experimental situation to measure the degree to which they would act polite or rude, their behavior correlated with the words with which they were primed.

After completing twenty variations of the scrambled sentences, the students were instructed to take the completed lists down the hall to the professor’s office where they were to be collected and scored. When the students arrived at the professor’s office, there was another student standing in the doorway asking the professor a series of questions. The real test was to see how quickly the students would interrupt or how long the students would wait before interrupting to hand in the completed test. The students who were primed with polite words waited longer on average than the students who were primed to be rude. In fact, the overwhelming majority of the students primed to be polite never interrupted at all.⁴⁴ Simply priming them with words associated with being polite made them wait longer than those students who were primed with words associated with being rude.

There is an enormous body of research demonstrating the ability to prime subjects with subtle words to act in an almost limitless variety of ways.⁴⁵ Research has even shown that priming can make us slow or fast, or even good or bad at math. But before we explore math, I will conclude the discussion of opening statements.

Think about the words mediators emphasize in their opening statements. Most give meaningful emphasis to words such as “listen,” “understand,” “comfortable,” “confidential,” “freely,” and “informal.” Mediation trainers and teachers often discuss the benefits of a good opening statement in order to set the tone for mediation because we want to establish an

⁴⁰ See Mediation Training Guidelines, *supra* note 37.

⁴¹ This is based on my own experience working with mediators.

⁴² See MALCOLM GLADWELL, *BLINK* 53 (2007).

⁴³ See *id.* at 55 (describing a study conducted by John Bargh, Mark Chen and Lara Burrows at New York University).

⁴⁴ *Id.*

⁴⁵ See IAIN MCGILCHRIST, *THE MASTER AND HIS EMISSARY* 167 (2009).

atmosphere of cooperation and open dialogue and in doing so, distinguish mediation from its adversarial alternatives. While most mediators have always appreciated the power of a good opening statement, we now have reason to believe there is a scientific explanation for its effectiveness as well. According to the “priming effect,” “the way we think and act...are a lot more susceptible to outside influences than we realize.”⁴⁶

When we deliver opening statements, we have the potential to prime the parties to act in a manner consistent with the words we use. Furthermore, given our tendency to associate conflict with that which is negative, parties are likely primed to behave poorly in conflict. At a minimum, they are primed to adopt a competitive and adversarial approach to conflict. Therefore, a mediator’s opening statement is not only an important aspect of establishing a collaborative atmosphere, but perhaps also plays a role in neutralizing the way in which parties are negatively primed as they enter the process.⁴⁷

V. THE FRAMING EFFECT AND THE UTILITY OF FRAMING NEGOTIABLE ISSUES

The research showing that we can be made to perform better or worse on mathematical problems ties the “priming effect” with another psychological phenomenon known as the “framing effect.”⁴⁸ In a study conducted by Sian L. Beilock from the University of Chicago, a group of female undergraduates were given a series of relatively simple math problems known as “modular arithmetic.”⁴⁹ Students were given horizontal math problems, represented by a left to right linear equation as well as vertical math problems represented by numbers above and below one another forming the equation. Then, half of the female students were reminded of a negative stereotype, for example that women do not do as well as men on math.⁵⁰ This form of priming is called the “stereotype threat” condition in which simply reminding people of a stereotype can create anxiety, which in turn decreases performance.⁵¹ This allowed Beilock and her colleagues to explore how a high-stress situation creates worries that compete for the working memory normally available for performance. After all, if we are stressed out and anxious, there is going to be less working memory available to deal with solving the math problems.

Jonah Lehrer, a frequent writer in the field of neuroscience, described the results of Beilock’s study in his blog, *The Frontal Cortex*.⁵² As it turned out, the activation of the stereotype led to decreased performance, but only on the horizontal problems.⁵³ The reason for these results has to do with the local processing differences of the brain.⁵⁴ The horizontal problems depended more on the same area of the brain (the left prefrontal cortex) associated with anxiety, which would likely be preoccupied worrying about our math performance. In contrast,

⁴⁶ GLADWELL, BLINK, *supra* note 42, at 58.

⁴⁷ For a related discussion on the power of “anchoring,” a commonly used negotiation technique, see LEHRER, *supra* note 27, at 156–58.

⁴⁸ See *id.* at 106.

⁴⁹ See Sian Beilock, *Math Performance in Stressful Situations*, 17 CURRENT DIRECTIONS IN PSYCHOL. SCI. 3395 (2008).

⁵⁰ *Id.* at 339.

⁵¹ *Id.*

⁵² Jonah Lehrer, *The Frontal Cortex* (Apr. 13, 2010), http://scienceblogs.com/cortex/2010/04/dont_choke.php.

⁵³ *Id.*

⁵⁴ *Id.*

performance on vertical problems was unaffected.⁵⁵ The vertical math problems are perceived primarily as visual spatial problems, which are associated with a different area of the brain (the right prefrontal cortex), which is not distracted by our anxieties or threatened by stereotypes.⁵⁶ In other words, according to Lehrer, “merely changing the presentation of the problem can dramatically alter how the brain processes the information.”⁵⁷

Beilock’s study should also remind mediators of a classic skill we call “framing negotiable issues.”⁵⁸ Mediators are trained to frame issues in neutral language to invite interest-based discussion rather than adversarial positional bargaining. This is done in order to avoid adopting the position of either party and to create an inviting agenda that encourages meaningful dialogue. We frame issues neutrally to take the sting out of the topic. Thanks to Sian Beilock, we now know that neutral framing also changes the way in which the brain actually processes the information and may even mitigate the anxiety produced by conflict.

VI. PRISONERS OF OUR PRECONCEPTIONS⁵⁹

“Tell me what you know. . . Then tell me what you don’t know, and only then can you tell me what you think. Always keep those three separated.”

Colin Powell⁶⁰

Robert Burton’s fascinating work, *On Being Certain, Believing You Are Right Even When You’re Not*, discusses an impressive line of studies, which show that emotional habits and patterns and expectations of rewards are difficult to break.⁶¹ Burton also makes a compelling case for how this same argument applies to thoughts: “Once firmly established, a neural network that links a thought to a feeling of correctness is not easily undone. An idea known to be wrong continues to feel correct.”⁶²

In *How We Decide*, Jonah Lehrer points to studies that show people with strong affiliations, for example, partisan voters, when confronted with inconsistent information, recruit the prefrontal cortex to filter the information to fit what it already believes and to ignore inconsistencies.⁶³ Once this is done, they get a positive emotional response (through the release of dopamine) and are rewarded—to Lehrer, this is the definition of rationalizing.⁶⁴

Marco Iacoboni and colleagues conducted research that revealed how political sophisticates, in answering political questions, rely on memory and a “default state network” or

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See Lela P. Love, *Deconstructing Dialogue and Constructing Understanding, Agendas, and Agreements*, 38 FAM. & CONCILIATION CTS. REV. 27, 30 (2000).

⁵⁹ This phrase is borrowed from University of California at Berkeley psychologist Philip Tetlock referring to political pundits who, according to Tetlock, are particularly prone to dismissing dissonant or contradictory possibilities. Or as Jonah Lehrer puts it, they “[p]erform elaborate mental gymnastics to avoid admitting error.” See LEHRER, *supra* note 27, at 209.

⁶⁰ *Id.* at 248.

⁶¹ See generally ROBERT A. BURTON, *ON BEING CERTAIN, BELIEVING YOU ARE RIGHT EVEN WHEN YOU’RE NOT* (2008).

⁶² *Id.* at 97–98.

⁶³ LEHRER, *supra* note 27, at 205. For another example of cognitive dissonance, see BURTON, *supra* note 61, at 13.

⁶⁴ LEHRER, *supra* note 27, at 205.

the region that is most active when we are resting.⁶⁵ In order to better understand the default state network, Iacoboni refers to the state you are in when you are daydreaming.⁶⁶ You were certainly conscious but not necessarily engaged in any form of conscious deliberation. Sophisticates think about politics all the time so they do not need to employ conscious deliberation to the political statements—they just rely on memory. Political novices show activity in the regions of the prefrontal cortex associated with cognitive attention and in doing so shut down the default state network.⁶⁷

Think about parties in conflict who have invested a lot of time, energy and thought to their positions. How much of their behavior in conflict is driven by their default state network and retrieval of memory? The research on political sophisticates suggests that perhaps a great deal of conflict is driven by processes other than conscious deliberation.⁶⁸ Colin Powell's approach to thinking, for instance, is a possible way to avoid becoming prisoners of our preconceptions.

VII. MIRROR NEURONS

Conflict escalation is a universal experience. We have all been involved in conflicts and we have all experienced firsthand how conflict has a tendency to escalate. One person speaks and the receiver raises an eyebrow. The speaker continues and suddenly an insult is hurled. Mediators allow venting as a means to let off steam. Mediators also frequently and repeatedly summarize the concerns raised by the parties as way to de-escalate conflict and encourage discussion of interests instead of positions.⁶⁹ But what really is at the core of the escalation? Is it just poor word choice or tone? What did that raised eyebrow really mean and were there other expressions communicated that we perhaps failed to consciously appreciate?

According to Marco Iacoboni, Italian scientists were among the first to discover mirror neurons while researching the macaque monkey in a laboratory in Parma, Italy.⁷⁰ Macaque monkeys were given grasping tasks, for example, picking up a raisin or a peanut.⁷¹ Meanwhile, the researchers tracked the firing of neurons in the motor areas of the monkey's brain through implanted electrodes.⁷² One day, researcher Leo Fogassi casually picked up a peanut and discovered that the monkey's brain reacted as if the monkey had grasped the peanut himself.⁷³ The area of the brain that reacted was the same area that reacts when the monkey performs the grasping action.⁷⁴ Only this time it happened based solely on observing Fogassi as he performed the task.⁷⁵ Soon enough, researchers discovered these same mirror neurons in human beings.⁷⁶

⁶⁵ See IACOBONI, *supra* note 5, at 252–53.

⁶⁶ *Id.* at 253.

⁶⁷ *Id.* at 252.

⁶⁸ For a related discussion on the phenomenon of “confabulation,” in which the mind “makes up” information to resolve ambiguities, see MCGILCHRIST *supra* note 45, at 81.

⁶⁹ Love, *supra* note 58, at 28.

⁷⁰ See IACOBONI, *supra* note 5, at 10 (According to Iacoboni, there are several recorded observations of mirror neurons claiming to be the first but none are confirmed as such. However, through many subsequent controlled experiments over a period of twenty years, the existence of mirror neurons was indeed confirmed).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

Anyone who has ever spent time with a baby knows how easily they can imitate and how this simple action can easily bring a smile to your face. But what researchers are beginning to conclude is that babies do not only learn to imitate, they imitate to learn.⁷⁷ In one study, a baby imitated facial expressions as early as forty-one minutes after birth.⁷⁸

According to Iacoboni, this ability to imitate is the result of special neurons known as mirror neurons. These mirror neurons are not just about copying, but are also a means of understanding another's intentions.⁷⁹ In fact, the mirroring of other people's speech is necessary for us to perceive it.⁸⁰ Mirror neurons send signals to the limbic system, which allows us to feel the emotions associated with the observed facial expressions. Only after we feel these emotions internally are we able to explicitly recognize them.⁸¹ Mirror neurons also learn to predict the actions of other people and to code them for intention, which suggests that mirror neurons are shaped by our experience.⁸² Mirror neurons help us reenact in our brains the intentions of other people, giving us a profound understanding of their mental states.⁸³

The discovery of mirror neurons has had widespread implications for many disciplines. For example, Iacoboni and others have begun to connect deficits in mirror neuron function to conditions such as autism.⁸⁴ Is there a connection between our unconscious imitation or mirroring of others and the way in which conflicts escalate? How much of our anger or frustration, or dismissive tone is derived from the other as opposed to our own free will or autonomy?

Iacoboni also discusses the interdependence of self and other when he says, "the more we learn about mirror neurons, the more we realize that we are not rational, free acting agents... Mirror neurons in our brains produce automatic imitative influences of which we are often unaware and that limit our autonomy by means of powerful social influences."⁸⁵ He even points out that "imitation and 'liking' tend to go together as well."⁸⁶ Is that why we hate it when people make faces at us or roll their eyes when we speak? Are we unconsciously looking for mirroring and instead receiving explicit rejection? How much of our response to conflict begins as an unconscious mirroring of the other? And if mirroring plays a role in the escalation of conflict, can it play a similar role in the de-escalation of conflict? According to Iacoboni, "mirroring is a pervasive form of communication and social interaction among humans."⁸⁷

We now know that parties in conflict have to deal with brains that may be wired to amplify the negative in conflict and are subject to the unyielding power of our preconceptions and the escalating potential of mirror neurons. At the same time, mediators can use opening statements and summarizing skills to encourage the parties toward a more collaborative conflict approach, de-escalate conflict, and perhaps discuss their interests instead of just their positions.

⁷⁶ IACOBONI, *supra* note 5, at 10.

⁷⁷ *Id.* at 48.

⁷⁸ *Id.*

⁷⁹ *Id.* at 58.

⁸⁰ *Id.* at 105.

⁸¹ *Id.* at 112.

⁸² *Id.* at 162.

⁸³ *Id.*

⁸⁴ IACOBONI, *supra* note 5, at 172.

⁸⁵ *Id.* at 209.

⁸⁶ *Id.* at 114.

⁸⁷ *Id.* at 245.

The reflections on the neuroscience surrounding conflict and decision-making are endless. But for now, I have only one more observation.

VIII. MEDIATING ON THE RIGHT SIDE OF THE BRAIN

In 1979, Betty Edwards published the bestselling book *Drawing on the Right Side of the Brain*, in which she illustrated how suppressing the left side of the brain and enabling the right side of the brain can bring out the true artist in anyone.⁸⁸ She believed that the left hemisphere is too narrowly focused on details to see the big picture. However, by using techniques to suppress the left hemisphere, she allows the right hemisphere to see the whole picture and put the pieces together.⁸⁹

A common theme in the neuroscience literature surveyed for this article involves the differences between the left and right hemispheres of the brain. While the left hemisphere of the brain is critical to decisionmaking, particularly for its ability to engage in sequential logic, it is the right hemisphere upon which we rely for matters of cooperation, empathy, and the types of problem solving associated with a shift toward collaboration.⁹⁰

If we are to accept some of the differences between the left and right hemispheres as accurate, then mediators should find ways to activate the right hemispheres of the parties in mediation. By doing so, we maximize the parties' ability to engage in collaborative dialogue. According to the research reported by Iain McGilchrist and others, there are quite a few commonly accepted differences between the left and right hemispheres of the brain. For example: "the left hemisphere delivers what we know, rather than what we actually experience"⁹¹; or the right hemisphere is concerned with the whole context while the left hemisphere is concerned with the parts and naming.⁹² According to McGilchrist, "we must learn to use a different kind of seeing, to be vigilant not to allow the right hemisphere's options to be too quickly foreclosed by the narrower focusing of the left hemisphere."⁹³

⁸⁸ See generally BETTY EDWARDS, *DRAWING ON THE RIGHT SIDE OF THE BRAIN* (1979).

⁸⁹ *Id.* For an interesting interpretation of the applicability of Edwards' book, see DANIEL H. PINK, *A WHOLE NEW MIND: WHY RIGHT-BRAINERS WILL RULE THE FUTURE* 15 (2006).

⁹⁰ See generally MCGILCHRIST, *supra* note 45. Additional differences between the left and right hemispheres cited by McGilchrist include: "When we put ourselves in others' shoes, we are using the right inferior parietal lobe and the right lateral prefrontal cortex, which is involved in inhibiting the automatic tendency to espouse one's own point of view." *Id.* at 57; "In circumstances of right hemisphere activation, subjects are more favourably disposed towards others and more readily convinced by arguments in favour of positions that they have not previously supported." *Id.*; "The right hemisphere plays an important role in 'theory of the mind,' a capacity to put oneself in another's position and see what is going on in that person's mind." *Id.*; "Ultimately, there is clear evidence that when it comes to recognising emotion...whether it is expressed in language or through facial expression, it is the right hemisphere on which we principally rely." *Id.* at 59; "The one exception to the right hemisphere's superiority for the expression of emotion is anger." *Id.* at 61; the right hemisphere is partial to emotions that deal with bonding and empathy while the left hemisphere is partial to competition, rivalry and self belief. See *id.* at 62-63; an extensive body of research now indicates that insight, whether mathematical or verbal, is associated with activation in the right hemisphere." See *id.* at 65; "Denial is a left hemisphere specialty." See *id.* at 85; "Our sense of justice is underwritten by the right hemisphere, particularly by the right dorsolateral prefrontal cortex." *Id.* at 86.

⁹¹ See *id.* at 164.

⁹² See *id.* at 70.

⁹³ *Id.* at 164.

Most mediators likely recall the Prisoner's Dilemma model in game theory, which has served as a basis for training mediators in the benefits of collaboration over competition.⁹⁴ According to McGilchrist, scientists have studied the brains of humans as they played this Prisoner's Dilemma game.⁹⁵ In Prisoner's Dilemma, subjects that achieve mutual cooperation with another human being show activity in the pleasure centers of the brain, including the dopamine system, striatum, and orbitofrontal cortex.⁹⁶ They do not, however, show activity when cooperation is with a computer.⁹⁷ When playing with a human being, the majority of regions showing cooperation are right-sided whereas when playing with the computer the regions are mainly left-sided.⁹⁸ McGilchrist goes on to say that "[i]t is mutuality, not reciprocity, fellow-feeling, not calculation, which is both the motive and reward for successful co-operation."⁹⁹

The research on the Prisoner's Dilemma scenario provides support for the theory that relationship building and direct communication between the parties is a critical component of establishing a cooperative negotiation environment. This research also has implications for the use of caucus in mediation. Mediators are frequently taught to caucus less if the parties have an ongoing relationship; the parties need to learn to work things out themselves.¹⁰⁰ The research on Prisoner's Dilemma supports the theory that the parties, particularly those with the potential for an ongoing relationship, may do better together in joint session than apart in caucus. At a minimum, caucus should be used sparingly in order to give the parties the greatest opportunity to develop the mutuality and fellow feeling necessary for cooperation.

IX. OLD LADY YOUNG LADY¹⁰¹

⁹⁴ For a detailed description of Prisoner's Dilemma, see MCGILCHRIST, *supra* note 45, at 147.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ CARRIE MENKEL MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 355 (2nd. ed., 2005).

¹⁰¹ This picture known as "My Wife and My Mother-in-Law" was originally published in 1915 by the cartoonist W.E. Hill.



The above image has been used extensively by mediation trainers. Through elicitive dialogue trainers might ask the trainees to look at the image and describe what they see. Some trainees would say they see an old lady. Others would say they see a young lady. And some would say they see both. The trainer might then ask those who see the young lady to help those who do not and vice versa. Trainees draw attention to the mouth of the old lady and encourage the viewer to see the mouth as a choker on the neck of the young lady. They point out that the young lady is looking off to her right revealing a profile of her left jawbone. The jawbone is also the nose of the old lady. Eventually, everybody will see both images. The lessons learned may include the fact that two people can look at the same thing and see it in dramatically different ways. One might say the image reflects the importance of being open to looking at a situation from another point of view. However, if anyone doubted that the other was telling the truth about what they see, they might only be willing to look at the image from their own point of view. What neuroscience now tells us about this exercise takes these lessons one step further.

McGilchrist argues that the right hemisphere will not prematurely resolve ambiguities such as the “old lady young lady image” because studies of the brain involving images like this one reveal that such ambiguities can be seen in one way or another, but not simultaneously.¹⁰² This means you cannot hold onto your own point of view and simultaneously see the other. You have to suspend your point of view or toggle points of view for a brief moment in order to see the other perspective. This is easier said than done. With images such as the old lady young lady, “[w]e remind ourselves that this is pure biology on display, and move on to other thoughts. But with unstable mental images that are personally meaningful, this is far more difficult.”¹⁰³ The key to this challenge may reside in the abilities of the right hemisphere. “So the left hemisphere needs certainty and needs to be right. The right hemisphere makes it possible to hold several ambiguous possibilities in suspension together without premature closure on one outcome.”¹⁰⁴

¹⁰² See MCGILCHRIST, *supra* note 45, at 82.

¹⁰³ See BURTON, *supra* note 61, at 199.

¹⁰⁴ See MCGILCHRIST, *supra* note 45, at 82.

CONCLUSION

“It is the rule of thumb among cognitive scientists that unconscious thought is 95 percent of all thought—and that may be a serious underestimate. Moreover, the 95 percent below the surface of conscious awareness shapes and structures all conscious thought.”¹⁰⁵

Phineas Gage and his horrible accident provided us with some of our earliest insights into the connection between our brain and the way in which we behave. Advances in technology now enable us to observe the brain in unprecedented ways. This has led to a wide array of discoveries in neuroscience with potentially broad application to the dispute resolution profession. Researchers who have studied the role of conflict in the lives of children have taught us that we learn as many if not more ineffective conflict management skills growing up as effective skills. From glucocorticoids to cognitive dissonance and the discovery of mirror neurons, we have reason to believe our perceptions of conflict and those with whom we have conflict may be influenced as much, if not more, by our unconscious thoughts than our own free will. We have explored how the “priming effect” and the “framing effect” can be correlated with the utility of certain mediator skills, including the delivery of opening statements and the framing of negotiable issues. We have learned there are many differences between the tendencies of the left and right hemispheres of the brain. These differences may provide new clues in how to best use mediation to foster collaborative dialogue. Yet we have only seen the tip of the iceberg when it comes to the application of neuroscience to the world of dispute resolution and mediation. More discoveries are surely on the horizon.

¹⁰⁵ GEORGE LACKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH* 13 (1999).

This Is Your Brain on Mediation: What Neuroscience Can Add to the Practice of Mediation

By Daniel Weitz

Introduction

A group of undergraduate students at New York University were chosen for the experiment.¹ Everyone was given a list of five word sets and asked to make a grammatically correct four word sentence out of each set. These are called scrambled sentence tests. For example, students are presented with the following: "feels weather the hot patience." This five word set could be unscrambled to read "the weather feels hot." However, students in this experiment were actually given one of two different lists containing words meant to "prime" them to behave in a specific way. Mixed into one list were words associated with being polite; mixed through the other list were words associated with being rude. When the students were soon placed in an experimental situation to measure the degree to which they would act polite or rude, their behavior correlated with the words with which they were primed.

After completing twenty variations of the scrambled sentences the students were instructed to take the completed lists down the hall to the Professor's office where they were to be collected and scored. When the students arrived at the Professor's office, there was another student standing in the doorway asking the Professor a series of questions. The real test was to see how quickly the students would interrupt or how long the students would wait before interrupting to hand in the completed test. The students who were primed with polite words waited longer on average than the students who were primed to be rude. In fact, the overwhelming majority of the students primed to be polite never interrupted at all.² Simply priming them with words associated with being polite made them wait longer than those students who were primed with words associated with being rude.

Advances in neuroscience have given us an unprecedented look at the human brain and human behavior. Discoveries have followed in disciplines ranging from cognitive-behavioral psychology to molecular biology. To what extent these discoveries impact other fields, including the dispute resolution profession, is now a hotly pursued topic. While a quick survey of recent studies of the brain opens a flood of connections to the practice of mediation, even neuroscientists caution against the certainty of their findings. There is still more research to be done and many of these studies provide evidence of correlation but not necessarily causation. Perhaps we too should resist the temptation to champion a long sought after scientific basis for all that we do. However, there is no denying the fascination with what we are learning

about the human brain and how it guides our behaviors and impacts the way we make decisions. At a minimum, it is cause for great reflection.

Our Negative View of Conflict

Mediation training programs often begin with a conflict word association exercise to explore the nature of conflict. Trainees typically produce a list of similarly negative words including argue, fight and disagreement. This list propels a lively discussion of why we tend to view conflict as something negative. We point to television, our past experiences and even our parents. After encouraging reflection, sometimes through small group exercises, mediation trainers ask if anything positive ever comes from conflict. Trainees list a number of positives including clarity, recognition, understanding and improved relationships. The trainer then hopes the group will come to appreciate that conflict is not inherently good or bad but that the nature of conflict is instead a function of how it is handled.

Recent discoveries in neuroscience shed even greater light on our negative associations with conflict. For example, significant research has been done on the importance of sleep.³ This research supports the position that we consolidate learning and store memory during sleep. In *Nurture Shock*, Po Bronson and Ashley Merryman report that negative memories are stored in the Amygdala (an area of the brain associated with strong emotions such as fear) while neutral and positive memories are stored in the Hippocampus (an area of the brain not only associated with storage of memory but conversion of short-term to long-term memory as well). Furthermore, lack of sleep is harder on the Hippocampus than it is on the Amygdala. So, when sleep deprived, we have a harder time remembering neutral or positive feelings and events since our Hippocampus is adversely affected by the lack of sleep. Meanwhile, the less-affected Amygdala has little trouble helping us to recall negative feelings and events. Therefore, since people often lose sleep during periods of conflict or crisis, could this explain why we so often judge people with whom we are in conflict by their most negative potential? How often have you heard people in conflict say "I can't think of one good thing to say about him?" Other studies have shown that stress can cause a similar effect on the Hippocampus. During situations of stress, hormones called glucocorticoids are released in the brain.⁴ Glucocorticoids are known to cause damage to the Hippocampus. In fact, under extreme conditions, glucocorticoids can kill brain cells in the Hippocampus. This

suggests that stress, and the brain chemistry connected with it, is not only related to our negative view of conflict but perhaps our negative view of those with whom we have conflict. Furthermore, it is not a far stretch to connect our negative view of conflict with our propensity toward competitive approaches to conflict. Is it possible that our negative view of conflict not only impacts how we approach it but also increases the likelihood that we will adopt a competitive style when a collaborative style would be optimal? The perception that conflict is inherently negative quite possibly precludes many disputing parties from even trying mediation when it would otherwise be helpful to them.

We Can Change

During much of the twentieth century, the prevailing theory was that our brains were pretty much completely formed and unchanging after childhood. However, recent discoveries have provided evidence of neuroplasticity, which challenges the assumption that our brains are done developing once we reach adulthood.⁵ For example, studies have shown that physical exercise can improve cognitive function and even brain physiology.⁶ Exercise also appears to stimulate a protein known as BDNF or Brain Derived Neurotrophic Factor, which aids in the development of healthy tissue. In *Brain Rules*, molecular biologist John Medina refers to BDNF as having a powerful fertilizer-like growth effect on certain neurons in the brain. According to Medina, BDNF not only keeps neurons young and healthy, which enables them to better connect with one another but it also encourages the formation of new cells in the brain.

If our negative view of conflict is indeed largely a conditioned response, perhaps we can change it. Mediation not only provides help with resolving the conflict at hand, it provides an opportunity to develop constructive conflict resolution skills that can be used well into the future.

Application of Neuroscience to Mediator Skills

Discoveries in neuroscience can be associated with a variety of mediator skills including the delivery of an opening statement and framing negotiable issues. The application of these skills relate to a number of discoveries including the psychological phenomenon of “priming” and the “framing effect.”

The Psychological Phenomena of Priming and the Utility of Mediator Opening Statements

Most mediators begin the initial meeting with an opening statement. This is particularly true of mediators who deal with interpersonal conflict including divorce or community or workplace mediation. The goals of an

opening statement include educating the parties about the process, developing rapport and trust, and setting the tone for a collaborative negotiation. Despite the apparent benefits of providing an opening statement, some mediators question its utility. Critics of a mediator opening statement say it takes too long and much of it is a waste of time as the parties are too distracted to absorb the content. While some openings may go on longer than necessary, the phenomenon of priming lends support for the use of mediator opening statements.

Recall the priming experiment, discussed above, conducted by Professor John Bargh and colleagues at New York University. There is an enormous body of research demonstrating the ability to prime subjects with subtle words to act in a seemingly limitless variety of ways. Research has shown that priming can make us slow or fast or even good or bad at math.⁷ But before I tell you about math, let us finish the discussion of opening statements.

Think about the words mediators emphasize in their opening statements. Most give meaningful emphasis to words such as listen, understand, comfortable, confidential, freely, and informal. Mediation trainers and teachers often discuss the benefits of a good opening statement in order to set the tone for mediation. We want to establish an atmosphere of cooperation and open dialogue and in doing so distinguish mediation from its adversarial alternatives. While most mediators have always appreciated the power of a good opening statement, we now have reason to believe there is a scientific explanation for its effectiveness as well. According to the phenomenon of priming, we are a lot more susceptible to outside influences and our unconscious than we realize.⁸ When we deliver opening statements, we have the potential to prime the parties to act in a manner consistent with the words we use. Furthermore, given our tendency to associate conflict with that which is negative, parties are likely primed to behave poorly in conflict. At a minimum, they are primed to adopt a competitive and adversarial approach to conflict. Therefore, a mediator’s opening statement is not only an important aspect of establishing a collaborative atmosphere but perhaps it plays a role in neutralizing the way in which parties are negatively primed as they enter the process.

The Framing Effect and the Utility of Framing Negotiable Issues

The research that shows we can be made to perform better or worse in math ties the priming phenomenon with another psychological phenomenon known as the Framing Effect. In a study conducted by Sian L. Beilock from the University of Chicago,⁹ a group of female undergraduates were given a series of relatively simple math problems known as modular arithmetic. Students were given horizontal math problems, represented by a left-to-

right linear equation as well as vertical math problems represented by numbers above and below one another forming the equation. Then, half of the female students were reminded of a negative stereotype, for example, that “women do not do as well as men on math.” This form of priming is called the “stereotype threat condition” in which simply reminding people of a stereotype can induce anxiety which in turn decreases performance. This allowed Beilock and her colleagues to explore how a high-stress situation creates worries that compete for the working memory normally available for performance. After all, if we are stressed out and anxious, there is going to be less working memory available to deal with solving the math problems.

Jonah Lehrer, a frequent writer in the field of Neuroscience, described the results of Beilock’s study on his blog *The Frontal Cortex*. As it turned out, the activation of the stereotype led to decreased performance, but only on the horizontal problems. The reason has to do with the local processing differences of the brain. The horizontal problems depended more on the same area of the brain (the left prefrontal cortex) associated with anxiety and would likely be preoccupied worrying about our math performance. In contrast, performance on vertical problems was unaffected. The vertical math problems are perceived primarily as visual spatial problems which are associated with a different area of the brain (the right prefrontal cortex) which is not distracted by our anxieties or threatened by stereotypes. In other words, according to Lehrer, “merely changing the presentation of the problem can dramatically alter how the brain processes the information.”¹⁰

Beilock’s study should also remind mediators of a classic skill we call framing negotiable issues. Mediators are trained to frame issues in neutral language to invite interest-based discussion rather than adversarial positional bargaining. This is done in order to avoid adopting the position of one side or the other and to create an inviting agenda that encourages meaningful dialogue. We frame issues neutrally to take the sting out of the topic. Thanks to Sian Beilock, we now know it also changes the way in which the brain actually processes the information. Perhaps it even mitigates the anxiety produced by conflict.

Conclusion

It is the rule of thumb among cognitive scientists that unconscious thought is 95% of all thought.... Moreover, the 95% below the surface of conscious awareness shapes and structures all conscious thought.

George Lackoff¹¹

We have only seen the tip of the iceberg when it comes to the application of Neuroscience to the world of dispute resolution. We have seen how the psychological phenomenon of “priming” and the “framing” effect can be correlated with mediator skills including the delivery of opening statements and framing negotiable issues. However, there is much more to learn. But unlike 95% of our unconscious thoughts, advances in neuroscience make it possible for us to consciously appreciate that which we continue to learn about the brain and to think and reflect about how it applies to the field of mediation.

Prolific author Malcolm Gladwell wrote in *Outliers* that “Plane crashes are much more likely to be the result of an accumulation of minor difficulties and seemingly trivial malfunctions.” This serves as a useful metaphor for any discussion of mediator skills. Focus on or use of any one skill will not by itself change the nature of the dialogue between the parties in mediation. In order to help the parties land their conflict safely, we need to use an accumulation of skills that may seem trivial when viewed in isolation. When explored in the context of Neuroscience, we can begin to see how these individual skills, utilized in conjunction with many others, can have a dramatic impact on conflict resolution and human behavior.

Endnotes

1. See Malcolm Gladwell, *Blink*, Paperback ed. (New York: Back Bay Books/ Little, Brown and Company, 2007), 55 (describing a study conducted by John Bargh, Mark Chen and Lara Burrows at New York University).
2. *Id.*
3. Po Bronson and Ashley Merryman, *Nurture Shock* (New York, Boston: Hatchett Book Group, First Edition 2009), 35
4. John Medina, *Brain Rules* (Seattle: Pear Press, 2009), 179
5. See Norman Doidge, M.D., *The Brain that Changes Itself* (London: Penguin, 2007).
6. John Medina, *Brain Rules* (Seattle: Pear Press, 2009), 14
7. See Iain McGilchrist, *The Master and His Emissary* (New Haven, London: Yale University Press 2009)
8. Malcolm Gladwell, *Blink*, Paperback ed. (New York: Back Bay Books/ Little, Brown and Company, 2007), 58.
9. Sian Beilock, *Math Performance in Stressful Situations*, Current Directions in Psychological Science, Volume 17-Number 5 (Association for Psychological Science)
10. Jonah Lehrer—The Frontal Cortex http://scienceblogs.com/cortex/2010/04/dont_choke.php (posted April 13, 2010).
11. G. Lackoff and M. Johnson, *Philosophy in the Flesh* (New York: Basic Books, 1999), 13

Dan Weitz is the Statewide ADR Coordinator for the NYS Unified Court System. The views expressed in this article are his alone and do not reflect those of the Unified Court System. Amy Sheridan, Senior Counsel in the UCS ADR Office, assisted with the preparation of this article.

