

New York Dispute Resolution Lawyer

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

Message from the Chair



Rona G. Shamoon

I write this message still savoring the priceless publicity received by our Section in the July / August *State Bar News*. As we begin our fifth year as a Section, we have grown from 760 dues-paying members in April of 2009 to 1,675 in April of 2012. As I reflect on this amazing progress (due of course in no small part to the indefatigable efforts of our past and present membership chairs), I have also considered that perhaps

some of this success is also due to who we are and what we are about—helping disputants to find better and more successful ways of resolving their differences.

I came to my first meeting of the NYSBA Dispute Resolution Committee (several years before it achieved “sectionhood”) wearing my litigator’s hat. Having practiced at that time for more than a decade as counsel in domestic and international arbitrations and litigations, mediation was not a big part of my everyday vocabulary. In fairness, my firm is often hired by clients looking for muscular advocacy, who are not at all interested in hearing about mediation, much less engaging in it. And yet, over the years, having seen the potentially corrosive effect of long-term litigation on both entities and individuals, it did cross my mind from time to time that there ought to be a better way. A colleague, friend and mentor of mine once told me that there was an old French curse that went, “May you be involved in a lawsuit in which you are in the right.”

In any event, after joining the ADR Committee, I began to learn more about mediation, early neutral evaluation, collaborative law and other techniques designed to

avoid the more bloody, painful and protracted aspects of litigation, and to consider anew the value of a well-drafted arbitration provision that creates an efficient and effective process tailored to the parties’ specific needs. Don’t get me wrong, I am not a pacifist or a believer in appeasement, and recognize that sometimes full-out, no-holds-barred litigation is necessary. There is no doubt that it takes parties who are reasonable (or at least have the capacity to achieve reasonableness) on both sides of the table to compromise on both process and / or outcome. I also recognize that although some cases may be susceptible to settlement early on, others may take a considerable amount of time and exposure of underlying facts before they can achieve *denouement*. Yet I have come to firmly believe that a well-trained and skilled mediator can often be indispensable in bringing the parties to an earlier and considerably more satisfactory settlement than the parties could have achieved on their own.

I have also come to believe that part of the blame for our overly litigious society lies in cultural norms that equate “winning” with success and compromise with weakness, when, in fact, it is the weakest and most insecure among us who most often refuse to compromise. For some plaintiffs, suing has become a sport or an occupation (or sometimes a little bit of both) and “I’ll sue you” has become a ubiquitous threat in the American vocabulary. I, for

(continued on page 5)

Inside

- Section News
- Ethics
- Calibrating Arbitration Presentations—Mock Arbitrations
- Arbitration
- International
- Mediation
- Book Reviews
- Case Notes

TO JOIN THE DISPUTE RESOLUTION SECTION, SEE PAGE 93 OR GO TO WWW.NYSBA.ORG/DRS

Message from the Co-Editors

This issue marks the first Message from our new Chair Rona Shamoon. She takes the reins of a relatively young—going on six years old—Dispute Resolution Section that has the good fortune of attracting amazingly gifted and still active Chairs. This good fortune is an outgrowth of a vital membership that itself is enthusiastic and energetic. That energy is reflected in the fast growth of the Section and the vibrancy of our programs, including a number in which former Chairs continue to contribute and participate. We are here not just for neutrals but for all attorneys, both transactional and litigation practitioners, who have to negotiate, and anticipate and help resolve client disputes.



Edna Sussman

This journal is also part of our Section's success. In this issue, we continue to provide our Ethical Compass column, lively introductions to new or developing areas of practice, book reviews to let you know what is available, and key developments in international and domestic arbitration and mediation along with selected case summaries. We hope you will continue to find our articles stimulating and engaging and we look forward to seeing you at the Section's many meetings and events. Let us know about new practice developments or areas of interest.

Section News

We report on our Section's ongoing and well-received programs that include both training and innovation. We had programs on the use of ADR in Trusts and Estates disputes, and trainings in mediation and arbitration. In addition, we are actively monitoring and, when needed, responding to legislative developments that can impact arbitration and mediation. We report on one such response to a recently proposed bill, the Titone bill that would have attempted to impact the grounds for vacating arbitration awards in New York. The Section's prompt attention and comments resulted in changes to the bill and to ongoing involvement to monitor its progress and provide continued guidance to the legislature.

Ethics

This month's Ethical Compass column by Elayne Greenberg is the second in her series "Show Me the Money," and addresses whether neutrals ought to consider new ways of charging for their services and whether there are ethical impediments to doing so.

Calibrating Arbitration Presentations—Mock Arbitrations

In this issue, we have three articles that address a new phenomenon and another potential arena for neutrals, mock arbitrations. This is a collaboration with social scientists to improve advocates' understanding of arbitrator responses to arbitrated cases *before* they enter the arbitral conference room. Like focus groups, mock trials, and other jury studies of themes and presentations for trials, this entails a scientific effort to measure response and calibrate presentations to anticipated reactions by a panel like the panel that will actually arbitrate the matter. For arbitrators, acting as if the matter were before them, it presents a challenge and an opportunity to assist the undisclosed party to understand and improve the arbitral presentation. Edna Sussman addresses this from the arbitrator's perspective, Dr. Philip K. Anthony and Les J. Weinstein, Esq. write about the social science background, and Dr. Stephen Tuholski further discusses the kinds of benefits that can be derived.



Laura A. Kaster

Arbitration

In this Fall issue, we are fortunate to have what has become our traditional review of Supreme Court cases by Sherman Kahn. Although arbitration may not be at the center of politics as were some other decisions issued this year, it is a perennial favorite of the Court receiving more close attention than many other areas of law. This year's arbitration decisions once again reaffirmed the Court's presumption in favor of arbitration, preemption, and reinforced the mandatory nature of the Federal Arbitration Act in requiring courts to order arbitration of arbitrable disputes even if that may result in inefficiencies.

We also have a report by Laurence Shore, Joe Zammit, and Amal Bouchenaki on the study of the New York City Bar Association that debunks the notion that New York's Second Circuit application of the manifest disregard standard makes it a hostile venue for international mediation. The study determined that manifest disregard has never been employed in an international matter and that it is a very limited doctrine, analogous to similar standards applicable to international disputes around the world.

Richard Hall and Matthias M. Pitkowitz address the need to tailor dispute resolution clauses to particular disputes that may be anticipated to arise in M&A Agreements and their conclusion that one might vary the mechanism even within a single agreement to make the resolu-

(continued on page 6)

Table of Contents

	Page
Message from the Chair..... (Rona G. Shamoon)	1
Message from the Co-Editors..... (Edna Sussman and Laura A. Kaster)	2
 Dispute Resolution Section News	
Bill That Would Negatively Impact Arbitration Tabled in the New York Assembly (John Wilkinson)	7
“The Basics of Mediating Trusts & Estates Disputes” (Leona Beane and Robert Steele)	7
Third Annual Commercial Mediation Training Generates a Fresh Crop of Commercial Mediators (Jennifer Peterson)	8
Second Annual Commercial Arbitration Training Attracts Wide Audience (Charles J. Moxley, Jr.)	8
 Ethics	
The Ethical Compass: Show Me the Money: Part Two Monetizing the “Value Added” of Attorneys Who Serve as Mediators and Arbitrators (Elayne E. Greenberg)	10
 Calibrating Arbitration Presentations—Mock Arbitration	
Improving Your Arbitration Presentation With a Mock Arbitration: Two Case Studies (Edna Sussman)	15
The Social Science Edge in Arbitration and Mediation (Dr. Philip K. Anthony and Les J. Weinstein, Esq.)	17
Mock Arbitrations: Getting the Most Value for Your Project..... (Stephen Tuholski, Ph.D.)	20
 Arbitration	
Arbitration at the Supreme Court (2011 to 2012 Term)..... (Sherman Kahn)	22
The New York City Bar Association’s International Commercial Disputes Committee Reports on the Manifest Disregard of Law Doctrine and International Arbitration in New York (Laurence Shore, Joe Zammit and Amal Bouchenaki)	26
Tailor-Made—Unique Dispute Resolution Clauses in M&A Agreements (Richard Hall and Matthias M. Pitkowitz)	29
Browsewrap Arbitration? Enforcing Arbitration Provisions in Online Terms of Service (Sherman Kahn and David Kiferbaum)	33
How Should New York Courts Apply the Federal Arbitration Act in Commercial Arbitration Cases: Does the Federal Act Wholly Displace the State Arbitration Statute or Does It Only Preempt New York State Provisions That Limit the Power of the Arbitrator? (William J.T. Brown)	37

(continued on page 4)

International

CIETAC Arbitration Rules 2012—Another Move Forward	39
(Yu Jianlong)	
Introduction to Arbitration in the People’s Republic of China	41
(Brenda Horrigan and Helen Tang)	
Anti-Suit Injunctions and Insurance Coverage	44
(Peter A. Halprin)	
The New U.S. Model BIT: “If Both Sides Are Angry With You, You Must Be Doing Something Right”	47
(Mark Kantor)	
The Revised Swiss Rules of International Arbitration	61
(Philipp Habegger)	
Where Does <i>Forum Non Conveniens</i> Fit in Enforcing Foreign Arbitral Awards?	64
(Marc Goldstein)	

Mediation

How German Judges Will Use Mediation Under the Recent German “Mediation Law”	68
(Julia Flockermann)	
Mediating the Multi-Cultural Fugue of Divorce Mediation	72
(Alla Roytberg)	
A Fact-Finding Process Might Be the Solution for Resolving Your Employment Dispute	75
(Jeffrey T. Zaino)	
From Mediation to Settlement and From Settlement to Final Offer Arbitration: A Case Study of MEDALOA in a Transnational Business Dispute Mediation	77
(Mordehai (Moti) Mironi)	
Mediation: A Tool for European Business People	81
(Fabienne van der Vleugel)	

Book Reviews

<i>Stories Mediators Tell</i> Eric R. Galton and Lela P. Love, Editors	83
(Reviewed by Stefan B. Kalina)	
<i>Arbitration of International Intellectual Property Disputes</i> Edited by Thomas D. Halket	84
(Reviewed by William H. Baker)	
<i>ADR Advocacy, Strategies and Practice for Intellectual Property Cases</i> Harrie Samaras, Editor	86
(Reviewed by Laura A. Kaster)	

Case Notes

Two Courts Address Sanctions for Seeking Judicial Relief from Arbitration <i>Enmon v. Prospect Capital Corp. and World Business Paradise, Inc. v. SunTrust Bank.</i>	88
(Julia Belagorudsky)	
Second Circuit Denial to Rehear Continues the Debate Over Arbitration Clauses With Class Action Waivers in Consumer Contracts	90
(Asari Aniagolu)	

one, do not blame this on lawyers; most of us would prefer to avoid frivolous or unnecessary litigation, even when we have a deep-pocket client who is willing to bear the freight. I recently met a young lawyer from upstate who, after successfully practicing matrimonial law for ten years, was desperate to become a matrimonial mediator so she could help parties to compromise and conserve their assets rather than battling until nothing was left like Michael Douglas and Kathleen Turner in *War of the Roses*. Through my work in this Section I have come to believe that for those in our profession it is not enough to simply throw up our hands and say, "Not my responsibility." We as lawyers do both the public and our profession a service when we seek out, develop and educate ourselves about methods for more efficiently and effectively resolving disputes.

Ironically, the planets are currently perfectly aligned for a shift towards alternative forms of dispute resolution. Drastic funding cuts in many courts have left litigants (many of whom cannot afford to wait from either a financial or business perspective) years away from a trial date. The courts, too, are searching for methods of promoting early case resolution in order to whittle down their overcrowded dockets. So it is time for all of us interested in ADR to step up to the microphone and let ourselves be heard. In this endeavor, the officers and committee chairs of our Section have set a very high bar.

In March, our Chair Emeritus, Simeon Baum, and Stephen Hochman once again mesmerized participants with their third annual three-day Mediation Training Program at Fordham. In May, Leona Beane put together and ran a highly successful a program with 150 attendees titled "The Basics of Mediating Trusts & Estates Disputes," designed to educate the Trusts and Estates bar about mediation, an uncommon dispute resolution technique in that practice area. In July, our immediate past chair, Charlie Moxley, along with former Section Chair Edna Sussman and Lea Haber Kuck, put on an amazingly comprehensive three-day arbitrator training program. Meeting Chairs Irene Warshauer and Dan Kolb, along with our CLE Chairs Elizabeth Shampnoi and Gail Davis, have been hard at work putting together an exciting Fall Program to be held at Fordham Law School on October 15. The morning panels for that program, which include International Arbitration and Effective Techniques for Dealing with Neutrals, Counsel and Clients in ADR Proceedings, are being organized jointly with the NYSBA Commercial and Federal Litigation Section. After a networking lunch, afternoon panels will include the neuroscience of decision-making and the elimination of bias in neutral selection.

The Arbitration Committee, ably chaired by Abigail Pessen and Jim Rhodes, is planning more bi-monthly meetings at which speakers will lead discussions on topics of interest to the arbitration community. Under the leadership of Irene Warshauer and David Singer, our

Mediation Committee, having established an online Mediator Registry, is also working on mentoring programs for neutrals. Our Committee on ADR in the Courts, under the knowledgeable leadership of Jacqueline Silbermann and Steve Hochman, continues to coordinate and consult with various representatives involved in the New York Courts' ADR programs to work towards improving these programs and maximize their utilization. Led by Chuck Miller and Pam Esterman, our Committee on ADR within Government Agencies is engaged in similar work with federal, state and local agencies. Our Education Committee, ably led by Jackie Nolan Haley, is moving forward in its efforts to have ADR added as a subject on the Bar exam. Our recently formed Negotiation Committee, chaired by Jason Aylesworth and Norman Solovay, is planning an ambitious program of mock negotiation sessions between teams consisting of experienced ADR practitioners, newly admitted attorneys and pro-active law students in an effort to educate both new and seasoned lawyers on a variety of negotiation tactics and techniques. Members of our Section are currently working with the New York International Arbitration Center Committee, a Herculean effort spearheaded by Judge Judith Kaye and Edna Sussman that is finalizing plans for a bricks and mortar international arbitration center in New York City and seeking to promote New York as an international arbitration venue.

The Ethical Issues and Ethical Standards Committee, under Kathleen Scanlon and Barbara Mentz, has worked through publications and CLE programs to heighten the awareness of ethical issues among New York's mediators and arbitrators. Our Legislation Committee, led by Sherman Kahn and Richard Mattiaccio, continues to monitor State and Federal legislation relating to arbitration, mediation and collaborative law and has submitted numerous reports on pending bills or enacted legislation. Most recently we submitted a report on the revised version of the Titone bill (a flawed bill which would have provided for vacatur of certain arbitration awards), leading to withdrawal of the revised version of the bill from the New York State Assembly. Our Section (with the help of Website Committee Chair Leona Beane) has developed what is an increasingly useful website for members, and which includes many of the Section's reports and studies. With the aid of the State Bar staff, our Blog Master Committee, chaired by Geri Krauss, will be developing a DR Section Blog which will host items of interest to the ADR community. We are also developing a Speakers' Bureau, whereby members of the Section who are experienced in arbitration, mediation and collaborative law will speak to professional and civic groups regarding ADR-related subjects.

The Collaborative Law Committee (co-chair Harriette M. Steinberg) has explored the possible adoption of the Uniform Collaborative Law Act in New York State, begun work with area law schools in developing curricula on

collaborative practice, worked with local bar associations to promote collaborative practice in multiple substantive areas, and is planning related CLE programs. Under the leadership of the Diversity Committee, currently chaired by Dan Kolb and Alfreida Kenny, our Section has implemented an ambitious diversity plan to increase minority representation in the Section and the ADR field, which resulted in the Section receiving top honors as “Champion” in the NYSBA 2012 Diversity Challenge. And our incomparable biannual publication, the *New York Dispute Resolution Lawyer*, superlatively edited by Edna Sussman and Laura Kaster, has become a superb resource for current articles on emerging practices and developing law and issues in the field ADR.

Our Membership Committee, ably chaired by Rick Weil and Geraldine Reed Brown, is enthusiastically planning events and strategies to expand our membership both in New York City and upstate. As a Section we are

seeking local representatives in upstate regions to implement CLE programs and more fully integrate our upstate members and Marc Goldstein our Liaison and District Rep Coordination Committee Chair is planning an exciting CLE program in Buffalo this December. Our newly formed Law Students Committee, with the support and assistance of chair Asari Aniagolu and members Ross Kartez and Glen Parker, has big plans for another networking event and the further expansion of our student membership. The accomplishments of our Section are built on the enthusiasm, knowledge and energy of our members. As our Section expands we seek more members to step up to leadership positions. Please join us by signing up for committee membership on the NYSBA Website, contacting Beth Gould at BGOULD@NYSBA.ORG, or for those interested in taking on leadership positions, by contacting me directly at rona.shamoon@skadden.com.

Rona G. Shamoon

Message from the Co-Editors *(continued from page 2)*

tion mechanism fit the dispute. They decry the habits of leaving the dispute resolution process to “boilerplate.”

Sherman Kahn and David Kiferbaum address click wrap and browserwrap arbitration and jury waiver provisions in online transactions and how they have been and should be addressed by the courts to assure consent in this expanding area of commerce.

In the final offering on arbitration, William J.T. Brown discusses the interplay of New York substantive and arbitration law with Federal Arbitration Act preemption.

International

In this issue we discuss a variety of new international rules and models, including new CEITAC rules described by Yu Jianlong, Vice-Chairman and Secretary General of CIETAC, the revised Swiss Rules of International Arbitration detailed by Dr. Philipp Habegger, and the new U.S. model BIT, described and discussed by Mark Kantor. Brenda Horrigan and Helen Tang provide us with a general introduction to arbitration in the People’s Republic of China. Peter Halprin provides information on the consequences of United Kingdom insurers inserting requirements for London arbitration in their agreements—insureds may be subject to anti-suit injunctions. Finally, Marc Goldstein undertakes a very interesting analysis of the doctrine of *forum non conveniens* in the context of the New York Convention. His analysis of the Second Circuit’s decision in December 2011 in *Figueiredo Ferraz Consultoria E Engenharia de Projeto Ltda. v. Republic of Peru*, considers the compatibility of the decision with international law.

Mediation

We also have rich offerings about mediation. Judge Julia Flockermann describes the new German approach to judicial or court-based settlement and mediation. Alla

Roytberg explains the multicultural diversity faced by a Queens County mediator. Jeffrey T. Zaino explores a neutral fact-finding option in pre-dispute agreements where parties may be far apart on key factual assumptions about their employment dispute, whether an individual or collective dispute. Although this article addresses the employment context, it has potential resonance for many other situations and could be part of a step process. Mordehai Mironi explores another flexible process, mediation combined with last offer arbitration, MEDALOA, as actually applied in an international mediation. Fabienne van der Vleugel provides a visual for explaining commercial mediation to her European colleagues and business people who may be unfamiliar or confused about the process.

Book Reviews

Our reviewers this issue have previewed for you *Stories Mediators Tell*, edited by Eric R. Galton and Lela P. Love. In addition, we review two books that connect to ADR and IP disputes, *Arbitration of International Intellectual Property Disputes*, edited by Thomas D. Halket, and the very different and complementary compendium of ADR practice strategies in *ADR Advocacy, Strategies and Practice for Intellectual Property Cases*, edited by Harrie Samaras.

Case Notes

Our student editors and young lawyer contributors have provided two case studies. Julia Belagorudsky addresses two decisions that deal with sanctions for frivolously contesting arbitration-related matters and Asari Aniagolu addresses the Second Circuit’s continued debate over class action waivers.

Enjoy the issue.

Edna Sussman and Laura A. Kaster

Bill That Would Negatively Impact Arbitration Tabled in the New York Assembly

By John Wilkinson

Last year, the New York Assembly (but not the Senate) passed a bill providing for vacating an arbitration award “where an arbitrator has been affiliated in any way with any party to the arbitration, or any of its subsidiaries or affiliates; or where the arbitrator has a financial interest, directly or indirectly, in any party or in the outcome of the arbitration.”

Immediately on learning of the bill’s existence and that it had actually passed the Assembly, the Dispute Resolution Section (“DRS”) filed formal opposition to any further legislative action on the bill, arguing that (i) the word “affiliate” was hopelessly vague; (ii) the bill would lead to endless litigation; (iii) the bill is unnecessary since for 90 years, New York courts have been vacating arbitration awards where bias or partiality was shown; (iv) by adding a new ground for vacating awards, the bill would fan the criticism that arbitration is becoming too much like litigation; and (v) finally, the bill would be ill-received in the international community and would be a substantial setback to the very large efforts to attract international arbitration to New York.

Following broad distribution of its opposition to the bill in the Senate and Assembly, the DRS had conferences with the offices of the Senate and Assembly sponsors of the bill. In the end, these efforts bore fruit, and the bill was not pressed further last year.

On May 15, 2012, the Assembly re-introduced the bill with drastic amendments which eliminated some undesirable features of the earlier version and incorporated a number of other improvements. While the DRS appreciated the Assembly’s efforts to accommodate its concerns, the fact remained that the amended bill, if passed, would still be a very bad development for arbitration.

On June 7, 2012, the DRS filed formal opposition to the amended bill. This opposition was principally authored by Bill Brown and, among other things, pointed out that (i) the amended bill contained new and badly flawed definitions of “arbitration” and “neutral third party arbitrator,” which are critically important terms; (ii) the amended bill would void portions of agreements which provide for appointment of non-neutral arbitrators, without giving any indication of how replacement arbitrators would be selected; (iii) following disclosure of a possible bias by an arbitrator, the amended bill would permit parties to object on the basis of such bias at any time prior



to commencement of the arbitration hearing, i.e., it would permit expenditure of substantial time, effort and money on the pre-hearing phase of an arbitration, only to have it all thrown out by an objection to the arbitrator on the eve of the hearing; and (iv) the bill would impose disclosure requirements set forth in the Revised Uniform Arbitration Act (“RUAA”), when it might better have adopted the RUAA itself, which has long been recommended by the New York

State Bar Association.

Subsequent to the opposition by the DRS and others, the amended bill was removed from a committee agenda and on June 25, 2012, the legislature adjourned without passing the amended bill. This is good news, but is likely not the end of the matter.

It is anticipated that the amended bill will reappear in some form in the next legislative session. The primary concern of those sponsoring the bill appears to be that in situations of unequal bargaining power, New York law should protect the weaker party against unconscionable arbitration agreements that impose an arbitrator who is aligned in interest with or controlled by the stronger party. New York courts, however already offer protection in cases of coercion or overreaching to induce weaker parties to enter into such agreements. *See Matter of Siegel*, 40 N.Y.2d 687, 691 (1976) (Fuchsberg, J.). If the wish of the amended bill’s sponsors is to expand the present protection against unconscionability in some focused way in the context of arbitration, the DRS has expressed willingness to work with the legislature to achieve its objective through a narrower enactment that does not collaterally damage the structure of New York arbitration law.

* * *

“The Basics of Mediating Trusts & Estates Disputes”

By Leona Beane and Robert Steele

A CLE program, “The Basics of Mediating Trusts & Estates Disputes,” co-sponsored by the Dispute Resolution Section and the Trusts and Estates Law Section, was held on May 21, 2012 at Cardozo Law School. This is believed to be the first such program offered in New York State demonstrating the use of mediation in trusts and estates disputes. The program was co-chaired by Leona Beane, LBMediateADR@aol.com and Robert Steele, steele@whafh.com, both members of both Sections.

The program received wide attention—there were 149 people who registered. When the program was first announced, the NYSBA received requests from upstate

attorneys, particularly Robert Baldwin from Syracuse, who recognized the importance and significance of the program, and requested that the program be videotaped for future viewing by upstate and other attorneys who were not able to attend. The Dispute Resolution Section agreed to pay for the video webcasting, and thus the program will be webcast at different times over the next few months so that additional attorneys can view the program.

The program started with Prof. Lela Love (Cardozo Law School) explaining the challenges of mediating high conflict family disputes, and Daniel Weitz (statewide coordinator of ADR for the OCA) discussing and explaining cognitive and emotional barriers to resolution. The program then covered Different Mediation Programs and Models for use in Surrogate's Court litigation. There is currently only one such pilot program, Surrogate Kristin Booth Glen's program in New York County. Surrogate Glen, along with Richard Lutringer (chair of the pilot program), explained some provisions of the pilot program and how it has been working so far. The pilot program rules were included in the program's written materials.

The next portion of the program was demonstrations of mediation, simulating training role plays—the Estate of Marilyn Fisher—to provide demonstrations of mediation role plays involving a sister and brother in a probate dispute. The fact pattern was originally developed by Prof. Lela Love for use in her classes, and was expanded upon by Leona and Rob Steele to emphasize estate dispute issues; the role play contained some humorous additions. The role players were Leona Beane (as the daughter, Ann Fisher), Barbara Levitan, former chief court attorney, New York County Surrogate's Court (as attorney for Ann Fisher), Robert Steele (as the son, David Fisher), and Gary Freidman, former chair of the NYSBA Trusts and Estates Section (as attorney for David Fisher). Lela Love was mediator in the first role play. After a break, the role play continued with Dan Weitz as the mediator, who also demonstrated a caucus with each of the parties.

The program moderator thereafter requested everyone in the audience to gather in groups of three to five people to informally continue the mediation among themselves. This was an unusual format for a CLE, especially for the trusts and estates lawyers who are just learning about mediation and mediation techniques.

The program ended with questions and answers and comments. The success of the program indicated (as we were pretty sure) that there is a need for such programs, incorporating the benefits of mediation in trusts and estates disputes in the Surrogate's Court and for these disputes even before they are filed in court. The DR section hopes to be presenting more intermediate and advanced programs on this topic in the future.

* * *

Third Annual Commercial Mediation Training Generates a Fresh Crop of Commercial Mediators

By Jennifer Peterson

On March 13-15, 2012, the Dispute Resolution Section presented its third annual Commercial Mediation Training, held at Fordham Law School. Once again, past Section Chair Simeon H. Baum and Steven Hochman conducted the same training that they have given for over a decade for mediators in the Commercial Divisions of the New York Supreme Court. The program received Part 146 certification from the Office of Court Administration and satisfies 24 hours of the 40-hour training requirement for Court Commercial Division panels.

The course, as always, offered a highly interactive format, replete with role plays, exercises and opportunities for experimentation and exploration of mediator skills and the dynamics of mediation. In addition, Messrs. Baum and Hochman presented a PowerPoint-supported lecture and fostered lively discussion on the nature of mediation and its place in the dispute resolution spectrum, negotiation theory and skills, various stages of the mediation process, use of joint session or caucus, generating movement, impasse breaking, mediation ethics, and even tips on building a mediation practice.

The program, which drew nearly 70 participants, received rave reviews. Former Section Chair Charles Moxley kicked off the first day with an inspiring description of the potential of mediation and history of ADR and its role in the Courts. Dan Weitz, Deputy Director, Division of Court Operations and Coordinator, Office of ADR and Court Improvement Programs, and Kevin Egan, Chief Clerk for the Commercial Division, appeared at later sessions to elaborate on the workings of the Commercial Division ADR Panel. Dan also contributed greatly to the ethics section. The event's success depended on the efforts of Program Co-Chairs Evan Spelfogel and Sherman Kahn, and Jennifer Peterson of Resolve Mediation Services, Inc., with support from former Program Co-Chair Lisa Brogan. In addition, 18 experienced mediators contributed mightily to the training by facilitating the role plays and sharing their insights with the full assembly.

* * *

Second Annual Commercial Arbitration Training Attracts Wide Audience

By Charles J. Moxley, Jr.

The Dispute Resolution Section, in conjunction with the Benjamin N. Cardozo School of Law, presented its second annual Commercial Arbitration Training on July 16-18, 2012 at Cardozo. The training, which was directed to

arbitrators and litigators wanting to improve their skills in arbitration, covered all aspects of commercial arbitrations from the drafting of the dispute resolution clause through the final award and any court applications for confirmation or vacatur.

Organized by the Section's immediate past Chair, Charles J. Moxley, Jr., and co-directed by Mr. Moxley and former DR Section Chair Edna Sussman and Skadden partner Lea Haber Kuck, the training attracted an audience of over 80 participants from around the country and indeed the world, with participants coming from as far away as the Philippines, Spain and Russia.

Leading arbitrators, counsel, providers and academics participated as faculty members in the training, including Sandra K. Partridge, Vice President of the American Arbitration Association, Luis M. Martinez, Vice President of the AAA's International Centre for Dispute Resolution, Columbia Law Professor George A. Bermann, and Daniel M. Weitz, the head of the New York court system's ADR programs. Numerous active members of the Dispute Resolution Section also participated as faculty

members, including William J.T. Brown, Elayne F. Greenberg, Stephen A. Hochman, Sherman W. Kahn, Daniel F. Kolb, Richard L. Mattiaccio, Abigail Pessen, James M. Rhodes, Kathleen M. Scanlon, David C. Singer, Irene C. Warshauer, and John Wilkinson. Also appearing as faculty members were Oliver J. Armas of Chadbourne & Parke, S.C.; Arbitrator and Mediator John F. Byrne; Eric S. Kobrick, Chief Reinsurance Legal Officer at AIG, Deborah Masucci, Vice President of Chartis; Michael S. Oberman of Kramer Levin Naftalis & Frankel LLP; Arbitrator and Mediator James F. Stapleton, and St. John's law professor Nicholas R. Weiskopf.

The central focus of the training was on how arbitrators can conduct their cases in an expeditious, efficient and fair manner, so as to achieve arbitration's promise as a better alternative to litigation—and how arbitration counsel can assure that the arbitrators in their cases conduct the cases according to contemporary arbitration Best Practices, so that the cases deliver on arbitration's promise of efficiency and fairness.

LET YOUR VOICE BE HEARD!

Request for Submissions

If you have written an article you would like considered for publication in the *New York Dispute Resolution Lawyer* or have something you want to share in a letter to the editor, please send it to:

Edna Sussman

SussmanADR

20 Oak Lane

Scarsdale, NY 10583

esussman@sussmanadr.com

Laura A. Kaster

Laura A Kaster LLC

84 Heather Lane

Princeton, NJ 08540

laura.kaster@gmail.com

Articles and letters should be submitted in electronic document format (pdfs are not acceptable) and include contact and biographical information.

www.nysba.org/DisputeResolutionLawyer

THE ETHICAL COMPASS

Show Me the Money: Part Two

Monetizing the “Value Added” of Attorneys Who Serve as Mediators and Arbitrators

By Elayne E. Greenberg

Introduction

In the oft-told fable “The Emperor’s New Clothes,” the candid, uncensored observations of a young child that the Emperor’s “new clothes” weren’t clothes at all but actually the emperor’s nudity, freed the rest of the townspeople to finally acknowledge the jarring reality that their the emperor was naked. And so, “The Emperor’s New Clothes” has become a metaphor for having the courage to see things as they actually are, not for what we are incorrectly told they are. In Part One of this column, I began the discussion of how settlement-savvy lawyers might realistically use alternative fee paradigms instead of traditional hourly billing to more accurately and ethically monetize the true value of the settlement skills they bring to clients. Continuing this discussion about more realistic billing paradigms, in Part Two of this column, I discuss how lawyers who serve as mediators and arbitrators might more accurately and ethically monetize “the value added”¹ they bring to parties through creative fee structures, beyond traditional hourly or daily fees. To engage in this discussion, dispute resolution practitioners are encouraged to adopt a more realistic and nuanced perspective about what mediator and arbitrator impartiality actually means in the context of ethical billing paradigms and forgo our long-held, unattainable concept of mediator and arbitrator impartiality.²

Traditionally, mediators and arbitrators have primarily relied on hourly and daily billing, believing this type of billing is comfortably ensconced within the ethical contours of their ethical mandates as lawyers and dispute resolution professionals. Moreover, many have avoided contingency billing regimes for fear that contingency billings would ethically jeopardize their impartiality as mediators and arbitrators. However, as with “The Emperor’s New Clothes,” we all know whatever billing regime is used, the mediator and arbitrator has an economic interest in settling the case that may potentially influence, either explicitly or implicitly, mediator and arbitrator impartiality towards settlement. That is the reality of the business of dispute resolution.

Therefore, in order for us to even consider alternative billing regimes such as contingency billing that monetize the “value added” that mediators and arbitrators offer,



we need to revisit the long-held belief that impartiality is a fixed fulcrum that clearly defines impartial billing behavior and instead reconceptualize impartiality as a more dynamic standard that guides ethical practice. I will begin this column by introducing some alternative fee arrangements for arbitrators and mediators that help monetize the “value added” they bring to cases. Then, I will continue the discussion by identifying the relevant Rules of Professional Conduct and the ethical mandates of arbitrators and mediators that define the ethical contours of mediator and arbitrator ethical billing regimes. In Part Three, I explain the reason our dispute resolution community should reconceptualize impartiality as a dynamic ethical standard rather than an absolute. Finally, I will conclude with suggestions for the next steps.

Part One: Alternate Fee Paradigms to Monetize “Value Added”

Despite the fact that so many of us are enthusiastic about finding innovative fee structures that ethically monetize our “value added,” there is a paucity of information about the topic. As part of my preparation for writing this column, I posted an inquiry on Maria Volpe’s listserv, asking listserv members to share any creative fee structures that they used.³ Although my inquiry generated interest among listserv members who were eager to learn more about this topic, only a couple of neutrals volunteered that they had actually used any type of creative billing paradigms. Thus, I invite you to consider the fee paradigms introduced in this section as the beginning of an ongoing discussion that hopefully whets your appetite, and will serve as springboard for generating other viable fee structures as we go forward.

Scott Peppet, one of the few dispute resolution scholars who has addressed this topic, proposes three types⁴ of contingency fees for mediation where the fee would be dependent on some aspect of the outcome: success fees,⁵ percentage of cost-savings fee⁶ and percentage-of-value-created fee.⁷ As the name implies, in a success fee agreement, the mediator gets paid only if the case gets resolved.⁸ Those mediators who along with consenting parties opt for a percentage of cost-savings agree at the onset of the mediation that the parties will pay the mediator a voluntary bonus based on the percentage of legal fees and other expenses saved in addition to the mediator’s daily rate.⁹ Those mediators who contract with parties for a percentage-of-value-created fee are compensated for

the expanded value the mediator brings to the parties by creating additional business or economic value beyond the scope of the initial dispute.¹⁰

Peppet acknowledges that these types of contingency fee arrangements could influence the mediator's impartiality in the way the mediator controls the process and the outcome of the mediation.¹¹ However, Peppet asserts that the mediator can safeguard the integrity of the mediation process by incorporating such procedural safeguards as explaining the fee arrangement in writing pre-mediation, encouraging parties to consult with an attorney about the suitability of such fee arrangement as it applies to the particular parties, and mediator assurances that the fee arrangement will not favor one party. Moreover, rather than disadvantaging parties, these more flexible billing paradigms honor the right of the mediator and the parties to fashion a fee arrangement compatible with everyone's interests.¹² Of course, contingency fee arrangements may not be for everybody, but they should be an available option in the right circumstances.¹³

Kenneth R. Feinberg, our renowned colleague who has spearheaded such high profile mediations as the mediation of the September 11 Fund, boasts that he is indeed biased in favor of settlement and that, in part, is why he is retained by sophisticated clients.¹⁴ As a business decision, Mr. Feinberg seeks alternatives to hourly billing such as a success fee if there is a settlement. However, Mr. Feinberg acknowledges that such a type of fee arrangement could be problematic and inappropriate for unsophisticated clients.¹⁵

Another innovative billing regime suggested by one of our esteemed colleagues is a 50% discount from the rate agreed upon "if the dispute does not settle prior to the date that there is a final judicial determination of the case."¹⁶

Still another esteemed colleague from Maria Volpe's listserv has been actively exploring several innovative billing arrangements including getting paid according to "the percentage of money saved," having the parties he trusts pay the mediator based on "whatever you thought I was worth," and exchanging less fees for a glowing review on LinkedIn. All creative ways of monetizing the "value added."¹⁷

For arbitrators, I was not able to find anything on arbitrators "value added" beyond the traditional time-based, fixed-based and ad valorem method. However, I could conceive of the value in having a fee regime that would allow the arbitrator to get a premium for hearing and determining an arbitration within a pre-specified time. This would reward arbitrators for conducting and deciding arbitrations efficiently and promptly.

How do these innovative billing regimes comport with our ethical professional mandates?

Part Two: Ethical Parameters for Fee Paradigms

Of course, we are concerned about whether any of the suggested contingent fee paradigms fit within our ethical mandates concerning fees. Unfortunately, this is the juncture where a good idea hit an apparent ethical roadblock. Although variations of many of the suggested alternate fee paradigms would be ethically permissible for lawyers,¹⁸ the same suggested fee regimes would be ethically barred for lawyers serving as mediators and arbitrators, because such contingency fee arrangements are considered to impugn a neutral's impartiality. Ethical codes for arbitrators and mediators regarding contingency fee arrangements are disfavored, because it is presumed that such contingency fee arrangements provide a financial interest in the dispute resolution process that compromises a neutral's impartiality. Let's have a more focused understanding of the challenge that exists within the current ethical framework that guides the ethical billing behavior of neutrals.

Lawyers who serve as arbitrators and mediators are required to consider both the Rules of Professional Conduct and the relevant ethical codes for arbitrators and mediators when defining ethical billing behavior. The challenge is how to harmonize the different ethical codes. As provided in the Rules of Professional Conduct, lawyers are ethically permitted to use "value added" fee arrangements such as contingent fees under certain delineated circumstances. However, those lawyers who serve as arbitrators and / or mediators may be ethically barred from monetizing their "value added" by using contingency fee arrangements because the ethical codes of arbitrators and mediators prohibit contingency fee arrangements or any fee arrangement that impugns their impartiality as neutrals.

When figuring out the ethical bounds of permissible fee arrangements, lawyers must first consider their ethical mandates as lawyers. To recap what was discussed in Part One of this column, the New York Rules of Professional Conduct Rule 1.5 Fees and Division of Billing informs us that reasonableness¹⁹ and transparency²⁰ shape the ethical contours of any billing structure that incentivizes settlement. Specifically, Rule 1.5(a) provides that any fees charged must be reasonable.²¹ A fee is not reasonable, if "after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive."²² Relevant factors that determine the reasonableness of a fee include "the skill requisite to perform the legal service,"²³ "the amount involved and the results obtained,"²⁴ "the experience, reputation and ability of the lawyer or lawyers performing the services,"²⁵ and "whether the fee is fixed or contingent."²⁶ The concept of "the amount involved and the results obtained," mirrors the standard the U.S. Supreme Court articulates in determining the appropriate fees to be awarded to prevailing attorneys in a Title 42 U.S.C. § 1988.²⁷ Moreover, the Court guides that an award of a premium or enhanced award is

permitted “in cases of exceptional success” if the hourly rate multiplied by the actual number of hours worked is necessary to arrive at a reasonable attorney’s fee.²⁸

Our New York Rules of Professional Conduct also inform that outcome-based compensation or contingency fees are ethically permissible²⁹ except for criminal matters³⁰ and certain domestic relations matter.³¹ Interestingly, contingency fee arrangements are not considered to implicate the personal, financial or business conflict prohibitions contemplated in Rule 1.8 Current Clients: Specific Conflicts of Interest.³² Thus contingency fees are allowed with specific exceptions even though we know that in practice, contingency fee arrangements may at times create a conflict between the client and attorney’s interests. In fact, this tension becomes magnified when clients and attorneys have different risk preferences and different economic goals.

As with any agreed-upon billing regime, lawyers have an ethical obligation to fully explain the agreed upon billing regime to their client. Before representation begins or within a reasonable time thereafter, lawyers must communicate to lawyers “scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible,”³³ and “whether the fee is fixed or contingent.” Moreover, “in domestic relations matters, a lawyer shall provide a prospective client with a Statement of Client’s Rights and Responsibilities at the initial conference and prior to the signing of a written retainer agreement.”³⁴ If the representation is based on a contingent fee, then “the lawyer must provide the client with a writing stating the method by which the fee is to be determined...and any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon the conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.”³⁵

The ethical inquiry for the lawyer serving as the arbitrator and/or mediator does not stop here, but continues to the appropriate dispute resolution codes, and if appropriate, any relevant court rules. For the arbitrator, The Code of Ethics for Arbitrators in Commercial Disputes,³⁶ Canon VII, AN ARBITRATOR SHOULD ADHERE TO STANDARDS OF INTEGRITY AND FAIRNESS WHEN MAKING ARRANGEMENTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES, provides fee and billing guidance. According to the canon, arbitrators should preserve the integrity and fairness of the process in the following manner: prior to accepting appointment, arbitrators should establish, in writing, 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;”³⁷ if services are administered through an institution, the institution

should collect the fees; however, if self-administered, payments should be made in the presence of all parties (other than party-appointed arbitrators);³⁸ and “Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.”³⁹

Beyond this guidance about fees, several places in the code emphasize that impartiality must be preserved. For example, CANON I. AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS cautions that “after accepting appointment and while serving as an arbitration, 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.”⁴⁰ Again in Canon I, arbitrators are advised they should accept appointment only if they can serve impartially⁴¹ and independently from the parties.⁴²

For mediators, the Model Standards of Conduct explicitly address mediator billing in STANDARD VIII: FEES AND OTHER CHARGES.⁴³ First, a mediator shall provide to each party or their representative “true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.”⁴⁴ The mediator should base their fees on such relevant factors as “the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.”⁴⁵ “The mediators should provide the fee arrangement in writing unless the parties request otherwise.”⁴⁶

As in the Arbitrator Code, the Mediator Code continues to warn against fee arrangements that impair impartiality such as contingent fee arrangements. Specifically, Standard VIII B provides:

A mediation shall not charge fees in a manner that impairs mediator’s impartiality.

1. A mediator should not enter into a fee arrangement which is contingent upon the result of the mediation or amount of the settlement.
2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator’s ability to conduct a mediation in an impartial manner.

Therefore, in an ethically perfect world, lawyers who are arbitrators or mediators should eschew any fee arrangement that impugns their impartiality. Like the astute child in the fable of “The Emperor’s New Clothes,” we realize that impartiality is an unrealistic ideal. As ethical practitioners we continue to struggle with how to reconcile our desire to be ethical practitioners

and ethically monetize our value as arbitrators and mediators.

Part Three: Developing a More Realistic Conceptualization of Impartiality

We cannot ethically implement the innovative billing regimes such as the contingency fee models discussed above unless we endorse a broader definition of impartiality than is currently defined in our ethical codes for arbitrators and mediators.⁴⁷ The current public, utopian viewpoint put forth in the Ethical Codes about the impartiality of arbitrators and mediators does not comport with the more private reality of good practice. Of course in the nascent stage of the mediation and arbitration professions, a narrowly defined standard of such ethical tenets as “impartiality” were requisites to establishing the integrity of the process and defining the respective dispute resolution profession. However, as the dispute resolution field continues to advance, we have learned from both our significant experience and the groundbreaking scholarly research about decision-making that impartiality is not a fixed concept, but a more nuanced one that is highly context-specific. Moreover, if we continue to hold onto the concept of “impartiality” as it is publicly discussed, we risk hampering the advancement of the field and our ability to ethically monetize “the value added” of arbitrators and mediators. In order to adopt a more realistic view about impartiality, we need to confront several truths.

Truth number one is that all humans have explicit and implicit biases. Behavioral cognitivists such as Daniel Kahneman⁴⁸ and Dan Ariely⁴⁹ have developed increasing bodies of research that educate us about how heuristics contaminate our impartiality and influence our decision making. Thus, impartiality is actually an ideal like nirvana rather than an achievable goal. Moreover, it is not an absolute, attainable standard, but a dynamic that is defined by the context. A more realistic approach is for us to deal with our human biases, embrace our humanity, heighten our awareness of our biases and develop conscious strategies to constructively harness these biases in arbitration and mediation.

Truth number two is that the traditional hourly and daily fees customarily charged by mediators and arbitrators, just as any economic interest can be, and sometimes is, manipulated to promote the economic interests of the neutral. We all know of neutrals who extend the time they need to conduct a mediation or arbitration so that they can earn a larger fee. Therefore, any economic interest, be it hourly, daily or contingency fees potentially influences a neutral’s impartiality. Excluding contingency fees because they might impair a neutral’s impartiality does not address the real issue. Economic interests do impact, either overtly or covertly, a neutral’s behavior. I believe it is more realistic to discuss safeguards to ad-

dress this reality, rather than eliminate contingency fees as one option to ethically monetize the “value added” of arbitrators and mediators.

Truth number three is that in arbitration and mediation partiality is ubiquitous, not just in fee arrangements but in the shaping and execution of the dispute resolution process.⁵⁰ For example, arbitrators and mediators frequently voice their preferences about how they conduct their process, how they define their role and how they assess success. As arbitrators and mediators, awareness, humanness and incorporating prophylactic strategies that address how our actions implicate our impartiality are ongoing and necessary to maintain the integrity of the arbitration and mediation processes.

I suspect these three truths are self-evident to many practicing arbitrators and mediators and confirm the reality that many arbitrators and mediators experience in their professional lives.

Conclusion

The topic of ethically monetizing the “value added” of mediators and arbitrators highlights the need to responsibly heed our concerns in a way that allows us as a profession to advance, rather than become paralyzed. The lesson of “The Emperor’s New Clothes” reminds us of the value of having the courage to re-examine our stated reality and see things as they are. For me, an exciting part of this profession is the ongoing re-evaluation and evolution of ethical and effective dispute resolution practice. How fortunate to be part of such a dynamic profession that has matured to the point that it is ready to have this needed conversation about innovative billing regimes.

There may be those readers who are misconstruing the message of this column to be that the dispute resolution sky is falling and that I am advocating for biased mediators and arbitrators. Relax. The important message that should not be lost is that I am advocating for a more reality-based working definition of impartiality. A more realistic definition of impartiality will allow our dispute resolution field to advance and prudently consider ethical ways to incorporate fee regimes that consider the “value added” arbitrators and mediators bring to parties.

