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Mediation on Life Support? Is The Demise of Mediation Greatly Exaggerated?

PRESENTED BY:
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TEN TIPS From The Mediator

By: Hon. John P. DiBlasi
J.S.C. (Rtd.)

❖ Prepare the client for the mediation much in the way you prepare them for trial.

❖ Consider how you will manage their expectations.

❖ Give them a realistic analysis of the strengths and weaknesses of their case in advance.

❖ Discuss the mediation process in detail.

❖ Explain the mediator’s background and role.

❖ Do not rush the process.

❖ Make sure your client has an opportunity to be heard.

❖ Discuss the objective factors that support accepting a settlement.

❖ Have your client sign the settlement agreement.

❖ Discuss the progress made if the case does not settle.

All clients are emotionally invested in their case. The process of slowly gaining an objective understanding of the strengths and weaknesses of their case will lead to a compromise and ultimately to a settlement.

The process of gaining the client’s acceptance of a compromise begins with the preparation for the mediation. The preparation of the client for the mediation should be similar to the process that one would engage in for trial. Doing a run through of what will be asked of the client if the case goes to trial, makes the entire process much more realistic for them with respect to the risks. The preparation process should include a detailed explanation of how the mediation will be conducted.

Counsel should consider how they will manage their client’s expectations during the negotiation process. The weaknesses of their case and the risks of trial should be explained to the client early on in the process. Further, the client should be advised that the ADR process is not a win lose proposition in the event that the case does not settle.
In all likelihood, you will want the mediator to speak to your client about the merits of the case. The experience and the background of the mediator should be explained to the client prior to the mediation session. You cannot expect the client to seriously consider the recommendations of the mediator if he knows nothing about the neutral’s background. To like accord, the mediator’s role should be explained in detail. It should be made clear that the mediator is not there to decide the case, but to assist the parties in the negotiations and to discuss the risk/reward aspect of each party’s case.

In advance of the mediation, a decision must be made as to whether the client will be present at the joint session. Do not assume that they will be. The practice varies from state to state. If counsel wishes that the client be present, it can be a precondition to the mediation itself. Prepare the client for what they may hear at the joint presentation and if the client has a strong reaction, consider whether they should attend.

During the breakout sessions, the mediator will have an opportunity to speak to the client and develop a better understanding of the case and the client’s position. Careful consideration should be given to the issues you want discussed. If an evaluation is sought, it should be explained to the client in advance that the mediator is going to discuss the risks versus the benefits of continuing with the litigation.

In obtaining the acceptance of risk and compromise by your client, the process must proceed prudently. Both counsel and the mediator, in discussing a settlement with the client, should do so in a manner that is clear and presents the objective factors that mitigate towards the client accepting a settlement. Make sure the client has an opportunity to be heard.

If a settlement agreement is reached, it should always be reduced to writing and signed by the client. When the case does not settle, counsel, with the help of the mediator, can review what has been accomplished and the next steps that will be taken in attempting to reach settlement post mediation.

In summary, gradual acceptance leads to compromise and, ultimately, settlement.

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Seeking an Evaluation from the Mediator and the Pre-Mediation Brief

By: Hon. John P. DiBlasi
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In the majority of cases, the parties to mediation ask the neutral for an evaluation of their case. This will encompass an analysis, inter alia, of the factual allegations, defenses, and issues of law, motion practice/decisions, venue/jury pool, and an evaluation with respect to jury verdict potential. The mediator will be making an assessment of the evidence to be presented and will give an opinion with respect to the credibility of potential witnesses based upon a variety of factors, including but not limited to, interest in the outcome of the proceeding, strength of deposition testimony, and whether such testimony will be supported by documentary and real evidence. It is to your advantage to give careful consideration as to the information provided to the mediator before the session.

The goal of counsel in advance of the mediation should be to educate the neutral as much as is reasonably possible with respect to the status of the litigation, facts of the case, the relative positions of the parties, issues of law, and damages sought. It is to your benefit that the mediator be properly informed prior to the mediation as it will lead to the savings of significant time during the course of the session, a better understanding of your position and allow the mediator to make a reasoned evaluation of the case.

The process of ensuring that the parties will get an informed evaluation begins with the brief submitted prior to the mediation. In any complex matter, the parties should submit a mediation brief to give the mediator an opportunity to analyze the matter before the mediation session. It is to your benefit to submit your brief well in advance of the mediation to give the mediator ample opportunity for review and to consider the arguments of the parties. The brief should contain a summary of the position of the submitting party with respect to the issues in the case. The submission of pleadings, exhibits, motions, decisions of the court and deposition testimony alone without a summary is not an effective way to educate the mediator as to your position which is to your advantage. The brief should incorporate exhibits which are critical to the understanding of the case. The exhibits submitted should be carefully referenced in the summary in the brief itself and relevant portions should be highlighted.

All too often, the briefs submitted prior to mediation are pure advocacy without a balanced reflection upon the potential evidence to be presented if the case were to go to trial. In an attempt to persuade the mediator as to the efficacy of the party’s position, the brief becomes unduly lengthy and redundant. It is to counsel’s advantage to submit a clear and concise brief which represents a balanced presentation of the facts that not only stresses the strengths of your case, but also acknowledges its defects and addresses them. While it may seem counter-intuitive, this is to your benefit. A balanced brief will enhance your credibility with the mediator. This is similar to the jury selection process wherein a knowledgeable trial attorney will make the jury aware of the problems in their case in advance so to avoid credibility issues as the negative evidence is presented. By the same token, this gives the mediator the opportunity to consider both the strengths and weaknesses of your case and to understand how you are going to address
the weaknesses. By doing this, you give the mediator time to consider these issues in advance of
the mediation. Additionally, you gain credibility with the mediator by presenting a fair view of
the case and one that is not slanted solely to your side.

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Addressing Legal Issues with the Mediator and Timing in Seeking an Evaluation

By: Hon. John P. DiBlasi
J.S.C. (Rtd.)

