NYSBA FALL 2007

Perspective

A publication of the Young Lawyers Section
of the New York State Bar Association

A Message from the Section Chair


Valerie Cartright

Greetings Section Members! As I enter my fourth month as Chair of the Young Lawyers Section, I am energized at the thought of working alongside the Executive Committee to satisfy your professional and personal needs as Young Lawyers. We, as Section Leaders, have committed ourselves to moving forward with the vision of the former Section Chairs, while simultaneously launching new and creative initiatives in 2007-2008. Furthermore, we are aware that the future of the NYSBA is held in the hands of the Young Lawyers Section, and will work tirelessly to achieve the 2007-2008 goals set for the Section by our Bar President Kathryn Grant Madigan.

The YLS 2007-2008 initiatives focus on five major areas: 1) Section Reorganization; 2) Section Communications; 3) Strategic and Long-range Planning; 4) Section Membership Benefits; and 5) Section Affiliations. To that end, the Section is engaged in the following efforts:

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Will the Updated Japanese Laws Result in Foreign Parties Choosing Japanese *Chusai*?: A Brief Synopsis of the Recent Changes in Japanese Arbitration Law

By Colm Patrick McInerney

Introduction

Unlike the U.S. and other countries that adopt an Anglo-American legal system, where litigation is rampant, Japan has a very low level of litigation. This extends into the field of arbitration. Compared to the approximately 200,000 cases that the American Arbitration Association handles per annum, Japan averages about 100 cases each year.[1]

This article shall briefly examine the recent history of arbitration in Japan, the new legislation that has been enacted in the area and particularly how the Japan Commercial Arbitration Association has reacted to it, and how this modernized arbitration framework may help establish Japan as an international arbitration center in the future.

The History of Arbitration in Japan

Modern civil litigation was ushered into Japan in 1890 when the Code of Civil Procedure was adopted. This code was heavily influenced by German law, with some French influence too. Arbitration law too was governed by this code, which over

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Inside

From the Editor's Desk . . .

Welcome to the Fall 2008 issue of *Perspective*. Before I get to the authors featured in this edition, I'd like to take a moment and recognize Valerie M. Cartright, the new Chairperson of the Young Lawyers Section. Valerie has great ideas for the upcoming year, and I believe her leadership and dedication will produce tremendous results. I must also thank our outgoing Chairperson, Justina Cintrón Perino. From the onset, Justina put forth her vision for the Section and outlined her goals. She worked tirelessly and brought our Section to a new level. Justina is a superb leader and mentor, an exceptional attorney, and above all else, a great friend. Thank you, Justina, and best of luck in your future endeavors.

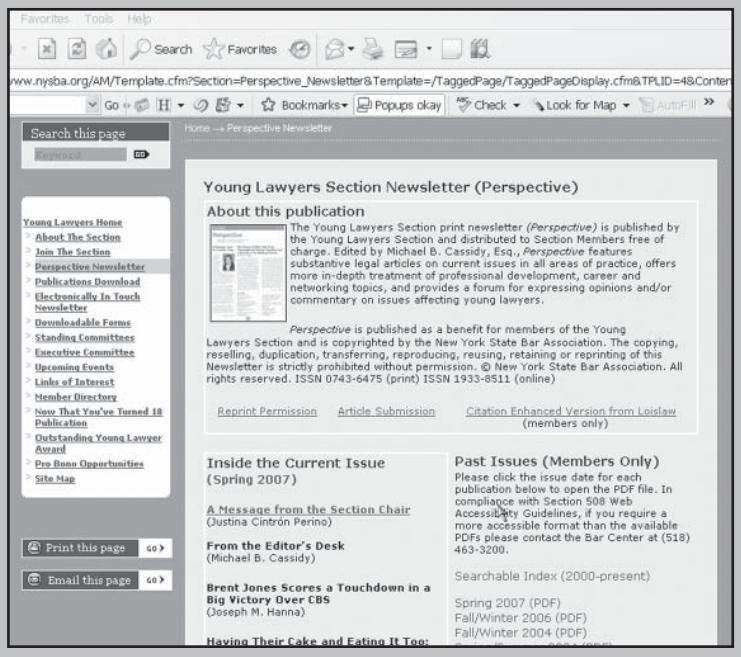
Moving forward, in this issue you'll find substantive and practical legal articles from our membership and well-known attorneys from around the country. I am confident you'll find the articles presented in this issue both interesting and informative.

In this issue, Colm Patrick McInerney provides a piece on recent changes in Japanese arbitration laws; Jonathan M. Cerrito gives an overview of taxing stock-based compensation; Elliott Wilcox outlines the pitfalls of self-authenticating documents; Joseph M. Hanna discusses a recent case involving Cablevision's digital-video recorder service; Christina Bost Seaton reviews Cordell Parvin's book *Prepare to Win*; and Alexandra Harrington provides an article on the Racketeer Influenced and Corrupt Organizations Act and how it relates to civil actions. I'd like to thank all of the authors for contributing to this issue of *Perspective*, as well as the newsletter department at the New York State Bar Association for assisting me with this issue.

Perspective is published in both the spring and fall. If you would like to author or have authored an article, report, summary, or update that would be appropriate for inclusion in the journal and has not yet been published, please contact me by e-mail at mcassidy@nysbar.com. The deadline for submissions for the next issue is January 15, 2008. Submissions should be sent in electronic format to my attention at the above e-mail address. I look forward to hearing from you.

Michael B. Cassidy
Editor-in-Chief

Perspective has a new online look!



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The ABC's of Taxing Stock-Based Compensation

By Jonathan M. Cerrito

Employees, in particular executives, may be covered by a wide range of compensation arrangements. These compensation arrangements may involve, for example, tax-qualified pension and retirement plans, health and welfare plans, nonqualified deferred compensation, life insurance and stock-based compensation.

Stock-based compensation, a commonly used form of executive compensation, may include stock, restricted stock, stock options, stock appreciation rights and phantom stock.[1] Employers may provide stock-based compensation to employees pursuant to a formal plan, an individual's employment contract or both. In addition to employees, nonemployee service providers, such as outside directors, may also receive stock-based compensation.[2]

This article discusses the federal income tax consequences to an employee or service provider who receives a grant of employer stock or stock options.[3]

I. Grants of Stock

Internal Revenue Code § 83 applies to stock granted to an employee because the stock is property transferred in connection with the employee's performance of services. In addition, I.R.C. § 409A also applies to stock grants where, for example, the grant is generally being used as a means for an employee to postpone paying income tax beyond the date when the employee has a right to the stock.

A. Internal Revenue Code § 83

Under I.R.C. § 83, whether an employee will be subject to immediate taxation at the time of receiving stock will depend on whether the employee's right to the stock is subject to a substantial risk of forfeiture. Stock that is subject to a substantial risk of forfeiture has been coined nonvested stock, whereas stock that is not (or is no longer) subject to a substantial risk of forfeiture is referred to as vested stock.[4] Generally, an employee receives nonvested stock if the employee's right to the stock is conditioned upon the future performance of substantial services or the occurrence of a performance–related condition.[5] Additionally, the possibility that the employee might lose rights to the stock must be substantial.[6]

Vesting may be thought of as having a secured right of present or future enjoyment where the employer may not take the stock back from the employee (well . . . at least not without paying fair market value for it). An employee may be vested and have a secured right to stock even though the employee does not have actual possession of the stock. On the other hand, stock that may be forfeited under certain conditions, such as termination of employment, will not be considered vested because there is a real possibility that the employee might lose any future right to the stock. Ultimately, the facts and circumstances surrounding the terms of the grant determine whether the employee is vested.[7]

If an employee receives vested stock, then the employee will have to include income, in the year of receipt, equal to the excess of the fair market value of the stock over the amount, if any, that the employee paid for the stock.[8] However, if an employee receives nonvested stock, then income inclusion is deferred until the year in which the stock vests unless the employee makes an affirmative election to include income in the year of receipt.[9] If an employee does not elect otherwise, then in the year the stock vests, the excess of the fair market value of the stock at the time of vesting over the amount, if any, that the employee paid for the stock is includible in income.[10]

An employee who receives nonvested stock may choose not to defer income inclusion and instead affirmatively elect to include, in the year of the receipt, the fair market value of the stock over the amount, if any, that the employee paid. An employee may make such an election no more than thirty (30) days after receiving stock.[11] Although it seems counterintuitive to elect to be taxed now versus later, there may be limited circumstances under which an employee may benefit from being taxed in the year of receipt.