Even if we adopt a broader definition of impartiality, I, like many of you, have concerns about the misuse of “contingency fee” billing and am against its wholesale adoption. However, in select circumstances, with enhanced procedural safeguards in place, “contingency fee” billing could be a welcome option for mediators, arbitrators and informed, sophisticated parties. The neutral would be wise to include such procedural safeguards such as having the neutral present the idea to the parties prior to the commencement of services, reducing the terms of the fee arrangement to a writing, allowing the parties adequate time to consider the proposed ar-

rangement, encouraging the parties to consult with their lawyers and assuring that the fee arrangement does not favor one party.

As with many of my columns, I hope this conversation is just a beginning. Your experience and perspectives are a vital part of that conversation. I look forward to hearing from you, sharing perspectives and collaborating on the continued advancement of our profession.

Endnotes

1. Mediators and arbitrators each offer distinct “value added” to the dispute. For mediators, “value added” could possibly include enhancing communication between disputing parties, providing each party a greater clarity about the available options, creating expanded opportunities for future economic collaboration between involved parties, mending damaged relationships and resolving the dispute. For arbitrators, the “value added” could possibly include conducting a fair, expedited process and offering a well-reasoned resolution.
2. See, e.g., Scott R. Peppet, *Contactarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 Tex. L. Rev. 227 (2003).
3. Posting of Elayne E. Greenberg to nyc-dr@listserv.jjay.cuny.edu (July 10, 2012) (on file with author).
4. Even though Scott Peppet mentions the option of a percentage-of-settlement fee, that option is less likely to pass ethical muster. Peppet at 239.
5. *Id.* at 239.
6. *Id.* at 240.
7. *Id.*
8. *Id.* at 239.
9. *Id.* at 240.
10. *Id.*
11. *Id.* at 270.
12. *Id.* at 276.
13. *Id.* at 241.
14. Kenneth R. Feinberg, *Billing Reform Initiative*, 59 Alb. L. Rev. 963 (1996).
15. *Id.* at 963.
16. Email from Stephen A. Hochman, Esq., Mediator & Arbitrator, to Elayne E. Greenberg, Dir., Hugh L. Carey Center for Dispute Resolution at St. John’s University School of Law (Mar. 22, 2012 12:17 EST) (on file with author).
17. Email to Elayne E. Greenberg, Dir., Hugh L. Carey Center for Dispute Resolution at St. John’s University School of Law (July 10, 2012 13:33 EST) (on file with author).
18. See, e.g., Allison O. Van Laningham, *Ethical Issues for Alternative Fee Arrangements* (2011), available at <http://www.thefederation.org/documents/6.Ethical%20Issues%20for%20Alternative%20Fee.pdf>.
19. N.Y. Rules of Professional Conduct (22 NYCRR 1200.0) R. 1.5 (2009) (amended 2011).
20. *Id.* at R. 1.5(b), (c).
21. *Id.* at 1.5(a).
22. *Id.* at R. 1.5(a).
23. *Id.* at R. 1.5(a)(1).
24. *Id.* at R. 1.5(a)(4).
25. *Id.* at R. 1.5(a)(7).
26. *Id.* at R. 1.5(a)(8).
27. See *Hensley v. Eckerhart*, 46 U.S. 424 (1983); see also *Blum, Comm’r, N.Y. State Dep’t of Soc. Serv. v. Stenson*, 465 U.S. 886 (1984).
28. See *Blum*, 465 U.S. 886 at 898 (1984).
29. N.Y. Rules of Professional Conduct (22 NYCRR 1200.0) R. 1.5(c) (2009) (amended 2011).
30. *Id.* at R. 1.5(d)(1).
31. *Id.* at R. 1.5(d)(5).
32. *Id.* at R. 1.8(c) cmt. 4C.
33. *Id.* at R. 1.5(b).
34. *Id.* at R. 1.5(e).
35. *Id.* at R. 1.5(c).
36. The Code of Ethics for Arbitrators in Commercial Disputes (Am. Bar Ass’n House of Delegates & the Exec. Comm. of the Bd of Dirs. of the AAA 2004).
37. *Id.* at Canon VII B(1).
38. *Id.* at Canon VII B(2).
39. *Id.* at Canon VII B(3).
40. *Id.* at Canon I(C).
41. *Id.* at Canon I(B)(1).
42. *Id.* at Canon I(B)(2).
43. Model Standards of Conduct for Mediators (Am. Arbitration Ass’n, Am. Bar Ass’n & Ass’n for Conflict Resolution 2005).
44. *Id.* at VIII(A).
45. *Id.* at VIII(A)(1).
46. *Id.* at VIII(B)(2).
47. See, e.g., Peppet putting forth his ideas about why we need a more fluid concept of impartiality.
48. Daniel Kahneman, *Thinking Fast and Slow* (2011).
49. Dan Ariely, *Predictably Irrational, The Hidden Forces That Shape Our Decisions* (1st ed. 2008).
50. See, e.g., Leonard L. Riskin, *Decision-making in Mediation: The New Old Grid and the New New Grid*, 79 Notre Dame. L. Rev. 1 (2003).

Elayne E. Greenberg is the Assistant Dean for Dispute Resolution Programs, Professor of Legal Practice and Director of the Hugh L. Carey Center for Dispute Resolution at St. John’s University School of Law. She can be reached at greenbee@stjohns.edu. She is grateful for the assistance of Henry Huang (St. John’s ’13) in the formatting of this article.

Improving Your Arbitration Presentation With a Mock Arbitration: Two Case Studies

By Edna Sussman

“Who speaks to the instincts speaks to the deepest in mankind, and finds the readiest response.”

Amos Bronson Alcott, American Educator and Philosopher (1799-1888)

With the recent blitz of scholarly and popular works on the science of judgment and decision making,¹ attention has begun to focus on the decision making of arbitrators. Arbitrators are people and like all people have their own frames of reference, experiences and societal inputs that guide their thinking and their decision making processes. Indeed it is precisely because arbitrators are not all the same that many have argued that the party-appointed system for arbitrator selection is a *sine qua non* if arbitration is to prosper. While legal principles and precedents are an overlay that clearly influences final decision making by arbitrators, subconscious factors that inevitably influence every person also play a significant role. Thus a party's selection of the arbitrator most likely to come into the arbitration with unconscious predilections favorable to that party's position can be an important factor in maximizing the chances of winning. Similarly, counsel's framing of the dispute and the theme developed to tell the story to evoke a positive response from the arbitrators is known by all to be essential to a persuasive presentation.

The routine employment of jury consultants is a response to the importance of selection and messaging. However, the arbitration community is just beginning to explore how counsel can strategically respond to arbitrators' inherent frames of mind. These discussions and explorations have led those versed in the fields of psychology and arbitration to conclude that “the most useful scientific tool we have in preparing for an arbitration hearing is a mock arbitration panel study.”²

The mock arbitration will not suffer from what is known as the “good subject” response or from confirmation bias, unlike vetting with colleagues at the firm or with an arbitrator hired as a consultant to advise on procedure or strategy. Rather, independent arbitrators similar to those who will actually hear the case will evaluate themes and facts without knowing which party is presenting. These neutrals can provide a road map (with the aid of social scientist consultants) on such matters as how to refine or revise the theme developed to tell the story more sympathetically, which legal theories to emphasize, whether particular kinds of graphics would be helpful and what kind of expert explanations would be most useful. Recalibration of the case based on these insights should result in the most persuasive presentation to the real arbitrators. If social science tools are used early in the process to assess potential arbitrators, they can also serve to assist in the selection of arbitrators more likely to be receptive to the party's submissions.

The use of mock arbitrations to enhance the likelihood of successful outcomes in larger cases is likely to grow significantly in the coming years as those in the arbitration community become more familiar with the availability of these tools and their benefits. The globalization of commerce and the increased participation of arbitrators from many different cultures is likely to make such a process even more valuable as counsel seek tools to assess how best to persuade arbitrators with different backgrounds.

There are many different system designs for a mock arbitration process and each process must be crafted and tailored to the specifics of the case. I offer vignettes from my experience with mock arbitrations as examples of two system designs. Both were orchestrated by consultants well versed in developing appropriate protocols with years of experience employing these social science tools in other litigation contexts as well as increasingly in arbitration.

“The use of mock arbitrations...is likely to grow significantly...as those in the arbitration community become more familiar with the availability of these tools and their benefits.”

The Matching Surrogate Panel Model

The call came from an ADR consultant: can I serve as a surrogate arbitrator to participate in a one-day mock arbitration in Washington, D.C. in a multi-million dollar dispute? I was told that I was selected as a good match for one of the arbitrators in the real arbitration. Two others had also been chosen as good matches. We were not told who the real arbitrators were or what factors were considered in our selection. All of us had been suggested by one of the arbitral institutions as fitting the characteristics provided of the real arbitrators along with others who were reviewed by the consultant before our selection was made.

After signing a very stringent confidentiality agreement, the three of us were given materials to prepare. To control costs we were told to limit our review of the papers to 5 hours. We were also asked to respond to a short series of questions to gauge our initial reactions. The mock arbitration followed at a law firm's offices. We were not told which side of the dispute that law firm was representing. I was asked to chair the panel. Lengthy arguments by both sides were presented with power point presentations.

We were asked to hold our questions to the end. The room had a see-through wall on one side so that the consultant and others could observe the proceedings.

Following the argument, and without conversing, we were asked to respond to another set of written questions and then were offered the opportunity to ask counsel questions. Panel deliberation followed and was observed through the one-way see-through wall. We came to a consensus relatively quickly and counsel came in, debriefed us and sought reactions to various strategy options, including such fundamental questions as which legal theories to pursue and whether some should be dropped, whether the industry witnesses they were planning to use would be persuasive and how to deflect some troublesome facts. A lengthy productive dialogue between the surrogate arbitrators and counsel completed the day.

Subsequently the lawyers called me to tell me that the mock arbitration had been very helpful to them. There ensued a more traditional consultation process with counsel seeking guidance from me as an arbitrator but in this case as an arbitrator who had been selected by the ADR consultant as a match for one of the real arbitrators. I was asked to review the initial prehearing submissions, both the briefs and the very extensive fact and expert witness statements, so that I could advise them as to what I thought was most important to rebut and what to highlight in the reply papers. A consultation session followed to review my recommendations and to try to predict how the real arbitrators might react on specific issues. Subsequent consultation sessions were held to discuss how to present the evidence most persuasively, which witnesses to emphasize and in what order, how to allocate time in what was to be a chess clock arbitration, and other strategic and practical hearing considerations.

The Multiple Arbitrators Model

Another call came from an ADR consultant asking if I could serve as a mock arbitrator in a one-day session. This time I was to be one of about 40 arbitrators gathered from around the country to participate in the mock arbitration hearings. The case concerned a structured financial product with respect to which I gathered there was an expectation of many claims being brought. The confidentiality agreement, again one of the most stringent I had ever seen, required a commitment not to take any arbitrations subsequently involving that specific structured product.

Forty of us gathered in midtown Manhattan where we had breakfast and were presented as a group with a one-hour presentation on the basic facts of the case using facts as they related to a single fictional investor. We were not given any materials in advance. Unlike the first mock arbitration, it was pretty easy to guess that it was the company which sold the financial product that had brought us together.

We were divided into panels with 5 arbitrators on each panel and seated in 8 separate rooms, each with a

one way see through wall. Lawyers, we later learned from different firms, presented their arguments for the defense. We were permitted to ask questions but were asked not to limit them in order to allow time for the lawyers to present their arguments.

Panel deliberation followed, again observed through the one way see through wall. After consensus was reached, we were debriefed by in-house counsel for the respondent both as to our views of the merits of the case and various specific facts and arguments made by counsel.

We learned that the mock arbitrations were being used for several purposes: It was a beauty contest for 8 law firms competing for the business of defending the expected hundreds of claims. Each lawyer had independently developed his or her own approach to the defense. Performance and success at persuasion at the mock arbitration was to play a major role in the selection of counsel. The mock also served the more traditional purposes of identifying the most successful strategy and assisting in analyzing the settlement values that would be appropriate for the claims.

Conclusion

As we strive to maintain arbitration as a more streamlined process than litigation, the value of the case is an important consideration in determining whether embarking upon a mock arbitration process is indicated. However, with the growth of high value arbitrations in recent years, the additional expense incurred in a mock arbitration may well be justified in particular cases. We can expect that parties and counsel will increasingly avail themselves of this process for improving their odds of winning as information about the possibility of mock arbitrations and their utility becomes more widely known.

Endnotes

1. Recent best-selling books on the subject include Daniel Kahneman, *Thinking Fast and Slow* (Farrar Straus and Giroux 2011); Dan Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (Harper Perennial 2010); Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Penguin Books 2009).
2. Richard Waites & James Lawrence, *Psychological Dynamics in International Arbitration*, in *The Art of Advocacy in International Arbitration* 69, 118 (Doak Bishop & Edward Kehoe ed., Juris 2010).

Edna Sussman, www.sussmanADR.com, is a full-time independent arbitrator and mediator specializing in international and domestic business disputes and is the Distinguished ADR Practitioner in Residence at Fordham University School of Law. She serves on the arbitration and mediation panels of many of the leading dispute resolution institutions. She is a Vice-Chair of the New York International Arbitration Center, past chair of the NYSBA Dispute Resolution Section and the immediate past chair of the Arbitration Committees of the Dispute Resolution Section and the International Section of the American Bar Association.

The Social Science Edge in Arbitration and Mediation

By Dr. Philip K. Anthony and Les J. Weinstein, Esq.

The value added by jury consultants has long been recognized by the trial bar and has led to an explosion in the use of such assistance to maximize the chances of winning. While the tools and methodologies differ, dispute resolution consultants can bring their skills and experience to bear to help counsel identify surrogate arbitrators, design a mock process, assess their real arbitrators' likely reactions and help develop an optimally persuasive presentation of the case. Counsel who have employed such assistance in arbitrations have found the input most useful. We review here the growing field of domestic and international dispute resolution consulting.

The Use of Social Science Research in the Legal Arena

The disciplines of the social sciences have been successfully and consistently applied to the field of courtroom litigation for forty years, beginning most noticeably with the trial of the "Harrisburg Seven" in 1972, when for one of the first times, social scientists applied their craft to assist lawyers and litigants in studying and usefully applying juror behavior in a trial environment. The social scientists and trial lawyers asked themselves a few deceptively simple questions: How might juror attitudes and experiences from their own lives impact their views in this prominent trial? What elements of the trial facts are fairly well understood, what parts are misunderstood, and overall, what specific elements of the trial work in concert to shape, guide, and help form the thinking and evaluation of the trial and its correct outcome in the minds of jurors as the triers of fact?

The disputed issues and facts which are presented are often boiled down by jurors to those which best resonate and fit in with their personal life experiences. The task of counsel is to use that derived research information to either confirm or challenge those juror predispositions. Ultimately, this form of research and analysis was also applied equally effectively to bench trials where the trial judge, though steeped in the law, is in effect a jury of one as the trier of fact.

As it turned out, and as the reader may have personally experienced, the systematic study of the decisions of surrogate and actual jurors and those of trial judges, when analyzed for the purpose of understanding how they process information presented at trial, has been dramatically refined and improved over the years and can effectively enhance, sometimes dramatically, trial presentation strategy—often giving lawyers a convincing communications edge. Lawyers frequently report that they believe that such research was likely outcome determina-

tive. Post-trial interviews of actual jurors confirm the value of such research in laying down psychological anchors in the minds of decision makers. Often it is a testament to the power of words and concepts. As Mark Twain is reputed to have said, "*The difference between the right word and almost right word is the difference between lightning and a lightning bug.*"

At its core, what is it about the process that allows for success? There are several correct ways to analyze this question, but most fundamentally, people everywhere and across cultures generally make decisions in a relatively consistent manner by taking into account their own attitudes, principles, background, values, cultures, and experiences gained during a lifetime and applying them to evaluate a set of facts and in which there is a dispute between two or more parties. By systematically studying and observing such human behavior, it is now very often possible to discern a pattern by which people will reach decisions in particular disputes and to make reasonable educated assumptions about those decisions and how they may be altered by what is presented and how it is presented.

Arbitrators Are People Too!

Whether your case is being heard by a jury, a trial judge, an arbitrator, or is being mediated, people are people. Even "neutrals" striving to be fair minded will have a world view, a cultural and legal frame of reference, biases, prejudices, and predispositions like everyone else. The role of the dispute resolution consultant is to anticipate any adverse predispositions and to solidify views favoring the client. Fast-forward to the present, and it can be observed that fundamental social science concepts and techniques are now being applied to the dispute resolution world of both arbitration and mediation. After all, just as the decision making of jurors and trial judges can be studied and evaluated, so too can that of dispute resolution neutrals. The result may be beneficial to the party choosing to investigate and apply the social science findings to the arbitration tribunal—whether composed of three neutrals or single decision making arbitrator—or even a decision influencing mediator.

There are a number of ways this research exercise can be structured and conducted which are case specific and may be cost- and time-bound. Assistance may be given as early in the process as the selection or rejection of the actual neutrals. Counsel often complain that they have insufficient information about the neutrals they consider. Compounding this dearth of information is an absence of the application of the kind of social science analysis

of predispositions that lawyers have found so helpful in jury selection. In a large case, such extra assistance during the neutral selection process may be well worth the additional expense. After all, counsel generally seek an impartial and independent arbitrator but one that has a predisposition that is favorable to their side of the case. The dispute resolution consultant will work with the advocates to help identify likely predispositions and beliefs held by the neutral. Once the arbitrators are selected, there are a multitude of specific research techniques, but the most commonly followed methodology in an arbitration setting is to undertake what is sometimes called “mock” arbitration research.

The dispute resolution consultant recruits from the special community of experienced and case-appropriate surrogate neutrals, often from an already developed extensive database, one, three or more individuals who possess characteristics or background deemed to be most consistent with those of the actual or anticipated neutrals. By way of simple example, if one of the arbitrators already selected is a former law firm partner, one is a former judge and one an academic, each of a certain age and background with experience in specific relevant industries or special legal expertise, then surrogate neutrals are recruited with the same personal characteristics, business experience, educational background, skill set/qualifications in mind. While counsel may be tempted to try this on their own, it's impossible to do so without having access to the neutrals or the social science background and grounding in the rigorous methodology required to make the study statistically reliable.

Importantly, in order, for the study to be effective, it must be a “blind” study for the surrogate neutrals, meaning they are not specifically aware which side in the dispute has retained their services. Within the social science literature there exists a term of art known as “subject bias,” meaning if a subject (the surrogate neutral) knows the intent or sponsor of the study, he or she is likely to subconsciously or otherwise take that factor into account and filter responses and evaluation through that prism, resulting in a less than accurate collection of responses.¹ Mock presentations to test strategy with one's own colleagues at a firm, as many lawyers do, are likely to provide false positives and fail to provide the benefits equal to the matching of characteristics required and provided by those utilizing social science techniques.

It is essential that the design of the process be conducted in close harmony with the lawyers who will present the case. Many factors enter into structuring the research in addition to the surrogate neutrals themselves, including, for example, characteristics and presentation techniques of opposing counsel, the reputation of the parties, evidentiary presentation latitude, and the witnesses who will testify. If there are to be three arbitrators, the potential intra-panel dynamics are yet another

and sometimes potentially outcome determinative factor to evaluate. The research is case specific, both as to the surrogate arbitrator(s) selected, the materials (and sometimes witnesses) presented to them and the manner of presentation. The stakes involved, the length of the actual proceeding, the nature of the legal issues, the status and position of the parties all play a role in structuring the study. A study designed for a routine domestic arbitration before a single arbitrator will be designed differently from a cross-border or international arbitration between multinationals heard by arbitrators from several nations who bring their own cultural backgrounds to the proceeding.

Typically the surrogate arbitrators participate in a mock hearing. The mock arbitration may be conducted in many ways. How extensive the materials provided to the arbitrators in advance of the mock session varies depending on the complexity of the case and the budget. A mock hearing, generally truncated in length to reduce costs, follows before one, three or more arbitrators “sitting” alone or as members of a surrogate panel.

The output from such a research exercise usually takes the form of a report, detailing the specific individual reactions of the several surrogate neutrals as well as identifying the pattern and commonalities of response from all surrogate neutrals when they act as a panel. Lawyers tend to want to know if their evidence, concept of the case, and strategy were effective—rather than learning what evidence, argument, or strategy worked well. However, understanding the persuasiveness of the case as presented allows for modification of tactical or substantive presentation considerations for implementation at the tribunal, such as a change in emphasis or focus, better, more detailed demonstrative exhibits, the selection and use of experts and witnesses, and /or the introduction of a needed subject matter animated or filmed tutorial. Counsel will often learn through this process that there is a more efficient, clearer, and more convincing manner in which to position the issues in the dispute and how best to prepare or select witnesses and which documents to emphasize. This is particularly true where, as usual, there are presentation time constraints. In addition, there may be a valuable opportunity to “re-road test” a different approach to the case prior to the main event by using yet another surrogate panel to evaluate the changed strategy.

Mediators, Like Arbitrators, Are People Too!

Much the same may be said of the presentation in a mediation proceeding before a different kind of neutral who, while not having the power to decide, often has the power to persuade. In a mediation, counsel has a unique opportunity to structure the mediation statement and both the joint and caucus presentations—where there are few rules (other than confidentiality)—not only to the mediator but also, perhaps for the first time, to the opposing party and its counsel. The party presenting its case in a

mediation setting has the opportunity to not only make a positive impression on the opposing party of the strength of the client's position but to cause a mediator (often in a caucus setting) to veer from an initial "facilitative" mediation mode toward an "evaluative" position where he or she can, in effect, though neutral, become a proponent for one side or position or another, perhaps sometimes even seeking to avoid an impasse by making a mediator's proposal. While preparing for mediation or a med / arb using social science techniques will be somewhat different, similar principles and techniques will be applicable. With the rise of mediation as an often-preferred means for parties to resolve cases short of arbitration or trial, mediation research can be a valuable tool in the advocate's toolbox.

Conclusion

Litigators long ago learned the value of using consultants to help them apply the social sciences to court environments with both juries and judges to win cases. With increased focus on dispute resolution arising from trial costs, limited court budgets, slow trial processes, long appeal times, lack of confidentiality, and a global economy in which companies increasingly prefer arbitration or mediation and shy away from foreign court trial proceedings, the dispute resolution field is changing at an accelerated pace. Arbitration and mediation counsel, with increasing frequency, are today following with similarly useful processes. The application of social science

provides guidance as to how to most efficiently and productively present a contested case to the actual neutrals to gain a presentation edge and enhance the chances of winning in arbitration or successfully settling the dispute at mediation.

Endnote

1. Referred to as the "good subject" role or response—the tendency of experimental subjects to act according to what they think the experimenter wants—in *Experimental Psychology*, Donald H. McBurney, Wadsworth Publishing Company, 1983.

Dr. Philip K. Anthony is the CEO of DecisionQuest, the nation's leading trial and dispute resolution consulting firm. Over the past 30 years, DecisionQuest principals have been retained in over 18,000 high-risk engagements nationwide, and Dr. Anthony has personally worked on more than 1,300 matters in all 50 states.

Les J. Weinstein, Esq. is an AAA/ICDR, CPR, CIAdr and WIPO panel arbitrator and mediator and also the Director of DecisionQuest's Dispute Resolution Services.

Both Dr. Anthony and Mr. Weinstein may be reached at 310.618.9600 or via e-mail at panthony@decisionquest.com and lesweinstein@decisionquest.com, respectively.

NYSBA CD and DVD Recordings

Newly redesigned and expanded to offer you the most complete digital media package available in the market today!

Check out the new feature to our CD and DVD packages—an extra data disc containing that program's entire set of lectures (in mp3 format) and course materials (in pdf format) that you can:

- * copy and transfer to other devices (iphones, tablets, mp3 players and other computers and laptops)
- * upload to "cloud"-based file-sharing

The extra data disc now included in each package is in addition to the traditional CDs and DVDs with the program's presentations (playable in computers, laptops and CD/DVD players) you receive with the program.



Mock Arbitrations: Getting the Most Value for Your Project

By Stephen Tuholski, Ph.D.

Mock arbitrations, like mock trials, are useful tools for assessing and recalibrating litigation strategy. When conducted properly, the data from a mock arbitration project can significantly increase the chances of success at an arbitration proceeding. On the surface, conducting a mock arbitration appears to be a relatively straightforward process. Gather some arbitrators, present your case, and observe arbitrators as they discuss and reach decisions based on the evidence and arguments. In fact, an effective mock arbitration that provides strategic level insight and value that can be effectively leveraged during your arbitration proceedings must be based on sound scientific methodology. Failure to rely on sound scientific methodology will result in a potentially disastrous “garbage-in garbage-out” scenario in which the data used to develop strategic recommendations are neither reliable nor valid. The best case scenario in these situations is that clients waste a significant amount of money on a project that produced results that were not helpful, while the worst case scenario results in an attorney relying on those results, much to the detriment of his or her client. In situations like these, it’s better to not conduct a research project than to conduct a poorly designed project. In the following article, I describe how best to increase the value and utility of your mock arbitration project.

“Consider the question ‘at the end of this project, what do we need to know?’ and design the project...”

A typical mock arbitration involves many phases, including recruiting arbitrators for the project, organizing and delivering materials for the arbitrators to review in advance of the mock arbitration, and the mock arbitration event, which includes the presentation of all relevant party’s evidence and arguments, arbitrator discussions / deliberations, and a summary debriefing session with arbitrators. Before this process begins, the most important thing to do is to clearly define your goals for the research.

Goals and Expectations

More often than not, if you are considering a mock arbitration project, you are doing so because the potential monetary award is significant, and the facts and / or laws governing the matter are complex. Clearly, most arbitration matters either do not need to be tested in a mock arbitration, or even if there is a need, the cost-benefit analysis may not work in favor of doing a research project. As such, it’s likely that the types of matters that require a mock arbitration are those that would ultimately involve multiple days of argument from both sides during the actual arbitration hearing. Unless your budget is virtually

unlimited, it will be impossible to present specific levels of detail for every single argument and fact that you would present during a real arbitration at a research project. Although multiple day mock trials are fairly commonplace, it’s rare that a mock arbitration lasts more than a day or two, because of the concomitant arbitrator fees associated with a longer project.

With this in mind, the first question you should ask is “What do I want to accomplish with this project?” The answers to this question may range from testing very specific arguments, to gaining a better understanding of your client’s financial exposure, to gaining a better understanding of what a “win” would be at arbitration. There is often disagreement within a litigation team as to what the goal of mock arbitration should be. The best way to limit the scope and goals of the mock arbitration project is to work backwards. That is, consider the question “at the end of this project, what do we need to know?” and design the project so that you can generate the most reliable and valid answers to those questions.

A mock arbitration will be more valuable if you limit your scope to the most important or vulnerable aspects of your case and not try to present a week-long arbitration in a single research day. You will find more value in your mock arbitration experience if you present a few key pieces of evidence and argument very well, rather than attempting the shotgun approach of presenting a little bit of everything in a reasonably short time frame. In a typical one-day project, there may be five hours total for both party’s presentations, so that there is enough time for arbitrators to discuss and deliberate, as well as a chance to debrief the arbitrators. It’s important to remember that the value of the project stems from what the arbitrators have to say, and in a zero-sum time situation, the longer the attorneys use on their presentations, the less time there is for arbitrator feedback and data collection. More often than not, this process will leave arbitrators with their own questions, as they may recognize that certain evidence and arguments are missing, but it is better to work through these issues during a debriefing period than attempting to present everything in a short time frame.

In terms of expectations, the worst mistake you can make in a mock arbitration is trying to “win” the case. More important than “winning” your mock arbitration is learning where the warts are in your case, and learning where your adversary’s strength lies. As such, it’s critically important to make sure that *both* sides of the case are argued as effectively as possible. When arguing the other side of the case, put on your adversary’s best evidence and arguments, and present them with the same vigor as you would present your client’s position. During preparations for the mock arbitration, make sure both “sides” are com-

municating so that they end up presenting on the same or similar issues. If the Claimant attorney presents certain evidence that the Respondent attorney does not address, this can create dissonance and confusion with the arbitrators. Without hearing the best of both sides of an argument, arbitrators are unlikely to give proper feedback on that argument, and counsel can be left with dangerously invalid data and conclusions.

Oftentimes, the task of arguing the adversarial side of a case is put on an Associate at the firm or a more junior Partner, presumably because the lead attorney on the case wants to remain focused on her arguments. This is a mistake. Although it is often an uncomfortable proposition, it is more effective to have the lead attorney argue and present the adversarial side of the case. Doing so makes the attorneys more fully appreciate their adversary's facts and arguments, and often results in the kind of insights that they would not get if they didn't have to walk a mile in opposing counsel's shoes. More often than not, counsel indicate that the simple process of putting together their adversary's case leads to great insights that they otherwise may not have developed if they remained solely focused on their own case, a tangential but significant value of the mock arbitration process.

Witnesses and Graphics

Arbitrators will reach decisions not only based on their interpretation of the facts and law involved in the case, but also by their reactions to witnesses. For the purposes of a mock arbitration, there are three ways to present witness testimony: via reading their testimony into evidence from transcripts or in summary form, through the use of recorded video depositions, or by live witness testimony at the mock arbitration. Whenever possible, bring live witnesses to a mock arbitration and avoid reading in testimony. Although arbitrators are trained to be objective, it is unwise to dismiss the unconscious effects that occur when given the chance to observe a witness's body language even though by definition we are not aware of some of those effects.¹ It is infinitely better to identify a troubling witness (in terms of their body language and demeanor) during a mock arbitration project when there is time to work on their performance issues than at the actual arbitration when it is too late.

Similarly, a mock arbitration provides an excellent opportunity to test graphics that will be used at arbitration, particularly demonstratives that are developed for the purposes of explaining complex subject matter. Often we are easily impressed with our own attempts to represent complex ideas graphically because we have spent a lot of time with the facts, and as such it's possible to overestimate the utility of our graphics. Learning how mock arbitrators react to, and develop opinions of, graphic representations is another way that a mock arbitration allows us to course-correct litigation strategy.

Number of Arbitrators

A common question asked about mock arbitrations is "How many arbitrators should we use?," and the correct and often dissatisfying answer is, "It depends." Mock arbitrations can be conducted with as few as one arbitrator, and as many (in the author's experience) as twenty-five arbitrators. Although there is a natural desire to bring in as many arbitrators as possible, it's important to consider the quality of the arbitrators as much as the quantity. If the real arbitration panel has already been selected, it is valuable to recruit mock arbitrators with similar background experiences and demographics. For example, in a FINRA arbitration, if counsel knows that the actual panel will be comprised of a non-public and two public arbitrators with real estate and construction experience, the project would benefit from recruiting arbitrators with similar background experience.

While using a single arbitrator is likely to yield some valuable data, including more arbitrators significantly increases the utility of the data. A mock arbitration that is used to test and understand a single matter in a single geographical location may be well served with a panel of three arbitrators, while mock arbitrations that test issues that may be occurring in several jurisdictions are clearly better served with a more diverse sample of arbitrators and more panels that represent those distinct jurisdictions.

In an ideal world, a mock arbitration would have two or more panels of three arbitrators each, and the process of the mock arbitration would include providing the same background information to each panel and then breaking the panels out for different presentations that represent different approaches to the case. In this way, it's possible to test and analyze the efficacy of certain argumentative approaches in terms of relative and overall strategic value. One problem that is often overlooked in research is that if one wants to "test" an approach, the test should involve a comparison group. For example, if you believe that there are two fairly mutually exclusive approaches that you could take at the arbitration, one way to determine which is the better route is to present both at a mock arbitration, each to different panels. If only one approach is "tested," there are no relative data to compare that approach to.

Summary

Not all mock arbitrations are created equally. With the proper guidance and insight into the process, a mock arbitration provides an opportunity to test and adjust various arguments, witnesses, and graphics, which ultimately increases your chances of success during the real arbitration.

Endnote

1. Kahneman, D. (2011). *Thinking Fast and Slow*. Farrar, Straus and Giroux. New York.

Steve Tuholski, Ph.D. is the President of Tuholski Consulting, LLC and a Senior Consultant at Empirical Creative, LLC. He may be reached at steve@tuholskiconsulting.com, stuholski@empiricalcreative.com, or at 469-233-1009.

Arbitration at the Supreme Court (2011 to 2012 Term)

By Sherman Kahn

The U.S. Supreme Court took time out from its momentous work deciding the fate of the health care law and Arizona's immigration enforcement statute to issue one regular opinion and two *per curiam* opinions on arbitration during its 2011 term (commencing in October 2011 and extending until June 2012). All three of these opinions are discussed below.

A. *Compucredit Corp. v. Greenwood*

The Supreme Court's sole regular opinion on arbitration this year was rendered in *Compucredit v. Greenwood*, 132 S. Ct. 665 (2012). In *Compucredit*, the Supreme Court reversed a Ninth Circuit decision finding that statutory claims brought under the Credit Repair Organizations Act ("CROA"), 15 U.S.C. § 1679, *et seq* were non-arbitrable, finding that a no-waiver clause in CROA was not sufficiently specific to demonstrate an intent by Congress to make an exception to the Federal Arbitration Act ("FAA") presumption in favor of honoring arbitration agreements.¹

"Thus, according to the Court, had Congress intended to prohibit arbitration of claims under CROA, it would have done so more explicitly."

Compucredit arose out of a class action complaint filed by individuals who had been offered a Visa branded credit card marketed by Compucredit.² CROA is a statute that regulates the practices of certain credit repair organizations as defined by CROA that offer services designed to improve a consumer's credit or provide advice regarding how to improve the consumer's credit.³ The substantive provisions of CROA provide for certain requirements for contracts between covered organizations and consumers and for a consumer right to cancel.⁴ CROA provides a private right of action to enforce those provisions.⁵ The class action complaint alleged that Compucredit and other entities involved with issuing the relevant Visa card had violated CROA by allegedly making misleading representations that the card could be used to rebuild poor credit and by diluting the advertised credit limit through the assessment of poorly explained fees.⁶

The individual named plaintiffs in *Compucredit* had submitted credit card applications that included an arbitration clause.⁷ Based on that clause, Compucredit and its co-defendants moved to compel arbitration.⁸ The district court denied the motion to compel arbitration on the ground that Congress intended claims under CROA to be non-arbitrable and the Ninth Circuit affirmed.⁹ The Ninth

Circuit and the district court found CROA claims to be non-arbitrable based upon a disclosure provision and a non-waiver provision.¹⁰ The disclosure provision requires that all covered organizations provide consumers with a statement specifically included by Congress as part of the act including in relevant part the following:

You have a right to sue a credit repair organization that violates the Credit Repair Organization Act.¹¹

The non-waiver provision states:

Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person.¹²

The Ninth Circuit reasoned that because the disclosure provision provided consumers with a right to sue, which involves the right to bring an action in court and the non-waiver provision prohibits the waiver or any right of the consumer under CROA, the arbitration clause could not be enforced.¹³

The Supreme Court, in an opinion by Justice Scalia joined by Chief Justice Roberts and Justices Kennedy, Thomas, Breyer and Alito, reversed the Ninth Circuit on the ground that the premise that the CROA disclosure provision provided a consumer with a right to bring an action in court was wrong.¹⁴ The majority opinion reasoned that the disclosure requirement did not create any substantive rights but rather required only a disclosure of other rights and that therefore the discussion of the "right to sue" did not create a non-waivable right.¹⁵ Likewise, the Court held that CROA § 1679g, which creates a private right of action to enforce CROA, did not create a non-waivable rights.¹⁶ The opinion recited a variety of cases in which the Supreme Court had previously held statutory rights arbitrable.¹⁷ Although the Court acknowledged that none of those prior cases had concerned a statute having a non-waiver clause like the one in CROA, the court held that those cases demonstrate that the creation of a private right of action in a statute does not create a right to initial judicial enforcement.¹⁸ Thus, according to the Court, there was no statutory right to litigate in court in the first instance to be waived under CROA and the non-waiver clause did not apply.¹⁹

The majority opinion went on to dismiss the argument that, absent an unwaivable right to litigate in court, the required CROA disclosure would effectively require credit repair organizations to mislead consumers.²⁰ Ac-

cording to the Court, the reference to the right to sue in the disclosure was “a colloquial method of communicating to consumers that they have the legal right, enforceable in court, to recover damages from credit repair organizations that violate the CROA.”²¹ As such, the Court opined that most consumers would understand it as a general right to litigate without regard to whether access to court may be preceded by an arbitration proceeding.²²

Finally, the Supreme Court pointed out that at the time of CROA’s enactment, arbitration clauses were common in consumer agreements.²³ Thus, according to the Court, had Congress intended to prohibit arbitration of claims under CROA, it would have done so more explicitly.²⁴

“The Supreme Court’s holding in Cocchi that the emphatic federal policy in favor of arbitration requires courts to compel arbitration even where the result may be increased inefficiency is not, in itself, controversial, but nonetheless stands in strong contrast to the Supreme Court’s statements regarding the goals of the FAA in AT&T v. Concepcion just one term before.”

Justice Sotomayor submitted a concurring opinion, joined by Justice Kagan, that agreed that statutory claims are generally subject to valid arbitration agreements unless Congress evinces a contrary intent.²⁵ Justice Sotomayor continued that she believed that the argument that Congress had intended to bar arbitration through a combination of the private right of action, disclosure and non-waiver provisions in CROA was plausible, but that the opposite conclusion was equally plausible.²⁶ Thus, given that the arguments for and against arbitrability were in equipoise, the issue should be resolved in favor of arbitrability because the courts resolve doubts in favor of arbitrability.²⁷ The concurrence added, however, that it would not be necessary for Congress to explicitly disallow arbitration to convey its intent to do so, but that rather the intent of Congress can be determined from the history and purpose of the statute in question.²⁸

Justice Ginsburg dissented, stating that CROA’s notice provision (15 U.S.C. § 1679c(a)), the private right of action (15 U.S.C. § 1679g) and the waiver provision (15 U.S.C. § 1679f) act together to “indicate Congress’s intention to preclude mandatory, creditor-imposed, arbitration of CROA claims.”²⁹ The dissent points to references in the private right of action section to “action,” “class action” and “court” which combined with the disclosure requirement suggested to Justice Ginsburg that Congress intended to bar arbitration of claims under CROA.³⁰

B. KPMG LLP v. Cocchi

In a *per curiam* opinion issued early in the term, *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011), the Supreme Court vacated a judgment of the Florida Court of Appeal, Fourth District, which had refused to compel arbitration after a determination that two of four claims were non-arbitrable. *Cocchi* arose from claims brought from nineteen individuals and entities who had bought interests in limited partnerships invested with Bernard Madoff.³¹ The plaintiffs sued a variety of entities including KPMG, the auditing firm for the manager of the funds.³² The Supreme Court’s opinion concerned only the claims against KPMG.³³

The plaintiffs had alleged four causes of action against KPMG: negligent misrepresentation, violation of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”); professional malpractice; and aiding and abetting a breach of fiduciary duty.³⁴ KPMG moved to compel arbitration based on the audit services agreement it had with the fund manager.³⁵ The Florida Circuit Court denied the motion and the appellate court affirmed.³⁶ The appellate court’s reasoning was that as none of the plaintiffs had directly assented to the arbitration clause, the clause could only be enforced against them if their claims were derivative in that they arose from the services KPMG performed for the fund managers under the audit services agreement.³⁷ The Florida Court of Appeal concluded that both the negligent misrepresentation and the FDUTPA claims were direct rather than derivative and thus denied arbitration.³⁸

The Supreme Court observed that the Florida Court of Appeals had not made any determination about the other two claims for professional malpractice and aiding and abetting a breach of fiduciary duty.³⁹ The Supreme Court vacated the ruling because the FAA “leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.”⁴⁰ Thus, the Supreme Court continued, “when a complaint contains both arbitrable and nonarbitrable claims, the Act requires courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result will be the possibly inefficient maintenance of separate proceedings in different forums.”⁴¹

The Supreme Court’s holding in *Cocchi* that the emphatic federal policy in favor of arbitration requires courts to compel arbitration even where the result may be increased inefficiency is not, in itself, controversial, but nonetheless stands in strong contrast to the Supreme Court’s statements regarding the goals of the FAA in *AT&T Mobility LLC v. Concepcion* just one term before. The majority opinion in *Concepcion* emphasized efficiency as the primary goal of the FAA:

The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.⁴²

In *Cocchi*, the Supreme Court opined that efficiency must step aside for the FAA. It remains to be seen how the Supreme Court will reconcile these two different lines of reasoning.⁴³

“Interestingly, however, the Supreme Court in Marmet did not completely preclude the West Virginia Court’s alternative ruling that the arbitration clauses at issue were unconscionable under state law.”

C. *Marmet Healthcare Center, Inc. v. Brown*

In a second *per curiam* opinion in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), the Supreme Court vacated a decision of the Supreme Court of Appeals of West Virginia holding that as a matter of public policy in West Virginia all predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes were invalid.⁴⁴

The *Marmet* decision arose from three negligence and wrongful death suits against nursing homes in West Virginia in each of which a relative had signed a nursing home agreement containing an arbitration clause on behalf of the patient.⁴⁵ The West Virginia court held the arbitration clauses in the subject agreements unenforceable as a matter of public policy.⁴⁶ The West Virginia court considered whether the FAA preempted West Virginia public policy with respect to the arbitration clauses and concluded that it did not because the U.S. Supreme Court’s interpretation of the FAA was “tendentious” and “created from whole cloth.”⁴⁷ The West Virginia court thus independently determined that “Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce, particularly where that agreement involves a service that is a practical necessity for members of the public.”⁴⁸ The West Virginia court thus concluded that the FAA did not preempt West Virginia’s public policy against predispute arbitration agreements that apply to wrongful death or personal injury against nursing homes.⁴⁹

The Supreme Court disagreed, stating “[a]s this Court reaffirmed last Term ‘when state law prohibits outright the arbitration of a certain type of claim, the analysis is straightforward: The Conflicting rule is displaced by the FAA.’”⁵⁰ The Court’s *per curiam* opinion concludes that West Virginia’s preclusion of arbitration for nursing home related negligence claims is precisely the kind of categorical rule that is preempted by the FAA.⁵¹

Interestingly, however, the Supreme Court in *Marmet* did not completely preclude the West Virginia Court’s alternative ruling that the arbitration clauses at issue were unconscionable under state law.⁵² Rather, the Supreme Court remanded that issue back to the West Virginia court for determination of the whether the arbitration clauses are unconscionable under state common law principles not specific to arbitration without influence from the state court’s categorical rule.⁵³ On remand, the Supreme Court of Appeals of West Virginia accepted the Supreme Court’s ruling and overruled the section of its prior opinion to which the Supreme Court had objected.⁵⁴ Nonetheless, with the observation that “[a]greements to arbitrate must contain ‘at least a modicum of bilaterality’ to avoid unconscionability,” the West Virginia court remanded the three underlying actions to the trial court for further proceedings on whether the individual contracts should be held unconscionable under the circumstances.⁵⁵

Endnotes

1. *Compucredit Corp.*, 132 S. Ct. at 672-673.
2. *Id.* at 668.
3. *Id.*
4. 132 S. Ct. at 669.
5. 132 S. Ct. at 668.
6. *Id.* The dissent provides a more complete explanation of the plaintiffs’ allegations. 132 S. Ct. at 676-77.
7. 132 S. Ct. at 668.
8. *Id.*
9. *Id.*
10. 132 S. Ct. at 669.
11. *Id.* The Supreme Court’s opinion includes the entire required statement as an appendix. 132 S. Ct. at 673-74.
12. 132 S. Ct. at 669, citing 15 U.S.C. § 1679f(a).
13. *Id.*
14. 132 S. Ct. at 669-70.
15. 132 S. Ct. at 670.
16. *Id.*
17. 132 S. Ct. at 670-71, citing, *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) (enforcing arbitration agreement with respect to claim under Age Discrimination in Employment Act of 1967), *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332 (1987) (enforcing arbitration agreement with respect to claim under RICO); and *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 105 S. Ct. 3346 (1985) (enforcing arbitration agreement with respect to claim under Clayton Act).
18. 132 S. Ct. at 671.

19. *Id.*
20. *Id.*
21. 132 S. Ct. at 672.
22. *Id.*
23. *Id.*
24. 132 S. Ct. at 672-73.
25. 132 S. Ct. at 675.
26. *Id.*
27. *Id.*
28. *Id.*
29. 132 S. Ct. at 676-77.
30. *Id.*

31. 132 S. Ct. at 24.
32. *Id.*
33. *Id.*
34. *Id.*
35. 132 S. Ct. at 25.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

40. 132 S. Ct. at 25-26 (emphasis in the original), *quoting Dean Witter Reynolds Inc. v. Byrd*, 105 S.Ct. 1238, 1241 (1985). The Florida Court of Appeal has already acted upon the remand in *Cocchi*, directing the circuit court to compel arbitration of the two remaining claims if they remain in the case. *KPMG LLP v. Cocchi et al.*, 2012 Fla. App. LEXIS 6886 (2012). On remand the plaintiffs alleged that the issue of the two remaining claims was moot as those claims had been dismissed, but KPMG disputed whether the claims had, in fact, been completely dismissed. *Id.*

41. 132 S. Ct. at 25-26, *again quoting Dean Witter*, 105 S. Ct. at 1241.
42. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).
43. 132 S. Ct. at 25-26
44. 132 S. Ct. at 1202.
45. *Id.*
46. 132 S. Ct. at 1203.
47. *Id.*, *quoting Brown v. Genesis Healthcare Corp.*, No. 35494, 724 S.E. 2d 250 (W. Va. 2011).
48. *Id.*
49. 132 S. Ct. at 1203.
50. *Id.*, *quoting AT&T mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1747 (2011).
51. 132 S. Ct. at 1204.
52. *Id.*
53. *Id.*
54. *Brown v. Genesis Healthcare Corp.*, 729 S.E.2d 217, 225 (W. Va. 2012).
55. *Brown*, 729 S.E.2d at 228.