Mastering the Unconscious

Arbitrators and Decision Making: Can We Improve?

Edna Sussman

Esussman@SussmanADR

NYSBA Arbitration Training

June 2017

© 2017

This year's hot subject

- IBA Arbitration Day - February 21, 2013- Making the award: need we rethink the process? Deliberations: an opaque and disorganised process?
- Swiss Arbitration Association- February 1, 2013- Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions
- Brunel University London- May 22-24, 2013- The Roles of Psychology in International Arbitration

Mental Contamination

- *“Mental contamination is the process whereby a person has an unwanted judgment emotion or behavior because of mental processing that is unconscious or uncontrollable.”* Timothy and Brekker, psychologists
- *[We] should take steps to limit the impact of ‘blinking on the bench’”* Guthrie, Rachlinski, and Wistrich, law professors and magistrate

Justice Cardozo

- “Deep below consciousness are other forces. The likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man whether he be litigant or judge.”

The Nature of the Judicial Process 167 (1921)

Judge Frank

- “The conscientious judge will, as far as possible, make himself aware of his biases...”

Judge Frank in *In re J.P. Linahan*, 138 F. 2d 650 (2d Cir. 1943)

Justice Scalia

- *While computers function solely on logic, human beings do not. All sorts of extraneous factors-emotions, biases, preferences-can intervene, most of which you can do absolutely nothing about (except play upon them, if you happen to know what they are.)”*

Justice Scalia, *Making Your Case: The Art of Persuading Judges* (2008)

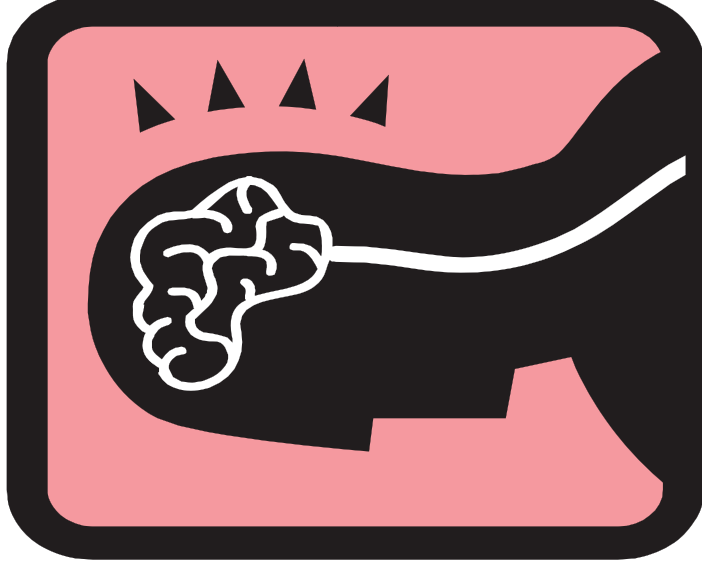
The Brain

- Plato (424-348 BC)
 - two horses
(rational/moral
and
irrational/passionate)
- Kahneman (2011):
 - System 1 and
System 2



Blinders

- Informational-
“unringing the bell”
- Attitudinal – personal
predilections
- Cognitive – heuristics-
mental short cuts



Judge experiments

- 265 state and federal judges
- Average 9 years on the bench
- Anonymous questionnaire



1. Informational Blinder- Inadmissible Evidence

- Privileged Communication
 - very damaging to plaintiff
- Half the judges saw it
- 75 % of those judges ruled that the communication was privileged
- Judges who did not see the document- 55% found for plaintiff
- Judges who saw it and ruled privileged - 29 % found for plaintiff



Informational Blinder-

Subsequent remedial measure

- Gasoline flare up from a gasoline can • Judges who saw the evidence- - 75% said not liable
- Company said almost never happened • Judges who did not see the evidence- 100% said not liable
- Warning and recall letter sent later
- Held inadmissible as a subsequent remedial measure



Application to arbitrators?

- Hearsay
- Expert witnesses
- Privileged document review
- Med – arb
- Should we be less generous in admitting inadmissible evidence? Risk of vacatur real?
- Should counsel highlight inadmissibility and unreliability of evidence more without unduly disrupting the proceeding?

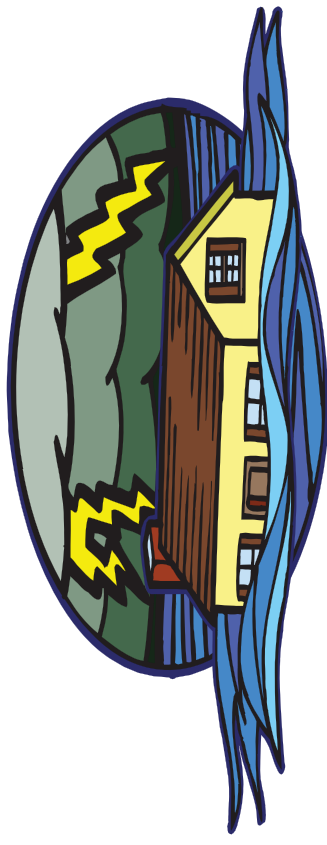
2. Attitudinal Blinders

Personal predilections

- Democratic judges studies show are 1.4 times as likely to render a liberal decision
- Our backgrounds; personal experiences and how they influence us
- Other forms of bias? Manner of presentation across cultures, deep pocket, plaintiff versus defendant, corporation vs. individual, race, culture, fill it in for yourself

3. Cognitive Blinder- Hindsight Bias Heuristic

- Was failure to take precautions against flooding negligent?
 - Not told about the flood, 24% found negligence
 - Told about the flood, 57% found negligence
- Half the judges were told that a flood costing \$1 million occurred subsequently



Cognitive Blinder

Confirmation Bias Heuristic

- Study of what you already believe
- Study of supporters of Bush and Kerry in the 2004 elections- statements by candidates- only the parts of the brain that control emotions were triggered; reasoning part completely inactive



Cognitive Blinder

Anchoring Heuristic

- Pedestrian hit by truck
- Half the judges heard a motion to dismiss for lack of \$75,000 jurisdictional minimum
 - they denied it
- Other judges did not hear the motion
- Judges who did not hear the motion awarded a mean of \$1,200,000 million
- Judges who heard the motion awarded a mean of \$880,000- 30% spread



Cognitive Blinder

Anchoring

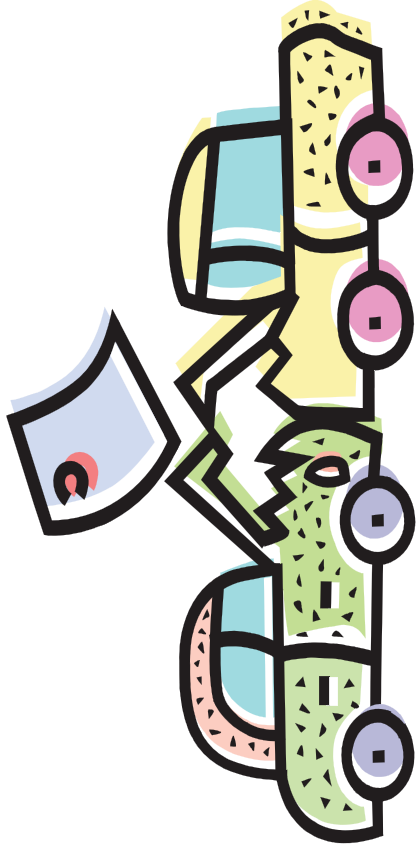
- Auto accident- arm amputated- facts presented
 - Judges who heard \$10,000,000 awarded mean of \$2,210,000
- Some Judges heard demand of 10 million dollars in settlement conference
 - Judges who only heard large number awarded mean of 808,000
- Other judges heard demand for “a lot of money”



Cognitive Blinder

Framing

- Alan- intelligent-industrious-impulsive-critical-stubborn-envious
- Ben- envious-stubborn-critical-impulsive-industrious-intelligent
- Who did you view more favorable?
- Film: asked how fast between 30-40 MPH car was going
 - Smashed 40 MPH
 - Collided 39 MPH
 - Bumped 38 MPH
 - Hit 34 MPH
 - Contacted 31 MPH



Application to Us?

- **Hindsight bias**– our job is often to reconstruct what must have been then – Actual outcome makes it seem more predictable than it was. Careful...
- **Confirmation bias**- our job is to listen and assess with an open mind; An early view of the case or our personal feelings about a subject may cause us to only hear and process what confirms that view. Careful...
- **Anchoring Bias**- Assessing damages- number anchors can impact thinking. Careful...

Application to counsel?

- Careful selection of arbitrators
- More expansive arbitrator interviews unrelated to merits to flush out biases
- Mock arbitrations
- Presentation tailored to suit particular arbitrators
- Play to cultural norms

The Coherence Bias:

On Being Certain

- “People hate being in a state of doubt and will do whatever is necessary to improve from doubt to belief.” **Judge Richard Posner**, THE JURISPRUDENCE OF SKEPTICISM, 86 Mich. L. Rev. 827 (1988)
- Coherence bias
- The feeling of pleasure/reward - Triggered by the feeling of being certain
- Brain’s mesolimbic dopamine system
- Same biology as sex, drugs and alcohol. Robert Burton, *On Being Certain*, 2008
- **Does feeling certain assure you are right?**

The Hunch

I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, **wait for the feeling, the hunch**—that **intuitive flash of understanding** which makes the jump-spark connection between the question and decision, and . . . sheds its light along the way.”

5th Circuit Judge Joseph C. Hutcheson, Jr., “The Judgment Intuitive: The Function of the ‘Hunch’ in Judicial Decisions” (1929)

Similar statements by Judge Friendly and Judge Hand



Overcoming Unconscious Bias

- Awareness of the mental contaminant
- Motivation to correct it
- Awareness of the direction and magnitude of the bias
- Control over resolve to correct it
- People, even if they believe they are biased, do not believe their bias has infected their judgment – the “bias blind spot”
- **Awareness, knowledge and motivation do not work; not enough; control does not follow**

Denial

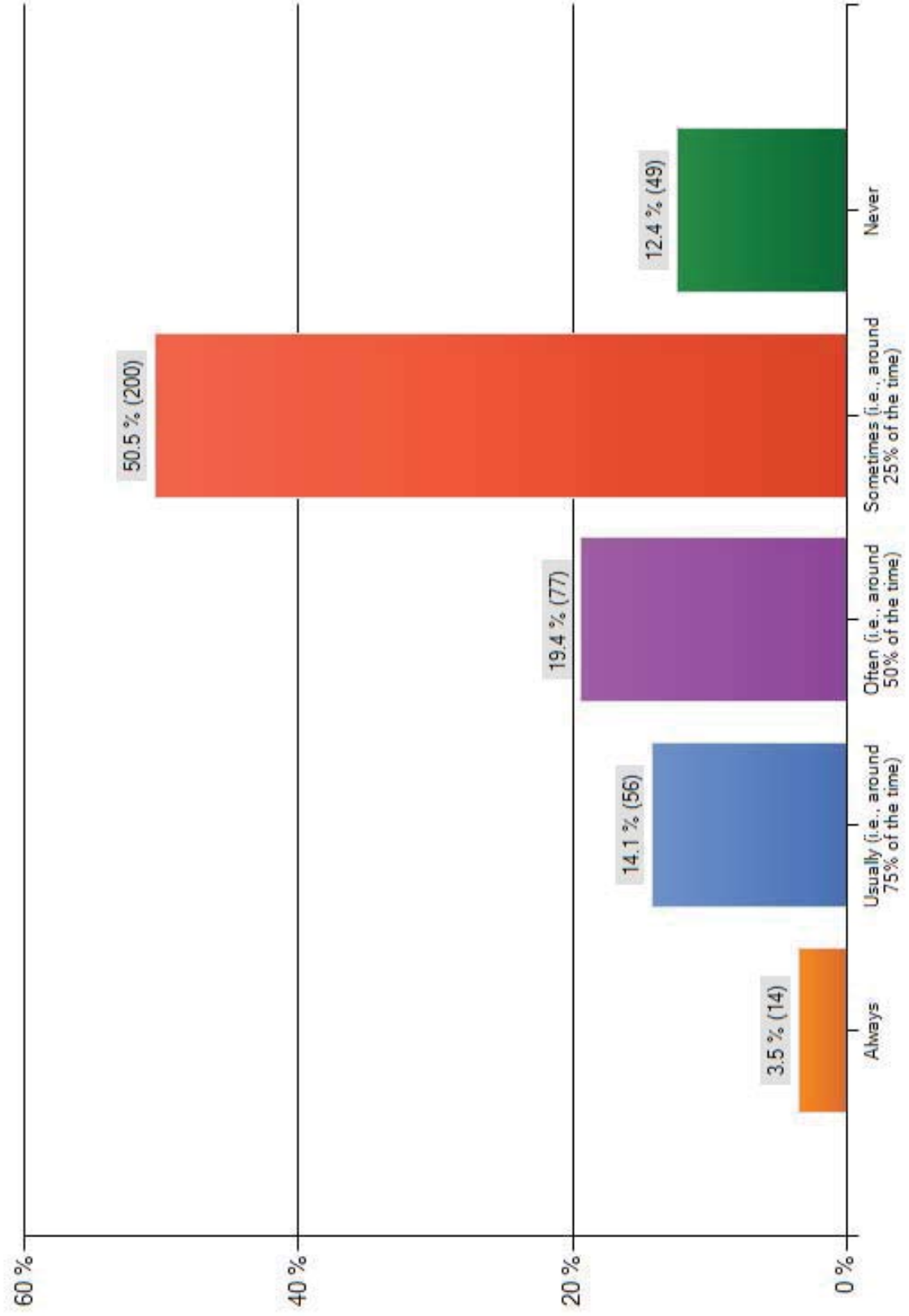
- De Nile
- The Illusion of objectivity



Decision framework

- “A typical arbitrator concludes the initial phase with a single dominant story in mind... Sizeable percentage of arbitrators have established a clear leaning by the end of the opening statement.”
- Richard C. Waites and James E Lawrence, *Psychological Dynamics in International Arbitration Advocacy*, In *The Art of Advocacy in International Arbitration* 109 (2010).
- **If we form a view early does it lead to biased assimilation of new evidence? Confirmation bias?**

Do you form a preliminary view of the merits of the case after receiving the pre-hearing submissions ?



Debiasing: Overcoming your “bias blind spots”

- Play both stories throughout the proceeding - Consider the Opposite
- Marshal and constantly weigh positive as well as negative evidence for both sides
- Makes sure you ask questions that elicit the full story- not just confirming preliminary view
- Identify why you may be wrong
- Reduce reliance on memory
- Replay how you reached your conclusions- what did you reject
- Write down your reasoning
- Estimate odds of your being wrong
- Were you influenced by any biases /heuristics /inadmissible evidence
- Consult your co-arbitrators
- Leave enough time - Delay decision making - Sleep on it
- What did you need to have presented to go the other way
- What would the losing party feel you overlooked
- If someone were writing it the other way- where and how would they differ

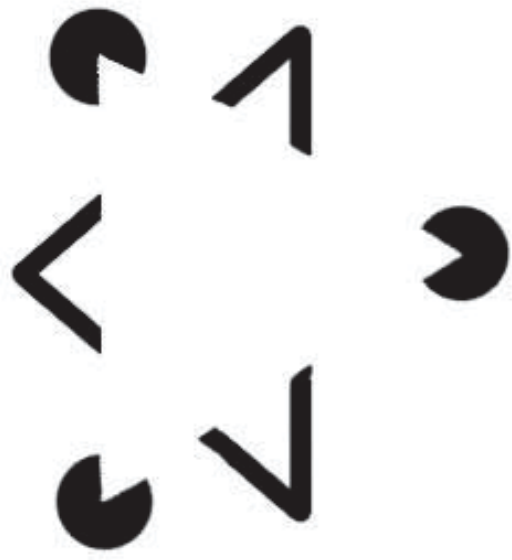
Two faces, an urn or both???



Young girl or old hag? Harder to
see both? Have to really try?



Gestalt theory – law of closure



590



Woody Allen's Story



- When I was kidnapped, my parents snapped into action...
- (By now you have probably constructed your own story of what happened next)
- ... They rented my room out.

- Thank you

- Edna Sussman

- 914-472-9406

ednasussman@sussmanadr.com

**Arbitrators, Mediators, and Heuristics --- The Search for
Antidotes to Potential Distortions in Our Thinking**Charles J. Moxley, Jr.¹**I. Introduction**

In recent years, it has become increasingly clear from the scientific and technical literature that the physical and psychological make-up of our brains can have important and sometimes distorting effects upon our judgment and decision-making.

Specifically, the construction of our minds, including the chemistry of the functioning of our minds, potentially affects our judgment and decision-making, as humans – and, by extension, as arbitrators, mediators, judges and lawyers in arbitrations, mediations and court cases – in significant ways. The same thing is true of the internal processing of our minds, where it appears that much more activity occurs on an unconscious, or perhaps a “preconscious,” basis than we are aware.

Numerous leading commentators, including, most notably, Daniel Kahnemann of Princeton University, in his recent bestseller “Thinking Fast and Thinking Slow” have suggested that our minds have essentially two systems, System 1 and System 2.²

System 1, as described by Kahnemann and others, is essentially our automatic, largely unconscious, mental apparatus that makes snap judgments, quick judgments, early decisions, and instinctual resolutions of matters that come to our attention.³ This part of our brain is often very

¹ I acknowledge the considerable assistance of Michael Krenicky in preparing this review of the heuristics literature and suggested solutions to the problems presented.

² Daniel Kahneman, *Thinking Fast and Slow* 20-21 (2011).

³ *Id.*

accurate and very reliable. Indeed, it is our primary survival mode, which includes the flight or fight phenomena and the like. In short, our System 1 instinctual mental processes serve us very well.

System 2, in turn, is the deliberative part of our minds, the part of our minds that processes information and reasons from point to point.⁴ This part of our minds enables us to override our System 1 and potential distortions it can introduce by imposing judgments on our instinctive responses to stimuli. Just as our System 1 is generally quite reliable and generally works quite well, System 2 is quite a fine piece of equipment, including the aspect of it that involves overriding System 1. This ability to impose judgments is often invaluable and is seen as distinguishing us from creatures that possess only instinct.

Nonetheless, scholars have concluded, based on what appear to be quite reliable objective psychological tests – that that our System 1 is prone to certain identifiable errors that our System 2 typically tends to overlook or ignore, absent intervention (such as this article might make possible).

Specifically, experts in this field have shown that our System 1 is prone to numerous types of misjudgment that can put us as arbitrators, mediators and judges at risk of making erroneous judgments and decisions grounded in fallacy or mistake.

The importance of the impact of System 1 on our decision-making processes is not lost on the legal world or the world at large, as several popular books have been written on this topic, including “Blink” by Malcolm Gladwell and, as mentioned, the recent comprehensive tome by Daniel Kahnemann, “Thinking Fast and Thinking Slow,” supported by an impressive array of high level psychological research. Professor Jeffrey Rachlinski of Cornell Law School and

⁴ *Id.*

others have reviewed this subject in the context of judicial decisions, conducting extensive studies concerning the impact of systematic errors that are prevalent in System 1 on judges and their decisions.

However, other than a few articles⁵, the impact of System 1 on arbitrators has largely been ignored by the academic world. This is despite the fact that arbitrators are presumably at least as prone to such errors of judgment and indeed, in some respects, may be more so, since arbitrators, by definition, function in a regime that is more flexible and less “rules-bound” than judges. For instance, arbitrators, unlike judges, are generally not bound by detailed Federal Rules of Civil Procedure or New York Civil Practice Law and Rules or the like.⁶ The Federal Arbitration Act, the New York Arbitration Law, and leading arbitration rules, such as the Rules of the American Arbitration Association, JAMS, and the ICC, tend to be less specific than comparable court rules and processes, leaving far greater discretion to arbitrators.

Additionally, arbitration takes place behind closed doors, in private. Thus, the awards of arbitrators are not subject to the same level of scrutiny as the decisions of judges (although there is some overview of arbitrators’ findings by the marketplace and, of course, by the courts, to a limited extent).

Therefore, for us as arbitrators and counsel in arbitrations, it is important to identify the main patterns of misjudgment and erroneous decision-making that are prevalent in our System 1, so we can identify steps we can take to correct for such potential errors.

⁵ See, e.g., Christopher R. Drahozal, *Mandatory Arbitration: A Behavioral Analysis of Private Judging*, 67 Law and Contemp. Prob. 105 (2004).

⁶ See, generally, FED. R. Civ. P.; N.Y. C.P.L.R.

II. ANALYSIS of HEURISTIC BIASES

A. Overview

This article focuses on seven key heuristics that appear to have the potential to affect the thinking of arbitrators, and goes on to propose potential solutions for mitigating the effects of such heuristics. While this article gives individual proposed solutions for each heuristic, it is important to note that there is also a common thread through each of the solutions offered. Several of the possible solutions for mitigating the effects of System 1 biases discussed in this article involve expanding the decision-making process in arbitration to broaden the arbitrator's perspective as to and understanding of the matters at issue.

B. Heuristics

1. Representative Heuristic

a. Overview

A representative heuristic is when an individual makes judgments about the probability that a person or event falls into a particular category based on the fact that that person or event has similar characteristics to people or events in that category as a whole. The most well-known study done on representative heuristics is Daniel Kahneman's study involving "Tom W."⁷ In this study, individuals were asked to guess the major of a fictional student, "Tom," after hearing a description of his personality traits.⁸ "Tom" lacked creativity and had little sympathy for or interest in interacting with others.⁹ Despite being told that humanities and education were the most common majors at his school and computer science was the least common major, the

⁷ Kahneman, *supra* n. 2 at 146-48.

⁸ *Id.*

⁹ *Id.*

majority of people guessed that “Tom” was a computer science major.¹⁰ Most of the survey subjects based their decision on the personality traits that were given to them.¹¹ This study showed that individuals often choose less probable outcomes rather than a more probable outcome because of assumptions made about certain people or events.

b. Solutions

There are a number of solutions that arbitrators and mediators can use to limit the negative effect of the representative heuristic during their decision-making or other processes. One such solution that applies to arbitrators was explained in Chris Guthrie, Jeffrey Rachlinski, and Andrew J. Wistrich’s article about the mental processes of judges titled *Inside the Judicial Mind*.¹² The authors suggested that while the representative heuristic can be helpful for making efficient decisions, it can also lead judges in the wrong direction.¹³ For example, “... Judges should regard a litigant’s efforts to prove that a highly unlikely event occurred with great suspicion. A rare event ... is more likely to be the extraordinary product of a common cause (non-negligence) than the ordinary product of an extraordinary cause (negligence). Rare events should not be attributed to extraordinary causes without powerful evidence.”¹⁴ Like judges, arbitrators should look closely at a party’s explanations that include extraordinary causes of events. Parties may attempt to exaggerate their position or sensationalize an event to draw sympathy from the arbitrator. It is important for the arbitrator to think rationally, based on the evidence, about the probabilities of various events in a case without being affected by language of the parties.

¹⁰ *Id.*

¹¹ *Id.*

¹² 86 Cornell L. Rev. 777, 823-24 (2001).

¹³ *Id.*

¹⁴ *Id.*

2. The Law of Small Numbers

a. Overview

The Law of Small Numbers is a type of representative heuristic that can also affect arbitrators. The Law of Small Numbers is a logical fallacy that occurs when someone assumes that a small sample is representative of a much larger population.¹⁵ This assumption can cause problems for arbitrators and mediators when attempting to assess the facts of a case. Dave Finch gives a relevant example for arbitrators and mediators in his article *Heuristics, Fallacies, and Biases*, “A plaintiff who suffered a whiplash though given a prognosis of complete recovery in a few months, based upon the large numbers of accident victims who recover at that rate, but whose friend had a similar injury two years before and continues to suffer, is likely to resist the prognosis, even despite obvious differences between her age and anatomy and that of her friend.”¹⁶ Therefore, a party that is involved in a personal injury arbitration may overlook the much larger sample size of all accidents because of a past experience with a similar accident.

b. Solutions

Like parties to arbitration or mediation, arbitrators and mediators can also be affected by the Law of Small Numbers. Arbitrators must avoid relying solely on their past experiences in similar arbitrations to determine what an appropriate result should be for a particular arbitration because often one’s personal experiences (even for an experienced arbitrator) may not be based on a large enough sample size to evaluate the particular situation at hand.

Finally, it is important for arbitrators and mediators to be aware of irrelevant things that might come up in a case, and how they might seem to affect relevant and significant matters in

¹⁵ Kahneman, *supra* n. 2 at 112-13.

¹⁶ Dave Finch, *Heuristics Fallacies, and Biases*, Dave Finch Mediation Services 5 (2008) available at http://mediationserv.com/?page_id=28

the case. As Dave Finch says in his article, “The mediator aware of this small numbers fallacy will diplomatically inquire of the party relying on limited data whether she believes it is sufficient in quantity to match the data on the opposing side, not by way of coercing her to accede to the opposition proposal, but by way of inviting her to reassess a position that may be based on inadequate data. In most cases there is a region in which no one can say with certainty that a particular number is too high or too low; above or below a probable verdict; unrealistic or spot on. But, the mediator can guide both parties toward that zone of possibilities where both sides are likely to take refuge in settlement.”¹⁷ Again, the role of the mediator is to act as an unbiased decision-maker. By forcing parties to assess their own personal biases, it helps to get all sides, including the arbitrator, on the same page as to what an appropriate settlement might be for a particular case.

3. The Availability Heuristic

a. Overview

The availability heuristic is when one readily remembers something or some event and the individual believes the event must be important because they remember the event. This availability heuristic often overinflates the importance or relevance of a particular fact or event in a case in the mind of an individual.

For example, an individual is likely to exaggerate the frequency of both Hollywood divorces and political sex scandals because they attract extensive news coverage and easily come to mind.¹⁸ Other examples of this type of bias include situations where personal experiences are more “available” than incidents that happened to others or statistics that one has heard second-

¹⁷ *Id.*

¹⁸ Kahneman, *supra* n. 2, at 130.

hand. For example, a judicial error that affects a person directly may undermine her faith in the justice system more than a similar incident that she reads about in a newspaper.¹⁹

b. Solutions

As arbitrators, it is very important that we look outside our personal experiences when coming to a decision in a particular arbitration. When making decisions, it is important not to assume the current proceeding requires the same outcome as a previous proceeding with similar facts that we remember. In addition, as arbitrators we should consider pausing and thinking about why we are making a particular decision. It is important for us as arbitrators to avoid making decisions based solely on personal anecdotes that easily come to mind. In addition to avoiding personal biases, it is important that we as arbitrators and mediators be aware of potential biases of the parties. As Robert Adler discussed, “One should be particularly alert to the availability heuristic as a confound in negotiation. An opponent who refuses to consider a truly generous offer may do so because he or she has had a bad memory triggered that creates unreasonably negative feelings towards the offer. Things as trivial as using a particular facial expression or phrasing words in a particular way might remind an opponent of a previous bad experience in such a way that he or she refuses to bargain further to reach a deal.”²⁰ Awareness of these potential biases can help a mediator bridge the gap between the parties to create a palatable settlement for both parties and can help make the arbitrator aware of any personal biases that he or she might have.

¹⁹ *Id.*

²⁰ See Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 Ohio St. J. on Disp. Resol. 683, 702 (2005).

4. Anchoring Bias

a. Overview

Anchoring is the common human tendency to rely too heavily, or “anchor”, on one trait, number, or piece of information during the decision-making process. One well-known study on anchoring that has particular relevance to arbitrators involved a group of 265 judges who were put into two groups to determine an appropriate settlement for a personal injury case.²¹ One group of judges was told that the plaintiff’s lawyer was asking for 175,000 dollars while the other group was told that the plaintiff’s lawyer was asking for 10 million dollars.²² The group of judges that were given the 10 million dollar amount awarded a much higher settlement in the hypothetical than the other group of judges.²³ The difference in results occurs because individuals are often affected by the higher base number and adjust their estimates accordingly. It thus appears that, unless we, when acting as arbitrators, are alert to this heuristic risk and take countermeasures, we may be inclined to mis-evaluate a situation, based on how it is presented to us.

b. Solutions

Guthrie, Rachlinski, and Wistrich’s article, *Inside the Judicial Mind*, discusses how judges can limit the effect of the anchoring bias through consciously differentiating between useful and meaningless anchors.²⁴ As suggested in their article, anchors can sometimes provide

²¹ Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information, The Difficulty of Deliberately Disregarding*, 153 U. Pa. L. Rev. 1251, 1288-89 (2005).

²² *Id.*

²³ *Id.*

²⁴ Wistrich, Guthrie, & Rachlinski, *supra*, note 6, at 823.

useful information that can improve the quality of a decision.²⁵ However, misleading anchors can negatively affect the decision-making process.²⁶ Arbitrators should examine the evidence and use their experience to evaluate when they must limit the effect of certain anchors.

5. Framing Bias

a. Overview

The framing bias is the idea that different ways of presenting the same information often evoke different emotions within individuals. There are a number of examples and studies that have been done on the effect that framing has on how individuals interpret various statistics. For example, the statement that the odds of survival one month after surgery are 90 percent is more reassuring than the equivalent statement that the mortality rate within one month of surgery is 10 percent.²⁷ Arbitrators should be aware that parties may try to influence them by manipulating numbers to make a situation appear better or worse than the actual numbers may deserve.

b. Solutions

There are several ways for arbitrators to limit the framing bias within the decision-making process. Studies have shown that judges are less likely to be influenced by framing effects during settlement decisions than the average population, potentially because of their ability to look at multiple angles of a case.²⁸ Arbitrators also should rely on their ability and skills to consider the facts in a case from multiple angles to avoid the effects of the framing

²⁵ *Id.*

²⁶ *Id.*

²⁷ See, e.g., Kahneman and Tversky, *Rational Choice and the Framing of Decisions*, The Journal of Business, Vol. 59, No. 4, Part 2: The Behavioral Foundations of Economic Theory. (Oct., 1986), pp. S251, S254, available at http://www.cog.brown.edu/courses/cg195/pdf_files/fall07/Kahneman&Tversky1986.pdf (explaining how people choose different treatment options based on the language that is used).

²⁸ Guthrie, Rachlinski, and Wistrich, *supra* note 12, at 822-23.

bias.²⁹ Like judges, arbitrators have a potential ability to re-frame the discussion because they are able to hear both sides of an argument without having a stake in the outcome. As with the anchoring bias, an arbitrator should strive to bridge the gap between the two sides' framing of the issues in a case. As attorneys often use colorful language to frame their arguments in cases, it is important for arbitrators to use their wealth of experience to distinguish between factual arguments and language and statistics that can be misleading.³⁰

6. Hindsight Bias

a. Overview

Hindsight bias is the concept that “you knew all along” that something or some event was going to happen. This bias can cause arbitrators to potentially miscalculate the predictability of past events. The ability to calculate the predictability of past events is something that can be very important to arbitrators. Therefore, it is important that arbitrators mitigate the effect that this bias can have on them.

Several studies have been conducted on the effect that this bias can have on the decision-making process. One study, completed by Baruch Fischhoff analyzed the effect of hindsight bias on undergraduate subjects using the results of a war between the British and the Nepalese Gurkhas in the nineteenth century.³¹ The account listed four possible outcomes for the war. The students were then separated into five groups, four of which were told the outcome of the war while one group was not given the results.³² The four groups of subjects that were told the outcome were asked to give the probability they would have assigned to each outcome if they

²⁹ *Id.*

³⁰ *Id.*

³¹ Behavioral Economics, Law and Psychology, 79 Or. L. Rev. 61 (2000).

³² *Id.*

had not been given the results.³³ The last group was asked to estimate the probability of each outcome without being given the result of the war.³⁴ The results showed that there was significant hindsight bias.³⁵ The groups that had been given the results rated the probability of that result higher than the groups did that were given a different outcome and the group that was given no outcome at all.³⁶

b. Solutions

To overcome hindsight bias, arbitrators must avoid assuming a potential event was necessarily likely to occur just because it actually did occur. This is of particular concern in events involving negligence or foreseeability because the arbitrator's decision may turn on whether the actions a party took were reasonable considering the circumstances.