One benefit of making such an election is that appreciation earned thereafter will be taxed at a capital gains rate (generally 15%) as opposed to ordinary income tax rates (generally 28%-35%). However, if after making an election and paying tax a forfeiture event occurs—an event that would cause the employee to lose his or her rights to the stock—the employee is not entitled to a tax deduction for the amount of tax previously paid. Thus, the downside of such an election is that the employee carries increased risk of losing not only rights to the stock but also the money expended to pay tax. It is for this reason that employees generally avoid elections to include income in the year that stock is received.

Nevertheless, an employee, in some instances, may benefit from making an election—for example, where the amount of income the employee expects to report as a result of the election is small and the potential

growth in the value of the stock is great. Or, where the employee expects reasonable growth in the value of the stock but the likelihood that a forfeiture event will occur is small. In these circumstances, the risk associated with an election is contained because there is either less tax paid or a small chance that the employee will lose rights to the stock. Weigh this more limited risk against the benefits of being taxed at a lower (capital gains) rate and employees in these circumstances may reasonably consider electing taxation in the year of receipt.

B. Internal Revenue Code § 409A

Stock grants should be structured to comply with I.R.C. § 409A unless the employee will suffer adverse tax consequences that include immediate income inclusion, a 20% penalty tax and interest. A grant of stock will be subject to the rigid rules of I.R.C. § 409A if, for example, the stock is not actually paid to the employee upon vesting. It is emphasized that the unusually severe consequences for violating I.R.C. § 409A are levied against the employee even though it is the employer that fails to comply.

II. Grants of Stock Options

A stock option is generally an award under which an employer grants an employee the right to buy employer stock at a certain price within a set period of time. The privilege associated with receiving options to buy stock is "the opportunity to benefit during the option's exercise period from any increase in the value of the stock without risking any capital."[12]

Under the Internal Revenue Code, there are two general types of stock options: nonqualified options and statutory options.[13] Statutory options include options provided under an employee stock purchase plan and incentive stock options ("ISOs").[14] Any other options granted in connection with the performance of services are nonqualified options.[15]

Nonqualified stock options may be granted either to an employee or non-employee service provider; whereas, statutory options may be granted only to employees.[16] Additionally, nonqualified stock options by definition are not subject to the rigid requirements that statutory options are. However, in return for conforming to Internal Revenue Code requirements, statutory options receive favorable tax treatment. The favorable tax treatment generally associated with statutory options is the employee's ability to exercise the option, receive vested stock and not realize income until the employee sells the stock.

A. Nonqualified Stock Options

Internal Revenue Code § 83 applies to grants of nonqualified stock options because stock options granted to employees are generally considered to be compensation for services. In addition, I.R.C. § 409A also applies to certain grants of nonqualified stock options.

1. Internal Revenue Code § 83

The tax consequences to an employee who receives nonqualified stock options depends on whether or not, at the time of grant, the option has a readily ascertainable fair market value. Generally, in most cases nonqualified options, at the time of grant, do not have readily ascertainable fair market values.[17]

Although nonqualified options have some value at the time of grant, ordinarily that value is not readily ascertainable unless the option is actively traded on an established market.[18] If a nonqualified option is not traded on an established market, to have a readily ascertainable fair market value the options must be transferable and immediately exercisable in full. Additionally, the stock subject to the option must not be subject to any restriction or condition which has a significant effect upon the fair market value of the option. Furthermore, the fair market value of the option privilege must be readily ascertainable.[19] The option privilege, as noted above, is the opportunity to benefit during a given period from increases in stock price without risking any money. These legal requirements generally highlight the reason why most nonqualified options that are not actively traded on an established market do not have readily ascertainable fair market values.

An employee has no includible income upon receiving a nonqualified option that has no readily ascertainable fair market value. Instead, I.R.C. § 83 will apply in the year when the employee exercises the option. If the employee receives vested stock on exercise, then, in the year of exercise, the excess of the fair market value of the stock over the option price is includible in the employee's income.[20] If the employee receives nonvested stock on exercise, then in the year the stock vests the employee will have income unless the employee makes an affirmative election to include income in the year the option in exercised.[21] If the employee does not elect otherwise, then, in the year the stock vests, the excess of the fair market value of the stock at the time of vesting, over the option price, is includible in income.[22]

Upon receipt of a nonqualified option with a readily ascertainable fair market value, the excess of the fair market value of the option over the amount, if any, that the employee paid is includible in income in the year the stock option vests.[23] Thus, unless an employee affirmatively elects to include income in the year of receipt, such employee will not be subject to tax until the year when the employee has a vested right to the stock option.[24] Because the employee will have income inclusion in the year of vesting, such employee will have no includible income upon exercising the option.

2. Internal Revenue Code § 409A

Internal Revenue Code § 409A applies to nonqualified stock options that, for example, have an exercise price below fair market value of

the stock, include a feature to defer income beyond vesting or where the underlying stock subject to the option is stock other than common stock. While there are no prohibitions on granting stock options subject to I.R.C. § 409A, the options must be properly structured unless the employee will be subject to immediate income inclusion, a 20% penalty tax and interest.

B. Statutory Stock Options

Statutory options may be granted to employees but not service providers. As noted above, statutory options include options provided under an employee stock purchase plan and ISOs.[25] An ISO is an option that provides an employee with the right to purchase employer stock and that meets the requirements of I.R.C. § 422.[26] An employee stock purchase plan is a plan that grants stock options to purchase employer stock and that meets the requirements of I.R.C. § 423.[27]

Statutory options are not subject to the complex tax scheme of I.R.C. §§ 83 and 409A. Instead, the general rule may be simply stated: An employee does not recognize income upon receipt or exercise of a statutory option.[28] That is, there are no tax consequences to an employee who receives statutory options until the employee *disposes* of the underlying stock subject to the options. Generally, a disposition of the stock includes a sale, exchange, gift or any transfer of legal title.[29]

At the time of disposition, the employee is taxed on the excess between the fair market value of the stock at disposition over the option price that the employee paid. Whether the includible amount of income is subject to tax at ordinary income rates or capital gain rates will depend on whether the employee satisfied the holding period requirement. An employee's disposition of stock within either two (2) years after the date the option is granted or one year after the date the stock is transferred to the employee (i.e., the option is exercised) is known as a "disqualifying event." If the disposition is pursuant to a disqualifying event, the employee does not qualify for capital gains treatment. Instead, the employee includes income realized on the disqualifying event as compensation subject to ordinary income tax rates.

"Minor structural differences can dramatically change the tax consequences associated with the receipt of stock and stock options."

III. Conclusion

While only scratching the surface of possible compensation arrangements, this article highlights the current complexity of taxing stock-based compensation. Minor structural differences can dramatically change the tax consequences associated with the receipt of stock and stock options. In addition to losing the ability to control the timing of taxation, employees also run the risk of suffering severe penalties and having to pay interest on tax owed. This is also an issue for employers—striving to attract talent while keeping current employees happy—to consider when designing the terms of such grants.

Endnotes

1. An employer may also use its stock in connection with a tax-qualified defined contribution or defined benefit pension plan.
2. Joint Committee on Taxation, *Present Law and Background Relating to Executive Compensation* (JCX-39-06), September 5, 2006 at page 32.
3. Unless otherwise indicated, the use of the term *employee* throughout this article includes non-employee service providers.
4. Joint Committee on Taxation, *Present Law and Background Relating to Executive Compensation* (JCX-39-06), September 5, 2006 at page 33, footnote 63.
5. Treas. Reg. § 1.83-3(c)(1).
6. *Id.*
7. *Id.*
8. I.R.C. § 83(a).
9. I.R.C. § 83(a) and (b).
10. *Id*.
11. I.R.C. § 83(b)(2).
12. Treas. Reg. § 1.83-7(b)(3).
13. Joint Committee on Taxation, *Present Law and Background Relating to Executive Compensation* (JCX-39-06), September 5, 2006 at page 34.
14. *Id.* at page 34.
15. *Id.* at page 34.
16. *Id.* at page 35.
17. *Id.* at page 34.
18. Treas. Reg. § 1.83-7(b)(1).
19. Treas. Reg. § 1.83-7(b)(2).
20. I.R.C. § 83(a).
21. I.R.C. § 83(a) and (b).
22. *Id*.
23. I.R.C. § 83(a).
24. I.R.C. § 83(a) and (b).
25. Joint Committee on Taxation, *Present Law and Background Relating to Executive Compensation* (JCX-39-06), September 5, 2006 at page 34.
26. *Id.* at page 35.
27. *Id.* at page 36.
28. I.R.C. § 421 and Treas. Reg. § 1.421-2(a)(1)(i).
29. Treasury Regulation § 1.424-1(c) outlines certain transactions that are not considered dispositions.