Many cases that come to mediation involve novel questions of law. Invariably, there will be a dispute as to the proper law applicable to the case and the interpretation of appellate decisions that impact upon same. It is common for parties in the context of their pre-mediation brief to cite case law with a summarization of the issues and the ruling of the court along with the formal citation. It is useful for the parties to cite the case law in the context of their brief. However, their interpretation of same is all too often misleading as the view proffered represents the attempt to advance a specific position. The better practice that will enhance your credibility with the mediator, which is to your advantage, is to make a balanced presentation. It is therefore extremely helpful to provide copies of the key cases to the mediator. The opportunity for the mediator to read the decisions and make his own determination with respect to the facts of the case, issues presented, applicability, and the court’s decision and rationale, leads to a better understanding by the neutral of the case law. Again, the goal is to assist the mediator in coming to a well-informed evaluation which ultimately will be to your benefit. In the same way that the narrative in the brief should be balanced, if there is opposing authority, those cases should be submitted and also be distinguished in the brief.

Attorneys, in an attempt to influence the mediator’s view of a case, may often refer to jury verdicts on claims asserted in similar cases. Of greater significance are appellate court decisions which address the issue of what causes of action are sustainable and what an appropriate award would be.

At some point during the mediation, one or both of the parties typically will ask the mediator for an evaluation of the case in terms of the strengths and weaknesses as they relate to a potential verdict after trial. Quite often, parties seek such an evaluation immediately after the joint session has been held. Even assuming the mediator has been properly educated on the facts and issues in the case prior to the time of the session, there is nothing like sitting face-to-face to be able to ask questions in private session. This will give life to the submissions, allow the mediator to develop a far better understanding of your case and give you an opportunity to advocate your position. It is therefore not useful for counsel to request an opinion prematurely at the outset of the mediation. The better practice is to give the mediator an opportunity to speak privately with the parties so as to gain a better understanding of their position, even if this takes several rounds with each side to render an opinion.

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Making the Most of the Evaluative Process at a Mediation

By: Hon. John P. DiBlasi
J.S.C. (Rtd.)

During the course of the private breakout sessions with the parties, the mediator is able to engage in a more candid discussion with counsel with respect to their case and their belief as to its strengths/weaknesses, and how they will likely address the opposing party’s case at the time of trial. It also gives the parties the opportunity to disclose information which is being withheld. Quite often the pre-mediation briefs do not contain key arguments or evidence that an attorney believes strengthens or potentially weakens their case. Often critical evidence or legal/factual arguments are withheld for a tactical advantage and are not referenced in the mediation brief or at the joint session. If this is the case, counsel must make clear that the mediator is not to disclose this information. The private session gives you the opportunity to engage in a dialogue with the mediator and answer questions that have arisen from the submission of the briefs and the joint session. A benefit to this dialog is that the mediator may often have insights which the parties have not considered. Mediators will withhold same and refrain from posing questions in the joint session that may adversely affect a party’s position.

The opportunity to speak with the client, whether an individual or corporate representative in private session is an excellent opportunity to favorably influence the mediator in giving an evaluation. In a case where the client is an individual, particularly if the client makes a good appearance, this process may be more informative than all of the briefs and the discussions had by counsel. It gives the mediator a significant opportunity to gain some insight as to the type of witness the client will make. This meeting also allows the mediator to gauge the willingness of the client to compromise, the emotional investment of the litigant in the case, and an assessment of the client’s understanding of the mediation process and the issues attendant thereto, which all may in some way affect the mediator’s evaluation.

The point of the foregoing is not to rush the mediator into giving a premature evaluation of the case before he has developed a complete understanding, to the extent possible, of all of the factors affecting same. It is a rare case where counsel for the parties will agree in whole with the evaluation given by the neutral. As a mediator it is important to stress to the parties that the evaluation is given with due respect to the fact that their view of the case may differ significantly. This is particularly important if counsel chooses to have the client present when the evaluation is given. This is the point in the mediation where diplomacy on the part of the mediator becomes paramount. It is important, whether counsel likes or dislikes the opinion of the mediator, that the opinion be given due consideration. The mediator must be careful not to give the impression that he is taking sides, and the evaluation should be delivered in as neutral and respectful manner as possible. A good mediator will provide counsel an evaluation which specifically cites objective factors supporting same. Counsel should engage in a meaningful discussion with the mediator on the points where they agree as well as disagree.
Finally, asking for the mediator to give an opinion in the presence of all parties is usually a mistake. While on occasion due to the peculiar facts of the case all of the parties may elicit an opinion while in group session, as a general rule this is not effective, and can lead to difficulties in settling the case.

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Making the Most of the Joint Session at a Mediation

By: Hon. John P. DiBlasi
J.S.C. (Rtd.)

Here are some do's and don’ts which lead to a more effective joint session of your mediation:

Do engage in a realistic discussion of the strengths and weaknesses of your case.

Do not spend time posturing to impress or intimidate.

Do recognize that every case is unique.

Do not lump your case in with similar matters that may have relevant differences.

Do engage in a give and take of views.

Do not rush the discussion in the joint session.

Do take the time to listen to the other side.

No two cases are the same. The joint session of the mediation is the best opportunity for the parties to speak face to face and engage in a realistic discussion of the strengths and weaknesses of their case. Counsel is best served by engaging in an objective, straightforward discussion of the uniqueness of the case at hand.

It is commonplace for counsel to extol the virtues of their own legal skills in achieving amazing results for their clients in other matters. As always past performance is not predictive of future results and what is telling is that such an advocate never speaks about their losses. Time expended in this manner is usually nothing more than egotistical posturing, often designed to intimidate but more likely to aggravate and impede the process. Engaging in this type of discussion is simply a waste of time. Counsel is better served by engaging in an objective straightforward discussion of the uniqueness of the case at hand.

Sometimes counsel, on an anecdotal basis, develops guidelines with respect to liability and damages in certain types of cases. It is of greater importance to address the application of certain similar facts to rulings on dispositive motions, evidentiary rulings during trial or on other significant legal issues decided on appeal.