7. Overconfidence Bias

a. Overview

Overconfidence bias provides different concerns for arbitrators than some other cognitive biases. One reason is that arbitrators do and should rely on confidence in their abilities to make a decision on particular issues. Nonetheless, overconfidence bias can negatively affect an arbitrator's decision-making process as well. One of the major problems in professional fields is the tendency to be overconfident. An example of the overconfidence bias of professionals was explained in Daniel Kahneman's *Thinking Fast and Thinking Slow*.³⁷ A study was done by Duke University in which the CFO's of large corporations estimated the returns of the S&P

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Kahneman, *supra* n. 2 at 261-62.

index over the following years.³⁸ The correlation between their estimates and the true value was slightly less than zero.³⁹ Despite this, CFO's gave 90% certainty of certain numbers for S&P returns that would turn out to be too high or too low.⁴⁰ Thus, their confidence was much higher than their actual success rate. Similarly to CFO's, arbitrators also tend to be experts within their own field and therefore can be prone to overconfidence bias.⁴¹

b. Solutions

Overconfidence bias affects arbitrators (as it affects all individuals) but it is extremely difficult to determine the proper solutions for limiting the effect of this bias because it is difficult to determine the line between confidence and overconfidence. Guthrie, Rachlinski, and Wistrich discussed this issue in their article *Inside the Judicial Mind*, "Among the five illusions we tested, the egocentric bias and the hindsight bias are essentially impossible to avoid. Egocentric beliefs are closely connected to good mental health, especially in instances where those abilities are important to one's personal or professional life. Inflated beliefs in one's personal and professional abilities allow people to enjoy a high sense of self-esteem; in fact, only people who are depressed appear to possess an accurate portrait of their abilities. Not only would it be difficult for judges to learn to avoid egocentric biases, it might be inadvisable for them to try. On balance, the social benefits of having confident, decisive judges likely outweigh the costs associated with an occasional erroneous decision caused by such self-assurance."⁴²

This explanation demonstrates the conundrum that arbitrators face in their work.

Arbitrators should try to temper their overconfidence by proceeding with caution and searching

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Guthrie, Rachlinski, and Wistrich, *supra* n. 12 at 824.

for independent sources of judgment, if possible. Obviously, a three-person panel can help in this regard, as having three persons look at the situation may serve to compensate for misperceptions of individual members of the panel.⁴³

Where we are acting as sole arbitrators, perhaps we need to submit our initial impressions to deeper assessment to make sure we are confident they are correct. As arbitrators we are often working alone and may need to make a special effort to make sure we consider all aspects of a situation before us. It may help for us to reflect on and analyze how other decisions or solutions might also be plausible. This is especially important, given the limited review of our arbitral awards.

Thus, it is important for us when acting as arbitrators to strive for a reasonable balance between being confident of our abilities and aware of our limitations, including our possible misperceptions and misjudgments. We need to maintain confidence in our ability to make good decisions while being careful to consider various ways of looking at the fact patterns before us.

C. Benefits of Arbitration

While arbitrators may be particularly susceptible to the foregoing heuristics, there are also benefits that come from years of experience as an arbitrator that can positively affect the decision-making process. The key thing would appear to be that we be aware of the possible pitfalls of our System 1 and take corrective actions along the lines of the approaches outlined here as we strive to make most appropriate decisions in the circumstances of the particular cases that come before us.

⁴³ *See Id.*

III. Conclusion

Heuristics are a natural part of the decision-making process. However, it is important that we be aware of them and look for ways to limit the negative effects these shortcuts can have on our mental processes. Arbitration continues to be a favored alternative to litigation for many parties because of the assumption that arbitrators are experts in their particular field and can make efficient and fair decisions. Therefore, it is critical that arbitrators continue to maintain this edge by not taking the mental shortcuts that often plague decision-making and lead to inconsistent and incorrect decisions. The approaches suggested above can hopefully be helpful to us in avoiding the negative effects of heuristics biases. However, more research and studies need to be conducted in this field to enable us to further understand how we can best make critical decisions.

The challenge would appear to be that we, on as expeditious a basis as possible, raise our consciousness of these mental shortcuts and work to overcome them. Because of the nature of the beast here, it would appear that this effort will not be automatic, even though we are now aware of at least some of what may be at play in our System 1, since we are talking about the very structure and instinctive functioning of our minds. However, it seems clear that we can make progress on this effort if we train our System 2 to intervene when necessary, which, afterall, is its job.

Diversity, Inclusion and Elimination of Bias - Implicit Bias



SASHA A. CARBONE is the Associate General Counsel for the American Arbitration Association. Ms. Carbone is also the Chair of the AAA's Diversity Committee. In that capacity, Ms. Carbone successfully launched the AAA Higginbotham Fellows Program in 2009 in order to provide training, mentorship and networking opportunities to up-and-coming diverse alternative dispute resolution professionals who have historically not been included in meaningful participation in the field of alternative dispute resolution. Ms. Carbone is a graduate of the University of Southern California with a B.S. in Business Administration and Harvard Law School.

JEFFREY T. ZAINO is Vice President of the Labor, Employment and Elections Division of the American Arbitration Association in New York. He oversees the operations, development and panel of arbitrators for the Labor and Employment Arbitration caseloads in New York. He is the chairperson of the New York City Bar Association's Increasing Diversity Among Arbitrators Subcommittee.

Increasing Diversity Among Arbitrators

A Guideline to What the New Arbitrator and ADR Community Should Be Doing to Achieve This Goal

By **Sasha A. Carbone** and **Jeffrey T. Zaino**

Introduction

This article is primarily for women and minority arbitrators who are looking to establish their careers. The path to success is not always clear, and there are different approaches to consider. However, there are fundamental guidelines that we think every new arbitrator, whether diverse or not, should consider. To be successful, new arbitrators must take the initiative, seize control of their careers early on and continue at that pace. This article seeks to provide a basic reference on the subject of establishing a career in arbitration, keeping in mind that the challenges to becoming successful as a neutral can be even more acute for women and minorities.

Becoming a neutral can be rewarding and fulfilling, providing an opportunity to perform a crucial function necessary for this country's dispute resolution system. From incorporating alternative dispute resolution clauses in national and state legislation to court-mandated alternative dispute resolution (ADR) programs, ADR is increasingly a mainstay of our justice system. It is critical, therefore, that ADR neutrals reflect the diverse cultural makeup of its market. Diversity, as we see it, includes cultural, racial, geographic, language and gender differences.

Why is diversity important to ADR? Gwynne A. Wilcox, Esq., of Levy Ratner, P.C., in New York City, notes the following:

I believe that increasing the diversity among arbitrators is extremely important to the process. While the diversity of the workforce has drastically changed over the years, it is evident that the arbitrator pool has not evolved to the same extent. The majority of arbitrators do not reflect the workers who appear before them and cannot identify with their realities as workers. Diversity among arbitrators will provide more credibility to the process in the eyes of the grievants. Also, a more diverse panel of arbitrators will provide a wider range of perspective and experiences that are often lacking among arbitrators who have had life experiences that differ greatly from those of the grievants.

A Look at the Numbers, a Greater Need for Diversity

There is no question that the ADR community is lacking in diversity. This can be attributed to a number of factors, including a lack or perceived lack of access for diverse candidates, failure by arbitral organizations to reach out to diverse candidates, and an arbitrator selection process that relies upon users to select neutrals to serve on their cases. And while corporations have been increasingly

vigilant in their employee diversity initiatives and require that their outside law firms employ and utilize diverse lawyers, they have not addressed the diversity issue in any coherent way when it comes to selecting neutrals to hear their disputes in arbitration. Arbitral associations continue to improve the diversity of the pool of arbitrators, but it is incumbent upon corporations to be mindful of diversity relative to the ADR process.

At the American Arbitration Association (AAA), creating and maintaining the diversity of our neutrals roster is part of our mission. While the AAA has made great strides, it recognizes that more work is needed. At the AAA, our overall Roster of Neutrals is approximately 23% diverse for gender and race. For the AAA's major

Yet, there is much a new arbitrator can do in this interim or transitional period to increase visibility and gain training and practical experience. We list four examples below. While none of these elements assures success, taken together they provide best practices for positioning a neutral to leverage opportunities, which usually expand as the neutral becomes more active.

1. Mentoring

Mentoring should start when a professional is considering the ADR practice, and it should never end. Successful mentoring relationships can provide invaluable aid to building and managing an ADR practice. Mentorship is a tradition in many areas of alternative dispute resolution

To be successful, new arbitrators must take the initiative, seize control of their careers early on and continue at that pace.

divisions, the diversity varies depending upon the caseload: labor (27%), employment (42%), commercial (17%), construction (10%), and insurance (20%).

Despite the ongoing efforts to assist new arbitrators, certain fields have particular challenges. For example, breaking into the labor arbitration field is difficult because in order to be considered on most labor panels, you must be a truly neutral decision maker (i.e., a full-time decision maker or one in a profession considered neutral), which is not the case for other arbitration disciplines such as commercial, construction, international, or insurance. To be on the AAA's labor panel, an arbitrator cannot be an advocate for either unions or employers, or be employed by a government agency, company or union involved in labor-management disputes. Since the only source of income for many new labor arbitrators is their labor arbitration practice, this can pose significant financial and professional risks. Consequently, these arbitrators depend more on networking and visibility than arbitrators in other disciplines. In short, the need to network and develop a caseload, always critical for arbitrators, is even more important for nascent labor arbitrators.

Getting on a Panel Is Just the Beginning

Appointment to an arbitral panel or selection to become a neutral for an arbitral sponsoring organization is a significant achievement for a young arbitrator. The fact of selection means that the neutral has attained a high level of industry expertise or knowledge and has reached the point where that expertise can translate into the young arbitrator's selection as a panelist on arbitration cases. However, the new arbitrators may be unpleasantly surprised that acceptance as a member of an arbitral association's panel does not mean he or she will be selected for cases right away.

—for example, the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes provides that one of the obligations an experienced arbitrator has to the profession is to cooperate in training new arbitrators.

When working with a mentor, it is useful to establish from the start goals and guidelines for how the relationship will work. Is the purpose of the mentorship to gain contacts, shadow the mentor in arbitration hearings, obtain advice or a combination of these goals? A new arbitrator should consider how often the mentor can reasonably be expected to be available and whether that fits the mentee's needs. These should be set early and communicated to the mentor to ensure that both parties start off on the right note.

Another consideration is the length of the mentorship period. Ideally, the mentoring relationship should have a timeline to help both parties manage expectations and goals.

There is no rule that arbitrators can only have one mentor. Using multiple mentors can provide increased exposure for the new arbitrator. For example, a mentor could be a highly experienced and work regularly but have a caseload limited to a few large ADR users or industry sectors (i.e., only private or public). Such exposure is valuable to the new arbitrator, but it could be limited. By researching the caseloads of mentors and using multiple mentors, the new arbitrator has a better chance of gaining exposure to different industries. Also, by using only one mentor the new arbitrator could run the risk of being negatively identified with one arbitrator or sector of an industry.

Shadowing experienced neutrals gives an inexperienced neutral the opportunity to observe peers' style and conduct. While the new arbitrator is not permitted to weigh in on any issues in the arbitration, shadowing

provides the additional benefit of allowing the new arbitrator the opportunity to consider how he or she would handle the issues if presiding over the case. Of course, the arbitrator hearing the case would need to obtain permission from the parties and the administrator.

Writing mock decisions is also a good way to hone skills. New arbitrators can write decisions of the case being observed for review by the arbitrator hearing the case. There are also many case scenarios available either through sponsoring organizations or, generally, on the Internet. New arbitrators can utilize these case scenarios to draft mock decisions, and have them reviewed by more seasoned arbitrators.

2. Pro Bono or Reduced Fee Work

Getting the first arbitration case can be difficult for the new practitioner, but there are opportunities to serve on a pro bono basis or on reduced fee cases that may provide future opportunities.

Court-Sponsored ADR Programs

There are numerous court-sponsored ADR programs nationwide. Many of these programs require neutrals to serve pro bono on a minimum number of cases per year. Some programs allow a neutral who has completed his or her probono requirement to accept payment from the parties, provided they agree to the terms in writing in advance.

Bar Associations

The American Bar Association Section of Dispute Resolution urges arbitrators to devote at least 50 hours of pro bono ADR services annually. It has established a Pro Bono Committee to assist neutrals with locating opportunities. For example, many state and city bar associations have pro bono fee-dispute programs, which offer excellent experience.

Private ADR Providers

If an arbitrator is a member of a roster of neutrals for a private ADR provider, he or she should inquire as to whether there are opportunities to serve on a pro bono basis for hardship cases or on reduced fee cases, such as for expedited caseloads. While pro bono opportunities may be limited, expedited caseloads are gaining popularity for small-dollar disputes. These cases are often on a documents-only basis and provide a new neutral with an opportunity to handle a case on a smaller scale.

In addition to opportunities in arbitration, the new practitioner should not foreclose other readily available ADR opportunities. Many local community mediation programs offer opportunities to mediate with the attractive benefit that they also often provide no-cost or low-cost training in exchange for a commitment to volunteer. This often enables the candidate to obtain experience in

mediating disputes and to meet others embarking on similar careers.

3. Exposure – Networking Through Professional Organizations and Publishing Opportunities

Bar Associations

Almost every bar association in the United States has an alternative dispute resolution section, a mediation section and/or an international dispute resolution section. It is very important for those new to the field to get involved in these associations. The profession's leading thinkers are often members of these committees and involvement with them presents an unparalleled opportunity to network and learn about developments in the field.

Industry-Specific Organizations

Industry-specific organizations may provide new arbitrators opportunities for growth and development. For example, some of the 122 regional offices of the Better Business Bureau (BBB) have pro bono or modest honorarium ADR programs to handle consumer-to-business complaints and certain business-to-business disputes. The pro bono arbitrators receive internal training and observe a set amount of BBB arbitrations before being assigned a case.

Many state associations of realtors also have established ADR programs that use both mediators and arbitrators. These associations could provide opportunities for a new arbitrator to receive training and hear actual cases. Specifically in the area of labor law, most states have public employment relations boards that are quasi-judicial agencies that oversee public sector collective bargaining and adjudicate disputes using labor arbitrators who work pro bono or for a minimal fee.

Join Committees, Subcommittees

There are numerous opportunities to get involved by joining committees and subcommittees of bar associations and industry-specific organizations. Because of ADR's ever-evolving nature, there is always legislation to consider, case law to review, and best practices to create and evaluate. Joining these committees and subcommittees creates a real opportunity to shape the thinking on these topics, as well as to learn from colleagues.

Run for Office Within the Organization

Running for office within an organization provides opportunities not only to lead, but to learn and grow as a neutral. These offices are generally high profile, and the committees do substantive work and analysis that impacts the profession. Haydee Rosario, a new labor and employment arbitrator, notes the following:

Gaining the acceptance of advocates on both sides of the aisle takes time, discipline and hard work. It does not happen overnight because each side needs to trust you before they select you to hear their cases.

There is a process that needs to take place before you become acceptable as an arbitrator. Your participation in organizations such as the New York City Labor and Employment Relations Association (LERA) is an essential part of that process. LERA offers you the opportunity to network with other professionals and to learn about new developments, issues and practices in the field. Being part of LERA's Executive Committee has given me the opportunity to learn about changes in the labor and employment arena while working directly with many of the labor and management representatives in New York and New Jersey. This experience may prove to be invaluable in gaining the trust and credibility that I need as an arbitrator.

Attend Events: Speaking Events, Educational Programs, CLE Courses, Luncheons, and Other Networking Events

Bar associations, sponsoring organizations and law firms all provide ample opportunities for novice arbitrators to network at events and educational programs. To the extent that a neutral has a particular expertise in a noteworthy topic, speaking at an event is another way to gain exposure in the field. Start by approaching your sponsoring organization or bar association committee with an idea for a panel and topic, then work with more seasoned arbitrators to craft the presentation. Many sponsoring organizations law firms, and bar associations offer online seminars that have the added benefit of sharing your thoughts with potentially large audiences.

Publishing Articles

Publishing articles is another way to show the marketplace your subject matter expertise. Many organizations and journals have an ongoing need for articles, including those that focus on ADR. The field of ADR is ripe for articles covering recent case law developments. Whether it is a split among the Circuits on an ADR issue or best practices for limiting discovery in arbitration, neutrals should look for topics that interest them and that may provide an opportunity to get published. Aside from ADR specific topics, new arbitrators should also consider publishing on a topic specific to their area of expertise. Once published, obtain reprints and circulate.

Ongoing Evaluation and Review

Marketing yourself as a neutral is an ongoing process. New neutrals often lament that they are not being selected for cases as often as they think they should, despite their experience. New arbitrators should review their resume quarterly to make sure that it is current. Having your resume reviewed by other arbitrators or mentors is very important.

Give an honest assessment of your per diem, cancellation fee and study time fees. A new neutral should consider whether his or her rate is reasonable and competitive.

Neutrals should also consider taking advantage of opportunities for ongoing review of technique, style and writing skills through refresher and ADR training courses.

New arbitrators should not be afraid to take a stand. Neutrality and respect should be a primary concern; timidity, however, can hurt your reputation. The most successful arbitrators have strong personalities and make tough decisions without worrying about alienating individual ADR users or advocates.

4. What ADR Providers and Users Should Do and What They Are Doing

Sponsoring organizations that administer arbitrations bear a great degree of responsibility in both the recruitment and maintenance of diverse neutrals. It is not enough to have diverse neutrals on the roster; sponsoring organizations must ensure that there are opportunities for advancement in the field.

There are numerous ways that sponsoring organizations can provide assistance to diverse neutrals starting out in the field. At the outset, it is important for sponsoring organizations to commit to investing in diverse neutrals. This means that sponsoring organizations commit to provide resources to diverse neutrals early on in their careers, and continue that commitment. Many of the resources are readily available to sponsoring organizations, and are often utilized, albeit in a piecemeal way. In order to have a substantial impact on the profession, there needs to be a systematic way to provide these resources to those trying to establish themselves in the field.

Publish Written Opinions; Allow Easy Access by ADR Users

When researching unknown or new arbitrators, most ADR users seek written opinions. This can be challenging. LexisNexis and Westlaw offer some redacted arbitration opinions, but the majority of these opinions come from experienced arbitrators. Published opinions are usually selected from complicated, unusual and/or extraordinary cases. New arbitrators' opinions are rarely selected, which limits exposure.

Some ADR providers publish opinions but mostly by experienced arbitrators. So if a new arbitrator has published opinions, there needs to be a vehicle for easy access. Both ADR providers and users should collectively determine a method for publishing and widely distributing opinions of new arbitrators, possibly by developing easily accessible web pages and other electronic tools. ADR users need such a resource to obtain information about unknown and new arbitrators. Parties want a substantive reason for selecting the new arbitrator – whether obtained from referrals, resumes or published opinions.

Opportunities for Arbitrators to Publish and Showcasing New Arbitrators With Photographs and Q&A

One way for sponsoring organizations to provide exposure to diverse neutrals is to encourage publication in

their journals or newsletters. This is a low cost, high impact way to provide advancement opportunities.

Putting a “name to a face” is vital in the arbitration industry, especially for new arbitrators. Many new arbitrators are now developing web pages with pictures, testimonials and other useful information. ADR providers should assist with this effort by developing methods and/or better vehicles for showcasing new arbitrators. For new arbitrators in the labor field, the AAA implemented a pilot program in 2010 in which five labor arbitrators were spotlighted in an electronic publication that used a Q&A format and included photographs. Many of the questions were provided by ADR users, such as:

- What past professional and/or personal experiences have you had that make you a better arbitrator?
- What is the most difficult decision you had to make on a case that you presided over?

The *AAA Arbitrator Spotlights* were sent, via an email blast, to hundreds of ADR users.

Review of Ranking to Provide Guidance to Arbitrators

Once neutrals become members of a roster, they don’t know if they are being listed on actual panels presented to the parties or what their level of acceptability is unless they are being selected for cases. For some, there is a long period – sometimes six months to a year – before being selected for a case. We propose that sponsoring organizations periodically share information with neutrals to let them know whether they are being listed and the number of cases for which they have been listed, and how parties are ranking the neutral if a list/strike process is being utilized.

Permanent Panels for New Arbitrators

A new arbitrator should seek, where possible, permanent panel assignments. Many ADR providers and large users have established permanent panels for their less complicated caseloads, geared towards new arbitrators who have substantive experience. For example, there could be specific discipline disputes in the labor-management context that are assigned permanent panels. Typically, the per diem is determined by the parties and there are set requirements for both the arbitrator’s study time and cancellation fees. Many permanent panels are established because the volume of disputes. Such permanent panels work on a rotation basis and have annual reviews of the panel and fee structure. The parties must mutually agree on all arbitrators on the permanent panel.

ADR Providers and Users Need to Sponsor More New Arbitrator Programs and Meet-and-Greet Events

By sponsoring professional and social networking events, ADR providers and users can provide greater exposure, which benefits new arbitrators. In May 2010 and June 2011, the New York City Bar Association and AAA co-

sponsored successful panel programs with 12 new arbitrators. More than 150 ADR users attended each program.

Ruth Moscovitch, a new arbitrator panelist on the May 2010 program, stated, “There is no question that I have benefited from the experience and exposure. Many people came up to me afterward to give me positive feedback, and I continue to hear that people are asking about me. I also got two new cases from the AAA, so that has been a tangible result.”

Bring Together ADR Users, Providers, and Experienced and New Arbitrators to Discuss Collectively How This Goal Can Be Achieved

There is a need for more communication and dialogue about developing new arbitrators. This should no longer be an academic exercise, but an industry-wide effort. There should be actual initiatives and a clear understanding that investing in new arbitrators is mutually beneficial. The main players – ADR users, providers, experienced arbitrators, and new arbitrators – have to be on board and ready to make changes. Representatives from each group should meet annually or semi-annually to discuss goals, specific caseloads for new arbitrators, resources, and steps towards implementing programs.

Use New Arbitrators, Reaching Out to Women and Minorities, on Specific Caseloads to Provide Exposure and Experience

The best way to assist a new arbitrator is by putting him or her on a case. Plenty of arbitration caseloads involve straightforward factual and legal issues. These types of cases should not be decided by experienced arbitrators with high per diems but by new, less expensive arbitrators. The perceived risk factor for the ADR users is reduced and these cases provide an opportunity for the ADR user to create a larger pool of arbitrators. Seeing an arbitrator in action is the only true way for the ADR user to achieve an absolute comfort level. ADR providers offer less-complicated case services and try to utilize new arbitrators. For example, the AAA offers Labor Rapid Resolve where an arbitrator will hear up to three cases in a single day for a reduced flat fee. These types of cases, heard mostly by new arbitrators, usually involve suspension or discipline issues.

Conclusion

It can take several years for the novice arbitrator to achieve success in the field. This is true even for the arbitrator with stellar credentials and an active practice. While all professions demand that practitioners market and promote themselves to achieve broader success, arbitration’s commitment to the highest ideals of fairness and access to justice is reflected in the path to success. They enhance and advance an arbitrator’s career and are the foundation for the future of the entire profession. ■

Arbitration Ethics



The Code of Ethics for Arbitrators in Commercial Disputes

Effective March 1, 2004

The **Code of Ethics for Arbitrators in Commercial Disputes** was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association® and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA®.

Preamble

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the **Code of Professional Responsibility for Arbitrators of Labor-Management Disputes**.

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, all such persons are called "arbitrators," although in some types of proceeding they might be called "umpires," "referees," "neutrals," or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.



Note on Neutrality

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone, to appoint one arbitrator (a “party-appointed arbitrator”) and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties’ agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

Note on Construction

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator’s fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.



CANON I: An arbitrator should uphold the integrity and fairness of the arbitration process.

- A.** An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.
- B.** One should accept appointment as an arbitrator only if fully satisfied:
 - (1) that he or she can serve impartially;
 - (2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;
 - (3) that he or she is competent to serve; and
 - (4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.
- C.** After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.
- D.** Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.
- E.** When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.
- F.** An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.
- G.** The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.
- H.** Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.
- I.** An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.



Comment to Canon I

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

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

CANON II: An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.

- A.** Persons who are requested to serve as arbitrators should, before accepting, disclose:
 - (1) any known direct or indirect financial or personal interest in the outcome of the arbitration;
 - (2) any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;
 - (3) the nature and extent of any prior knowledge they may have of the dispute; and
 - (4) any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.
- B.** Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.
- C.** The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.
- D.** Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.
- E.** Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.
- F.** When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.



- G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:
 - (1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or
 - (2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.
- H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:
 - (1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or
 - (2) Withdraw.

CANON III: An arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties.

- A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.
- B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:
 - (1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:
 - (a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and
 - (b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.
 - (2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;
 - (3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;
 - (4) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX;
 - (5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or
 - (6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.
- C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.



CANON IV: An arbitrator should conduct the proceedings fairly and diligently.

- A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.
- B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.
- C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.
- D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.
- E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.
- F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.
- G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

Comment to Paragraph G

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude *ex parte* requests for interim relief.

CANON V: An arbitrator should make decisions in a just, independent and deliberate manner.

- A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.
- B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.
- C. An arbitrator should not delegate the duty to decide to any other person.
- D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.



CANON VI: An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.

- A.** An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.
- B.** The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.
- C.** It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.
- D.** Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

CANON VII: An arbitrator should adhere to standards of integrity and fairness when making arrangements for compensation and reimbursement of expenses.

- A.** Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.
- B.** Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:
 - (1)** Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established;
 - (2)** In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and
 - (3)** Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

CANON VIII: An arbitrator may engage in advertising or promotion of arbitral services which is truthful and accurate.

- A.** Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.
- B.** Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.



Comment to Canon VIII

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

CANON IX: Arbitrators appointed by one party have a duty to determine and disclose their status and to comply with this code, except as exempted by Canon X.

- A.** In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.
- B.** Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as "Canon X arbitrators," are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.
- C.** A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:
 - (1)** Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;
 - (2)** Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and
 - (3)** Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.
- D.** Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.



CANON X: Exemptions for arbitrators appointed by one party who are not subject to rules of neutrality.

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

A. *Obligations Under Canon I*

Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

- (1) Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and
- (2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

B. *Obligations Under Canon II*

- (1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and
- (2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

C. *Obligations Under Canon III*

Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

- (1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;
- (2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3);
- (3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;
- (4) Canon X arbitrators may not at any time during the arbitration:
 - (a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;
 - (b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or
 - (c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.



- (5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;
- (6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and
- (7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations Under Canon IV*

Canon X arbitrators should observe all of the obligations of Canon IV.

E. *Obligations Under Canon V*

Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations Under Canon VI*

Canon X arbitrators should observe all of the obligations of Canon VI.

G. *Obligations Under Canon VII*

Canon X arbitrators should observe all of the obligations of Canon VII.

H. *Obligations Under Canon VIII*

Canon X arbitrators should observe all of the obligations of Canon VIII.

I. *Obligations Under Canon IX*

The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.

Limitations on Arbitrators' Use of Associates

by Charles J. Moxley, Jr.

- General Practice: Arbitrators do not generally use associates or the like in domestic cases and only occasionally do so in international cases.
- Canon V.C of the Code of Ethics for Arbitrators in Commercial Disputes: "An arbitrator should not delegate the duty to decide to any other person."
- Canon VI.B: ".... An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon."
- Absence of Disclosure Requirement in Canon VI.B: Canon VI.B does not reference Canon II's requirement that "AN ARBITRATOR SHOULD DISCLOSE ANY INTEREST OR RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY."
- Reading of Canon II into Canon VI.B: Reading the disclosure requirements of Canon II into Canon VI.B seems prudent.
- Canon II's disclosure obligation: Canon II.A(2) requires that persons requested to serve as arbitrators disclose, *inter alia*:
 - any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. *They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts*; [emphasis supplied]
- Requirement under Canon II to Disclose the Associate's Connections with the Case: Even if Canon VI.B does not require disclosure of the associate's connection with the case, Canon II.A(2) would appear to require such disclosure.
- Billing Guidelines: Under the AAA's Billing Guidelines for Commercial, Construction, and Employment Neutrals, arbitrators may only bill for study time at the rates set forth on their panel cards. Arbitrators would need to make special arrangements with the parties through the AAA to be able to bill for an associate's time.

Who Is Responsible for Ethical Behavior by Counsel in Arbitration

By Steven C. Bennett

The author explains why attorneys must comply with applicable codes of professional conduct when they serve as counsel in arbitration proceedings and why it falls to arbitrators to deter and penalize unethical behavior by counsel that would affect the fairness of the proceedings.

Arbitration is a significant (and growing) part of today's system of justice, albeit a largely private one. The ethical conduct of parties and attorneys in arbitration proceedings is essential to the legitimacy of the arbitration process. Arbitrators (at least in American Arbitration Association (AAA) proceedings) must follow the Code of Ethics for Arbitrators in Commercial Disputes (AAA/ABA Code).¹ This code stresses that arbitrators, as dispensers of justice, have a responsibility to the public as well as to the parties who request assistance in the resolution of disputes.²

Steven C. Bennett is a partner in the New York City offices of Jones Day and the author of "Arbitration: Essential Concepts" (2002). The views expressed are solely those of the author, and should not be attributed to the author's firm or its clients.

There is no similar specific code of ethics for counsel in arbitration. Attorneys are subject to relevant state codes of lawyer conduct, generally modeled on the American Bar Association's Model Code of Professional Conduct (ABA Model Code). The prevailing view is that these codes apply to lawyers who serve as advocates in arbitration. But enforcing these ethical obligations in arbitration is another matter.

The questions addressed in this article are: Who is responsible for enforcing ethical conduct by attorneys in arbitration? What are the challenges involved? This article also suggests ways that arbitrators may encourage ethical and deter unethical conduct by parties and counsel. In addition, it suggests that arbitration-sponsoring institutions should create ethics committees whose advice arbitrators may seek when they are unsure whether they have authority to address particular unethical conduct. Finally, this article concludes that arbitrators must take primary responsibility for policing ethical violations that affect the fairness of proceedings. Arbitrators must take reasonable steps to deter and, when appropriate, penalize such conduct, including the imposition of appropriate sanctions.

Is Ethical Misconduct by Counsel a Serious Problem in Arbitration?

There is no documented, empirical answer to the question of the extent of unethical conduct in arbitration. Information on the scope of unethical behavior by attorneys in arbitration is largely anecdotal. For example, one commentator, reflecting on his 25 years' experience as a securities arbitrator, quickly recalled at least a dozen examples of unprofessional conduct by counsel.³ If every arbitrator could so easily cite such instances of misconduct, a serious problem could appear.

The same commentator suggested that ethical violations could have serious consequences for parties and tribunals and threaten the public's confidence in arbitration as a viable dispute resolution system. For example, such violations could "result in unnecessary motions, longer hearings, duplication of effort and wasted time." Unethical behavior, moreover, could "slow the dispute resolution

Arbitrators must take reasonable steps to deter and, when appropriate, penalize ethical violations that affect the fairness of proceedings, including the imposition of appropriate sanctions.

process and increase the cost of arbitration."⁴

The reputation of arbitration as a fair process certainly would be adversely affected if attorneys felt free to engage in unethical conduct either because the arbitration process is flexible and for the most part private, or because the attorneys in arbitration are unlikely to see the same arbitrators more than once.

Arbitrators may conclude that enforcement of ethical standards upon counsel in arbitration is not part of an arbitrator's job. Arbitrators are charged with deciding only the specific issues submitted to them for resolution. They are generally appointed through a private process, and they are often subject to a duty of confidentiality. Also, reviewing courts generally defer to arbitrators and are reluctant to inquire into the conduct of arbitration proceedings. Thus, the temptation to ignore misconduct may be great. But it is clear that at least some minimal ethical standards should

apply to attorneys in arbitration.

Do Ethics Rules Apply to Counsel in Arbitration?

There is some authority for the proposition that lawyer ethics codes do not apply in arbitration.⁵ This is not the mainstream view. It makes sense that lawyer codes of professional conduct apply in arbitration because such codes broadly address lawyer conduct in society by requiring lawyers to adhere in all their professional acts to high standards of conduct.⁶

It is also logical that these codes apply to arbitration because arbitration is a well-accepted means of resolving legal issues. Thus, courts have recognized that arbitrators are quasi-judicial figures and enjoy the same quasi-judicial immunity from civil liability as judges.⁷ Similarly, at least one federal appellate court has held that witnesses who testify in arbitration are entitled to immunity from civil liability for such testimony.⁸ There is little reason to consider representation in arbitration as other than the practice of law.

The 2004 ABA Model Code makes clear that lawyers have ethical obligations in connection with the provision of non-legal services, saying, for the most part, that attorneys who provide

both legal and non-legal services must comply with the ethics code in both regards.⁹ Thus, state ethics codes should apply to attorneys serving as advocates in arbitration even if such work is somehow not the practice of law.

Courts have recognized that lawyers who breach certain ethical obligations in arbitration can be sanctioned. In a leading case, *People v. Bergmann*, the Colorado Supreme Court disbarred a Colorado lawyer for failing to file a client's demand for arbitration, despite repeated requests from his client.¹⁰ The court held that the deliberate neglect of a legal matter (this included arbitration) violated several disciplinary rules.