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The Danger of "Self-Authenticating" Documents

By Elliott Wilcox

Normally, when you're seeking to introduce items into evidence, you need a live witness to testify and establish your evidentiary predicates. But some evidence is so trustworthy that it doesn't require a witness. These forms of evidence are inherently reliable, and are deemed to be "self-authenticating." Examples of self-authenticating evidence include:

- State and federal laws
- Contents of the Federal Register
- Laws of foreign nations
- Acts of Congress
- Court records
- Rules of court
- Municipal and county charters
- Ordinances and resolutions of municipalities
- Administrative agency rules
- Items under official governmental seal
- Facts that are not subject to dispute

The last item on the list is also the most interesting: Facts that are not subject to dispute. There are two different sources of indisputable facts. The first source is facts which aren't subject to dispute because they're generally known within the territorial jurisdiction of the court. For example, here in Orange County, Florida, everyone knows that Central Blvd. and Orange Ave. intersect in the middle of downtown. You wouldn't need a geography expert to establish that fact—everyone in the jurisdiction is expected to know it, so you can ask the court to take judicial notice of the fact.

"The great benefit of these forms of self-authenticating evidence is that you can introduce the items into evidence without the time and expense of calling a live witness to the stand."

The second source of indisputable facts is those which are capable of accurate and ready determination by resorting to sources whose accuracy cannot be questioned. For example, if you were trying to establish which day of the week August 3, 2007 fell on, your judge could take judicial notice that it fell on a Friday. Why? Because the fact isn't subject to dispute—anyone with access to a calendar can quickly and easily determine its veracity.

The great benefit of these forms of self-authenticating evidence is that you can introduce the items into evidence without the time and expense of calling a live witness to the stand. For example, I recently tried a case where my opponent was seeking to introduce a medical document. He didn't use an expert witness or records custodian to admit the document. Instead, he introduced it using our state's version of Federal Rule of Evidence 803(6). In case you're unfamiliar with it, FRE 803(6) establishes another form of evidence that is (basically) self-authenticating: Records of Regularly Conducted Activity. When the evidence code was amended in 2000, they eased the business records' hearsay exception by no longer requiring live testimony from a business records custodian. Instead, they now allow you to simply certify that the records are kept in the normal course of business.

Using this evidentiary rule, my opponent didn't need to call a single witness to the stand. Instead, he simply handed the document and the certification to the judge, then asked to have them admitted into evidence. That was it! Without asking a single question, he satisfied the entire evidentiary predicate for admitting the document.

That was when I noticed the problem with "self-authenticating" documents.

After the document was marked into evidence, the attorney asked for permission to publish it to the jury. The judge granted permission, and the document was handed to the first juror. The juror received the document and quietly stared at it. If the document could have spoken, it would have said, "I'm important, because I show that the witness had alcohol in his bloodstream when he was admitted to the hospital. In fact, the witness had an alcohol level of .089, which is more than the legal limit to drive a car. You might want to question whether or not this witness knowingly and voluntarily gave up his right to remain silent before he gave that statement to the police. . . ."

That's what the document would have said, if it could speak. But it couldn't. It just sat there while the juror stared at it. You could tell from the look on his face that he wasn't sure what he was supposed to be looking at. He didn't have any medical training, so medical codes and terms like "mg/dl" probably didn't mean anything to him. He was just as confused as he would have been if the document had been written

in Sanskrit. He stared at it for a moment longer, then passed it to the next juror. What might have been an important element in the case was completely overlooked, because the document didn't get a chance to speak.

Many attorneys make the same mistake. They believe that if a document is self-authenticating, it should be able to "speak for itself." But nothing could be further from the truth. Documents don't speak. They don't explain themselves. If a juror doesn't know how to read them, or if he or she doesn't know which parts of the document are important, the document just sits there and silently stares back at them.

Don't make the same mistake. As the trial lawyer, it's your responsibility to ensure that the jury understands your evidence. Even when your evidence is supposed to "speak for itself," you still must give it a voice. The most effective way you can help your self-authenticating evidence "speak" is by strategically publishing the exhibits to the jury. If my opponent had waited until closing argument to publish his exhibit, he could have shown the jurors

"Don't fall into the trap of automatically publishing your exhibits immediately after they've been admitted into evidence."

which parts of the document to examine closely, and told them why it was important. Instead, they examined the document in a vacuum, and had no idea why it was important or why they were looking at it. The importance of the document was lost, never to be regained.

Don't fall into the trap of automatically publishing your exhibits immediately after they've been admitted into evidence. Wait until the most opportune time to publish them. This may mean that you don't publish your self-authenticating documents until much later in your case, when a witness can use the document to explain or enhance his testimony. It may even mean that you wait all the way until closing argument (when you can explain the document or highlight the important elements) before publishing the documents to the jury.

Self-authenticating documents don't speak for themselves. It's up to you to give them a voice. Find a way to work the document into another witness's testimony, or hold off on publishing the document until closing argument. Regardless of which method you use, you'll breathe more life into your evidence, making it more persuasive than it ever could be on its own.

Elliott Wilcox is the creator of Trial Tips Newsletter, a free weekly ezine for trial lawyers (www.Trial-Theater.com).

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Court Erases Cablevision's DVR Plans

By Joseph M. Hanna

The Dodgers are playing the Mets on ESPN at 8:00 p.m. and "The Simpsons" are on FOX at the same time. What is one to do? Cablevision Systems Corporation ("Cablevision"), the nation's sixth-largest cable TV provider, had hopes of deploying a network-based digital-video recorder (DVR) service; however, those plans were squashed after a recent ruling by the United States District Court of the Southern District of New York. The court ruled in favor of major TV networks and Hollywood studios which argued that the cable distributor's network DVR would violate copyright laws.[1]

Cablevision announced in March of 2006 that it would offer "a new Remote-Storage DVR System" (the "RS-DVR"). The RS-DVR was intended for Cablevision customers who did not have a DVR in their homes. The RS-DVR would offer subscribers a way to retrieve recorded programs from its central servers system at Cablevision's facilities and play the programs back for viewing at home. However, Cablevision had not received permission from 20th Century Fox Films, Universal Studios, Paramount Pictures, Walt Disney, CBS, ABC, NBC and Turner Broadcasting System's Cartoon Network and CNN (collectively, "Plaintiffs"), the owners of the copyrighted programs through its proposed RS-DVR.

Cablevision argued under the Supreme Court's decision in *Sony Corp. v. Universal City Studios, Inc.*,[2] that a license was not required because the customer, not Cablevision, chose the content and recorded the program for personal viewing. Cablevision noted that a company could not be held liable for infringement merely because it supplied Betamax recorders, VCRs, or DVRs to consumers to record television programs for in-home, personal viewing, and it asserted that its RS-DVR was no different from these traditionally used devices.

"[T]he only question before the Court was whether Cablevision was 'copying' Plaintiffs' copyrighted programming or otherwise violating Plaintiffs' rights under the Copyright Act."

Plaintiffs sued Cablevision for copyright infringement, seeking a declaratory judgment that Cablevision's RS-DVR would violate their copyrights, and seeking an injunction enjoining Cablevision from rolling out the RS-DVR without copyright licenses. The district court granted Plaintiffs the relief requested, holding that Cablevision, and not just its customers, would be engaged in unauthorized reproductions and transmissions of Plaintiffs' copyrighted programs through the RS-DVR.