The joint session should not be rushed. Many times the parties do not want to engage in a process where their views are exchanged in detail with the other side; or they want to cut the joint session short and move as quickly as possible into caucusing privately with the mediator. What the parties often fail to understand is that the mediation process is about taking the time to engage in a “give and take” and to exchange views with the other side. It is to the benefit of all parties to have a good understanding of the other’s position. Often the parties in the joint session
will repeat their arguments over and over again in many different ways. While, at times, this process may become tiresome, in actuality, there can be a lot of value in it. Despite the redundancy, new facts may come out and a better understanding often comes about as to the other party’s position.

So take the time to really listen and do not rush the joint session. So if you want to have a useful joint session, turn off the rush to get to the end, and turn on the ability to take the time to mediate.

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The Shrinking Joint Session: Survey Results
Jay Folberg

As mediation has proliferated and become part of our legal culture, how mediations are conducted has diversified. Although we are aware that there is no “standard” process of mediation, there is little empirical evidence to inform us of what is really happening behind closed mediation doors. We tend to think that how we conduct mediation is the norm, particularly if it is how we were trained. We are not immune to selective perceptions that reinforce our way of how we practice. I was surprised to hear experienced mediators in roundtable discussions and at conferences describe what they do as the norm, when what they described was different. This was particularly true in the use of joint sessions.

One of the earliest books on mediation was premised on the assumption that the entire process would be conducted in joint session: separate meetings with the parties would be an exception when animosity was too high for the parties to be in the same room together or secret information could not otherwise be revealed (see Folberg and Taylor, 1984). It was standard mediation training to begin with a joint session that would continue until no longer productive. As a co-author of that early book and a frequent mediation trainer, I believed that joint sessions were essential. Times have changed.

We thought it would be informative to survey experienced mediators to ask if, when and why they use joint sessions. We were interested in individual practice differences, as well as whether there were regional variations. We also wanted to learn about how use of joint sessions may have changed over time, the purposes for which they are used, and what the mediators thought about the use of joint sessions.

Background

JAMS is a private ADR provider with over 300 exclusive panelists in 24 resolution centers in the US and Canada. Although JAMS panelists mediate all types of disputes, the largest category of cases are business and commercial matters in litigation where all parties are actively represented by attorneys. JAMS provides mediation workshops and continuing education programs for its panelists, however, they are independent contractors who determine their own mediation style and practices.

In March, 2015, we asked all JAMS panelists to anonymously respond to an electronic survey about their use of joint sessions in mediation. 205 completed the survey, which is 76% of JAMS mediators, excluding the approximately 10% of JAMS panelists who only arbitrate. We analyzed the responses to determine the frequency of conducting an initial joint session, the purposes for which they are used, changes in frequency and purposes over time, resistance to joint sessions and whether the mediators thought a diminishing use of initial joint sessions to be positive or negative. We also were able to determine variations among JAMS three administrative regions: Northwest, Southwest and East/Central.
Survey Results

1) How long have you been a full-time ADR Neutral?
- 63% had been full-time for more than five years and about 40% more than 10 years.

2) Immediately prior to becoming a full time ADR Neutral were you a …?
- 63% had been judges and 24% litigators.

3) In which subject area do you most frequently mediate (choose one)?
- The most frequent subject area of mediations was business/commercial, with very little family cases.

4) Which is your primary JAMS region?
- JAMS regions are administratively divided into three sections of the United States. The largest region geographically and by number of mediators is the East/Central. The survey response rate was about the same between Southwest, Northwest and East/Central.

5) When you started mediating did you regularly begin with a joint session?
- When respondents first started mediating slightly more than 80% regularly began with a joint session.

[East/Central mediators began with a joint session 95%, as compared with 72% in Northwest and 63% Southwest.]

6) If you did begin with a joint session, was this for the purpose of (choose multiple):
- The principal purposes for conducting a joint session when they first started mediating were introductions and discussing the process, discussing confidentiality, allowing parties to be heard by the other side, and providing an opportunity to assess parties and attorneys.

[No neutrals from the Northwest selected “beginning negotiations” as a purpose for joint sessions. In the Southwest 12.8% selected this purpose as compared to 4.8% in East/Central. “Exploring parties needs/interests” was selected by 23% in Southwest, 16.9% East/Central, and 2.9% in the Northwest region.]

7) Do you now use an initial joint session?
- In contrast to when the mediators first started practicing, now only 45% regularly use an initial joint session. (Compared to 80% when they began practicing).

[68.5% of East/Central respondents now use an initial joint sessions regularly, compared to 34% Northwest and 23.6% Southwest.]

8) When you use an initial joint session now is it usually for the purpose of (multiple):
- When an initial joint session is now held it is for similar purposes as earlier, but with less emphasis on what might be termed the more “substantive” purposes: clarifying procedural status of the litigation, allowing parties to be heard by other side, discussing facts, legal theories, and beginning negotiations.
[The East/Central region now uses joint sessions more for “substantive” purposes than either the Northwest or Southwest regions.]

9) **If you do not use an initial joint session, do use a joint session later in the process?**
   - Although it is not uncommon after skipping an initial joint session to bring everyone together later for a joint session, most often that is not done.

10) **What is your primary consideration in determining whether or not to use a joint session?**
    - The primary consideration in deciding whether or not to have a joint session was most often the combined preference of the attorneys and the parties, followed closely by the mediator’s general policy or/and the nature of the case.

11) **Would you consider the impact of a diminishing use of initial joint sessions to be positive, negative or neither?**
    - More mediators considered a diminishing use of initial joint sessions negative rather than positive, but even more regard this trend as neither positive nor negative.

12) **Have you experienced increased resistance to the use of initial joint sessions by attorneys or parties?**
    - A majority of JAMS mediators have experienced increased resistance to the use of initial joint sessions (58.4% who have to 41.6% who have not).

    [The East/Central region experienced much less resistance to the use of initial joint sessions (40.4%), than did the Northwest (80.8%) or the Southwest (66.7%).]