The informal nature of modern arbitration proceedings could suggest that ethical obligations, such as those governing the unlicensed practice of law, should be relaxed in arbitration. But there is no logical reason to believe this to be so. Legal representation remains legal representation, whether a lawyer wears a suit or a sports jacket. Furthermore, changes in the unauthorized practice of law rules are the result, not of a belief that ethics rules have no place in arbitration, but of the huge growth in commercial and international arbitration, requiring counsel to be able to engage in multi-jurisdictional practice of law.

The unauthorized practice of law cases have often involved fee disputes in which the client claims that it need not pay its attorney for representation in arbitration because the attorney was not licensed in the jurisdiction where the arbitration took place. In *Williamson v. John D. Quinn Construction Corp.*, the court rejected such a claim, holding that representing a party in arbitration does not amount to the practice of law and thus cannot constitute the unauthorized practice of law.¹¹ The court noted the "informal nature" of arbitration, and that its rules of evidence and procedures differ from litigation.¹²

However, this rationale is not accepted by all courts. The contrary view appears in *Birbrower Montalbano, Condon & Franc v. Superior Court*.¹³ The California Supreme Court held in *Birbrower* that a New York law firm committed the unauthorized practice of law (and thus was entitled to no fee) when its lawyers appeared in an arbitration proceeding in California. The court held that arbitration proceedings (despite their informal nature) "are important aspects of our judicial system." In response to this case, the California legislature changed the state Code of Civil Procedure, to permit a form of *pro hac vice* admission of foreign lawyers in California arbitrations.

Similarly, the NASD Code of Arbitration for investor arbitration has recently been changed to allow out-of-state attorneys to represent parties

in NASD proceedings, notwithstanding state law to the contrary.

In response to the need for more flexibility in multi-jurisdictional practice, the ABA formed a commission on multi-jurisdictional practice to explore the issue. The commission concluded that an exception to the rule against the unauthorized practice of law is warranted for ADR proceedings, for several reasons. First, parties might have an interest in retaining counsel with particularized knowledge of the field in dispute. Second, parties also might have developed relationships with lawyers who could assist in resolving the dispute through an ADR process. Third, the commission pointed out that, in many instances, knowledge of the laws of the jurisdiction in which an ADR proceeding takes place may not be particularly important. Thus, the commission proposed a new rule allowing out-of-state attorneys to represent clients temporarily in ADR proceedings in the state without violating the rule on the unauthorized practice of law.

Connecticut has adopted a variant of this rule, but it conditions permission for out-of-state attorneys to practice arbitration in the state on the attorney's home state granting "reciprocity."¹⁴ Connecticut's attorney ethics rules broadly define the practice of law as "ministering to the legal needs of another person and applying legal principles and judgment to the circumstances or objectives of that person." Included in this definition is "[r]epresenting any person in a court, or formal administrative adjudicative proceeding or other formal dispute resolution process or in any administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review." (Emphasis added.) The definition only excludes "[p]articipating in labor negotiations, arbitrations, or conciliations arising under collective bargaining rights or agreements."¹⁵ Thus, representing parties in other forms of arbitration would be considered the practice of law in Connecticut.

While arbitration developed outside of litigation, the process recently adopted many of the trappings of modern litigation procedure. This development has been criticized. But until arbitration returns to its simpler roots, counsel must be prepared to respond when these litigation procedures are used in arbitration. This makes the case for requiring high standards of professionalism required by lawyer ethics codes to arbitration.

One aspect of that professionalism is the duty of lawyers to be as truthful and candid in all dealings with the arbitral tribunal as they would be with a court. This finds support in Rule 3.3(a) of

the ABA Model Code, which establishes the duty to avoid making false statements or failing to disclose legal authority to a "tribunal in the course of advocacy, and Rule 1.0(m) defines that term as denoting, in relevant part, "a court, *an arbitrator in a binding arbitration proceeding* or a legislative body, administrative agency or other body acting in an adjudicative capacity." (Emphasis added).

Moreover, Rule 4.1(a) of the ABA Model Code requires truthfulness in statements to persons other than clients, stating: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person."

Other ethical duties that advocates would have in arbitration include, for example, the duty to:

- provide competent representation to a client,¹⁶
- abide by a client's decisions concerning the objectives of representation,¹⁷
- consult with the client as to the means by which the client's objectives are to be pursued,¹⁸
- abide by a client's decision whether to settle a matter,¹⁹
- act with *reasonable* diligence and promptness in representing a client,²⁰ and
- explain matters to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.²¹

There are surely other obligations in lawyer ethics codes that would govern advocates in arbitration.

Do Arbitrators Have the Power to Sanction Unethical Attorney Conduct?

The ideal arbitration is efficient, cost-effective and imbued with fairness. To achieve these goals, the rules of institutional arbitration providers give arbitrators the power to control the proceedings and to award broad forms of relief.²² Arbitrators generally are not limited to awarding relief allowed by law; they may "base their decision upon broad principles of justice and equity[.]"²³ Since arbitrators manage the process, it falls to them to see that the arbitration process is fair and completed efficiently.²⁴ It follows from this essential fact that arbitrators have the authority to address abuses and disruption of the arbitration process.²⁵

There is some case authority for this conclusion. For example, in *First Preservation Capital v. Smith-Barney*, an NASD panel of arbitrators granted a request to dismiss an arbitration as a

sanction for discovery abuses.²⁶ On review the court confirmed the award dismissing the case. The court expressly stated that arbitrators have the authority to halt proceedings where "abhorrent behavior" appears:

The great discretion arbitrators have over the proceedings must include the ability to halt proceedings such as this one, where plaintiff's abhorrent behavior was so clearly disruptive to the proceedings. If arbitrators are not permitted to impose the ultimate sanction of dismissal on plaintiffs who flagrantly disregard rules and procedures put in place to control discovery, arbitrators will not be able to assert the power necessary to properly adjudicate claims ... Allowing parties ... to abuse the process not only serves to undermine the principles of arbitration, it will ultimately diminish the integrity of any court in which information obtained through an abuse of arbitration is used.

Other types of sanctions that arbitrators can award include an allocation of the fees and costs of the proceedings, barring the assertion of claims or defenses, drawing adverse inferences, or precluding the submission of evidence or testimony.²⁷ Even monetary sanctions may be awarded in some cases.²⁸ The Supreme Judicial Court of Massachusetts upheld an arbitration award imposing monetary sanctions as damages for violation of a discovery order.²⁹ The arbitration was conducted under the AAA Commercial Arbitration Rules, which authorize arbitrators to resolve disputes involving information exchanges and to award "any relief that the arbitrator deems just and equitable."

The 5th Circuit suggested in *dicta* that arbitrators may have the power to impose sanctions even when inappropriate conduct by counsel cannot be shown to have directly affected the outcome of the dispute. In *Forsythe International, S.A. v. Gibbs Oil Co. of Texas*, the court said in a footnote: "Misconduct, even when deemed irrelevant to the merits, may nevertheless subject offenders to other sanctions. Arbitrators may, for example, devise appropriate sanctions for abuse of the arbitration process"³⁰

Do Arbitrators Have the Power to Sanction Counsel Directly for Their Misconduct?

Counsels' participation in arbitration on behalf of parties who are within the jurisdiction of the arbitral tribunal arguably constitutes consent of counsel (who are non-parties to the arbitration agreement) to be bound by the results of the arbitration.³¹ In *Dalyn v. Kellwood Co.*, for example,

the court confirmed an award that included sanctions against the claimant's counsel (half the cost of the arbitration, excluding attorney's fees).³²

But there is contrary authority. In *Chem Asia 2000 Pte. Ltd. v. Oceana Petrochemical AG*, the court held that an arbitrator could impose sanctions on a party, but not on a party's attorney.³³ The court distinguished *Polin*, noting that it involved an NASD arbitration clause authorizing broad relief, including any relief "that would have been available to the parties had the matter been heard in court." But *Chem Asia* was a post-dispute submission to arbitration and the submission in that case permitted the arbitrator to award "any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties." The court found it significant that the submission agreement made no reference to the imposition of sanctions, or applica-

(an indication, perhaps, that a party does not believe it has a credible position, sufficient to sustain without trickery).

Possible Objections to Arbitrators Sanctioning Attorney Misconduct

The scarce authority for arbitrators' sanctioning unethical conduct by counsel suggests, quite rightly, that there could be serious objections to arbitrator involvement in this area.

One possible objection is the inability of counsel to obtain timely court review of an order sanctioning counsel. In general, review can be had only after the award is issued, for example for "corruption" of the process.³⁵ The distant threat of vacatur may have less deterrent effect than other sanctions.³⁶

Furthermore, courts afford arbitration awards a presumption of validity unless the fairness of

Arbitrators have authority to establish what will be deemed inappropriate or disruptive conduct in the arbitration and to advise counsel that such conduct could lead to sanctions, even if limited to the party whose counsel engaged in misconduct.

tion of the Federal Rules of Civil Procedure (which do authorize sanctions on counsel). Absent an agreement on broad relief, the court questioned whether an arbitrator had inherent authority to award sanctions. The conflict between *Polin* and *Chem Asia* suggests that the arbitrator's ability to impose sanctions on counsel may depend on the terms of the arbitration agreement.

Fortunately, there are other ways arbitrators can deter unethical conduct by counsel. For example, in lieu of sanctions at the end of the process, arbitrators could bring up the issue of attorney ethics at an early preliminary conference and then ask counsel whether they will agree to be subject to sanctions if they behave unethically during the arbitration.³⁴

Alternatively, on the authority of *Polin* and *Chem Asia*, arbitrators could announce, at the preliminary conference, or later in the event of misconduct by counsel, that they will hold the parties responsible for the misconduct of their counsel. Arbitrators also could make clear that unethical behavior will be viewed with skepticism

the proceeding has been called into question.³⁷ Thus, deferential review cannot effectively address the unethical conduct of counsel. The problem is exacerbated by the fact that some arbitration proceedings are not transcribed. And even when they are, the record may not reflect all of counsel's misconduct. Absent a reference to that misconduct in the award, it would be very difficult for a reviewing court to determine whether the misconduct occurred and whether it had an impact on the award. Moreover, the court's power to vacate an award for misconduct cannot be based on relatively minor ethical violations.

The objections to arbitrators sanctioning counsel for ethical breaches suggest the need for caution, but they are not an absolute barrier to sanctions.

Court Control of the Profession Remains Vital

Certain sanctions for attorney misbehavior, such as disqualification from representation for conflicts of interest and disbarment belong under the purview of the courts. For example, *Bidermann*

Industries Licensing, Inc. v Avmar N.V. involved a motion for a stay of arbitration of the issue of whether petitioner's counsel should be disqualified from representing the petitioner in arbitration proceedings. The trial court granted a stay and the Appellate Division affirmed, holding that only a court may rule on an attorney disqualification issue.³⁸ The court stated: "Issues of attorney disqualification ... involve interpretation and application of the Code of Professional Responsibility and Disciplinary Rules, as well as the potential deprivation of counsel of the client's choosing[.]"³⁹

Regulation of the legal profession presents a formidable problem for courts and bar association disciplinary bodies. Arbitrator regulation of attorneys in arbitral proceedings is not likely to intrude too far into the courts' domain because core regulations of the profession (such as bar admission, suspension, disbarment and the like) are so clearly beyond the purview of arbitrators. If arbitrators were to intrude too far into these areas, "public policy" concerns should allow for court review. Moreover, invoking these concerns, as in *Bidermann*, may permit immediate intervention by a court, to prevent such intrusions from going forward.⁴⁰

If an arbitrator were to stray erroneously into areas exclusively regulated by the courts, an award based on such misplaced authority could be challenged on *de novo* review based on public policy concerns⁴¹ or "manifest disregard" of law.⁴²

Confidentiality Concerns May Preclude Ethics Review

For many who choose arbitration over litigation, the preeminent advantage of the process is confidentiality. Canon VI(B) of the AAA-ABA Code of Ethics, states: "Unless otherwise agreed by the parties, or required by applicable rules or law, an arbitrator should keep confidential all matters relating to the arbitration proceedings and decision."

On the other hand, attorneys have an obligation under the rules of professional conduct to report unethical conduct of other members of the bar. If this obligation applies to attorneys when they serve as arbitrators, the arbitrators would

have conflicting ethical obligations—to maintain confidentiality and to report unethical conduct by counsel in arbitral proceedings.

There is relatively limited guidance on this conflict issue. In a 1977 Informal Opinion, the ABA Standing Committee on Ethics and Professional Responsibility declined to answer the question, at least in the context of an attorney fee dispute.⁴³ But an ethics committee in Tennessee opined that fee arbitration committees were excused from their normal ethical obligations to report ethical misconduct.⁴⁴ At least one commentator has suggested that the answer may depend on whether the arbitration process is purely private or sponsored by a court.⁴⁵

The concern for confidentiality in arbitration need not preclude arbitrators from taking steps to promote ethics and greater professionalism in arbitration. Arbitrators have authority to establish what will be deemed inappropriate or disruptive conduct in the arbitration and to advise counsel that such conduct could lead to sanctions, even if limited to the party whose counsel engaged in misconduct. The potential publication of an award imposing sanctions due to attorney misconduct (which would occur if proceedings were later brought to enforce or vacate the resulting award) could also encourage more ethical attorney behavior.

Conclusion

The task of an arbitrator is hard enough already. Adding a duty to control ethical misconduct may complicate the main task, which is to decide the dispute. It may add to the cost of arbitration and delay dispute resolution. It also could deter qualified people from serving as arbitrators.

Because parties in arbitration want a fair and impartial process, arbitrators have no choice but to adopt fair procedures and see that they are followed.⁴⁶ This inevitably puts policing attorney misconduct in arbitration under the arbitrators' control.

Institutional arbitration providers could help promote ethical attorney conduct in arbitration by offering education programs and developing specific sanctions for various kind of misconduct. One sanction that a provider's ethics committee

***The objections
to arbitrators
sanctioning
counsel for
ethical breaches
suggest the
need for caution,
but they are
not an absolute
barrier to
sanctions.***

might impose on an attorney who is a repeat offender is a suspension from appearing in future arbitrations that the provider administers.

Provider organizations could also help arbitrators carry out their responsibilities by establishing an ethics or grievance committee from which arbitrators could seek guidance when they have a problem with misconduct by counsel. Such committees could also hear complaints by the parties, not only about attorney misconduct, but also about arbitrator breaches of ethics.⁴⁷

State bar disciplinary committees also could actively encourage more ethical conduct in arbitration. They could draft procedures for confidential proceedings to deal with ethical misconduct in arbitration. The result (the decision whether discipline is or is not imposed) could become public.⁴⁸

Unless arbitration providers step in, arbitrators are the only actors in the process who can police ethics in arbitration. Courts cannot be involved, since the whole purpose of arbitration is to eliminate court involvement.⁴⁹ Bar association ethics

committees can do nothing unless alerted to violations of professional ethics in the arbitration process, but this is unlikely to happen unless a party to the arbitration makes a complaint. Arbitrators cannot make such complaints due to their obligation of confidentiality.

If the arbitrator does not police ethics in arbitration, that leaves the "fox to guard the hen house."⁵⁰ Although most attorneys can be counted on to uphold their professional obligations, unfortunately, some do not. As our society becomes less civil, so may attorneys in their conduct in arbitration.

Thus, even though ethics policing of counsel is not in the arbitrator's job description, and problems could arise while doing it,⁵¹ the arbitrator's responsibility to control the process necessarily includes the obligation to promote ethical, professional conduct by parties and their counsel and, when appropriate, sanction ethical misconduct that would negatively affect the fairness of the process. The integrity of the arbitration process depends upon this remedy. ■

ENDNOTES

¹ Available at www.adr.org. The Code of Ethics for Arbitrators in Commercial Disputes was promulgated in 1977 by a joint committee of the American Bar Association (ABA) and the American Arbitration Association (AAA).

² There are other ethics codes for arbitrators in the labor, maritime, and international fields. See, e.g., FMCS Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (1972), available at www.naarb.org, the International Bar Association's Code of Ethics for International Arbitrators (1987), available at www.iba.net; Society of Maritime Arbitrators, Code of Ethics, available at 6A *Benedict on Admiralty* §7-84.3 (1991). Ethics codes, however, do not necessarily have the force of law. See *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7th Cir. 1983) (the Code and AAA Rules "do not have the force of law"). Several states have legislated on specific ethical matters pertaining to arbitrators. See Carrie Menkel-Meadow, "Ethics Issues In Arbitration And Related Dispute Resolution Processes: What's Happening and What's Not," 56 *U. Miami L. Rev.* 949, 978-79 (2002) (citing examples and not-

ing "absolute prohibition" of receipt of gifts or honoraria by arbitrators, adopted by California in the wake of "scandal" involving arbitrators who were given a cruise as a gift after their decision on behalf of a party).

³ See J. Pat Sadler, "One Lawyer's Proposal for a Code of Professionalism in Securities Arbitration," 1264 *PLI/Corp* 67, 77 (2001).

⁴ *Id.* at 78

⁵ However, this authority may be limited to negotiations of a labor-management agreement. See *Dunmore Police Ass'n v. Borough of Dunmore*, 528 A.2d 299, 311 (Penn. Commw. Ct. 1987). This was an arbitration to determine the terms of a collective bargaining agreement. The union's counsel testified as the union's only witness. The court rejected the argument that the union's lawyer violated the "lawyer as witness" proscription of the Code of Professional Responsibility. It stated: "An arbitration panel is neither a court nor an administrative agency." It went on to say that arbitration in this context "represents an extension of the collective bargaining process."

⁶ Robert M. Jarvis, "Arbitration Ethics," in *Alternate Dispute Resolution* 177 (1992) (citing examples and not-

Bar, 1995)

⁷ See *American Eagle Fire Ins. Co. v. New Jersey Ins. Co.*, 148 N.E. 562, 564 (N.Y. 1925) (arbitrator "acts in a quasi-judicial capacity, and should possess the judicial qualifications of fairness to both parties").

⁸ *Rolon v. Henneman*, 517 F.3d 140 (2d Cir. 2008).

⁹ N.Y. Lawyers Code of Professional Responsibility, Ethical Considerations under Canon 1, EC 1-9 through EC 1-12.

¹⁰ 807 P.2d 568 (Colo. 1991).

¹¹ 537 F. Supp. 613, 616 (S.D.N.Y. 1982). The court cited a New York ethics opinion—Committee Report, Labor Arbitration and the Unauthorized Practice of Law, 30 *Record of the Association of the Bar of the City of New York* (No. 5/6, May/June 1975).

¹² The *Williamson* court also noted that the arbitration "fact finding process is not equivalent to judicial fact finding." See *Prudential Equity Group, LLC v. Ajamie*, 2008 WL 510047 at *2 (S.D.N.Y. Feb. 27, 2008) (citing *Williamson*; noting "material differences between an arbitration and a judicial proceeding, with the former being far more informal and applying much less evidence and pro-

cedure").

¹³ 949 P.2d 1 (Cal. 1998). See Cal. Civ. Proc. Code § 1282.4; see generally, Samuel Estreicher & Steven C. Bennett, "Is Arbitration the Unauthorized Practice of Law?", *NYLJ*, Jan. 6, 2005, at 3.

¹⁴ Conn. Rules of Professional Conduct, R. 5.5(c).

¹⁵ *Id.*

¹⁶ ABA Model Code of Professional Conduct, R. 1.2(a).

¹⁷ *Id.* and R. 1.4(a)(2).

¹⁸ *Id.*, R. 1.2(a).

¹⁹ *Id.*

²⁰ *Id.*, R. 1.3.

²¹ *Id.*, R. 1.4(b).

²² See, e.g., *Marshall & Co. v. Duke*, 114 F.3d 188 (11th Cir. 1997) (arbitrators had power to award "damages and other relief" under NASD rules, including an award of attorney fees), *cert denied*, 522 U.S. 1112 (1998); *Mutual Serv. Corp. v. Spaulding*, 972 F. Supp. 1126 (N.D. Ill. 1997) (same).

²³ *Moncharsch v. Heily & Blase*, 832 P.2d 899, 904 (1994). See James J. Marcellino, "Mediation and Arbitration—Ethical Considerations," 32 *Boston B J* 5-6 (Sept./Oct. 1988) ("Rule 3.3's rationale is that it promotes the determination of truth, which is a fundamental objective of the adversarial system. Arbitration, adversarial in nature, is also fundamentally concerned with the determination of truth. Thus, the rationale for Rule 3.3 of promoting the determination of truth is equally applicable in the arbitration context."). The *Restatement (Third) of the Law Governing Lawyers* similarly treats both arbitration and litigation as matters subject to the ethical obligations of appearance before a "tribunal." See ch. 7, intro. cmt. (2000) (chapter governing representation before a "tribunal" would be applicable in contested arbitration and similar trial-type proceedings).

²⁴ See *Jarvis*, *supra* n. 6, at § 13.48 (1995) ("arbitrators have a duty to promote ethics, at all times"). Although most arbitrators are lawyers (and many are former judges), they are not necessarily familiar with all the rules of ethics (though they should be). Of course, some conduct (for example, lying, intimidating witnesses, attempting to bribe a deci-

sion maker) is so obviously *malum in se* that an arbitrator does not need an ethics code to recognize it.

²⁵ Canon I(G) of the AAA-ABA Code states: "An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process."

²⁶ 939 F. Supp. 1559, 1565 (S.D. Fla. 1996).

²⁷ See Michele R. Fron & Kelly M. McIntyre, *Sanctions in Arbitration* 1264 PLI/Corp 1143, 1145, 1151 (2001) (citing sanction examples).

²⁸ Phillip O'Neil, "Mass. Allows Arbitrators to Award \$\$ Sanctions to Remedy Discovery Abuse," 61(2) *Disp. Resol. J* 8 (May-July 2006). The court acknowledged that there is contrary authority.

²⁹ *Superadio Ltd. Partnership v. Winstar Radio Productions*, 844 N.E.2d 246 (Mass. 2006).

³⁰ 915 F.2d 1017, 1023 n. 8 (5th Cir. 1990) ("Arbitrators may, for example, devise appropriate sanctions for abuse of the arbitration process.") (citing *Bigge Crane & Rigging Co. v. Docutel Corp.*, 371 F. Supp. 240, 246 (E.D.N.Y. 1973)).

³¹ See generally Fredrick E. Sherman & Steven C. Bennett, "Binding Nonsignatories to Arbitrate: The Limits of the Federal Arbitration Act," *Commercial L. Advisor* 10 (1996).

³² 103 F. Supp. 2d 238 (S.D.N.Y. 2000). But *Polin* did not involve a pre-dispute arbitration agreement. The parties agreed to arbitrate after litigation had been commenced.

³³ 373 F.Supp.2d 340, 356-57 (S.D.N.Y. 2005).

³⁴ A standard form sanctions agreement could be drafted by the major arbitration-sponsoring organizations and bar associations. To avoid any risk of coercion, the form might be raised with the arbitrator by a case administrator before the first preliminary conference. The arbitrator could later be told whether both counsel had signed the sanctions agreement.

³⁵ See *Gulf Guar. Life Ins. v. Connecticut Gen. Life Ins.*, 304 F.3d 476, 490 (5th Cir. 2002) ("even where arbitrator bias is at issue, the FAA does not provide for removal of

an arbitrator ... prior to an award....").

³⁶ A party seeking to vacate an award based on alleged attorney misconduct may be required to demonstrate that the misconduct had an effect on the award. See *Chopra v. Investcape, Inc.*, 2003 WL 356325 at 3 (Mich. App. Feb. 18, 2003) (unpublished) (award upheld where party could not show counsel's misconduct "affect[ed] the validity of the arbitration award"); *In Re Bankhead*, 1985 WL 10399 at 2 (Ohio Ct. App. Mar. 18, 1985) (award upheld where attorney's unethical conduct was not one of the statutory grounds for vacatur).

³⁷ See *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 328 (6th Cir. 1998) (FAA "expresses a presumption that arbitration awards will be confirmed"); 1 Martin Domke, *Commercial Arbitration* § 36:01 (2001) ("procedural fairness assumes even greater significance in light of the strict limits on judicial review of arbitration awards").

³⁸ 570 N.Y.S.2d 33 (1st Dep't 1991) (referring to disqualification as a matter of "overriding public policy considerations").

³⁹ *Id.* at 34. See also *In re Erdheim & Selkove*, 51 A.D.2d 705, 705 (N.Y. App. Div. 1976) (finding that arbitrators lacked the ability to censure attorneys and that this power "is reserved to the Appellate Division of the Supreme Court in each department"); *Munich Reinsurance America Inc v Ace Property & Casualty Ins.*, Opinion & Order, April 10, 2007, stating that the issue of attorney disqualification for an alleged conflict of interest is a substantive matter for the courts and not arbitrators), available at www.reinsurancefocus.com/uploads/MunichRe.pdf.

By contrast, in *Bell v. Seabury*, 622 N.W.2d 347 (Mich. Ct. App. 2001), the arbitrators denied a motion to disqualify counsel. On review, the appeals court held that, because it could not be shown that the need for counsel's disqualification resulted in an adverse award, there was no ground to vacate the award.

⁴⁰ See also *Larrison v. Scarola Reavis & Parent LLP*, 812 N.Y.S.2d 243, 246-47 (N.Y. Sup. Ct. 2005) (whether law firm's one-sided arbitration

agreement with client violated public policy was for the court to determine).

⁴¹ *Schoonmaker v. Cumming & Lockwood of Conn., P.C.*, 747 A.2d 1017 (Conn. 2000), Connecticut Supreme Court applied a *de novo* standard of review of an arbitration award that the court said implicated issues of public policy. The court explained that heightened review is necessary to ensure that "public policy of this state is given the proper interpretation and application". *Id.* at 1028 n. 10.

⁴² See *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 24 (2d Cir. 1997).

⁴³ See ABA Informal Ethics Op. No. 1393 (Aug. 9, 1977) (issue of confidentiality of arbitration of fee disputes presented "matter of law" not appropriate for ethics opinion).

⁴⁴ See Ethics Committee, Board of Professional Responsibility, Tenn., Formal Op. 89 (Aug. 8, 1989) (excuse from reporting obligation appropriate to "encourage greater participation and cooperation in the fee arbitration process").

⁴⁵ See C. Menkel-Meadow, "Ethics Issues in Arbitration," 56 *U. Miami L*

Rev. 955 n. 32 (describing potential distinction as a "conundrum").

⁴⁶ See Canon I(F) of the AAA-ABA Code states: "When an arbitrator's authority is derived from an agreement of the parties, the arbitrator should neither exceed that authority *nor do less than is required to exercise that authority completely.*" (Emphasis added)

⁴⁷ See Menkel-Meadow, *supra* n. 45, at 970 ("the existence of a formal complaint and grievance procedure is likely to render that provider more acceptable to courts").

⁴⁸ In *In re Ziman*, 847 P.2d 106 (Ariz. 1993), a lawyer was disciplined for misconduct (including use of profanity in an arbitration). Although the lawyer was identified in the bar committee's decision, the parties and the details of the arbitration were not.

⁴⁹ See *Commonwealth Coatings Corp. v. Continental Cas. Corp.*, 393 U.S. 145, 151 (1968) (judiciary should "minimize its role in arbitration" as judge of arbitrator impartiality").

In court-annexed arbitration, courts have imposed sanctions for attorney misconduct in arbitration. *Legair v. Circuit City Stores, Inc.*, 2006

WL 278405 (S.D. Ohio Feb. 3, 2006) (court held counsel in contempt and imposed sanctions for "dilatatory tactics and unprofessional conduct" in arbitration).

A court may admonish counsel for unprofessional conduct in arbitration, even where the conduct cannot be shown to have affected the award. See *Barcume v. City of Flint* 132 F. Supp. 2d 549, 558 (E.D. Mich. 2001) (noting "years of unprofessional behavior" by counsel in arbitration, but denying motion to vacate award).

⁵⁰ Menkel-Meadow, *supra* n. 45, at 952.

⁵¹ One issue omitted from this discussion is how conflict-of-law principles apply to ethical obligations. In international arbitration, a transnational ethics code may need to be developed. The need for such a code has been proposed. Catherine A. Rogers, "Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration," 23 *Mich. Int'l L.J.* 341 (2002), and "Context and Institutional Structure in Attorney Discipline: Developing an Enforcement Regime for Ethics in International Arbitration," 39 *Stan. J. Int'l L.* 1 (2002).

Challenging the Selection of Party-Appointed Arbitrators

Skadden

January 2016

This article is from Skadden's *2016 Insights* and is available at skadden.com/insights/2016-insights.

Contributing Partners

Julie Bédard

São Paulo and New York

Lea Haber Kuck

New York

Timothy G. Nelson

New York

As arbitration continues to be widely utilized in international commerce, the issue of how arbitrators should handle conflict checks, and who is suitable for appointment as arbitrator in complex cases, will remain a vital one. A pending case is likely to shed light on challenges to arbitral awards based on an arbitrator's conflicts or partiality.

Under most modern international arbitration rules (as well as those of the leading U.S. domestic commercial arbitration bodies), all members of an arbitral tribunal are expected to be neutral and independent of all parties. Thus, under the rules of most international arbitral institutions as well as the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), each arbitrator — not just the chair — is subject to challenge if there is a conflict that compromises independence or

impartiality. Where, as often occurs, the arbitration agreement or rules provide for a three-person tribunal (a chair plus two arbitrators appointed by the parties), the opposing party's choice of arbitrator is often scrutinized to ensure there are no disabling conflicts or other considerations that would make the appointment inappropriate.

For an arbitration seated in the United States, issues of arbitrator "conflicts" are occasionally raised after an award has been rendered, through a petition to vacate the award under Section 10(a)(2) of the Federal Arbitration Act (FAA) on grounds of evident partiality. There are myriad cases dealing with evident partiality, with

some disagreement among various federal circuits as to the precise test to apply when an arbitrator conflict is alleged. For example, the U.S. Court of Appeals for the Second Circuit has suggested that there is a duty to check conflicts, and that "a failure to either investigate or disclose an intention not to investigate [conflicts] is indicative of evident partiality." *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*

In the pending case of *Republic of Argentina v. AWG Group*, a challenge was filed in the U.S. District Court for the District of Columbia that raises similar points on conflicts and evident partiality. In that case, a U.K. investor sought and obtained a significant damages award from an UNCITRAL tribunal after Argentina impaired its interests in an action found to violate the Argentina-U.K. bilateral investment treaty. In the course of that arbitration, Argentina challenged the claimant's choice of arbitrator on the basis that she was the director of an international bank that held an investment portfolio that included shares in one of the claimants. At an early stage in the case, the challenge was heard and rejected pursuant to Article 11 of the UNCITRAL rules, on the grounds that the arbitrator was not aware of the investment and that it was, in any event, immaterial.

In 2015, an award of damages was rendered against Argentina, which prompted it to seek *vacatur* of the award on the same grounds as stated in its prior arbitrator challenge, but this time, the issue was framed as whether the arbitrator's ties revealed evident partiality warranting *vacatur* under Section 10 of the FAA. Among the issues to be determined by the D.C. court is whether the prior decision rejecting the challenge should be granted deference, or whether the question of evident partiality can be litigated afresh. The case is pending, and practitioners will be watching closely.

There are myriad cases dealing with evident partiality, with some disagreement among various federal circuits as to the precise test to apply when an arbitrator conflict is alleged.

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

Perspectives on Practice Development in the Arbitration World

AS A CLIENT, SHOULD I AGREE AHEAD OF TIME WITH MY ATTORNEY TO RESOLVE FEE DISPUTES THROUGH THE FDRP RATHER THAN THE COURTS?

It's up to you. Remember the program is voluntary for the client and therefore you do not have to agree to use the program. The FDRP offers a quick, inexpensive and informal means of resolving fee disputes. Litigation in the courts can take longer and cost more. Unlike litigation in the courts, arbitration is confidential and closed to the public. If you or the attorney are not satisfied with the arbitration award, it can be rejected by filing an action in court (a "trial de novo" – see the section titled, "Rejection of the Award (Trial de Novo)" for a description).

On the other hand, you may prefer the formality of a lawsuit, and to have your dispute resolved by a judge or jury rather than by arbitrators. In a lawsuit, you have the right to conduct depositions and engage in other pretrial fact finding, which are generally not permitted in arbitration, and to appeal a judgment that you think is contrary to law.

So think it over carefully. If you want to preserve your right to go to court to resolve disputes over fees, then you may wish to avoid arbitration, and you should not waive your right to a trial de novo. On the other hand, if you are interested in achieving closure quickly and inexpensively and want to avoid litigation in the courts, then you may wish to choose arbitration in advance. You may also want to waive your right to a trial de novo.

WHAT IS NEEDED TO ENTER INTO AN AGREEMENT TO GO TO ARBITRATION AND TO WAIVE THE RIGHT TO A TRIAL DE NOVO?