Copyright Infringement

The Copyright Act of 1976 ("Copyright Act")[3] was drafted to provide copyright owners the exclusive right to, among other things, "reproduce the copyrighted work in copies" and "in the case of . . . audiovisual works, to perform the copyrighted work publicly."[4] "To establish a claim of copyright infringement, a plaintiff must establish (1) ownership of a valid copyright and (2) unauthorized copying or a violation of one of the other exclusive rights afforded copyright owners pursuant to the Copyright Act."[5]

In this case, there was no dispute that Plaintiffs owned valid copyrights for the television programming at issue. Plaintiffs owned the copyrights to numerous copyrighted entertainment programs, including movies, television series, news and sports shows, and cartoons, which are shown on television and also used (or licensed for use) in other media, including the Internet, DVDs, and cellular telephone technology. Thus, the only question before the Court was whether Cablevision was "copying" Plaintiffs' copyrighted programming or otherwise violating Plaintiffs' rights under the Copyright Act.

Plaintiffs alleged that Cablevision, through its RS-DVR, directly infringed upon their copyrights in two ways: first, by making unauthorized copies of Plaintiffs' programming, Cablevision violated Plaintiffs' rights to reproduce their work; second, by making unauthorized transmissions of Plaintiffs' programming, Cablevision was in violation of Plaintiffs' exclusive right to publicly perform their works.

Was Cablevision Making Unauthorized Copies?

According to Plaintiffs, Cablevision made multiple unauthorized copies of programming in two respects: (1) a complete copy of a program selected for recording was stored indefinitely on the customer's allotted hard drive space on a server at Cablevision's facility; and (2) portions of programming were stored temporarily in buffer memory on Cablevision's servers. Cablevision did not deny that these copies were made in the operation of its RS-DVR, but the question was: *who* made the copies?

Cablevision argued that it was entirely passive in the RS-DVR's recording process. It was the customer,

Cablevision contended, who was "doing" the copying.[6] Plaintiffs, on the other hand, alleged that Cablevision itself was the "copier."[7] The Court agreed with Plaintiffs' characterization of the RS-DVR as a service which required the continuing and active involvement of Cablevision.[8]

Cablevision relied on *Sony* and other cases to support its position that it could not be held liable for copyright infringement for merely providing customers with the machinery to make copies.[9] In *Sony,* the owners of copyrights on television programs brought a copyright infringement action against the manufacturer of Betamax VCRs. The record showed that consumers primarily used the VCRs for "home time-shifting."[10] Time-shifting was described as the "practice of recording a program to view it at a later time, then erasing it."[11] The Supreme Court held that time-shifting is "fair use," and therefore, Sony's manufacture of Betamax VCRs did not constitute "contributory infringement" in violation of the Copyright Act.[12]

The district court held that Cablevision's reliance on *Sony* was misguided. The court noted that the RS-DVR and the VCR had little in common.[13] It also reasoned that the relationship between Cablevision and potential RS-DVR customers was significantly different from the relationship between Sony and VCR users.[14]

Was Cablevision Making Unauthorized Transmissions?

In order for an RS-DVR to work, "the programming stream that Cablevision receives at its head-end must be split into a second stream, reformatted, and routed to the main server system."[15] When a customer requests the playback of a recorded show, the program has to be retrieved from Cablevision's main server and then transmitted to the customer. This transmission, according to Plaintiffs, is an unauthorized public performance by Cablevision of their copyrighted works.

To "perform" a work, as defined in the Copyright Act, is "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible."[16] Cablevision did not contest that the streaming of recorded programming in response to a customer's request was a "performance." However, it asserted that the performance is a passive process and that it is the customer, not Cablevision, "doing the performance." The district court rejected this argument, noting that Cablevision actively participated in the playback process. Although the customer uses the remote control to select a recorded program for viewing, that in itself does not result in playback. The customer's command triggered the playback process; however, Cablevision and its operation "of an array of computer servers" actually made the retrieval and streaming of the program possible.

"The district court determined that the RS-DVR, unlike a VCR, was a complex system that involved an ongoing relationship between Cablevision and its customers. . ."

The court concluded that "Cablevision would engage in public performance of plaintiffs' copyrighted works in operating its proposed RS-DVR service, thereby infringing Plaintiffs' exclusive rights under the Copyright Act." Accordingly, the court granted summary judgment in favor of Plaintiffs and held that Cablevision, absent the appropriate licenses, was enjoined from engaging in public performance of Plaintiffs' copyrighted works.

Conclusion

The district court determined that the RS-DVR, unlike a VCR, was a complex system that involved an ongoing relationship between Cablevision and its customers, payment of monthly fees by customers to Cablevision, Cablevision's retention of ownership rights in all of the equipment used by the customers, the use of numerous computers and servers located within Cablevision's private facilities and the ongoing maintenance of the server by Cablevision. All of these factors played a key role in the court's determination that Cablevision, not just its customers, was engaging in the unauthorized reproduction and transmission of Plaintiffs' copyrighted programs in violation of the Copyright Act.

Endnotes

1. *Twentieth Century Fox Films, et al. v. Cablevision Systems Corporation*, 478 F. Supp. 2d 607 (S.D.N.Y. 2007).
2. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
3. 17 U.S.C. § 101.
4. 17 U.S.C. §§ 106(1) and (4) (2002).
5. *Byrne v. British Broad. Corp.*, 132 F. Supp. 2d 229, 232 (S.D.N.Y. 2001) (*citing Twin Peaks Prods. v. Publ'ns Intl. Ltd.*, 996 F.2d 1366, 1372 (2d Cir. 1993)); *see Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S. Ct. 1282 (1991).
6. *Twentieth Century Fox Films, supra* note 1 at 618.
7. *Id.* at 618.
8. *Id.*
9. *Sony Corp., supra* note 2 at 417.
10. *Id.* at 423.
11. *Id.*
12. *Id.* at 456.
13. *Twentieth Century Fox Films, supra* note 1 at 618.
14. *Id.*
15. *Id.* at 622.
16. 17 U.S.C. § 101.

Joseph M. Hanna is an Associate with the firm Goldberg Segalla LLP in its Buffalo, New York office. Mr. Hanna concentrates his practice on the areas of commercial litigation, construction litigation, and intellectual property law.

Book Review

How to Find Meaning in 147 Pages: Cordell Parvin's *Prepare to Win*

Reviewed by Christina Bost Seaton

Prepare to Win: A Lawyer's Guide to Rainmaking, Career Success, and Life Fulfillment will not teach you the meaning of life. Neither will a fur-shrouded guru on top of the Himalayas, your hairstylist, or a Magic 8-Ball. You're also unlikely to find the meaning of life hiding underneath the seas of papers overwhelming your desk, though by hunting through that abyss you are likely to find even more hours of billable work that needs to be done.

By reading *Prepare to Win*, by nationally known attorney career coach Cordell Parvin, however, you will learn a lesson that is bound to have a profound impact on your life—how to start working meaningfully.

No one signs up to be a lawyer because they want to be really good at reviewing documents, or because they really enjoy due diligence. Of course, a case is only as good as its facts, and no smart investor goes into a transaction without learning about what they're buying, but such platitudes serve as cold comfort when you're alone at your desk, long after the partners have gone home. How many times have you found yourself wondering how the documents you found will actually affect the client? How many times have you wondered who the heck the client is? Seriously, if you wanted to tell "the client" about a great breakthrough in your case, whom would you call to share the news?

Because we are often so detached from the big picture, we have a hard time finding meaning in our work. While our paychecks, and the nice things that they enable us to buy, help distract us for a short bit, the large attrition among associate classes is proof enough that the money alone isn't fulfilling. Even the shiny brass ring of partnership isn't sufficient to keep us spinning around the carousel of billable hours.

In *Prepare to Win*, Parvin effectively argues that no lawyer can be successful—and more importantly, happy—without being able to answer *why* they're motivated to work, and *what* they are motivated to work toward. According to Parvin, you must be able to set forth your end goal, the purpose that drives you forward each day, and you must be able to answer why achieving that goal is important to you. Most importantly, while you likely have separate career and life goals, in order to feel fulfilled by your daily efforts, you must find some way to align those two goals in some way.

Prepare to Win is thus a workbook that provides lawyers of all ages with the tools they need to figure out their purpose in life—both career and personal—and the tools they'll need along their journey to achieve that purpose. Drawing lessons from diverse sources, including the life and music of Harry Chapin; Joe Montana in Super Bowl XXIII; Holocaust survivor Viktor Frankl; Dr. Stephen Covey; and Supreme Court Justice Stephen Breyer, Parvin presents a step-by-step guide for winning in both your career and (in my opinion, more importantly) in your life.