Sherman Kahn, skahn@mofo.com, is of-counsel with the New York office of Morrison & Foerster LLP and vice-chair of the Dispute Resolution Section of the New York State Bar Association.

The New York Dispute Resolution Lawyer is also available online



Go to www.nysba.org/DisputeResolutionLawyer to access:

- Past Issues of the *New York Dispute Resolution Lawyer**
- *New York Dispute Resolution Lawyer* Searchable Index
- Searchable articles from the *New York Dispute Resolution Lawyer* that include links to cites and statutes. This service is provided by Loislaw and is an exclusive Section member benefit*

*You must be a Dispute Resolution Section member and logged in to access.

Need password assistance? Visit our Web site at www.nysba.org/pwhelp. For questions or log-in help, call (518) 463-3200.

The New York City Bar Association's International Commercial Disputes Committee Reports on the Manifest Disregard of Law Doctrine and International Arbitration in New York

By Laurence Shore, Joe Zammit and Amal Bouchenaki

In the face of the frequently heard criticism that the existence of the “manifest disregard of law” doctrine makes New York a poor choice as a seat for international arbitrations, the International Commercial Disputes Committee of the New York City Bar Association sought to evaluate whether such a position is justified. In particular, the Committee undertook an empirical review of the extent to which the manifest disregard doctrine has actually been applied in the Second Circuit (as well as in other Circuits) to set aside international arbitration awards, and examined whether the doctrine in fact renders New York a less desirable venue than other major international arbitration fora such as Paris, London, Switzerland, and Hong Kong.

“[N]one of the arbitral awards vacated on that ground [of Manifest Disregard] was an international or Convention award.”

The Committee, in a report entitled “The Manifest Disregard Doctrine and International Arbitration in New York” issued in the fall of 2012, found that the doctrine has been applied exceedingly sparingly, especially in the context of international awards rendered in New York. In fact, since the Second Circuit began applying the doctrine in 1960, it appears from the Committee’s research that *none* of the arbitral awards vacated on that ground was an international or Convention award. The Committee also found that, regardless of the legal rubric used, courts in other leading international arbitral seats have shown a comparable willingness to provide relief from awards that clearly depart from basic notions of fairness. Consequently, the existence of the manifest disregard doctrine does not make New York unique in this respect.

Empirical review of the application by the federal courts in New York of the manifest disregard doctrine reveals: (i) that manifest disregard of the law is rarely raised as the sole ground for challenging an arbitral award; (ii) that review for manifest disregard does not amount to a review of substantive arbitral decisions for errors of law; and (iii) that litigants are rarely successful in invoking the doctrine in either federal or state court.

Moreover, almost fifty percent of all cases in which defendants successfully invoked manifest disregard involved domestic employment issues. The willingness of

courts to step into the employment arena and vacate or review the judgment of the arbitrators is not exceptional, given that many federal employment laws and regulations are mandatory. In other popular seats of arbitration, mandatory rules also carry heightened significance and serve as grounds for review of arbitral decisions, in particular when domestic labor law is concerned.

The limited actual impact of manifest disregard on international arbitration in New York is further reinforced by the very high threshold required to set aside an award on the ground of manifest disregard. Following the Supreme Court’s holding that parties cannot contractually expand the grounds for judicial review of an arbitral award in *Hall Street Associates, LLC v. Mattel*,¹ the Second Circuit “reconceptualiz[ed] manifest disregard as judicial gloss on the specific grounds for vacatur of arbitration awards under 9 U.S.C. § 10.”² In *Stolt-Nielsen*, the Second Circuit recognized that some of its previous pronouncements of the “manifest disregard” standard as an entirely separate ground for vacatur from the FAA Enumerated grounds were “undeniably inconsistent” with the *Hall Street* holding.³ Nonetheless, the Second Circuit later held that manifest disregard “remains a valid ground for vacating arbitration awards” as a gloss on the exclusive grounds for vacatur provided in the Federal Arbitration Act.⁴ However, since Second Circuit jurisprudence is highly deferential to arbitrators’ findings and reluctant to disturb the finality of arbitral awards, judicial review on manifest disregard grounds is “severely limited.”⁵ A party challenging an arbitration award on the basis of manifest disregard bears a “heavy burden.”⁶

In determining whether a petitioner has carried the heavy burden for invoking the doctrine, the Second Circuit has required parties challenging awards on manifest disregard grounds to show that: (i) “the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators [as] an arbitrator obviously cannot be said to disregard a law that is unclear or not clearly applicable[;]”⁷ (ii) “the law was in fact improperly applied, leading to an erroneous outcome[;]”⁸ and (iii) the arbitrator knew of a governing legal principle that was applicable to the facts of the dispute but refused to apply it or ignored it altogether.⁹ As one federal judge in New York observed, the manifest disregard standard in the Second Circuit is so difficult to satisfy that it “will be of little solace to those parties who, having willingly cho-

sen to submit to unarticulated arbitration, are mystified by the result.”¹⁰

Unsurprisingly, the other Circuit Courts of Appeal have also adapted the manifest disregard doctrine for cases arising under the FAA. Although the lack of clarity from the Supreme Court concerning the standard’s application and scope has led to a recent degree of wavering about the continuing validity of the doctrine, by 1999 most Circuits had recognized the doctrine as applicable to, at the least, domestic arbitration arising under the FAA.

Many of the arbitral cases in the other Circuits only tangentially identified manifest disregard of the law as a possible ground for vacatur without any further consideration, or the doctrine only arose in the context of a domestic labor dispute. Moreover, these Circuits did not vacate any international awards on manifest disregard grounds. Thus, the Second Circuit is not an exception in this regard.

Moreover, the United States, and certainly the Second Circuit, is not unusual when compared to the other leading arbitration-friendly jurisdictions. The Committee’s review shows that, like the manifest disregard doctrine, standards of substantive review under the 1996 English Arbitration Act allow English courts to set aside arbitral decisions that create a risk of manifest injustice. For example, the English doctrines of public policy and exceeding powers under section 68 of the Act—especially as colored by the conscious disregard doctrine—are comparable to manifest disregard in that they entail a substantive review of arbitral awards. As with the manifest disregard doctrine in the United States, these doctrines are applied extremely sparingly by the English courts. While it may be too soon to say that England embraces a “conscious disregard” doctrine per se, English courts’ review of arbitral awards under a variety of grounds for vacatur approaches the American doctrine of manifest disregard to a greater degree than other major arbitral seats.

The Committee found a similar result in studying its other common law subject, Hong Kong, which has adopted the UNCITRAL Model Law. Under Article 34(2), which provides the exclusive grounds for setting aside an international arbitral award, a party to an arbitration may move to set aside an award if the party can show that the matters decided by the award exceeded the scope of the arbitration agreement or were beyond the authority of the arbitrator. A court may also set aside an award if it finds that the award conflicts with State public policy. Though a narrow exception, this allows courts to set aside awards in extreme circumstances. Additionally, the requirement that enforcement of an award not be repugnant to conceptions of justice and fairness echoes the Second Circuit’s manifest disregard case law.

The grounds upon which an arbitral award may be challenged in the two civil law jurisdictions the Committee studied, Switzerland and France, are limited and in line with the statutory grounds provided in other arbitration-friendly fora, including the United States. Swiss courts have used provisions of the Swiss Private International Law Act, such as the “right to be heard” and public policy, to conduct substantive review of arbitral awards. The French Code of Civil Procedure provides five grounds pursuant to which an international arbitral award may be set aside. A review of the French decisions on challenges to arbitral awards since 2000 shows that, like the courts of the other jurisdictions analyzed here, French courts do not revisit the merits of international arbitral decisions, but do on occasion vacate awards where there has been a flagrant and concrete breach of French international public policy or a violation by the arbitrators of their mission. Over the years, French courts have identified key principles and mandatory rules of French (or European) law that have been “elevated” to the level of principles of French international public policy. In so doing, French courts have implemented what appears to be a safety valve comparable, in its objective, to manifest disregard of the law.

“Thus, any perception that New York is a less desirable seat because awards rendered there are more vulnerable to vacatur than those rendered in other major international venues is both inaccurate and unfair.”

Conclusion

The “Report on Manifest Disregard of the Law and International Arbitration in New York” takes no position on the value of the manifest disregard doctrine, or whether it should continue to apply as a gloss on the FAA grounds for vacatur of international arbitral awards rendered in New York. The Committee simply notes that the doctrine has been applied infrequently and in a conservative manner in the context of international arbitration, especially in the Second Circuit. Thus, any perception that New York is a less desirable seat because awards rendered there are more vulnerable to vacatur than those rendered in other major international venues is both inaccurate and unfair. As the Second Circuit has done by means of the manifest disregard doctrine, leading foreign arbitral seats have each provided safety valves for the vacatur of particularly egregious arbitral awards. The Committee concluded that these jurisdictions have impliedly or expressly recognized the need for substantive safety-valve mechanisms, but that, like the Second Circuit, they have also exercised restraint in their application.

Endnotes

1. 552 U.S. 576 (2008).
2. *T. Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339 (2d Cir. 2010) (quoting *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94-95 (2d Cir. 2008), *rev'd on other grounds*, 559 U.S. ___, 130 S. Ct. 1758 (2010)).
3. 548 F.3d 85, 94 (2d Cir. 2008).
4. *T. Co Metals*, 592 F.3d at 339 (quoting *Stolt-Nielsen*, 548 F.3d at 94).
5. *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383 (2d Cir. 2003) at 389.
6. *GMS Group, LLC v. Benderson*, 326 F.3d 75, 81 (2d Cir. 2003).
7. *Duferco*, 333 F.3d at 390 (citation omitted).
8. *Id.*
9. *Id.*
10. *Goldman Sachs Execution & Clearing, L.P. v. Official Unsecured Creditors' Comm. of Bayou Grp.*, No. 10 Civ. 5622 (JSR), 2010 WL 4877847, at *2 (S.D.N.Y. Nov. 30, 2010), judgment amended by *Goldman Sachs Execution & Clearing, L.P. v. The Official Unsecured*

Creditors' Committee of Bayou Group, LLC, No. 10 CIV. 5622 JSR, 2011 WL 2224629 (S.D.N.Y. May 31, 2011), affirmed by *Goldman Sachs Execution & Clearing, L.P. v. Official Unsecured Creditors' Committee of Bayou Group, LLC*, No. 10-5049-CV, __ F.App'x __, 2012 WL 2548927 (2d Cir. July 3, 2012).

Laurence Shore, lshore@gibsondunn.com, is the co-chair of Gibson Dunn's international arbitration practice. He is qualified in New York and England.

Joe Zammit, jzammit@fulbright.com, is a senior member of Fulbright & Jaworski's litigation department and of the international arbitration and ADR Practice Groups. He is qualified in New York.

Amal Bouchenaki, ABouchenaki@gibsondunn.com, is an of counsel attorney with the law firm of Gibson Dunn in New York. She is qualified in France and California.

Are you feeling overwhelmed?

The New York State Bar Association's Lawyer Assistance Program can help.

We understand the competition, constant stress, and high expectations you face as a lawyer, judge or law student. Sometimes the most difficult trials happen outside the court. Unmanaged stress can lead to problems such as substance abuse and depression.

NYSBA's LAP offers free, confidential help. All LAP services are confidential and protected under section 499 of the Judiciary Law.

Call 1.800.255.0569

NEW YORK STATE BAR ASSOCIATION
LAWYER ASSISTANCE PROGRAM



Tailor-Made—Unique Dispute Resolution Clauses in M&A Agreements

By Richard Hall and Matthias M. Pitkowitz

I. Introduction

Some of the largest and most heavily negotiated M&A agreements sometimes, if not frequently, find their way into court. Curiously, during the negotiation of these agreements, comparatively little attention normally is paid to the mechanisms governing such disputes. The dispute resolution clause used in earlier deals—whatever its choice of judicial or arbitral forum—frequently remains untouched, or is only lightly negotiated.

Given the frequency of disputes, it is problematic for counsel not to consider their clients' interests in negotiating these dispute resolution clauses. It is also odd, given that M&A lawyers are very familiar with the idea of finely tuning each M&A agreement to achieve optimal outcomes. Because this is an issue at the border of corporate law and litigation, the overspecialization of counsel is likely one of the causes of the failure to consider these clauses in the M&A agreement. Another explanation may be inertia: why would anybody spend time on negotiating—what currently appear to be—boilerplate provisions, especially if a significant risk of error may be involved?

But not everyone is sitting tight. Parties have already discovered some value behind toying with dispute resolution provisions. For example, it is now standard to include accounting expert arbitration clauses governing disputes relating only to purchase price adjustments.¹ Similarly, some parties have carved out disputes over escrow and other provisions to be decided by an arbitral tribunal.² Additionally, experienced disputes practitioners, including those in international arbitration and litigation practices at major law firms, often advise their corporate colleagues on dispute resolution clauses in pending deals. But the idea has yet to catch on in the wider M&A community. This article will argue that the use of clearly delineated and innovatively structured dispute resolution mechanisms (DRMs) specifically tailored to address various types of likely disputes would more effectively resolve disputes between the parties.

II. One Size Does Not Fit All

An analysis of recent U.S. M&A agreements shows that the main area of focus for parties addressing dispute resolution in their agreements is to decide on the inclusion of a **choice of forum** clause (included in 80% of public deals and 73% of private deals), a **choice of law** clause (in 100% of deals; Delaware law in 55% of public deals and 22% of private deals), or an **arbitration clause** for the entire agreement (2% of public deals, 20% of private deals).³ The chosen DRM, be it litigation or arbitration, will generally apply to the entire agreement (other than to any purchase price adjustment dispute), without any

particular regard to the suitability of such mechanism for the substantive issue in dispute or the properties of the dispute itself. This assumes that the chosen DRM fits all shapes and sizes of disputes.

This, however, is unlikely to be an accurate or beneficial assumption. Disputes arising out of different clauses in the agreement will have different **characteristics**, which will likely be addressed with varying degrees of effectiveness by different DRMs. A tailor-made DRM seems needed. Arbitration may prove to be the better option for the resolution of more disputes that are currently sent to arbitration.

III. Tailoring DRMs

To overcome the one-size-fits-all-treatment, we encourage parties to take the following steps to more efficiently tailor the dispute resolution process to their needs. First, parties should **identify likely disputes** arising out of their M&A agreement and specific provisions therein and the characteristics of these likely disputes (*see* Section III.A. below). Second, parties should think about **suitable DRMs** to address each of the identified disputes (*see* Section III.B. below).

In the following, we look at some of the most frequent disputes arising in both public and private M&A transactions as well as the likely interests of each party in these disputes, with the goal of highlighting how certain issues could be more effectively addressed in the dispute resolution clause(s).

A. Most Likely Disputes and Their Characteristics

When seeking to identify likely disputes, parties should consider the following questions: What are the most likely remedies sought in the dispute? Is the client going to be the plaintiff or the defendant? Does the client want speedy resolution? What is nature of the claims? Below is an account of likely disputes for typical M&A transactions and potential implications for DRMs.

1. Public M&A

In public M&A transactions, disputes are most likely to relate to a failure to close the transaction or to the lack of compliance with deal protection provisions. In both instances the remedy is non-monetary. In disputes arising out of a party's **failure to close**, the likely plaintiff will be the target, seeking specific performance against a buyer allegedly suffering from "buyer's remorse." The plaintiff target will have an interest in having the dispute addressed with extreme speed—both to enforce the deal and to increase its leverage in negotiations that likely are running in parallel to the legal proceedings. Seventh-three

percent of U.S. public M&A agreements⁴ contain a *contractual* provision explicitly providing for the remedy of specific performance⁵ to force the buyer to close the transaction.⁶ Disputes will typically be fact specific.

The other likely dispute arising in public M&A is over a party's non-compliance with **deal protection** provisions. Deal protection provisions are designed to ensure that there are no interferences from unsolicited bidders. Typical deal protection provisions include "no-shop" provisions (preventing the target from soliciting interest of other prospective bidders), "no-talk" provisions (preventing the target from negotiating with other bidders once approached), termination provisions (permitting the target to terminate the acquisition agreement to pursue a superior proposal),⁷ a stock option to acquire a certain percentage of the target's stock,⁸ an option to acquire some of the target's most valuable assets for a steep discount if the agreement is terminated⁹ and a termination fee (typically between 3% and 5% of the target's market value). The acquiror will be the likely plaintiff in such disputes and both parties will want to resolve them very quickly. The remedy sought by the acquiror will be for injunctive relief or specific performance.

2. Private M&A

In private M&A transactions, disputes are most likely to arise in connection with purchase price adjustments (PPA) or earn-outs, post-closing non-compete or non-solicit claims, post-closing indemnity / representations and warranties claims or a failure to close.

Private M&A transactions often include a mechanism to adjust the purchase price after signing or, in the case of earn-outs, making payments contingent on post-closing performance, to account for changes in the acquired company's balance sheet or performance between signing and closing and thereby avoid giving the buyer or seller a windfall.¹⁰ In disputes over PPAs, the acquiror is the likely plaintiff, seeking to make adjustments to the balance sheet. In earn-out disputes, the seller will be the likely plaintiff. Disputes will likely be as to the correct application of accounting principles to relatively settled facts, which is why accountants are frequently involved in the resolution of these disputes. As noted above, it is quite customary for PPAs and earn-outs to have their own, separate DRM, with the accounting issues set aside for accountants and other issues sometimes already reserved for other DRMs.¹¹

Non-compete and **non-solicit** covenants restrict the seller from competing with the target or the acquired business and from soliciting employees and customers of the target company or the acquiror, respectively, for a certain period of time after closing in order to protect the underlying value of the transaction. The most likely plaintiff is the acquiror trying to enforce the covenant restrictions imposed on the seller. The plaintiff acquiror usually wants matters resolved with speed and the likely remedy will be non-monetary (preliminary injunction).

In disputes involving post-closing **indemnity provisions** or **representations and warranties**, the remedy sought by the plaintiff, namely the acquiror, will be for monetary damages due to breach of a representation or warranty, or the applicability of an indemnification provision, issues as to which an arbitrator is well suited.

A **failure to close** by the buyer will involve substantially similar issues as those discussed under Section II.A. above.

B. Finding a Suitable DRM

To identify suitable DRMs available to parties to resolve the disputes identified in the process described above, parties should consider the following:

- Most importantly, location of assets and need to nationally or internationally enforce decisions
- The need for an agile and speedy adjudication of the dispute
- Desire for speedy resolution of monetary disputes
- The need for precedent
- Benefits of confidentiality
- Involvement of third parties (shareholders, financing sources) that have key interests in the dispute
- Efficacy of grant of needed injunctive relief
- Ability to select adjudicator with knowledge of substantive law / expertise in certain area.

IV. Creating More Efficient Dispute Resolution Clauses

All the foregoing suggests that M&A lawyers should move beyond the simple "accounting expert for PPAs and court proceedings for everything else" to consider the introduction of several DRMs into the same agreement, including the greater use of arbitration, sending disputes arising out of different clauses or certain types of disputes to different decision-making bodies where the disputes likely to arise call for such delineation. To make sure that each of these DRMs can operate at its full intended scope and capacity, a few principles should be followed to ensure that multiple DRMs do not interfere with each other. Thus, each DRM should be **simple**, clearly **delineated** from others and create the right **incentives**. A "simple" DRM will be less likely to be misconstrued even if looked at by different decision-making bodies; "clear delineation" will help avoid disputes about the applicable DRM, reducing the risk of disagreement over which decision-making body should hear the case; a look at the "incentive structure" created by the DRM will help avoid unintended issues. Furthermore, parties should weigh the risks and efficiency implications associated with including several, individualized DRMs against those of a unitary dispute resolution clause in the agreement. Only if the rewards outweigh the risks should multiple DRMs be included in the M&A agreement.

A. A Bifurcated Dispute Resolution Clause (Pre-Closing versus Post-Closing)

One possible mechanism is to send all pre-closing disputes to a specified court (for example, the Delaware Chancery Court) and all post-closing disputes to an alternative forum. This bifurcated DRM would comply with all three DRM principles, with particular advantages when it comes to clear delineation.

Aggregating the information discussed above, **pre-closing** disputes are likely to have one or both parties seeking to resolve the dispute with extreme speed. Most likely, pre-closing disputes (failure to close, non-compliance with deal protection provisions) will be addressed through injunctive relief/specific performance, and rarely through damages. This article is not an adequate place to consider as a general matter the relative speed and reliability of court versus arbitration. Suffice it to say, however, that most U.S. M&A lawyers would—given reputation for speed, reliability and transparency—rather trust the courts and especially the Delaware Chancery Court in such cases. All things considered, it seems reasonable to allocate all pre-closing disputes to the courts.

Post-closing disputes (PPAs, non-compete or indemnity/breach of R&W), on the other hand, are more likely to be for monetary damages (in two out of three cases) and less likely to require injunctive relief. Structured properly, parties may benefit from sending these post-closing disputes to an alternative forum such as arbitration. Generally speaking, arbitration has many advantages, including, for example, confidentiality of proceedings or the award; ability to appoint expert arbitrators knowledgeable not only in the applicable law, but also in a particular industry or sector in which the signatories operate, who are familiar with the economics of the deal or even the nature of contract negotiations between parties in similar M&A transactions; ability to choose internationally neutral arbitrators, procedures and rules¹² (which may be particularly appealing to non-U.S. parties or U.S. parties who would otherwise be subjected to the jurisdiction of a foreign court); the ability to avoid creating legal precedent; and the ability to limit access to discovery, punitive damages as well as fees and expenses.

In addition, there may be advantages to **including an arbitration clause** even in a heavily arbitration-resistant area like **public M&A**, where an arbitration clause is currently included in only 2% of deals.¹³ Arbitration should be seriously considered in all transactions where cross border enforcement is likely because arbitration promises simplified **international enforcement** of the award. Once rendered, an “award will be directly enforceable by court action, both nationally and internationally.”¹⁴ International treaties governing the recognition and judicial enforcement of arbitral awards (such as the New York convention¹⁵) are widely accepted around the world, making enforcement faster and easier than that of court decisions, for the enforcement of which only few recipro-

cal treaties exist.¹⁶ All this may be especially beneficial in typical post-closing disputes.

B. Clause-by-Clause Allocation

Another model could be to assign disputes over specific clauses to specific DRMs, or specific clauses to one DRM and ‘everything else’ to the default DRM. This probably would create a greater issue of delineation, particularly if one considers the implications of counterclaims. We note, however, that the frequently used allocation of “PPAs to accountant-arbitrators, everything else to court” largely follows this model, and the history of disputes over “who should decide what” in this area is limited.¹⁷ The risk of such disputes can be reduced by clearly defining the scope of each DRM—with the possibility of introducing an overarching DRM covering only disputes relating to the scope of all other DRMs.

C. Split Remedy

Yet another possible model would be to split remedies themselves into different DRMs. For example, equitable remedies could be addressed by the courts, remedies at law by an arbitral tribunal. This approach has the benefit that all requests for equitable remedies, whether pre- or post-closing, could be heard by speedy courts with enforcement powers (keeping in mind that the rules of many renowned arbitration institutions now provide for emergency arbitration, which can significantly speed up equitable relief in arbitration). This approach may, however, raise delineation issues because not all courts may trust the contractual stipulation by the parties that conventional damages will not be adequate (as Delaware courts readily do in requests for specific performance¹⁸), raising the question of whether the court would deny its own jurisdiction once it decides that it would want to award a remedy at law, or would find that it is itself competent deciding on this remedy. Similarly, delineation would suffer as it is unclear how courts and tribunals would react if a plaintiff sought both remedies simultaneously and if permanent rather than just interim relief is sought in court, pursuit of claims in both forums simultaneously may lead to inconsistent results. Parties would have to weigh the risk associated with this approach against the gains of having each remedy heard by the forum they prefer.

Although this third model at first sight seems unattractive because of the delineation question, we do note the implicit parallel with the very common selection of “Delaware courts” as the exclusive forum. From any perspective, the Delaware Court of Chancery, the Delaware State Superior Court and the Delaware Federal District Court are very different—all of which could be the competent forum under the general Delaware choice of forum clause. There is a history of forum litigation among parties to contracts with Delaware forum clauses based on the remedy sought.

D. Forum Shopping Clause

An M&A agreement could provide both a choice of forum clause as well as an arbitration clause. Disputing parties could be given the choice between either mechanism, but once one mechanism is selected—by one party filing a claim—the other mechanism would be automatically excluded (either perpetually or only for the specific claim brought—although the latter will likely cause conflicts with the principle of delineation).

Given the fairly wide variety of claims possible after closing, it may be efficient to give parties a choice between both mechanisms and let them select the most favorable judicial or arbitral forum for their dispute. The principles of delineation and proper incentivization might be negatively affected by (frivolous) forum-defining preemptive claims by the likely defendant. The arguably limited risk of such frivolous claims (and related enforcement issues outside of the U.S.) should be weighed against the benefits of having available a choice of several forums. While fairly complex, this structure—if finely tuned to the particular situation of the parties—could enable the plaintiff to choose the most efficient forum for a specific claim at the time a dispute arises.¹⁹

V. Conclusion

As the examples above indicate, the structure—and success—of most non-standard DRMs will depend heavily on the specific situation of the parties. It is arguably an onerous task to make a point for individualized dispute resolution clauses in this article by providing examples based on sweeping generalizations. Yet, guided by the principles outlined in this article, parties and their counsel will find considering alternatives to boilerplate language on a case-by-case basis to be a valuable exercise. This could potentially lead to a more careful selection of DRMs, a more thoughtful choice between court and arbitration and, consequently, to a more efficient dispute resolution process.

Endnotes

1. Such clauses are included in 25% of public M&A deals and in 89% of private M&A deals in the U.S. See Cogan, *Managing Disputes Through Contract: Evidence from M&A*, 2 Harv. Bus. L. Rev. 23 (forthcoming 2012).
2. See, for example, the arbitration clause in Section 9.07 of Merger Agreement dated as of December 21, 2010, among Teradata Corporation, Aprimo, Inc. and TDC Merger Sub, Inc.
3. Cogan, *Managing Disputes Through Contract: Evidence from M&A*, 2 Harv. Bus. L. Rev. 23 (forthcoming 2012).
4. *Id.*
5. See, for example: *United Rentals, Inc. v. Ram Holdings, Inc.*, 937 A.2d 810 (Del. Ch. 2007); *True North Communications Inc. v. Publicis, S.A.*, 711 A.2d 34, 44 *et seq.* (Del. Ch. 1997), *aff'd*, 705 A.2d 244 (Del. 1997).
6. Another, even if not quite as popular an option, is the selection of liquidated damages (termination fee) as a contractual remedy. Whether specific performance or damages is the preferred remedy in a contract should depend on the parties' expectation of the concerns of the relative importance of a tendency for underperformance arising from money damages versus increased renegotiation costs and potential for overperformance with

specific performance. See Yair Listokin, *The Empirical Case for Specific Performance: Evidence from the IBP-Tyson Litigation*, Yale Law School Legal Scholarship Repository 470 (2005).

7. Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 Fordham L. Rev. 1899, 1901 (2003).
8. Kimberly J. Burgess, *Gaining Perspective: Directors' Duties in the Context of No-Shop and No-Talk Provisions in Merger Agreements*, 2001 Colum. Bus. L. Rev. 431 (2001).
9. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 178 (Del. 1986).
10. David Herrington / Jerilin Buzzetta, *Purchase Price Accounting Arbitration: Why Courts Sometimes Find That Disputes About Purchase Price Are Not Subject To Purchase Price Arbitration*, 26-10 Mealey's International Arb. Rep. 16 (2011).
11. See discussion in *Viacom Int'l, Inc. v. Winshall*, Civ. No. 7149-CS (Del. Aug. 9, 2012) on whether the Resolution Accountants selected to resolve Earn-Out disputes were acting as arbitrators or experts, given that § 2.4(c) of the Merger Agreement specifically provided that they "shall be deemed to be acting as experts and not as arbitrators." The court found that the Resolution Accountants were acting as arbitrators as defined in the FAA, independent of nomenclature in the Merger Agreement ("I do not accept Viacom's argument that I should conclude that the Resolution Accountants had less authority because they did not go to law school").
12. Gary B. Born, *International Commercial Arbitration* 73 (Volume I, 2009).
13. Cogan, *Managing Disputes Through Contract: Evidence from M&A*, 2 Harv. Bus. L. Rev. 23 (forthcoming 2012).
14. Nigel Blackaby et al. in Redfern and Hunter on International Arbitration 1.92 (2009).
15. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.
16. The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters would, if successfully ratified by sufficient signatories, create an effective enforcement framework for court judgments. See also Nigel Blackaby et al. in Redfern and Hunter on International Arbitration 1.93 (2009). However, this treaty has not yet been ratified by many countries.
17. *But see Viacom Int'l, Inc. v. Winshall*, Civ. No. 7149-CS (Del. Aug. 9, 2012); *HDS Inv. Holding Inc. v. Home Depot, Inc.*, Not Reported in A.2d (2008).
18. Compare, for example, *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 965 A.2d 715 (2008).
19. Note that particular care should be taken if the choice is given to only one party to ensure enforceability of the arbitration option in the likely jurisdictions.

Richard Hall, RHall@cravath.com, is a partner at Cravath, Swaine & Moore LLP and the Practice Leader of the Firm's Mergers and Acquisitions practice. Mr. Hall's practice focuses on mergers and acquisitions, particularly in the international arena and natural resources sector, and corporate governance advice. He has also advised in the areas of unsolicited activity, takeover defense and in general corporate matters.

Dr. Matthias M. Pitkowitz, MPitkowitz@cravath.com, is a corporate associate at Cravath, Swaine & Moore LLP where he advises clients on a diverse range of corporate matters. Dr. Pitkowitz is the founder and an organizer of the annual Columbia Arbitration Day at Columbia Law School and is a member of the International Commercial Disputes Committee of the New York City Bar Association.

Browsewrap Arbitration? Enforcing Arbitration Provisions in Online Terms of Service

By Sherman Kahn and David Kiferbaum

Companies that provide services to consumers have often sought to reduce the risk of class action lawsuits by requiring that their customers agree to arbitrate any disputes. Such arbitration agreements may require customers to arbitrate on an individual basis only, with customers being obligated to waive any rights they might otherwise have to pursue claims through class actions. In recent years, many such arbitration provisions, particularly those that included class action waivers, had been held unenforceable under state law contract doctrine.¹ In April 2011, however, the U.S. Supreme Court held in *AT&T Mobility v. Concepcion* that the Federal Arbitration Act preempts most state law challenges to class action waivers, including challenges on grounds of unconscionability.² How broadly lower courts will interpret the *Concepcion* decision remains to be seen. For example, on February 1, 2012, the Second Circuit held in *In re American Express Merchants' Litigation* that the *AT&T* decision did not preclude invalidation of an arbitration waiver where the practical effect of enforcement would impede a plaintiff's ability to vindicate his or her federal statutory rights.³

Nonetheless, in the wake of *Concepcion*, many companies that provide online products or services to consumers are exploring whether to include an arbitration clause and class action waiver in their online Terms of Service. Moreover, it is increasingly common for business-to-business agreements to be documented based on agreements contained in online Terms of Service. Enforceability of online arbitration agreements is thus likely to be an increasingly important issue both in the commercial and consumer contexts.

Assessing the enforceability of arbitration provisions in online Terms of Service requires two further inquiries:

1. What online contract principles do courts use to determine whether a user of an online product or service has validly agreed to the provisions of an enforceable contract governing his or her use of such product or service?
2. How have courts applied these online contract principles in determining whether online agreements containing arbitration provisions and/or class action waivers may withstand state law challenges to their enforcement?

A. Online Contract Principles

In order to compel arbitration under Section 4 of the Federal Arbitration Act ("FAA"), the moving party "must make a prima facie showing that an agreement to arbitrate existed before the burden shifts to the party op-

posing arbitration to put the making of that agreement 'in issue.'"⁴ Having satisfied this showing, courts then "apply ordinary state-law principles that govern the formation of contracts" in deciding whether the agreement to arbitrate is enforceable.⁵

Courts have struggled to conform "ordinary state-law principles" to agreements in the digital age—for example, agreements presented to consumers over the Internet or through other digital means, or those which, by their terms, are accepted through the continued use of a product or service.⁶ Over time, courts began to distinguish between two common types of agreements: "clickwrap" agreements, which digitally present the applicable terms and require consumers to affirmatively indicate their assent, e.g., by checking a box or clicking a button stating "I agree" to such terms prior to permitting the use of a product or service; and "browsewrap" agreements, the terms of which are made available to users on the subject product or service's website, and which provide that users assent to the terms through the users' continued use of the product or service.⁷

"Courts have struggled to conform 'ordinary state-law principles' to agreements in the digital age."

New York courts have held that in either case, the same contract principles apply; to be an enforceable contract, consumers must have reasonable notice of the terms of the agreement, and must manifest assent to those terms. In a landmark 2002 ruling by then-Judge Sotomayor in *Specht v. Netscape Communications Corp.*, the Second Circuit denied Netscape's motion to compel arbitration under a browsewrap software license agreement, holding that users of Netscape's software did not have reasonable notice of the license agreement containing the agreement to arbitrate.⁸ As such, plaintiffs have had success in challenging the enforceability of similar browsewrap agreements; conversely, clickwrap agreements that clearly present their terms have more often been held to be enforceable.⁹

Applying these same principles, courts have enforced agreements against plaintiff consumers in scenarios that challenge the clickwrap/browsewrap distinction, such as the Facebook Terms of Use at issue in a January, 2012 case, *Fteja v. Facebook*.¹⁰ There, the Southern District of New York upheld the forum selection clause in Facebook's Terms of Use, which were "click accepted" during registration for the online social network by clicking a

“Sign Up” button that was immediately followed by hyperlinked text providing: “By clicking Sign Up, you are indicating that you have read and agree to the *Terms of Service*.”¹¹ Because the plaintiff user had been “informed of the consequences of his assenting click” by the hyperlinked text (which directed users to the applicable terms), the court deemed such notice “enough” to have resulted in a contract enforceable against Facebook’s users.¹² It is possible that courts will extend the reasoning of this decision to a provision providing for arbitration and there is no reason to think that under ordinary state law contract principles, the enforceability of an arbitration agreement should be treated any differently.

“Courts have enforced arbitration provisions contained in online Terms of Service in commercial transactions.”

B. Enforcing Online Arbitration Provisions

Courts have enforced arbitration provisions in online Terms of Service agreements where the party sought to be bound clearly assents to the terms and conditions of the agreement.

Courts have enforced arbitration provisions contained in online Terms of Service in commercial transactions. For example, in *Spartech CMD, LLC v. International Automotive Components*, the Eastern District of Michigan upheld an agreement to arbitrate in the online Terms and Conditions governing purchase orders by defendant for plaintiff’s chemical products.¹³ Because the defendant’s electronically submitted purchase orders contained text explicitly referencing the applicability of defendant’s online terms governing its purchases, including a URL linking to these terms, the court held that the plaintiff could not claim it lacked notice of the terms, and was bound by the agreement to arbitrate.¹⁴ However, such a determination still hinges on fundamental online contracting principles discussed above; other courts have declined to enforce online agreements governing business-to-business transactions where the online terms mentioned in transaction documents are not made readily accessible by reference to the URL containing the relevant terms.¹⁵

In the consumer context, courts apply more scrutiny, but have enforced arbitration agreements in online Terms of Service if there is evidence that the consumer consented to the arbitration agreement. In *Blau v. AT&T Mobility*, decided in December 2011, the plaintiff consumers, who were arguing that AT&T Mobility’s network was not sufficiently robust to provide the promised level of service, had specifically assented to AT&T Mobility’s Terms of Service, which included an arbitration clause.¹⁶ One of the plaintiffs was bound by an e-signature collected by AT&T Mobility at a retail store.¹⁷ He asserted that he was not bound because another user of his account had

provided the signature.¹⁸ The court rejected this argument because the user who signed was an authorized user of the plaintiff’s account.¹⁹ A second co-plaintiff had accepted the Terms of Service by pressing a button on his mobile phone’s keypad; the court held that this acceptance was valid even though the co-plaintiff could not recall whether he had seen the AT&T Mobility Terms of Service.²⁰

These principles were extended more explicitly into the online realm in *Vernon v. Qwest Communications Int’l, Inc.*, decided in March 2012, when the District of Colorado granted defendant Internet service provider Qwest’s motion to compel arbitration under arbitration and class action waiver provisions of its Subscriber Agreement with the plaintiff Internet service subscribers.²¹ The subscribers had enrolled in Qwest’s “Price for Life” Internet service by initially placing orders with Qwest over the phone or Internet.²² When ordering the service over the phone, subscribers were informed of the governing Subscriber Agreement and its availability online; when ordering over the Internet, subscribers were required to click-accept a Terms and Conditions referencing the Subscriber Agreement.²³ In either case, all subscribers were subsequently provided with necessary computer software which, during installation, required click-acceptance of terms referencing the Subscriber Agreement.²⁴ Furthermore, all subscribers received a “Welcome Letter” informing subscribers of the Subscriber Agreement and the arbitration provision thereunder.²⁵ Challenging the validity of a \$200 fee Qwest imposed under the Subscriber Agreement following plaintiffs’ early termination of the “Price for Life” Internet service, plaintiffs argued that (a) they did not assent to the Subscriber Agreement, and (b) the arbitration and class action waiver provisions were “unenforceable, violate[d] public policy, and are unconscionable.”²⁶ Citing *Blau* and *Fteja*, the court found that plaintiffs had ample notice of the existence of the Subscriber Agreement and its arbitration provision; by affirmatively click-accepting terms referencing the Subscriber Agreement, they could not disclaim assent to its terms.²⁷ Following *Concepcion*, the court rejected plaintiffs’ unconscionability arguments.²⁸

The enforceability of an arbitration provision becomes more problematic where there is a lack of evidence of affirmative assent to the agreement containing such provision. In *Kwan v. Clearwire Corp.*, decided in December 2011, the Western District of Washington denied the defendant’s motion to compel arbitration in a putative class action against Clearwire, an Internet service provider, in connection with allegedly poorly performing modems.²⁹ Clearwire sought to compel arbitration based on an arbitration provision in its online Terms of Service, to which the plaintiffs, Brown and Reasonover, claimed they had not agreed.³⁰ The court held that evidentiary hearings were required to determine whether Brown and Reasonover had actually accepted the Clearwire Terms

of Service, as Brown introduced evidence that it was the Clearwire technician who installed her modem who had click-accepted the Terms of Service,³¹ and because Clearwire could not produce a record of a click-acceptance for Reasonover, who testified that she had “abandoned” the Clearwire website without click-accepting the Terms of Service.³²

In New York, the Second Circuit recently affirmed the denial of a motion to compel arbitration in a case where the moving party failed to raise an applicable theory of online contracting at trial that could have established affirmative assent to an arbitration provision in the online agreement. In *Schnabel v. Trilegiant Corp.*, decided on September 7, 2012, the Court considered Trilegiant’s motion to compel arbitration in a putative class action against Trilegiant for allegedly deceptive billing practices associated with its enrollment of the plaintiffs in its “Great Fun” online discount service.³³ In the district court, Trilegiant claimed that the plaintiffs had accepted the arbitration provision of its Great Fun Membership Terms and Conditions because, following enrollment in Great Fun, each plaintiff received an email from Trilegiant that referenced the Terms but did not cancel membership in the service after receiving the email. The district court held that this email failed to give the plaintiffs sufficient notice or opportunity for affirmative assent sufficient for the creation of an enforceable agreement to arbitrate.³⁴

The Second Circuit’s decision affirmed the district court, but suggested that had Trilegiant argued differently, it may have prevailed. Trilegiant asserted on appeal that a hyperlink to its Terms and Conditions presented at the time of signup for the Great Fun service—a “hybrid” clickwrap / browsewrap mechanism factually similar to the form of notice and assent upheld in *Fteja*—provided sufficient notice and affirmative assent.³⁵ However, as Trilegiant had failed to raise this “possibly meritorious” theory in the district court, the Second Circuit refused to consider it on appeal.³⁶

C. Conclusions

What lessons can be drawn from these decisions? For an arbitration provision contained in an online Terms of Service agreement to be enforceable against a party, there should be clear consent by that party to be bound by the agreement. If the arbitration provision is contained in a passive “browsewrap” Terms of Service, requiring no affirmative consent from the party sought to be bound, whether business or consumer, this may be insufficient—absent other factors—to bind the party with respect to arbitration.

In addition, an online Terms of Service containing an arbitration provision should be presented to counterparties in a reasonably conspicuous manner before they click-accept the Terms of Service; the agreement should not be “submerged” within a series of links, placed on a

part of the screen not visible before the customer reaches the “I accept” button (though note, as indicated in *Fteja*, hyperlinked text indicating the consequences of click-acceptance may be sufficient to create a binding contract) or buried in small print at the footer of a long email message. In commercial transactions, online terms containing agreements to arbitrate that are incorporated into purchase orders or price quotes should be explicitly referenced and made readily available via URL.

“For an arbitration provision contained in an online Terms of Service agreement to be enforceable against a party, there should be clear consent by that party to be bound by the agreement.”

Service providers should maintain robust records documenting where customers, in particular if the customers are individual consumers, have been notified or have affirmatively agreed to the Terms of Service. For example, a record indicating where and when a user was provided notice of the Terms of Service Agreement may support a service provider’s argument that such user had notice of the Terms’ existence and thus could be deemed capable of having accepted those Terms. Moreover, a record of users’ actual “click-acceptances” of an online Terms of Service agreement incorporating an arbitration provision will substantially improve the likelihood that such agreement (and the incorporated arbitration provision) will be enforced against such users. A click-accept record that is linked to the user who actually click-accepted the agreement is best. Moreover, the Terms of Service agreement should make clear that it applies not only to the individual who originally click-accepted such agreement, but also to other users with the organization agreeing to the service or to whom the individual provides access to his or her account.

Endnotes

1. See, e.g., *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124 (2d Cir. 2010), vacated sub nom. *Affiliated Computer Servs., Inc. v. Fensterstock*, 131 S. Ct. 2989 (2011) (vacating and remanding judgment in light of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)); *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094 (Cal. Ct. App. 2002).
2. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).
3. *In re Am. Express Merchants’ Litig.*, 667 F.3d 204 (2d Cir. 2012), reh’g denied, 681 F.3d 139, 140 (2d Cir. 2012) (Pooler, J., concurring) (emphasizing that the holding is not governed by *Concepcion*, because “[w]hile *Concepcion* addresses state contract rights, *Amex III* deals with federal statutory rights—a significant distinction.”).
4. See 9 U.S.C. § 4; *Blau v. AT&T Mobility*, No. C 11-00541 CRB, 2012 U.S. Dist. LEXIS 217, at *9 (N.D. Cal. Jan. 3, 2012) (quoting *Hines v. Overstock.com, Inc.*, 380 F. App’x 22, 24 (2d Cir. 2010)).
5. *Vernon v. Qwest Commc’ns Int’l, Inc.*, No. 09-cv-01840-RBJ-CBS, 2012 U.S. Dist. LEXIS 31076, at *13 (D. Colo. Mar. 8, 2012) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

6. *Cf. Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) (“While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.”).
7. *See id.* at 429-30.
8. *Specht v. Netscape Commc’ns. Corp.*, 306 F.3d 17, 32 (2d Cir. 2002).
9. *See, e.g., Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362 (E.D.N.Y. 2009); *Register.com*, 356 F.3d at 429 (citing *Specht*, 150 F. Supp. 2d at 594); *but see, e.g., Southwest Airlines Co. v. BoardFirst, L.L.C.*, No. 3:06-CV-0891-B, 2007 U.S. Dist. LEXIS 96230, at *20-21 (N.D. Tex. Sept. 12, 2007) (enforcing browsewrap agreement due to party’s “actual knowledge” of the agreement’s terms).
10. *Fteja v. Facebook, Inc.*, 2012 U.S. Dist. LEXIS 12991 (S.D.N.Y. Jan. 24, 2012).
11. *Id.* at *12.
12. *Id.* at *27.
13. *Spartech CMD, LLC v. Int’l Auto. Components Grp. N. Am., Inc.*, No. 08-13234, 2009 U.S. Dist. LEXIS 13662, at *13-14 (E.D. Mich. Feb. 23, 2009).
14. *Id.*
15. *Cf., e.g., Leica Geosystems, Inc. v. L.W.S. Leasing, Inc.*, No. 10-cv-01813, 2012 U.S. Dist. LEXIS 75174, at *16-17 (D. Colo. May 31, 2012) (holding that plaintiff could not enforce its online terms against defendant, because, distinguishing this case from *Spartech*, plaintiff’s price quotes containing an explicit reference to its “Standard Terms and Conditions of Sale” at issue “do not explicitly define Leica’s Standard Terms nor do they provide a link to the internet address where Leasing could review these terms...party cannot agree to terms that are not included in or made available through the offer.”).
16. *Blau*, 2012 U.S. Dist. LEXIS 217, at *13-14.
17. *Id.* at *9.
18. *Id.* at *9-10.
19. *Id.* at *10-11.
20. *Id.* at *11-13.
21. *Vernon v. Qwest Commc’ns Int’l, Inc.*, No. 09-cv-01840-RBJ-CBS, 2012 U.S. Dist. LEXIS 31076 (D. Colo. Mar. 8, 2012).
22. *Id.* at *25-30.
23. *Id.* at *21-23.
24. *Id.* at *23.
25. *Id.* at *25.
26. *Id.* at *5.
27. *Id.* at *34-41.
28. *Id.* at *56-59.
29. *Kwan v. Clearwire Corp.*, No. C09-1392JLR, 2011 U.S. Dist. LEXIS 150145 (W.D. Wash. Dec. 28, 2011).
30. *Id.* at *1-5, 14.
31. *Id.* at *28-29.
32. *Id.* at *32-33.
33. *Schnabel v. Trilegiant Corp.*, No. 11-1311-CV, 2012 WL 3871366 (2d Cir. Sept. 7, 2012).
34. *Id.* at 13-14, 35 (“We do not think that an unsolicited email from an online consumer business puts recipients on inquiry notice of the terms enclosed in that email and those terms’ relationship to a service in which the recipients had already enrolled, and that a failure to act affirmatively to cancel the membership will, alone, constitute assent.”).
35. *Id.* at 41 n.18.
36. *Id.* at 40-43 (“The accessibility of the arbitration provision from a hyperlink on the enrollment screen, as appears to have been the case here, might have created a substantial question as to whether the provision was a part of a contract between the parties. The issue is not before us, however. Trilegiant forfeited the argument by not raising it in the district court.... Trilegiant’s inability to raise a possibly meritorious argument as to why it is contractually entitled to an arbitration on the plaintiffs [sic] claims is not, in our view, a ‘manifest injustice.’”)