To enter into a valid agreement ahead of any actual fee dispute, the agreement must be in writing and specify that the client has read the written materials describing the rules and procedures of the FDRP and the appropriate local program. If you have also decided to waive the right under the FDRP to a trial de novo, the written agreement must specify that you understand that you are doing so. The FDRP's model form "Consent to Submit Fee Dispute to Arbitration Pursuant to Part 137-2(c) of Rules of the Chief Administrator and to Waive the Right to Trial De Novo" (UCS 137-14) contains language that satisfies the FDRP requirements and can be incorporated into a retainer agreement or engagement letter.

THE CLIENT FILED A REQUEST FOR FEE ARBITRATION. WHAT HAPPENS NOW?

Upon receiving the Request for Arbitration, the local program administrator will forward it to the attorney, who then has 15 days to complete an Attorney Response form (UCS 137-5a) and return it to the local program along with a certification that the client was served with the attorney response and it must indicate the manner of service.

If there is a pre-existing agreement to arbitrate and the attorney files for fee arbitration, the local program administrator will forward the request to the client, who then has 15 days to complete the Client Response form (UCS 137-5b).

Unless the fee dispute is rejected by the local program for jurisdictional reasons, the parties will then be given 15 days advance notice of the time and place of the arbitration hearing and the identity of the arbitrator(s).

Prior to the arbitration hearing, someone from the local program may contact the parties in an effort to settle the dispute. In addition, some local programs may offer mediation services and may ask the parties whether they wish to participate in mediation. Mediation is voluntary for both sides. If one side does not wish to mediate, or the attempt at mediation proves unsuccessful, the next step in the process is the arbitration hearing.

WHAT IS THE PROCEDURE AT THE ARBITRATION HEARING?

Both parties have the right to present evidence and call witnesses. The burden of proof is on the attorney to prove the reasonableness of the disputed fee by a preponderance of the evidence. Because the burden is on the attorney, the attorney goes first and must present documentation of the work performed and the billing history. If witnesses are called, both parties have the right to question the witnesses at the hearing. Arbitration is less formal than court, so clients do not necessarily need attorneys to help prepare for and/or provide representation at the hearing. However, parties may, of course, appear with an attorney at their own expense.

THE ARBITRATION AWARD

The arbitration hearing will result in a decision (arbitration award) issued by the arbitrator(s) within 30 days of the hearing. The arbitration award will be final and binding on both sides, unless either party seeks a trial de novo within 30 days.

In most instances, the party against whom the award has been rendered will pay as the arbitration award becomes binding on the parties if de novo review is not sought. However, if payment does not occur, the arbitration award must be confirmed and entered as a judgment of the court to be enforceable. Parties have one year after the date of delivery of the award to confirm the award by commencing a proceeding in the appropriate court. Confirmation of arbitration awards is governed by CPLR 7510.

REJECTION OF THE AWARD (TRIAL DE NOVO)

A trial de novo means that either party can reject the arbitration award by filing a court action within 30 days after the award has been mailed. The arbitration award is not used as evidence in the court case. Since a trial de novo obviously will add significantly to the time and expense of resolving the fee dispute, the client and attorney may wish to waive this right ahead of time in writing. However, keep in mind that if you do so and agree to final and binding arbitration, the arbitrators' decision can be appealed only on very limited grounds.

FDRP

THE NEW YORK STATE ATTORNEY-CLIENT FEE DISPUTE RESOLUTION PROGRAM

PART 137

Published as a public service by the Board of Governors
New York State Attorney-Client Fee Dispute Resolution
Program C/O UCS Office of ADR Programs

This brochure provides an overview of the FDRP. To see the complete rules, forms and additional information, visit us at www.nycourts.gov/feedispute. Please check our website for the most current information.

Providing this brochure to a client does not satisfy the attorney's notice requirement under the rule.

25 Beaver Street, 8th Floor
New York, NY 10004
feedispute@nycourts.gov
(877) FEE5-137 / (877) 333-7137

FDRP

FEE DISPUTE RESOLUTION PROGRAM

645

INTRODUCTION

The New York State court system has established a Statewide Fee Dispute Resolution Program (FDRP) to resolve attorney-client disputes over legal fees through arbitration (and in some cases mediation). The FDRP is established by Part 137 of the Rules of the Chief Administrator of the Courts.

This brochure has been designed to educate clients and attorneys about the FDRP to help clients make informed choices about whether the FDRP is right for them and to help attorneys satisfy their requirements under Part 137.

Please keep in mind that the FDRP does not apply to all disputes involving legal fees. For example, the FDRP cannot address claims of attorney misconduct¹ or attorney malpractice.

WHAT IS FEE ARBITRATION AND THE FDRP?

Attorneys in New York State are in most cases required to provide their clients with retainer agreements or letters of engagement that set forth the fees and expenses to be charged. At the initial conference with the attorney, the client may request a retainer agreement or letter of engagement and may ask questions regarding the fees to be charged.

Despite the letter of engagement and discussions about fees, disputes may arise. In general, an attorney may not sue a client in court over a fee dispute unless he or she first provided the client with notice of the right to utilize the FDRP. Once the client has received this notice he or she has 30 days to initiate a proceeding under the FDRP by filing the "Client Request for Arbitration" form (UCS 137-4a) that is included with the notice. If the request for arbitration under the FDRP is not filed within the 30 day period, the attorney is free to pursue the matter in court.

The FDRP is a network of State-approved and monitored local programs that resolve attorney-client fee disputes outside of court through arbitration. Arbitration is a hearing conducted by one or more neutral persons who have special training and experience. One arbitrator or a panel of three arbitrators (at least one of whom must be a non-attorney) hear the evidence and arguments presented by client and attorney and decide the outcome of the dispute. Fee arbitration is inexpensive and usually faster than going to court.

1. In New York State, there are special attorney disciplinary or grievance committees charged with investigating complaints of professional misconduct. They operate under the authority of the Appellate Divisions of the Supreme Court. For more information on the grievance committees, including contact information, please see: <http://insurants.gov/attorneys/grievance/complaints.shtml>

In addition to arbitration, some local programs may offer mediation. This is a process by which both sides meet with the assistance of a trained mediator to clarify issues and explore options for a mutually acceptable resolution. Mediation provides the opportunity for both parties to discuss their concerns and reach a satisfactory result without going to court. Unlike an arbitrator, the mediator does not issue a decision. Participation in mediation is voluntary for both parties, and it does not waive the right to arbitration. If you are interested in resolving your dispute through mediation, you may indicate this on the Request for Arbitration form. However, not every local program offers mediation.

If you are interested in using the FDRP process to resolve your dispute, or just want to learn more about the FDRP, please visit the FDRP web site at www.nycourts.gov/feedispute.

WHEN DOES THE FDRP APPLY?

- The attorney practices in New York and the case involved a civil matter (personal injury and criminal cases are not covered);
- The amount in dispute is between \$1,000 and \$50,000 (eligible fee disputes can involve fees that the client has already paid and for which a refund is sought, or fees that the attorney claims are owed by the client);
- The legal representation began on or after January 1, 2002;
- The attorney has rendered services to the client within two years prior to the filing of the request for fee arbitration.

A lawyer and client may agree in their retainer or letter of engagement to submit any future fee disputes to the FDRP even if the amount in dispute exceeds \$50,000. To see the rule and more information about when the FDRP applies and does not apply, see our website www.nycourts.gov/feedispute

ALTERNATIVES TO FEE ARBITRATION

Fee arbitration provides clients and attorneys with an out-of-court option for resolving fee disputes, but that does not mean it is necessary or appropriate in every case. Sometimes, fee disputes can be easily resolved through direct communication about the issues. For example, if the amount of the fee is in question, the client should ask the attorney to explain why the bill is higher than expected. It may be that the case was more complicated than the client expected and took more time than he or she realized. Or the attorney may agree that it is appropriate to adjust the bill. If discussion does not solve the problem, the client has the option to take the dispute to arbitration under the FDRP or to resolve it in court.

WHO ADMINISTERS THE PROGRAM AND HOW MUCH DOES IT COST?

The FDRP's Board of Governors has approved a number of local programs which administer the FDRP on a region by region basis, otherwise known as judicial districts. These programs are run by local bar associations or by the court system's regional District Administrative Judges. The rules and procedures of all the local programs have been carefully reviewed by the Board so that they comply with the FDRP goal of resolving fee disputes in a fair, impartial and efficient manner. To find out which local program has jurisdiction over your fee dispute you need to identify the county in which the majority of the legal services were performed. This is usually (but not always) the county where the attorney's office is located. If you have a question about which local program will handle your dispute, please visit the FDRP's web site, www.nycourts.gov/feedispute for an updated list of local programs.

The cost of utilizing the FDRP varies from program to program. You can find out about local program fees by checking the local programs section of the FDRP web site. Some programs charge no fees; others charge about the same or less than it costs to file a case in court.

HOW DOES THE FEE ARBITRATION PROCESS START?

There are three ways, discussed below, to initiate a proceeding under the FDRP. The filing of a Request for Fee Arbitration form, available on the fee dispute website www.nycourts.gov/feedispute, officially starts the process.

A. A DISPUTE OVER FEES EXISTS BETWEEN THE CLIENT AND THE ATTORNEY. THE ATTORNEY SERVES THE CLIENT WITH THE NOTICE OF CLIENT'S RIGHT TO ARBITRATE (UCS 137-1) BY CERTIFIED MAIL OR PERSONAL SERVICE.

The client now has 30 days to decide whether to utilize the FDRP and to file the form entitled "Client Request for Fee Arbitration" (UCS 137-4a) with the appropriate local program. The attorney is required to include this form, along with a copy of the local program rules and the "Standard Written Instructions and Procedures" (UCS 137-3), with the notice sent to the client. Clients are not obligated to participate in arbitration unless they have agreed ahead of time to resolve disputes through arbitration pursuant to a written agreement with the attorney. If the client decides to participate, he or she should file the Client Request for Fee Arbitration and pay the filing fee if one is charged. The attorney will be required to participate in the FDRP unless the

local program determines the dispute is one that is not eligible for the FDRP such as disputes that involve claims of attorney malpractice. (See the section titled, "The client filed a request for fee arbitration, what happens now?" to find out how the rest of the process works.)

If the client does not file the Request for Fee Arbitration within 30 days, the attorney will be free to file a case in court.

In order to satisfy the notice requirements, attorneys may download packets located on the local program's page on www.nycourts.gov/feedispute. Each packet contains the notice form, the standard written instructions and procedures, the client request form, and the local program rules.

B. THE CLIENT INDEPENDENTLY INITIATES A PROCEEDING UNDER THE FDRP.

In some cases, the client may not have received the Notice of Client's Right to Arbitrate from the attorney but decided to initiate the FDRP on his or her own. The client may have obtained this brochure directly from the FDRP web site, from a Court Help Center, by contacting a local program directly, or by asking the attorney for information about the FDRP.

A client seeking to initiate the FDRP should read this brochure carefully to determine if an eligible fee dispute exists. To initiate the FDRP proceeding, complete the Client Request for Arbitration form (UCS 137-4a) and file it with the appropriate local program, with payment of any filing fee. The attorney will be required to participate in the FDRP if the dispute is eligible for arbitration. (See the section titled, "The client filed a request for fee arbitration, what happens now?" to find out how the rest of the process works.)

C. THE CLIENT AND THE ATTORNEY HAVE AGREED AHEAD OF TIME TO USE THE FDRP IN A WRITTEN AGREEMENT.

Both parties previously agreed in writing to resolve fee disputes through the FDRP rather than in court. If there is a fee dispute, either party may begin the proceeding by simply filing the appropriate Request for Arbitration form (Client Request UCS 137-4a or Attorney Request 137-4b) with the local program, together with a copy of the agreement to arbitrate through the FDRP and payment of any filing fee. (See the section titled, "The client filed a request for fee arbitration, what happens now?" to find out how the rest of the process works.)

How does a new arbitrator get their first appointment?

Q&A Session with Remy Gerbay

This Q&A Session was conducted for LexisPSL in August 2014 – <http://www.lexisnexis.com>

Q: A common gripe at 'Young' Arbitration conferences is the difficulty of getting a first appointment as an arbitrator, do you think this is fair?

A: It is a difficult question. While there is little empirical evidence on the subject, in Western Europe, the more precocious arbitrators I know seem to have seen their arbitrator career take off in the latter part of their thirties or in their early forties.

Is that old? It is debatable...

- o On the one hand, you need to have the right skillset before you can be considered for appointment, and this, I think, requires suitable experience of arbitration as counsel, tribunal secretary or otherwise. You can acquire a good theoretical understanding of arbitration by taking a degree or diploma in arbitration like the ones we have been offering at Queen Mary University for the past thirty years, but ultimately there is no substitute for experience.
- o On the other hand, the statistics published by the leading arbitral institutions confirm that there are hundreds upon hundreds of relatively small international disputes referred to arbitration each year. Parties and institutions need to have access to a pool of qualified and reliable young arbitrators willing to give to these smaller disputes the time and attention they deserve. Therefore, the opportunities for appointment exist.

What is perhaps difficult in the process is that there is no clear path or roadmap to getting your first appointment. Less-experienced lawyers don't necessarily know what they can do to improve their chances of being appointed. There are, however, a number of things that one can do to become a more qualified candidate.

Q: What barriers do new arbitrators face when seeking a first appointment?

A: At the source of the problem is the obvious fact that, when making decisions on appointments, people tend to be risk adverse (as they should be). Both arbitral institutions and outside counsel tend to be reluctant to appoint individuals who have no track record, even if in my view arbitral institutions do a much better job of appointing new people than outside counsel.

While, notionally, everyone agrees that it would be good to appoint new arbitrators, when you have to make a decision in a real-life case, it becomes more complicated. Even for smaller cases, you always try to appoint the best arbitrator you can get for your case. And to many practitioners the very best arbitrator rarely looks like the one who has never sat on a tribunal! Sadly, in practice, there seems never to be a perfect case to appoint someone for the very first time.

I guess that what this boils down to is the fact that people do not always see the upside of appointing a new arbitrator. In my experience there are advantages, key among which is the fact that new arbitrators are usually keen to impress and therefore tend to dedicate more time and attention to their cases than some of the more seasoned arbitrators.

¹ Remy Gerbay is an academic member of the School of International Arbitration at Queen Mary, University of London and the former the Deputy Registrar of the LCIA in London and Registrar of DIFC-LCIA in Dubai having previously practised at Herbert Smith LLP in London. He is a co-Chair of YIAG. He has been appointed as sole arbitrator, co-arbitrator and Chairman in ad hoc, ICC and LCIA arbitrations.

As an aspiring arbitrator, therefore, the challenge is to demonstrate to outside counsel and institutions that, despite your lack of arbitrator experience, you are a reliable individual, who is perfectly capable of managing proceedings all the way to a final (and enforceable) award. In other words, you have to demonstrate that you are a safe pair of hands.

Q: How did you get your first appointment(s)?

A: My first appointment came in the form of a party nomination. It was an ICC arbitration and I was appointed as co-arbitrator on a three-member tribunal. The party that appointed me was represented by the London office of a US firm. Admittedly it was a very small case for the firm's standards (approx \$1m). I knew the partner in charge of the matter professionally from my time at the Secretariat of the LCIA.

My second and third appointments came relatively quickly after that first one. They were institutional appointments, from the ICC first, and then from the LCIA. Most other approaches and appointments so far have been from these two institutions. I feel genuinely grateful for the confidence that they have shown me so far with these appointments.

One recent appointment, as a Chairman of the three-member tribunal, came from the co-arbitrators. In that particular case, a professional acquaintance of mine who is a young arbitrator himself put my name forward to the other co-arbitrator who accepted it. It was interesting because the second arbitrator was a very senior lawyer. Having a younger and less experienced individual as Chair did not bother him at all and we all got along very well!

Clearly, working for the Secretariat of a leading arbitral institution for a few years has helped me immensely in getting my first appointments. I feel that I gained some useful skills (eg case management, procedural expertise, drafting etc.) but I also got to work with many arbitration lawyers in various parts of the world. As a result, I was able to start building a profile a little quicker than if I had remained in private practice. I also believe that being a London-based UK (and US) qualified lawyer without being English has played in my favour for some of my appointments as sole arbitrator. Another factor is that, being based at an academic institution, I have very few conflicts of interests. This means that, statistically, I am able to accept more cases than someone practising out of a large international law firm. I know many lawyers in large law firms who have been approached several times before they could accept a first appointment.

Q: Are the institutions open to 'new' arbitrators in the market?

A: I think they are.

In fact, conventional wisdom suggests that most people receive their first appointment from an institution rather than a law firm.

Arbitral institutions (but normally not the parties) are occasionally called upon to select all arbitrators on a three-member tribunal. When this is the case, they are in a unique position to appoint at least one, if not two, new arbitrators alongside an experienced Chair. Without getting into the debate about party appointments vs institutional appointments, there are different dynamics at play when the parties themselves nominate their arbitrators.

The ICC is well known for appointing new arbitrators when appropriate. It is true that their large and diversified caseload means that they are in a unique position to do so. Likewise, for some time now, the LCIA has been making a conscious effort to appoint new entrants and, more generally, to support 'diversity' (including gender-based).

But to me the question is not so much 'Are institutions open to new arbitrators in the market?', but rather 'Are parties and their counsel open to new arbitrators in the market?' At the end of the day, more appointments are made by the parties and their counsel than by institutions. In 2012, for example, the ICC saw 1,341 individuals appointed as arbitrators, of which 774 were party-nominated, 195 were selected by the co-arbitrators, and only 372 by the institution itself.

Q: Are there certain jurisdictions where first appointments are easier? Are there cultural differences on this issue?

A: I am not sure whether there are significant cultural differences. Conventional wisdom suggests that in some Asian jurisdictions seniority plays a more important role in society than, say, in Western Europe or North America.

But to an extent it is a question of supply and demand. It should be easier to get a first appointment in a jurisdiction where there is a smaller pool of reliable arbitrators and a large pool of cases. Some of my colleagues in more exotic jurisdictions have indeed received their first appointment when they were still associates in their firms. This seems to be rare in places like London, Paris or New York.

In some jurisdictions language skills can help get a first appointment (eg Russian, Portuguese or Arabic). I know a few individuals who have received a number of appointments over the years primarily because they were amongst the few people with both the right experience/qualifications and the right language skills.

Q: Did you undertake any particular arbitrator training?

A: I did not. However, I can see how training courses like the award writing module of the Chartered Institute of Arbitrators, could be useful. There are jurisdictions (in particular in Africa) where these certifications are looked at very positively. They are particularly useful for non-lawyers, or for non-arbitration specialists who are trying to transition into arbitration.

But ultimately the training that you really need is exposure to arbitration cases. I have met some students who express the desire to become arbitrators without first practising. I guess that many assume that since in some countries one can become a judge immediately upon graduating from law school, it should be possible to do the same for arbitration. This, sadly, is not realistic. Any appointment requires a measure of confidence on the part the person making the appointment, and it is difficult to foster that confidence unless you have worked in the field for a little while.

Q: What tips do you have for those seeking a first appointment?

A: There are a number of practical things that can be done, some of which are common sense.

Let people know you are accepting appointments

It should be obvious but once you feel that you have acquired enough experience to sit as arbitrator, let people know that you are accepting appointments. This means mentioning this to outside counsel and the staff of any relevant arbitral institution. For institutions it is useful to get to know not only the Secretariat staff but also the members of the institution's deciding organ (the 'Court', or 'Board' etc.). More generally, it is useful to understand how decisions on appointments are made, by whom, on what criteria etc. The process varies greatly from one institution to the next.

Prepare an arbitrator CV, and make it available

An arbitrator CV does not have to look like a traditional solicitor's or attorney's CV (for one thing, it can be longer). In my view, it should ideally contain a short biography followed by an anonymised list of cases as counsel and/or secretary to a tribunal. For inspiration, you may wish to look at the CVs of the Barristers at some of the leading commercial chambers in England.

The list of cases is useful because if someone is hesitating between you and another candidate, finding confirmation in your CV that you have done the relevant kind of work may well be the deciding factor.

Get your CV on arbitral institutions' rosters or databases. However, don't expect this to be enough, or even to be a key step (building your profile is more important). Going forward, I believe that online networking tools will play a greater importance than they do today. You can already use LinkedIn or other online tools to showcase your qualifications and experience and to make your CV widely available.

Try to raise your own profile within the arbitration community

In a law firm, as a younger member of a team of lawyers, you don't really have much opportunity to impress arbitrators and other outside counsel because of the limited opportunities for advocacy. You can, however, show your talents in other ways.

Speaking at conferences, for example, allows you to demonstrate a number of attributes: (1) You can show that you are reasonably smart, (2) that you are a good technical lawyer, and (3) that you have a certain gravitas. At the beginning, I was accepting almost all proposed speaking engagements, even if sometimes they were really inconvenient in terms of timing or location. I also try to treat every conference paper as if it were the single most important job I have ever done. The objective is to show to your colleagues not just that you are good, but that you are consistently good. I remember, earlier on in my career, being disappointed by a conference presentation given by one of international arbitration's leading figures. I remember that this left me questioning not just whether that person was unprepared, but also whether he was, in fact, as good as his reputation. In sum, seek out and accept speaking engagements, but then ensure that you take the time to do a good job.

Write (good) articles with (reliable) information that will be useful to practitioners. The first example that comes to my mind is Anthony Sinclair's 2009 article *ICSID Arbitration: How Long Does it Take?* ((2009) 4(5) GAR) Anthony and his colleagues analysed 115 ICSID cases that went to a final award, breaking down their timetables and ascertaining how long, on average, each phase takes.

Becoming a member of young arbitration practitioners groups is also an easy step to start building a network. There are many such groups including the LCIA's YIAG, the ICC's YAF, ICDR Young and International, ASA Below40, CFA-40, Young ICCA, the Young IBA, Club España Del Arbitraje -40, DIS 40, YAP, Y-ADR, SCC's YAS, CPEANI40, NAI Jong Oranje etc. Once you are a member, attend as many events as you can. Try to be involved in the preparation of events (this way you can often get a speaking slot).

Teach


One of my old professors who successfully transitioned from practice to a full time career in arbitration once told me that teaching was a good way to build a profile. I did not quite realise at the time how insightful his advice was. I have no doubt that many of the students that take our arbitration classes today will be successful arbitration practitioners and in-house counsel tomorrow. Nowadays, it is not difficult to find some teaching opportunities as an "adjunct" or a "visiting lecturer" at a local University.

Build a different profile

Sometimes having a unique profile can be useful. You can be 'the' new insurance/re-insurance arbitration specialist in Paris. Or 'the' new common law practitioner based in Geneva that speaks Arabic.


Of course, building or changing a profile is a long term project but the least you can do is think actively (and regularly reassess) what your profile is and what it should be.

But, no matter what profile you craft for yourself, there are some attributes that any arbitrator need to demonstrate: (1) Absolute integrity, (2) total respect for the confidentiality of the proceedings, and (3) an understanding that being an arbitrator means being at the service of the users of the system, and not the opposite.



AMERICAN ARBITRATION ASSOCIATION®

Expectations of AAA-ICDR and ADR Users




AAA-ICDR Mission & Core Values

The American Arbitration Association was founded in 1926, following enactment of the Federal Arbitration Act, with the specific goal of helping to implement arbitration as an out-of-court solution to resolving disputes. This legal framework was passed by Congress and signed by President Calvin Coolidge. The AAA's staff members and panelists continue to live out the principles on which the Association was founded.

The AAA's official mission statement and vision statement are based on the following core values:

- Integrity**
- Conflict Management**
- Service**
- Diversity & Inclusion**





AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 2

The Truth

- Most arbitrator service is infrequent, not a full time job.
- Most arbitrators (unless retired) maintain a profession, law, academia, industry professional, etc.
- The baby boomer generation is retiring and interested in pursuing arbitration and mediation appointments (a lot of competition).
- The focus should always be on what is the right fit for ADR users.





AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 3


AAA-ICDR and ADR User Focus


AAA-ICDR Focus

- It's not about AAA-ICDR or you
- The 3 Ps: the **Public**, the **Process** and the **Parties**

ADR Users

- They want Arbitrators/Mediators with expertise in a field that uses ADR
- The importance of industry expertise
- Additional focus - former judges





AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 4

ADR Resource – www.adr.org

- Rules: Commercial, Construction, Labor, Employment, International, Insurance
- Guidelines: how to draft ADR clauses
- Codes: Code of Ethics for arbitrators all areas, including mediation
- Protocols: Employment, Consumer, Healthcare
- Articles: Dispute Resolution Journal
- AAA-ICDR Webfile, electronically filing a dispute
- Information on special programs (Storm Sandy)
- eCenter – arbitrators/mediators update resume
- AAAMediation.org
- ClauseBuilder Program
- Education Services – see the calendar of nationwide programs



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 5

ADR Resource – LexisNexis/Westlaw/BN

- Thousands of decisions, full text, redacted (employment, international and labor)



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 6

ADR Resources

LinkedIn

- AAA-ICDR
- AAA-ICDR Vice Presidents
- Construction Group
- Employment Group
- Higginbotham Group



Twitter

- AAA-ICDR



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 7

Things That May Impact Selection

- High hourly rate, cancellation terms, unreasonable cancellation or postponement fees.
- Poorly drafted resume.
- Billing Practices: study time. Review Code of Ethics and AAA-ICDR Billing Guidelines.
- Lack of flexibility when parties agree – remember, **PARTIES PROCESS, YOU ARE NOT A JUDGE.**



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 8

Professional Email Address – Confidential Account

NO
jzaino@yahoo.com

adrrocks@aol.com

YES
esussman@sussmanadr.com

Your account should be confidential, no sharing passwords



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 9

Necessity of Understanding Technology

- Because we work online, there is a necessity to understand technology and cybersecurity



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 10

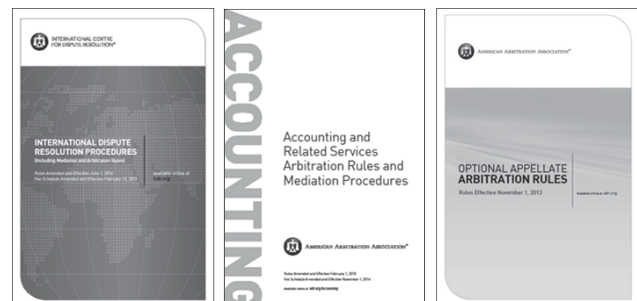
Know the Rules



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 11



Keep Current on Rules – Rules Change/New Offerings



AMERICAN ARBITRATION ASSOCIATION®


www.adr.org | 12

Keep Current on the Latest AAA-ICDR Developments


AMERICAN ARBITRATION ASSOCIATION® www.adr.org | 13

Know of New Services Offered By AAA-ICDR



AMERICAN ARBITRATION ASSOCIATION® www.adr.org | 14

Know of New Services Offered by AAA-ICDR



AMERICAN ARBITRATION ASSOCIATION®

Streamlined Three Person Panel Option for Large Complex Cases

In cases where the rules or the parties' agreement requires a panel of three arbitrators to hear and decide the case, the **Streamlined Three Person Panel Option** allows parties to move through the preliminary and exchange of information (discovery) stages of a case working with a single arbitrator. The full panel would then participate in the evidentiary hearing and render the final award on the case.

The AAA's statistics show that approximately 60% of cases filed with the AAA are resolved without the issuance of an award. The **Streamlined Three Person Panel Option** allows parties to take advantage of this by utilizing a single arbitrator to manage the early stages of the case, decide issues related to the exchange of information and resolve other procedural matters without incurring the costs associated with the entire panel. The AAA has found that a three arbitrator panel actually costs five times as much as a single arbitrator. By measuring the use of a single arbitrator, the parties will be able to capitalize on the cost savings provided by a single arbitrator while still preserving their right to have the case ultimately decided by a panel of three arbitrators.

Option 1

AMERICAN ARBITRATION ASSOCIATION® www.adr.org | 15

AAA-ICDR Panelist eCenter

News & Notices

SAVE THE DATE!
2019 AAA/ICDR/Mediation.org Panel Conference
 March 8-9, 2019
 Nashville, TN

Make plans now to hold the dates of March 8-9, 2019 so you can join your fellow AAA/ICDR/Mediation.org Panelists at our next national Panel Conference in Nashville, TN. The conference will be held at the Omni Nashville Hotel. Additional information will be posted here as planning proceeds, so be sure to check occasionally for updates.

Panelist Resources

- Case Administration Resources
- AAA/ICDR No GRI Policy
- AAA/ICDR Award Checklist
- Annual Continuing Education Requirement
- Panelist Newsletter
- Roster Information
- Panel Fees
- 2016 AAA/ICDR/Mediation.org Panel Conference Pictures
- Standards and Responsibilities for AAA Panelists
- 828 Dispute Resolution Impact Report
- Death by Discovery, Delay and Disengagement
- Construction Fast Track Procedures Fast Sheet for Arbitrators
- 2017 Panel Logo Information

PANELIST eCENTER

My Cases | My Resumes | My Panelist Account

Cases with Pending Status: 1

Case Number: 123456789 | Case Name: ABC Corp. v. DEF Corp. | Case Type: Commercial | Case Status: Pending | Case Date: 1/1/2019

My Cases

Case Number	Case Name	Case Type	Case Status	Case Date	Case Location	Case Method	Case Comments
123456789	ABC Corp. v. DEF Corp.	Commercial	Pending	1/1/2019	Nashville, TN	Online	

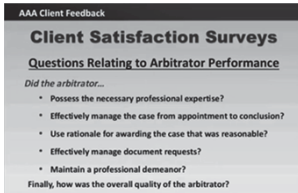
My Panelist Account

Field	Value
First Name	John
Last Name	Doe
Phone Number	(615) 555-1234
Email Address	john.doe@aaa.org
Panelist Type	Online
Panelist Status	Active
Panelist Date	1/1/2019
Panelist Location	Nashville, TN
Panelist Method	Online
Panelist Comments	

AMERICAN ARBITRATION ASSOCIATION® www.adr.org | 16

Client Satisfaction and Staff Surveys

Arbitrators are evaluated by both **CLIENTS** and **AAA-ICDR STAFF** at the conclusion of each case.



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 17

Know the Code of Ethics

- Importance of AAA-ICDR Notice of Appointment (Oath)
- Do not accept cases with too many potential conflicts
- Challenging and removing an arbitrator is a waste of time and money for the parties
- Administrative Review Council (Three year period – 43% removal rate)



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 18

Arbitrator Video Resume

- Length: 2 minutes
- Cost: \$325
- Video link will be embedded in resume
- Why: helping parties in their consideration and selection of the arbitrator



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 19

Arbitrator Continuing Education Requirement

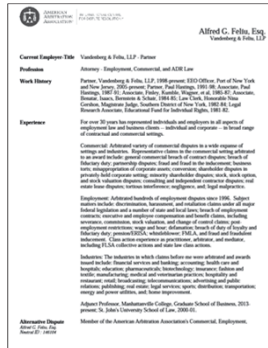


AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 20

AAA-ICDR Resume

- Do not inflate your expertise or experience
- Advocates know when you inflate your resume
- AAA-ICDR can share sample resumes of successful arbitrators
- Keep resume updated



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 21

Hourly Rate and Billing Practices

- Study fees/expense section of the Code of Ethics
- Rates range between \$200 to ^{MAM2}\$1,200 per hour
- Consider necessary adjustments to your rate
- Detailed invoicing: understand AAA-ICDR Billing Guidelines
- Transparency: parties have the right to see your invoices



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 22

Volunteer

- Pay your dues: volunteer your services as an arbitrator or mediator to develop skills and network.
- There are various pro bono community and court programs.
- Reduced fee, fast track and expedited cases for AAA-ICDR



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 23

Your Geographic Area

- Advocates typically do not see a reason to "import" arbitrators for most cases.
- You will most likely be selected to serve in your geographic area.
- In your geographic area, advocates may know of you and your reputation.
- It is a national panel, however, and you could be picked outside your geographic area. Your travel expenses should be reasonable.



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 24

Area of Expertise

- AAA-ICDR and parties do not want "Jack of All Trades"
- Think hard: what areas are you really an expert?
- Most panelists will not see appointments if their area of expertise is **not** using ADR.
- Focus should be on cases in your biggest area of practice



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 25

Keep Subject Matter Expertise Up to Date

- Training in subject matter expertise, not simply ADR training
- Some industries and legal areas change rapidly

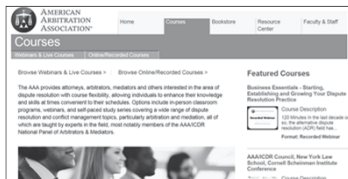


AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 26

AAA-ICDR Educational Programs

- AAA-ICDR sponsors and conducts hundreds of programs each year
- If you know of areas AAA-ICDR should offer educational programs to advocates, let us know
- AAA-ICDR and panelists collaborate on educating the public and user communities



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 27

Publish & Post Blogs

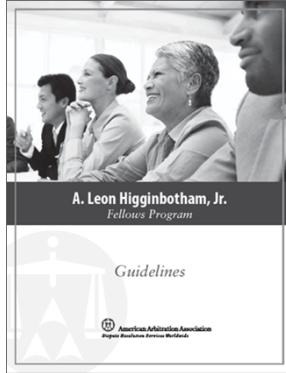
- AAA-ICDR publishes articles by panelists – reprints can be made
- Articles should focus on your subject matter expertise
- AAA-ICDR will soon be launching a new blog



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 28

Diversity Initiatives – Higginbotham Fellows Program



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 29

Social Media

- Advocates/parties do extensive social media research on prospective panelists. Be aware of what they will find.
- Google yourself: what should appear is positive, free information about you.
- Know of potential social media pitfalls: **Guidance Note: Arbitration and Social Media** by the Chartered Institute of Arbitrators.