Among other things, Parvin gives young lawyers tips about how to find good role models and mentors, and how best to learn from those relationships; how to translate their careers and life goals into concrete plans; and how to execute their plans for achieving those goals. *Prepare to Win* provides young lawyers with suggestions as to how they can manage their time more effectively and increase their focus at work; how they can build their profiles within and without the firm; and how they can effectively build relationships.

As lawyers find themselves progressing along their legal careers, they will continue to gain value from *Prepare to Win*. Parvin outlines strategies for maximizing the return on your business development investment and tips for providing outstanding client service. *Prepare to Win* even provides suggestions for firm administrators, including models for teaching rainmaking to associates, beginning with their first year.

Young associates who are willing to learn will gain a lot simply by reading *Prepare to Win*, and even more by working through its exercises. In *Prepare to Win*, Parvin provides a rare gift to young associates: He teaches us to how we can provide for our own success, and more importantly, our own happiness.

Christina Bost Seaton is a fourth-year Associate in the Litigation Department of Troutman Sanders LLP, dealing primarily with commercial litigation, and also having significant experience in labor and employment law, litigating noncompete agreements and discrimination claims. In addition, she has worked on matters involving banking, securities, antitrust, and admiralty law. She is the Chair of the Mentoring Committee of the Young Lawyers Section, and the author of the column "Standing out in the Crowd" in the Section's electronic newsletter, *Electronically in Touch*. Christina is also the co-author of *Say Ciao to Chow Mein: Conquering Career Burnout*, which is available on www.cordellparvin.com and at bookstores.

Civil RICO: What the Mob Movies Never Told You

By Alexandra Harrington

As is frequently the case among aspiring lawyers, many of the impressions and assumptions that I brought with me to the first day of law school orientation were based on dramatic scenes from television and the movies. Over the years, most of these impressions are either dashed as creative works of fiction or tempered to reflect the reality of courtroom decorum, procedure, and the elements of various crimes. Interestingly, there is one concept from any mob movie which haunts most law school graduates well after the ink on their bar exam essays has dried: RICO is useful only to prosecute mobsters and the occasional drug lord. The goal of this article is to change this common belief about the Racketeer Influenced and Corrupt Organizations Act laws, particularly as they relate to civil actions, and their use in litigation.

Perhaps the best way to understand RICO as a whole is to understand what it is not. RICO is not purely criminal or purely civil—there are separate laws codifying conduct which rises to the level of criminal RICO and which qualifies as civil RICO. The use of civil RICO in litigation is not necessarily tied to a criminal RICO prosecution of the same actors for the same conduct.[1] Although it is certainly possible for a civil RICO litigation to occur after convictions have issued under the criminal RICO laws, it is not necessary.[2] Civil RICO does require the allegation of a qualifying criminal act; however, this allegation is not held to the same standard as a criminal prosecution for the same alleged violation and there is a lower threshold of criminality necessary to sustain a civil RICO action.[3] The use of civil RICO in litigation is neither easy nor a guaranteed path to victory, but it is a viable option, even in unlikely cases, and provides a diligent and successful proponent treble damages for his client's trouble.[4]

"RICO is not purely criminal or purely civil—there are separate laws codifying conduct which rises to the level of criminal RICO and which qualifies as civil RICO."

The elements of a civil RICO case are fairly straightforward. No matter how well crafted, no civil RICO case will stand unless there is a successful allegation of two or more predicate offenses.[5] The list of qualifying predicate offenses is set out in 18 U.S.C. § 1961 and is lengthy. Two of the most common predicate offenses are mail fraud under 18 U.S.C. § 1341 and wire fraud under 18 U.S.C. § 1343. As will be discussed below, the willingness of courts such as the United States Court of Appeals for the Second Circuit to include electronic communications within the scope of these predicate offenses has expanded the types of cases in which it is feasible and reasonable to examine including a civil RICO charge in litigation.

In addition to two or more qualifying predicate offenses, the elements of civil RICO are: 1) the allegation of a "person" involved in the conduct complained of, meaning either individuals or a corporate entity; 2) a pattern of predicate acts, meaning that these acts were committed within a certain time frame; and 3) a qualifying "enterprise," meaning the collaboration of the persons involved in order to further and/or accomplish the predicate acts alleged.[6] If these elements are established, 18 U.S.C. § 1862 provides several avenues of wrongful conduct which can be alleged to take the complaint from theoretical creation of a civil RICO violation to a legitimately alleged violation of the RICO laws.[7] Again, it bears repeating that in order to successfully litigate a civil RICO claim, it is not necessary to have a criminal conviction or ongoing prosecution for the qualifying predicate offenses alleged. However, a civil RICO case which alleges predicate offenses for which the defendants have been tried and not convicted is likely to be dismissed and threatens counsel and plaintiff with court-imposed sanctions.[8]

By now, many readers will wonder what types of cases have been successfully brought under civil RICO laws. Although much civil and criminal RICO prosecution is brought to counter organized crime and drug-related activities, it is interesting to note that a great many civil RICO cases have been successfully brought in the areas of white collar crime. Notable examples include banking and bank fraud[9] and commercial transactions gone wrong.[10] Successful civil RICO claims are not limited to the realm of large corporations, well-heeled clients, or large law firms; in fact, one of the more interesting civil RICO cases was brought by a single woman, without ample means, against a large banking operation.

This is not to suggest that a civil RICO case should be entered into lightly—the risk of court-imposed sanctions exists and civil RICO claims require involved pleadings which evidence thorough research of the evidence available to plaintiff's counsel. Nor should the lure of treble damages be enough to entice you to file a civil RICO claim which is at all dubious in your own mind. These caveats aside, the civil RICO laws ex-

ist to punish all manner of concerted wrongful conduct and are an important tool in any litigator's overall tool box.

As mentioned previously, civil RICO's predicate crimes are changing in a way which makes it imperative for lawyers—particularly young lawyers, who are often more involved in reviewing client documents and general discovery—to be aware of the potential application of civil RICO across a broad spectrum of conduct. In the "electronic age," commercial and business transactions have changed dramatically. In-person meetings between merchant and customer, banker and account holder—to name just a few relationships—have increasingly devolved into quick exchanges over e-mail and text messaging. Discussions during in-person meetings, which were once subject to the limits of personal recollection and often became a matter of he-said-she-said proof at trial, are memorialized through electronic transmission on a routine basis. It is now easier for businesses to send and receive purchase orders, contracts, and other commercial papers via facsimile than to physically deliver them. As counselors in the Second Circuit, lawyers must know that the Second Circuit takes a very liberal view of the application of mail and wire fraud statutes to e-mail, Internet usage generally, and the use of facsimile transmissions. Given that the crux of your client's claims will likely be demonstrated through retained e-mails and attachments, electronic communications generally, and facsimiles now and in the future, a basic understanding of the civil RICO laws will allow you to evaluate these records—which were often the stumbling block to civil RICO claims surviving motions to dismiss in the past—with an eye toward whether they could be used to support a civil RICO claim.

In sum, there are advantages and dangers to the use of a civil RICO claim, but they are only advantages and disadvantages if you know how to use a civil RICO claim. In practice, there are very few times when law mirrors its portrayal on television and in the movies. But, just like you would not rule out a murder defense because you saw it in "Matlock," you should not rule out the potential application of a civil RICO charge for your client because you saw it in a movie.

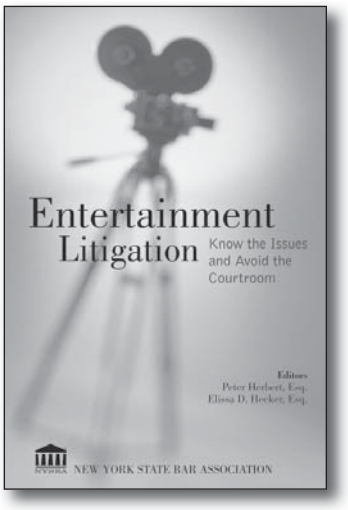
Endnotes

1. *See* 18 U.S.C. §§ 1962, 1964 (2006).
2. *See id*.
3. *See id*.; *see also* PAUL A. BATISTA, CIVIL RICO PRACTICE MANUAL 2d ed. § 2.4.
4. 18 U.S.C. § 1964 (2006).
5. 18 U.S.C. § 1962 (2006); *see also* BATISTA, *supra* note 3 at § 2.5.
6. *See* 18 U.S.C. § 1962; BATISTA, *supra* note 3 at § 2.
7. 18 U.S.C. § 1962.
8. *See* Fed. R. Civ. P., Rule 11; BATISTA, *supra* note 3 at §§ 2.10, 2.14.
9. *See* BATISTA, *supra* note 3 at § 1.1.
10. *See* BATISTA, *supra* note 3 at § 1.1.