Sherman Kahn, skahn@mofo.com, is of-counsel with the New York office of Morrison & Foerster LLP and vice-chair of the Dispute Resolution Section of the New York State Bar Association.

David Kiferbaum, dkiferbaum@mofo.com, is an associate with the New York office of Morrison & Foerster LLP.

How Should New York Courts Apply the Federal Arbitration Act in Commercial Arbitration Cases: Does the Federal Act Wholly Displace the State Arbitration Statute or Does It Only Preempt New York State Provisions That Limit the Power of the Arbitrator?

By William J.T. Brown

The New York Court of Appeals' latest arbitration case seems to deepen the mystery about how and when New York state courts are to apply the Federal Arbitration Act ("FAA") in place of New York State's arbitration statute, CPLR Article 75. *NJR Assoc. v. Tausend*, 202 NY Slip Op. 5120, June 27, 2012, was a dispute between a father and daughter involving a family limited partnership and Manhattan real estate. The applicable agreement provided that New York law should govern and all disputes be resolved through arbitration. When the daughter commenced court proceedings to challenge the partnership's disposition of property, the partnership successfully insisted that its claims against the daughter should be arbitrated. When she responded by asserting counterclaims in the arbitration, the partnership asked a court to enjoin arbitration of the counterclaims on grounds that they were stale and barred by the statute of limitations. She in turn asked the court to allow the arbitrator to decide whether the statute of limitations barred her counterclaims, as part of arbitral decision of the entire case.

The Appellate Division, First Department, held, 83 A.D.3d 596 (2011), that under New York's arbitration statute, the partnership, having insisted upon arbitration of its own claims, could not deny the daughter the right to submit her counterclaims to decision by the arbitrator, including a decision whether the statute of limitations barred those counterclaims, even though New York State arbitration law generally calls for initial submission of statute of limitations issues to a court prior to referral of any remaining issues to arbitration. CPLR 7502 (b), 7503.

The Court of Appeals granted leave to appeal and addressed the question whether the Federal Arbitration Act should have been applied to preempt New York law and require decision of the statute of limitations issues by the arbitrator. A six-judge majority of the Court held that it was unnecessary to decide whether New York state or federal arbitration law applied since, in light of the circumstances of the case, both laws required decision of the statute of limitations issues by the arbitrator, not by a court. The Court of Appeals majority acknowledged the prior statement by the Court in *Diamond Waterproofing Sys. Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 252 (2005), that "[t]he Federal Arbitration Act (9 USC §1 *et*

seq.) applies to any arbitration provision in any contract that affects interstate commerce," but held it was unnecessary to decide whether this was a case involving interstate commerce, since the result would be the same under either state or federal arbitration law.

In a strong separate opinion, Judge Robert Smith argued that New York state arbitration law would have given the partnership the right to have a judge decide whether the daughter's claims were time barred—that the trust's submission of its own claims to arbitration was not a waiver of its right to judicial decision of the timeliness of her counterclaims. But Judge Smith concurred with the majority in their result, emphasizing that the Court's prior cases had held that the FAA, with its insistence on decision by arbitrators rather than courts, must be applied by New York courts in all arbitration cases linked to interstate commerce, and that facts of record showed that the subject matter of the dispute would have been within the scope of Congress' regulatory power under the Interstate Commerce Clause. Although the dispute was between family members originally based in New York and involved Manhattan real estate, the family members had dispersed to different states and the real estate had been administered by a bank active throughout the world. Judge Smith cogently referred to recent controversy in the U.S. Supreme Court, stating that while there could be debate as to whether Congress could force consumers to buy broccoli or health insurance, there was no doubt that the transactions at issue in this case were within the ambit of Congress' regulatory power..

The case suggests that the Court of Appeals majority is reluctant to push to its logical extreme the Court's prior suggestion in *Diamond Waterproofing* that state courts must apply the Federal Arbitration Act,"9 USC §1 *et seq.*," to the exclusion of state arbitration law, in all cases linked to interstate commerce. If that were really true, in view of the great breadth of the federal commerce power, the Court of Appeals would be nullifying CPLR Article 75 in virtually all cases of commercial arbitration and would be ousting the New York state legislature of its authority to prescribe rules for commercial arbitration in New York state that supplement and do not conflict with the FAA. If that were true in New York why would it not also apply

in all the other states that have enacted versions of the Uniform Arbitration Act with its full panoply of rules that are usually taken as supplementing the bare bones of the FAA? To what purpose do bar groups lobby the State legislature for improvement to state arbitration law, such as adoption of the Revised Uniform Arbitration Act, if all is preempted? To the contrary, however, the U.S. Supreme Court itself has been very clear in at least four cases that the only section of the FAA that state courts *must* apply is section 2 of the Act, the section stipulating that agreements to arbitrate must be enforced in the context of interstate commerce. See, e.g., *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 268 (1995); *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 447 (2006). Such agreements must be enforced by state courts, to be sure, but federal law seems to leave states free to enforce them through their own procedures, so long as these procedures do not hinder or obstruct the enforcement of agreements to arbitrate.

An earlier case that seemed to illustrate the Court of Appeals' reluctance to push its adoption of federal arbitration law to an extreme is *Fiveco, Inc. v. Haber*, 11 N.Y. 3d 140 (2008), a case involving commerce in music videos and pinball machines, surely a quintessential subject of interstate commerce. The Court upheld application of the provision of New York state arbitration law, wholly absent from federal law, that allows a party to give its adversary notice of intent to arbitrate forcing the party so notified to sue within 20 days to enjoin arbitration, otherwise to acquiesce in the obligation to arbitrate. See CPLR §7503 (c). *Fiveco* suggests that the Court of Appeals sees a continuing role for state arbitration law alongside federal law in commercial arbitration.

It must also be recognized that on the narrow point of law at issue in *NJR Assoc. v. Tausend*, whether federal arbitration law preempts the New York rule requiring submission of statute of limitations issues to judges, it is well established that the New York rule is indeed preempted by section 2 of the Federal Arbitration Act in the context of interstate commerce unless the parties have unambiguously agreed to the New York rule. *In re Smith Barney, Harris Upham & Co., Inc. v. Luckie*, 85 N.Y.2d 193 (1995); see *Bechtel do Brasil Construcões v. UEG Araucaria Ltda.*, 638 F.3d 150 (2d Cir. 2011). But here there was no need to preempt the New York rule since, in the circumstances, New York law itself made the rule inapplicable. Where, as in this case, the parties to a New York-based but interstate commerce-linked transaction have agreed on application of New York law to their contract without specific adoption of New York arbitration law, that may not mean that the parties have submitted to the FAA *en*

bloc, to the exclusion of New York state law arbitration provisions.

"It must also be recognized that on the narrow point of law at issue in NJR Assoc. v. Tausend, whether federal arbitration law preempts the New York rule requiring submission of statute of limitations issues to judges, it is well established that the New York rule is indeed preempted by section 2 of the Federal Arbitration Act in the context of interstate commerce unless the parties have unambiguously agreed to the New York rule."

The U.S. Supreme Court stated in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S.52, 64 (1995), not that a New York choice of law clause excludes principles of New York arbitration law, but that it does not draw in "special [New York] rules limiting the power of arbitrators." *Id.* Echoing this characterization, the Court of Appeals has previously stated that a generic choice of New York law in an arbitration case "does not also pull in conflicting restrictions on the scope of authority of arbitrators and the competence of parties to contract for plenary alternative dispute resolution." *Smith Barney Shearson, Inc. v. Sacharow*, 91 N.Y. 2d 39, 49 (1997). Does not "pull in," but why should such a generic choice of New York law be taken as pushing out all application of New York arbitration rules in New York state courts, rules indeed that are not in conflict with but, as in *Fiveco*, may supplement federal law and further the federal policy favoring arbitration? It is respectfully suggested that the correct question in these cases in New York State courts may not be, does the Federal Arbitration Act or CPLR Art. 75 apply, as both may have some application. Rather the question may be, is application of the particular section of CPLR Art. 75 preempted in this case by application of section 2 of the FAA. The Court of Appeals majority in *NJR Assoc. v. Tausend* can be seen as giving some support to this approach.

William J.T. Brown is an independent attorney, arbitrator and mediator in New York City. Email: williamjtbrown@gmail.com. He is chair of the New York County Lawyers Arbitration and ADR Committee and has served as co-chair of the Legislation Committee of the Dispute Resolution Section of the New York State Bar Association. A member of the New York, Michigan and Paris bars, he is an advocate of rational reform of New York State's historic arbitration law.

CIETAC Arbitration Rules 2012—Another Move Forward

By Yu Jianlong

Established in April 1956, the China International Economic and Trade Arbitration Commission (CIETAC) is one of the longest standing and most important arbitration institutions not only in China but also in the rest of the world. It reflects the importance of ADR procedures in Asia and particularly in China. Over the years the case-load of CIETAC has been increasing very significantly every year since its inception:

Year	1985	1998	2003	2005	2009	2011
Number of Cases	37	678	709	979	1,482	1,435

The revised CIETAC arbitration rules (Rules 2012), approved by the China Chamber of International Commerce (CCOIC) earlier this year, came into effect from 1 May 2012. The 2012 Rules apply to all arbitration cases filed with CIETAC as of 1 May 2012, unless parties otherwise agree. This is the seventh revision of the CIETAC Rules since they were first published in 1956. The changes are designed to address the increasing complexity of contemporary arbitration proceedings, and to ensure the competitive edge of CIETAC among international arbitration organizations. While many of the amendments relate to clerical or language issues or intend to bring the provisions into an even more logical order, a number of the developments may have a significant impact on the conduct of CIETAC proceedings in the future.

“The revised CIETAC arbitration rules (Rules 2012), approved by the China Chamber of International Commerce (CCOIC) earlier this year, came into effect from 1 May 2012.”

Some of the major amendments include:

1. Greater clarity in terms of the administration of cases by CIETAC Headquarters or its sub-commissions

While previously subject to “the general arbitration clause” in the Rules 2005 where parties agree on arbitration in CIETAC but do not name a specific CIETAC branch, the claimant could choose whether the dispute went to CIETAC headquarters or its sub-commissions.¹ That provision has been changed to avoid uncertainty regarding cases’ destination and to prevent the parties from forum shopping. The provision also avoids the possibility of parties filing domestic cases with a CIETAC office

outside mainland China, which has been held to be forbidden by a judgment rendered by the Supreme People’s Court in 2010. Pursuant to the Rules 2012, a dispute will be administered by the Secretariat in Beijing Headquarters unless the arbitration clause explicitly provides that it be administered by one of the sub-commissions.²

2. Broader options for the arbitration language, place of arbitration and exchange of documents

Unless otherwise agreed by the parties, the compulsory use of Chinese as the language of the arbitration proceedings was one of the most debated concepts before CIETAC. As many of the arbitration clauses do not expressly choose a language, most foreign-related cases were tried in Chinese, which may cause some obstacles for foreign parties.

Giving regard to that debate and to international arbitration practice, CIETAC now provides an option allowing the parties to choose between Chinese and a foreign language.³ Any issue regarding language should be resolved by CIETAC, not the tribunal, because a decision on language often needs to be made at an early stage when the tribunal is yet to be formed.

CIETAC may determine places other than the domicile of its headquarters or sub-commissions giving regard to the circumstances of a case.⁴

In respect of document exchange, Art. 18 Rules 2012 confirms that all arbitration documents shall be submitted to and exchanged by the Secretariat of CIETAC. However, if the parties agree and the tribunal consents or the tribunal decides, the documents could be exchanged among the parties and the tribunal so as to improve efficiency. In such a case a copy of each document shall still be submitted to CIETAC.

3. Changes made to the appointment of arbitrators

CIETAC rules now provide the criteria that the Chairman will consider when appointing an arbitrator. Along with international arbitration practice issues like the applicable law, the place and language of arbitration and the nationality of the parties will be taken into account.⁵ The issue of nationality is a field of hot debate as the majority

of presiding arbitrators used to be from China. Under the new rules, there may more frequently be appointment of a presiding arbitrator from a third and foreign country in international arbitration cases at CIETAC.

Art. 27 par. 3 Rules 2012 brings along a substantial change in the appointing procedure in a multiple-party arbitration. The provision states that, if either the Claimant or the Respondent side fails to make an appointment within the time limit, the Chairman shall appoint all three arbitrators and determine which one of the three will act as presiding arbitrator.

4. Arbitral tribunal is empowered to grant interim measures in certain circumstances

Art. 21 Rules 2012 introduces the concept of interim measures. This provision mainly applies to arbitrations seated in jurisdictions where interim measures made by tribunals are supported by law. It entitles the tribunals to adopt interim measures by way of procedural orders or interlocutory awards. The tribunals may request appropriate security from the party requesting such interim measures. As this concept is new to CIETAC rules, it remains to be seen whether interim measures will play an important role in future CIETAC arbitrations, and whether and to what extent they will be made subject to providing security.

5. Consolidation of different cases

The Rules 2012 introduce the concept of consolidating different cases. However, it is unclear whether this provision will have any practical consequence because it is subject to several conditions, which are rather unlikely to occur (the approval of all parties, identity of all tribunal members).

6. Combination of conciliation with arbitration

As a legacy of Chinese legal tradition the Rules 2012 maintain and clarify the combination of conciliation with arbitration and authorize the arbitral tribunal to conciliate the dispute in a manner it considers appropriate.

Art. 45 par. 5 and 6 Rules 2012 introduce a new instrument, the “conciliation statement.” When a settlement is reached through conciliation, the parties may request an arbitral award or a conciliation statement. A conciliation statement is enforceable in China as provided by the Chinese Arbitration Law. The Rules 2012 also provide the parties with the possibility of having their cases conciliated by a third person other than the tribunal and CEITAC may assist.

7. Threshold for summary procedure increased

Under the old Rules, unless otherwise agreed by the parties, cases with a dispute amount under RMB 500,000 were subject to summary procedures, where a sole arbitrator determines the case and the time limit for rendering awards is 3 months from the constitution of arbitral tribunals. According to the Rules 2012, unless the parties otherwise agree, the threshold for summary procedure is raised to RMB 2,000,000, which will result in more cases being heard in an expedited manner.

“Among other changes, the revised rules provide ‘[b]roader options for the arbitration language, place of arbitration and exchange of documents.’”

If during the course of the arbitration the value of the case increases above RMB 2 million, there will be no automatic transition to a general procedure from the summary procedure, but the parties may make a joint application or the tribunal may change the matter to a general proceeding.⁶

Conclusion

It is safe to say that another big move forward has been achieved in CIETAC Rules 2012. The Rules are streamlined, clearer and more consistent. At the same time, they introduce some new concepts of international arbitration practice. It is our hope that the Rules 2012 will better adapt to the needs of arbitration users, and we will always provide fair and efficient services to parties at home and abroad.

Endnotes

1. Art. 2 par. 8, Rules 2005.
2. Art. 2 par. 6, Rules 2012.
3. Art. 71 par. 1, Rules 2012.
4. Art. 7 par. 2, Rules 2012.
5. Art. 28, Rules 2012.
6. Art. 61, Rules 2012.

Mr. Yu Jianlong has extensive experience in international arbitration. He is the Vice-Chairman and Secretary General of CIETAC, Vice-Chairman of CMAC, APRAG, IFCAI, and also the Board Member of the SCC. Mr. Yu was awarded the title of Young and Middle-Aged Expert with Outstanding Contributions by the Chinese Ministry of Personnel in 2001.

Introduction to Arbitration in the People's Republic of China

By Brenda Horrigan and Helen Tang

With the PRC now the world's second largest economy and with its exponential expansion around the world, the number and size of business dealings by international companies with Chinese counterparties are rapidly increasing. Hand in hand with this increase in the number of transactions has come an increase in the number of disputes. Moreover, as the bargaining power of Chinese companies (especially Chinese state-owned companies) rises, an ever-growing number of such disputes are being heard through arbitration within the PRC.

While arbitration within the PRC remains preferable to litigation in PRC courts—which is more likely to suffer from local protectionism, rigid and alien court procedures and a less sophisticated judiciary—it entails certain jurisdiction-specific features that differentiate it from international arbitration outside of the PRC.

This article will discuss the basics of arbitration within the PRC, the risks that one should try to avoid, and some tips for facilitating conduct of an arbitration seated in the PRC.

Distinction Between Domestic and Foreign-Related Disputes

For arbitrations in the PRC, the first distinction one needs to make is between “domestic” disputes and “foreign-related” disputes. This distinction is important because it will affect the way that a dispute can be resolved, and also the standard of review on enforcement.

Domestic disputes can only be resolved by litigation in PRC courts or by domestic arbitration seated in the PRC, administered by a Chinese arbitration commission; neither arbitration outside of the PRC nor *ad hoc* arbitration within the PRC is allowed for such matters. Foreign-related disputes, on the other hand, may be arbitrated or litigated either within or outside of the PRC, and if arbitrated outside of the PRC may be either administered by an international arbitration institution or conducted on an *ad hoc* basis.

Another difference, as discussed below, is that the PRC courts have more scope to review an award rendered in a domestic arbitration within the PRC than they do with respect to awards rendered in foreign or foreign-related arbitrations.

The PRC Supreme People's Court has provided guidelines to aid in distinguishing between domestic and foreign-related disputes.¹ A dispute with one or more of the following elements is regarded as foreign-related:

- (1) At least one of the parties is foreign. For a company, this means that its place of incorporation must be outside of the PRC. A foreign-invested company incorporated in the PRC, even if 100% foreign-owned, will be regarded as a domestic Chinese party. On the other hand, companies incorporated in Hong Kong, Macau and Taiwan are regarded “foreign” for this purpose, and their participation in a transaction would give it a foreign element. It is also common practice, when two foreign-invested Chinese companies enter into a contract, for their foreign parents to enter into a guarantee arrangement with an arbitration clause so that future disputes can be submitted to arbitration between the parent entities outside of the PRC.
- (2) The subject matter of the contract with respect to which dispute arises is or will be wholly or partly outside of the PRC. For example, a contract for acquisition of an asset in Hong Kong would normally be foreign-related; similarly, if the subject matter of the contract is goods to be exported abroad, it will generally be regarded as foreign. (It should be noted, however, that there are cases where contracts for the sale of parts in China, which were then to be assembled into end products to be exported abroad, have been held to be not foreign related.)
- (3) There are other legally relevant facts “as to occurrence, modification or termination of civil rights and obligations” which occur outside the PRC. Some commentators argue that if a contract is executed outside the PRC, it should be regarded as foreign-related. However, a completely “artificial” foreign element, e.g., where two Chinese parties fly to Hong Kong solely to execute a contract that has no other foreign element, would normally not be sufficient. Given the uncertainties in interpretation, this ground is not widely used to establish the “foreign-related” qualifications of a dispute.

Arbitration Seated in the PRC

As mentioned above, all domestic disputes must be arbitrated (or litigated) within the PRC. Also, although not compulsory, there are an increasing number of foreign-related contacts that provide for arbitration seated in the PRC, usually because the Chinese party has stronger bargaining power (e.g., the Chinese party is a high-powered State-owned enterprise).

Arbitration seated in the PRC has some special features that differentiate it from international arbitrations commonly seen in other developed countries. Understanding these features and taking measures to mitigate the relevant risks can make an arbitration seated in the PRC more manageable.

According to article 16 of the PRC Arbitration Law, a valid arbitration agreement (or arbitration clause in the relevant contract) providing for arbitration seated in the PRC must be concluded in writing, and it must include:

- (1) an indication of the intention to arbitrate;
- (2) clear provisions on the scope of matters to be arbitrated; and
- (3) a selection of an arbitration commission.

The prevailing view in the PRC is that the requirement of “indication of the intention to arbitrate” makes invalid the type of “one-sided” arbitration agreements that one might encounter in other jurisdictions—such as where one party is given the right to choose between arbitration and litigation, or between two different arbitration institutions at the time the dispute arises.

The third requirement under Article 16 is the most difficult. In most arbitration-friendly jurisdictions, the lack of a selection of an arbitration institution in an arbitration clause will not make the whole clause invalid, although it might make the arbitration process more complicated. In the PRC, however, an arbitration clause will be struck out as void if it does not specify an “arbitration commission.” A clause with clear choice of the rules of arbitration, but lacking a clear choice of the arbitration commission, can also be held to be void, unless the selected arbitration rules clearly provide for the selection of the relevant arbitration commission.

Moreover, the general view is that the “arbitration commission” selected must be a domestic PRC arbitration commission, and not an international arbitration institution such as the ICC or the Hong Kong International Arbitration Center (“**HKIAC**”). There have been cases where the PRC courts have held that an arbitration clause providing for ICC arbitration seated in the PRC is void.² In a more recent 2008 case, the intermediate people’s court in Ningbo city did recognize and enforce an arbitral award rendered by an arbitration administered by the ICC within the PRC;³ however, the legal reasoning of the case has been widely criticized, and the case in any event has no binding or persuasive effect on any future decisions.⁴

The most commonly selected arbitration commission within the PRC, especially for foreign-related disputes, is the China International Economic and Trade Arbitration Commission (“**CIETAC**”), headquartered in Beijing. CIETAC was established in 1956 and, according to its annual reports, has administered around 500 foreign-

related arbitrations each year for the past decade. The Beijing Arbitration Commission (“**BAC**”) and the Shanghai Arbitration Commission are also acceptable choices for administering foreign-related arbitrations, although neither yet has a caseload history matching that of CIETAC. Other local arbitrations commissions⁵ within the PRC tend to be less sophisticated and their case management skills are unlikely to meet international standards.

According to article 13 of the PRC Arbitration Law, arbitrators for arbitrations seated in the PRC must meet certain qualifications, including a requirement of having eight years of arbitration or legal experience (as a lawyer or a judge), or having equivalent professional knowledge. Each arbitration commission keeps its own panel/list from which arbitrators are drawn. The CIETAC panel contains some 1,000 names, of which 45 are from Hong Kong, Macau and Taiwan, and another 218 are from elsewhere outside the PRC. In a CIETAC arbitration, appointments from outside of the CIETAC panel are only permitted upon agreement of all parties and confirmation by the chairman of CIETAC.⁶ In BAC arbitrations, appointments from outside the panel are permitted as long as the dispute is foreign-related.⁷

There are also practical differences between the manner in which arbitrations are conducted by CIETAC or BAC as compared to many other international arbitration institutions. As a general matter, most proceedings involve only a single round of pleadings (although with a Reply to Counterclaim allowed if a counterclaim is raised by the Respondent) which are often completed prior to full constitution of the tribunal. There is little or no provision for discovery / disclosure. Submission of documentary evidence and witness statements (if any) occur relatively late in the process, and there is only limited reliance (if any) on expert testimony (even for questions of quantum). Additionally, although the institution may prepare a recording or other record of the hearing for use by the tribunal in its deliberations, that record generally is not made available to the parties.

Most of these practical differences, however, can be ameliorated through appointment of experienced international arbitrators to the tribunal. By providing in the arbitration agreement requirements that English be the language of the arbitration, that a 3-member tribunal be appointed, that the chair be of a nationality different from that of the parties to the dispute, and that the parties are free to appoint arbitrators from outside of the panel system, the contracting parties can help to ensure that they are able to draw upon as broad of a pool of experienced practitioners as possible to hear their dispute.

Enforcement of Arbitration Awards in the PRC

When it comes to enforcement of arbitral awards in the PRC, the distinction between domestic and foreign-related disputes is again very important.

The PRC is a member state of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“**Convention**”). As a result, enforcement of PRC-seated arbitral awards in other Convention countries, and enforcement in the PRC of arbitral awards rendered in other Convention countries, are fairly straight forward. PRC courts can only refuse recognition or enforcement of an arbitral award rendered outside of the PRC based on the grounds set forth in the Convention, which are generally limited to severe infringements of procedural norms.

In addition, as a further protection for enforcement of foreign arbitral awards, the PRC courts have introduced a pre-reporting system. Under that system, a request for recognition and enforcement of a foreign arbitral award is first submitted to an intermediate people’s court. If that court decides to recognize and enforce the award, it may do so without any further report to or approval from its superior court. However, if an intermediate people’s court is minded to refuse recognition or enforcement of a foreign arbitral award, that court must report its intention to its superior court to get approval. If the superior court agrees with the proposal to refuse recognition and enforcement, that court must in turn report that intention to the Supreme People’s Court. Through this system, no foreign award can be refused recognition and enforcement without the blessing of the Supreme People’s Court. The existence of this pre-reporting system has reduced the incentive of courts to refuse recognition or enforcement of foreign awards on arbitrary bases, although the system does result in delays in the recognition and enforcement process.

A foreign-related arbitration award rendered within the PRC will be protected by this same pre-reporting system, and the standard of review under PRC law for such awards essentially parallels that existing under the New York Convention for foreign awards. However, if the underlying dispute is purely domestic, the pre-reporting system will not apply. Moreover, in reviewing awards rendered within the PRC with respect to domestic disputes, the relevant PRC court has considerable latitude in its review of, and interference in, the decisions of the arbitral tribunal, both on substantive grounds and on grounds of procedural irregularities. Specifically, in addition to New York Convention-type grounds, PRC courts have the right to overturn an award rendered in respect of a domestic dispute upon a finding of (1) error in the application of law by the arbitral tribunal; (2) lack of evidence to ascertain the facts; (3) a showing that the evidence on which the award was based was forged; or (4) a showing that a party withheld evidence sufficient to affect the impartiality of the arbitration.

Conclusion

As demonstrated above, there are many challenges and pitfalls involved in arbitration in the PRC. However, with careful planning and foresight, many of these difficulties can be avoided or minimized. As the number of arbitrations within the PRC involving foreign parties continues to increase, arbitration within the PRC will continue its progression towards parity with international standards.

“[T]here are many challenges and pitfalls involved in arbitration in the PRC. However, with careful planning and foresight, many of these difficulties can be avoided or minimized.”

Endnotes

1. See Article 178 the Opinions of the Supreme People’s Court on Several issues concerning the Implementation of the General Principles of the Civil Law on 26 January 1998, and Article 304 of the Opinions of the Supreme People’s Court on Several issues concerning the Implementation of the PRC Civil Procedure Law on 14 July 1992.
2. See, e.g., *Zublin International GmbH v. Wuxi Woke General Engineering Rubber Co., Ltd.* (decided by the PRC Supreme People’s Court in July 2006).
3. *Duferco SA v. Ningbo Arts & Crafts Import & Export Co* (decided by the Ningbo City Intermediate People’s Court in April 2009).
4. The Ningbo court relied on the New York Convention in its decision to enforce, treating the award (though rendered within the PRC) as a “French” award because the ICC’s headquarters are in France. Because the lower court ordered enforcement, its decision was not reviewed by the higher courts and the Supreme People’s Court’s view on this case is unknown.
5. According to statistics available, there are over 200 arbitration commissions in China.
6. See article 24(2) of the 2012 CIETAC Rules.
7. See article 55(1) of the 2008 BAC Rules.

Brenda Horrigan, BRENDA.HORRIGAN@herbertsmith.com, is a partner and Helen Tang, Helen.Tang@herbertsmith.com, is an associate in the Shanghai office of Herbert Smith LLP, where they each focus on international arbitrations involving Chinese parties. Herbert Smith LLP is licensed to operate as a foreign law firm in China by the Ministry of Justice. Although we are permitted to provide information on the impact of the Chinese legal environment, we are not permitted to conduct Chinese legal affairs, including giving legal opinions on Chinese law.

Anti-Suit Injunctions and Insurance Coverage

By Peter A. Halprin

I. Introduction

Anti-suit injunctions play an important, and perhaps increasing, role in determining the forum for dispute resolution in cases involving international parties. Such injunctive relief is prevalent in insurance coverage litigation as insurance companies, often based in the United Kingdom, insure corporations and risks throughout the globe. This article examines the interplay between anti-suit injunctions and insurance coverage with a focus on the decision in *Sul America Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A.* (“*Enesa*”), a recent ruling on this issue by the Court of Appeal in England.

II. Anti-Suit Injunctions

A. What Is an Anti-Suit Injunction?

Anti-suit injunctions are a device issued by courts to protect jurisdiction by ordering a party to refrain from bringing a claim before the courts of another State or before an arbitral tribunal or, if the party has already brought such a claim, ordering that party to withdraw from or suspend the proceeding.¹ Thus, they are issued where concurrent jurisdiction exists and one or both courts decide to assert jurisdiction instead of allowing the parallel litigation to proceed.²

“[P]olicyholders facing arbitration clauses providing for London arbitration could be exposed to litigation in the United Kingdom to enjoin coverage litigation in a policyholder’s home country or the country where the risk is located. In addition, questions as to the validity of an arbitration clause, or the enforceability of an award, will be decided under English law.”

B. History and Origins

Anti-suit injunctions have their roots in English law and are traceable to 15th Century England.³ Common law courts originally used anti-suit injunctions as a writ of prohibition against the assertion of jurisdiction by ecclesiastical courts.⁴ Later, the Court of Chancery, a court of general equity jurisdiction, used such injunctions to prevent parties from bringing suits in common law courts.⁵ Over time, this evolved into the present practice whereby anti-suit injunctions were eventually extended to foreign or international proceedings.⁶ In the United States, it was not until fairly recently that the power to issue such orders was used to restrain proceedings in foreign courts.⁷

III. Anti-Suit Injunctions in Practice

A. Anti-Suit Injunctions in The United Kingdom

In the United Kingdom, there is a statutory basis for anti-suit injunctions. Indeed, the Supreme Court Act of 1981, § 37(1) provides that, “The High Court may by order grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.” Further, the Arbitration Act of 1996⁸ § 44 confirms the judicial power to grant an interim injunction in connection with arbitration proceedings. In a 2008 decision, the High Court examined the interplay between two provisions and held that although the power under the Arbitration Act is more limited than that in the Supreme Court Act, the High Court retains the right to issue an injunction against foreign litigation in order to preserve the contractual property right to submit a dispute to arbitration.⁹ Given this statutory basis, it is no surprise that English courts are perceived as favorable to anti-suit injunctions.¹⁰

English courts will generally grant an anti-suit injunction if two requirements are satisfied: (1) the court must be in a position to assert jurisdiction over the claimant to the foreign litigation proceeding, and (2) the court must be persuaded that it should grant such a remedy.¹¹

The first requirement, jurisdiction, will be satisfied if the defendant has a physical presence in England or has submitted to the jurisdiction of the English courts by its actions.¹² The second requirement can be met by the existence of an agreement to arbitrate in England.¹³

Assuming that jurisdiction is found, however, this second requirement of the anti-suit injunction test can be more difficult for a claimant to satisfy. Indeed, there is no bright line rule for determining whether the court will deem an anti-suit injunction to be the appropriate remedy in a given case. The inquiry is, in fact, very fact specific and includes a number of factors including: whether the cases involve the same or similar issues, the existence of an arbitration clause, whether exceptional circumstances exist which militate against granting relief, and the stage reached by the foreign proceeding. The inconvenience of a foreign proceeding, however, is unlikely to result in the issuance of an anti-suit injunction.

IV. Insurance Coverage Jurisprudence Involving Anti-Suits in the United Kingdom

In recent years, a line of cases has developed in English jurisprudence which would suggest that policyholders facing arbitration clauses providing for London arbitration could be exposed to litigation in the United Kingdom to enjoin coverage litigation in a policyholder’s home country or the country where the risk is located. In addition, questions as to the validity of an arbitration

clause, or the enforceability of an award, will be decided under English law.

A. Owens Corning

In *XL Insurance Ltd. v. Owens Corning*,¹⁴ the insurance policy at issue, as is common in many London–arbitration clauses,¹⁵ identified New York state law as the law governing the substantive contract and incorporated the Federal Arbitration Act by reference, but provided for London arbitration under the provisions of the Arbitration Act. The policyholder sought a declaratory judgment in Delaware that, under the insurance it purchased, the policyholder was entitled to indemnification for certain Y2K costs. The insurance company sought an anti-suit injunction in London to enjoin the policyholder from pursuing the Delaware action. The policyholder, in turn, opposed the injunction on the grounds that the arbitration agreement was invalid under New York law. The Queen’s Bench granted the injunction and held that by selecting London as the seat of arbitration, and in referencing the Arbitration Act, the parties had chosen English law to govern matters falling within the scope of the Act, including the validity of the arbitration agreement.

Owens Corning is notable for a number of reasons. First, the Queen’s Bench rejected Owens Corning’s assertion that it was inconvenienced by not being able to sue all of its insurance companies in one jurisdiction, holding that this was not an adequate reason to deprive XL of its contractual rights under the arbitration clause. Second, the court considered the policyholder’s argument that a Delaware Court would be forced under the Federal Arbitration Act to apply New York law and thus subject XL to jurisdiction. Rejecting this argument, the court opined that, “The grant of an anti-suit injunction involves by definition a degree of interference with foreign court procedures, because that is its object. But if the English court is satisfied that litigation in another country would be a breach of contract to arbitrate the dispute in London, the grant of an injunction involves no disrespect or unfriendliness towards the foreign court, but merely an insistence on parties respecting their own contractual obligations.”

B. C&D

In *C v. D*,¹⁶ the policy at issue was governed by New York law but contained an arbitration provision that provided for London arbitration “under the provisions of the Arbitration Act of 1950 as amended.” The policyholder initiated arbitration in London and prevailed in arbitration. The insurance company then asked the tribunal to re-consider the award on the grounds that the rationale supporting the award constituted a manifest disregard of New York law. The insurance company also indicated that it would seek to vacate the award on the grounds of manifest disregard of the law in the United States. The policyholder then sought to enjoin the insurance company from initiating a challenge to the award in New

York or otherwise relying on New York law to oppose enforcement of the award. The court granted the injunction and held that the choice of London as the seat of arbitration “necessarily imports that...challenges to any award are governed by the relevant sections of the [Arbitration Act]” and thus the only permissible challenges are those provided for by the Arbitration Act.¹⁷ On appeal, the Court of Appeal affirmed the decision of the trial court and held that “the choice of the seat of arbitration was also a choice of forum for remedies to challenge any award.”¹⁸

C v. D is notable for at least two additional reasons. First, *C v. D* seems to be one of those rare situations in which a policyholder prevailed in London arbitration, and benefited from an anti-suit injunction in favor of London arbitration—a reminder that anti-suit injunctions are a double-edged sword. Second, the anti-suit injunction was sought after an award was issued by the tribunal. Generally, such injunctive relief is sought prior to the initiation of proceedings, or directly after proceedings are brought, in favor of some other forum or dispute resolution mechanism. Indeed, “Time and again the English courts have granted an injunction to restrain a clear breach of an exclusive jurisdiction agreement or a breach of an arbitration agreement where the rights of the parties are clear. [In the court’s judgment] the position is even stronger where an award *has already been* issued and the breach of the agreement to London arbitration consists of an unlawful attempt to *invalidate* the award.”¹⁹

C. *Sul America Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A.*

The latest chapter in the intersection between insurance coverage litigation and anti-suit injunctions is the *Enesa* case,²⁰ decided in June in the England and Wales High Court, Commercial Court.

The policyholders, a group of affiliated Brazilian companies, sought to pursue an action against the insurance companies in Brazil in connection with a claim related to the construction of a hydroelectric plant in Brazil. The policy at issue contained a London arbitration clause and an express choice of Brazilian law as the law governing the contract and an exclusive jurisdiction clause in favor of Brazilian courts. While the Brazilian coverage action was pending, the insurance companies sought an anti-suit injunction in London enjoining the policyholders from pursuing the coverage action against the insurance companies in Brazil. The trial court granted the injunction and the policyholders appealed.

On appeal, the Court of Appeal Civil Division affirmed the injunction and held that while Brazilian law applied to certain parts of the insurance policy (including a mediation clause), the choice of London as the seat of arbitration meant that the parties accepted that English law would apply to the proceedings.²¹ The decision of the

Court of Appeal was premised upon a determination of what system of law (Brazilian or English) has the closest and most real connection to the agreement. To that end, the court held that “an agreement to resolve disputes by arbitration in London, and therefore in accordance with English arbitral law, does not have a close juridical connection with the system of law governing the policy of insurance, whose purpose is unrelated to that of dispute resolution; rather, it has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective.”²²

V. Conclusion

Litigators, arbitration practitioners, and coverage counsel need to pay particular attention to arbitration clauses, and should consider the potential for an anti-suit injunction when seeking relief outside of an arbitration or dispute resolution clause in a policy. Where a clause makes reference to English law, in particular, parties should expect that English courts, more likely than not, will enforce London-arbitration clauses and will look to English law when deciding the validity of an arbitration clause or enforceability of an award.

Endnotes

1. IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTI-SUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 1 (E. Gaillard ed., 2005).
2. Michael David Schimek, *Anti-Suit and Anti-Anti-Suit Injunctions: A Proposed Texas Approach*, 45 BAYLOR L. REV. 499, 499-500 (1993).
3. George Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589, 593 (1990).
4. *Id.*
5. *Id.* at 593-94.
6. *Id.* at 594; Arif Ali, Katherine Nesbitt and Jane Wessel, *Anti-Suit Injunctions in Support of International Arbitration in the United States*

and the United Kingdom, Int. A.L.R. 2008, 11(1), 12, 16. The authority for anti-suit injunctions in the United States comes from 28 U.S.C § 2283 (2000) which provides that “[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” 28 U.S.C § 2283.

7. Bermann, *supra* note 3.
8. Referred to herein as the “Arbitration Act.”
9. See *Starlight Shipping Co. v. Tai Ping Ins. Co. Ltd. (Hubei Branch)*, [2007] EWHC 1893 (QBD Comm.).
10. This is the cause of much tension between the European Union and England. See Martin Illmer and Ingrid Naumann, *Yet Another Blow: Anti-Suit Injunctions in Support of Arbitration Agreements within the European Union*, Int. A.L.R. 2007, 10(5), 147,158-9; see *Turner v. Grovit*, C-159/02 [2004] E.C.R. I-3565.
11. See *Navigation Maritime Bulgare v. Rustal Trading Ltd.* [2002] Lloyd’s Rep. 106.
12. Ali, *supra* note 6, at 17.
13. *Id.* This contractual obligation alone frequently provides the basis for jurisdiction.
14. *XL Ins. Ltd. V. Owens Corning (XL)* [2000] 2 Lloyd’s Rep. 500 (QBD (Comm.)).
15. See RICHARD JACOBS ET AL., *LIABILITY INSURANCE IN INTERNATIONAL ARBITRATION: THE BERMUDA FORM 1.25-1.26* (Hart Publishing 2004).
16. *C v. D*, [2007] 2 Lloyd’s Rep. 367 (QBD (Comm.)).
17. *Id.* at para. 27.
18. *C v. D*, [2008] 1 Lloyd’s Rep. 239 (Ct. App. Civil Div.).
19. *C v. D*, [2007] 2 Lloyd’s Rep. 367 (para. 55) (emphasis added).
20. *Sul America Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A.*, [2012] EWCA Civ 638 (C.A. C.D.).
21. *Id.* at para. 29.
22. *Id.* at 32.

Peter A. Halprin, phalprin@andersonkill.com, is an attorney with Anderson Kill & Olick PC. A frequent author, Mr. Halprin specializes in domestic and international litigation and arbitration with a special emphasis on insurance, commercial disputes, bankruptcy, environmental law, and intellectual property matters.

The New U.S. Model BIT: “If Both Sides Are Angry With You, You Must Be Doing Something Right”

By Mark Kantor

The U.S. Government released in April 2012 a newly revised version of its model bilateral investment agreement (the 2012 U.S. Model BIT).¹ In the end, the 2012 U.S. Model BIT is not so very different from the 2004 version of the U.S. Model. Critics of investor-State arbitration were particularly disappointed, as the U.S. government determined to maintain the provisions of the 2004 Model BIT with few changes.

Investor-State arbitration and the most prominent substantive investment protections remain effectively untouched in the new Model BIT. Proposals by anti-investment treaty critics to eliminate or greatly narrow those provisions were not adopted. Some clarifying changes were made to the financial services provisions of the BIT, but none that appear controversial inside the U.S.. Similarly, changes were made to assure that the exercise of government authority by State-Owned Enterprises did not fall outside the scope of investment protection. The “performance restrictions” obligation in the Model BIT was expanded to prohibit protectionist practices preferring local technology over technology of nationals from the other State. Most controversially and unlike recent U.S. free trade agreements, the 2012 U.S. Model BIT did not incorporate binding State-State dispute resolution for environmental or labor disputes.

Competing press releases issued by advocacy groups illustrate the reaction to the 2012 U.S. Model BIT. Opponents of U.S. trade and investment agreements were deeply disappointed by the absence of roll-back in the 2012 U.S. Model BIT (“the same in all major respects as the deeply flawed ‘old’ Model Bilateral Investment Treaty...text will allow companies to challenge public interest regulations outside of domestic court systems before tribunals of three private sector trade attorneys operating under minimal to no conflict of interest rules...can order governments to pay corporations unlimited taxpayer-funded compensation for having to comply with policies that affect their future expected profits, and with which domestic investors have to comply...the administration is exposing the anti-public interest agenda...using BITs to evade justice and get out of environmental remediation obligations...privilege the rich at the expense of the 99 percent”).²

Proponents of U.S. trade and investment agreements, on the other hand, welcomed the new Model BIT but were disappointed by the absence of additional investment protections. Those groups criticized the expansion of labor and environmental coverage even if only backed by the right to State-State consultation (“applauds the Obama Administration’s commitment to open markets, eliminate foreign barriers and protect U.S. investment overseas...”

urges forward movement on a robust U.S. BIT negotiating agenda...highly concerned about whether the expanded Model BIT language relating to labor and environment could be counterproductive...is very disappointed that the new 2012 Model BIT does not strengthen core protections for U.S. investors overseas”).³

The 2012 U.S. Model BIT was the product of a public and inter-agency consultation process begun by President Obama just a few months after he was sworn in as Chief Executive in January 2009. After taking office and in the midst of the international financial crisis, his Administration commenced a review of the U.S. Model Bilateral Investment Agreement. The Model BIT is the template document used by the U.S. as a starting point when contemplating the negotiation of a new BIT. The terms and conditions of the Model BIT also signal the approach of the U.S. towards the comparable investment chapters of U.S. free trade agreements, although such chapters and related provisions are often more complex in the end than BITs. As a result, the 2012 U.S. Model BIT is important not only as the baseline for U.S. bilateral investment treaties with such prospective partners as China, India and Vietnam; it also can foreshadow the U.S. position on investment issues in the Trans-Pacific Partnership (TPP) free trade agreement negotiations involving at least nine Pacific Rim countries.⁴

As part of the BIT review process, the U.S. Department of State and the Office of the U.S. Trade Representative (USTR) asked the State Department’s private sector Advisory Committee on International Economic Policy in June 2009 to establish a Subcommittee to review the U.S. Model BIT. The scope of the Subcommittee’s proposed review was not limited. However, the State Department and USTR asked the Subcommittee to consider in particular three topics: dispute settlement provisions; state-owned enterprises; and financial services issues.

The Subcommittee issued its report in September 2009.⁵ That report demonstrated the continuing divide between critics and proponents of investment treaty protections. Indeed, the annexed separate statements of individual members far exceeded in length the consensus report itself.⁶ A public consultation organized by the State Department and USTR around the same time also illustrated the significant differences among interested parties. In addition to a well-attended open meeting, 36 written comments were submitted in the public consultation process, demonstrating both considerable attention from interest groups and considerable disagreement as to the way forward.⁷

With that information in hand, the Administration entered into an inter-agency process. While the inter-agency

process was proceeding, the U.S. Senate ratified in 2011 a BIT with Rwanda⁸ that had been negotiated in 2008, one of only two bilateral investment treaties the U.S. has entered into since 2000. Additionally, the Administration successfully pressed in October 2011 for Congress to ratify free trade agreements with Colombia, Panama and Korea, all of which had languished after conclusion of their negotiation during the Bush years. The U.S. further aggressively pursued negotiations with a number of trade partners for the multi-state Trans-Pacific Partnership. Moreover, to the evident disappointment of investment treaty critics, the Administration did not publicly propose any changes to NAFTA. The U.S. also continued consultations with a number of countries over the prospects for bilateral investment agreements, most prominently with China, India and Vietnam. The course of the Administration was confirmed when the 2012 U.S. Model BIT was released in April 2012, showing few changes from its predecessor 2004 Model BIT.