GUIDANCE NOTE: ARBITRATION AND SOCIAL MEDIA

INTRODUCTION

The use of social media presents unique challenges for arbitrators because of a variety of obligations of arbitrators to maintain impartiality, confidentiality and integrity. This guidance note provides a framework for arbitrators to navigate these challenges. It is intended to be used in conjunction with the Chartered Institute of Arbitrators' Code of Ethics and the Arbitration Act 1996. The guidance note is not intended to be a substitute for legal advice. Arbitrators should seek legal advice if they are unsure of the law. The guidance note is not intended to be a substitute for legal advice. Arbitrators should seek legal advice if they are unsure of the law. The guidance note is not intended to be a substitute for legal advice. Arbitrators should seek legal advice if they are unsure of the law.



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 30

Social Media Disclaimer

In Notice of Appointment, disclosures, not resume

"I use a number of online professional networks such as LinkedIn and group email systems. I generally accept requests from other professionals to be added to my LinkedIn profile but do not maintain a database of all these professional contacts and connections. **LinkedIn now features endorsements, which I do not seek and have no control over who may endorse me for different skills.** The existence of such links or endorsements does not indicate any depth or relationship other than an online professional connection, similar to connections in professional organizations."

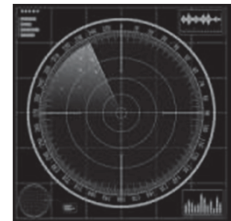


AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 31

AAA-ICDR Radar

- Keep AAA-ICDR informed on your speaking engagements, publications, etc.
- Know your local Vice President



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 32

Summary

- Be prepared to serve occasionally – not full time
- It will be rare that both sides agree to your selection
- Remember the 3 Ps – we are about:

the Public
the Process
the Parties



AMERICAN ARBITRATION ASSOCIATION®

www.adr.org | 33

Expectations of AAA-ICDR and ADR Users

QUESTIONS?



AMERICAN ARBITRATION ASSOCIATION®

POWERED BY
BNET.com

Find Articles > Dispute Resolution Journal > Apr-Dec 2005 > Article > Print friendly

Selecting the Ideal Arbitrator

Moxley, Charles J Jr

In addition to being well prepared, there is no more important step in arbitration than selecting the arbitrator. This article stresses the importance of identifying a well-qualified arbitrator who will be responsive to the client's side of the case. It also describes the "Enhanced Neutral Selection Process" that the American Arbitration Association recently launched, which is available in certain large, complex cases administered by the AAA.

The quality of an arbitration obviously depends on the fair-mindedness, experience and ability of the arbitrator or panel selected to hear the dispute. But is it sufficient for counsel to select arbitrators having such qualities? If the question were asked in the context of jury selection, the answer would clearly be "no." Litigators go to famous lengths to select jurors who seem likely to view their case favorably. Why shouldn't those who select arbitrators do the same?

Yet many attorneys seem to believe that, in arbitration, it is sufficient to select well-qualified arbitrators without regard to their potential responsiveness to the client's case. I believe that following such an approach misses a crucial step in the process. In over 28 years as a commercial arbitrator I have seen many cases in which intelligent and fair-minded arbitrators hearing the same evidence have reached significantly different conclusions as to the appropriate award.

Identifying arbitrator candidates who are likely to be responsive to one's case is a daunting task. However, with the Internet and ever-expanding data bases, information from which to make such a judgment is greater than ever before.

The Need for Early Evaluation of One's Case

Asked to identify the differences between arbitration and litigation, most lawyers and experienced business people would mention arbitration's relative informality and substantial limitations on discovery and the right to appeal, which generates savings in both time and cost. Many would also mention the ability to participate in the selection of a decision maker (whether a sole arbitrator or a panel of three) who has knowledge and expertise in the subject area of the dispute.

But a further major difference between the two processes is the fact that in arbitration the attorneys need to have much greater knowledge of their case when they are launching or preparing to defend it than is generally necessary at the early stage of a lawsuit. In litigation, by the time the attorneys select the jury, they have generally lived with the case for years.

In arbitration, the arbitrator selection process starts at the administrative conference held shortly after the case is filed. At that conference, counsel for both parties have the opportunity to tell the case manager what types of persons they want to see on the list of potential arbitrators. In order to do this well, both counsel must know their clients' case inside and out, and have determined their arbitrator preferences—for example, whether the arbitrator should be male or female; young or old; experienced or inexperienced; employed (full time or part time) or retired; a lawyer or non-lawyer; if a non-lawyer, an accountant, business person, or technical expert; an "in-demand" arbitrator with a busy calendar or an arbitrator who can deal with the case right now; an entrepreneurial or "establishment" type of person; a naturally bright high achiever or a serious hard worker; or a proactive or laid back individual.

To select sympathetic and qualified arbitrators, the attorneys need to understand the strengths and weaknesses of their clients' case and have a sense of the personalities involved. The ideal arbitrator always depends on the particular case. At the deepest

level, both counsel need to figure out the chain of logic whereby the client has the potential to win-whether based on the facts, the law, the equities, or sleight of hand. Then they must determine what types of potential arbitrators would be likely to respond in a favorable manner to such a case.

"Broad-Picture" People versus Sticklers

Perhaps the broadest distinguishing characteristic of arbitrators, cutting across such categories as age, gender, education, experience, profession and substantive knowledge, is a psychological one-the distinction between the conceptual, open-minded, equity-oriented person at one extreme, and the rule-oriented, no-nonsense, by-the-numbers strict constructionist at the other. These two types of individuals have very different ways of looking at the world and may generally be expected to view many fact patterns in very different ways.

It seems to me that the relatively few cases that go to trial do so largely because they involve a gray area of fact or law that causes each side to believe its position is correct. In such circumstances, there is often no strong objective basis for either side to convince the other it is wrong. One side often urges strict construction of the contract and related documents, while the other argues the parties' intent and the equities of the case. Daunting as the task may be, counsel for both sides need to anticipate the likely mindset of potential arbitrators in making their selections.

Importance of the Chair

The interpersonal dynamics on a panel, particularly between the arbitrator selected to chair the panel and the two co-arbitrators, can have a substantial impact on the outcome of a case.

In my experience, the chairperson usually has a strong leadership voice with one co-arbitrator and often with both. This multiplies the importance of the arbitrator who is likely to be designated to chair the panel.

In arbitration proceedings administered by the AAA, the AAA will designate the chair based on experience as an arbitrator, knowledge of ADR, the amount of AAA training the arbitrator has taken (for example, training for the large, complex case panel, and training as a chair), and good feedback from users of AAA services. There is no rule of which I am aware calling for a lawyer to be appointed to serve as the chair, although it appears to me that lawyers are often selected for this role. However, a non-lawyer who has more experience with, knowledge of and training in arbitration, who is positively reviewed by AAA clients, could be appointed to chair the panel.

Investigative Steps

Experienced counsel take steps to check out the people whose names are on the list of arbitrator candidates prepared by the ADR provider. The first step is to review the list of candidates and the accompanying biographical information and circulate them to the attorneys at the firm and to other trusted colleagues at other firms, seeking feedback about candidates of potential interest. Some law firms active in the field of arbitration collect information about arbitrators and potential arbitrators in a computer data base. In addition, it is important to send the arbitrator candidate list to the client, who may have access to independent information about persons on the list.

It is very useful to search for information about the potential arbitrators on the Internet using search engines such as Google and Yahoo, and legal and news-oriented data bases (for example, the Lexis/Nexus and Westlaw databases are available only to subscribers). These searches can yield valuable information about arbitrator candidates, which could include titles of articles and books they have written. Counsel should always read whatever the potential arbitrator has written in order to learn how this person thinks and perhaps his or her views on issues involved in the case. Sometime briefs can be found on the Internet

that were written by candidates who are (or were) litigators, as well as information about litigation in which candidates (or entities or persons with whom they are closely identified) have been involved. As to potential arbitrators of any prominence, it may be possible to find leads to people they have dealt with in other cases. Calling these people for information can mean avoiding a big mistake.

It can be helpful to interview potential arbitrators. However, arbitrator interviews should only be conducted on a joint basis with the adversary to avoid risking disqualification of the candidate or undermining the award.

AAA's Enhanced Neutral Selection Process

The AAA recently introduced the Enhanced Neutral Selection Process to facilitate counsel's selection of arbitrators in certain large, complex cases. This process has the potential to greatly facilitate the process of identification and selection of desirable arbitrators.

As part of the new process, the AAA will provide the parties with an early, initial sample of arbitrator resumes selected on the basis of qualifications identified by the parties. This should enable the parties' attorneys to determine whether the Association is on the right track in offering arbitrator candidates. If necessary, the AAA can redirect its efforts in preparing the list.

The AAA also will send out so-called "block lists" of arbitrators, categorizing potential panel members by professional expertise—such as attorney, retired judge, industry expert, accountant, or other categories of experience requested by the attorneys.

The new program specifically contemplates joint interviews of potential arbitrators by both sides, either by telephone or written questions. In the interview, both counsel (through the case manager) will have the opportunity to ask prospective arbitrators a reasonable number of general questions agreed upon by the parties and the arbitrator (but not questions specific to the fact pattern involved), in order to get a sense of the prospective arbitrator and his or her view of the world.

Given the importance of arbitrator selection, the opportunity to interview the candidates in large, complex cases is always worth taking.

The new process also contemplates that counsel may request references for prospective arbitrators. References would be of great value in evaluating candidates.

The AAA Enhanced Neutral Selection Process is only available if both sides agree and the case is administered pursuant to the AAA's Procedures for Large, Complex Disputes. Otherwise, the case will be administered according to the regular arbitrator selection process in the AAA Commercial Arbitration Rules.

Lawyers versus Industry Experts

How important is it to select arbitrators with industry expertise? Again, it depends on the case. Many experienced business people and attorneys provide arbitration clauses in their contracts precisely because arbitration offers the opportunity to have potential disputes resolved by decision makers who know the practices of the industry the parties are involved in and are likely to decide any dispute that arises in accordance with such practices. Being judged by one's peers is believed to lead to decisions that better reflect industry expectations. "Architects judging architects" should produce decisions that make sense in the context of architectural practice. Decision making by arbitrators with industry expertise also fosters efficiency, since less time needs to be spent educating them about technical matters. Arbitrators with such expertise can "cut through" the issues.

Yet once disputes arise, the law comes into play. The arbitrators, whatever their technical expertise, will need to have "process" expertise. By that I mean experience conducting arbitration proceedings effectively and expeditiously. Litigators who come to an arbitration with expectations derived largely from their litigation experience (i.e., those who do not have a great deal of experience in arbitration) may not understand this.

In cases involving substantial legal or procedural issues, each side will typically want at least one lawyer. In cases involving substantial technical issues, each side will typically want at least one technical expert. Yet such predilections should not be followed on a knee-jerk basis. Attorneys need to exercise judgment based on the specific case. If their client seems more likely to win based on application of the law, perhaps an effort should be made to select an all-lawyer panel. If the client seems more likely to win based on industry practice or other non-legal considerations, perhaps a panel made up solely of industry experts should be sought.

The issue is most acutely posed in a case to be heard by a single arbitrator where significant legal and technical issues are presented. In such a case, the attorneys for each side have to make the hard choice and seek to select the type of arbitrator believed to be most likely to respond favorably to their client's case.

I do not mean to suggest that there is always a disconnect between decisions based on application of law and those based on industry practice or other non-legal considerations. Having participated in many deliberations on panels with lawyers and industry experts, it seems to me that industry practice is generally substantially consistent with the law and provides a fair result. Yet there are cases where law and practice conflict and where strict application of law conflicts with considerations of fairness and equity. One of the distinctive advantages of arbitration is that it offers the potential for decision-making based on industry practice and equitable considerations in such circumstances.

Yet such decision making does not come automatically. Attorneys must seek to select arbitrators who are potentially amenable (or not amenable) to decision making on a particular basis.

One potential problem with basing the selection of an arbitrator largely on industry expertise is that the arbitrator candidate may have gained the expertise working on one side or the other of the relevant issue. This could make the person desirable to one party and undesirable to the other.

Retired Judges

Do retired judges make better arbitrators than lawyers? This depends on the judge and the case. Perhaps the central questions for parties who are seeking to obtain (or avoid) decision making based largely on industry expertise and equitable considerations are: (1) is the retired judge open to such decision making? (2) does the former judge have the arbitration mindset of expedition and economy? and (3) will he or she be open to spending substantial study time in a particular case if necessary and desired by counsel?

If a case fits into a familiar legal paradigm, the party whose case fits that paradigm may fare better with a retired judge. Correspondingly, the party who needs to overcome that paradigm may fare better with an arbitrator who is not a judge, perhaps a lawyer who specializes in an area of law other than the one involved in the case, or a nonlawyer. Such a person may be more inclined to take a fresh look at the matter.

Some retired judges are more sympathetic to requests for extensive discovery (particularly depositions) than arbitrators imbued with the arbitral mindset of speed and expedition. So retired judges may appeal to parties who think there is something to be gained (but not a speedy proceeding) from more discovery.

An important consideration in deciding whether to select a retired judge is the attitude of the client toward arbitration. If a client is nervous about the prospect of arbitrating, having a prominent former judge as the arbitrator might increase the client's comfort level and acceptance of the result, even if it is adverse.

Single Arbitrator or Panel of Three

Should there be a single arbitrator or a panel of three? Often this question is answered in the parties' arbitration agreement. Of course, the parties can always reach a new agreement on that point when the dispute arises. So the issue is always, in a sense, open.

The question is an important one in a case where expense or a speedy decision is of major concern. Having three arbitrators increases the arbitrator fees. It also makes scheduling more difficult and can cause delays.

On the other hand, having a panel brings more perspective to the decision-making process. I never cease to be amazed at the range of recollections and perceptions of the evidence that members of panels bring to deliberations. Lawyers who do jury trial often say that the jury sees everything. In my experience, the same can be said of a panel of arbitrators.

A key factor in deciding whether to have a sole arbitrator or a panel is the attorney's level of confidence in the potential sole arbitrator. After all, in federal and state courts throughout the land attorneys regularly appear before a single trial judge, even in the largest of cases. However, at the appellate level there are at least three judges and sometimes more. Given the limited scope of appeal in arbitration, arbitrators in a sense act as both trial and appellate judges.

Reasoned v. Conclusory Awards

Should you ask for a reasoned decision? This question is closely related to the type of arbitrator and, in a broader sense, the type of process, desired for a given case. Requiring a reasoned decision requires the selection of at least one arbitrator who is capable of writing the decision. It also raises the likelihood that the arbitrators will view the case in a legalistic fashion, focusing on the fine points of counsels' arguments rather than an overall sense of the equities of the case. It also will increase the cost of the process.

Use of Consultants

Understanding a case does not necessarily imbue counsel with the wisdom to fathom which arbitrator candidates are likely to be favorably disposed to the client's side. Many litigators who do jury trials use consultants to help with jury selection. It seems that jury consultants are used little if at all in arbitrator selection, although the same expertise is involved. Based on a recent informal survey conducted by a law student at my request, jury consultants regard themselves as qualified to provide arbitrator selection services and would be interested in such assignments.

An Arbitrator Who Has Time

An arbitrator may be superb but must have time for the case. The most experienced and capable arbitrators may be overlooked in the short run. However, in my experience, most complex commercial cases need at least three to five months from the preliminary hearing for document production and preparation of expert reports, pre-hearing memoranda, and exhibits and witness lists. When additional discovery is sought or substantive motions are made, more time-over a longer period of time-is needed to deal with the case. This reality generally allows for the selection of very sought-after arbitrators (as long as they commit to be available for discovery and pre-hearing issues in the interim).

Conclusion

Arbitrator selection is one of the most important steps in the arbitration process. Counsel for both parties must have a solid grasp of their case before they go into the administrative conference so they can tell the case manager what kind of arbitrator or panel they want. Then, using available investigative methods and information provided to the parties about the arbitrator candidates, counsel should strive to find arbitrators who are most likely to be responsive to the client's case.

BY CHARLES J. MOXLEY, JR.

Charles J. Moxley, Jr. is counsel to the law firm of Kaplan Fox & Kilsheimer LLP in New York City, where he specializes in litigation and arbitration. He is also an adjunct professor of law at Fordham University School of Law. He has served on the American Arbitration Association's Commercial Panel since 1977. This article is adapted from a presentation he made in New York in June 2005 on the process of selecting an arbitrator. Mr. Moxley welcomes comments from readers about their experiences with arbitrator selection. He may be reached at cmoxley@kaplanfox.com.

Copyright American Arbitration Association Aug-Oct 2005

Provided by ProQuest Information and Learning Company. All rights Reserved

ABOUT The ADR Providers

American Arbitration Association or AAA

www.adr.org

www.mediation.org

www.icdr.org

The AAA is a not for profit offering mediation, arbitration and other neutral services. They are the largest administrator of alternative dispute resolution services worldwide. The AAA offers specialty rules for sectors such as commercial, construction and labor/employment. Their website contains educational tools for users that provides options for drafting clauses and other important information. The AAA also trains thousands of neutrals and advocates each year.

The AAA provides services in the U.S and abroad through the International Center for Dispute Resolution (ICDR). Its headquarters is in lower Manhattan but they have twenty offices throughout the U.S. The AAA established Mediation.org in 2013 to focus its efforts on mediation.

The AAA offers education to mediators and arbitrators through AAA Education Services.

CPR or International Institute for Conflict Prevention and Resolution

www.cpradr.org

CPR was formed in 1977 bringing together Corporate Counsel and their firms to find ways to lower the cost of litigation. CPR was the first to develop an ADR Pledge[®]. Today, this Pledge obliges over 4,000 operating companies and 1,500 law firms to explore alternative dispute resolution options before pursuing litigation.

CPR's membership is comprised of executives and legal counsel from global companies and law firms, government officials, retired judges, highly experienced neutrals, and leading academics. Through their numerous Committees and Task Forces, CPR uses the expertise of these legal minds to develop rules, protocols, white papers and other tools to more effectively resolve conflict.

CPR is best known as a think tank that publishes books and best practices that are models in the dispute resolution field. They have an award-winning newsletter called *Alternatives* that previews many of the changes, and a blog

called “CPR Speaks” that covers more fast-breaking developments.

Until recently CPR’s model was to offer non-administered rules. They developed rules and a list of mediators and arbitrators but it was up to the parties and the panel to administer the case unless the parties arranged for CPR administration through a program (e.g. The Wellington Agreement) or in their contracts. CPR will serve as billing agent for matters filed under the non-administered rules charging the parties on an hourly basis.

On July 1, 2013, CPR launched its administered rules targeting complex commercial disputes. The rules provide for party appointment of arbitrators but absent party agreement, the Chair must be from the CPR arbitrator panel. Several companies have included the administered rules in clauses and one matter (later settled) was filed under the new Rules. In another case, the filing party filed under the Administered Rules but in the end the case used the Global Accelerated Commercial Rules due to the date of the clause. The International Administered Rules were released in December 2014. A dozen cases have been filed under these Rules.

JAMS – The Resolution Experts

www.jamsadr.com

JAMS was founded in 1998 by combining a California based dispute resolution provider named Judicial Arbitration and Mediation Service¹ and an East Coast dispute resolution provider named Endispute. Some JAMS’ neutrals have an ownership interest in JAMS and take part in the management and direction of the Organization. Historically, JAMS is known for having a panel primarily comprised of retired federal and state judges because of its roots in California. By combining with dispute resolution providers like Endispute and active recruitment, JAMS has expanded its panel to include attorneys that do not have prior judicial experience and neutrals that do not serve full-time. Similar to the AAA, JAMS resolves disputes involving a myriad of subject matters including business/commercial, construction, and disaster recovery. The majority of JAMS filings are resolved through mediation; however, it has a robust arbitration practice.

ARIAS-US

www.arias-us.org

¹ Judicial Arbitration and Mediation Service was established in 1979.

ARIAS•U.S. is a not-for-profit corporation that promotes improvement of the insurance and reinsurance arbitration process for the international and domestic markets.

They are promoting mediation, however most disputants in the reinsurance arena want a resolution and not a compromise.

Most cases are resolved by a handful of arbitrators. Most of their arbitrators are former senior executives with carriers.

FINRA

www.finra.org

FINRA operates the largest securities arbitration forum in the United States to assist in the resolution of monetary and business disputes involving investors, securities firms, and individual brokers. All rules related to the FINRA arbitration program have been filed with and approved by the SEC, after publication in the Federal Register and a finding by the SEC that such rules are in the public interest. FINRA's arbitration forum has 71 hearing locations—at least one in every state. Depending on the amount of damages being sought, disputes in the arbitration forum are heard by either a panel of three arbitrators, or by a single arbitrator. In all cases involving investors, parties have the option to have their case decided exclusively by public arbitrators who have no ties to the securities industry. Brokerage firms pay for most costs, and FINRA waives fees for investors experiencing financial hardship. The average turnaround time across all arbitration cases is 15 months. FINRA publishes detailed arbitration statistics on its website, including the number of cases filed and their respective outcomes. All arbitration awards are made publicly available on FINRA's website.

Training and Credentials for Becoming an Arbitrator or Mediator

International Mediation Institute

www.imimmediation.org

IMI is a non-profit public interest initiative that drives transparency and high competency standards into mediation practice across all fields worldwide.

IMI has 40 Qualified Assessment Programs (QAPs) worldwide that certify mediators. In the U.S. the AAA, CPR, JAMS, The New Jersey City University Center for International Dispute Resolution, Columbia University's School of Continuing Education and The Bridges Academy are QAPs. IMI is user driven and the feedback digest for mediators that is required as part of being a certified

mediator is a resource for potential users considering the selection of a mediator. The digests can be found on IMI's website.

In 2013 IMI launched standards for certifying mediation advocates. Law firms can use certification as a competitive edge.

IMI has a network with the Singapore International Mediation Institute/Singapore International Mediation Center (SIMC) and the Florence International Mediation Chamber (FIMC). Additional relationships in Africa, the Middle East, Europe, and South America are being formed. Both SIMC and FIMC require IMI certification for inclusion on their panels.

ABA/DR Section

http://www.americanbar.org/groups/dispute_resolution.html

The ABA offers training for neutrals on a regular basis. Some particular programs include:

Arbitration Institute – Three-day program developed by the College of Commercial Arbitrators, AAA and JAMS. The program is focused on arbitrators and arbitration practitioners and is held in the early summer.

Mediation Institute – Three-day program focused on mediator and mediation advocacy. The program is held each year in November.

Spring Conference – The Conference will be held in Minneapolis in April 2019. The ABA solicits presenters and programs during the summer preceding the conference and generally accepts 90 programs.

The ABA offers international programs. In November 2014 a trip was offered for Cuba and in 2015 a Summit was held in India. In 2019 they will be traveling to Florence, Italy.

Monthly webinars and teleconference CLEs are offered.

Women In Dispute Resolution or WIDR was established in 2012 to develop women neutrals. WIDR offers programs that combine practice development, networking and substantive learning. In 2015, the ABA launched Minorities in Dispute Resolution with similar goals to WIDR.

The ABA also offers professional liability insurance for mediation and arbitration practice. Specifics can be found on the Section's webpage.

AAA

The AAA roster includes over 8,000 people with backgrounds as business executives, law firm partners, educators and others. All candidates for the AAA panel of neutrals are required to satisfy their requirements and attend annual trainings offered by the AAA. Information about the AAA's educational programs can be found at <https://www.adr.org>

The AAA is committed to diversity and offers a special program for people with diverse backgrounds to break into the field – the Higginbotham Fellows Program.

Neutrals are paid their going hourly or per diem rate for services provided.

CPR

When determining whether to accept a candidate for CPR's panel of neutrals, CPR considers candidates' education, experience with complex commercial matters, ADR training, ADR experience, references and, where appropriate, substantive experience in a given field. CPR strives for geographic and other diversity. All CPR neutrals are expected to maintain the highest ethical standards as set out by the governing ethical codes and rules.

To apply to be a CPR Neutral, a candidate must complete a Neutral Application Form and return it by email. Neutrals are approved for specific panels such as employment, insurance, policy-holder, intellectual property to name a few. Committees in each of the specialized areas review completed applications. There is a three to six month backlog for Specialty Committee review of applications to CPR's Panels.

CPR does have a listing fee to continue on its panel. The fee is \$395 for the first panel and \$100 for each additional panel plus 5% of amounts billed for hearing/mediation sessions. A refund of a portion of the fee will be made the following year for years in which no case is received. Panelists set their own rates for assignments. For more information go to www.cpradr.org

CPR offers arbitrator training in collaboration with other organizations like the Chartered Institute of Arbitrators. CPR also offer mediator skills training in conjunction with the Center for Effective Dispute Resolution (CEDR).

FINRA

FINRA maintains a roster of more than 7,500 arbitrators. FINRA regularly recruits professionals with established careers, including attorneys, professionals with MBAs, and business owners. More than 3,500 of FINRA's approximately 7,500 arbitrators are attorneys. More than 100 arbitrators are currently, or were formerly judges. Additionally, FINRA actively recruits minority and female arbitrators, and publishes data on the diversity of the arbitrator pool on its website.

Arbitrator applicants must have a minimum of five years of paid work experience—inside or outside of the securities industry—and two years of college-level credits. No previous arbitration, securities, or legal experience is required to apply. FINRA provides free training and continuing education for arbitrators on a broad range of topics.

Arbitrators receive an honorarium for each hearing session they attend: typically \$600 per day or \$725 per day for arbitrators serving as chairpersons.

In addition to arbitrators, FINRA has a highly qualified roster of mediators. FINRA mediators have subject matter knowledge and significant and relevant experience in both investor disputes and securities employment disputes. For more information about becoming a FINRA arbitrator or mediator, go to the Become an Arbitrator and Become a Mediator pages on FINRA's website.

OTHER ORGANIZATIONS

ARIAS-US

ARIAS neutrals are generally senior executives or lawyers from the insurance or reinsurance industries. ARIAS has a number of ways to become certified that include industry experience and training. Recertification is required every two years. Look to the ARIAS-US website at <http://www.arias-us.org> for details. There is a separate website for reinsurance arbitrators in London.

Neutrals are paid their going rate. A limited number of arbitrators are appointed to most of the cases.

ICC

<http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Articles/2014/ICC-Court-further-extends-worldwide-reach-in-2013>

In 2013 the ICC opened an office in New York to administer cases in North America. The entity formed is called SINCANA, Inc. Anyone can add their name to ICC's directory of experts for consideration as an arbitrator or mediator. In order to be selected, a potential neutral needs to become known by the SINCANA staff or the lawyers who select neutrals. The ICC charges a fee to be listed as an expert on their list of experts.

New York State Bar Association Section for Dispute Resolution

www.nysba.org

The Section for Dispute Resolution offers many education programs for potential mediators and arbitrators. Some target new neutrals while others enrich the skills of more experienced neutrals and advocates. Some regular offerings include:

Mediator Skills and Advanced Mediator Skills – This is a two part multi day program that will help qualify an attendee for the Commercial Division mediation panel.

Arbitration Training – This is a multi-day program offered for new and experienced arbitrators and arbitration advocates both domestic and international.

Fall Conference – This is a one day program focused on skills for members.

Annual Meeting – This is a half day program held during the NYSBA annual meeting in January each year.

The Section also offers programming and other opportunities for law students and young lawyers including:

- Arbitration Moot
- NYSBA ACCTM Writing Competition
- Dispute Resolution Clinic
- Law Student and Young Lawyer Reception
- Scholarships for women and minorities
- Mentoring for women and minorities

The Section has about 20 Committees that develop policy, monitor the field, and offer education programs. The Committees are subject and field oriented including: Arbitration, Mediation, ADR in the Courts, International Dispute Resolution, Diversity, and Legislation. The Mediation Committee created a video for pro se disputants so they understand the value and goal of mediation.

Finally, the Section publishes a quarterly magazine focused on the field. The Section regularly seeks contributors to the Dispute Resolver

Small Business Arbitration Center of New York

www.sbacnyc.com

This Center was established in New York to assist small business owners in resolving disputes. They describe their neutrals as planning change advocates. The Center offers several certification programs for neutrals.

List Serves

John Jay Listserve

<http://listserver.jjay.cuny.edu/cgi-bin/wa.exe?SUBED1=NYC-DR&A=1>

Peter Lurie's Arbitration Listserve

MEDIATE-AND-ARBITRATE@PEACH.EASE.LSOFT.COM

Compiled by Deborah Masucci. © 2018 Masucci Dispute Management and Resolution Services.

DISCLAIMER: This document was prepared to assist individuals who are thinking of a career as a mediator or arbitrator. Anyone using the information should refer to the websites referenced for the latest information on the organizations or programs.

CLIMBING THE ADR NEUTRAL LADDER

A NEXT STEPS GUIDE FOR NEUTRAL OPPORTUNITIES IN NEW YORK CITY

BY: M. SALMAN RAVALA, ESQ. This guide is prepared to assist newly trained neutrals in navigating mediator and arbitrator opportunities in New York City. The opportunities relate primarily to commercial and employment law and are outlined here for information purposes only. Please verify final information directly with the court-annexed ADR program, ADR institution or provider. For updates to this document or to report an inactive weblink, please contact the author at SRavala@lawcrt.com.

FINRA

FINRA has opportunities to serve as both Mediator and Arbitrator in areas serving investors, brokerage firms, and brokers in the securities industry. The Mediation roster is small compared to the Arbitration roster and it is therefore more selective, requiring significant mediator training and experience.

Mediation

Candidates must possess mediator experience and securities knowledge or expertise. One of the requirements for FINRA mediators is that they have significant, relevant mediation experience and subject matter knowledge in securities. The program requires pre-qualification and then completion of an application. For the application and more information, see: <https://www.finra.org/arbitration-and-mediation/become-a-mediator>.

FINRA prefers multi-day mediator training that includes role-playing techniques; certifications or membership on other mediator rosters; relevant experience as a mediator in ten to fifteen mediations in business related disputes; and four letters of reference to be supplied with the mediator's application and from parties or attorneys who have mediated with the applicant and can attest to the applicant's skills and experience as a mediator.

Arbitration

FINRA has two classifications of arbitrators: public and non-public. Public arbitrators are select individuals who are not required to have knowledge of the securities industry. Non-public arbitrators have a more extensive securities industry background. Unless waived by FINRA at its discretion, the program requires candidates to have a minimum of five years of paid work experience—inside or outside of the securities industry. For the application and more information, see: <https://www.finra.org/arbitration-and-mediation/apply-now>.

Background checks and employment verification will be conducted as part of the application review process. Expect some back and forth to clarify your entries in the application

and a final approval between 60-90 days of submission of your application. Upon approval, Arbitrators must attend FINRA specific arbitrator training and pass an exam.

NYS PART 137 FEE DISPUTE PANEL

Mediation

Neutrals on the Part 137 panel generally serve as arbitrators but may also be called to serve as mediators.

Arbitration

Administrators manage local programs in various Districts across New York State. For New York and Bronx Counties, the 1st and 12th Districts, the Administrator is NYCLA. For a list of other Districts and to contact their Administrators, see https://www.nycourts.gov/admin/feedispute/local_programs.shtml.

There are two components to the Part 137 training. The first is to watch an online orientation video and the second is to obtain arbitration training offered by the NYS Office of ADR. No online orientation is required if the candidate's arbitration training is the actual Part 137 Fee Dispute Panel specific arbitrator training, which is six hours long. While other arbitration training may qualify on a case by case basis in lieu of the Part 137 specific training, the Part 137 specific arbitration training is highly recommended as it reviews core principles and comes with a Part 137 training book which provides sample forms and essential guidance on issues that regularly come up during Part 137 arbitrations. For more information, see <http://ww2.nycourts.gov/admin/feedispute/faqs.shtml#arbitrator>.

For a list of upcoming trainings, see the NYCLA calendar of events or see New York State ADR Training website at <https://www.nycourts.gov/ip/adr/Training.shtml>. You may contact NYCLA Fee Dispute Program Administrator, Elizabeth Biberman, at Phone: 212-267-6646, ext. 207 or E-mail: EBiberman@nycla.org.