Alexandra Harrington is in private practice in Albany, NY and is an LL.M. student at Albany Law School.

Entertainment Litigation

New



What does an entertainer or creative artist need for a healthy, dispute-free career?

An artist needs protection, and litigation in the entertainment and intellectual property fields commonly involves:

- managers with conflicting interests and divided loyalties; contracts that demand exclusivity, but have no express obligations to implement the contract terms; copyright infringements; and unauthorized use of an artist's name, likeness or persona;
- proper credit for the artist and a full accounting of all compensation due and owing.

The artist (and the litigator) needs education, as litigation often involves:

- a misunderstanding of the legitimate needs and the reasonable expectations of the parties with whom the artist contracts, and the legitimate positions of the adversary, and
- the misguided belief that only trial by combat will best achieve the artist's objectives.

While each field in the creative arts has its own special customs and practices, but these issues are common to them all. *Entertainment Litigation* is a thorough exposition of the basics that manages to address in a simple, accessible way the pitfalls and the complexities of the field, so that artists, armed with that knowledge, and their representatives can best minimize the risk of litigation and avoid the courtroom.

Written by experts in the field, *Entertainment Litigation* is the manual for anyone practicing in this fast-paced, ever-changing area of law.

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Appendices

Key Benefits

- Keep up-to-date with recent changes representing clients in the entertainment field
- Understand the nature of artist-manager relations
- Increase your versatility across several entertainment mediums

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NYSBA

Message from the Chair

(Continued from page 14)

1) Section Reorganization

This year, the YLS will be reviewing and reorganizing the Section in accordance with our Bylaws in response to feedback from our membership and with the goal of the future direction of the Section in mind.

Appointments to the Executive Committee. Almost all of the vacancies on the Section's Executive Committee, including District/Alternate Representatives, Liaisons to the substantive NYSBA Sections, committee chairpersons, and committee members, have recently been filled. We presently have an Executive Committee of over forty (40) members.

Bylaws Review and Revision. The Executive Committee will be undertaking a review of the Section's Bylaws to determine if there are any areas requiring revision.

2) Section Communications

This year, our goal is to update and improve the way in which the YLS communicates with our membership, with the State Bar Association, with the legal profession, and with the community.

Listservs. The YLS has the ability to set up listservs so that we may communicate with one another as a Section, regularly and informally. Plans are in progress to have listservs available for communications among the Section's executive body, committees, and membership by judicial district.

3) Strategic and Long-Range Planning

This year, the YLS will engage in strategic and long-range planning in an effort to evaluate where the Section is today and where it would like to be in the next couple of years. We have already committed ourselves to continuing the initiatives of the Former Chairperson.

Long-Range and Strategic Plans. The YLS will be revisiting and evaluating the Section's Long-Range and Strategic Plans from 2004. During this evaluation, the Section will be looking at whether it is has made progress in achieving its past goals and whether it will be implementing a new plan in the coming year.

Diversity Statement. In 2004, the YLS adopted a diversity statement for the Section. That statement included a diversity plan with ten (10) action items. The YLS will continue to examine where the Section is in implementing this plan and where it needs to be moving forward. In fact, this year, we have opened up the lines of communication with various law schools in an effort to create law school diversity programming geared towards educating the students on diversity in the legal profession.

Role as an Advocate. One of the roles of the YLS is to champion and facilitate the resolution of issues relevant to our membership. This year, the Section will continue to examine our role as an advocate for our membership, identifying whether there are issues that should be raised by the Section within the Bar Association, the profession, and the community.

4) Section Membership Benefits

The core mission of the YLS is to meet the changing and unique needs of our membership. As a Section, we recognize that this can only be done by providing you, our members, with opportunities for continuing legal education that is relevant to your practice and/or studies; opportunities for leadership and professional development; opportunities for networking and career development; and opportunities for community and pro bono service. We also recognize and are sensitive to the pressures that you face as young lawyers to meet your often overwhelming financial responsibilities, and to balance your personal and professional lives in ways that give you satisfaction and fulfillment. In that regard, we will explore the possibility of adding member benefits that are geared more toward newly admitted or young lawyers.

In addition, this year we plan to continue to bring value to your membership in the Section in ways that satisfy you both professionally and personally. Our plans include:

Mentoring. This year, the YLS will continue to work toward updating and revising our Mentor Directory—a service designed to allow YLS members an opportunity to consult with seasoned lawyers about specific legal or law office management questions. This is a members-only benefit available to you free of charge. Additionally, the Section will also be looking to other opportunities for mentoring programs and relationships within the Section, the Association, and the profession.

Electronically in Touch. The YLS will continue our electronic newsletter publication, *Electronically in Touch* as a service to our membership. *In Touch* will continue to feature advice, guidance, and tips useful to you both professionally and personally; include "nuts and bolts" information about substantive legal issues; highlight cases and decisions of interest; provide updates from Section Liaisons and District/Alternate Representatives; offer employment resources and opportunities; and list a calendar of events, activities, and programs. This is a members-only benefit offered to you free of charge.

Perspective. The YLS will continue our print newsletter publication, *Perspective*, as a service to our membership. Published twice per year, *Perspective* offers substantive legal articles, Section news and events, As-

sociation information, and a forum for expressing opinions and/or commentary on issues affecting young lawyers and law students today. This is a members-only benefit distributed to you free of charge.

CLE Programs and Events. This year, YLS will continue to offer CLE-certified programs and events throughout the state during the course of the year at a discount to YLS members. Some events will be sponsored by the Bar Association while others will be sponsored by the Section or in cooperation with the Bar Association. In 2007-2008, the Section included CLE programming and events at our Fall Meeting in Albany, October 19-20, 2007; at our upcoming Annual Meeting CLE Program in New York City on January 30, 2008; and at our Bridge-the-Gap Program in New York City, January 31 and February 1, 2008.

District Programs and Events. This year, the YLS will continue to host a number of district programs and events around the state. District programs and events are an opportunity for you to network and socialize with colleagues and notable attorneys from the bench and the bar in your area. They are also opportunities for career and professional development. District events will be coordinated by District and Alternate Representatives, and will be planned with the district membership in mind. Our goal this year is to reach out to the Section members to determine what events that they would like to see in their District. We will discuss and implement some of these ideas, hoping to increase your attendance and participation at these events. The planning has already begun!

Law Student Outreach Initiatives. As future colleagues, members of the profession, and members of the bar, law students are an important segment of the Bar Association. This year, the YLS will continue in our outreach initiatives to law students around the state. These initiatives include Web site development, focus groups, and programs and events tailored to law students. The YLS is partnering with the Bar Association on many of these efforts, and is planning outreach of its own at the district level. With the assistance of our Staff Liaison, the YLS has created its newest Committee, the Law Student Development Committee. This Committee will work in conjunction with the Association's Membership Committee and the Law Student Council in the development of law student resources and increasing law student memberships in the Young Lawyers Section and the Association.

Community Service and Pro Bono Projects. Community and pro bono service is an important part of bar association work for young lawyers sections around the country. Over the years, the YLS has engaged in a number of community service and pro bono projects, but it has not planned service activities of its own in quite some time. In the coming year, the Section will look at ways in which we can become more active within our local communities. This will be done at the committee level, where review and coordination will take place.

5) Section Affiliations

Developing and Maintaining New Relationships

The YLS will seek to develop and maintain relationships with other young lawyer organizations, divisions and sections of other Bar Associations. The primary goal of this affiliation system will be to allow an exchange of ideas and communication among the dozens of young lawyer organizations in existence in the State of New York. We expect to develop and maintain relationships with affiliates from state, local, national, and international young lawyer organizations that have a subchapter or subdivision in New York.