The lack of change may reflect just how much change had in fact already occurred in the texts of U.S. investment agreements since NAFTA Chapter 11 was concluded. The U.S. Congress took seriously concerns arising out of the first three NAFTA awards, *Pope & Talbot v. Canada*, *Metalclad v. United Mexican States* and *S.D. Myers v. Canada* (all released in 2000). Reacting to those criticisms, the terms of U.S. investment agreements changed significantly by virtue of the 2002 Trade Promotion Act. In section 2(b)(3)(D) of that Act, Congress set out “no greater substantive rights” and “comparable to United States legal principles” negotiating objectives for future investment agreements.

the principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, *while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States, and to secure for investors rights comparable to those that would be available under United States legal principles and practices [...]*. [Emphasis added]⁹

The NAFTA Free Trade Commission (FTC), an organ of the three NAFTA State Parties, reacted as well to the three early awards by issuing its “Notes of Interpretation concerning Article 1105(1)” on July 31, 2001.¹⁰ Paragraph B of that FTC Interpretation states:

B. Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum

standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

This Interpretation tied the understanding of NAFTA Article 1105 protections to “customary international law.”¹¹

The 2001 NAFTA Free Trade Commission Interpretation was embodied in Article 5, paragraphs 1–3 of the 2004 U.S. Model BIT and similar provisions of recent U.S. investment agreements, as well as Exhibit A to the Model BIT and similar agreement provisions. While NAFTA Article 1110 [Expropriation] was not itself modified, pursuant to the Congressional negotiating instructions that “foreign investors in the United States are not accorded greater substantive rights” and “to secure for investors rights comparable to those that would be available under United States legal principles and practices,” the “regulatory takings” language from the U.S. Supreme Court decision in *Penn Central Transportation Co. v. New York City*¹² was incorporated as the description of the relevant factors for an “indirect expropriation” in Annex B to the Model BIT and similar agreement provisions.

Thus, U.S. treaty negotiators arguably pared back the substantive protections with respect to expropriation and the international minimum standard of treatment / fair and equitable treatment from the texts employed by the U.S. in the 1990s.

If the objective was to minimize the risk that the U.S. would be held liable for breach of an investment agreement, that approach has been successful. There have been at least 17 cases filed against the U.S. under NAFTA Chapter 11, and five claims that reached final award. The U.S. has never lost any of those disputes. Moreover, the U.S. has never even been sued in a claim under any investment treaty other than NAFTA, despite being party to 40 BITs and free trade agreements with 17 States.

Turning from substance to questions of transparency and public access, in 2003 the NAFTA Free Trade Commission issued a “Statement on Non-Disputing Party Participation.” That Statement recommended specific guidelines to be adopted by NAFTA tribunals when considering proposed *amicus curiae* submissions. The United States also issued its own “Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations.” In that unilateral statement,

the United States announced that it “will consent, and will request the consent of disputing investors and, as applicable, tribunals, that hearings in Chapter Eleven disputes to which it is a party be open to the public, except to ensure the protection of confidential information.”

The 2004 U.S. Model BIT and subsequent U.S. investment agreements made those transparency provisions mandatory for U.S. participation in investment treaty arbitration. The 2004 Model BIT included provisions mandating publication of documents and open hearings, excluding only certain business- and government-protected information. The Model BIT also made explicit the authority of the tribunal to take *amicus curiae* submissions.

With the introduction of these public access and transparency measures into U.S. investment treaty arbitral proceedings, arbitrations with the U.S. have become the most open in the world, rivaling the transparency of U.S. Federal court proceedings.¹³ The days of “secret NAFTA tribunals” famously decried by Bill Moyers on PBS have been gone for a decade.¹⁴

In sum, the 2001 NAFTA FTC Interpretation, the 2003 NAFTA FTC Statement (and subsequent unilateral actions by the State parties), the 2002 Trade Promotion Act and the 2004 U.S. Model BIT proved to be watershed events in the development of U.S. investment agreements and NAFTA Chapter 11 arbitration awards. In the view of many (but not all) observers, the concerns of the treaty critics had been met. Indeed, voices from the U.S. business community argued that the U.S. Government had gone too far in cutting back on substantive investment protections. The revised 2012 U.S. Model BIT, with its limited changes, reflects the apparent conclusion by the Obama Administration that the U.S. adaptations to investment treaties subsequent to the early NAFTA awards prove an old maxim: “If both sides are angry with you, you must be doing something right.”

In light of that history, the story of what changed in the 2012 U.S. Model BIT does not occupy a large portion of the rest of this article. The toll of what treaty critics and treaty proponents sought, but did not obtain, is the larger part of the story that remains to be told.

A. Investor-State Arbitration

The 2012 U.S. Model BIT made no material changes to the provisions of the model treaty concerning investment arbitration.

Investment treaty critics had requested changes in the U.S. Model BIT to replace investor-State arbitration with State-State dispute resolution (“Replace investor-state dispute settlement with a state-to-state mechanism”).¹⁵ That proposal failed. More realistically, but in the end equally unsuccessfully, critics sought to scale back investment arbitration in a number of ways.

Critical observers made a number of proposals to cut back on the jurisdiction of investment treaty arbitration or

to impose additional procedural hurdles before arbitration could be triggered. None of those proposals were accepted by the U.S. Government. The most significant of those proposals are listed below.

i. Imposing a Procedural Exhaustion of Local Remedies Requirement

Treaty opponents sought to include a procedural requirement that investors exhaust local remedies in the host State before commencing an investor-State arbitration, subject only to a “futility” exception.

Treaty proponents, on the other hand, responded that many of the States sued in investment treaty arbitrations engage in governance practices that are very poor indeed. Those practices cast a harsh light on proposals for mandatory exhaustion of local administrative and judicial remedies in such States.

The U.S. Government declined to add a procedural exhaustion of remedies requirement into the 2012 U.S. Model BIT.

ii. Narrowing the Definition of “Investment”

Treaty critics sought to “[n]arrow the definition of investment to include only the kinds of property that are protected by the U.S. Constitution. This would mean excluding the expectation of gain or profit and the assumption of risk.”¹⁶

Treaty proponents asserted in reply that the definition of “investment” in the 2004 Model BIT was unexceptional. The references in that definition to “the expectation of gain or profit and the assumption of risk” were descriptions of elements to be considered in determining if any particular property constituted an “investment” under the BIT, rather than “investments” themselves. In any event, the items of property covered by the term “investment” did not in fact exceed the scope of property protected by the Takings Clause of the Fifth Amendment to the U.S. Constitution.¹⁷ Both tangible and intangible rights and interests are entitled to protection under the Fifth Amendment, including operating businesses, personalty, contract rights, bank accounts, financial instruments and intellectual property rights.¹⁸

The U.S. Government rejected the proposal to alter the definition of “investment” in the 2012 U.S. Model BIT.

iii. Explicitly Incorporating into the BIT a High Standard of Proof Required to Demonstrate a Breach of the Fair and Equitable Treatment Standard Under Customary International Law as Set Out in the State Department’s Submissions in *Glamis Gold v. United States*

Advocates of limiting investment arbitration proposed the new U.S. Model BIT provide that “a foreign investor has the burden of demonstrating that a purported standard of protection under customary international law is based on actual State practice rather than on the unsup-

ported assertions of previous investment tribunals.”¹⁹ The position of the State Department on behalf of the U.S. in *Glamis Gold* was that:

- a. The claimant has the burden of demonstrating both the existence of a rule of customary international law and of demonstrating that the respondent State has violated that rule with regard to the investor, and
- b. The awards of arbitral tribunals that do not examine relevant state practice are insufficient to demonstrate the content of customary international law.

Treaty proponents, in contrast, claimed that the standard set out in *Glamis Gold* set the bar too high and prevented the evolution of customary international law. Business interests also argued that codifying into treaty language the litigation position of one disputing party in an independent dispute resolution process was inappropriate.

The position of the U.S. Government in NAFTA arbitrations on the standard of proof of customary law has, of course, remained unchanged from its successful advocacy in *Glamis Gold*. However, the Administration chose to not try to codify its position into the model treaty text.

iv. Revising Article 17 to Ensure That Foreign Subsidiaries Are Not Allowed to Bring Investment Claims Against a Nation That Is the Home of Their Parent Company

Treaty critics argued that the 2004 Model BIT’s language on Denial of Benefits in Article 17 “contains a loophole that allows corporations to bypass their own country’s domestic courts by filing investor-state claims through foreign subsidiaries located in a BIT partner nation. ...Global corporations will inappropriately use this provision to avoid the normal “diversity of nationality” requirement for investor-state arbitration.”²⁰

Treaty proponents responded that there is no record of investor claimants actually using the language of Article 17 or similar provisions under recent U.S. treaties in such an inappropriate fashion or of arbitral tribunals accepting such arguments. Non-U.S. treaties, where critics pointed to purported “treaty-shopping” conduct by claimants, did not contain the “substantial business activities” requirement found in Article 17 of the U.S. treaties. Accordingly, said the investor community, the critics were chasing phantoms.

Again, the U.S. Administration made no changes in the 2012 Model BIT from the language in the 2004 Model.

v. Appellate Mechanism

The 2004 Model BIT contained a requirement in an annex that the State parties commence negotiations over an appellate mechanism for investor-State arbitration

within three years. That annex has now been deleted from the 2012 U.S. Model BIT in favor of a provision in Article 29.10 of the BIT about appellate mechanisms. The new provision, in contrast to prior clauses in U.S. investment agreements, does not contain a deadline for the State parties to commence discussions. The removal of the deadline to commence discussions was apparently motivated by the lack of interest by State counterparties to pursue such negotiations under investment treaties and investment chapters of free trade agreements containing the prior annex.

B. Substantive Investment Law Protections

Not only did investor-State arbitration survive unscathed. There were similarly no material changes to the core substantive investment law protections in Articles 3 to 10 of the Model BIT—encompassing national treatment, most-favoured-nation treatment, minimum standards of treatment (including fair and equitable treatment, full protection and security, and no denial of justice), expropriation and compensation, free transferability of payments, performance requirements, composition of senior management and boards of directors, and publication of investment measures. The only exceptions were changes relating to financial institutions and financial systems and an extension of the prohibition on performance restrictions to covered protectionist conduct with respect to local technology.

Supporters of investment arbitration had requested a rollback of the 2004 changes, particularly the reliance on “customary international law standards” and the inclusion of “self-judging” language in the “Essential Security” provision, to return to earlier versions of the U.S. model investment treaty. Those requests were rejected by the U.S.. Critics of investment treaties made a larger number of requests, but in general they too failed to secure approval from the U.S. Government.

i. Limit the Scope of Conduct Considered to be an Indirect Expropriation Solely to Direct Appropriations of Property for the Use of the Host State

Advocates of restricting investor-State arbitration asked the U.S. to modify the Model BIT to “[c]larify that an ‘indirect expropriation’ occurs only when a host state seizes or appropriates an investment for its own use or the use of a third party, and that regulatory measures that adversely affect the value of an investment but do not transfer ownership of the investment do not constitute acts of indirect expropriation.”²¹ The effect of that proposal, if adopted, would have been to eliminate treaty coverage of “indirect expropriations,” known in the U.S. as “regulatory takings.”

Treaty proponents objected to the proposal, asserting that international law makes clear that an expropriation can occur if the acting State by its conduct destroys the

value of the property even though the State does not seize or appropriate ownership of the investment.

The U.S. Government declined to make the proposed change in the 2012 Model BIT. Here too, the Government may have been motivated by the Congressional negotiating instruction in the 2002 Trade Promotion Act to “secure for investors rights comparable to those that would be available under United States legal principles and practices.” Limiting expropriations solely to takings that seize or appropriate the property of the owner is not consistent with U.S. Supreme Court teaching for at least the past 100 years, including the 1910 case of *U.S. v. Welch*,²² *United States v. General Motors*²³ in 1945, *United States v. Causby*²⁴ in 1946, *Penn Central Transportation Co. v. New York City* (the leading Fifth Amendment regulatory takings case) in 1978, *Ruckelshaus v. Monsanto*²⁵ in 1984, and a unanimous Court in *Lingle v. Chevron USA*²⁶ in 2005.

ii. Limit “Minimum Standard of Treatment/Fair and Equitable Treatment” Claims to the Standard Articulated by the U.S. State Department in *Glamis Gold*

Critical observers sought to have the Model BIT modified to “[c]odify the State Department’s position in *Glamis* regarding the content of the minimum standard of treatment.”²⁷

Critics of investment treaty protections for investors have been concerned over the prospect that the “fair & equitable treatment” provision of an investment treaty could be broadly construed to undermine legitimate regulatory conduct of the host State. That concern was fueled by broad language in the first three NAFTA awards (*Pope & Talbot*, *Metalclad* and *S.D. Myers*) with respect to the reference to “fair and equitable treatment” in NAFTA Article 1105. The narrower international minimum treatment standard preferred by treaty critics is often equated with the famous statement in the 1926 case of *Neer v. Mexico*, a decision of the U.S.-Mexico Mixed Claims Commission addressing the failure of the Mexican government diligently to pursue the murderers of a U.S. national.²⁸

[T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.

Treaty opponents urged the Obama Administration to codify in the new Model BIT the narrow “minimum standard of treatment” that the U.S. State Department had advocated in the *Glamis Gold* dispute.

The 2001 NAFTA FTC Interpretation, however, had already narrowed the ability of the arbitral panels to find a breach of NAFTA Article 1105, and that Interpretation

was codified in the 2004 U.S. Model BIT and other U.S. investment agreements. As the *Merrill & Ring* NAFTA tribunal recently explained, the Interpretation had “the effect of linking fair and equitable treatment with customary law only and [...] the effect of de-linking it from breaches of other NAFTA articles or separate treaties.”²⁹

Contrary to treaty critics, the business community argued that, instead of codifying *Glamis Gold*, the revised Model BIT should return to the less deferential “fair and equitable treatment” standard found in earlier U.S. model bilateral investment treaties such as the one on which the U.S.-Argentina BIT is based, rather than the “customary international law” approach taken in the 2001 FTC Interpretation and the 2004 U.S. Model BIT.

Moreover, several public international law voices, most prominently former ICJ President Stephen Schwebel, asserted that the “customary international law” approach taken by the U.S. in the 2001 FTC Interpretation and subsequent investment agreements was flawed as a matter of public international law. For those commentators, the sharp disagreements between States over the proper standards of protection under international investment law principles made clear that even the existence of a customary international law standard was highly contentious.³⁰

In the end, the U.S. Government chose not to copy the *Glamis Gold* language into the 2012 model agreement. Instead, the Government determined to continue with the “customary international law” approach taken in the 2001 NAFTA FTC Interpretation and codified in the 2004 U.S. Model BIT and recent investment agreements.

iii. Ensure That Foreign Investors May Not Use the Most Favoured Nation (MFN) Principle to Assert Rights Provided by Other Investment Agreements or Treaties

Treaty critics requested that the Model BIT be revised to prevent investors from “us[ing] the most favoured nation principle [MFN] to assert rights provided by other investment agreements or treaties.” It appears that this proposal is aimed at preventing incorporation of substantive protections from other agreements, not procedural arrangements such as the ability to commence an arbitration immediately rather than awaiting expiration of a waiting period or local recourse—the result obtaining in the controversial *Maffezini v. Spain* award.

Unlike MFN clauses in treaties of other States, U.S. investment agreements carefully limit the scope of the MFN clause to “the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” That language does not address procedural aspects of arbitration proceedings, such as the requirement in investment treaties like the UK-Argentina BIT that an investor pursue its claim in national courts of the host State for 18 months before commencing an arbitration under the BIT. The negotiating records for the investment chapters of the most recent U.S. free trade agree-

ments also make abundantly clear that the State parties reject the application of the *Maffezini* award to the MFN clause.³¹ Moreover, no NAFTA award has ever extended the MFN clause to incorporate procedural arbitration provisions of another investment agreement. Consequently, there is little scope for an argument that the MFN clause in recent U.S. investment agreements will produce a result incorporating *procedural* provisions such as occurred in the *Maffezini* award.

Instead, the critics' proposal appears to have been an effort to defang MFN clauses completely, by preventing the incorporation into a U.S. treaty of more favorable *substantive* treatment to investors afforded by a host State under a different treaty. Such a result would, of course, eliminate the use of an MFN clause entirely.

Treaty proponents predictably objected to this proposal. Notably, the business community did not argue that the existing language of the U.S. MFN clause should be modified to permit incorporation of *Maffezini*-style more favorable procedural provisions from other international agreements. They argued instead that substantive non-discrimination between foreign parties was a bed-rock principle of international investment and trade law.

The U.S. Government left unchanged the scope of the MFN clause in the 2012 U.S. Model BIT.

iv. Explicitly Limit the National Treatment (NT) Obligation to Instances in Which a Regulatory Measure is Enacted for a Primarily Discriminatory Purpose

Treaty opponents were concerned that the "National Treatment" (NT) non-discrimination principle "can be interpreted by tribunals as prohibiting regulatory actions that result in de facto discrimination, even when there is no facial or intentional discrimination involved. For example, an otherwise neutral regulatory action to protect the environment that results in a disproportionate impact on a foreign investor could run afoul of this standard."³² To counter this concern, the critics proposed that the scope of the national treatment provision in the U.S. Model BIT be limited solely to "instances in which a regulatory measure is enacted for a primarily discriminatory purpose."

Treaty proponents responded with several different arguments in reply: (a) no investment arbitration tribunal had ever interpreted the NT obligation in the manner that concerned the critics; (b) investment tribunals had instead regularly interpreted the NT provision of NAFTA, and its sister MFN provision, to require express or implicit discriminatory intent; (c) governments are generally not foolish enough to expressly state that trade or investment enactments are being adopted for a discriminatory purpose, so an express "intent" requirement would *de facto* gut the NT obligation; and (d) most trade and investment enactments grant regulatory authorities discretion, so that the risk of discrimination on the basis of nationality

is commonly a matter of improper *application* of a facially neutral requirement.

The U.S. Government left unchanged the existing National Treatment provisions of the U.S. Model BIT.

v. Remove the "Except in Rare Circumstances" Introduction to the "Public Welfare" Provision in Annex B (On Expropriation) and More Generally Exclude From Liability All Regulatory Conduct Motivated by Public Welfare Objectives Regardless of Impact

Treaty critics have remained concerned that the substantive protections of an investment agreement can be applied to reject regulatory conduct of the host State motivated by legitimate public welfare concerns.

The U.S. Government sought to respond to those concerns, which were raised following the *Metalclad, Pope & Talbot* and *S.D. Myers* NAFTA awards in 2000, in a number of ways: (a) specifying in the 2001 FTC Interpretation and annexes to subsequent investment agreements that the "international minimum standard" obligation in NAFTA Article 1105 and similar articles of the subsequent agreements incorporates solely "customary international law" standards rather than an autonomous "fair and equitable" standard; (b) arguing before NAFTA tribunals (successfully in *Glamis Gold* and elsewhere) that the "customary international law" standard essentially required an investor to show that the regulatory conduct of the State was "manifestly arbitrary and irrational" to make out a breach of NAFTA Article 1105, a very high standard to meet; (c) expressly incorporating into investment agreements a definition of "indirect expropriation" that copied the *Penn Central/Lingle* standards of existing U.S. Supreme Court jurisprudence for regulatory takings under the Fifth Amendment; and (d) expressly providing as part of the expropriation provisions of the investment agreements that "[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

While those responses satisfied some of the critical commentators, other treaty opponents were not mollified. In connection with the revision of the U.S. Model BIT (and in connection with other investment agreement negotiations), some critical observers have sought to (a) remove the reference to "except in rare circumstances..." found in the public welfare exclusion from the indirect expropriation provision, thereby insulating from expropriation review any non-discriminatory measure motivated and applied for legitimate public welfare objectives without exception³³ and (b) more broadly, to include in U.S. investment agreements a "general exception" along the lines of the General Exceptions for public welfare measures found in various WTO agreements and a number of recent Asian bilateral and regional investment agreements.³⁴

With respect to the “except in rare circumstances” language, treaty supporters noted that language faithfully followed U.S. Supreme Court precedent. The “except in rare circumstances” language is consistent with U.S. Supreme Court takings jurisprudence in the *Penn Central*, *Lucas v. South Carolina Coastal Council*,³⁵ *Loretto v. Teleprompter Manhattan CATV Corp.*³⁶ and *Dolan/Nollan* lines of cases.³⁷ Thus, the Congressional negotiating instruction to “secure for investors rights comparable to those that would be available under United States legal principles and practices” had been honoured.

Public welfare objectives underlying a government measure play an express role in the *Penn Central* balancing test for Fifth Amendment regulatory takings, but are clearly not by themselves decisive. “The *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.”³⁸ In addition, *Penn Central* enjoins courts to review the “character of the governmental action”—for instance whether it amounts to a physical invasion or instead merely affects property interests through “some public program adjusting the benefits and burdens of economic life to promote the common good.” All of those factors are balanced in the *Penn Central* regulatory takings analysis. As a result, the presence of legitimate public welfare objectives clearly is not sufficient by itself to prevent regulatory conduct from becoming a taking under *Penn Central*—it is a factor to be taken into account along with the economic impact of the measure and the degree of interference with property interests.

Moreover, the existence of legitimate public welfare objectives do not play any role at all, let alone a decisive role, with respect to *per se* takings under *Lucas* (total deprivation of value) and *Loretto* (permanent physical invasions) or the narrower *Dolan/Nollan* line of cases (“dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings”).

The U.S. Government declined to remove the “except in rare circumstances” language from the Model BIT.

Similarly, the U.S. Government declined to incorporate into the Model BIT a General Exceptions clause along the lines of such provisions in WTO agreements like the General Agreement on Trade in Services (GATS). Illustratively, the GATS General Exceptions in Article XIV insulates regulatory measures “necessary to protect public morals or to maintain public order” or “necessary to protect human, animal or plant life or health” so long as not constituting a means of arbitrary or unjustifiable discrimination between countries or a disguised restriction on trade in services.

While some treaty critics have proposed the adoption of a General Exceptions provision along the lines of the GATS and other WTO agreements, other treaty critics consider that the chapeau to the GATS General Exceptions

provision (“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services...”) offers too large of a shelter and undermines the effectiveness of the exception. Similarly, those critics consider that limiting the GATS General Exceptions to only those measures “necessary” for the protection of human, animal or plant life or health is a standard too strict, and should be relaxed to a reasonableness test rather than a necessity test.

Regardless of the approach taken by the various treaty critics, the U.S. Government declined to include a General Exceptions provision in the 2012 U.S. Model BIT. That decision sets up an interesting negotiating dilemma, since potential U.S. investment agreement partners such as China and ASEAN member states do include General Exceptions along WTO lines in their investment agreements. For example, the exception for measures “necessary to protect public morals or to maintain public order” will raise serious political issues in those discussions.

vi. Essential Security Proposals

Commentators made competing recommendations regarding the Essential Security provision of the U.S. Model BIT, which allows the host State to apply measures “that it considers necessary to the fulfillment of its obligations” concerning international peace or security or its own essential security interests. Treaty opponents wished the provision clearly expanded to make decisions in economic crises or prudential financial measures a matter for the State actor to unilaterally decide. Business voices wished instead to clearly limit the “essential security” exception to exclude government measures advanced predominantly for economic reasons. In addition, business commentators urged replacing the “it considers necessary” language, which arguably makes such determinations self-judging, with either investor-State or State-to-State dispute resolution.

In the end, the U.S. government opted to leave the language of the 2004 U.S. Model BIT unchanged in the 2012 Model.

vii. Performance Requirements

Unlike investment treaties of most other countries, U.S. investment treaties include substantive obligations limiting the ability of the host State to impose local content and similar “performance requirements” on foreign investments beyond the restraints found in WTO agreements. The coverage of Article 8.1(h) (Performance Requirements) of the revised 2012 U.S. Model BIT was expanded to include a prohibition on conduct by a State Party to “afford protection [to purchase, use, or accord a preference to technology] on the basis of nationality to its own investors or investments or to technology of the Party or of persons of the Party.”

As a consequence of this addition, a host State accepting the prescriptions of Article 8 of the 2012 U.S. Model BIT may not engage in protectionist conduct to prefer its own technology over that of its treaty partner in connection with investments.

viii. Territorial Seas

The phrase “territory of a Party” is used in U.S. investment agreements to identify the territorial reach of the substantive investment protections. That term was clarified in the 2012 U.S. Model BIT to expressly refer to territorial seas and further areas within which the State may, as defined by customary international law, exercise sovereign rights or jurisdiction. This clarification is aimed at avoiding any dispute that the BIT’s investment protections apply to, for example, offshore oil and gas projects (and perhaps fish farms).

In the case of a possible U.S.-China BIT or U.S.-Vietnam BIT, or even within the Trans-Pacific Partnership talks, the presence of this provision on the negotiating table signals a very interesting negotiation regarding petroleum exploration in the South China Sea.

C. Financial Institutions and Systems

The Great Recession has triggered concerns by some that foreign investors might bring investment treaty arbitration claims alleging breaches founded on the U.S. Government responses to the financial crisis. Indeed, the State Department and USTR expressly singled out financial services issues as one of the three topics on which they particularly sought the views of the private sector Advisory Subcommittee. No such claims were ever brought against the U.S.. However, critical observers nevertheless proposed a variety of changes to U.S. investment treaties to avoid the possibility entirely.

i. Excluding Sovereign Debt From the Definition of “Investment”

NAFTA Chapter 11 excludes sovereign indebtedness and indebtedness of state enterprises from the definition of “investment.” That was not the case in the 2004 U.S. Model BIT and recent U.S. investment agreements.

The 2012 U.S. Model BIT followed the 2004 Model BIT, permitting claims that sovereign debt holdings constitute an investment. The new Model BIT also does not contain any annexes, such as have been included in recent U.S. free trade agreements, specifically addressing the relationship between sovereign debt reschedulings and investment treaty arbitration. However, the U.S. Government has made clear in its briefings that such annexes may be incorporated in future investment agreements on a case-by-case basis.

ii. Allowing the Use of Capital Controls by Adding a Temporary “Safeguards” Provision in the Model BIT for Balance of Payments and Other Financial Crises Not Subject to Investor-State

Dispute Settlement; Making Regulatory Decisions About Financial Matters Self-Judging in a Manner Similar to Essential Security Protections; Rewording the Second Sentence of BIT Article 20.1 (“Where such measures [prudential financial services measures] do not conform with the provisions of this treaty, they shall not be used as a means of avoiding the party’s commitments or obligations under this treaty”) to Make Clear That Anti-Avoidance Sentence Does Not Override the Operative Exclusion for Prudential Measures in the First Sentence of Article 20.1

The BIT review commenced in the midst of the international financial crisis. Many observers at that time wondered whether the investment protections in investment agreements might interfere with regulatory measures taken by the U.S. and other governments to address the crisis. Critics offered three related proposals to eliminate this possibility: adding a temporary balance of payments safeguards provision, making regulatory decisions about financial services self-judging, and revising the “no avoidance” language in Article 20.1 to eliminate any risk that language made the remainder of the BIT Article 20.1 “prudential measures” financial regulation exception inapplicable. None of those proposals was accepted by the U.S..

Treaty critics sought to include in the U.S. Model BIT an exceptions provision for temporary balance of payments measures along the lines of the Safeguards provisions in WTO agreements like the GATS, NAFTA Art. 2104.3(d) and the Balance of Payments Safeguards clause in the last draft of the failed Multilateral Agreement on Investments (MAI). Thus, those groups proposed that the Model BIT should “[a]llow the use of capital controls by including a safeguard provision for balance of payments and other financial crises that is not subject to investor-state dispute settlement.”³⁹ That safeguards provision would both permit certain foreign exchange restrictions and exclude disputes over such restrictions entirely from investment treaty arbitration.

Not only the business community objected to these proposals; so did the U.S. Treasury Department. The Report of the Advisory Subcommittee notes that “in Subcommittee meetings with the Treasury Department, representatives of the Department indicated that, even in light of the recent financial crisis, they did not feel that their ability to act was constrained by any obligations under BITs to which the U.S. is a party, and, therefore, that no amendment for balance of payment purposes was, in their view, necessary.”⁴⁰

Existing exemptions in U.S. investment agreements overlap with these proposals. The 2004 Model BIT, for example, contains at least three potentially applicable exculpatory provisions relating to financial crisis measures: the Essential Security clause in Article 18.2 (somewhat similar clauses have been construed in several of the Argentine cases to cover economic crises), the “prudential measures”

exclusion relating to financial services in Article 20.1 and the exclusion in Article 20.2 for “non-discriminatory measures of general application taken by [the central bank or monetary authority] in pursuit of monetary and related credit policies or exchange rate policies.” The latter two provisions, found in BIT Article 20, were a focus of discussion in the Advisory Subcommittee. The 2004 version of Model BIT Article 20 reads as follows:

Article 20: Financial Services

Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system.¹⁴ Where such measures do not conform with the provisions of this Treaty, they shall not be used as a means of avoiding the Party’s commitments or obligations under this Treaty.

2. (a) Nothing in this Treaty applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party’s obligations under Article 7 [Transfers] or Article 8 [Performance Requirements].¹⁵

(b) For purposes of this paragraph, “public entity” means a central bank or monetary authority of a Party.

14 It is understood that the term “prudential reasons” includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions.

15 For greater certainty, measures of general application taken in pursuit of monetary and related credit policies or exchange rate policies do not include measures that expressly nullify or amend contractual provisions that specify the currency of denomination or the rate of exchange of currencies.

Clause 3 of Article 20 permits the two States party to the BIT to jointly make a binding determination that the investor’s claim is excluded under one of these provisions.

Treaty critics consider the exculpatory provisions of BIT Article 20 to be inadequate. With respect to Article 20.1, those groups asserted “the U.S. government should consider eliminating the arguably self-canceling second

sentence of Article 20.1, and including language indicating that the prudential measures exception is self-judging (similar to the language in the essential security provisions of recent FTAs).”⁴¹ As regards Article 20.2, treaty opponents objected that the provision did not provide an exemption for conduct constituting a breach of the “Payments and Transfers” obligation in BIT Article 7 and similar provisions of U.S. investment agreements. The same critics considered in any event that the “Payments and Transfers” obligation should be modified to exclude “capital controls.”

Treaty proponents, and the U.S. Treasury Department and the WTO Secretariat, argued otherwise. The purportedly “self-cancelling” anti-avoidance language in the second sentence of Article 20.1 (“[w]here such measures do not conform with the provisions of this Treaty, they shall not be used as a means of avoiding the Party’s commitments or obligations under this Treaty”), is taken virtually word-for-word from the “prudential measures” exception for financial regulation in the GATS. The WTO completed a review of the substantially identical language in the GATS “prudential measures” exception in February 2010. At that time, the WTO Secretariat circulated to member countries its review of the language at issue and thereafter made that review public.⁴² The 2010 WTO review expressly rejected the argument that the provision was self-cancelling, concluding instead that this second part was “clearly intended to avoid abuse in the use of the exception.” The U.S. Treasury Department has taken the same position as the WTO in its public discussions of Article 20.1 and the similar GATS language.

The U.S. Government did not accept the critics’ proposals to eliminate the anti-abuse language as “self-cancelling.” The Government also declined to make the Article 20.1 “prudential measures” exception self-judging, as requested by treaty critics.

In one of the few changes that were adopted into the 2012 U.S. Model BIT, the U.S. Government did expand explanatory footnote 18 (formerly footnote 14) to Article 20.1. The additional language made express that covered prudential reasons include “the maintenance of the safety and financial and operational integrity of payment and clearing systems.” That footnote language seems non-controversial. Financial payment systems like FedWire, CHIPS and SWIFT, which are operated by financial institutions for the banking and securities community, and securities clearing institutions are prominent financial market participants. Experienced financial services lawyers would have in any event considered protection of payment and clearing systems as falling within the pre-existing “ensure the integrity and stability of the financial system” and “safety and soundness of financial institutions” language from, respectively, Article 20.1 and the original footnote.

The U.S. Government also added another new footnote (note 19) to 2012 Model BIT Article 20.2, making

clear that exchange restrictions imposed as part of debt moratoriums to “nullify or amend contractual provisions that specify the currency of denomination or the rate of exchange of currencies” are *not* encompassed by the monetary, credit and exchange rate exculpatory language in Article 20.2. That change demonstrates the intent of the U.S. Government to not permit such currency and exchange rate nullifications to be excluded from investor-State arbitration by operation of Article 20.2.

In addition to those changes, the 2012 U.S. Model BIT also includes new language in BIT Article 20.8 exempting regulatory measures “related to the prevention of deceptive and fraudulent practices or that deal with the effects of a default on financial services contracts.” That addition was apparently motivated by the anti-fraud provisions of financial reform legislation in the U.S.. For such measures to obtain the benefit of this exception, they must satisfy requirements that the measures (i) be “necessary to secure compliance with laws or regulations that are not inconsistent with this Treaty” and (ii) “are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on investment in financial institutions.” There is little concern the new U.S. regulatory powers in financial reform legislation will fail to meet these requirements.

With that as background, let us now turn to the proposal by treaty critics to permit “capital controls” under Article 7 of the Model BIT (the prohibition on restrictions on financial payments and transfers) by adding to the Model BIT a Balance of Payments Safeguards provision. The balance of payments Safeguards section of the GATS was the model.

GATS Article XI makes clear that GATS member states are prohibited from applying restrictions on payments and transfers for current transactions or restrictions on capital transactions, except as specified in GATS Article XII. Article XII of the GATS then sets out the actual Balance of Payments Safeguards exception. That exception specifies that exchange restrictions are permitted for “serious balance-of-payments and external financial difficulties or threat thereof.” The restrictions cannot discriminate among GATS members, must avoid unnecessary damage to the commercial, economic and financial interests of any other Member, and must be temporary and phased out progressively as the situation improves. Importantly, the restrictions are also required to “be consistent with the Articles of Agreement of the International Monetary Fund.”

In contrast, Article 7 (Payments and Transfers) of the 2004 U.S. Model BIT and recent U.S. investment agreements prohibit foreign exchange payment and transfer restrictions regardless of whether they affect current transactions or capital movements. As explained below, under the IMF Articles of Agreement⁴³ countries are free under the IMF Articles to impose capital controls. However,

under Article VIII.2(a) of the IMF Articles of Agreement, a member cannot impose restrictions on “payments and transfers for current international transactions” without IMF approval. Current payments are defined in IMF Article XXX(d). Based on that definition, pursuant to Articles VIII.2(a) and XXX(d), a member of the IMF cannot, without IMF approval, lawfully impose exchange restrictions on the following financial flows.

- All payments (whether principal or interest) due in connection with *foreign trade, other current business, including services, and normal short-term banking and credit facilities*. Thus, IMF approval is required for exchange control restrictions on any international trade-related payments and credit facilities to finance current international payments.
- All payments due as *interest on loans* (regardless of whether they are for foreign trade or current business or short- or long-term credit facilities). Whether or not a moratorium on foreign exchange payments is good economic policy, these interest payments on international debt, along with the principal payments addressed in the next bullet point, are the central focus of any such moratorium. The inability to lawfully prevent their payment without IMF approval guarantees a large breach in the financial dam intended to be created by the moratorium.
- Payments of *moderate amount for amortization of loans* (in effect, most scheduled principal payments on foreign indebtedness, but not a lump sum payment of principal by acceleration or otherwise). Along with interest payments to foreign creditors, moratoriums aim to block these principal payments from being made in the midst of a liquidity crisis. Here too, exchange restrictions without IMF approval are internationally unlawful for any IMF member.
- All payments due as *net income from other investments* (i.e., ordinary dividends on equity investments for a return **on** invested capital and royalty payments on licenses). Thus, ordinary dividends and royalty payments are treated as payments for current transactions under the IMF Articles of Agreement.
- Payments of *moderate amount for depreciation of direct investments* (i.e., in effect, moderate amounts of ordinary dividends on equity investments for return **of** invested capital, but not proceeds from the sale or liquidation of the investment). Consequently, periodic dividends and similar distributions constituting recovery by a foreign investor of invested capital are also treated as payments for current transactions under the IMF Articles of Agreement.

Modifying the U.S. Model BIT, of course, has no impact on these long-standing IMF provisions.

As noted above, NAFTA Art. 2104.3(d) and the GATS and draft MAI Safeguards Clauses all provide that, to be

excepted from the other obligations of the agreement for balance of payments reasons, any financial regulatory measure covered by the safeguards provision “shall be consistent with the Articles of Agreement of the International Monetary Fund.” Therefore, none of these “restrictions on the making of payments and transfers for current international transactions” are permitted as a matter of international law for IMF members unless approved by the IMF under IMF Article VIII.2(a), even taking into account the existence of a balance of payments safeguards clause along the lines of the NAFTA, GATS and draft MAI clauses. In comparison, the following are likely capital transactions, which can be restricted under the IMF Articles by a host State without the need for IMF approval: (i) lump sum payments of principal of a loan (whether by prepayment or by acceleration) and (ii) proceeds from the sale or liquidation of an investment.

The IMF does occasionally grant approvals under IMF Article VIII.2(a) for temporary restrictions on current payments. However, according to IMF officers, such approvals are granted only if at least three conditions are met: (i) the restriction is imposed for balance of payments reasons, (ii) the restriction is applied in a manner that does not discriminate between Fund members, and (iii) the restriction is temporary in the sense that there is a clear timetable for the measure’s removal (generally one year). Moreover, the IMF only grants such temporary approvals if the host State accepts IMF economic policy recommendations—the famous IMF “conditionality.”

Controls on capital transactions (often called “capital movements”) are, as noted, generally permitted under the IMF Articles of Agreement without the need for IMF approval. While capital controls are legally permitted, the IMF has historically counseled States as a policy matter to not impose such restrictions. However, following the Asian financial crisis in the late 1990s, the IMF began to rethink its generic policy opposition to controls on capital transactions, even if those controls were permitted by the IMF Articles. Today, the IMF does not oppose temporary capital controls as a policy matter in certain limited circumstances. The IMF continues to believe, though, that capital controls should not normally be used. The U.S. Treasury Department, as shown by its negative view of capital controls set forth in Model BIT Article 7, is even less inclined towards capital controls than the IMF.

D. State-Owned Enterprises

There was also been considerable discussion in the U.S. about the application of the substantive investment protections of U.S. investment agreements to conduct by State-Owned Enterprises (SOEs). As part of their instructions to the private sector Advisory Committee, the State Department and USTR specifically asked for the views of the Committee on the SOE subject.

Unlike other topics addressed in the BIT review, treaty critics and treaty advocates shared some common ground

on the question of whether foreign SOEs should be permitted to freely invest in the U.S. on the same basis as foreign private enterprises. Both proponents and opponents made a number of proposals to include provisions in the 2012 U.S. Model BIT regulating SOE investments in the U.S.. For example, treaty opponents requested insertion of “a provision to ensure that State-Owned Enterprises (SOEs) which invest in productive assets in the United States do not receive financing and inputs at below market rates or access to other anti-competitive subsidization by a foreign government.”⁴⁴ Some business observers requested the U.S. government to include in the revised Model BIT provisions (i) for a screening mechanism for investments by State-Owned Enterprises and (ii) to regulate the competitive activities of SOEs when acting in a commercial manner.

The U.S. Government declined to employ its investment agreements as platforms to impose regulatory restrictions on foreign investors, rather than providing protections for investors from State regulatory misconduct. State-Owned Enterprises remain “investors” for purposes of the Model BIT on the same basis as private enterprises. Thus, the Obama Administration did not accept these proposals, instead leaving regulatory control over investments into the U.S. to the normal processes of the legislative and administrative branches of the U.S. Government.

In the end, the U.S. made only one addition to the 2012 U.S. Model BIT with respect to State-Owned Enterprises. The 2004 Model BIT and other U.S. investment agreements have long provided that the substantive investment protections of the BIT apply not only to direct conduct of a State, but also “to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party.” A newly added footnote 8 to Article 2.2(a) in the 2012 U.S. Model BIT made clear that coverage of an SOE’s conduct extended to government authority delegated through a wide variety of means, including the broad notion of “Party...action.”

8 For greater certainty, government authority that has been delegated includes a legislative grant, and a government order, directive or other action transferring to the state enterprise or other person, or authorizing the exercise by the state enterprise or other person of, governmental authority.

Thus, the U.S. was unwilling to use investment agreements to regulate State-Owned Enterprises investing in the U.S.. The U.S. was, however, willing to make clear in the 2012 U.S. Model BIT that a foreign State could be held liable under the substantive provisions of the BIT for conduct of one of its SOEs wielding governmental authority, even if the delegation of that governmental authority took place by informal means.

E. Environment and Labor Obligations

Among the most controversy-laden aspects of the BIT review was whether, and if so to what extent, the U.S. Model BIT would include environmental and labor obligations binding on the State parties. Treaty critics, led by labor unions and environmental non-governmental organizations, fought to expand the scope of binding obligations and to make those obligations enforceable by means of binding dispute resolution in a manner similar to the Labor and Environmental Chapters of recent U.S. free trade agreements. Business interests opposed those proposals.

The 2012 Model BIT controversially addressed environmental and labor obligations in a manner quite different from both NAFTA and recent U.S. free trade agreements. NAFTA and the 2004 Model BIT contain exhortatory language regarding environmental and labor obligations, not enforceable in either State-State or interested party-State arbitration. DR-CAFTA began to move towards binding and enforceable environmental and labor obligations. The Peru, Korea, Colombia and Panama free trade agreements all contained separate environmental and labor chapters, with significant obligations ultimately enforceable by State-State arbitration and financial penalties. Notably, no other country in the world has to date included anything like those binding and enforceable provisions in their own trade or investment agreements.

i. Environment Obligations

Environmental groups and their allies sought to “transform the hortatory and aspirational language in the ‘Investment and Environment’ provision [of the BIT] into a legal obligation subject to State-to-State dispute settlement. In Article 12.1, the language “shall strive to ensure that it does not waive or otherwise derogate from” should be replaced by a firm obligation: “shall not waive or otherwise derogate from.” The footnote to this article [limiting its scope, in the case of the U.S., to Federal legislation or regulation enforceable by central authorities] should be deleted to expand the scope of Article 12 to all environmental laws. The Investment and Environment Provision should be subjected to State-to-State dispute settlement....”⁴⁵

Those groups found their wishes met in part but not in whole. The 2012 U.S. Model BIT does replace the 2004 Model “strive to ensure” language with a stronger duty that “each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws.” However, the new Model BIT does not provide for State-State binding dispute resolution, but only State-State consultations in the same manner as the 2004 U.S. Model BIT.

The Obama Administration also rejected the proposal by environmental groups to delete the footnote that limits the environmental obligations covered by BIT Article 12 to Federal measures enforced by Federal authorities. Ac-

cordingly, environmental laws of the 50 states and their local bodies, as well as Federal laws enforced by state or local authorities, continue to not be covered by the BIT Article 12 obligations.

ii. Labor Obligations

Labor unions and their allies had sought expanded labor protections in Article 13 of the U.S. Model BIT, enforceable directly by interested parties or by State-State dispute resolution as provided in the most recent U.S. free trade agreements. Here too, the picture was mixed, but notably State-State dispute resolution was not included.

The 2012 U.S. Model BIT made several changes from Article 13 (Investment and Labor) of the 2004 Model. Language from earlier U.S. free trade agreements, but less strong than the most recent free trade agreements, was included in BIT Article 13 under which the State parties “re-affirm” their obligations as members of the International Labor Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up. The scope of covered labor laws under BIT Article 13 now includes the elimination of discrimination in employment and occupation.

In addition, Article 13 now further includes an obligation for a State “not to waive or otherwise derogate from” its labor laws, or offer to do so, where doing so would be inconsistent with core ILO labor rights (whereas the State previously only had to “strive” to do so under the 2004 Model BIT). Moreover, State parties cannot “fail to effectively enforce their labor laws through a sustained or recurring course of inaction as an encouragement for the establishment, acquisition, expansion or retention of an investment in its territory.”

Still, only State-State consultations exist as a platform for enforcing these obligations. The enforceability of these more stringent provisions remains open to question in the absence of binding dispute resolution procedures.

In addition to not providing for State-State binding dispute resolution, the U.S. Government also did not accept a proposal from labor interests to require a State party to amend its existing national laws to bring them into line with ILO minimum labor rights. Instead, as stated above, Article 13 requires the State to not waive or derogate from national labor laws already adopted and to not fail to enforce those laws. That result was not surprising. U.S. labor unions have long maintained that some U.S. labor legislation is inconsistent with ILO rights. No U.S. Administration, regardless of party, is likely to try to preempt the U.S. Congress by *de facto* amending domestic U.S. labor law through an investment treaty with another country.

iii. Free Trade Agreements and Environment/Labor Obligations

In the course of explaining the 2012 Model BIT provisions to interested parties, it has become apparent that the

Obama Administration believes the U.S. does not have sufficient leverage to extract binding and enforceable environmental and labor obligations from counterparties in a bilateral investment treaty negotiation. That is the case largely because the U.S. is already one of the most open investment environments in the world. Thus, the U.S. has less to offer in a negotiation limited solely to investment issues.

However, that is not the situation in the broader context of free trade agreement negotiations. There, the attraction to treaty partners of selling into the U.S. domestic market offers powerful negotiating leverage to the U.S.. We do not have public knowledge about the U.S. negotiating proposals on labor and environmental obligations under the Trans-Pacific Partnership or the responses from prospective treaty partners. However, one might reasonably expect that the going-in position of the U.S. with respect to those chapters will be at least as strong as the four most recent U.S. free trade agreements, and perhaps even stronger. As for how the negotiating partners will respond, well....

F. Other New Provisions

Several other provisions of the 2012 U.S. Model BIT are new and deserve attention even if they were not controversial between treaty proponents and treaty opponents—they will surely be of interest to prospective treaty partners.

i. Standards-Setting

The U.S. Government included in the 2012 Model BIT new provisions in Article 11.8 requiring the host State to permit persons of the other State to participate in the development of technical and similar standards on the same basis as nationals of the host State. The Korea-U.S. free trade agreement (KORUS) contains a provision covering the same concepts, but the 2012 Model BIT provision is far more detailed. There are exceptions for standards with respect to sanitary and phytosanitary measures and with respect to procurement specifications of a governmental body for its own requirements.

This provision is enforceable in the Model BIT by State-State dispute resolution, not by investor-State arbitration. Business interests have applauded this new requirement. Although little in the revised 2012 U.S. Model BIT will be satisfying to non-governmental organizations and others critical of investment treaties, those groups may find this provision to be useful not only for business interests but also for their own interests.

ii. Regulatory Transparency

The transparency provisions of the U.S. Model BIT relating to investor-State arbitration proceedings did not change, likely because there are currently no investor-State arbitration provisions mandating more transparency that the U.S. provisions. However, the provisions of Article 11 of the 2012 U.S. Model BIT, addressing publication

of regulatory actions and transparency in a host State's regulatory and administrative matters, have been expanded. Here too, non-governmental organizations that are treaty critics may find the new provisions to be useful.