Once training is completed, candidates must submit a bio; resume; and Oath of Arbitrator. A complete submission packet

should be sent to the Fee Dispute Program Administrator in the candidate's District for formal submission to the New York State Office of Court Administration Attorney Client Fee Dispute Program Board of Governors for approval.

CIVIL COURT OF THE CITY OF NEW YORK

Mediation

Mediators are experienced volunteers who have training in civil court dispute resolution. Candidates, including lawyers, are required to obtain formal mediation training. Mediation training can be obtained via the Peace Institute. To become certified, candidates must complete the five-day formal training; a three-month, once a week, apprenticeship; pass a video course; and obtain an additional one-day civil court training, which is also provided by the Peace Institute. A six-week mentorship at the Civil Court is also required. Mediation takes place at Court or at a local community dispute resolution center, depending on where the action is brought. For more information, see: For more information, see <https://www.nycourts.gov/ip/adr/NYCCivil.shtml>.

For a list of upcoming trainings, see <http://nypeace.org/basic-mediation-training/>. You may contact Mediation Services Coordinator, Eddy Valdez, at Phone: 646- 386-5417 or E-mail: mediationcivil@courts.state.ny.us.

Arbitration

Not Applicable

NYS SMALL CLAIMS PART

Mediation

Neutrals on the Small Claims Part panel generally serve as arbitrators but may also be called to serve as mediators.

Arbitration

The only court-annexed arbitration program in New York State Courts is the Small Claims Part Arbitration, which is cited by many as an excellent way to get actual arbitrator training. The program runs throughout the five boroughs of New York City. The scope is limited to small claims cases under \$5000.00.

To become an arbitrator and hear cases before the Small Claims Part, a candidate must be licensed to practice law in the State of New York for five or more years; complete Small Claims court arbitration training, which is two hours long; and observe at least two arbitrations in the program. Once training and observations are completed, the candidate will be sworn in and may choose the county in which he or she wishes to serve as an arbitrator. For more information, see: https://www.nycourts.gov/courts/nyc/smallclaims/sc_volunteer_opps.shtml.

For a list of upcoming trainings, see the New York State ADR Training website at <https://www.nycourts.gov/ip/adr/Training.shtml>. You may also contact New York County Small Claims Part administrator, Ananias Grajales, at Phone: 646.386.5730 or E-mail:

agrajale@nycourts.gov.

NY COUNTY COMMERCIAL DIVISION

Mediation

Cases are referred to the Program by Order of reference of the assigned Commercial Division Justice or authorized non-Division Justice. Mediators provide three hours of actual mediation at no charge to the parties but are paid at the rate of \$400.00 per hour thereafter.

Candidates must have at least ten years of experience as a practitioner of commercial law and have the requisite forty hours of Part 146 approved mediation training, with at least twenty-four hours in basic mediation training and at least sixteen hours in commercial mediation techniques. Training in arbitration does not suffice. Prior experience as a mediator is not required, but is strongly preferred. Candidates must submit a completed application, resume; cover letter; and satisfactorily complete an interview in order to join the roster. Candidates that are added to the roster are required to be available to handle at least three mediations each year for the Commercial Division. Candidates are also required to attend at least six hours of additional training in commercial law every two years. For the application or more information, see: <https://www.nycourts.gov/courts/ComDiv/NY/PDFs/ADR-NeutralAp.pdf>.

A recommended training is NYSBA's 3-day commercial mediation training but for a list of upcoming trainings, see the New York State ADR Training website at <https://www.nycourts.gov/ip/adr/Training.shtml>. You may contact New York County, Commercial Division ADR Program administrator, Simone Abrams, at Phone: 212-256-7986 or E-mail: sabrams@nycourts.gov.

Arbitration

Not Applicable

U.S. DISTRICT COURT, SDNY & EDNY

Mediation

Any individual may apply to serve as a mediator if he or she satisfies the following criteria, at outlined in the Mediation Program Procedure: 1) member in good standing of any US District Court; 2) with substantial exposure to mediation in federal court or mediation in other settings; 3) provides letter of reference from a party, training provider, judge, court administrator, or ADR institution that addresses the applicant's mediation process skills including their ability to listen well, facilitate communication, and assist with settlement discussions; and 4) is willing to participate in training, mentorship programs, and ongoing assessment. Those that join the roster are required to be available to handle at least two mediations.

Mediators in the SDNY serve without compensation but qualify for *pro bono* service hours. For the application and more information, see:

<http://www.nysd.uscourts.gov/docs/mediation/Mediation%20Program%20Volunteer%20Application/Mediation%20Program%20Volunteer%20Application.5.25.17.pdf>.

Mediators in the EDNY provide four hours of actual mediation at no charge but are paid at the rate of \$300.00 per hour thereafter. For the application and more information, see: <https://img.nyed.uscourts.gov/files/forms/adrapplicationsandycases.pdf>.

For those interested, observation of an actual SDNY or EDNY mediation is permissible upon identifying a mediator that will allow candidates to sit-in on the mediation. Follow rule 6 (g) of the SDNY Mediation Program Procedures which requires consent of all parties, consent of all attorneys, consent of mediator, and written notice by mediator of the observer to the Mediation Office. Observers must sign the Mediation Confidentiality Agreement.

Both the SDNY and EDNY also have a Pro Bono Mediation Counsel program for *pro se* clients (also referred to as the Mediation Advocacy Program or MAP) which offers a federal employment mediation training free of charge. This is a great way to meet SDNY & EDNY mediators, attend networking events, and get a candidates foot in the door.

You may contact SDNY Mediation Office, Rebecca Price, at Phone: 212-805-0643 or E-mail: mediationoffice@nysd.uscourts.gov. You may contact EDNY ADR Administrator, Robyn Weinstein, at Phone: 718-613-2578 or E-mail: Robyn_Weinstein@nyed.uscourts.gov.

Arbitration

Arbitration in the EDNY is governed by Local Rule 83.7 and is limited to cases under \$150,000.00. Candidates must complete an application; submit a resume; and one letter of reference from a person with direct knowledge of the applicant's experience. For the application and more information, see: <https://www.nyed.uscourts.gov/arbitration>.

You may contact EDNY ADR Administrator, Robyn Weinstein, at Phone: 718-613-2578 or E-mail: Robyn_Weinstein@nyed.uscourts.gov.

AAA

AAA maintains a roster of both mediators and arbitrators. AAA administered disputes typically arise out of contractual conflicts or business disagreements, but stem from a wide range of industries. The AAA only recruits individuals who have expertise in areas that align with the types of cases the AAA administers, because this ensures the candidates are appealing to parties seeking a AAA administered arbitration or mediation.

Mediation

Candidates must have at least ten years of senior level experience in business, industry or profession; an education degree or professional license appropriate to the candidate's

field of expertise; and maintain membership in at least one business, trade, or professional association. The candidate must also complete at least twenty-four hours of training in mediation process skills; and have served as mediator on at least five mediation cases within the last three calendar years.

For the application or more information, see: <https://www.adr.org/aaa-panel>.

A recommended training is AAA's 4-day Mediator Essentials course by Harold Coleman and/or Neil Carmichael but for a list of upcoming trainings, see the AAA's Education Services website at <https://www.adrededucation.org/courses>. You may contact AAA, VP of Commercial Division, Jeffrey T. Zaino, at Phone: 212-484-3224 or E-mail: zainoj@adr.org.

Arbitration

Candidates must have at least fifteen years of senior level experience in business, industry or profession; an education degree or professional license appropriate to the candidate's field of expertise; and maintain membership in at least one business, trade, or professional association. Candidate must submit a resume and cover letter to their local AAA office. Upon receipt of the candidate's application, AAA schedules an in-person meeting or a teleconference with the candidate. Thereafter, the candidate is required to submit to the AAA a nomination letter and three letters of reference.

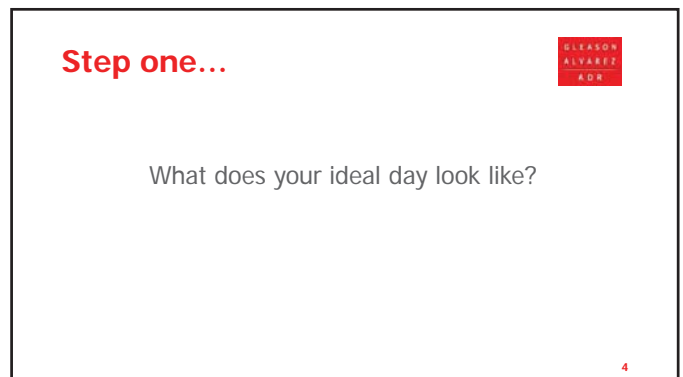
For the application or more information, see: <https://www.adr.org/aaa-panel>.

A recommended training is NYSBA's 3-day Commercial Arbitration Training by Charlie Moxley, Lea Haber Kuck, and Edna Sussman, and AAA's Arbitration Fundamentals & Best Practices for New AAA Arbitrators course by Edna Sussman but for a list of upcoming trainings, see the AAA's Education Services website at <https://www.adrededucation.org/courses>. You may contact AAA, VP of Commercial Division, Jeffrey T. Zaino, at Phone: 212-484-3224 or E-mail: zainoj@adr.org.

CPR

CPR maintains a roster of both mediators and arbitrators. To become a neutral with CPR, candidates must submit a completed application; resume; two letters of references; and a processing fee of fee of \$150.00, plus \$50.00 for every specialty panel the candidate is applying for. CPR will consider a candidate's education, commercial experience, ADR training and experience, substantive experience in specific fields, and references, in order to determine whether the candidate will be awarded a position on the CPR neutral roster. For the application and more information, see: <https://www.cpradr.org/neutrals/become-a-neutral>.

You may contact CPR Corporate Secretary, Helena Tavares Erickson, at Phone: 646-753-8237 or E-mail: herickson@cpradr.org.



Self-assessment



- What is your niche?
- What qualities do you possess that set you apart (and are advantageous in the arbitration context)?
 - What do you need to cultivate?

5

Self-assessment, continued



- What does your network look like now?
 - Professional network
 - Bar associations
 - Other affiliations

6

Self-assessment, continued



- Is your online presence conveying the best message about you?
 - Website
 - Social networking
 - Articles/blogs
 - Personal information

7

Self-assessment, continued



- Do you know how you want to set up your practice?
 - Name
 - Structure
 - Location
 - Records management
 - Insurance
 - Cyber security
 - Banking and finance
 - Other resources you may require

8

Business plan: Mission



- Mission statement: What is the purpose of your practice?
- Examples:
 - Not great: To arbitrate cases
 - Better: To serve as an arbitrator in business to business disputes, primarily focused in the New York Metro area
 - Best: To deliver fair and efficient services as an arbitrator in disputes relating to reinsurance, both domestically and internationally

9

Business plan: Vision



- How do you envision the future of your arbitration practice?
- Examples:
 - Within two years, I will have a consistent and full-time arbitrator practice, focused on a mix of domestic and international matters.
 - Within five years, I will conduct all proceedings online.
 - Within ten years, I will conduct arbitrations from my own spaceship.

10

Business plan: Goal setting



- SMART Goals: What are four-five specific goals that will help you to achieve your mission/vision?
 - Specific: who, what, when and where
 - Measurable: put a number on it
 - Attainable: be realistic
 - Relevant: relate to your mission/vision
 - Time-bound: set a deadline

11

Business plan: Goal setting examples



- I will be accepted to two panels by December 31.
- I will have at least ten speaking engagements in 2019.
- I will write one scholarly article by June 30.

12

Business plan: Tasks to support your goals



- What activities must you undertake in order to achieve your goals?
- Example:
 - Goal: I will have at least ten speaking engagements in 2019.
 - Tasks:
 - Identify target organizations/conferences by July 1.
 - Write three blog posts and two articles that may serve as topic of interest at these events by September 1.
 - Arrange meetings to discuss idea with potential co-panelists by September 30.

13

Maintaining your business plan



- Review at least once a week
- Set up report out meetings with a colleague
 - Helps hold you to task
 - Brainstorm
 - Comradery!
- Living document – revise as needed

14

Marketing strategy:

**How is anyone going to know about you?
And what do you want them to know?**



- Who is your target audience?
- What are their interests?
- Where do they spend their time?
- When is it appropriate for you to make contact? In what form?
- Why should anyone care about you? (Harsh!)

Always be mindful of and avoid the potential for creating conflicts...

15

Intellectual pursuits:

There is always something new to learn



- Write
- Teach
- Speak
- Listen

16

Measuring progress & success



- Success metrics tied to goals/tasks
- Ask for feedback, as appropriate
- Meet with mentors and sponsors regularly and appropriately
- Develop professional support networks with colleagues

Your health and happiness:
if it's not off the charts, fix immediately

17

Suggested reading



- Springboard, G. Richard Shell
- How to Make Money as a Mediator (And Create Value for Everyone): 30 Top Mediators Share Secrets to Building a Successful Practice, Jeff Kravis

18

Erin Gleason Alvarez

Gleason Alvarez ADR, LLC
43 West 43 Street, Suite 93
New York, NY 10036

+1 646 253 2374
Erin@GleasonADR.com
www.GleasonADR.com



FINRA Dispute Resolution

Arbitration, Mediation and the Neutrals Who Serve



Everyday, our neutrals provide quick, fair and efficient resolution of securities-related disputes.

Most business in the securities industry is conducted fairly and efficiently. But when problems arise, our neutrals stand ready to help investors, securities firms and individual registered representatives resolve securities-related disputes.

In 2013, more than 3,700 arbitration claims and nearly 500 mediation cases were filed with FINRA, the Financial Industry Regulatory Authority.



- ▶ FINRA Dispute Resolution, a division of FINRA, operates the largest forum in the United States to facilitate the resolution of securities industry-related disputes.

About FINRA

FINRA is the largest independent regulator for all securities firms doing business in the United States. FINRA's mission is to protect America's investors by making sure the securities industry operates fairly and honestly. All told, FINRA oversees more than 4,100 brokerage firms, nearly 161,000 branch offices and more than 635,000 registered securities representatives.

FINRA touches virtually every aspect of the securities business—from registering and educating industry participants to examining securities firms; writing rules; enforcing those rules and the federal securities laws; informing and educating the investing public; providing trade reporting and other industry utilities; and administering the largest dispute resolution forum for investors and registered firms. We also perform market regulation under contract for major U.S. stock markets. Authorized by the federal government, FINRA protects American investors from fraud and bad practices.

About FINRA Dispute Resolution

FINRA Dispute Resolution operates the largest forum in the United States specifically designed to facilitate the resolution of business and employment disputes between and among investors, securities firms and individual brokers.

FINRA Dispute Resolution handles more than 99 percent of securities-related arbitrations and mediations in the United States through its network of regional offices. We conduct arbitrations and mediations in more than 70 hearing locations, including at least one in all 50 states, Puerto Rico and London. We maintain a roster of more than 6,400 arbitrators and nearly 250 mediators around the country.



Two Methods of Dispute Resolution: Arbitration and Mediation

Most business in the securities industry is conducted fairly and efficiently. However, disputes or problems can arise. FINRA's Dispute Resolution forum offers two non-judicial processes—arbitration and mediation—to resolve securities-related disputes between and among investors, securities firms and individual brokers. Most securities disputes are resolved through arbitration, unless all parties agree to mediation.

Our Forum

Arbitration and mediation are:

- ▶ Alternatives to the legal court system
- ▶ Less formal than litigation
- ▶ Often more cost-effective than a court case
- ▶ Time-efficient
- ▶ Resolved by fair-minded professionals

Arbitration

Arbitration is a formal dispute resolution process in which the parties—customers, associated persons or brokerage firms making or responding to a claim—select a neutral, third party, called an arbitrator, to listen to the arguments set forth by the parties, study the testimonial and/or documentary evidence, and render a decision on the matter. Every day, our arbitrators hear and decide cases, including but not limited to disputes about unauthorized trading to breach of fiduciary duty to unsuitability of recommended investments.

The arbitrator's decision is final and binding, subject to review by a court on very limited grounds. Generally, arbitration is faster, less expensive and less formal than litigation.

Mediation

At any time before filing an arbitration or a case concludes with an award, many parties consider mediation—a natural first step in the dispute resolution process. Mediation is a process in which a trained and impartial person, called a mediator, facilitates negotiations between disputing parties, helping them to find a mutually acceptable resolution. The mediator helps parties narrow the issues and keeps the discussion focused and productive. Mediation is flexible, and the process can vary from case to case depending on the parties' needs and the mediator's style. FINRA mediations result in settlements over 80 percent of the time and the process is usually significantly faster than arbitration.

Unlike arbitration, mediation is voluntary and is not binding until the parties reach and sign a settlement agreement. The mediator does not impose a solution, but rather, helps parties to form and agree upon a solution themselves.



- ▶ FINRA neutrals are not employees of FINRA, but are independent contractors who serve at the discretion of FINRA. Therefore, they are not eligible to receive FINRA employee or unemployment benefits.

FINRA Neutrals

FINRA arbitrators and mediators, also known as FINRA neutrals, represent a broad cross-section of fair-minded individuals, diverse in culture, profession and background. Among other professions, FINRA neutrals may be lawyers, educators, doctors, accountants and securities professionals. Because the role of a neutral is the most critical component of a fair dispute resolution forum, FINRA recruits only highly qualified and unbiased individuals to carry out this important work.

The skills required to become an arbitrator or mediator are unique, and the two neutral pools are separate and distinct. Arbitrators are not required to have knowledge of the securities industry, but they must complete FINRA's Basic Arbitrator Training Program and pass an examination before becoming eligible to serve on arbitration cases. FINRA has created a solid arbitrator training curriculum that serves as a model for other training programs across the United States. If you are an attorney, this training may qualify you for Continuing Legal Education (CLE) credit in your state. FINRA Dispute Resolution also offers advanced arbitrator training on specific areas of FINRA's arbitration rules and processes.

Some FINRA arbitrators serve as FINRA mediators and some of our neutrals serve as mediators only. Parties prefer to work with mediators with securities industry expertise and knowledge. FINRA mediators must have prior mediation training and experience and preferably mediation experience in resolving securities and/or employment matters. FINRA does not provide mediator training and seeks experienced mediators with transferrable skills and knowledge relevant to the forum.

- ▶ More than 83 percent of the parties believed that the mediator helped them understand the strengths and weaknesses of their cases.



Serving As a FINRA Neutral

FINRA neutrals have the opportunity to acquire a broad knowledge of the securities industry and gain experience with a respected forum, including the chance to:

Develop Skills. By serving in our forum, not only will you learn the skills necessary to become a FINRA arbitrator, you will also acquire valuable skills that can be applied in other professional, arbitration or mediation settings.

Give Back. If you're looking for an opportunity to serve the public or give back to your community, serving as an arbitrator or mediator enables you to help others by applying your professional knowledge.

Build Your Network. Serving with other neutrals on a panel gives you the opportunity to meet and network with other professionals, including individuals who work inside and outside the securities industry.

Earn Honoraria. FINRA neutrals also receive honoraria for their service on cases. Arbitrators receive a modest honorarium for each regular or prehearing session they attend. The honorarium schedule is established by the Code of Arbitration Procedure. In some cases, FINRA may reimburse arbitrators for reasonable travel expenses to attend a hearing. For further details, please refer to FINRA's Guidelines for Arbitration Reimbursement on our website at www.finra.org/ArbitrationMediation.

Mediators set their own hourly rate, and FINRA bills the parties who are responsible for paying the mediator's fees and expenses, including the mediator's travel. Parties share these charges equally unless they agree otherwise.

Interested in becoming an arbitrator?

Unless waived by FINRA at its discretion, arbitrator applicants must have a minimum of five years of paid business and/or professional experience and at least two years of college-level credits. Apply now at www.finra.org/BecomeAnArbitrator or contact our recruitment team at arbrecruitment@finra.org.

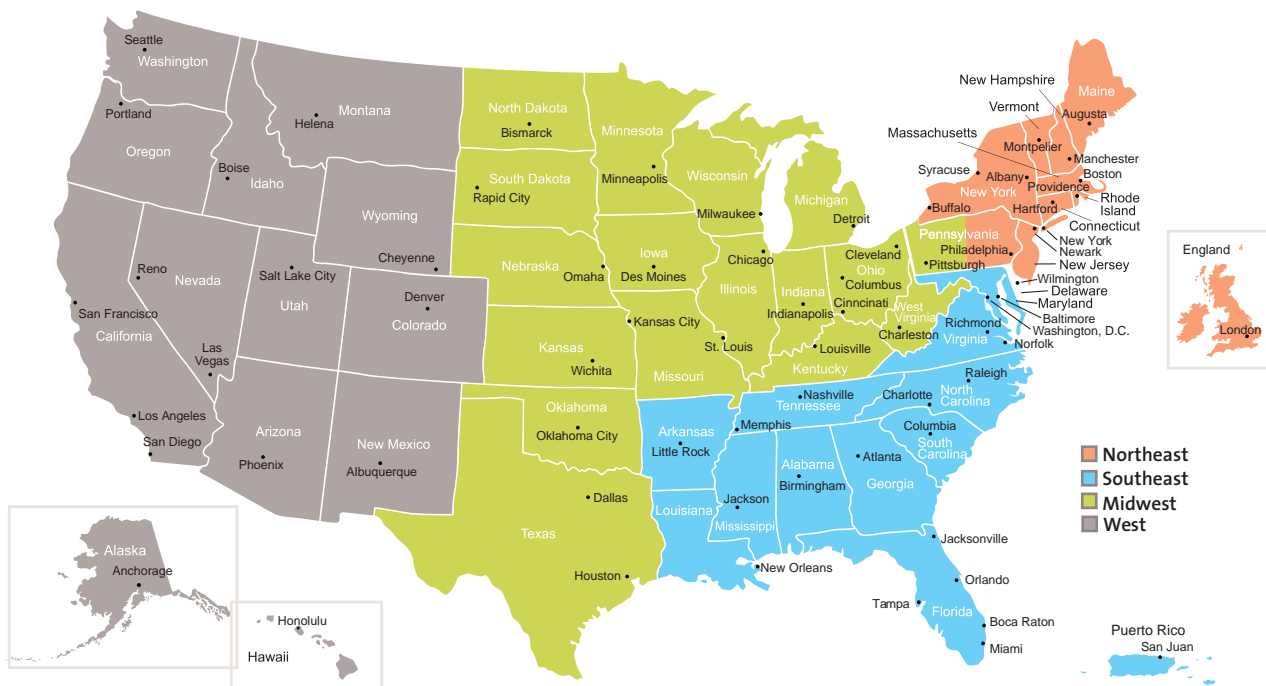
Interested in becoming a mediator?

If you are an experienced mediator with securities and/or employment expertise, you may be eligible to join our roster. To learn more, visit our website at www.finra.org/BecomeAMediator or email mediate@finra.org.

- ▶ I greatly enjoy being on FINRA's roster. I've been on the bench for 27 years, and FINRA provides the basic procedures I'm used to for arbitration service. I especially like FINRA's high standards and complete impartiality.

—Arbitrator, Philadelphia, PA

FINRA offers more than 70 hearing locations for arbitration and mediation cases, including at least one in each state in the United States; one in San Juan, Puerto Rico; and one in London, England. We administer cases from our four regional offices: Northeast (New York City), Southeast (Boca Raton, FL), Midwest (Chicago) and West (Los Angeles).





Investor protection. Market integrity.

FINRA
One Liberty Plaza
165 Broadway
New York, NY 10006

www.finra.org
© 2013 FINRA. All rights reserved.
FINRA and other trademarks of the
Financial Industry Regulatory Authority, Inc.
may not be used without permission.
14_0289.1-07/14

Revised May 24, 2019

The Financial Industry Regulatory Authority (FINRA) administers a dispute resolution forum for investors, brokerage firms, and their registered employees in the U.S. through its network of 70 hearing locations, including at least one in each state and Puerto Rico. FINRA administers between 4,000 and 8,500 arbitrations and numerous mediations annually. FINRA maintains a diverse roster of over 7,900 arbitrators and 270 mediators. The National Arbitration and Mediation Committee (NAMC), which is composed of investor, industry, and neutral (arbitrator and mediator) representatives, provides policy guidance to FINRA's Dispute Resolution staff. A majority of the NAMC members and its chair are public. FINRA is regulated by the United States Securities and Exchange Commission (SEC).

FINRA's Dispute Resolution program is administered out of four regional offices: Northeast, Southeast, Midwest, and West, located in New York City, Boca Raton, Chicago, and Los Angeles, respectively, with headquarters in New York City. Contact information for the regional offices, as well as for other FINRA staff, is available on FINRA's website at www.finra.org. Below is a map showing the hearing locations and the regional offices to which they are generally assigned:



Below are highlights on: Statistics and Trends; FINRA Dispute Resolution Task Force; Recent Significant Rule Changes; Proposed Rule Changes; Regulatory Notice on Forum Selection; Significant Initiatives; FINRA Neutrals; Office of Dispute Resolution Technology Initiatives; FINRA Investor Education Foundation; and Mediation.

II. STATISTICS AND TRENDS

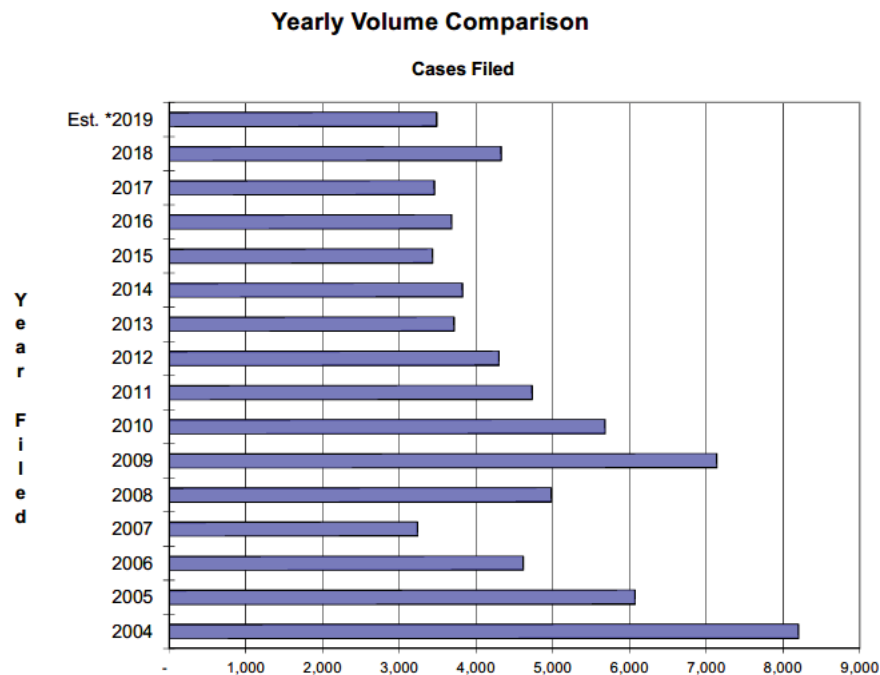
Arbitration case filings decreased in April 2019 compared to April 2018. In April 2019, parties filed 1,163 cases – a 24% decrease from the 1,539 cases filed in April of 2018. Customer claims decreased by 24% compared to April 2018. In April 2019, 38% of filed claims were intra-industry cases.

Mediation cases increased in April 2019 compared to April 2018. In April 2019, parties filed 181 mediation cases – a 5% increase compared to the 172 mediation cases filed in April 2018.

Case Filing Statistics for 2019 - This section provides key filing data and trends.

Overall arbitration case filings:

- April 2019: 1,163 (24% decrease compared to April 2018).



Mediation case filings

- April 2019: 181 (5% increase compared to April 2018).

Customer Award Statistics

- Cases in which customers are awarded damages
 - 2019 through April:
 - Overall: 44% (40% in 2018, 43% in 2017, and 41% in 2016).

- Hearing cases (not including cases decided by review of documents only): 42% (42% in 2018, 45% in 2017, and 42% in 2016).

Case Processing Statistics

Processing times from service of the claim to close of the case

➤ April 2019:

- Overall: 13.8 months (3% decrease compared to April 2018)
- Hearing cases: 17.2 months (9% increase compared to April 2018)
- Simplified cases (decided on the documents submitted without a hearing): 5.9 months (20% decrease compared to April 2018)

- Percentage of cases closed by award

- April 2019: 18% (compared to 17% in 2018, 18% in 2017, and 21% in 2016).
- In April 2019, Customer cases closed by award or settlement approximately 87% of the time.

FINRA Office of Dispute Resolution Top 15 Controversy Types in Customer Arbitrations Through April						
Type of Controversy*		2019 Cases Served	2018	2017	2016	2015
Breach of Fiduciary Duty	Through April	606	783	534	629	493
	Year-End	--	2,290	1,899	2,002	1,807
Negligence	Through April	550	651	484	583	480
	Year-End	--	1,974	1,662	1,862	1,677
Failure to Supervise	Through April	512	635	472	571	428
	Year-End	--	1,935	1,621	1,802	1,554
Misrepresentation	Through April	462	651	440	518	394
	Year-End	--	1,775	1,663	1,670	1,499
Suitability	Through April	456	669	440	483	338
	Year-End	--	1,779	1,606	1,606	1,364
Breach of Contract	Through April	433	553	372	484	390
	Year-End	--	1,711	1,318	1,495	1,444
Fraud	Through April	419	568	375	384	250
	Year-End	--	1,707	1,389	1,301	1,089
Omission of Facts	Through April	414	561	382	408	321
	Year-End	--	1,547	1,493	1,394	1,216
Violation of Blue Sky Laws	Through April	165	262	138	106	59
	Year-End	--	810	547	344	236
Manipulation	Through April	123	76	79	81	42
	Year-End	--	302	299	236	208
Unauthorized Trading	Through April	76	88	92	110	79
	Year-End	--	245	263	362	264
Churning	Through April	72	68	88	89	79
	Year-End	--	205	219	254	247
Elder Abuse**	Through April	70	74	--	--	--
	Year-End	--	216	61	--	--
Margin Calls	Through April	37	20	18	27	29
	Year-End	--	85	62	84	97
Errors-charges	Through April	19	28	17	14	24
	Year-End	--	81	66	56	64

* Each case can be coded to contain multiple controversy types. Therefore the columns in this table cannot be totaled to determine the number of cases served in a year.
 **These categories were not tracked for the years in which no data appears.

FINRA Office of Dispute Resolution
Top 15 Security Types in Customer Arbitrations Through April

Type of Security *		2019 Cases Served	2018	2017	2016	2015
Municipal Bonds	Through April	187	279	94	151	104
	Year-End	--	971	565	433	559
Municipal Bond Funds	Through April	180	265	85	175	97
	Year-End	--	959	558	480	607
Common Stock	Through April	171	235	177	210	167
	Year-End	--	579	604	646	610
Mutual Funds	Through April	155	224	109	80	70
	Year-End	--	731	447	352	373
Government Securities	Through April	88	135	29	7	9
	Year-End	--	519	229	96	169
Real Estate Investment Trust	Through April	76	66	67	51	63
	Year-End	--	205	177	184	191
Options	Through April	76	64	37	42	39
	Year-End	--	150	127	124	128
Private Equities	Through April	46	39	36	43	28
	Year-End	--	111	111	114	92
Exchange-Traded Funds	Through April	39	70	46	50	47
	Year-End	--	167	131	133	127
Limited Partnerships	Through April	39	56	53	40	29
	Year-End	--	144	183	199	79
Variable Annuities	Through April	36	33	48	33	32
	Year-End	--	105	129	115	104
Annuities	Through April	34	38	38	41	25
	Year-End	--	101	115	127	81
Corporate Bonds	Through April	29	51	37	44	25
	Year-End	--	135	119	154	194
401(k)**	Through April	20	33	28	--	--
	Year-End	--	94	69	27	--
Structured Products	Through April	17	22	13	18	13
	Year-End	--	78	45	57	25

* Each case can be coded to contain multiple security types. Therefore the columns in this table cannot be totaled to determine the number of cases served in a year.
 **These categories were not tracked for the years in which no data appears.

FINRA Office of Dispute Resolution
Top 15 Controversy Types in Intra-Industry Arbitrations Through April

Type of Controversy*		2019 Cases Served	2018	2017	2016	2015
Breach of Contract	Through April	117	108	145	125	124
	Year-End	--	413	403	389	373
Promissory Notes	Through April	71	88	100	129	121
	Year-End	--	261	296	401	401
Libel, Slander, or Defamation	Through April	52	59	39	41	35
	Year-End	--	166	117	124	115
Compensation	Through April	50	47	55	51	42
	Year-End	--	168	161	163	140
Libel or Slander on Form U-5	Through April	40	45	40	36	43
	Year-End	--	135	136	124	119
Wrongful Termination	Through April	37	38	42	37	41
	Year-End	--	122	116	127	123
Commissions	Through April	24	24	40	19	27
	Year-End	--	95	103	60	73
Misrepresentation	Through April	21	40	6	3	7
	Year-End	--	68	54	21	17
Discrimination or Harassment**	Through April	18	13	13	21	19
	Year-End	--	38	37	58	54
Breach of Fiduciary Duty	Through April	14	21	11	6	7
	Year-End	--	39	52	18	28
Suitability	Through April	13	49	2	1	--
	Year-End	--	63	59	15	1
Negligence	Through April	13	17	7	4	8
	Year-End	--	32	25	17	21
Omission of Facts	Through April	10	8	5	2	1
	Year-End	--	18	16	7	8
Fraud	Through April	7	11	5	4	5
	Year-End	--	24	26	11	13
Raiding Disputes	Through April	6	12	8	11	14
	Year-End	--	37	33	42	40

* Each case can be coded to contain multiple controversy types. Therefore the columns in this table cannot be totaled to determine the number of cases served in a year.
 ** This category combines the following discrimination controversy types: disability, age, gender, race, sexual orientation, national origin, religion, employment discrimination, and sexual harassment. This number does not represent the number of cases served, as one case may have multiple discrimination claims.