The success of 2007-2008 will depend on your active involvement and participation in the Section. Please consider serving on a committee; writing a piece for publication in one of our newsletters; planning a program, activity, or event; or coordinating a community service or pro bono project. The possibilities are endless, and the rewards are invaluable. I also encourage you to take full advantage of the many opportunities, benefits, and services that the Young Lawyers Section and the New York State Bar Association have to offer, and to find ways to make the YLS your own.

Thank you for the opportunity to serve as your Chair. I look forward to working with you to reach all of these goals in 2007-2008.

Valerie M. Cartright

(Continued from page 1)

time came to be seen as outdated and unusable in modern commercial disputes.

Several theories have been put forward as to why exactly the old arbitration law resulted in a low level of arbitration proceedings in Japan. First, until recently foreign lawyers could not represent their clients in Japan. The Lawyers Act was amended in 1996 to allow *gaikokuho-jimu-bengoshi* to represent their clients, and this extends to representing them in an international arbitration.[2] Second, the lack of cases per annum meant that it was impossible to establish a large group of experienced arbitrators. Third, Japanese arbitrators apparently often veered more toward a mediation role and encouraged settlements, which tended to annoy Anglo-American parties who were more used to an adversarial style of arbitration.[3] This led to lawyers recommending alternative arbitration venues to their clients. Fourth, Japanese arbitration law was based on a 19th-century statute inspired by old German law, and was not seen as flexible enough to embrace contemporary commercial realities.[4]

The New York Convention

The Convention is concerned with the recognition and enforcement of foreign arbitral awards.[5] Japan acceded to the Convention in 1961. Japan is also a signatory of the Geneva Convention, a member of ICSID[6] and has signed over a dozen bilateral treaties that recognize and enforce foreign arbitral awards. Article 98(2) of the Japanese Constitution provides that treaties concluded by Japan shall be faithfully observed. Article 45 of the new Arbitration Act provides for Japanese courts to recognize and enforce a foreign arbitral award from a New York Convention member country.[7] To enforce an award, the enforcing party must appear before a Japanese court, who has to grant it an enforcement order. Once an enforcement order has been granted, it has the same effect as that of a final and conclusive court judgment. To date a Japanese court has never refused to recognize and enforce a foreign arbitral award.[8]

The Arbitration Act of 2003

The Arbitration Act was adopted in 2003 by the Diet and became law in 2004. Its aim is to encourage greater use of arbitration in Japan, and it applies to both domestic and international disputes that have the *chusaichi* (arbitral forum) in Japan.[9] Its provisions are very similar to those of the UNCITRAL Model Law. Article 13 lists the requirements for a valid arbitration agreement, which usually states the arbitral forum, choice of language, number of arbitrators and so on. Article 13(4) requires the arbitration agreement to be in writing, whether by hard copy or electronic form.[10] Under Article 35, the courts can be used to assist taking evidence. Article 33 enables the arbitral tribunal to make an award even if one side refuses to appear at an oral hearing or to produce documentary evidence. Article 36, which deviates slightly from the Model Law, says that in the absence of party agreement on the applicable law, the State with the "closest connection" to the dispute shall have its law applied.

Other important components are promulgated by the Act: Article 17 discusses the appointment system for arbitrators, with a fallback procedure if parties cannot agree on one another's appointments. Articles 18-22 deal with the dismissal and withdrawal of arbitrators. Article 46 provides for the recognition and enforcement of an arbitral award, and applies to both domestic and foreign awards. Articles 47-49 have default rules on arbitrators' costs and fees. Interestingly, Articles 50-55 provide for criminal sanctions to be applied against corrupt arbitrators. These articles reveal the contractual view of arbitration taken by civil law countries, where the relationship between the arbitrator and the parties is based predominantly on contract law. Therefore, arbitrators are professionals who can be held liable for negligence or wilfull conduct. In common law countries, arbitrators have limited or unlimited liability from suit, as they are treated more like judges.[11]

Two crucial issues, separability and *kompetenz-kompetenz*, are dealt with smoothly by the Act. Article 13(6) enumerates the separability principle which holds that the arbitration agreement survives the termination or nullification of any agreement of which it forms a part. Article 23 states that arbitrators have in effect *kompetenz-kompetenz*, i.e., they are able to decide on their own jurisdiction, including the validity of the arbitration agreement itself.

The JCAA's New Rules

The Japan Commercial Arbitration Association (JCAA) was established in 1950 within the Japan Chamber of Commerce. In 1953 it reorganized itself as an association independent of the Chamber of Commerce, as it attempted to restructure its procedures in the face of the growth of international trade. It is the prominent international arbitration institution in Japan, with 21 cases being filed with it in 2004. It has offices in Toyko, Osaka, Nagoya, Kobe and Yokohama. Other arbitration institutions in Japan include the International Chamber of Commerce (ICC), which has an office in Toyko, although it receives fewer cases than the JCAA. In more specialized matters, there is the Japan Shipping Exchange (JSE), established in 1921, that deals with maritime arbitrations, the Japan Intellectual Property Arbitration Centre and the Japan Sports Arbitration Agency.

As the JCAA is the largest and most important arbitration associa-

tion in Japan, I will briefly discuss its rules, which have been amended in the wake of the new Arbitration Act. The Association formed an ad hoc committee in 2003 to examine its rules and modify them in relation to the new arbitration law.[12]

The JCAA has a set of rules called the Commercial Arbitration Rules,[13] and the following is a summary of these regulations:

Chapter I: General Provisions—The parties may agree to adopt all or some of the JCAA rules, or an amended version to suit their needs, as per Rule 3. If they can't agree on procedural rules, the tribunal can conduct the arbitration as it sees fit, subject to the Arbitration Act. Rule 5 does away with the previous "meeting of the minds" requirement for an arbitration agreement in favor of simply having a written agreement. This agreement can be a single written clause or an exchange of e-mails, etc. Parties are free under Rule 9 to designate whomever they want to represent them in the arbitration.

Rule 11 does away with the old rule that required the arbitration to be conducted in either Japanese or English. This was seen as a potential barrier to international arbitrations being conducted in Japan.[14] The new rule allows the arbitration to be conducted in any language that the parties choose. In a proactive move the JCAA has filled in the Arbitration Act's *lacuna* on the immunity of arbitrators. Rule 13 provides for their immunity from liability of suit except for acts or omissions that constitute willful or gross negligence.

Chapter II: Commencement of Arbitration—Rule 16 expressly provides for the arbitrator's competence to decide the validity of the arbitration agreement, taking its cue from the *kompetenz-kompetenz* provision in Article 23 of the new arbitration law. If the tribunal determines that it has no jurisdiction to hear the dispute, it must terminate its proceedings as per Article 33.

Chapter III: Arbitral Tribunal—The JCAA maintains a panel of arbitrators, but the parties are free to choose arbitrators from outside this panel. Following criticism from foreign parties about the lack of impartiality of arbitrators in Japan,[15] New Rule 28 requires an arbitrator to remain at all times impartial and provides an opportunity to challenge the arbitrator for alleged lack of impartiality. Rule 29 demands even more impartiality by presenting a mechanism to challenge an arbitrator if either party has "justifiable doubts" as to his impartiality or independence.

Chapter IV: Arbitral Proceedings—The JCAA's New Rules (in Rule 32(3)) adopt Article 33 of the Arbitration Act's tenet that the arbitral tribunal can proceed and make an award even if one side refuses to give evidence. Rule 41, entitled Rules Applicable to Substance of Dispute, leaves it up to the parties to decide on the choice of law to apply to the dispute. However, if they cannot agree, then the Rules follow the Arbitration Act and apply the law of the State that "is most closely connected" to the dispute. The place of arbitration, too, is based on the parties' choice (Rule 42). Previously, the old rules required the arbitration to be carried out in Japan.

Rule 38 allows the arbitral tribunal to appoint experts to assist it with its work on "necessary issues."[16] Rules 46 and 48 provide for interlocutary awards and for interim measures of protection. Rule 48(2) empowers the tribunal to order any party to provide security for costs. Rule 54(6) makes it clear that an award is "final and binding" on the parties. Rule 54(1) requires the arbitrator to give reasons for the award unless the parties have agreed that no statement is necessary.