G. Conclusion

The bottom line is that the Obama Administration accommodated few, if any, of the changes demanded by critics of investment treaty arbitration during the BIT review process. The 2012 U.S. Model BIT instead closely mirrors its 2004 predecessor. Drafting a model agreement is one thing, however. Negotiating an investment treaty or an investment chapter in a free trade agreement is quite another matter. Only time will tell the extent to which this document foreshadows the investment chapter of free trade agreements like the proposed Trans-Pacific Partnership or that Holy Grail of investment treaties, a U.S.-China bilateral investment treaty.

Endnotes

1. Available at <http://www.state.gov/e/eb/ifa/bit/index.htm> and <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.
2. From Global Trade Watch, an arm of Public Citizen.
3. From the Emergency Committee for American Trade (ECAT).
4. A negotiating draft of the TPP investment chapter was leaked in June 2012, and significantly resembles U.S. templates, with various open issues and competing proposals as well. See tinyurl.com/tppinvestment.
5. The Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty (September 30, 2009) can be found at <http://www.state.gov/e/eb/rls/othr/2009/131098.htm>. The covering letter to Secretary Hillary Clinton is at <http://www.state.gov/e/eb/rls/othr/2009/131096.htm>.
6. The annexed separate statements can be found at <http://www.state.gov/e/eb/rls/othr/2009/131118.htm>.
7. See Docket Id. USTR-2009-0019, at <http://www.regulations.gov/#!docketDetail;dt=FR%252BPR%252BN%252BO%252BSR%252BPS;rp=25;po=0;D=USTR-2009-0019>.
8. Available at http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file743_14523.pdf. See <http://www.ustr.gov/about-us/press-office/press-releases/2011/december/united-states-rwanda-ratify-bilateral-investment> for the USTR press release.
9. The 2002 Trade Promotion Act granted negotiating authority to the U.S. Government for trade and investment agreements. With the Congressional approval of the Korean, Colombian and Panamanian free trade agreements in 2011, that authority finally lapsed. However, the negotiating parameters laid out in the 2002 Act remain potent political themes in U.S. discussions of trade and investment agreements, since Congressional approval will be required for any new agreements.
10. Available at http://www.naftalaw.org/files/NAFTA_Comm_1105_Transparency.pdf.
11. Following issuance of the 2001 FTC Interpretation, NAFTA tribunals have unanimously found the Interpretation to be binding on them for purposes of determining the scope of protections under NAFTA Chapter 11.
12. 438 U.S. 104 (1978). In *Penn Central*, the Supreme Court identified several factors that have particular significance in the evaluation of “regulatory takings” claims. Primary among those factors are “the economic impact of the regulation on the claimant and, particularly,

the extent to which the regulation has interfered with distinct investment-backed expectations.” In addition, the “character of the governmental action”—for instance whether it amounts to a physical invasion or instead merely affects property interests through “some public program adjusting the benefits and burdens of economic life to promote the common good”—is relevant in discerning whether a taking has occurred. The *Penn Central* factors have thereafter served as the principal judicial guideline for resolving “regulatory takings” claims under the 5th Amendment. *Penn Central* was unanimously reaffirmed in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

13. See Kantor, The Transparency Agenda for UNCITRAL Investment Arbitrations: Looking in All the Wrong Places, presented at the Arbitration Forum of the NYU Center for Transnational Litigation and Commercial Law (February 7, 2011), available at <http://www.iilj.org/research/documents/IF2010-11.Kantor.pdf>.
14. Transcript: Trading Democracy—A Bill Moyers Special, available at http://www.pbs.org/now/transcript/transcript_tdfull.html.
15. The New U.S. Model Bilateral Investment Treaty: A Public Interest Critique, May 9, 2012 at 2 (Produced by: Sarah Anderson, Institute for Policy Studies; Linda Andros, United Steelworkers; Marcos Orellana Cruz, Center for International Environmental Law; Kevin P. Gallagher, Boston University and Global Development and Environment Institute; Owen Herrnsstadt, International Association of Machinists and Aerospace Workers; Thea Lee, AFL-CIO; Matthew C. Porterfield, Harrison Institute for Public Law—Georgetown Law; Margrete Strand Rangnes, Sierra Club; and Martin Wagner, Earthjustice), available at http://www.ips-dc.org/reports/the_new_us_model_bilateral_investment_treaty_a_public_interest_critique (hereinafter “Public Interest Critique”).
16. Public Interest Critique, *supra* n. 15 at 3.
17. See generally, Parvanov & Kantor, Comparing U.S. Law and Recent U.S. Investment Agreements: Much More Similar Than You Might Expect, in *Yearbook on International Investment Law and Policy 2010-2011* (Karl Sauvant ed., Oxford University Press 2011), at 747-779.
18. *Id.*
19. Public Interest Critique, *supra* n. 15 at 2.
20. *Id.* at 4.
21. Public Interest Critique, *supra* n. 15 at 3.
22. 217 U.S. 333, 339 (1910).
23. 323 U.S. 373, 378 (1945).
24. 328 U.S. 256, 263 (1946).
25. 467 U.S. 986 (1984). See also *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 353 U.S. 302, 326 (2002).
26. 544 U.S. 528 (2005).
27. Public Interest Critique, *supra* n. 15 at 3.
28. *L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, General Claims Commission, 4 R.I.A.A. 60, 61–62 (October 15, 1926), available at www.untreaty.un.org/cod/riaa/cases/vol_IV/60-66.pdf.
29. *Merrill & Ring Forestry L.P. v. The Government of Canada*, NAFTA/UNCITRAL, Award (March 31, 2010), at ¶189.
30. What is the customary international law that governs the treatment and taking of foreign investment? That question was at the heart of United Nations debates over ‘Permanent Sovereignty over Natural Resources,’ the ‘New International Economic Order,’ and the ‘Charter of Economic Rights and Duties of States.’ The resolutions adopted on those questions demonstrate that, while in the view of the industrialized democracies, there is a customary international

law in this sphere—whose core provides for prompt, adequate and effective compensation for expropriated foreign property—in the view of the very large majority of UN Members no such customary international law exists. In their view, a State is free to treat foreign investment as its law and policy dictates without regard to alleged international obligations of which there are none. Far from relying on a customary international whose existence, not to speak of its content, is contentious, the United States will do far better to rely on the terms of BITs, such as its Model 1994 BIT, which vault over this traditional divide of the international community and provide specific, progressive terms for the treatment and taking of foreign investment.”

Separate Statement of Judge Stephen Schwebel appended to The Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty (September 30, 2009), available at <http://www.state.gov/e/eb/rls/othr/2009/131118.htm#9>.

31. International Investment Law: A Changing Landscape (OECD 2005), at 132, quotes the negotiating record for DR-CAFTA as an illustration.
32. Public Interest Critique, *supra* n. 15 at 4.
33. Global Trade Watch, Backgrounder: CAFTA Investor Rights Undermining Democracy and the Environment Commerce Group Case (November 15, 2010), at 12, available at <http://www.citizen.org/documents/CAFTA-investor-rights-undermining-democracy.pdf> (footnotes omitted).
34. For example, the China-ASEAN Investment Agreement, the China-New Zealand free trade agreement and the Trilateral Investment Agreement among China, Japan and South Korea.
35. 505 U.S. 1003 (1992).
36. 458 U.S. 419 (1982).
37. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831–832 (1987).
38. *Lingle*, *supra* n. 26 at 540.
39. Public Interest Critique, *supra* n. 15 at 6-7.
40. See The Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty, *supra* n. 5.
41. Public Interest Critique, *supra* n. 15 at 6.
42. World Trade Organization, Council for Trade in Services, Committee on Trade in Financial Services, Financial Services: Background Note by the Secretariat, S/C/W/312, S/FIN/W73 (3 February 2010), ¶¶ 28-34 at 8-9.
43. The IMF Articles of Agreement are, of course, a multilateral treaty binding on all member States. The U.S. undertook membership in the IMF pursuant to the Bretton Woods Agreement Act of 1945, 59 Stat. 512, 22 USC § 286 *et seq.*
44. Public Interest Critique, *supra* n. 15 at 7.
45. Public Interest Critique, *supra* n. 15 at 4-5.

Mark Kantor is an international arbitrator. He also teaches as an adjunct professor at Georgetown University Law Center, is Chair of the DC Bar International Dispute Resolution Committee and is Editor-in-Chief of Transnational Dispute Management. He served on the Subcommittee of the State Department’s Advisory Committee on International Economic Policy established to review the U.S. Model BIT.

The Revised Swiss Rules of International Arbitration

By Philipp Habegger

The revised version of the Swiss Rules of International Arbitration (“Swiss Rules”) became effective on June 1, 2012.¹ This article addresses the main changes and innovations.

I. Introduction and Main Goals of the Revision

On 1 January 2004 the Swiss Rules of International Arbitration became effective. After close to 600 administered cases have been successfully conducted it was time to use the experience gained and to (moderately) adapt the arbitration rules. This was especially important against the background of the 2010 revision of the UNCITRAL Rules of Commercial Arbitration 1976, upon which the Swiss Rules are based. Moreover, findings from the revision of other arbitration rules² were analyzed. Most importantly, however, it was important to maintain the flexibility that always was one of the great advantages of the Swiss Rules.

II. Powers of the Institution

It is the Swiss Chambers’ Arbitration Institution’s arbitration court (the “Court”) which renders the administrative decisions as provided for under the Rules. The Court is assisted in its work by a secretariat (the “Secretariat”). It also administers arbitrations seated outside of Switzerland (Art. 1(2)). These cases were increasingly common in 2010, 2011 and the first half of 2012.

According to Art. 1(4) Swiss Rules the parties delegate all powers to the Court (instead of the local state court) which are necessary to supervise the proceedings to the fullest extent permitted by law. With that, the autonomy of the arbitration is safeguarded as much as possible. Especially, the Court is permitted to extend any terms of office of the arbitral tribunal or to decide on challenges of arbitrators on grounds not provided for in the Rules. A challenge for reasons not mentioned in Art. 10 Swiss Rules may be available under the law applicable to the arbitration in case the arbitrator does not fulfil the requirements agreed upon by the parties.³

The most important new power of the Court in connection with the constitution of the arbitral tribunal is contained in Art. 5(3). According to this provision the Court shall have all powers of constituting the arbitral tribunal in the event of any failure in the constitution. The Court may thus revoke any appointment already made, it can appoint or reappoint any of the arbitrators and it can designate the presiding arbitrator. This fallback provision guarantees the proper constitution in any case that might come to mind and supplements the existing provision on the constitution of the tribunal in multi-party proceedings (Art. 8(3-5)). The provision is based on Art. 10(3) UNCITRAL Rules.⁴

Unlike other institutional rules,⁵ Art. 2(3) expressly provides that the Court may not only extend, but also

shorten, time limits. This expanded power as well aims at ensuring the smooth and efficient conduct of proceedings.

The Court decides whether to administer the proceedings in the first place. This decision must be affirmed unless there is manifestly no agreement to arbitrate that refers to the Rules (Art. 3(12)). The *prima facie* test in relation to jurisdiction under the Swiss Rules is more flexible than Art. 6(4) ICC Rules which prescribes a rather mechanical test. In the author’s view the test under the Swiss Rules reduces the risk that the competence-competence of the arbitral tribunal ultimately is undermined, especially in multi-party, multi-contract and extension of the arbitration clause situations.

III. Amendments (Further) Enhancing Efficiency

Art. 15(7) now establishes a duty of all participants in the arbitral proceedings to make every effort to contribute to the efficient conduct of the proceedings and to avoid unnecessary costs and delays. The provision expressly addresses all participants, i.e., the parties and the arbitral tribunal but also counsel and experts. This obligation might not be directly enforceable; however, the arbitral tribunal can have reference to the participant’s behaviour when allocating the costs of the arbitration (cf. Art. 40(1+2)).⁶

According to the new Art. 15(8) the arbitral tribunal may take steps to facilitate the settlement of the dispute with the agreement of each of the parties. Guidance may be taken from the CEDR Rules for the Facilitation of Settlement in International Arbitration (CEDR Rules).⁷ Like Art. 3(3) CEDR Rules, Art. 15(8) provides that the agreement by the parties to have the tribunal act as facilitator constitutes a waiver of their right to challenge an arbitrator’s impartiality based on the arbitrator’s participation and knowledge acquired in taking the agreed steps. However, since an arbitrator’s obligation to disclose and to be impartial is ongoing (Art. 9(1) and (2)), an arbitrator should disclose, or even resign, if, as a consequence of his or her involvement in the settlement facilitation, the arbitrator develops doubts as to his or her impartiality in the further course of the arbitration.⁸

Unless the parties agree or the tribunal orders otherwise, the provision of evidence is shifted to the beginning of the proceedings. The parties are generally obliged not only to provide documents but all evidence on which they want to rely for their claim or defence with their first written brief (Art. 18(3) and 19(2)).

The successful and proven Expedited Proceedings (Art. 42) remain available for cases in which the amount in dispute is below 1 million Swiss Francs or for opting-in by the parties. It applied in about 36% of all case administered since 2004. Its characteristics features are that after the submission of the Answer to the Notice of Arbitration,

the parties are in principle entitled only to submit one Statement of Claim, and one Statement of Defence (and Counterclaim) and, where applicable, one Statement of Defence in reply to the Counterclaim. A single hearing is to be held for the examination of witnesses and experts as well as for oral argument, and the arbitral tribunal is to render its award within six months from the date it received the file from the Secretariat.

IV. Consolidation and Joinder

The Rules remain very innovative when it comes to consolidation and joinder.

Art. 4(1) grants the Court the greatest possible flexibility to decide whether one or more new cases should be consolidated with a pending arbitration. The Court may consolidate two or more proceedings even if different entities are parties to the new proceeding(s) (Art. 4(1) 2nd sentence).⁹ The Court has to take into account all relevant circumstances, including the links between the cases and the progress already made in the pending arbitral proceedings (Art. 4(1) 3rd sentence). The latitude for consolidation has been expanded because the Court may, according to Art. 4(1) 4th sentence, revoke the appointment and confirmation of arbitrators and apply the provisions for the composition of the tribunal anew. This is an extended application of the above mentioned Art. 5(3) which allows the Court to properly constitute the arbitral tribunal even if a party or a group of parties does not nominate an arbitrator. The Swiss Rules thereby leave more room for, but also allow for better preservation of, equal treatment of the parties in the event of consolidation than any other set of arbitration rules.

According to Art. 4(2) it is possible that a third person may request to participate in proceedings already pending under the Rules. Furthermore, a party to pending proceedings may request that one or more third persons participate in the arbitration.¹⁰ Under the Swiss Rules the manner of participation is intentionally left open. Possible modes are the third-party-notice, the civil law institutes of *Streitverkündung*, *Hauptintervention*, but also *amicus curiae* briefs and the French *droit d'intervention à titre accessoire*. The decision to permit a third party to participate in the proceedings in the requested manner is left to the arbitral tribunal (and not the Court) after consultation with all parties, including the person or persons to be joined taking into account all relevant circumstances. Depending on the manner of participation there might be different prerequisites and some forms of participation may not require the existence of an arbitration agreement with the person to be joined.¹¹

V. Interim Relief

The Swiss Rules allow for interim relief not only after (Art. 26) but also before constitution of the arbitral tribunal (Art. 43).

Interim measures may be granted by the arbitral tribunal in the form of an interim award or a procedural order (Art. 26(2)). In exceptional circumstances, the new Rules also allow for preliminary orders before the request has been communicated to any other party (Art. 26(3)). The right to be heard is ensured by requiring that the request is communicated no later than the preliminary order and that the other parties are immediately granted an opportunity to be heard (Art. 26(3)).

A wholly new provision is contained in Art. 43, which regulates interim measures before the arbitral tribunal has been constituted. Provision for emergency relief prior to the constitution of the tribunal by a competent arbitrator has already been adopted by various institutions in different forms.¹²

A party requiring urgent interim measures before the arbitral tribunal is constituted may submit an application for emergency relief proceedings to the Secretariat (Art. 43(1)). After receipt of the registration fee and the deposit, the Court appoints a sole emergency arbitrator unless there is manifestly no agreement to arbitrate referring to the Rules or it appears more appropriate to proceed with the constitution of the arbitral tribunal and have it decide on the application (Art. 43(2)(a) and (b)). The latter option together with the new competence to shorten time limits¹³ leads to more flexibility for the Court in order to deal with the specific case at hand.

The emergency arbitrator may grant any measure that an arbitral tribunal would be able to grant (Art. 43(1) in conjunction with Art. 26). Therefore, preliminary orders are permissible. This distinguishes the Swiss Rules from all other provisions on emergency relief known to the author.¹⁴

The emergency arbitrator has to render a decision within 15 days, unless extended by agreement between the parties or by a decision of the Court (Art. 43(7)). The emergency arbitrator also determines his fees and disbursements after approval or adjustment by the Court (Art. 43(9) in connection with Art. 38(g)). These costs are paid out of the deposit paid by the applicant. The decision on costs for party representation and on the question of the respective apportionment of all costs among the parties is decided by the arbitral tribunal (Art. 43(9) 3rd sentence). In case no tribunal is constituted the decision falls back to the emergency arbitrator who decides on the costs in a separate award (Art. 43(9) 4th sentence). By this provision the enforceability of the cost decision is assured because it is rendered in the form of an award in all cases.¹⁵

Art. 43 does not contain any regulations as to the form the decision should take. The emergency arbitrator may therefore decide in the same manner as the arbitral tribunal, i.e. he or she may render awards as well as orders. The subsequently constituted arbitral tribunal may modify, suspend or terminate the measures granted by the emergency arbitrator (Art. 43(8)).

In case the request for emergency relief was lodged before the Notice of Arbitration was submitted, Art. 43(3) provides for a ten-day time limit after the receipt of the application by the Secretariat to file the Notice of Arbitration. The provision on the one hand guarantees the legal protection of the requesting party before the tribunal has been constituted. On the other hand it ensures that a party requesting emergency relief is also willing to pursue the main claim in a following arbitration.¹⁶

VI. Costs

In order to speed up the proceedings until the arbitration can start, the arbitral tribunal may set deadlines for the other party to substitute for non-paid advances on costs after 15 days (Art. 41(4)). In case of non-payment the arbitral tribunal may then order the suspension or termination of the proceedings.

Pursuant to Art. 40(4) the Court has to approve and adjust if necessary the determination on costs made in relation to the fees and expenditures of the arbitral tribunal and the secretary (Art. 38(a) to (c)) and of the emergency arbitrator (Art. 38(g)).¹⁷

VII. Summary

The Swiss Rules have rightly retained the trust of the users. The revision sticks to the established principles. The competences of the institution are only reinforced where necessary to maintain the integrity of the proceedings in exceptional circumstances and without constraining the flexibility of arbitral tribunals and the parties. The flexibility was even further enhanced by the new provisions on consolidation, joinder, interim measures and emergency relief. Parties wanting to minimize interference by the institution are well advised to choose the Swiss Rules. The statistically shorter length of proceedings under the Swiss Rules as compared to ICC or AAA arbitrations should be maintained with this revision.¹⁸

Endnotes

1. The revised Swiss Rules are available in several languages at www.swissarbitration.org.
2. For example, the revision of the Arbitration and ADR Rules of the International Chamber of Commerce in 2012 ("ICC Rules," cf. *Nathalie Voser*, Overview of the Most Important Changes in the Revised ICC Arbitration Rules, ASA Bull. 2011, 783) as well as the arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC Rules") and the Arbitration Rules of the Singapore International Arbitration Center (SIAC Rules), both in 2010.
3. See e.g., Art. 180(1)(a) of the Swiss Private International Law Act.
4. See Michael Bühler & Michael Feit, in: Zuberbühler / Müller / Habegger, *Swiss Rules of International Arbitration*, 2nd Ed., Zürich 2012 (forthcoming), at Art. 5 No. 28 ss. also stressing that Art. 5(3) is based on Art. 10(3) UNCITRAL Rules. This provision was inserted as reaction to the so-called Dutco decision (Cour de cassation, 7 January 1992, Rev.arb. 1992, 470) and was designed for multiple party arbitrations. During the discussions of the UNCITRAL working group the applicability was broadened to encompass all situations which might occur in practice. The Swiss

Rules adapted this broad approach and furthermore used it in relation to consolidation (see further discussion below).

5. See, e.g., Art. 9(3) arbitration rules of the London Court of International Arbitration (LCIA). There the Court may only shorten time limits set in connection with the constitution of the tribunal. All other time limits are expressly excluded.
6. See also Art. 9(7) IBA Rules on the Taking of Evidence in International Arbitration which foresees a similar measure in relation to the taking of evidence.
7. Available at: http://www.cedr.com/about_us/arbitration_commission/Rules.pdf.
8. See IBA Guidelines General Standard (4) "Waiver by the Parties" lit. (d) and relating explanation, and Art. 7(1) CEDR Rules.
9. Deferring from, e.g., Art. 11 SCC Rules, which foresees consolidation only if the same parties are involved in the different proceedings.
10. Under Art. 7(1) ICC Rules only the parties to the pending proceeding may request the joinder of third parties as additional respondent party.
11. Cf. contrary to that Art. 17(5) UNCITRAL Rules, which requires an arbitration agreement and which seems to be limited to the joinder of one or more persons as a "real" party to the proceeding (*The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, ...*).
12. Art. 37 International Arbitration Rules of the American Arbitration Association (International Centre for Dispute Resolution) (2010); Annex II SCC Rules (2010); Art. 26 with Annex I SIAC Rules (2010); Art. 29 with Annex V ICC Rules (2012).
13. Art. 2(3); see discussion above.
14. See Annex V Art. 1(5) ICC Rules; Art. 42d Netherlands Arbitrage Instituut Rules; Annex II Art. 3 SCC Rules (see Patricia Shaughnessy, *Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules*, J. Int. Arb. 2010, 338); Schedule 1(1) SIAC Rules; Martin F. Gusy & James M. Hosking & Franz T. Schwarz, *A Guide to the ICDR International Arbitration Rules*, 2011, No. 37.14; Guillaume Lemenez & Paul Quigley, *The ICDR's Emergency Arbitrator Procedure in Action Part II: Enforcing Emergency Arbitrator Decisions*, Dispute Resolution Journal (Nov 2008 / Jan 2009), 4.
15. Contrary to the ICC Rules, where the interim measure may only be granted in the form of an order thereby possibly endangering the enforceability of the cost decision.
16. See *Voser*, *supra* note 2, at 817.
17. See the cost control in Art. 41(3) and (4) UNCITRAL Rules 2010, on which Art. 40(4) was modelled.
18. See Gabrielle Nater-Bass / Christina Rouvinez, in: Zuberbühler / Müller / Habegger, *supra* note 4, at Art. 23 No. 18.

Dr. Philipp Habegger, LL.M., philipp.habegger@walderwyss.com, is a partner in the international arbitration group at Walder Wyss Ltd. in Zurich, Switzerland. He has acted as counsel and arbitrator in more than 120 international arbitrations. He was an active member of the Working Group on the revision of the Swiss Rules of International Arbitration. He also serves as a member of the Arbitration Court of the Swiss Chambers' Arbitration Institution and the ICC International Court of Arbitration. He teaches international arbitration and international sales at the University of Zurich law school and acts as a course director at the Swiss Arbitration Academy. He is a former Vice-Chair of the Arbitration Committee of the International Bar Association.

Where Does *Forum Non Conveniens* Fit in Enforcing Foreign Arbitral Awards?

By Marc Goldstein

Introduction

You expect your international arbitration award to be portable, globally. You expect that when you obtain a \$1 billion award for your Brazilian client against a Chinese company from a tribunal that had its seat in Singapore and applied English law, that if you think there are or may soon be assets of the award debtor in New York, you can take your award to the federal court in New York to have it recognized under the New York Convention¹ as implemented by Federal Arbitration Act (“FAA”) Chapter Two,² and then enforced by execution against assets in New York as would be any other money judgment resulting from plenary proceedings in that court.

And almost always your expectations will be met. But suppose the award debtor from China moves to dismiss the confirmation petition under the doctrine of *forum non conveniens* (“FNC”)? Suppose the Chinese company asserts that Chinese law regulates its annual expenditures to meet certain foreign obligations including this one, and that the U.S. Court should invoke FNC to respect the prerogatives of China in the enforcement of its own laws?

More likely than not this plea (or ploy) will not get a warm reception, but the Second Circuit’s decision in December 2011 in *Figueiredo Ferraz Consultoria E Engenharia de Projeto Ltda. v. Republic of Peru*³ dismissed an award confirmation case against a Peruvian state agency and the Republic of Peru under the FNC doctrine. Peru invoked a Peruvian law that imposed annual limits on its agencies’ expenditures to satisfy judgments. It argued to the Second Circuit that the application of its “Cap Statute” was a “public interest” factor that weighed in favor of FNC dismissal. Two members of the Second Circuit panel agreed, and reversed the decision of the District Court, which normally is accorded substantial deference to its discretion in applying the very discretionary FNC doctrine. Circuit Judge Gerard Lynch dissented, and stated that if the panel were not bound by *stare decisis* he would have had the panel reject application of FNC in any New York (or Panama⁴) Convention award confirmation case—a position shared by the ALI’s Restatement (Third) of the Law of International Commercial Arbitration.⁵ Judge Lynch went on to question the panel majority’s application of FNC to this case in any event, regarding the “Cap Statute” as a factor unlike considerations of mainly domestic convenience and public interest that traditionally have informed FNC decisions in plenary proceedings.

Stare decisis precluded a decision of the panel rejecting the application of FNC in New York Convention

award confirmation proceedings because, in 2002 in a case known as *Monde Re*,⁶ the Court held that FNC is a U.S. “rule of procedure” that Article III of the New York Convention permits an award-enforcing national court to apply. Article III states that each Contracting States of the Convention “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....” This conclusion of treaty interpretation is itself controversial.

But even if one were to accept this view of Article III as valid (which most serious scholars do not), *Monde Re* was a case with some unique aspects that made it seem like a rather harmless and anomalous exception—until *Figueiredo*.

Notably, the award in *Monde Re* was against a Ukraine state agency, but its enforcement was sought also against the Government of Ukraine, raising an “alter ego” theory for the first time in the confirmation proceeding, and implicating legal issues of Ukraine law and factual questions requiring testimony from Ukraine witnesses. So, unlike the usual streamlined “summary proceeding” for confirmation of a Convention award, the judicial resources to be harnessed to resolve the *Monde Re* case made the case appear, to the district court and the Second Circuit, much like any plenary case involving foreign law and evidence located mainly overseas.

“Rules of Procedure” in New York Convention Article III

Whether FNC fits comfortably, or at all, as a “rule of procedure” within Article III of the New York Convention depends largely on where one looks for an answer. The Second Circuit looked mainly to domestic law in an “Erie” context,⁷ and in that context the classification of FNC on the procedure side of the substance / procedure divide was inevitable. But the Second Circuit’s inquiry in *Monde Re* into the intent of the Convention’s drafters was cursory, focused on one U.S. law review article by an author who had not been a member of the 1958 U.N. drafting group. The Court focused on the drafters’ desire that recognition of foreign awards should not be subjected to more onerous procedural requirements than domestic awards. Whereas FNC applies to domestic awards, the *Monde Re* Court reasoned, applying FNC to foreign awards is not more onerous. That was a curious conclusion, considering that FNC dismissal of a foreign award generally means the United States is an inconvenient fo-

rum and the award must be enforced in another legal system, whereas FNC dismissal of a domestic award would ordinarily mean only that the chosen federal judicial district is an inconvenient forum and the petition should be re-filed in another federal judicial district.

A fresh approach to the “rule of procedure” conundrum might usefully proceed like any other question of treaty interpretation, using principles found equally in federal case law and the Vienna Convention on the Law of Treaties. Those principles would instruct the courts to have in mind the context in which words are used, and the overall object and purpose of the treaty, and to resort for interpretation of ambiguous language to the drafting history.⁸ And inquiry along those lines might lead to several conclusions that weigh against the position adopted in *Monde Re*: that the purpose of the New York Convention was to unify standards for enforcement of awards; that the great majority of countries represented in the 1958 U.N. drafting group did not have FNC as a part of their domestic legal landscape; that Article V of the New York Convention was intended as an exhaustive list of the discretionary reasons why a Contracting State might refuse recognition of a foreign award; and that Article III “rules of procedure,” in light of Article V’s enumeration of specific and exclusive reasons why recognition of an award may be refused, is best understood to refer to the mechanical rules of the judicial system and not to discretionary doctrines whose application might exclude certain confirmation cases entirely from the U.S. courts.

A Violation of International Law?

If the conclusion is drawn, by interpreters of the Convention who are not Second Circuit judges, that Article III of the Convention permits a national court to apply certain generally applicable “rules of procedure” concerning place of filing, numbers of copies, certification of translations, form of motions and supporting and opposing papers, and the like—rules of the type that a prudent litigant may read and observe—but not discretionary rules for the selective banishment of confirmation petitions from the U.S. judicial system, then the questions arise whether the Second Circuit violates international law by applying FNC, whether this type of violation should be eradicated by change in the law, and what remedies might exist for a party aggrieved by the violation.

It seems correct to conclude that there is a violation of the treaty, and therefore a violation of international and domestic law, when a Convention confirmation case is dismissed based on FNC. But this will be small consolation to the award creditor like *Figueiredo*, who may find no other jurisdiction hosting sufficient assets of the award debtor to satisfy the award. The award creditor is unlikely to have meaningful recourse against the United States under investor protection treaties. And the violations are sufficiently rare in relation to the volume of

foreign awards that are reliably recognized and enforced in the United States and the facts of *Figueiredo* sufficiently unique that the United States is not genuinely at risk of developing a reputation as an international outlaw or even as a hostile forum for enforcement of foreign awards.

What is more problematic than the risk that confirmation cases actually will be dismissed is the prospect that FNC motions will become fairly predictable tactics in award confirmation cases, adding time, expense and uncertainty to what should be an orderly and short-lived proceeding. That risk is perhaps best addressed by the courts having at hand a set of guiding principles for considering FNC in award confirmation cases that takes into account the critical differences in procedural context and policy.

Thinking About Convenience and Comity in the Award Confirmation Context

A. Adequacy of an Alternate Forum

The Second Circuit in *Figueiredo* rejected the argument that Peru, where the award was made and the Peruvian Government obviously had assets, was an inadequate forum because the Cap Statute would limit recovery through award enforcement efforts to a small fraction per annum of the sum awarded by the arbitral tribunal. The Court extended into the Convention award confirmation realm the general FNC principle that limitations on remedies in another jurisdiction that do not exist in the United States is not a factor that makes the alternate forum inadequate unless those limitations effectively preclude any relief.

But this was a flawed extension of a legal principle from one context to another. When a foreign litigant chooses a U.S. rather than a foreign forum to litigate the merits of a claim that could have been brought elsewhere, and there is no contractual or statutory right to remedies offered by U.S. law, there is no *a priori* entitlement to have remedies quantified in a particular amount or by a particular method.

When a Convention award creditor petitions for confirmation of a \$20 million award in a U.S. court, however, the principle underlying the status of the U.S. as a Contracting State of the Convention is that the award creditor will be swiftly elevated to the status of a domestic judgment creditor just as if the award had been a final merits adjudication by the Court. There is an international legal entitlement to execute upon assets of the award debtor located in any Contracting State up to the full amount of the award. Adequacy of an alternative forum in the Convention confirmation setting should then logically mean—at least—the ability of any alternative forum to provide the applicant with the full economic benefit of the award.

And this arguably is only part of what “adequacy” of another country’s courts should mean in the Convention context. The Convention envisions that an award creditor holding a \$20 million award might file concurrent confirmation actions and pursue enforcement in an unlimited number of Contracting States, each of which hosts more than \$20 million of award debtor assets. The Convention’s design is to empower the award creditor to go on a “forum shopping-spree.” Therefore, if U.S. courts propose to apply “adequacy of alternate forum” analysis, the question should be whether at least one available alternative forum reasonably will permit recognition and enforcement as seamlessly, cost-effectively, and thoroughly, as would the United States.

B. Convenience of Parties and Witnesses

A Convention confirmation action should involve only the procedural and systemic defenses permitted by Convention Article V. A defense that the award debtor was denied a fair hearing, or did not have notice of the proceedings, or that its representative lacked capacity to enter into the arbitration agreement, or that the award violates international public policy, should rarely involve such a degree of credibility-based contentiousness about the relevant facts that a court would find a need to hold testimonial hearings. Therefore, the FNC movant award debtor should bear a heavy burden to demonstrate that testimonial proceedings will be necessary and will implicate foreign witnesses to such an extent that it would be unfair to proceed in the United States. That showing should be an almost insurmountable hurdle unless the needed witnesses are non-parties whose testimony cannot be obtained unless the proceedings are held elsewhere.

C. The Public Interest

Under traditional *Gulf Oil Corp. v. Gilbert*⁹ FNC analysis, courts are accustomed to considering whether the merits of the dispute have a geographic and /or economic center of gravity that makes more rational the investment of public resources (judges, juries, court administrative staff, court facilities) in proximity to the physical locus of the dispute. And the applicability of foreign law to a dispute is invariably a factor that weighs in favor of FNC dismissal, out of respect for the greater public interest of the foreign State in the application of its own law.

In *Figueiredo* a version of this “public interest” factor was the dispositive consideration for the panel majority, who reasoned that Peru had a significant public interest in the proper application of its Cap Statute to regulate the rate at which public agency funds are expended to satisfy obligations toward private sector vendors.

But the Second Circuit majority was unpersuaded by a number of factors that arguably should give the “public

interest” analysis a different complexion in the Convention award confirmation context. First, if (as was the case in *Figueiredo*) the award was made in the State whose law and /or public policy is said to be at issue, the award debtor may move to vacate the award in competent courts at the seat of the arbitration, and at the same time ask a U.S. court to suspend confirmation proceedings until the vacatur action is concluded.¹⁰ In *Figueiredo*, Peru had already pursued vacatur in Peru without success and without even raising the Cap Statute as a ground to set aside or modify the award.

Second, whenever FNC dismissal of an award confirmation action is sought, and a public interest of a foreign State invoked, the foreign interest comes into conflict with U.S. public policy strongly favoring recognition of foreign arbitral awards as an essential condition for the vitality of international commerce. And that public policy is inseparable from the international legal commitment toward the nearly 150 other Contracting States that flows from U.S. accession to the New York Convention. That commitment gives rise to a significant U.S. public interest in the global perception of the United States as a proponent of a unified global legal order based on multinational treaties.

Given these competing considerations, it is tempting to say that, before a U.S. court could invoke a foreign State’s domestic policy as a basis to refuse confirmation of a foreign arbitral award, the purported foreign public interest would have to be so compelling that respect for it would amount to a public policy imperative for the United States. And if that conclusion may be drawn on the facts of a particular case (and surely it could not be drawn about Peru’s Cap Statute), then the public policy defense to enforcement ought to be available (Convention Article V(2)(b)¹¹), and it should be unnecessary to analyze the foreign public interest factor in terms of FNC.

Conclusion

The Second Circuit’s position that FNC is an available tool to oppose confirmation of foreign arbitral awards is arguably a violation of international law and is at least a questionable position that erodes the U.S. commitment to enforcement of such awards under the New York and Panama Conventions. Until such time as the Supreme Court overrules the Second Circuit precedents or the Second Circuit reconsiders them, it is to be hoped that District Courts when invited to apply FNC will take particular note of the fundamental differences, for purposes of FNC analysis, between summary proceedings to enforce foreign arbitral awards and plenary proceedings to adjudicate cases on their merits, and will take a very restrictive view of the circumstances in which FNC may properly be invoked to obtain dismissal of an award confirmation petition.

Endnotes

1. 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. June 10, 1958, 21 U.S.T. 2517, TIAS No. 697, 330 U.N.T. 53 (the “New York Convention”).
2. 9 U.S.C. §201 *et seq.*
3. 665 F.2d 384 (2d Cir. 2011).
4. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 245, 14 I.L.M. 336.
5. Just prior to the decision in *Figueiredo*, the Council of the American Law Institute gave its final approval to Section 4-29 (a) of the Restatement (Third) of the U.S. Law of International Commercial Arbitration (Council Draft No. 3, approved Dec. 23, 2011) which states:

An action to confirm a U.S. Convention award or enforce a foreign Convention award is not subject to a stay or dismissal in favor of a foreign court on *forum non conveniens* grounds.

Comment b of that Section states:

Stay or dismissal of an action to confirm or enforce a Convention award based on *forum non conveniens* would run afoul of the Conventions’ requirement that, absent a specific Convention defense to enforcement, Contracting States confirm and enforce such awards.

The Reporters’ Notes elaborate further:

Convention awards are entitled to confirmation under the Conventions and the FAA chapters that implement them, unless one of the grounds enumerated in the Conventions for denying confirmation is established. Inconvenience is not among those grounds. More important, it would not be consistent with U.S. treaty obligations under the Conventions and the U.S. implementing legislation, for a court to refuse to entertain an action to confirm on a fundamentally discretionary ground such as *forum non conveniens*.

Judge Lynch in his dissenting opinion (at footnote 3) in *Figueiredo* embraces the Restatement position, noting: “I here seek to invoke not so much the prestige of the ALI as the cogency of the analysis set forth by the Reporters in support of their position.”

A subsequent Draft of these provisions (Tentative Draft No. 2 (April 16, 2012)) was submitted to the Members of the American Law Institute for approval at the May, 2012 Annual Meeting. Section 4-29, along with the Comments and Reporters’ Notes, remained unchanged from the Council Draft and was approved by the full membership.

6. *In the Matter of Arbitration between Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002) (“Monde Re”).

7. The Second Circuit cited *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), in which the Supreme Court held that federal law did not preempt a state court from applying a state statute that prevented the application of *forum non conveniens* in Jones Act and maritime law cases. The Supreme Court observed that *forum non conveniens* is “procedural rather than substantive,” and a “matter that goes to process rather than substantive rights—determining which among various competent courts will decide the case.” 510 U.S. at 453. The Supreme Court emphasized that “*forum non conveniens* is not a substantive right of the parties, but a procedural rule of the forum.” *Id.* at 454 fn. 4.
8. U.S. case law on treaty interpretation is substantially in conformity with the principles stated in the Vienna Convention. *See, e.g., Medellín v. Texas*, 552 U.S. 491, 506-07 (2008) (“The interpretation of a treaty, like the interpretation of a statute, begins with its text.... Because a treaty ratified by the United States is ‘an agreement among sovereign powers,’ we have also considered as ‘aids to its interpretation’ the negotiation and drafting history of the treaty as well as ‘the poststratification understanding’ of signatory nations.”); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (quoting the Restatement (Third) of Foreign Relations Law of the United States § 325(1) (1986), in parallel to Vienna Convention Article 31(1): “‘An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose’”; *United States v. Stuart*, 489 U.S. 353, 365 (1989) (“The clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories” (citations and internal quotation marks omitted)).
9. 330 U.S. 501 (1947).
10. *See* Article VI of the New York Convention allowing a court to “adjourn decision on the enforcement of the award” if “an application for the setting aside” of the award has been made to a competent authority.
11. “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...[t]he recognition and enforcement of the award would be contrary to the public policy of that country.”

Marc Goldstein, goldstein@lexmarc.us, is the co-author with Professor Linda J. Silberman of the New York University School of Law of a Report by the International Arbitration Club of New York (IACNY), Lawrence Newman, Chair, *Application of the Doctrine of Forum non Conveniens in Summary Proceedings for the Recognition and Enforcement of Awards Governed by the New York and Panama Conventions*. Pending formal publication, the Report can be found on the IACNY website (www.arbitrationclub.org).

How German Judges Will Use Mediation Under the Recent German “Mediation Law”

By Julia Flockermann

As a German Judge and Berlin “Court Mediator,” I recently had the pleasure of attending conferences about mediation and international arbitration in New York. Here I realized that there is a misconception in the U.S. about German Judges and a view of those judges as mediators in a robe or—in other words—switching hats in the same case, from the judge’s to the mediator’s hat and back. It seems that there is even the impression that parties are misled about what they can expect in court—freely interpreted from German fairytale Rumpelstiltskin: “Today I negotiate, tomorrow I mediate; and then the settlement I will make; for no one knows my little game; that mediator is my name.” This myth may result from the non-uniform landscape of “Mediation Projects/Experiments” in the German states (Bundeslaender) with “judge-mediators” and also from the unclear terminology in German law. Having realized this, I am glad to shed some light into how German Civil Courts use mediation and the benefits I have seen as a judge in practice there. It is a perfect timing as just a couple of weeks ago the German “Mediation Law”¹—supporting mediation methods in courts—was adopted.

A. Long Story Short—Mediation History in German Civil Courts

Judges in Germany were recently asked by journalism and communication professors what had changed in the 500 years since the city of Leipzig ordered: “The judge should sit on his bench as a cranky-grim lion with the right foot over the left and when he cannot decide immediately on the facts he should think the case over one, two or three times.”² Judges still think carefully about their decisions. But orders are different today.

Under today’s Federal Code of Civil Procedure (ZPO) the German judge has to do her job of providing peace in law by two official means: she has (1) to judge and (2) to facilitate settlement negotiations. Legislation and jurisdiction³ recognized that peace in law can best be reached by amicable resolutions and these on the other hand can reduce the increasing workload of the courts. Hence legislation worked on improving the results of the settlement task.⁴ In 2001 legislation provided two instrumentalities: mandatory pre-trial settlement negotiations conducted by the judge, and a special “Conciliation Judge” (Guet-erichter) who carries out settlement negotiations for cases of other judges but has no power to decide these cases.⁵ The Conciliation Judge—and this was just confirmed by legislation⁶—may use all methods of dispute resolution including mediation outside of the courtroom but may in addition provide a legal evaluation of the case at hand. Here it is good to know that judges in Germany have with very few exceptions⁷ no power to require private mediation and there are in general no court-related mediation programs comparable to those in most U.S. courts.

With the growing interest in settlements, some judges, courts, and state administrations sought even better ways to meet the expectations of improving the settlement processes. They focused on more proficiency with the use of mediation in courts and developed projects / experiments ranking from “Court Mediation” by judges as an additional procedure (e.g., Lower Saxony, Berlin)

to a Conciliation Judge using technics of mediation (e.g., Bavaria). These projects had in common that some judges of the participating courts were trained in mediation skills and devoted part of their time settling other judges’ cases outside of the courtroom. Under the recently adopted Mediation Law only the Conciliation Judge will survive, who is integrated in the German rules of civil procedure, meaning in particular that she may as a judge provide her legal opinion and propose solutions.⁸ The Legislature voted against the “court mediator” who also is a second judge but offers in the role of a mediator an additional mediation procedure beside the court trial and who may not give a legal opinion or propose solutions.⁹ This first German Mediation Law implements the “EU-Mediation-Directive 2008”¹⁰ dealing with harmonizing mediation in cross border disputes. It concerns in particular out-of-court mediation whether cross-border or not and offers a framework for the profession “certified mediator.” In-court mediation was one of the most talked about and controversial subjects in this context. Among others, the German lawyers lobby has debated the necessity of mediation as a public task when private mediators may be retained. Such lobbies have also questioned the fairness of competition between “Court Mediation” by judges charging no fees in addition to the usual court fees and private mediators.¹¹ The compromise found by the Legislature is the above mentioned Conciliation Judge who can use all methods of dispute resolution including mediation.¹² This first regulation about the use of mediation methods in courts raises the question whether it will promote in-court settlement negotiations similar to mediation, just under the different name “Conciliation Judge,” or if a “Conciliation Judge” who can also give her legal opinion and is by title recognized solely as a judge will diminish the use of wider methods of mediation under the existing court projects and increase law-driven settlement negotiations. This will, in the author’s view, depend very much on how the courts will shape the education they will offer their judges and the role and perception of the “Conciliation Judge.”

B. What Is Going on in German Civil Courts

Today judges with different functions and education offer in-court settlement negotiations, taking on the following roles as:

- a. The **judge**.¹³
- b. A different **Conciliation Judge** who will not decide the case, but may offer legal analysis.¹⁴
- c. A **judge** (see (a)) using **communication and negotiation skills** also used in mediation.

a. The Judge

As noted, the 2001 Legislation requires that Civil Court Judges work on settlements before the start of the trial. What is usually done by a judge in those mandatory and in general public settlement negotiations? The Legislature has given few rules how to proceed. Generally, the judge will introduce the facts and the points of the discussion and may ask questions. She shall ask the parties to appear and will seek to hear their views and positions. The perception of a judge as having authority, being competent and trustworthy already supports settlement negotiations, but communication and negotiation will differ from judge to judge. As profound as the legal training in Germany is, the communication and negotiation education of judges mostly depends on their own initiative.

Thus a traditional proceeding can be as follows: A judge may introduce the facts and identify the points of discussion. She will give her legal opinion and a roadmap about the procedure to be followed. Based on this she might propose an agreement; in general there is no great fear that this might bias her in the proceeding should the parties not accept the proposed resolution. In case the parties do not reach an agreement in the pre-trial negotiation phase, the oral trial will start. The settlement negotiations can be picked up anytime during the trial.

b. The Different Role of the Conciliation Judge

The Conciliation Judge differs from the judge, and a private mediator, in the following ways:

As compared to the **judge** who decides the case—

- she is a *different, mediation-trained judge*, to whom the case may be transferred by the judge for settlement negotiations;
- she has *no power to decide* the case;
- negotiations are *not public*;
- parties can agree to include third persons in the negotiations;
- *confidentiality* agreements are possible—there will be a protocol only if parties wish so.

- she can use all *methods of dispute resolution* including *mediation*;
- she uses a different setting (special negotiation room), *no robe* and
- she offers a time frame of usually some *hours*.