**Respondent Comments**

The final item asked of survey respondents was:

**Please state any other comments you wish to share on the topic of joint sessions in mediation.** (103 comments were received. Selected comments are indicated below.)

The comments regarding joint sessions were mixed. Some commentators expressed their preference for joint sessions and stated the classic reasons for starting with a joint session:

- “I cannot imagine not having a joint session. It helps the parties hear from a neutral, it causes the lawyers to be a bit more credible, it saves an immense amount of time.”
- “I believe through experience that some sort of joint session is necessary. I have found that cases without joint sessions are the ones that don't settle on the first try.”
- “I find them very helpful in setting the "tone" for the process, including letting the parties see ‘the enemy’ - often the parties have not met face-to-face and are amazed that the other side doesn't have horns and a pitchfork.”
- “My success rate is well over 95% and I attribute that in significant part to properly orchestrated joint sessions.”
- “The value of a direct opportunity to be heard cannot be underestimated.”

Others commented negatively about joint sessions based on bad experience with them:
• “I found that they often led to grandstanding and hardening of position or were used as a delay tactic.”
• “As the negotiation skill of lawyers diminishes and financial pressures on firms increase, the joint session is often destructive to the settlement process.
• “An initial joint session is likely to do more harm than good and make the mediator’s job more difficult.”
• “The damage typically done by posturing attorneys during joint sessions takes hours to undo.”
• “I stopped using joint sessions when it became common for lawyers and parties to get angry with each other and argue with each other, taking away from the idea of working together toward a compromise.”

Many comments addressed adaptations to a changing mediation market, timing of the sessions, case specific use of joint sessions, and alternatives to joint sessions:

• “Evolution of mediation and sophistication of parties' counsel renders joint session at the outset to be less productive and potentially harmful; best to meet individually with counsel and get "buy in" for nature and extent of the joint session.”
• I offer services in a crowded mediation marketplace. I heed the market’s wishes on joint sessions.
• “While I routinely have a joint session, parties are not regularly making opening statements. 90% in the past and 20% now.”
• “I speak with counsel of each side before the day of the mediation. The day of the mediation I start with relatively short private meetings with each side (where I present my credentials, review the process, etc.). I then go into a joint meeting.”
• “Good things can happen with a joint session, if used at the right time.”
• “I find that at least 50% of the time (or more in complex disputes) I will end up having an issue specific joint session.”
• “They are useful if focused on specific obstacles to settlement which have developed during the individual caucuses and only after I have had a good chance to size up the parties with an eye to my being able to steer the discussion away from the shoals of disaster.”
• “In complex construction cases, joint conferences are good ways to start the mediation, and sometimes update multiple parties during the mediation.”
• “In probate and will contests I advocate hard for a joint session because so often the participants are family members who have become so polarized that they are not speaking to each other, and I believe the joint session provides an opportunity for a discussion led by me to open doors that may have been previously slammed shut.”
• “Joint sessions are a case sensitive issue. Depends on the sophistication of the parties and their respective counsel.”
• “I include traditional joint session purposes and topics in each private caucus when not using a joint session.”
• “Most lawyers think they are a waste of time, but they can be awesome in the right circumstances!” Need to design the joint session to fit the case.”

Finally, some mediators have relabeled or reinvented joint sessions:

• “I now call joint sessions my ‘benediction’. I remind those assembled together why we are here and we discuss how we will go about achieving our goal of settlement.”
• “I don’t talk about a joint session, it is a ‘recognizance meeting’. I ask all to state their commitment to settle and try to move on.”
• “I conduct a ‘meet and greet’, so they can see who they are working with and confirm they are here to resolve this matter.”
• “The purpose of getting everyone together, after meeting separately with each side, is to design a path to settlement. No one gets what they want unless everyone gets something they want.”
• “It’s all about the ‘contact hypothesis’. Get them in the same room, treat them as equals, and have them talk together about themselves or their situation. It’s the demonization antidote.”

Survey Limitations

The JAMS panel was chosen for the survey because of our association with the organization and the likelihood of a good response rate. The makeup of the JAMS panel is not necessarily representative of the general population of mediators. About two thirds of respondents had been judges, although their answers did not appear to significantly vary from those who had not been judges. We analyzed variations among the three JAMS regions, however, it should be noted that these regions are delineated for JAMS administrative purposes and are not of equal size; they do not reflect a geographical or population triad and are subject to change. The makeup of the three regions at the time of the survey and the number of completed responses from each were: East/Central (New York, Philadelphia, Boston, Chicago, Miami, etc.) = 94; Southwest (Los Angeles, Santa Monica, Orange, Las Vegas, etc.) = 55; Northwest (San Francisco, Silicon Valley, Sacramento, Seattle, etc.) = 54. The survey questions as originally drafted were more numerous and detailed than finally distributed. As in most surveys, a balance had to be struck between desired information and likely receipt of a credible number of completed responses. Our response rate of 76% is credible, but more detail would have been desirable.
Analysis

The survey responses indicate that the use of initial joint sessions is diminishing, but has not vanished. 80 percent of JAMS mediators regularly used initial joint sessions when they began mediating, as compared to 45 percent now. However, the use of joint sessions varies by region, 68.5 percent of East/Central respondents now use an initial joint sessions regularly, compared to 34 percent in the Northwest and 23.6 percent in the Southwest.

Changes in the use of joint sessions appear to reflect the changing nature and maturity of mediation. When mediation was first introduced into our legal culture, few parties knew about it and most lawyers were unfamiliar with the process. Joint sessions were essential to apprise participants of what to expect, set “ground rules,” demonstrate neutrality, present the mediator’s credentials, agree upon confidentiality, sometimes introduce the parties and attorneys to one another, seek agreement about basic facts, define the issues, reconfirm a commitment to seek agreement, set the agenda and begin negotiations. Although initial joint sessions can still be of value to accomplish some of these purposes and to set the tone, de-villainize the other side, and explore common interests, some of the reasons for joint sessions may no longer exist or the tasks can be accomplished in other ways.