Comparison of Results of All-Public Panels and Majority-Public Panels in Customer Claimant Cases

Year Decided	Cases Decided by All-Public Panels	Number of Cases Decided by All-Public Panels Where Customer Awarded Damages	Percentage of Cases Decided by All-Public Panels Where Customer Awarded Damages	Cases Decided by Majority-Public Panels	Number of Cases Decided by Majority-Public Panels Where Customer Awarded Damages	Percentage of Cases Decided by Majority-Public Panels Where Customer Awarded Damages
2014	135	59	44%	104	39	38%
2015	163	77	47%	84	38	45%
2016	145	63	43%	72	26	36%
2017	137	66	48%	71	26	37%
2018	158	67	42%	58	27	47%
YTD 2019	43	23	53%	23	8	35%

In April 2019, investors prevailed 53% of the time (23 out of 43 cases) in cases decided by all-public panels and 35% of the time (8 out of 23 cases) in cases

decided by majority-public panels. To find more information on Case Statistics and Award Outcomes please visit the [Dispute Resolution Statistics](#) page at finra.org.

III. FINRA DISPUTE RESOLUTION TASK FORCE

In 2014, FINRA formed the [FINRA Dispute Resolution Task Force](#) to suggest strategies to enhance the transparency, impartiality, and efficiency of FINRA's securities dispute resolution forum for all participants. The Task Force brought together a diverse group of leading investor advocates, academics, regulators, and industry representatives to help ensure that FINRA's arbitration and mediation processes continue to serve the needs of the investing public. Seven Task Force members serve on FINRA's arbitrator roster.

The Task Force established an email inbox, which was available throughout the process, to solicit comments from interested parties. It also directly solicited written comments from more than 30 interested organizations and individuals. Over a period of 14 months, the Task Force held four in-person meetings, and its ten subcommittees met 57 times. On December 16, 2015, the Task Force issued its final report and recommendations [Final Report and Recommendations of the FINRA Dispute Resolution Task Force](#). The Task Force recommendations focus, among other matters, on arbitrator training and recruitment, and expanded use of explained decisions and mediation. FINRA Dispute Resolution Task Force members:

- Barbara Black – Retired Professor and Director, Corporate Law Center, University of Cincinnati College of Law (Chair);
- Philip Aidikoff – Investor attorney, Aidikoff, Uhl & Bakhtiari;
- Joseph Borg – Director, Alabama Securities Commission;
- Philip Cottone – FINRA arbitrator and mediator;
- John Cullem – FINRA arbitrator;
- Sandra Grannum – Industry attorney, Davidson & Grannum;
- Mark Maddox – Investor attorney, Maddox Hargett & Caruso;
- Kevin Miller – General Counsel, Securities America;
- Joseph Peiffer – Investor attorney, Peiffer Rosca Wolf Abdullah Carr & Kane;
- Barbara Roper – Director of Investor Protection, Consumer Federation of America;
- Lisa Roth – President, Tessera Capital Partners (formerly Principal, Keystone Capital Corporation);
- Edward Turan – Managing Director, Citigroup Global Markets; and
- Harry Walters – Managing Director, Morgan Stanley Wealth Management.

On February 15, 2019, FINRA posted its intended [Final Status Report](#) on the implementation of the Dispute Resolution Task Force's 51 recommendations.

IV. RECENT SIGNIFICANT RULE CHANGES

Rule Change to Expand Time for Non-Parties to Respond to Arbitration Subpoenas and Orders of Appearance of Witnesses or Production of Documents

On May 6, 2019, the SEC approved rule filing [SR-FINRA-2019-004](#) to amend FINRA Rule 12512(d) through (e) and FINRA Rule 12513(d) through (e) of the Code of Arbitration Procedure for Customer Disputes and FINRA Rule 13512(d) through (e) and FINRA Rule 13513(d) through (e) of the Code of Arbitration Procedure for Industry Disputes to expand time for non-parties to respond to arbitration subpoenas and orders of appearance of witnesses or production of documents, and to make related changes to enhance the discovery process for forum users. The amendments extend the response time for non-parties to object to an order or subpoena from within 10 calendar days of service to within 15 calendar days of receipt, exclude first-class mail as an option to serve these documents on non-parties and for non-parties to file a response, and codify the current practice that the Director send objections and responses to the panel at the same time (after the response date has passed) unless otherwise directed by the panel.

The amendments are effective for cases filed on or after July 1, 2019.

Rule Change to Pay Arbitrators a \$200 Honorarium for Decisions on Contested Subpoena Requests or Contested Orders for Production or Appearance

On October 12, 2018, the Securities and Exchange Commission approved a proposal to amend FINRA Rule 12214(c) through (e) of the Code of Arbitration Procedure for Customer Disputes and FINRA Rule 13214(c) through (e) of the Code of Arbitration Procedure for Industry Disputes to pay each arbitrator a \$200 honorarium to decide without a hearing session a contested subpoena request or a contested order for production or appearance.

The amendments are effective for cases filed on or after February 7, 2019.

See [Securities Exchange Act Release No. 34-84418](#), published in the *Federal Register* on October 18, 2018 (Vol. 83, No. 202, pp. 52857-52860).

Rule Change to Create a \$100 Fee and Honorarium for Late Cancellation of a Prehearing Conference

On July 31, 2018, the SEC approved amendments to FINRA Rules 12500 and 12501 of the Code of Arbitration Procedure for Customer Disputes and FINRA Rules 13500 and 13501 of the Code of Arbitration Procedure for Industry Disputes to charge a \$100 per-arbitrator fee to parties who request cancellation of a prehearing conference within three business days before a scheduled prehearing conference. This rule change will also amend FINRA Rules 12214(a) and 13214(a) of the Codes to create a \$100 honorarium to pay each arbitrator scheduled to attend a prehearing conference that was cancelled within three business days of the prehearing conference.

These amendments are effective for all cases filed on or after October 29, 2018.

See [Securities Exchange Act Release No. 34-83752](#), published in the *Federal Register* on August 6, 2018 (Vol. 83, No. 151, pp 38327-38329).

Rule Change Relating to Simplified Arbitration

On May 17, 2018, the SEC approved SR-FINRA-2018-003, which amends FINRA Rules 12600 and 12800 of the Code of Arbitration Procedure for Customer Disputes and 13600 and 13800 of the Code of Arbitration Procedure for Industry Disputes to provide an additional hearing option for parties in arbitration with claims of \$50,000 or less, excluding interest and expenses. This intermediate form of adjudication will provide parties with claims of \$50,000 or less an opportunity to argue their cases before an arbitrator in a shorter, limited telephonic hearing format than a regular hearing.

There will be two options for hearings; Option One follows the regular provisions of the Codes relating to prehearings and hearings, including all fee provisions. If the customer (or claimant in industry disputes) chooses Option One, they will continue to have in-person hearings without time limits, and they would continue to be permitted to question opposing parties' witnesses.

Option Two is the new Special Proceeding subject to the regular provisions of the Code relating to prehearings and hearings, including all fee provisions, with several limiting conditions, including timing limitations for hearings, making telephonic hearings the default hearing method (unless the parties jointly agree to another method of appearance), and limiting total hearing sessions to two sessions to be completed in one day, exclusive of prehearing conferences.

If the customer or claimant does not request one of the two hearing options in a simplified case, the matter will be decided by a sole arbitrator based on documents submitted by each party.

This rule amendment is effective for cases filed on or after September 17, 2018.

See [Securities Exchange Act Release No. 34-83276](#), published in the *Federal Register* on May 23, 2018 (Vol. 83, No. 100, pp 23959-23963).

V. PROPOSED RULE CHANGES

Proposed Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information

At its [December 2018 meeting](#), the FINRA Board of Governors approved proposed amendments to the Codes of Arbitration Procedure for Customer and Industry Disputes to codify the Notice to Arbitrators and Parties on Expanded Expungement Guidance and modify the fees for small claim expungement. The proposed rule would establish specific filing fees for claimants filing expungement claims, and would prevent associated persons from filing second requests to expunge the same customer dispute information that was the subject of a prior request that a panel or court denied.

Proposal to Prohibit Compensated Non-Attorney Representatives (NARs) in Arbitration and Mediation

In [December 2018](#), the FINRA Board of Governors approved filing with the SEC proposed amendments to the Codes of Arbitration and Mediation Procedure to prohibit compensated non-attorney representatives from practicing in the FINRA arbitration and mediation forum. The rule proposal would also specify that a student enrolled in a law school, who is participating in a clinical program or its equivalent, and is practicing under the supervision of an attorney pursuant to state law, is allowed to represent parties in arbitration and mediation. It would also include guidelines for resolving issues regarding the qualifications of NARs or law students in the forum.

Regulatory Notice on Discovery of Insurance Information (Regulatory Notice 18-22)

On July 26, 2018, FINRA published [Regulatory Notice 18-22](#) seeking comment on proposed amendments to the Discovery Guide's Firm/Associated Persons Document Production List (List 1). Specifically, the amendments would require firms and associated persons, upon request, to produce documents concerning third-party insurance coverage in customer arbitration. The proposed amendments would strictly limit the circumstances under which insurance coverage information could be presented to the arbitrators. The new list item would state that it may be prejudicial for arbitrators to be given information related to coverage or lack of coverage by liability insurance.

Any party wishing to submit insurance-related evidence at a hearing would have to demonstrate to the arbitration panel that there are extraordinary circumstances warranting admission of this information, or the existence of an insurance policy is directly related to the dispute outlined in the statement of claim.

The comment period ended September 24, 2018.

Regulatory Notice on Inactive Parties (Regulatory Notice 17-33)

On October 18, 2017, FINRA published [Regulatory Notice 17-33](#) which proposes to amend the Code of Arbitration Procedure for Customer Disputes to expand a customer's option to withdraw an arbitration claim and file in court, even if a mandatory arbitration agreement applies to the claim, to situations where a member firm becomes inactive during a pending arbitration, or where an associated person becomes inactive either before a claim is filed or during a pending arbitration. The proposed amendments include changes that allow customers to amend pleadings, postpone hearings, request default proceedings and receive a refund of filing fees under such situations.

The comment period ended on December 18, 2017.

VI. REGULATORY NOTICE ON FORUM SELECTION PROVISIONS INVOLVING CUSTOMERS, ASSOCIATED PERSONS AND MEMBER FIRMS

In July 2016, FINRA published [Regulatory Notice 16-25](#) to remind member firms that customers have a right to request arbitration at FINRA's arbitration forum at any time and do not forfeit that right under FINRA rules by signing any agreement with a forum selection provision specifying another dispute resolution process or an arbitration venue other than

the FINRA arbitration forum. In addition, FINRA reminded member firms that FINRA rules do not permit member firms to require associated persons to waive their right to arbitration under FINRA's rules in a pre-dispute agreement.

VII. SIGNIFICANT INITIATIVES

List of Member Firms and Associated Persons with Unpaid Customer Arbitration Awards

In October 2018, FINRA posted a list on its website of firms and individuals responsible for unpaid customer arbitration awards. FINRA has provided this information in an effort to increase transparency regarding those firms and individuals with unpaid arbitration awards, and to make this information more readily accessible to investors. The list includes the names of firms and individuals whose FINRA registration has been terminated, suspended, canceled or revoked, or who have been expelled from FINRA. This information will also continue to appear on the firms' or individuals' BrokerCheck reports. FINRA updates this information monthly.

The list is available on the [Member Firms and Associated Persons with Unpaid Customer Arbitration Awards](#) page on finra.org

Expanded Expungement Guidance for Arbitrators and Parties

Notice to Arbitrators and Parties: In October 2013, the forum sent to all arbitrators a notice and published on its website guidance for parties and arbitrators concerning expungement requests. The guidance emphasizes the extraordinary nature of expungement relief and advises arbitrators to consider the importance of the Central Registration Depository (CRD) information to regulators, firms, and investors (through BrokerCheck) when considering requests for expungement. The guidance encourages arbitrators to request any documentary or other evidence they believe is relevant to the expungement request, particularly in cases that settle before an evidentiary hearing or in cases where only the requesting party participates in the expungement hearing. It also suggests that arbitrators ask the broker requesting expungement to provide a current copy of his or her BrokerCheck report when determining the appropriateness of expungement. The guidance further recommends that arbitrators identify in the award the specific documentary evidence that they relied upon when recommending expungement.

On July 22, 2014, the SEC approved FINRA Rule 2081, which prohibits conditioned settlements, and it became effective on July 30, 2014. In August 2014, the forum sent to all arbitrators a notice and published on its website updated guidance wherein we addressed settlement payments and prohibited conditions relating to expungement of customer dispute information. The updated guidance reminds arbitrators to consider whether the party seeking expungement contributed to the settlement. Further, the updated guidance provides that if arbitrators learn of prohibited conditions, as described in Rule 2081, they should consult FINRA's procedures on disciplinary referrals.

In September 2014, we e-mailed to arbitrators a notice and published on our website updated guidance wherein we addressed the importance of allowing customers and their counsel to participate in the expungement hearing in settled cases. This section of the updated guidance reminds arbitrators to allow the customer, among other things, to introduce documents and evidence at the expungement hearing, cross-examine the broker

and other witnesses called by the party seeking expungement, and to present opening and closing arguments if the panel allows any party to present such arguments.

In December 2014, we published on our website updated guidance about cases in which an associated person will file an arbitration claim against a member firm solely for the purpose of seeking expungement, without naming the customer in the underlying dispute as a respondent. This section of the updated guidance reminds arbitrators to order the associated persons to provide a copy of their Statement of Claim to the customer in the underlying arbitration to ensure that the customer is aware that an expungement claim is pending regarding his or her prior dispute. This will also give the customer an opportunity to advise the arbitrators and parties (in writing or through participation in the expungement hearing) of their position on the expungement request, which may assist arbitrators in making the appropriate finding under Rule 2080.

In September 2017, we updated the guidance published on our website to discuss requests for expungement prior to the conclusion of the underlying arbitration. This section states that a broker may not file a request for expungement of customer dispute information arising from a customer arbitration claim until the underlying arbitration has concluded. If a broker files a request for expungement prior to the conclusion of the related customer arbitration, the Director will deny the forum as to the second expungement-only case. This procedure ensures that the underlying customer arbitration is resolved before any subsequent request to expunge customer dispute information from the underlying customer arbitration is considered.

The [Notice to Arbitrators and Parties on Expanded Expungement Guidance](#) can be found on the Arbitration Special Procedures page of FINRA.org.

Neutral Workshop: In February 2015, FINRA filmed a neutral workshop addressing expungement, among other matters. In May 2014, FINRA conducted a neutral workshop that provided expanded expungement guidance and an overview of the proposed new rule to address expungement of customer dispute information. In December 2013, FINRA conducted a neutral workshop that provided an overview of CRD and BrokerCheck, stressing the important role arbitrators play in safeguarding the integrity of the information in CRD in the expungement process. The recorded workshop can be found on the [Neutral Workshop page](#) on FINRA.org, along with other recorded neutral workshops, providing an additional resource for information to neutrals. FINRA pre-records the workshops to allow neutrals to pause and playback the audio file.

The Neutral Corner: The December 2013 edition (Volume 4, 2013) of the arbitrator newsletter, *The Neutral Corner*, was devoted to the topic of expungement. The issue included an article emphasizing the procedural requirements in recommending expungement and another article discussing the limitations on the types of disclosures that may be expunged from CRD through arbitration. The September 2014 edition (Volume 3, 2014) included articles about the revised Award Information Sheet, the new Rule 2081 to address prohibited conditions relating to expungement of customer dispute information, and expanded expungement guidance for arbitrators to allow customers and their counsel to participate in the expungement hearing. The October 2015 edition (Volume 3, 2015) included information on recent court decisions on expungement. The December 2015 edition (Volume 4, 2015) included information on parties making second expungement requests after a previous denial.

We also developed enhanced online training for arbitrators that expanded on and emphasized the points addressed in our expungement guidance.

The latest edition of [*The Neutral Corner*](#), along with previous issues, can be found on the Publications page on finra.org.

Online Arbitration Claim Filing Guide: FINRA revised the [Online Arbitration Claim Filing Guide](#) to include new information that asks claimants filing expungement claims to provide the occurrence number for the underlying disclosure and other registration information.

Award Information Sheet: To assist arbitrators with the updated expungement guidance, FINRA revised the Award Information Sheet.

We believe the above initiatives will help arbitrators safeguard the integrity of the information in CRD.

Short List Option to Reduce Extended List Appointments

Forum constituents want to select their own neutrals from the roster and thus have complained about the appointment of “extended list” arbitrators. Extended list arbitrators are not selected by the parties and may only be challenged for cause. (FINRA has virtually eliminated the appointment of extended list arbitrators in the initial appointment process.) FINRA has increased parties’ options to reduce the likelihood of extended list appointments when an arbitrator withdraws or is no longer available, no ranked arbitrators remain on the parties’ initial ranking lists, and hearing dates are scheduled in a case. Under the “short list option,” parties may stipulate to use a list of three arbitrators to select a replacement arbitrator. All parties must agree to use the short list option. Each side may strike one arbitrator’s name from the list and may rank all remaining arbitrators’ names in order of preference within a prescribed number of days.

If a hearing is scheduled within five calendar days of an arbitrator’s withdrawal, removal, or unavailability, parties need to postpone the hearing to use the short list option. The postponement allows FINRA staff time to prescreen arbitrators for conflicts and to ensure they are available for scheduled hearing dates and to provide parties with time to review the list and strike and rank arbitrators. A postponement fee is charged in accordance with current FINRA rules. An additional fee is assessed for postponements granted within ten business days of the hearing date, also in accordance with current FINRA rules. Arbitrators may allocate the fees among the parties that agreed to the postponement. Arbitrators may also waive the fees.

More information, along with an FAQ, about the Short List Procedure can be found at the [Short List Option to Reduce Extended List Appointments](#) page of finra.org.

Voluntary Program for Large Cases

On July 2, 2012, FINRA implemented a voluntary program in all regional offices for large cases (i.e., cases with damages claims of at least \$10 million exclusive of interest, costs, and attorneys’ fees). FINRA Office of Dispute Resolution processes many cases that involve very substantial amounts in dispute. While the rules give the parties flexibility to agree on an

ad hoc basis to vary from the procedures in the Arbitration Codes, the large case program was introduced to provide a more formal approach to these cases.

Upon receiving written party agreement to use the program, the Regional Director and an experienced, specially trained case administrator will conduct an early administrative conference with counsel to develop a plan for the administration of the case. Areas to be discussed will include: arbitrator qualifications and the procedures for appointing arbitrators; the use of depositions and interrogatories; the form of the hearing record; and different hearing facilities (costs would be paid by the parties). Parties can use arbitrators from outside of FINRA's roster or provide FINRA with criteria/qualifications to screen arbitrators on FINRA's roster. Parties may pay additional compensation to arbitrators above the standard FINRA honorarium. There is also a non-refundable administrative fee of \$1,000 for each separately represented party to use the program. The large case program is available to eligible cases in each of our regional offices.

The program is targeted at cases involving damages claims of at least \$10 million. However, any case can participate in the program where all parties agree and are represented by counsel.

A list of frequently asked questions and the news release for the voluntary program for large cases are available on our website at the [Large Case Pilot – FAQ](#) page of finra.org

VIII. FINRA NEUTRALS

Arbitrator Disclosure

FINRA continually stresses to arbitrators the need to make complete and accurate disclosures. Below are recent measures we have taken to emphasize the importance of disclosing all information that may be relevant:

Arbitrator Disclosure Report Reviews

FINRA staff regularly conducts comprehensive reviews of arbitrators' disclosure reports to ensure accuracy and freshness of information.

- This review includes a search of legal databases such as PACER, detailed internet searches for new public information or publications, employment records, professional license records, etc.
- If new information is found, staff will contact the arbitrator for confirmation and add the information to the arbitrator's disclosure report.

Internet Searches

- We verify the accuracy of arbitrator disclosure by conducting internet searches of arbitrators prior to appointment to a case.

- If staff finds information during an internet search that is not disclosed in the arbitrator's disclosure report, staff contacts the arbitrator, confirms the validity of the information, and adds the information to the neutral's disclosure report.

Last Affirmation Dates

- FINRA displays the date that arbitrators last affirmed the accuracy of their disclosure reports at the top of the disclosure report documents.
- Arbitrators are advised to regularly review and affirm the accuracy of their disclosures on the DR Portal, as parties may consider the last affirmation date as a factor when selecting arbitrators for their cases.
- Arbitrators can confirm the accuracy of their disclosures in two ways:
 - Submitting an update through the DR Portal;
 - Submitting an Oath of Arbitrator when assigned to a case.

Attorney Information

- Disclosure reports feature the names of party representatives and the city and state in which the representative practices on each of the arbitrator's active cases.
- This feature helps to alert parties to potential conflicts based on legal representation.

More information on [Arbitrator Disclosure](#) can be found on the Information for Arbitrators page at finra.org,

Arbitrator Recruitment

A primary goal of FINRA's arbitrator recruitment program is to identify and train a qualified pool of potential arbitrators from which parties can choose to hear their disputes. The strategic goal has been to continue to shift the balance of the arbitrator pool to include more public arbitrators and a more diverse roster nationwide. FINRA has implemented an aggressive recruitment campaign to seek individuals from diverse backgrounds from across different industries to serve as arbitrators. Ongoing recruitment initiatives thus far have included more than 100 women and minority organizations nationwide to source and recruit all types of people through on-site events, targeted recruiting advertisement and direct marketing campaigns.

To help maximize our resources and opportunities further, we leveraged our staff talent in the regions to assist with recruitment efforts, particularly in reaching women-focused groups, LGBT communities and other untapped diverse organizations. We also hired an additional full-time national recruiter in 2015.

FINRA began working to recruit arbitrators with the following professional organizations in 2018:

- NASPA, Black Psychiatrists of America, The Association of Junior Leagues International, National Academy of Elder Law Attorneys, American Immigration

Lawyers Association, American Library Association, Links National Assembly, National Educators Network, National Association of Blacks in Criminal Justice, The Association of LGBTQ Journalists, The Society for the Advancement of Chicanos/Hispanics and Native Americans in Science, NODA, and Society for Human Resource Management

In 2019, we are hosting recruitment events in nine mid-sized cities: Nashville, Charlotte, Oklahoma City, Kansas City, Cincinnati, Columbus, Cleveland, Portland and Seattle.

We also piloted a digital advertising campaign in 2018 Albany, Charlotte, Milwaukee and Los Angeles. The online campaign targeted administrators and lawyers on Facebook and LinkedIn. The campaign resulted in 132 leads and 23 arbitrator applications.

In March 2019, the second phase of the campaign launched in the following cities: Birmingham, Buffalo, Charlotte, Cincinnati, Cleveland, Columbus, Hartford, Indianapolis, Kansas City, Las Vegas, Milwaukee, Nashville, New Orleans, Oklahoma City, St. Louis, Salt Lake City, Seattle and Portland.

We are continuously enhancing the diversity of our arbitrator and mediator roster. In 2018, we saw increases in the number of women on the roster. We also saw increases in the number of Hispanic or Latino and LGBT arbitrators. Of the new arbitrators added to the roster in 2018, 37% were women, 8% were Hispanic or Latino, and 5% were LGBT.

Our number of mediators from diverse backgrounds also increased in 2018. We saw gains in number of women, African-American, Hispanic or Latino, Asian, and LGBT mediators. Of mediators (who may also be arbitrators) polled in 2018, 27% were women, 7% African-American, 4% Hispanic or Latino, 2% Asian, and 3% were LGBT.

To learn more about FINRA's efforts to diversify our arbitrator and mediator rosters visit [Our Commitment to Achieving Arbitrator and Mediator Diversity at FINRA](https://finra.org/commitment-to-achieving-arbitrator-and-mediator-diversity) at finra.org

Finally, to become more effective in how we communicate our message, we have begun using social media to recruit arbitrators. All Office of Dispute Resolution Twitter updates can be found under FINRA's Twitter handle, [@FINRA](https://twitter.com/FINRA). We also released our first formal recruitment video on several social media platforms including Vimeo, LinkedIn, and YouTube in December 2016: <https://vimeo.com/188349814>.

Arbitrator Application and Approval

Individuals interested in becoming an arbitrator can apply to our roster using the online arbitrator application available in the [Become an Arbitrator](#) section of our website. Applicants can complete the arbitrator application and submit it electronically along with a completed Consent to Background Search and Investigation Form and Social Security Number Verification Form. FINRA conducts a review of applications and works with applicants to ensure their submissions are complete before forwarding them to a subcommittee of the NAMC for final approval. FINRA processes applications and notifies applicants within 120 days from the date of receipt.

In 2018 we received 1,051 applications, exceeding our 2018 goal of 750 applications. The average time for application process completion was 89 days. As of May 2019, there are 3,628 public arbitrators on our roster.

Arbitrator Training

Through 2018, Arbitrator applicants were required to complete the Basic Arbitrator Training program, consisting of: 1) online basic training; 2) online expungement training; and 3) classroom training. After successfully completing the online basic and expungement courses, candidates were required to attend the classroom training at one of our regional offices or by live video. FINRA offered live video training in an interactive WebEx format to allow candidates to participate remotely. In 2018, on average, arbitrators completed this training in 91 days.

As of February 2019, in an effort to streamline training, FINRA discontinued the live classroom training requirement. Instead, we now offer voluntary live Arbitrator Orientation Sessions where new arbitrators can ask questions and learn more about the forum in an informal setting. We are continuing to expand and improve our online training offerings.

To be considered for the chairperson roster, arbitrators must complete FINRA's online chairperson training and satisfy the case service requirement. FINRA staff has discretion to select arbitrators to serve on the chairperson roster from among those arbitrators who have completed the online chairperson training and: 1) have a law degree, are a member of a bar of at least one jurisdiction, and served as an arbitrator through award in at least one arbitration administered by an SRO; or 2) if not an attorney, served as an arbitrator through award in at least three arbitrations administered by an SRO (Customer Code Rule 12400(c) and Industry Code Rule 13400(c)).

In addition to the required trainings, FINRA offers advanced, subject-specific courses.

For more information on Basic and Advanced Arbitrator Training visit the [Arbitrator Training](https://www.finra.org/arbitrator-training) page at finra.org

IX. OFFICE OF DISPUTE RESOLUTION TECHNOLOGY INITIATIVES

Online Portals

Portal for Parties. Use of the Portal is mandatory for all parties, excluding pro se investors. This rule applies to all cases filed on or after April 3, 2017. Parties using the Portal can sign into a secure website and perform many functions online, including:

- filing a claim;
- receiving service of a claim;
- submitting an answer to a received claim;
- submitting additional case documents;
- viewing the status of a case;
- viewing case documents;
- striking and ranking arbitrators online;
- viewing and downloading disclosure reports of prospective arbitrators;

- scheduling hearing dates online; and
- paying invoiced fees.

Portal for Neutrals. Neutrals are not required to use the portal on a mandatory basis, but arbitrators and mediators must register in the Portal to take advantage of the numerous functions it provides, such as:

- viewing and printing their disclosure reports;
- viewing and updating their personal profiles and disclosures;
- accessing information about their assigned cases, including upcoming hearings and payment information;
- viewing case documents;
- submitting documents;
- scheduling hearing dates; and
- viewing how often their names have appeared on arbitrator ranking lists sent to parties, and how often they are ranked or struck on those lists.

Paperless Office Initiative

All Regional Offices have digitized their respective paper-based arbitration files (including portal and non-portal cases). Any paper documents received will be converted to an electronic format, and all case documents will be stored in electronic arbitration and mediation case files. Staff assignments and correspondence are organized and distributed using electronic mailboxes. FINRA is continuing the process of digitizing neutral files.

FINRA Office of Dispute Resolution Website

FINRA Office of Dispute Resolution's website, <http://www.finra.org/arbitration-and-mediation>, provides various resources for parties and neutrals regarding FINRA's arbitration and mediation processes. On the website users can find, among other things: an overview of arbitration and mediation; information on how to file a claim; forms that parties and arbitrators need in the arbitration process; arbitrator and mediator applications; The Codes of Arbitration Procedure; and rule filing information. The website also contains a "What's New" section, where users can access case statistics and information on recent FINRA initiatives and announcements.

Arbitration Awards Online

FINRA's Arbitration Awards Online database is available without charge on FINRA's website at <http://www.finra.org/arbitration-and-mediation/arbitration-awards>. Through the database, users can access FINRA arbitration awards from February 1989 through the present.

In addition, users can access all NYSE arbitration awards, as well as the awards of all arbitration programs absorbed over the years by FINRA (which include the American Stock Exchange, Chicago Board Options Exchange, International Stock Exchange, Philadelphia Stock Exchange, and Municipal Securities Rulemaking Board) and NYSE (which includes Pacific Exchange/NYSE ARCA).

The database provides users with access to awards and the ability to search for awards by using multiple criteria, such as by case number, keywords within awards, arbitrator names, date ranges set by the user, and any combination of these features. FINRA now includes in customer awards information about the panel selection method and panel composition.

Videoconferencing

All four of FINRA's regional office locations have videoconferencing capabilities. With the consent of all parties or with the permission of the arbitration panel, parties or witnesses may appear at hearings by videoconference for hearings held in one of the regional office locations. There is no additional cost to use the videoconferencing equipment at FINRA. Parties are encouraged to notify their case administrator at least 30 days prior to the hearing to request videoconferencing services. All videoconferencing requests are honored in the order they are received.

In addition, the following companies offer videoconferencing services compatible with FINRA's:

- Regus
www.regus.com
1-800-633-4237
- Veritext
www.veritext.com
(contact phone numbers vary by region and are listed on the Veritext website).

Additional information on specific Regus and Veritext locations, costs, and reservations to use videoconferencing services are available by contacting these companies directly. All costs to use videoconferencing services outside of a FINRA regional office location are the responsibility of the party reserving the facilities.

X. MEDIATION

Mediation remains an important service that FINRA offers. Since the program's inception in 1995, FINRA's mediation staff has administered thousands of cases involving a wide variety of securities disputes with over 80 percent resulting in settlement between the parties.

Parties interested in mediation can fill out an online [Request for Mediation Form](#) which is located on the Initiate a Mediation page of www.finra.org. Parties involved in current arbitration cases can also indicate their interest in mediation by checking the box on the Party Case Submission Form in the DR Portal. Both methods relay a message to mediation staff, who will follow-up with other parties regarding available mediation options.

FINRA Mediation Settlement Month

In order to solicit parties' use of mediation and raise awareness of its mediation program, FINRA provides an annual "Settlement Month" program every October, which offers reduced mediation fees for smaller cases.

In 2018, we extended FINRA Mediation Settlement Month to two months. Parties were able to take advantage of cost savings with participating mediators from September 15 through November 15, 2018.

The Office of Dispute Resolution invites parties to take advantage of significantly reduced mediation prices during FINRA Mediation Settlement Month each year. Our aim is to encourage parties to experience the benefits of mediation for the first time, and to reinforce its value and effectiveness for those who have mediated already.

Mediation Program for Small Arbitration Claims

Since February 2013, FINRA has offered reduced fee and pro bono telephonic mediation to parties in simplified cases. Under the program, mediators serve on a pro bono basis on cases alleging \$25,000 or less in damages. We have also offered significantly reduced fee mediation at \$50 per hour on cases alleging damages between \$25,000.01 and \$50,000. The program benefits forum users by: 1) increasing the number of cases that settle and giving parties more control over the results of their cases; 2) reducing travel and preparation costs; and 3) providing an alternative for senior, seriously ill, and physically challenged parties who may find traveling to and attending an in-person mediation especially difficult; and 4) offering parties in small cases an efficient and cost-effective option to meet their needs within our forum.

Separately, the program provides newer mediators with an opportunity to demonstrate their mediation skills. Staff has processed hundreds of requests to mediate through the Mediation Program for Small Arbitration Claims with parties settling over 80% of cases mediated. FINRA continues to communicate the opportunity for parties to mediate through this program to all eligible cases, and highlights the benefits of this affordable mediation option for small claims.

For more information on FINRA's Mediation Program visit the [Learn About Mediation](#) page at finra.org.