As compared to a **mediator**:

- she can *give her legal opinion* (parties often expect her to do so) and she can *propose solutions*;
- there are—so far—*no costs in addition* to the usual court fees for the conciliation judge;¹⁵
- negotiations can result in an *enforceable settlement agreement*;
- mediator-standards under mediation law will not apply to her as she is not a mediator, and
- the requirements to be presented by a *lawyer* are the same as with the judge.

c. A Judge with Mediation Skills

Now, what happens when a mediation trained judge leads her own mandatory pre-trial settlement negotiations? Is she allowed to use communication and negotiation methods also used in mediation?

Even though Germany's new Mediation Law clarifies the role of the Conciliation Judge and confirms that she can use all methods of dispute resolution, including mediation, it does not say that the primary judge is precluded from using the same measures. In fact, nothing in the ZPO proscribes the judge from doing so, up to some limits. Using such methods will not be misleading, but may be utilized to efficiently fulfill the judge's role of facilitator of settlements.

One can be sure—and hereby I rely on my own experience and that of my Berlin colleagues—a mediation-trained judge's pre-trial settlement negotiations differ from those of a judge who does not have the benefit of mediation training. The mediation training and the court-mediation experience I gained as well as the exchange with my colleagues working with mediation methods led to a change in the way I conduct oral pre-trial (and other) settlement negotiations. In general it can be said that the mediation-trained judge in her pre-trial meetings likely uses communication and negotiation methods used by mediators, e.g.:

- allowing the participants to *explore interests* and options prior to focusing on legal evaluation and proposals for solutions;
- focusing on the interests of the parties;
- e.g., *actively listening*, asking open questions in an effort to bring the parties to an understanding and

- taking in an early moment adequate *time* for the negotiations.

But there are limits. The judge, e.g.:

- will remain the decision maker;
- cannot offer the protection of confidentiality of facts that are disclosed in the settlement negotiations and
- will probably avoid caucusing—even when parties agree—as it bears the risk of bias.

C. What Works

a. Conciliation Judge

In Bavaria, during the relatively short time period between 2004–2006, Prof. Dr. Reinhard Greger evaluated the methods and experiences with institutionalizing settlement negotiations and the “Conciliation Judge” at Regional Civil Courts.¹⁶ This comprehensive evaluation shows among other things that:

- From 2002, in Bavaria, the number of settlements increased with the introduction of mandatory settlement negotiations held by the judge;
- numbers of overall settlements increased during the trial of the “Conciliation Judge” model from 2004–2006: Regional Courts participating in the experiment by 13.4% and in all Bavarian Regional Courts together by 9.9%;
- settlement rates of Conciliation Judges reached approximately 70%;
- settlements with the Conciliation Judge were more time efficient, a noted improvement to the system, even in German states where the overall settlement rate did not significantly increase;¹⁷
- while the rate of acceptance of proposals to use a Conciliation Judge was under 50%, lawyers and parties reported very positive experiences;
- additional or ancillary disputes could be resolved by the Conciliation Judge;
- legal aspects are not always of the highest importance for the parties though they are already in court (e.g., economic aspects were in approximately 2 of 3 cases more important)¹⁸ and
- Bavarian Conciliation Judges in general did not provide a legal solution for the case.¹⁹

b. Judge

In addition to the above, the evaluation of the Bavarian project shows another very interesting advantage. The general increase of settlements was in some courts more due to settlements achieved by the judges than to those contributed by the Conciliation Judges.²⁰ This was not

only because the Conciliation Judge had already prepared a foundation for a settlement, but it was—among other factors—also due to a greater focus on settlements, more mediation education and early settlement negotiations. This is consistent with my own experience as described above. Courts have already expressed the wish to get all judges trained in negotiation skills as are the Conciliation Judges.²¹

D. Conclusion

The use of mediation methods in German civil courts is a developing story of success. So far legislation and courts focus on special “task forces” of Conciliation Judges trained as mediators who offer settlement negotiations in special cases other judges have to decide. These Conciliation Judges either contributed to a higher number of settlements in courts or to quick and early settlements that were more time efficient. Moreover, not only has efficiency increased, but also greater satisfaction of parties, lawyers and Conciliation Judges was experienced. In addition there is even more potential for success in the regular pre-trial and other settlement negotiations of judges.

“The use of mediation methods in German civil courts is a developing story of success. The recent Mediation Law and courts focus on special ‘task forces’ of Conciliation Judges trained as mediators who offer settlement negotiations in special cases other judges have to decide. These Conciliation Judges either contributed to a higher number of settlements in courts or to quick, early and for the parties satisfying settlements that were more time efficient.”

As to the question: Will the newly adopted Mediation Law continue to support in-court settlement negotiations similar to mediation, under the different name “Conciliation judge” or, will the practice diminish the “use of mediation methods” in German Civil Courts” and increase the use of law-driven settlement negotiations, this will depend very much on the courts and their judges decisions on how they can do the settlement task best. They will have to decide how much need there is for non-deciding Conciliation Judges who offer confidential settlement negotiations and how they will continue to shape—while respecting the judges independence—their education, role and perception. Decisions on how to go forward may vary from court to court as requirements differ, e.g., for parties being represented by lawyers are different but also, e.g., the field and the complexity of the cases (e.g., between Small Claim Courts, Family Courts, Regional Courts, Courts of Appeals). There is no question,

however, that with a growing focus on settlements and use of mediation techniques including communication and negotiation methods in the court—in—and outside of the courtroom—the success of the settlement task of judges in general will further increase.

Endnotes

1. Gesetz zur Foerderung der Mediation und anderer Verfahren der aussergerichtlichen Konfliktbeilegung, VOM21.Juli2012. BGBl. I S. 1577, in force since July, 2012.
2. Gerhardt / Kepplinger / Geiss, *Mit Macht und Mitgefuehl*, Frankfurter Allgemeine Zeitung, June 14, 2012, p. 9.
3. BVerfG, Beschluss from 02.14.2007 -1 BvR 1351 / 01 -; Bundesgerichtshof, BGHZ 161, 145 / 149.
4. Greger, *Abschlussbericht zur Evaluation des Modellversuchs Gueterichter*, 1, www.reinhard-greger.de/aber/gueterichter-abschlussbericht.pdf; MuenchKomm-Prueetting, ZPO, 3rd Edition 2008, § 278 Rn. 6.
5. "Gesetz zur Reform des Zivilprozesses" from 07.27.2001 in force since 01.01.2002 (BGBl. I S. 1887); § 278 (2) ZPO.
6. "Mediationsgesetz," see fn. 1.
7. Some State Law on the grounds of § 15a EG-ZPO.
8. See fn. 1 and "Pressemitteilung des Bundesrats" from 06.27.2012, "*Kompromiss zur Mediation*," www.Bundesrat.de/cln_117/nn_6898/DE/presse/pm/2012/097-2012.html/_nnn=true.
9. E.g., Berlin, Lower Saxony; see also Moltmann-Willisch, Kraus, von Hammerstein, *Richterliche Mediation als Verfahrensmethode – was spricht dagegen?*, ZKM 2012, 64.
10. Directive 2008 / 52 / EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, eur-lex.europa.eu/LexUriServ.do?uri_OJ:L:2008:136:0003:0008:EN:PDF.
11. Carl, *Vom richterlichen Mediator zum Gueterichter*, ZKM 2012, 16.
12. In all beside criminal courts; see fn. 1.
13. Regular settlement negotiations by the judge § 278 (2) ZPO).
14. Settlement negotiations by a different conciliation judge new § 278 (5) ZPO); see fn. 2; I will not focus on the "Court mediator" as legislation now provides only the Conciliation Judge.
15. The Mediation Law will allow the German States to introduce fees for using the Conciliation Judge.
16. Greger, *id.*, 12, 69-78 and 113.
17. Greger, *Evaluation der Gerichtsmediation im Land Berlin, Abschlussbericht*, *Id.* 105-107, 108 and 113, settlement-rates differ between 16%–30% in the German Bundeslaender, 113.
18. Greger, *Abschlussbericht zur Evaluation des Modellversuchs Gueterichter*, *id.*, 48.
19. *Id.*, 86.
20. *Id.*, 74.
21. *Id.*, 39–41, 90–91, 102, 116.

Julia Flockermann (LL.M. Fordham) is a Regional Court Judge (civil and commercial insolvency cases) and Court Mediator, Berlin "Court Mediator." This article reflects exclusively the author's personal opinion. I thank Valerie Marvin for her helpful discussion in preparing this article.

NYSBA's CLE Online

ONLINE | iPod | MP3 PLAYER

Bringing CLE to you... anywhere, anytime.

NYSBA is proud to present the most flexible, "on demand" CLE solutions you could ask for.

With **CLE Online**, you can now get the valuable professional learning you're after

...at your convenience.

- > Get the best NY-specific content from the state's **#1 CLE provider.**
- > Take "Cyber Portable" courses from your laptop, at home or at work, via the Internet.
- > Download CLE Online programs to your iPod or MP3 player.
- > Everything you need to obtain full MCLE credit is included **online!**



Come click for CLE credit at:
www.nysbaCLEonline.com



Features

Electronic Notetaking allows you to take notes while listening to your course, cut-and-paste from the texts and access notes later – (on any computer with Internet access).

Audio Seminars complement the onscreen course texts. You control the pace, and you can "bookmark" the audio at any point.

Bookmarking lets you stop your course at any point, then pick up right where you left off – days, even weeks later.

MCLE Credit can be obtained easily once you've completed the course – the form is part of the program! Just fill it out and mail it in for your MCLE certificate.

Mediating the Multi-Cultural Fugue of Divorce Mediation

By Alla Roytberg

“The poetry, the atmosphere, the intensity of expression, the beauty of the preludes and fugues grip, overwhelm, and stimulate us. Let us not be afraid....” Carl Friedrich Zelter, the teacher of Felix Mendelssohn (letter to Goethe, 9 June 1827)

Although many of us live in the most multi-cultural State and City in the world, for New York mediators a dispute between participants of unfamiliar cultural, religious and ethnic backgrounds brings unprecedented challenges. In her article on Neuro-Literacy, Pauline Tesler rightly points out that “our clients experience divorce as an extended human transition of operatic dimensions, with emotionally exhausting peaks and valleys involving betrayals, bad faith, and narcissistic wounds that call into question identity, core values, and even the will to survive.”¹ Add to this a mix of centuries’ old beliefs, traditions and rituals, sprinkle it with a committee of advisors, comprised of family, clergy, and community elders, and you get a cacophony of contrasting voices which exacerbate an already looming emotional headache of a human being facing a divorce.

My office is located in Queens, the most ethnically diverse county in New York State. Families of all backgrounds, languages and faiths from all over the world arrive and make their homes in tightly knit Queens communities—Chinese, Korean, Japanese, Haitian, Indian, Bukharian, Italian, Hispanic, African, Russian, Iranian, Hindu, Moslem, Greek Orthodox, Catholic, Jewish, and Buddhist...just to name a few.

Each family’s cultural story is unique. Some spouses’ backgrounds are identical. Others may share same faith and culture, but vary in degree of observances. And then there are those where spouses, their parents and siblings experience great discord over diversity of religions, languages and cultural norms. Amid this medley of conflicting cultural stimuli and knowing full well that he has to help the parties negotiate a viable agreement under New York law, a mediator needs extra skill and sensitivity to help each party identify his or her own voice, help it mature and fully understand its own needs and interests. Only after each participant explores cultural, legal and religious themes in his/her own community and decides which of them to retain and which to discard, can he or she begin to effectively communicate with the other and negotiate a compromise.

A mediator who helps two Western-minded spouses navigate the legal and emotional process of divorce is similar to a composer of a sonata. During its Exposition participants formulate their individual melodies of needs and interests. During its Development, contrasting themes communicate with the aid of a mediator-

composer-conductor who gently guides their dialogue, by looping and re-framing with the goal of helping them reach a somewhat altered Recapitulation and, ultimately, a successful Coda of a Settlement Agreement. But for a mediator-composer of a multi-cultural mediation, the process does not consist of clear melodies and arpeggio accompaniment. Rather, it is a fugue, a polyphonic composition, with themes and variations working in tandem and moving forward, increasing in intensity and transforming into something new and different. The mediator’s job is to ensure that while each party experiences a transformation of his/her own voice horizontally, both continue to progress within a framework of contrapuntal rules in harmony towards a common resolution.

THE FIRST MEETING: Before writing the first bars, the composer of a multi-cultural mediation carefully listens to each instrument and determines if it is able to express itself without the help of others. In ideally structured American divorce mediation, two spouses address their needs and interests with a neutral mediator, who facilitates the conversation, provides neutral legal information and helps them reach an agreement on each important item that needs to be addressed in a separation or a divorce. In that structure there is an assumption that each spouse is, at least, able to articulate what he or she needs or wants in order to move forward. But what if that assumption is incorrect? What if a 45 year old woman from India is unable to articulate her needs and interests without consulting with her older brother, who has been her advisor in all financial matters even after her marriage? What if a 43 year old Bukharian² man is unable to decide or even discuss what type of post-separation parenting time he would want with his children without the involvement of his parents, or sometimes, even his grandparents? A mediator would be unable to help the parties move forward in their dispute without understanding, first of all, who are the important advisors in their lives, and secondly, whether these people may need to be more directly involved and even present in the mediation process.

In closely knit communities and cultures, marriage is more than just a union of two individuals. Rather, it is a joining of two families, two separate groups of people. In a divorce, families of each marital partner are stigmatized by their community. In extreme cases, a wife’s family may even try to persuade her to remain married despite presence of abuse. For members of those groups, the most

important value is for a family to “save face” in front of others. They often go to extremes to discourage divorce and hide evidence of mental illness. After all, if discovered, the family will be labeled as socially or genetically impaired for generations to come. Divorce brings shame to the family. Sadly, community leaders and clergy often reinforce these views and divorcing parties, especially the woman, find themselves isolated both from the secular and religious spheres of their familiar world.

HELPING EACH SIDE FIND HIS/HER OWN

VOICE: In a multi-cultural mediation, each person’s theme is often first presented by one uncertain voice. It needs time to explore itself, vary in tone and mood, and finally evolve through theme and variations before it can begin to negotiate with the other. The mediation process is uniquely well suited for this self-exploration to take place. No court would provide sufficient time and space for it, and, if a settlement is not reached quickly, a judge would issue an order forcing compliance.

Indira’s view of her own existence is initially informed by her family, his family and the communal norms of the world she grew up in. She needs time to explore herself as a subject, to learn what her needs and interests may be. Perhaps a mediator’s room provides her with her very first opportunity to do so. It is invaluable for her future life. The mediator as a master composer can provide the space and time for her voice and theme to develop, evolve and mature. And be careful not to mention therapy. In her world, therapy is unacceptable. At least she is not yet ready for it. If you merely insist on therapy at the outset, you will lose her and not help her. With gentle guidance, by providing a steady baseline as her violin explores its initial melody in all of its variations she can reach an epiphany of self-understanding and only then begin to perceive her needs and interests in a way that is often taken for granted by any New York teenager.

A violin does not know how to communicate with a cello. And here is a violin that is played by series of musicians, each with his different system of beliefs. Her traditional Hindu family says one thing, Americanized girlfriends suggest something else, and years of cultural preconditioning instill fears and promise hopes for the future. A Muslim woman may want the freedom and equality provided in America and yet she fondly recalls childhood memories of praying with her grandmother and maintains a strong spiritual connection to Islam. What to retain and what to discard? How to move forward, face separation and divorce and yet safeguard treasures of her ancient culture? Will she find a place within her community post-divorce? Will she be forced to abandon her past completely? As she and her husband separately explore their own themes and variations—identities, pasts, presents and futures—the mediator-composer listens and strives to understand each party’s

unique cultural view of what is right and wrong, fair and unfair, moral and immoral.

Eventually, violin and cello achieve a variation that would allow them to communicate with each other in a Stretto of exchanges and negotiations on the same subject, repetitions and accelerations, that intensify, transform and finally reach a fuller realization under a mediator’s gently guiding hand. Only the mediator-composer can know the moment during which each person’s individual voice has reached the precise point of being able to fully express itself to the other. Only the mediator can gingerly guide the joint conversation and help it move forward.

LEARNING ABOUT CULTURAL DIFFERENCES:

Hindu and Bukharian religious and cultural practices are vastly different. However, both cultures are characterized by tightly knit family structures and centuries’ old history of how disputes get resolved in their communities.

How does a mediator maintain a delicate balance between honoring the cultural and religious rules and rituals that a family has held sacred for hundreds if not thousands of years and, on the other hand, help people understand U.S. law and come up with agreements that are considered fair and legally enforceable under our modern civil system? Does “E pluribus unam” really work? When people from these types of communities arrive in the United States, do they blend in, or stay separate? Do they adopt our laws or devise ways to avoid them or manipulate them to suit their own cultural norms? In one of my litigation cases, a husband in an Albanian family that has resided in the U.S. for nearly 20 years and where both partners were U.S. citizens, went to the “old country” and obtained a divorce without notice to his wife, while his matrimonial action was already pending on the trial calendar of a New York court. In prior decades Bukharian men were participating in religious marriages, but refused to register their marriages under civil law, because they were advised that, in case the marriage did not work out, they could avoid having to share property acquired in their name. In the same community families and clergy ignored spousal abuse, until someone advised the women to start obtaining Orders of Protection. Ultimately, that advice evolved into a practice of “teaching the husband a lesson” where many Bukharian women obtained Orders of Protection whether or not real abuse or threats actually existed. While the men manipulated the system to avoid equitable distribution, women did the same in order to Americanize their husbands—an odd way to force cultural change in a traditional world. Similarly, other minority cultures in the U.S. have developed variously culturally oriented strategies instead of assimilating into society such that they have retooled the law to suit their cultural needs.

THE LEGAL ENLIGHTENMENT SPEECH: The moment has finally arrived for the “Legal Enlightenment Speech.” “I understand and appreciate the richness and incredible value of the X tradition and that under X the

idea of dividing property that you feel you worked so hard for during the time you were married is incredibly unfair. Unfortunately, here we have to consider the law of the State of New York. Your agreement must be viewed as fair and equitable by a court. And, if you cannot reach a settlement here, your divorce will be governed by New York law and decided by a New York court.”

In a multi-cultural mediation a mediator’s neutral explanation of applicable law is extremely important. In most cases, the spouses have not sought legal advice. This is the first time they hear about support, equitable distribution of marital assets and co-parenting. Some of these laws greatly contradict their legal expectations. They often seem genuinely unfair and drastically different from the social norms of their original culture.

When people from other cultures first enter the mediation room, their views on marriage and divorce are based on their customs and beliefs. According to standard definitions, we view a marriage as a legalized union, sanctioned and dissolvable only by law. But what laws do the parties to a multi-cultural mediation think of? A Muslim man may consider himself divorced and free to remarry once he pronounces the Talaq, a statement that he is “divorcing his wife.” For him marriage was sanctioned by a deity and can be dissolved the same way. In Old England divorce was first allowed only through a private act of Parliament, and it took centuries of ideological changes for divorce to become an acceptable way to end marital strife. In India arranged marriages are still common. Even in China, old customs and beliefs often override Communist-era gender equality in divorce legislation.

We are trained to think of divorce as a process of real-locating finances and providing for the children. In traditional societies a woman may be discouraged from study or work during the marriage. When I asked Maryam, a 42 year old Pakistani woman with two children, why she never finished college or got a job, she said, “I tried to go to school, but he was complaining about it. Also, we were living with his parents. And his mother needed me around to prepare meals.”

What happens if these people end up in court where New York law is forcefully imposed? They will have no time to consider it and adopt it. They will have no opportunity to reach a result that would comply with the law and yet honor their centuries’ old beliefs. In that process, the “loser” is less likely to obey the court’s order. He is more likely to view himself as a victim of an unfair system, the one he does not belong in and does not understand.

And what about therapy? Ultimately, the spouse who will continue to conform to prior cultural norms will usually refuse therapy. He “does not need it”! He’s empowered by his clergy, community and family. The nonconforming spouse is more likely to be open to it, because

he or she is the one who wants something different than what is customarily accepted in the community. Financial independence for a woman? Custody or more parenting time for a man? By seeking to alter for themselves centuries’ old gender roles, these people are likely to be discarded by their communities as awkward, inconvenient and even dangerous. Most of my immigrant older clients seek divorce after being persuaded to do so by their Americanized children, who grow tired of witnessing cultural inequality at home, which greatly contrasts with their secular U.S. experience outside.

RECONCILING CULTURE AND U.S. LAW. Some beliefs can withstand time. But what about those that are contrary to our society’s laws? How does a mediator deal with an Iranian man who has several wives, or a Bhutanese man who feels entitled to marry a second wife, because the first wife did not “give” him sons? Or a Sicilian father who hits his teenage son after the son announces that he is gay? We cannot “honor” these beliefs and many of these people would not voluntarily participate in therapy or wish to “transform.” For them, the U.S. legal system provides a reality check, a common denominator to which all will be reduced if they don’t reach a settlement during mediation. It will cost more money, take more time and not provide a more favorable resolution. They clearly have an incentive to remain committed to the mediation process.

Ideally, after each participant has had ample time and opportunity to explore his or her own theme with variations and then effectively move forward through a negotiation process, informed by full understanding of the other’s needs and interests and New York law, both parties, with the help of the mediator can find a way to honor their religion, retain their treasured cultural identity and best aspects of their tradition and, in harmony with laws accepted in 21st Century New York, conclude their Agreement and move forward with their lives in a respectful way. And we, as mediators, can help make this happen.

Endnotes

1. Pauline H. Tesler, *Neuro-Literacy for Collaborative (and Other) Lawyers*, NYSBA New York Dispute Resolution Lawyer, Fall 2011, Vol. 4, No. 3, p. 47.
2. Bukharians are Jews from a Muslim country of Uzbekistan. Uzbekistan is a former republic of the Soviet Union. The Bukharian community retains a mixture of Jewish religious beliefs, Muslim customs and is influenced by Soviet cultural domination.

Alla Roytberg, aroytberg@goodlawfirm.com, is a family and divorce mediator, matrimonial litigator and collaborative divorce attorney with a private practice in multi-cultural Queens, New York. She has over 20 years of legal experience and is an Advanced Practitioner Family Mediator with the Association of Conflict Resolution and founding member of the Academy of Professional Mediators.

A Fact-Finding Process Might Be the Solution for Resolving Your Employment Dispute

By Jeffrey T. Zaino

It is common for parties to an employment dispute to first attempt mediation to resolve a dispute. This is typically the first step in many employer-promulgated dispute resolution plans. Mediation is a non-binding process where a skilled mediator guides the parties to a negotiated settlement. If the dispute is resolved in mediation, both the employer and employee then avoid the time and potentially higher costs of either litigation or arbitration. Adversarial proceedings like litigation and arbitration should be the last step in achieving resolution of a dispute. Such proceedings can require extensive information exchange and discovery. If the parties, however, have extreme positions and lack any consensus on the facts of the case, mediation may also be impractical and a futile exercise, particularly in the early phase of a dispute.

What should parties do if faced with a dispute that is not suited for mediation and where they want or need to avoid resorting to litigation or arbitration? A fact-finding process might be the solution. This article will explore how a fact-finding process works and how disputes can be resolved long before a mediation and /or arbitration phase is triggered by an employer promulgated plan or individually negotiated employment contract.

History

The fact-finding process has its roots in international disputes, being first established during the Hague Convention of 1907. The process is commonly used today by international bodies like the United Nations. Recent examples of fact-finding missions and reports by the United Nations are Saddam Hussein's weapons arsenal in 2002 and the Gaza Conflict in 2009. Besides international disputes, fact-finding is used domestically by the federal government, states, towns, unions, and companies when contentious issues arise that require fact-finding investigations and reports. The process also works to address and resolve employment disputes, both individual and collective disputes.

Fact-Finding Process

Like other alternative dispute resolution (ADR) processes, fact-finding is created either by a pre-dispute contract between the parties calling for a fact-finding process or by joint submission after a dispute has arisen. Administrative agencies like the American Arbitration Association (AAA) offer fact-finding procedures and sample contract clauses to trigger a fact-finding process. The following is an example of a fact-finding clause that

could be added to an employment contract in conjunction with a standard arbitration provision:

If a dispute arises out of or relates to this contract, or the breach thereof, the parties agree to first submit their dispute to a neutral fact-finder pursuant to the American Arbitration Association's Fact-Finding Procedures administered by the American Arbitration Association before resorting to arbitration, litigation, or some other dispute resolution procedure.

Pursuant to the AAA's *Fact-Finding Procedures*, "any party may initiate a Fact-Finding process" and the fees are borne equally. It is recommended, however, if fact-finding is triggered by an employer-promulgated plan (a plan that all employees sign as a condition of employment), the employer should bear the majority of the administrative costs and fact-finder's per diem.

Once either party initiates the fact-finding process, the parties can either review a list of fact-finders for a mutually acceptable person or have a neutral administrator appoint the fact-finder. This should occur within days of the initiation and the fact-finder should be an expert versed in fact-finding, employment law, and have an understanding of the employer's industry. No person should serve as a fact-finder if he or she has any personal or financial connections to the parties, or interest in the outcome of the dispute. Like serving as an arbitrator or mediator, the fact-finder should make any and all disclosures upon selection.

The fact-finder, once selected, then works with the parties to establish a schedule for submission of documents and identifies all persons with information pertaining to the dispute. Also, the fact-finder and parties should establish set rules of procedure, including specifics such as length of interviews. The parties should also advise the fact-finder whether or not they want a settlement recommendation included in the fact-finder's report.

The fact-finder should have access to all relevant documents and information and all participants, the parties and those persons with information related to the dispute, are expected to fully cooperate during the interviews. Confidential information disclosed to the fact-finder during the investigation and interviews of the parties and witnesses must remain confidential. A fact-finder should never be compelled to divulge information disclosed or testify about the investigation in any ad-

versarial or judicial proceeding. The parties should also maintain the confidentiality of the process. This includes expressed suggestions of settlement or admissions by either party and proposals and views made by the fact-finder during the investigation. The complete investigative process should be completed within two weeks but can be shortened or lengthened based on mutual agreement by the parties.

Fact-Finding Report

The fact-finder should prepare a concise report summarizing in detail all facts found during the investigation and include credibility determinations. Close questions of credibility should be identified and explained. Unless agreed to by the parties, the report should not include suggested remedies and / or settlement recommendations. The report will hopefully provide the parties with a far better understanding of disputed facts and make it easier to determine if it is time to settle or pursue other dispute resolution solutions. If mediation or arbitration is deemed necessary after the fact-finding, the fact-finder should not be the mediator or arbitrator.

Employer-Initiated Fact-Finding

Beyond individual disputes between an employer and employee, an employer should also consider initiating fact-finding investigations when facing repeated employee complaints, or claims. A fact-finder can conduct an extensive investigation, evaluate ongoing disputed facts between the employer and employees, and provide the employer and its management team with a better understanding of what is creating a negative environment. The information uncovered during the investigation could go a long way toward eliminating or reducing future employee complaints and claims.

Jeffrey T. Zaino, ZainoJ@adr.org, is the vice president of the Labor, Employment and Elections Division of the American Arbitration Association in New York and oversees the operations, development and panel of arbitrators for the Labor and Employment Arbitration caseloads. Zaino is dedicated to promoting ADR methods and neutral election services for our nation's unions, associations, corporations, and colleges.

NEW YORK STATE BAR ASSOCIATION



LEGALEase Titles

Display Them, Send Them, Use Them

LEGALEase brochures give you excellent flexibility of use. Display a full set in your lobby or waiting area in one of our display racks. Mail brochures to prospects in a standard envelope. Hand them out during consultations. Use them any way you want. Plus, there's a space on the back of each brochure where you can stamp or sticker your firm's name.

Informative, Inexpensive, Invaluable

At a cost of only \$25.00 per packet of 50 brochures for New York State Bar Association Members, and \$40.00 for Non-Members, the LEGALEase brochure series is an outstanding value – and an outstanding way to educate your clients and promote your practice.

Adoption in New York
Animal Law in New York State
The Attorney's Role in Home Purchase Transactions
Buying and Selling Real Estate
Child Support – Determining the Amount
Divorce and Separation in New York State
Guideline for Guardians
If You Have an Auto Accident
Intellectual Property
Living Wills and Health Care Proxies
Long-Term Care Insurance
Marriage Equality in New York
Rights of Residential Owners and Tenants
Tenant Screening Reports and Tenant Blacklisting
Things to Consider if You Have a Serious or Chronic Illness
Why You Need a Will
You and Your Lawyer
Your Rights as a Crime Victim
Your Rights if Arrested
Your Rights to an Appeal in a Civil Case
Your Rights to an Appeal in a Criminal Case

Order your LEGALEase brochures today!

3 ways to order!

- Order online @ www.nysba.org/legalease
- Charge by phone at 800-582-2452 or 518-463-3724
- Fax a completed order form to 518-463-8844

New York State Bar Association, Order Fulfillment
One Elk Street, Albany, NY 12207



Allow 4-6 weeks for delivery.
Source Code PUB 1046

From Mediation to Settlement and From Settlement to Final Offer Arbitration: A Case Study of MEDALOA in a Transnational Business Dispute Mediation

By Mordehai (Moti) Mironi

This article tells the story of a transnational business dispute which had been referred by the court to outside mediation. The road to final resolution of the dispute began with a typical mediation process, later transformed into settlement efforts, and ended with final-offer arbitration, a process sometimes referred to as MEDALOA. The journey took only two consecutive days and the parties came out highly satisfied with the process and the outcome.

This case highlights the importance of having the flexibility and expertise in the full menu of ADR processes that enable the mediator to suggest moving from one process to another as the need arises.

The Dispute

The case was referred to mediation by the court, with the consent of the parties. The plaintiff was a well-established Israeli company that has been for years one of the leading players in the market of importing, selling, installing and servicing hearing instruments. The defendant was a multinational American-based company, which is one of the largest producers of hearing instruments of various kinds in the world. As part of its M&A strategy, the multinational defendant bought an Austrian producer of hearing aids, with whom the plaintiff had a long and fruitful business relationship.

The Israeli company claimed that after being the exclusive distributor for over thirty years, the multinational had cut it off without notice and in bad faith, appointing one of its competitors as an exclusive distributor. Furthermore, simultaneously with the decision to terminate the distribution relations, the defendant refused to fulfill orders, which had been sent by the plaintiff prior to the termination date, and even refused to supply parts for instruments that had been previously sold by the plaintiff.

The plaintiff alleged that the multinational's decision had caused it a major loss in revenue and severely damaged its reputation. It asked for compensation based on expected sales over a period of one-and-a-half years, compensation for loss of reputation, a mandatory injunction ordering the multinational to continue the supply of spare parts for five years, and discovery as to the sales of all multinational's products in Israel during the one and a half year period following the severance of the business relationship.

The defendant claimed that there was no agreement appointing the plaintiff as an exclusive distributor for

the multinational or for the Austrian company that was merged into the multinational; and in any case, the plaintiff's performance was poor. The defendant contended that the plaintiff became useless as a distributor since it had been clinging to the old model of business relationship it had with the Austrian company, which model centered on analog devices. It failed to adapt to the fact that its business partner had changed and with it also the business policies and practices. For instance, plaintiff's management refused to adjust to the new marketing policies and sale targets as to quantity and types of product, especially as to marketing the new generation of programmable digital instruments that had been developed by one of the business units in the multinational. Even though the plaintiff had known that failure to make a clear, unequivocal and timely commitment to promote the sale of the new line of products would cause the multinational to look for a new distributor, the plaintiff failed to respond promptly and acted in bad faith by asking for more information and trying to stall for time, which was simply not available given the fierce competition in the market.

"The road to final resolution of the dispute began with a typical mediation process, later transformed into...a process sometimes referred to as MEDALOA."

The defendant contended that it was disappointed to discover that all along the plaintiff had been selling much larger quantities of hearing instruments produced by the multinational's main competitor, the ratio being nine to one. In addition to its substantive defense, the defendant claimed lack of jurisdiction by the Israeli court and alternatively filed a counter claim for money allegedly owed by the plaintiff.

This was a run of the mill contractual business case; only that it was a transnational dispute and the parties agreed to try mediation instead of litigation or arbitration.

The Process

Building the Infrastructure

The first stage in the process was a pre-mediation planning meeting with the lawyers representing the parties. During the meeting I explained the essence of the mediation process and we examined whether mediation

would be adequate for this particular case. We also discussed two issues which play a pivotal part in the architecture of any mediation and are critical when mediation is conducted in transnational settings. The first referred to who would participate in the mediation; the second to the format of the meetings. We quickly agreed to the following: (1) lawyers would be present throughout the mediation, (2) in addition to the lawyers, the plaintiff would be represented by the two partners, who jointly own the firm, and the defendant by the multinational's regional manager whose office was in Austria, (3) the mediation would be conducted in English, and (4) we would plan for two consecutive days of marathon meetings.

Within days we signed a mediation agreement, scheduled the meeting days for the next month, and the lawyers approved my assistant mediator. Following the meeting we conducted a conference call and agreed that in order to save costs, the two law firms would alternately host the meetings.

Mediation

During the morning of the first day the parties told their story at length. We summarized and reflected. The underlying subtext of their narratives was mutual disappointment. It was clear that the plaintiff had not appreciated the multinational's time pressure. It had mistakenly perceived the multinational's sales targets as "take it or leave it" figures rather than as initial demands. The multinational's management mistakenly interpreted the plaintiff's caution and reluctance to over-commit itself, to what it perceived as an unreasonable yet uncompromising sales target, as unwillingness to adapt to the multinational's new policy of aggressive marketing and giving priority to promoting the new line of product.

In the afternoon we moved to a private caucus. We only allowed the lawyers to very briefly vent their positions on the legal issues in order to remove it from the table. Instead, we asked each party why it had behaved the way it did, what had happened to their business as a result of the events that had led to the lawsuit, and what were its immediate and strategic needs.

We gained two important insights. First, the primary reason why the good relationship went sour was the fact that as a result of two rounds of acquisitions and mergers the Austrian company had become part of the multinational group and frequent policy changes were introduced. The Austrian company and the regional European office of the multinational group had imposed high demands and strict timetables on the Israeli distributor—the plaintiff—because they themselves were under severe pressure to quickly comply with the new management's policies and sale objectives. The plaintiff, on the other hand, moved slowly and hesitantly because of the high level of uncertainty associated with what it perceived as too frequent and stormy changes in the multinational's ownership, management and policies.

Second, the interests of both sides would be best served by renewing their business relationship. Since the claim had been filed, the multinational had had difficulties in penetrating the Israeli market. In short, the multinational did not find a satisfactory replacement for the plaintiff. At the same time, the plaintiff still needed the multinational's products, especially the old generation analog instruments, and would be happy to enlarge its business opportunities by selling all or part of the new lines of products.

The contours of the interest-based and value-creating solution were clear and on the table. Restructuring the relationship would entail renegotiating a three party deal among the multinational (the defendant), the plaintiff and the firm with whom the multinational had been working at that time. The diversification of the multinational's products, and the relatively high investments needed in order to sell and service each product, cried for re-dividing the market for the defendant's products between two or more importers along product lines.

The parties and the lawyers agreed that this was an optimal solution; a real value creating solution. Nevertheless, to our disappointment, it was not feasible. The defendant's representative, i.e., the multinational's regional manager, had neither the authority nor the time to discuss a future relationship. He had been sent to the mediation with a clear-cut mandate—to reach a quick out of court monetary settlement. Several telephone calls by the regional manager and the defendant's lawyer to headquarters failed to change the regional manager's mandate and the demise of the mediated win-win solution.

It was late; the right time to adjourn. The parties agreed to devote the next and final day to case settlement, to try to reach a compromise agreement over the money.

Case Settlement

As the second day of talks began, we, as mediators, felt that something was different. The atmosphere, the discourse and the music of the negotiation were entirely different. The preceding day of mediation had transformed the discourse. There had been mutual recognition; parties understood that legitimate albeit different business considerations had brought about the dispute; they had been engaged in interest-based forward-looking negotiation falling only short of renewing their business relationships. All these had impact on the mode of negotiation.

Notwithstanding, at noon the gap was still wide. A few more rounds of separate caucuses had not produced any progress. Both parties felt that they had made huge concessions and refused to move further.

Since time was running out, I suggested that the amount of money to be paid to the plaintiff would be

determined through an elaborated model of final-offer arbitration.

Final Offer Arbitration

The underlying idea of final-offer arbitration is to cope with the chilling effect and judgmental overconfidence that often block the parties' way to agreement. As such, the main purpose of final-offer arbitration is to cultivate the negotiation process by deterring them from reaching the arbitration and by forcing them to adopt more reasonable positions. This is why final-offer arbitration is so effective in cases of a large and enduring gap between parties' positions. In the particular case, we felt that parties put high value on reaching an agreement on their own, with the assistance of the mediators. A decision by a third party was perceived as a second-best and last resort. Consequently, I designed for them a special model of final-offer arbitration.

In a regular final offer, the arbitrator listens to the parties' arguments and then selects one of the parties' offers given to him in confidence. I suggested that at the end of oral arguments the two offers would be opened on the table. Then the parties would have three hours to negotiate. The idea was that the two offers would serve as a new anchor for the negotiation and that the parties would compromise in order to avoid the uncertainty of an arbitration award. If they failed to reach an agreement, the arbitrator would select one of the offers.

Both parties instantly embraced the idea. They insisted that my assistant and I would serve as arbitrators. Their decision, i.e. to appoint us as arbitrators, transformed the process into a med-arb final-offer (medaloo); only that according to our improved model, the parties would have an additional opportunity to negotiate on the basis of their final offers.

A detailed agreement was drafted and signed. It laid out the arbitration model as well as other issues that had been agreed upon throughout the mediation, such as the continued supply of spare parts and the offsetting of the distributor's debts. Special provisions were added to the agreement in order to protect the mediators and the arbitration award against the possibility that one party would attempt to quash our decision for lack of neutrality. The provisions stipulated that the parties had selected the mediators as arbitrators knowing that we had acted previously as mediators, had conducted private caucuses and had received confidential information. The parties agreed that we would use all this confidential information for our decision, waiving any right they might have to quash the award for that reason.

The parties signed also a motion asking the court to give the agreement the power of a consent judgment and refund court fees which had been paid by the parties when the claim and counter claims had been filed. With the signed agreement and motion in hand, the only thing

left was to fill in, at the end of the final-offer arbitration, the sum of money the defendant would pay.

The arbitration stage began with a short meeting during which the parties had one hour each for oral summations and an additional half hour for a response. Immediately afterward the parties submitted their final offers in sealed envelopes. We let the parties see the offers. As expected, they were not far apart. We adjourned the meeting in order to allow the parties time for negotiations.

After only one hour of negotiations the parties asked us to decide. We did. Both were very satisfied with the outcome and the process. The multinational's regional manager left for Vienna on time.

Analysis

Many insights and lessons for transnational commercial mediation can be drawn from this particular case. Some are common to transnational commercial and cross-cultural negotiation. The four aspects discussed briefly below highlight the particular mediation dimension.

The Challenge of Language and Cultural Differences

As this case demonstrated, mediators in transnational settings may structure and conduct the mediation process in a way that may assist the disputants to relieve or overcome the difficulties associated with language barriers and cultural differences. Co-mediation serves many functions. In case of language barriers, the mediator may engage a co-mediator who is proficient in the language of the disputant who experiences problems with the language used in the mediation. Another effective means to cope with language and cultural differences in transnational mediation is to reflect upon the parties' statements with far more length, depth and details than is commonly the case in domestic mediation. Such practice may reduce the risk that both the mediator and the other parties may not understand what was meant to be said by the speaker, a risk which is always there, only that in transnational mediation it is much larger due to language and cultural differences.

Time Constraints

Time constraints and the ensuing pattern of marathon meetings on consecutive days may have a downside. In this particular case, it did not allow the time needed in order to work out an interest-based forward-looking and value-creating solution—a solution which was on the table and could optimally serve the immediate and strategic business needs of the plaintiff and the defendant as well as the needs of a third relevant party, i.e., the firm which replaced the plaintiff as the defendant's distributor in Israel. Since we did not have an extra day or a time interval in order to develop and examine the feasibility of the win-win, interest-based and systemic solution, we had to compromise on an "inferior" monetary settlement.

The Participants

The identity of the participants in mediation, i.e., who will represent the disputing parties, in addition to lawyers, is decided in advance. At that stage, no one actually knows in which direction the mediation will go. Quite often, especially in case settlement, this does not create a problem. In this case it did.

“Versatile skills and experience in the rich menu of ADR processes led to a productive resolution of a transnational business dispute.”

We had a golden opportunity to reach an integrative win-win solution. The interests of both parties would be better served by restructuring their relationships. Nonetheless, the multinational’s relevant or essential decision makers were neither physically present nor accessible in order to give a fair chance to the mediated win-win solution. To the disappointment of all who worked together on the architecture of the mediated solution and deeply believe in its superior qualities, it did not see the light of the day.

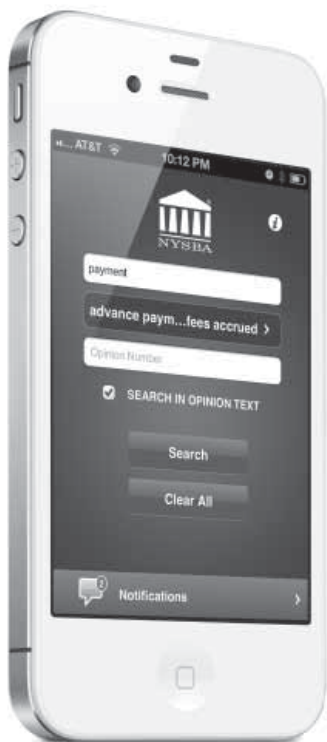
Conclusion

In transnational business mediation, there is an advantage to engaging a mediator with special qualities. One who is well versed in dispute processing design, has versatile skills and experience in the rich menu of ADR processes, and possesses the prudence, flexibility and sensitivity in order to timely select and to facilitate the process of moving from one dispute resolution process to another, as the need arises and changes.

Prof. Mironi, mmironi@law.haifa.ac.il, is an Associate Professor at the Faculty of Law at Haifa University and has served as a visiting professor at Cornell University and U.S.C. Law School. He is the chairman of the Israel Bar Association’s ADR Forum and a former President of the Israeli Mediators Association. Prof. Mironi serves on several international panels including WIPO (World Intellectual Property Organization), CAS (Court of Arbitration for Sport) and the Milan Chamber.

This article is adapted from an article previously published in the *International Journal of Arbitration, Mediation and Dispute Management*.

Ethics—We’ve Got an App for That!



The new NYSBA mobile app for Ethics offers you the complete NYSBA Ethics library on the go.

- Available for free for download to iPhone, iPad, Android phones and BlackBerrys
- Search by keywords, choose from categories or search by opinion number
- See the full text of opinions even when you have no Internet access
- Get notified of new opinions right on your device as they become available
- All opinions are presented as issued by the NYSBA Committee on Professional Ethics



Visit **www.nysba.org/EthicsApp** for more information **518-463-3200**

Mediation: A Tool for European Business People

By Fabienne van der Vleugel

As a matter of fact, mediation in Europe is not yet used in complex commercial and company-related disputes as much as it is in the U.S. or in the UK.

Why is it so? Does commercial mediation have a future in Europe? What should be done to ensure development of mediation?

Unfortunately there seems to be a basic confusion. Among many European economic actors—managers, clients, customers, directors, lawyers and experts—mediation's value is perceived as limited to personal and family disputes such as disputes between opposing neighbours or members of a family. In addition, a sizable group is simply confused about the process and believe that mediation is identical to arbitration. In many contexts business people indiscriminately use the words “arbitration award” for “decision,” “arbitrators” for “mediators,” “arbitration procedure” for “mediation process.”

To the extent that misinformation or incomplete information contributes to the confusion and to the low acceptance of mediation in business disputes, the ADR community must find better ways to educate the public about the process, and about its use in business disputes of all kinds from the most basic to the most complex. When educating business people one can rely on ordinary business processes and preparations to bridge the information gap—the more concrete the explanation, the better.

The typical business executive will be able to understand the degree of preparation necessary to negotiate an important business transaction, such as restructure or negotiating contracts. The investigation of alternatives, the listing of options, the weighing of costs and benefits will all be within the known realm of business preparation. Indeed to successfully negotiate any new deal, the business person must be willing and able to understand the negotiating partner's state of mind, objectives, and interests. Even issues of confidentiality are routinely considered in business discussions. He or she is deeply and personally involved in the process. These preparations and approaches are also required in mediation and the mediator assists the parties in making an orderly examination of the same types of questions that have blossomed into a dispute.

Mediation is a tool well-designed for complex commercial and company-related disputes because it builds on the accepted business practices, leaves ultimate authority with the parties and permits the business people (being accompanied by their respective lawyers) to remain in control of the solution, through a process organized and directed by the mediator. The mediator

facilitates a resumption of the communication that may have been impaired by the dispute.

Another important tool for convincing European business people is the acceptance of mediation in the US. Getting explanations from U.S. users of mediation services before their European counterparts may jump-start the process that is beginning to move in the right direction.

Article 1 of the European Union directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the “Directive”) expressly states that “the objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.” All European countries (with the exception of Denmark) had to implement the Directive into their national law by 20 May 2011.

Multiple associations have been set up in various countries to develop mediation. Local initiatives create a real dynamic in some major capitals and cities, giving concrete support and efficiency to mediation.

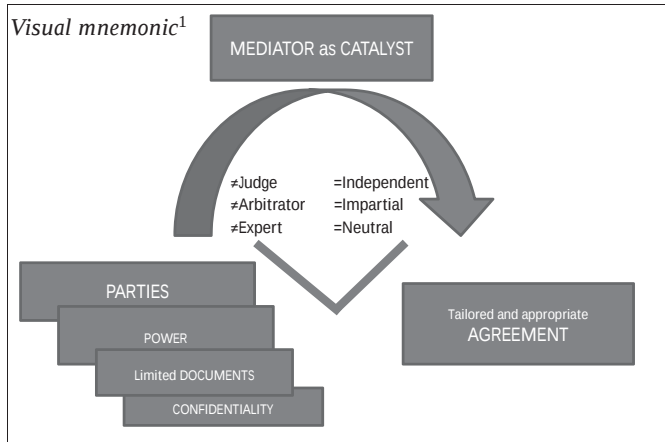
Various mediation centres ensure professional education, seminars and conferences, ensuring continuous training and guaranteeing professionalism of mediators.