Few lawyers are now unfamiliar with mediation. Experienced lawyers have been exposed to the process in court connected and private settings. Newer lawyers have probably studied mediation and other ADR approaches in law school. If their clients are unfamiliar with mediation, their attorneys have likely educated them on what to expect. Abundant information is available about individual mediator’s experience and style of mediating from the Internet, list serves, their reputation and past cases with them. Mediators are increasingly selected by attorneys for specific disputes after careful vetting. More often than not, the parties and attorneys are familiar with those on the other side and may have no desire to be reintroduced or to hear again from them what they heard in prior negotiations or depositions. Although practices differ, most mediators encourage the exchange of premediation briefs and staff often attend to the agreements to mediate and provide information about confidentiality, which is established by statute. Ground rules, as such, are rarely used now and interests may be more easily probed in the confidentiality of private sessions.

In addition, the comments of some mediators indicate that they have experienced joint sessions which have increased hostilities and derailed potential agreements. Based on their experience, and possible discomfort with managing direct conflict, they rather not risk what they see as the downside of initial joint sessions. Their comments imply that they can achieve many of the traditional purposes of joint sessions in initial private settings and determine later in the course of the mediation if an issue specific joint session or one focused on specific obstacles to settlement may be helpful. The comments of other mediators note that they utilize brief, initial joint sessions for “housekeeping” purposes or as “meet and greet” sessions, rather than for more substantive purposes like clarifying the facts, exploring common interests or beginning negotiations. Still others have relabeled joint sessions as “recognizance meetings” or “benedictions.”
It is interesting to note that a majority of JAMS mediators have experienced increased resistance to the use of initial joint sessions (see responses to question 12). The preference of attorneys is a primary consideration in deciding whether or not to have a joint session. Comments indicate a sensitivity to lawyer resistance. “Most lawyers think they are a waste of time …” “I offer services in a crowded mediation marketplace. I heed the market’s wishes on joint sessions.” Attorney resistance, however, like the use of joint sessions, varies by region. The East/Central region experienced much less resistance to the use of initial joint sessions (40.4%), than did the Northwest (80.8%) or the Southwest (66.7%).

The use of joint sessions appears to be increasingly case specific. The comments emphasize the importance of their use in complex construction cases, family related matters and in probate and will contests. When joint sessions are employed, the time devoted to specific components is changing. This survey and a previous one conducted by the author indicated less time spent on the mediator commenting on his/her experience and credentials, and less use of opening statements by the parties and their attorneys. For example, “While I routinely have a joint session, parties are not regularly making opening statements. 90% in the past and 20% now.”

**Joint Sessions Live On**

While the use of joint sessions in mediation may be shrinking, it is important to observe that they are not vanishing. More mediators in our survey considered the diminishing use of initial joint sessions negative rather than positive, although even more regard this trend as neither positive nor negative. The most emphatic comments came in support of joint sessions, expressing the sentiment that “mediation would be unimaginable without them,” they “save an immense amount of time,” and mediation success could be attributed “in significant part to properly orchestrated joint sessions.” Other benefits listed for joint sessions included letting the other party see “the enemy,” serving as the “demonization antidote,” helping in “setting the tone,” and causing “the lawyers to be a bit more credible.” We were admonished not to underestimate “the value of a direct opportunity to be heard.” One respondent wrapped up the theory of why joint sessions work: “It’s all about the ‘contact hypotheses.’ Get them in the same room, treat them as equals, and have them talk together about themselves or their situation.”

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MEDIATION: THE BEST AND WORST OF TIMES

Jacqueline Nolan-Haley*

At this period in the evolution of dispute resolution, mediation is in a unique time zone, similar to what Dickens described in a *Tale of Two Cities*, as the best and worst of times, the seasons of Light and Darkness. It is the best of times, the season of Light and a time of joy in honoring human connections, as mediation is widely embraced in the public and private sectors. From government agencies and courts to corporations and United Nations peacemaking units, mediation offers a vision of hope in the midst of drowning bureaucracies, clogged dockets, corporate scandals and ethnic conflicts. But it is also the worst of times, the season of Darkness and sadness, as mediation escapes to her slumber and hibernates, surrounded by problems that need to be resolved, and could potentially be resolved, if only she were responsive.1

Responding to one of the questions raised in this Symposium—is mediation sleeping—I take the optimistic view that mediation is not sleeping but simply resting, exhausted from the multiple demands placed on her. I make a modest claim that we can reasonably hope she will arise from her rest, radiate light, and offer the potential for healing2 when the value of consent is once again acknowledged and respected. In short, we need a renewed appreciation of consent in mediation.3

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1 Consider the creative possibilities of resolving conflicts around issues related to ebola, immigration and environmental disasters.


I. The Season of Light

At one level, mediation is at the height of popularity, in some cases displacing arbitration as a method of dispute resolution. Frustrated by the delays and costs associated with contemporary arbitration practice, parties are turning to mediation to resolve and manage their disputes. “Obsession with mediation,” claims one scholar, is a “global phenomenon.” International and domestic provider organizations that formerly were focused on arbitration have enacted new rules that concentrate exclusively on mediation. Support for mediation is ubiquitous. From Africa to Malaysia the mediation project is gaining traction; in India, court-annexed mediation programs have been described as a “ray of hope.”

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5 See e.g., Alexander McKinnon, Mediation in England & Wales, Hong Kong and Singapore: Arbitration’s Reactions to Developments in Litigation, 8 WORLD ARB. & MED. REV. 369 (2014).


last ten years, the United Nations has offered greater encouragement to strengthen the role of mediation in resolving disputes and preventing conflict, and has issued Guidelines for effective mediation. The World Bank maintains an office of mediation services as part of its conflict resolution program. Scholars have suggested that mediation could be useful as a parallel practice to arbitration in investor-state disputes and the International Bar Association (“IBA”) has issued rules to govern such mediations. Currently, an UNCITRAL working group is considering a proposal from the United States for a convention on the recognition and enforcement of international settlement agreements resulting from mediation.