Crucially, the JCAA Rules give protection for confidentiality, unlike the Arbitration Act itself. Rule 40 provides that arbitral proceedings shall not be heard by the public and that those present shall not disclose any facts to the public except where disclosure is required by law or required in court proceedings.

Chapter V: Expedited Procedures—The New Rules follow the old rules here, with expedited procedures allowed for claims that do not exceed ¥20,000,000.[17]

Chapter VI: Supplementary Rules—Rule 68 makes the parties jointly and severally liable for payment of the JCAA's fees in the arbitration and Rule 70 states that the parties shall bear equally the cost of remuneration as set by the Association.

Other Dispute Resolution Methods

Alternative dispute resolution (ADR) has traditionally been utilized greatly by businesses, which partly explains why litigation rates are so comparatively low to the U.S. The Civil Mediation Law, enacted in 1955, sees Japanese courts resolving disputes not by way of a formal court decision, but by reaching consensus between the parties concerned. The court-nature of the process is diluted by having a panel composed of a judge and two laypeople, and settlement discussions are encouraged. In 2004, 484,081 such mediation cases occurred throughout Japan, with 74.4% being successfully resolved.[18]

Japan's chances of becoming an international arbitration center in the future rests not only on improved laws and experienced arbitrators, but also on the government allowing the modern arbitration framework it has created to be used freely by individuals. This means that individuals and associations should be allowed to develop an array of dispute settlement procedures that adhere to the Arbitration Act.[19] An interesting article by David Wagoner suggests one such approach: "a three-tiered dispute resolution clause,"[20] which forces the parties first to try non-lawyer-present negotiation, then mediation and finally, if required, arbitration. The first tier involves an "executive negotiator"[21] with the capacity to settle. Mediation, the second

tier, is more formal with a mediator in attendance, but his decision is non-binding. Should these first two processes fail, then arbitration can proceed under agreed-upon terms in the contract.

Conclusion

The new arbitration statute and the proactive approach of the JCAA are steps in the right direction for Japan if it seeks to attract more international arbitrations to its shores. There are several factors that make Japan an enticing arbitral venue: it is a signatory to the New York Convention, its law is based on UNCITRAL Model Law and its courts interfere rarely in arbitration proceedings and have so far always enforced foreign arbitration awards.

Another benefit of adopting an arbitration law so closely sculpted from UNCITRAL Model Law is that Japan can draw on the knowledge being created by Working Group meetings at UNCITRAL,[22] who suggest and debate changes to the current Model Law.

A few hurdles remain, however. The Arbitration Act itself has several deviations from the Model Law which may put off foreign parties. The potential criminal sanctions for arbitrator corruption or bribery (Articles 50-55) may be an affront to common law businesses or lawyers where arbitrators are immune from suit. The new Act actually gives these criminal sanctions extraterritorial effect, in that they can be applied to foreign arbitrations operating under the Act's laws.

The Act also has no rules on the confidentiality of arbitrations or the immunity of arbitrators.[23] The JCAA has intelligently written these requirements into its new working rules, but for peace of mind for foreign parties choosing to arbitrate in Japan these two crucial issues should be enshrined in the Arbitration Act.

Although Article 14 allows a court to dismiss an action upon the defendant showing that there is an arbitration agreement, the court does not have the power to refer the parties to arbitration nor to stay the litigation. This offers, albeit limited, scope to a *male fides* party to slow up the arbitration by proceeding with litigation.[24]

Another problem is that Japan currently has a lack of quality arbitrators to arbitrate under the new laws. The JCAA and other institutions need to promptly train more arbitrators to meet potential future demand for their services.

As things currently stand, Japan lags far behind countries such as England, France and the U.S. as an arbitration center. In Asia, Hong Kong, Singapore and even South Korea have outpaced it in updating their laws and attracting more international dispute resolutions to their territories. The number of arbitrations held in Japan per annum is increasing gradually,[25] but with the legislative framework in place, the country has the potential to expand its arbitration practice more rapidly in the future.

Endnotes

1. Yoshimasa Furuta and Hideo Tsukamoto, *Japan Enters a New Era*, ADR in Asia: Solutions for Business.
2. Chapter V of Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers (Law No. 66 of 1986). *See* http://www.jcaa.or.jp/e/arbitration-e/kaiketsu-e/special.html.
3. In Japanese culture mediation was favored and litigation and arbitration disfavored. Therefore, in practice, arbitration was seldom used except in arbitration clauses with foreign business firms. *See* Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan, Japanese Legal System: Text and Materials* (Meryll Dean ed., 1997).
4. *See* Luke Nottage, *The Procedural Lex Mercatoria: The Past, Present and Future of International Commercial Arbitration*, CDAMS Discussion Paper 03/1E (2003), *available online at* www.cdams.kobe-u.ac.jp/archive/dp03-1.pdf.
5. There are over 140 signatories to the Convention today. *See* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.
6. ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted at Washington on 18 March 1965, and ratified on 17 August 1967 (Treaty No. 10, 1967). For more on ICSID please see http://www.worldbank.org/icsid/about/main.htm.
7. Although the court cannot review the merits of the award, if the award offends public policy or was given in violation of due process rights of one of the parties, the court may refuse to enforce the award. Such reasons to reject a foreign award are consistent with those outlined in the New York Convention itself.
8. *Japan as the Place of Arbitration*, *available at* http://www.jcaa.or.jp/e/arbitration-e/kaiketsu-e/venue.html.
9. Luke Nottage, *Japan's New Arbitration Law: Domestication Reinforcing Internationalisation?* [2004] Int. A.L.R. Issue 2.
10. *See* Tatsuya Nakamura, *Salient Features of the New Japanese Arbitration Law Based upon the UNCITRAL Model Law on International Commercial Arbitration*, JCAA Newsletter, Number 17, April 2004.
11. *See* Melanie Ries, *International Arbitration In Japan & China*, Dispute Resolution Journal, November 2006-January 2007.
12. Gerald McAlinn, *New Rules for International Commercial Arbitration in Effect from March 1, 2004*, JCAA Newsletter, Number 17, April 2004.
13. For a copy of the JCAA *Commercial Arbitration Rules*, as amended and effective on March 1, 2004, *go to* http://www.jcaa.or.jp/e/arbitration-e/kisoku-e/shouji-e.html.
14. Melanie Ries, *Arbitration under the ICC and the JCAA: A Comparison between the ICC Rules and the JCAA Rules*, Asian Dispute Review, 12-13, January 2006.
15. *See* Richard A. Eastman, *New Law, New Changes: An Update on the Japanese Arbitration and ADR Scene*, *available at* http://www.metrocorpcounsel.com/current.php?artType=view&artYear=2004&EntryN1o=450.
16. Melanie Ries, *International Arbitration in Japan & China*, Dispute Resolution Journal, Nov. 2006-Jan. 2007.
17. ¥20,000,000 is approximately $169,410.72.
18. Yoshimasa Furuta and Hideo Tsukamoto, *Japan Enters a New Era*, ADR in Asia: Solutions for Business.
19. *See* Luke Nottage, *Japan's New Arbitration Law: Domestication Reinforcing Internationalisation?* [2004] Int. A.L.R. Issue 2.
20. David E. Wagoner, *Japan Becomes a Friendly Place for International Arbitration*,

Dispute Resolution Journal, Feb.-Apr. 2006, p. 3.

21. *Id.* at p. 4.

22. *See* Luke Nottage, *Japan's New Arbitration Law: Domestication Reinforcing Internationalisation?* [2004] Int.A.L.R. Issue 2.

23. *See* Tatsuya Nakamura, *Salient Features of the New Japanese Arbitration Law Based upon the UNCITRAL Model Law on International Commercial Arbitration*, JCAA Newsletter, Number 17, April 2004.

24. This underhand tactic is limited in that the local courts only have limited ability to intervene in arbitrations—essentially they can rule on appointing, challenging and removing arbitrators and the competence of an arbitral tribunal—and their role is generally supervisory. Furthermore, the procedure for court intervention is *Kettei*, which is quite quick and does not require giving oral evidence in court.

25. In 2000, 10 arbitration cases were filed with the JCAA. In 2004 this number increased to 21 filings. *See* Melanie Ries, *International Arbitration In Japan & China*, Dispute Resolution Journal, November 2006-January 2007, n. 70.

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3:00 p.m. – 4:00 p.m. District/Alternate Representatives

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