Students are invited to participate in various mediation competitions such as the very well known international commercial mediation competition organized by the International Chamber of Commerce in Paris. This competition has educated a growing cadre of young lawyers on the potential benefits of mediation and many of them will bring their commitment into their practice.

Although an increase in mediation among all European countries is not in doubt, now is the time to assure that mediation is clearly explained to the business community on a broad scale: European ADR professionals should encourage the teaching of mediation in law schools and business schools. Mediation should be systematically explained by lawyers to their clients; each time they are engaged in a new transaction, there is an opportunity to discuss dispute resolution and to incorporate dispute resolution provisions in any agreement. As in the U.S. and UK, mediation should be suggested by judges to litigants in the course of the judicial procedure. Mediators themselves can continue to remind the parties in public discussions and in introducing mediation sessions.

Now, let's imagine you have a few minutes to explain what mediation is all about. You must convince a European business manager that this tool may be useful for the

dispute he is facing. In case you have a visual memory, the visual mnemonic reproduced below may be helpful to make sure you do not forget essential characteristics. This visual mnemonic may also be helpful for any teaching venue or discussion on mediation. You may draw it before your audience, so that it may visualize your presentation.



(a) **Voluntary** process: the « V » forming the base of the mediation process. It is the parties that opt for mediation, and they may end it at any time.

(b) Throughout the **process**: the arrow above the «V» hence demonstrating the flexible character of the mediation process which offers business advantages: speed, low costs, creativity of the solution, relationship improvement, parties' empowerment.

(c) The mediator facilitates as an **independent, impartial** and **neutral professional (=)**

Professional, because s/he must be skilled in mediation and provides documentation of on-going training. S/he must be able to handle specific techniques and master the mediation process. Independent, because s/he cannot have conflicts of interest with either party in the dispute. Impartial, because s/he cannot take the side of either party. Neutral, because the mediator has no interest whatsoever (either professional or personal) that the dispute be resolved in a particular manner that excludes other possibilities.

(d) Throughout the process, the parties retain power—the mediator facilitates their resolution and the mediator does not act as a **judge, arbitrator or expert (≠)**.

European businessmen, who often confuse arbitration and mediation, should be reminded that the mediator does not render any decision to be unilaterally imposed on the parties.

(e) Mediation is **confidential**: an essential aspect of mediation which certainly is an advantage for business.

“Mediation has a bright future in Europe but first it must be explained and understood.”

(f) The parties retain the **authority (power) to resolve their own matter**. This is clearly an advantage for parties who are ready to spend time and energy to solve disputes. However, some businessmen do not want to handle their disputes themselves. They prefer entrusting any and all disputes to lawyers while they focus on business development. It seems essential to explain the fact that mediation is also a part of business development: solving disputes quicker, spending appropriate time on a shorter and well-designed calendar, tailoring the best practical solution serves the best interest of the business.

(g) Mediation consists of a process that must be simple to administer, i.e., only a few **documents** to assemble (list of those present, confidentiality agreement, mediation agreement, fee agreement, documents specific to the case notably the disputed contract).

(h) The mediation process ends with an **agreement** stated in a contract not an order.

Mediation has a bright future in Europe but first it must be explained and understood.

Endnote

1. Technical sheets regarding mediation, VDV Médiation®, Fabienne van der Vleugel.

Fabienne van der Vleugel who concentrates in company law, is an attorney admitted to practice in New York, Brussels, and Meaux—Mediator—Arbitrator.

DISPUTE RESOLUTION SECTION

Visit us on the Web at WWW.NYSBA.ORG/DRS

Book Reviews

Stories Mediators Tell

Eric R. Galton and Lela P. Love, Editors
(American Bar Association 2012)

Reviewed by Stefan B. Kalina

Stories are powerful. Well told, they can seamlessly teach, entertain and inspire. This collection of mediation stories follows suit. The editors usefully gather good stories, harness their power and deliver them with great practical effect.

The inviting title sets the friendly tone of the book. Readers are asked to experience stories from the front-lines of mediation. The stories are told by experienced mediators. The credentials of each storyteller is provided. This credibly sets the stage for a captivating inside look at mediation. Without technical jargon, the accessible narratives follow the give and take of the parties as well as the reaction and efforts of the mediators.

The deft hand of the editors is revealed by allowing the mediators to tell *their* stories. The stories here belong to the mediators' like mediation belongs to the parties. Certainly, each story explains how the mediation unfolded, whether the parties were able to settle and why the mediation succeeded or failed. However, each story is purposefully told by from the mediators' viewpoint and particular attention is also paid to mediators' striving effort to deliver a meaningful process for the parties.

As with any good story, the spotlight remains on the characters while lessons are taught organically through *their* stories. Here, the editors lay bare the mediators' progression as well as the parties' journey. The stories are punctuated with the drama of seemingly intractable conflict. Readers are thus able join the mediators as they confront the high hurdles of disparate party positions and incongruous interests. While listening to the mediators' own personal struggles, readers learn why their story ends in success or failure. Along the way, readers gain knowledge that they, too, can use to bridge such divides in future mediations, whether as mediators or counsel.

The editors successfully enhance the value of the mediators' stories with several elements. First, they carefully take necessary license "to convey the feel and tone and mood of a situation" (as well as to protect the confidentiality of the parties involved). This element transports the reader into the middle of the action and permits readers to evaluate the evolving currents of the conflict for themselves. The detailed narrative affords readers the valuable opportunity to consider how they would deal with a particular situation before hearing about each mediator's

chosen technique. The creativity fostered in the reader by the storytelling itself is as compelling as the array of creative techniques demonstrated throughout several stories in the book.

Second, each story contains very helpful and entertaining section titles. These section titles help describe the action while lending context to the nature of the conflict and the technique deployed to deal with it. For example, and without spoiling the story itself, the editors track a wrongful death mediation as follows: "Sarah: Final Hours; Sarah's Parents: Forever Changed," "The Litigation Process Begins," "The First Mediation," "Keeping the Lines of Communication Open," "Co-Mediators," "The Second Mediation," "Dealing with Economics of the Case," "Making a Connection," "Operational Changes 'So This Can Never Happen Again,'" "Putting the Pieces Together." Following these titles alone demonstrates how each conflict can benefit from a mediated approach unique to itself.

"While listening to the mediators' own personal struggles, readers learn why their story ends in success or failure."

Third, each story is followed by a postscript known as "second thoughts." This section elevates the action with after-the-fact commentary, again in very human terms. Although quite experienced, the mediators in the book are evolving in their mediation practice. With the benefit of time and perspective, the mediators offer their thoughts on what lessons their stories teach—for better or for worse. Following one case, the mediator makes the personal observation that:

Parties sometimes value things that their lawyers do not. And I want to be ready to hear that and provide a process that delivers that opportunity to them. I want to be open, aware, and available. For a long while I was not available. I am happy to report that I am now, and that is why I wrote this story.

Readers benefit from such insights because they, too, have had the opportunity to reflect on the events of mediation just re-told. They can triangulate their reactions with those of the authors to forge a creative mindset to conflict resolution. Towards this end, the editors expand on the "second thoughts" section by devoting one set of stories to the theme of "Self Reflection and Reflection on Practice."



The balance of the stories is organized around other themes that expand upon the basic tools of mediation. They include “Listening for the Undercurrents and Finding Missing Pieces” and “Staying in the Middle Without Judgment or Favoritism.” Taken together, the themes support the central thesis of the book that through such creative solutions, mediation can provide the “other path” to “litigation and adversarial contest.” The stories themselves provide the vehicle for showing mediation is “another way” to address conflict.

The editors use the powerful medium of stories in service of their broader effort to show how mediation “may enhance the preservation of relationships, allowing parties to access creativity and discover alternatives that our justice system could not offer.” They use these stories to build upon the “successful relationship between mediation and the law” and to further integrate mediation into “American culture.”

This collection provides a valuable addition to the literature of mediation. Stories are the foundation of oral tradition and written history. The editors have identified the lack of formal recording of mediators’ participation in the modern mediation movement within the United States legal community. Using the above-mentioned license to protect confidentiality, the editors have effectively found a way to capture these first-hand accounts and preserve them for the benefit of current and future students of the field.

In sum, creative ideas abound in every entertaining story. The stories can be read as a whole or they may be accessed individually for illumination or variation on a particular theme. In either event, this collection offers guidance to lay readers, new practitioners and seasoned mediators alike on the benefits and uses of mediation.

The editors are both mediators as well as authors, teachers, trainers and bar leaders in the mediation field. Eric R. Galton is a founder of Lakeside Mediation Center in Austin, Texas. Lela P. Love is the Director of the Kukin Center for Conflict Resolution and the Mediation Clinic at the Benjamin N. Cardozo School of Law.

Stefan B. Kalina is Counsel at the New York office of Cox Padmore Skolnik & Shakarchy, LLP. He may be reached at kalina@cpsslaw.com.

* * *

Arbitration of International Intellectual Property Disputes

Edited by Thomas D. Halket

Reviewed by William H. Baker

Arbitration of International Intellectual Property Disputes is a book that will be useful to experienced arbitra-

tion practitioners and IP practitioners alike. For the IP practitioner it provides a comprehensive overview of international arbitration law from A to Z. For the sophisticated arbitration practitioner, who already understands all of the nuances of international arbitration, it provides guidance on unique IP issues that may arise during an international arbitration and how to deal with them.

The book comprises more than 500 pages with an enclosed CD-ROM that contains the codes of ethics promulgated by leading bar associations and arbitral institutions; the major international conventions governing international arbitration; various protocols and guidelines regarding discovery and evidence issued by arbitral institutions; the international arbitration rules of most arbitral institutions; the governing arbitration statutes in many of the countries that are frequent sites of international arbitration; and a chart comparing the rules of the major arbitral institutions.

Each chapter deals with different aspects of international arbitration but with a focus on the particular IP issues that may arise. The structure of the chapters indicates the comprehensiveness of the book’s coverage. Chapter 1 covers the benefits of international arbitration with a particular emphasis on IP disputes; chapter 2 discusses the substantive arbitrability of intellectual property disputes in various jurisdictions; chapter 3, the drafting of the arbitration agreement with a particular eye toward IP issues; chapter 4, the rules of selected administrative bodies and the pros and cons of each set of rules as they might apply to IP disputes; chapter 5, the choice of arbitrators in IP disputes; chapter 6, the confidentiality of international proceedings when they involve IP issues; chapter 7, the admission of evidence in international arbitrations of IP disputes; chapter 8, the choice of law, as it applies to particular IP issues that may arise; chapter 9, the impact of public policy considerations in the IP context; chapter 10, the availability of provisional and final remedies and their effectiveness in the IP context; and, finally chapter 11, the enforceability of international arbitration awards with a focus on particular IP issues that may arise.

Chapter 1 starts by noting that IP rights are far from uniform around the world. Some, such as moral rights, mask rights and database rights, exists in some countries but not in others. Some others, such as patent and trademark rights, exist in most, if not virtually all, countries but with considerable variation from country to country. It then notes the numerous contexts in which IP issues may arise: use licenses; assignments; acquisitions and divestitures; joint ventures; branding transactions; joint development and other R&D arrangements; consulting and engineering agreements and so forth.

With an eye towards the diversity of contexts in which IP disputes can arise and the diversity of protection of IP rights around the world, the author of Chapter

1 then discusses the standard benefits of international arbitration from an IP point of view (e.g., preservation of the business relationship, cost of proceedings, speed of proceedings, forum neutrality, confidentiality of the proceedings, sophisticated and experienced adjudicators, avoidance of the risk of inconsistent judgments; international enforcement of the award). For example, many IP disputes arise in the middle of an existing business relationship. A license agreement may stretch for a term of many years in the middle of which disputes may arise as to the proper amount of royalties to be paid or the permitted use of the licensed technology. In such circumstances the preservation of the existing relationship can be of substantial importance to the parties notwithstanding their desire and need to resolve the dispute at issue. This means that arbitration, as opposed to litigation with its “take no prisoners” attitude, is a more conducive forum to settle such disputes.

Confidentiality can also be very important to the resolution of IP disputes, but as later pointed out in Chapter 6, such confidentiality may not be as absolute as one might hope. For example, 35 U.S.C §294 provides that infringement and validity may be arbitrated as long as the determination of validity is only binding on the parties to the arbitration. Section 294(d), however, provides that when an award is made the arbitrator or patentee or licensees shall give notice thereof in writing to the director of the patent office and the director shall, upon receipt of such notice, enter the same in the record of the prosecution of such patent. Section 294(e) further provides that any arbitration award shall not be enforceable until the notice required by subsection (d) has been received by the director. Thus, although patent arbitration proceedings may be confidential, if one needs to enforce an award, one must make it public, at least to the extent of filing a notice of the award with the director and having it placed in the record of prosecution of the patent.

As experienced arbitration practitioners know, the default rule in international arbitrations, as opposed to domestic arbitrations, is that the arbitrator or arbitration tribunal shall file a reasoned award. In the absence of a reasoned award, an international arbitration award may not be enforceable under the New York Convention. This presents the practitioner involved in a patent arbitration with a conundrum. In the event his client loses the arbitration, he may wish to have as little as possible stated in the public record about the reasons for the decision. On the other hand, as noted, without stated reasons, the award may not be enforceable internationally. One possible solution, although this reviewer has never researched whether it might be legitimate, is to have an agreement in advance that there be an award and a separate opinion setting forth the reasons for the award. Only the award need be filed with the director of the patent office, but if the award needs to be enforced internationally, then in that event both the award and supporting opinion can be used.

Apart from the ability to preserve ongoing business relationships, and the benefits (at least to a certain extent) of confidentiality, several of the other benefits of arbitrating international IP disputes that are discussed in Chapter 1 merit at least a passing mention. The most obvious is the ability to obtain sophisticated and experienced adjudicators. IP disputes, particularly patent disputes, can be complex. Being able to choose experts in the field as the members of your tribunal certainly beats trying to explain such issues to a lay jury.

The avoidance of the risk of inconsistent judgments is another benefit that might not come as readily to mind. Chapter 1 gives as an example a dispute regarding an international patent license that licenses a U.S. patent and corresponding patents in various foreign countries. If in that dispute an issue is raised as to whether certain conduct falls within the claims of various patents, there is the distinct possibility that a court of one nation might interpret the claims differently than the court of another nation. Thus, the same conduct might be viewed as within the claims of the patent and the license and subject to a royalty in one country and not so in another. Arbitration can be a solution to these problems. Assuming that both parties’ home countries are signatories to the New York Convention, it can be expected that the courts of these countries will stay their own proceedings in favor of compelling the parties to arbitrate, thus avoiding the risk of inconsistent judgments.

Another advantage of arbitrating international IP dispute is the relative ease of enforcement of arbitral awards as opposed to the enforcement of court judgments. Many IP practitioners may not be aware that the United States is not a signatory to any treaty with any country that requires enforcement of its judgments in the event one needs to find assets abroad against which to enforce the judgment. Instead, one must rely on international comity. By contrast, most of the major industrial countries in the world are signatories to the New York Convention, which requires enforcement of an arbitral award except in the very limited circumstances set forth in Article V of the Convention.

Chapter 2 of the book deals with the question of arbitrability of various types of IP disputes including copyright, trade secret, trademark, and patent disputes. For example, patents, can be viewed as exclusive rights issued by the sovereign. One can understand that there might be hesitancy on the part of a country to permit a private arbitral panel to determine the rights which the sovereign has issued. Nonetheless, as noted above, 35 U.S.C. §294 permits the arbitration of both patent infringement and invalidity as long as the determination of invalidity is binding only as between the parties to the arbitration. Chapter 2 covers how other major countries have dealt with this issue and other similar issues. Somewhat surprisingly, there is a trend, although not universal, in most jurisdictions toward the same solution as that

embodied in Section 294, namely, permitting both infringement and invalidity to be arbitrated as long as the determination of invalidity is binding only between the parties to the arbitration. Chapter 2 explores these issues in detail and then provides a very useful country-by-country survey of the relevant statutes and case law in the United States, the United Kingdom, France, Germany, Switzerland, China, Singapore, and Japan insofar as they bear on the issue of arbitrability of IP rights. This useful compendium is worth the price of the book by itself.

Chapter 8, which deals with choice of law in arbitrating international IP disputes, is also particularly worthwhile for the IP practitioner who may not be well-versed in international arbitration law. As this chapter points out, many countries' laws can impact an international arbitration. First, in the case of a patent infringement dispute, one may need to deal with both a U.S. patent and foreign counterparts issued in various countries. The law governing infringement, validity, and enforceability of such patents will normally be the jurisdiction that issued the particular patent or its foreign counterparts. A proper analysis, however, does not stop there. One must also look at the law of the jurisdiction in which the arbitration is sited (i.e., the seat of the arbitration). This is often referred to as the *lex arbitri*. The *lex arbitri* governs the procedural aspects of the arbitration, but it often governs far more than that. For example, the question of whether a particular patent dispute is arbitrable may, in some circumstances, be governed by the *lex arbitri*, as well as the issue of whether such arbitrability should be determined by a court or by the arbitration tribunal. In addition, one needs to look to the various jurisdictions where one may need to enforce the award to determine if it would be recognized in those jurisdictions. Thus, in planning for an international arbitration of an IP dispute, a practitioner may need to analyze carefully in advance not only what substantive law(s) will be applied and their effect, but also what law or *lex arbitri* may be brought into play by virtue of choosing a seat of the arbitration, what effect that *lex arbitri* may have, and what law(s), particularly laws that may decline to enforce an award based on issues of public policy, may exist in the jurisdiction(s) in which enforcement may be sought.

In the foregoing, this reviewer has discussed only briefly certain aspects of Chapters 1, 2, and 8 of *Arbitration of International Intellectual Property Disputes*. A similar detailed discussion of the other chapters is beyond the scope of this review. Suffice it to say, however, that this very useful book should be in the library of every IP litigator and every international arbitration practitioner who may at some point in time need to consider whether to arbitrate an international IP dispute.

William H. Baker, bill.baker@alston.com, practices IP litigation, with a particular emphasis on computer-related patent disputes, with the New York office of

Alston & Bird. He is also a member of the firm's international arbitration group and teaches a course at Cardozo Law School on International Dispute Resolution. He is listed in *Best Lawyers in America*.

* * *

ADR Advocacy, Strategies and Practice for Intellectual Property Cases

Harrie Samaras, Editor (ABA 2011)

Reviewed by Laura A. Kaster

On the Cover of this book, a portion of the title, *ADR Advocacies, Strategies and Practice*, is in standout white with the *for Intellectual Property Cases* in a more muted tone. It is a visual statement of something important about this handy tome—it speaks to general ADR issues as powerfully as it does to the special issues raised in the context of resolving IP disputes. For that reason, it is extremely valuable for IP practice by advocates, arbitrators and mediators, and is worth examining for all more generally involved in ADR.

The book is a collection of detailed essays by impressively knowledgeable practitioners, neutrals, the Circuit Mediation Officer for the U.S. Court of Appeals for the Federal Circuit, and administrative and magistrate judges. Each chapter is almost a monograph on its topic. Nine detailed chapters cover when and how to use ADR in IP disputes; the special issues that arise in drafting ADR clauses for IP problems (many of which have broad impact in other disputes as well); the value of early case assessment, which involves, among other things, using some mediative skills such as examining opposing party perspective; mediation in the IP setting; a guide for counsel and clients preparing for mediation; using a special master in IP cases; ADR tools such as screening tools to evaluate single or combined ADR processes; tools for selecting the right neutral, and tools for decision tree analysis—and how to use them with the client, opponent and neutral to expand, persuade and evaluate the dispute; how to mediate patent cases on appeal in the Federal Circuit—with focus on preparation for mediation and effective advocacy; and proceeding in the United States International Trade Commission as an alternate approach to IP dispute resolution. Many of the chapters make particularly good use of case examples and all carefully address unique problems that arise in IP litigation, such as the possibility of triggering a declaratory judgment suit.

Each chapter has little gems. It is impossible here to address all of the bon mots and the organizing themes. The book makes a special contribution by focusing on advocacy and neutrals will recognize that it captures many of the traps that advocates can fall into when moving from litigation to ADR. It is extremely strong in helping the advocate reorient toward the kind of preparation with

the client and the kind of expansion of the issues that can cause a real shift in the playing field and assist resolution.

An underlying theme running through many of the pieces is the need early and often to engage with the client so that the client has a better understanding of risks and benefits, to stop thinking about dispute resolution as a game requiring holding the cards close to the chest and instead to look up, expand the field of vision and embrace a much wider understanding of client needs and real costs of a dispute in order to prepare for the possibility of resolution. Early case assessment, well described here, gives the party who does it the possibility of shaping the story and sharing it early.

Although the book is focused on advocacy, it has a great deal for the neutral. There are many instances where an insight inspires the desire to include prepara-

tion tips in the request to the parties for pre-mediation submissions or for instructions on preparation for either a mediation or arbitration. There are pieces that emphasize the use of multiple resolution techniques and keeping open the possibility of a return to one or more if the matter doesn't resolve early.

This excellent resource deserves a place on the shelves of all neutrals and advocates in IP and well beyond.

Laura A. Kaster, Esq. is an arbitrator and mediator working in the greater NY metropolitan area (www.AppropriateDisputeSolutions.com). She is the Chair of the New Jersey State Bar Association Dispute Resolution Section, and Co-Editor of this *Journal*. She has presented and published widely on arbitration and mediation.

LPM Resources

Get help. Get answers.

NYSBA's Law Practice Management online resources include the following:

- Monthly T-News e-newsletter
- Quarterly LPM e-newsletter
- TechConnect technology blog
- Solo/Small Firm blog
- Law Practice Management Tip of the Week blog
- Monthly luncheon CLE series



Visit **www.nysba.org/lpm** to improve your practice **518-487-5596**

Two Courts Address Sanctions for Seeking Judicial Relief from Arbitration

Enmon v. Prospect Capital Corp. and World Business Paradise, Inc. v. SunTrust Bank

By Julia Belagorudsky

Two recent Court decisions address the exposure of parties who seek to impede access to arbitration or to vacate arbitral awards on frivolous grounds. Failure to establish adequate grounds to vacate an arbitration award on a motion to vacate can result in court-awarded sanctions if the court views the motion as a baseless or a bad faith contest of an arbitration award.

The Federal Arbitration Act provides for vacatur of an arbitration award only in four narrow circumstances: 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 any other misbehavior by which the rights of any party have been prejudiced; or 4) where the arbitrators exceeded their powers.¹ When motion practice cannot be justified on one of these bases, the advocate proceeds at his or her risk.

Background

In *Enmon v. Prospect Capital Corporation*,² the Second Circuit affirmed the decision of the district court for the Southern District of New York (“SDNY”) affirming the imposition of sanctions on the law firm Arnold & Itkin, for acting in bad faith and engaging in frivolous and vexatious litigation by opposing an arbitration proceeding.

Michael Enmon was unable to secure a subordinated loan for a business venture from Prospect Capital Corporation (“Prospect”) after months of negotiation. Shortly after the loan fell through, Enmon’s former counsel sued him in Texas state court for unpaid legal fees. Enmon retained Arnold & Itkin as new counsel and filed third-party claims against Prospect alleging fraud and related causes of action in connection with the failed loan transaction. In response, Prospect initiated arbitration proceedings in New York pursuant to the arbitration clause in the Letter Agreement to address Enmon’s claims in an arbitration proceeding rather than in federal court. Prospect also filed a petition to compel arbitration in district court.

Arnold & Itkin opposed the arbitration proceeding, and in doing so, engaged in behavior which eventually led the district court to issue, and the court of appeals to affirm, a sanctions order pursuant to 28 U.S.C. § 1927 for Prospect to recover approximately \$354,559 in fees incurred.³

Arnold & Itkin requested that the Texas court issue a temporary restraining order to stay the arbitration proceedings but failed to inform the Texas court that Prospect had already filed a complaint in the SDNY and that Prospect was actively seeking a competing temporary restraining order in the SDNY action. After the SDNY court granted Prospect’s petition to compel arbitration, Arnold & Itkin filed a motion for relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, a motion riddled with misrepresentations and brought in bad faith. For example, the motion was filed on behalf of both Enmon and Caprock, Inc., a shell company controlled by Enmon, but in its motion papers, Arnold & Itkin falsely described Enmon as a part owner of Caprock, when in reality, Caprock was Enmon’s wholly owned shell company.

After timely appealing both the district court’s order denying the Rule 60(b) motion and the order granting Prospect’s petition to confirm the arbitral award, Arnold & Itkin voluntarily withdrew its appeals causing the district court to view the filing of those appeals as “purely for dilatory and resource-draining reasons,”⁴ and found that Arnold & Itkin had acted in bad faith and engaged in frivolous and vexatious litigation.⁵

In *World Business Paradise Inc. v. SunTrust*,⁶ the Eleventh Circuit affirmed the decision of the district court for the Northern District of Georgia entering judgment on an arbitral award. The court of appeals also determined that sanctions should be imposed on World Business Paradise (“WBP”) for filing an appeal of the district court’s confirmation of the award and its denial of WBP’s motion to vacate the award. Relying on the FAA vacatur standards, the Eleventh Circuit reviewed the district court’s vacatur decision for clear error in the fact-findings and reviewed its legal rulings *de novo*.

WBP and Olumba Ogum (plaintiffs) challenged the underlying arbitral award alleging arbitrator partiality. They asserted that the arbitrator held that Ogum was not a party to the arbitration, denied them depositions while permitting SunTrust numerous depositions, and refused to postpone the arbitration hearing. WBP and Ogum relied exclusively on the arbitral award itself and failed to provide any evidence to support their claims. SunTrust contested WBP’s assertions and the district court agreed, holding that there was no evidence of the partiality and misconduct alleged by WBP and required by the FAA for vacatur. The award itself contradicted the contention that Ogum was treated as a nonparty, referring to “claimants” plural, and there was no evidence in the award

that discovery was denied or that there was a refusal to postpone. Both contentions were disputed and WBP and Ogum bore the burden of proof, which they failed to meet.

On appeal, SunTrust sought sanctions for the frivolous effort to seek vacatur without objective bases for believing the efforts could succeed. The Eleventh Circuit held that sanctions were appropriate here to protect the allure of arbitral finality and to express the Court's exasperation with those "who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration."⁷ The Court remanded to the district court for the imposition of sanctions

Conclusion

These cases make clear that parties must proceed at peril of sanctions when they seek to delay or impede the

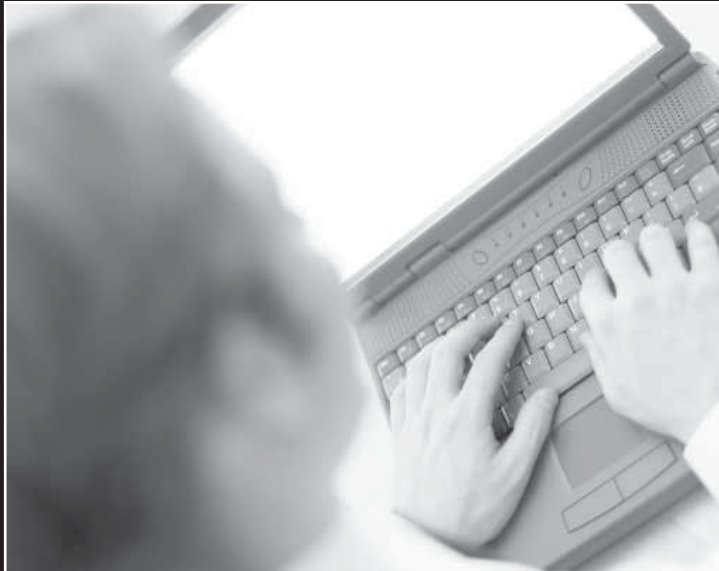
arbitral process and when they seek to vacate arbitral awards without an appropriate basis.

Endnotes

1. 9 U.S.C. § 10.
2. 675 F.3d 138 (2d Cir. 2012).
3. Id.
4. Id. at 147.
5. Id. at 143.
6. 403 F. App'x 468 (11th Cir. 2010).
7. Id. at 470-71.

Julia Belagorudsky is a 3L at Fordham University School of Law.

A Pro Bono Opportunities Guide For Lawyers in New York State *Online!*



Looking to volunteer? This easy-to-use guide will help you find the right opportunity. You can search by county, by subject area, and by population served. A collaborative project of the New York City Bar Fund, New York State Bar Association, Pro Bono Net, and Volunteers of Legal Service.

powered by **probono.net**



NEW YORK
STATE BAR
ASSOCIATION

You can find the Opportunities Guide on the Pro Bono Net Web site at www.probono.net/NY/volunteer, through the New York State Bar Association Web site at www.nysba.org/volunteer, through the Association of the New York City Bar Web site at www.abcny.org/volunteer, and through the Volunteers of Legal Service Web site at www.volsprobono.org/volunteer.



VOLS
Volunteers of
Legal Service

Second Circuit Denial to Rehear Continues the Debate Over Arbitration Clauses With Class Action Waivers in Consumer Contracts

By Asari Aniagolu

On May 29, 2012, the Second Circuit denied rehearing in banc of the Court's earlier decision on class action waivers in arbitration clauses. *See In re Am. Exp. Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012) ("Amex III"), *rehear'g denied In re Am. Exp. Merchants' Litig.*, 681 F.3d 139 (2d Cir. 2012). With this denial, the Second Circuit solidified its position that arbitration provisions that include class action waivers that do not allow parties to enforce their statutory rights are unenforceable.

The procedural background of this case is a snapshot of the jurisprudential debate over the enforceability of arbitration clauses with class action waivers. Initially, the Southern District of New York dismissed the merchants' antitrust claims against the charge-card issuer and granted the card issuer's motion to compel arbitration. On appeal, the Court of Appeals reversed and held that the arbitration clause in question containing a class-action waiver provision was unenforceable. The Supreme Court granted the card issuer's petition for writ of certiorari. In the interim, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776, 176 L. Ed. 2d 605 (2010) was decided and the Supreme Court held that imposing class arbitration on parties whose arbitration clauses are "silent" on class arbitration is inconsistent with the Federal Arbitration Act ("FAA"). Consequently, the present case was vacated and remanded. The Court of Appeals reversed again and placed a hold on the mandate. During the period when the mandate was on hold, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753, 179 L. Ed. 2d 742 (2011), was decided, holding that under the FAA, States cannot deem arbitration agreements per se unenforceable because they contain a class action waiver. Now, the Second Circuit has refused to rehear the present case and instead, upheld its *Amex III* ruling, an outcome that many view as diverging from the Supreme Court's stance in *Concepcion*.

Amex III is a departure from *Concepcion* because it refuses to enforce an arbitration clause that bars class-action arbitrations in spite of the FAA's public policy encouraging arbitration agreements. In an effort to validate *Amex III*, Justice Pooler's concurrence to the Second Circuit's decision distinguishes the present case from previous cases regarding the enforceability of class action waivers in arbitration clauses. Pooler stresses that *Concepcion* is inapplicable because "*Concepcion* holds that the [FAA] preempts state laws hostile to arbitration, and focuses its analysis on preemption issues. In contrast, analysis in *Amex III* rests squarely on a vindication of statutory rights analysis—an issue untouched in *Concepcion*." Consistently

highlighting the differences between the two cases, Pooler declares "*Concepcion* addresses state contract rights, *Amex III* deals with federal statutory rights—a significant distinction." *Concepcion* and *Amex III* both tackle different issues regarding those rights as *Amex III* is not about "the right to proceed as a class, but the ability to effectively vindicate a federal statutory right that predates the FAA." With this in mind, the Second Circuit anchors its holding on *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636-37, 105 S. Ct. 3346, 3359, 87 L. Ed. 2d 444 (1985), and subsequent related cases, including *Green Tree Fin. Corp. Alabama v. Randolph*, 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000), which "hold that parties may agree to prosecute statutory rights via arbitration instead of litigation only where 'the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.'" *See Mitsubishi*, 473 U.S. at 637.

Further distancing *Amex III* from *Concepcion*, the concurrence asserts that *Amex III* is distinguishable from *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir.2012), which explicitly followed *Concepcion*'s rationale in holding that the FAA preempts the state law regarding class-action waivers. *Coneff*, 673 F.3d 1155 at 1161. In contrast to *Coneff*, where the question centered on the plaintiffs' incentive to pursue their rights, in *Amex III*, the damages provisions under the antitrust laws would not fully compensate an individual plaintiff so "the only economically feasible means for plaintiffs enforcing their statutory rights is via a class action." Noting that the *Coneff* court also acknowledged "the difference between incentive and ability" when differentiating its case from *Amex III* (*see Coneff*, 673 F.3d at 1158–60 n. 3), the Second Circuit's decision accentuates the apparent circuit split on the question of the enforceability of class action waivers in arbitration provisions.

As an aside, the concurrence also refutes the contention "that *Amex III* permits plaintiffs to evade enforcement of class action arbitration waivers simply by manufacturing an affidavit or choosing pricey attorneys." Reiterating that "each case will need to stand on its own merits," the Second Circuit insists that courts are equipped to determine whether parties have demonstrated individual arbitration to be prohibitively expensive.

The main dissent, authored by Chief Judge Jacobs and joined by Judge Cabranes and Judge Livingston,¹ tackles many of the foreseeable complications that may arise in the district courts as they attempt to implement *Amex III*. In his dissent, Jacobs portrays the panel opinion as a continuation of "[t]he longstanding judicial hostility

to arbitration agreements,” citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S. Ct. 1647, 1651, 114 L. Ed. 2d 26 (1991). The dissent offers three main reasons for disagreeing with the panel opinion: (1) the opinion does not correspond with the FAA’s public policy to resolve arbitrable issues in favor of arbitration; (2) it improperly “narrow[s]” *Concepcion* and creates a unfounded distinction which results in the same types of unconscionability laws that were preempted in *Concepcion* at the state level now being permissible in *Amex III* because of “federal substantive law of arbitrability,” and (3) the panel relies on “distorted” dicta of *Mitsubishi* and *Green Tree* to support its claim that the court cannot allow high arbitration costs to impede parties from pursuing statutory rights. The dissent advocates a rehearing of *Amex III* because it is an “unbounded” opinion that “makes the district court the initial theater of arbitral conflict” without any clear-cut guidelines for the court to use in deciding whether individual or class action arbitration is “economically feasible.”

In short, the Second Circuit’s decision to deny rehearing and effectively affirm *Amex III* presents the situation where the inclusion of an arbitration clause in a contract can become a double-edged sword. Here, there is an arbitration clause and within that arbitration clause, there is a class action waiver. The Second Circuit decided that the class action waiver is unenforceable, thus rendering the entire arbitration clause unenforceable and leaving the parties without the ability to arbitrate at all.

As it stands, the Second Circuit’s decision may set the trend for future cases; see *In re Electronic Books Antitrust Litig.*, 11 MD 2293 (DLC) (S.D.N.Y. June 27, 2012), as these courts limit *Concepcion* and discourage the use of arbitration clauses with class action waivers, at least where statutory rights may be in issue.

Amex has filed a cert petition with the Supreme Court. Given that court’s recent interest in these arbitration issues, there is a high likelihood that cert will be accepted and we will see yet another pronouncement from the Supreme Court on class action arbitration.

Endnote

1. Judges Cabranes wrote a brief separate dissent; Judge Raggi also wrote a dissent, which Judge Wesley joined.

Asari Aniagolu, aniagolu.asari@arentfox.com, is an associate at Arent Fox LLP, and focuses her practice on a range of complex litigation matters, including trademark, copyright, and breach of contract issues and criminal procedure in a high-profile white collar defense cases. With a strong interest in ADR, she is the co-chair of the NYSBA Dispute Resolution Section’s Law Students Committee.

www.twitter.com/nysba

**Follow NYSBA
on Twitter**



visit

www.twitter.com/nysba

and click the link
to follow us
and stay up-to-date
on the latest news
from the Association

Section Committees and Chairs

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

ADR in the Courts

Jacqueline W. Silberman
Blank Rome LLP
405 Lexington Avenue
New York, NY 10174-0208
JSilberman@BlankRome.com

Stephen A. Hochman
600 Lexington Avenue, 15th Fl.
New York, NY 10022-6018
shochman@prodigy.net

ADR within Governmental Agencies

Charles E. Miller
Dickstein Shapiro LLP
1633 Broadway
New York, NY 10019
millercharles@dicksteinshapiro.com

Pamela R. Esterman
Sive Paget & Riesel PC
460 Park Ave
New York, NY 10022-1906
pesterman@sprlaw.com

Arbitration

Abigail J. Pessen
Abigail Pessen Dispute Resolution Services
1 Battery Park Plaza, 34th Fl.
New York, NY 10004-1411
pessenadr@earthlink.net

James M. Rhodes
Merrion Street Partners LLC
55 East 86th Street, Ste. 16a
New York, NY 10028
jamesmrhodes@me.com

Blog Master

Geri S. Krauss
Krauss PLLC
1 North Broadway, Ste. 1001
White Plains, NY 10601-2325
gsk@kraussny.com

Collaborative Law

Harriette M. Steinberg
Harriette M. Steinberg, P.C.
1400 Old Country Road, Ste. 416
Westbury, NY 11590-5119
hms@lawyersonli.com

Continuing Legal Education

Gail R. Davis
Resolutions NY Inc.
120 East 30th Street
New York, NY 10016-7303
gdavis@resolutionsny.com

Elizabeth Jean Champnoi
Navigant Consulting Inc.
90 Park Avenue, 10th Fl.
New York, NY 10016
elizabeth.shampnoi@navigant.com

Diversity

Alfreida B. Kenny
Law Office of Alfreida B. Kenny
111 John Street, Ste. 800
New York, NY 10038-3101
abkenny@abkenny.com

Daniel F. Kolb
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017-3911
daniel.kolb@davispolk.com

Education

Jacqueline Nolan-Haley
Fordham University School of Law
140 West 62nd Street
Lincoln Center
New York, NY 10023-7407
jnolan-haley@mail.lawnet.fordham.edu

Ethical Issues and Ethical Standards

Kathleen Marie Scanlon
Law Offices of Kathleen M Scanlon PLLC
120 E 79th Street, Ste. 2e
New York, NY 10075-0319
kscanlon@adradvocate.com

Barbara Antonello Mentz
140 West 86th Street
New York, NY 10024
bmentz@mentz.org

Law Students

Asari A.C. Aniagolu
Arent Fox LLP
1675 Broadway
New York, NY 10019-5820
asariani@gmail.com

Legislation

Sherman W. Kahn
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0101
skahn@mofo.com

Richard L. Mattiaccio
Squire Sanders (US) LLP
30 Rockefeller Plaza, 23rd Fl.
New York, NY 10112
richard.mattiaccio@squiresanders.com

Liaison and District Rep Coordination

Marc J. Goldstein
Marc J Goldstein Litigation & Arbitration
Chambers
1230 Avenue of the Americas, 7th Fl.
New York, NY 10020-1513
goldstein@lexmarc.us

Mediation

Irene C. Warshauer
60 East 42nd Street, Ste. 2527
New York, NY 10165
icw@irenewarshauer.com

David C. Singer
Dorsey & Whitney LLP
51 West 52nd Street
New York, NY 10019-6119
singer.david@dorsey.com

Membership

Richard S. Weil
WeilMediation
1065 Park Avenue, #20c
New York, NY 10128
rickweil@weilmediation.com

Geraldine Reed Brown
The Reed-Brown Consulting Group
180 Union Street
Montclair, NJ 07042-2125
RBCG1@aol.com

Negotiation

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

Jason Aylesworth
Sendroff & Baruch, LLP
1500 Broadway, Ste. 2201
New York, NY 10036
jaylesworth@sendroffbaruch.com

Publications

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

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

Website

Leona Beane
Mediator & Arbitrator
11 Park Place, Ste. 1100
New York, NY 10007
LBMediateADR@aol.com

Escape the Fray



Battle of Munfordville, Kentucky, Sunday, Sept. 14th, 1862, c1863, by Harper's History of the Great Rebellion, Harper's Weekly

Enlist in the Dispute Resolution Section

Find out how you can:

- Employ Dispute Resolution in virtually every practice area
- Stay on top of ADR opportunities, techniques and procedures with our CLE courses and publications
- Network with dispute resolution practitioners and leaders in our field
- Develop skills in negotiating, representing your client and selecting good mediators and arbitrators

**For more information visit www.nysba.org/drs and
join today at drs@nysba.org or call 518-463-3200**

New York Dispute Resolution Lawyer

Editor-in-Chief

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

Co-Editor-in-Chief

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

Board of Editors

Leona Beane

11 Park Place, Suite 1100
New York, NY 10007
LBMediateADR@aol.com

Geraldine Reed Brown

The Reed-Brown Consulting Group
180 Union Street
Montclair, NJ 07042
RBCG1@aol.com

Gail R. Davis

Resolutions NY Inc.
120 East 30th Street
New York, NY 10016-7303
gdavis@resolutionsny.com

Erin M. Hickey

Fish & Richardson PC
Citigroup Center, 52nd Floor
153 East 53rd Street
New York, NY 10022
hickey@fr.com

Jae Soog Lee

26 Sutton Terrace
Jericho, NY 11753
jaesooglee@yahoo.com

Barbara Antonello Mentz

140 West 86th Street
New York, NY 10024
bmentz@mentz.org

Stefan B. Kalina

Cox Padmore Skolnik & Shakarchy LLP
630 3rd Ave, 19th Floor
New York, NY 10017-6735
kalina@cpsslaw.com

Paul B. Marrow

11 Hunting Ridge Place
Chappaqua, NY 10514
pbmarrow@optonline.net

Norman Solovay

McLaughlin & Stern, LLP
260 Madison Avenue
New York, NY 10016
nsolovay@mclaughlinstern.com

Karen Mills

KarimSyah Law Firm
7th Floor, Plaza Mutiara
Jl. Lingkar Mega Kuningan Kav. 1 & 2
Jakarta 12950 INDONESIA
kmills@cbn.net.id

Student Editor

Julia Belagorudsky

Section Officers

Chair

Rona G. Shamoon
Skadden, Arps, Slate, Meagher & Flom LLP
4 Times Square
New York, NY 10036-6522
rona.shamoon@skadden.com

Chair-Elect

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

Vice-Chair

Sherman W. Kahn
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0101
skahn@mofo.com

Secretary

Louis B. Bernstein
50 East 89th Street
New York, NY 10128
louisbernsteinatty@gmail.com

Treasurer

Barbara Antonello Mentz
140 West 86th Street
New York, NY 10024
bmentz@mentz.org

Members-at-Large

Hon. Judith S. Kaye
Skadden, Arps, Slate, Meagher & Flom LLP
4 Times Square
New York, NY 10036
judith.kaye@skadden.com

Evan J. Spelfogel

Epstein Becker & Green, P.C.
250 Park Ave.
New York, NY 10177-1211
espelfogel@ebglaw.com

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

Accommodations for Persons with Disabilities:

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

© 2012 by the New York State Bar Association
ISSN 1945-6522 (print) ISSN 1945-6530 (online)

Definitive Creative Impasse-Breaking Techniques in Mediation

Section Members
get 20% discount*
with coupon code
PUB1556N

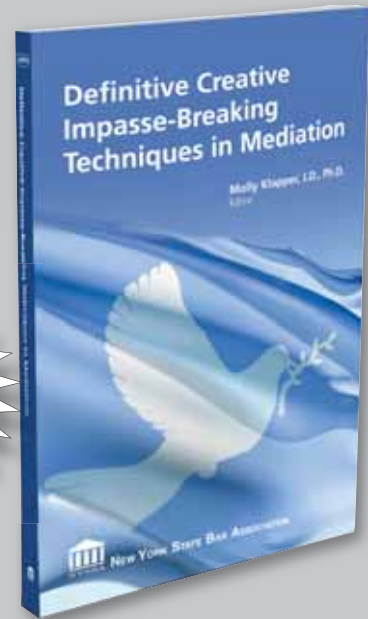
Written by leading practitioners, trainers, academicians and judges, Definitive Creative Impasse-Breaking Techniques in Mediation is replete with tips, techniques and tools for breaking impasse in mediation and negotiation. This book is a resource for lawyers who represent clients in mediation and negotiation, general practitioners and other professionals interested in honing their ADR skills.

This invaluable reference offers mediation approaches which can be applied to many different situations. The topics include: Avoiding Impasse: A Mediator's Rules to Live By; Using Emotions in Mediation to Avoid or Get Through Impasse; Changing Faces to Change Positions; Getting a Bigger Bang for Fewer Bucks; Resolving Impasses in Personal Injury Mediations; Using Game Theory to Break Impasse in Disputes Between Joint Owners of Property; The Technique of No Technique; More...

Get the Information Edge

1.800.582.2452 www.nysba.org/pubs

Mention Code: PUB1556N



EDITOR

Molly Klapper, J.D., Ph.D.

PRODUCT INFO AND PRICES

2011 / 290 pages, softbound
PN: 41229

List Price	\$60
NYSBA Members	\$45

Order multiple titles to take advantage of our low flat rate shipping charge of \$5.95 per order, regardless of the number of items shipped. \$5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.

*Discount good until November 15, 2012.

To order call 1.800.582.2452
or fax order form on the
back to 518.487.5618





NEW YORK STATE BAR ASSOCIATION
DISPUTE RESOLUTION SECTION

One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155



Dispute Resolution Section Meeting

Thursday
January 24, 2013

NYSBA

Annual Meeting

The Hilton

1335 Avenue of the Americas

New York City

January 21-26, 2013