In the United States, mediation is the most frequently used ADR process in state and federal courts. Judicial support for mediation, whether rooted in efficiency reasons or possibly exhaustion with adversarial procedures, has been a major factor in its growth. Corporations have also embraced mediation. A recent survey of Fortune 1000 companies showed that more companies reported using mediation for nearly all kinds of disputes while

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11 See Report of the Secretary-General on Enhancing Mediation and Its Support Activities, S/2009/189 (Apr. 8, 2009) (describing the need for experienced mediators and support teams with women adequately represented, who have sufficient resources to intervene at early stages of conflict and attempt to address the root causes of conflict, overcome impediments to progress and obtain agreements that result in sustainable peace.) [hereinafter Report of the Secretary-General].


15 See IBA Rules, supra note 7.


18 Genn, supra note 6, at 13.
fewer companies reported arbitrating in key categories.\textsuperscript{19} Finally, mediation has proved effective in the resolution of disputes arising from disaster claims\textsuperscript{20} and a range of environmental issues.\textsuperscript{21}

II. Resting Between the Dark and the Daylight\textsuperscript{22}

Mediation’s Season of Light is fading. Some of my colleagues in this Symposium have eloquently described mediation’s descent from light to darkness.\textsuperscript{23} I will simply add to that list a few other storms threatening the landscape—assurances of confidentiality not honored,\textsuperscript{24} courts that look the other way when this happens,\textsuperscript{25} promises made in mediation and not kept,\textsuperscript{26} accusations of mediator coercion,\textsuperscript{27} participants acting in bad faith by using mediation as a fishing expedition, mediators failing to disclose conflicts of interest,\textsuperscript{28} and in some situations, giving inaccurate information to


\textsuperscript{20} American Arbitration Association, Storm Sandy, https://www.adr.org/aaa/faces/aoe/gc/government/statenaturaldisasterprograms/sandy?sessionid=54vJk3DQnY6ZlKj4pR0JHjiJ340Sl0K8QnMxTpzBTWqbbSBGL27810521221?_afrLoop=257104801964186&_afrWindowId=0&_afrWindowMode=0&_afrWindowId=3Dnull%40%3F_afrWindowId%3Dnull%26_afrLang=0&_afrWindowMode%3D0%26_adctrl-state%3Dbg8c3gn8_4 (describing the AAA Storm Sandy mediation program).


\textsuperscript{22} Sadly, this is not the pleasant time of day described in Henry Wadsworth Longfellow’s beloved poem \textit{The Children’s Hour}, available at http://www.poets.org/poetsorg/poem/childrens-hour.


\textsuperscript{26} Coben & Thompson, supra note 24, at 73–89 (discussing cases challenging the enforceability of mediated agreements).

\textsuperscript{27} E.g., Vitakis-Valchine v. Valchine, 793 So. 2d 1094 (2001) (the case was remanded to the trial court).

\textsuperscript{28} CEATS, Inc. v. Continental Airlines, Inc., 755 F.3d 1356 (Fed. Cir. 2014) (petition for cert. pending).
MEDIATION: THE BEST & WORST OF TIMES

parties.\textsuperscript{29} Also clouding the landscape are multiple permutations of mediation\textsuperscript{30}—other processes out there labeled mediation but in fact very different from the traditional understanding of mediation as a voluntary process based on party self-determination. Tacked on to this list are mediators who combine arbitration with mediation,\textsuperscript{31} those who offer proposals for settlement,\textsuperscript{32} and judges who mediate.\textsuperscript{33} Some countries use mediation and conciliation interchangeably, leading to confusion in cross-border mediation with parties who have different expectations of the process.\textsuperscript{34}

Numerous critics have described mediation’s shortcomings. Some have argued that unlike arbitration and litigation, mediation is unregulated and leaves mediation parties without protection.\textsuperscript{35} Others are concerned that mediation may become diluted as an increasing number of lawyers request that the joint session be eliminated.\textsuperscript{36} Some commentators claim that as mediation practice moves away from the fundamental principle of self-determination, its power to deal with issues of social justice has diminished.\textsuperscript{37} Finally, as mediation has expanded in the courts, it has generated

\textsuperscript{29} Rachael Field, Neutrality and Power: Myths and Reality (Nov. 2002), available at http://www.mediate.com/articles/fieldr.cfm (challenging mediators to be more honest in their claims of neutrality when mediating family disputes.).

\textsuperscript{30} Peter Adler, Protecting the Future of Mediation (Nov. 2014), available at http://www.mediate.com/articles/AdlerFuture.cfm (observing that “[M]ediation is a container into which people pour (and sometimes extract) collaborative law, citizen review panels, deliberative democracy, settlement hearings (in and out of court), collaborative governance, family conferencing, peer mediation, settlement weeks, joint fact-finding, and appreciative inquiry.”).


\textsuperscript{35} Hazel Genn, What is Civil Justice For? Reform, ADR, and Access to Justice, 24 Yale J.L. & Human. 397 (2012).

\textsuperscript{36} See, e.g., Eric Galton & Tracy Allen, Don’t Torch the Joint Session, 21 Disp. Resol. Mag. 25 (2014). It should be noted, however, that the feasibility of joint sessions depends upon context. UN mediators, for example, favor shuttle diplomacy over joint sessions that may give parties the opportunity to become more entrenched in their positions. See Report of the Secretary-General, supra note 9.

\textsuperscript{37} Robert A. Baruch Bush & Joseph P. Folger, Mediation and Social Justice: Risks and Opportunities, 27 Ohio St. J. on Disp. Resol. 1, 49 (2012) (“When the [this] foundational principle
critiques of ethnic and gender disparity in the treatment of minority claimants, and claims that it does not provide access to justice but simply to settlement.

III. THE SEASON OF DARKNESS

Mediation, exhausted from all she is asked to do, now resists engagement. Current pushback from potential users attests to this reality. The season of darkness is upon us, and this is happening on a global basis, not just in countries in the European Union whose reluctance to use mediation prompted the debate leading to this Symposium. Mordehai Mironi describes the sad story of the “mediation” revolution in Israel, as a tale of a broken dreams and unfulfilled promises. He writes about the failure of the mediation revolution and the abandonment of the concept of mediation as a vehicle for social and cultural change as courts develop mediation substitutes within the court system. With an increasing backlog of cases and pressure from the media and bar association, clearing the docket has become the first priority of court administrators.
IV. RETURN TO CONSENT

We should not separate consent from mediation. I propose a return to a consensual understanding of mediation, so that we may recover at least plausible account mediation’s joy, and its powerful connections to human dignity. Hopefully, this will attract potential users to engage with her once again. Mediation is a voluntary process based on party self-determination. Acknowledgement of this first principle honors the consensual nature of mediation both at entry into the process, during the process and at the outcome.

Pushback from potential users is often the result of unwanted pressure. Some parties’ discomfort with mediation comes from being pressured into participation. Coercion appears in many disguises—from telling parties that mediation is an automatic part of the litigation process to imposing costs and fees if they refuse to mediate. Non-consensual mediation may help to clear dockets, but it is a poor substitute for the real thing. It compromises a party’s ability to influence how her dispute is resolved, and may minimize the potential for meaningful settlement. There is some research which shows that cases are more likely to settle at mediation if the parties enter into the process voluntarily rather than being pressured into the process.

A. Court Mediation

Court-connected programs have been a breeding ground for non-consensual mediation practices with variations of mandatory

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49 Not all parties share this view, however. In an IMI survey of in-house counsel and senior managers in North America and Europe, nearly half the respondents stated that mediation should be a mandatory step in both arbitration and litigation. IMI International Corporate Users ADR Survey, Int’l Mediation Inst. (Apr. 4, 2014), available at http://imimediation.org/imi-international-corporate-users-adr-survey-summary.

50 See Donna Shestowsky, Disputants’ Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and We Know So Little, 23 OHIO ST. J. ON DISP. RESOL. 549, 550 (2008).

51 Genn, supra note 35, at 406.
regimes operating in many countries.\textsuperscript{52} In the United States, for example, courts have upheld programs where parties may be required to participate in mediation\textsuperscript{53} while England has adopted a more indirect approach through the imposition of costs.\textsuperscript{54} In the seminal case of \textit{Halsey v. Milton Keynes General NHS Trust}, Lord John Dyson considered the question of whether courts could compel unwilling parties to mediate and he concluded that while courts could not force unwilling parties to mediate, they could use robust means to encourage mediation.\textsuperscript{55} Thus, parties who unreasonably refused to mediate could be liable for costs.\textsuperscript{56} \textit{Halsey} generated much debate over the merits of compulsory mediation with courts extending its principle to refusals to negotiate, delays in agreeing to mediate, and taking unreasonable positions in mediation.\textsuperscript{57} Ten years after the \textit{Halsey} decision, Lord Dyson reflected on the normative question of whether courts could order parties to mediate. His response is instructive on the issue of consent:

\[ \text{[T]he real question is not whether or not a power exists to order mediation. Rather it is whether the court should exercise that power. Ten years on, I remain in the “carrot” camp; it is one thing to compel parties to consider mediation; it is another to frog march them to the mediation table and deny them access to the courtroom if they refuse to participate in the mediation.} \textsuperscript{58} \]


\textsuperscript{54} This has resulted in much litigation with parties challenging the validity of their consent to participate in mediation. See Jacqueline M. Nolan-Haley, \textit{Mediation Exceptionality}, 78 Fordham L. Rev. 1247, 1256 (2009); Jacqueline M. Nolan-Haley, \textit{Is Europe Headed Down the Primrose Path with Mandatory Mediation?} 37 N.C.J. INT’L & COMP. REG. 981, 999–03 (2012).


\textsuperscript{56} The \textit{Halsey} court offered a non-exhaustive list of six factors in determining the reasonableness of a party’s refusal to participate in mediation: (1) the nature of the dispute; (2) the merits of the case; (3) the extent to which other sentiment methods have been attempted; (4) whether the costs of the ADR would be disproportionately high; (5) whether any delay in setting up and attending the ADR would have been prejudicial; and (6) whether the ADR had a reasonable prospect of success. \textit{Id.}


\textsuperscript{58} Lord Dyson, Belfast Mediation Conference: \textit{Halsey 10 Years On-The Decision Revisited} 11 (May 9 2014) (on file with the author).
B. International Mediation

Forced mediation has the trappings of arrogance, one of the seven deadly sins of mediation described by UN diplomat Lakhdar Brahimi.\(^{59}\) In the context of resolving international conflicts, meaningful mediation requires consent,\(^{60}\) and lack of voluntariness in mediation has been considered morally problematic.\(^{61}\) Consent is an integral aspect of mediator ethics codes,\(^{62}\) rules,\(^{63}\) and policy documents. The UN Guidance for Effective Mediation, for example, identifies consent as a crucial ingredient, noting that—“[t]he success or failure of a mediation process ultimately depends on whether the conflict parties accept mediation and are committed to reaching an agreement.”\(^{64}\) Certainly, where usage is low, we need to find new ways to motivate parties to use mediation.\(^{65}\) But, at the same time, we need to understand that there may be cultural reasons why mediation will not be a good fit in some cases.\(^{66}\)

\(^{59}\) Lakhdar Brahimi & Salman Ahmed, Ctr. on Int’l Coop., In Pursuit of Sustainable Peace: The Seven Deadly Sins of Mediation (2008). In addition to arrogance, Brahimi lists ignorance, partiality, impotence, haste, inflexibility and false promises. Id. at 5–11.

\(^{60}\) See Jacob Bercovitch, Theory and Practice of International Mediation 29 (2011) (claiming that “effective mediation requires consent, high motivation and active participation.”).

\(^{61}\) See Lea Brilmayer, Daniel J. Meador Lecture: America: The World’s Mediator, 51 Ala. L. Rev. 715, 717 (1999). With reference to the role of the United States as mediator in international conflicts, Brilmayer writes “What seems to be a mutual acceptance of the process and outcome of mediation is frequently coerced, to a greater or lesser degree.” Id.


\(^{63}\) See, e.g., IBA Rules, supra note 7, at art. 8(2) (“The mediator shall assist the parties to reach an agreement on a settlement of their dispute on a voluntary basis in which the parties make free, informed and self-determined choices as to the process and the outcome, . . .”).

\(^{64}\) United Nations Guidance, supra note 12, at 23. It defines mediation as a “voluntary endeavor in which the consent of the parties is critical for a viable process and a durable outcome.” Id.

\(^{65}\) A study from the Netherlands shows that mediation is not a one size fits all process and that success depends upon whether there is an appropriate analysis of the type of conflict. Genn, supra note 35, at 10 (citing Machteled Pel, The Hague, Referral to Mediation: A Practical Guide for an Effective Mediation Proposal pt. 1 (2008)).

\(^{66}\) E.g., In Ghana, parties reject what they consider the “compromise values” of mediation, particularly when it comes to highly valued assets such as land. Nolan-Haley, Mediation and Access to Justice in Ghana, supra note 8.
V. CONCLUSION

Once consent is restored, it may be possible to recover an account of the joy of mediation. This is an intentional task that will require imagination, memory and reflection. We need to remember:

1. what Lon Fuller told us about mediation’s capacity to realign relationships;\textsuperscript{67}
2. that mediation offers relief from a somewhat rigid, rules-bound justice system just as equity offered relief from the common law;\textsuperscript{68}
3. that mediation as a process has some powerful capacities—to acknowledge emotions and to respect the psychological and spiritual needs of the parties, including the need to reconcile, to forgive and to be forgiven; and finally
4. that mediation provides opportunities to honor human dignity.

We all know stories about the joy that mediation can bring to parties. Consider the accounts that many of our colleagues in this Symposium have written about the powerful stories that mediators tell,\textsuperscript{69} the transformative effects of empowerment and recognition,\textsuperscript{70} and the procedural justice benefits that accompany mediation.\textsuperscript{71} For many of us, it was a certain joy that brought us to mediation in the first place. If we can recover a renewed account of that joy, I believe that mediation will arise from her slumber and parties will be motivated to engage in the process. This will not happen while the value of consent remains an imaginary part of the mediation process. A new dawn will rise when consent in mediation is for real.

\textsuperscript{68} Nolan-Haley, Mediation Exceptionality, supra note 53, at 1250.
\textsuperscript{69} E.g., Stories Mediators Tell (Eric R. Galton & Lela P. Love eds., 2012); See also Daniel Bowling & David Hoffman, Bringing Peace into the Room (2003).
\textsuperscript{70} Robert Baruch Bush & Joseph P. Folger, The Promise of Mediation (2d ed. 2005).
The Challenge of Keeping Mediation Vibrant

By Rebecca Price and Margaret Shaw

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MARGARET SHAW: Rebecca, I’m delighted that you’re here to talk with me about mediation and the differences between our generations, as they say, which makes me feel very old.

REBECCA PRICE: Makes me feel very young!

SHAW: When did you get into mediation, and how did you get into the field?

PRICE: It’s about nine years ago now, in reaction to increasing dissatisfaction with being a litigator. I had been doing disability law work. I found that even with a highly, highly, client-centered approach to litigating, the litigation process, just by design, excluded the participation of the people to whom it mattered most. I went to the Safe Horizon Mediation Program [now the New York Peace Institute]. The idea of a process where self-determination was so central completely resonated for me. How about you?

SHAW: It was really serendipity for me. After law school I had gone to work for a big Wall Street law firm. Then I got pregnant and decided that I really wanted to spend time at home with my baby. In 1990, I worked with the Children’s Aid Society to create a parent-child mediation program that eventually expanded throughout the city. I became a real fan of mediation, with its humanity and emphasis on self-determination. Some years later, three of us decided to form our own mediation firm. Perhaps because all of us were women, we got wonderful coverage in the New York Law Journal, and we were off and running.

PRICE: One big difference in terms of our entries into mediation is that my own entry really started with training. You entered with action. A shared experience for many mediators of my generation is that it is very hard to become active. At this point, there are
way more people who want to mediate than there are cases. My early years were really a huge mix of excitement and frustration, because I felt so many doors were closed.

SHAW: Yes. I agree that it is a lot harder now to get into the field and develop a practice, particularly with so many people looking to become mediators after law firm cutbacks.

PRICE: There’s such exhilaration that comes with learning this stuff, and there often is a letdown when people realize that there isn’t a linear path to actually doing mediation, particularly for pay. For attorneys, that’s an even harder pill to swallow. A lot of what I do is to lower people’s expectations — I often say, “I don’t know you, and maybe you’re a rainmaker. If you are, terrific. If you’re not, this is definitely a marathon. It’s not a sprint.” And I think that’s a big difference from when you entered the field.

SHAW: Yes. It was a different time. Mediation was so novel back then. People wanted to try it, and courts were starting to initiate mediation programs. Sometimes I think we need to invent a new alternative to this alternative! This leads me to ask: where do you think this whole field is going at this point?

PRICE: Well, I can tell you where I hope it will go, which is that we find ways to institutionalize it more. I actually think that court-based programs can provide a lot to the mediation community. If we’re setting standards for practice and encouraging or sending people automatically into mediation, I think those are good things.

SHAW: I agree with you, and I guess I would add that while the quality level of mediation is very high these days, I rue the fact that it has become so heavily evaluative. Less time is spent trying to understand people’s needs and interests and trying to be creative about resolutions.

PRICE: Do you have a sense or a perspective about what kinds of knowledge or experience are essential if you want to have a career as a neutral?

SHAW: It probably goes without saying: if you’re going to do mediation in the legal context, it helps to have knowledge of the law. I find that here at JAMS, especially as mediation has gotten more sophisticated, practice specialties can be helpful. I can’t get over thinking that actual mediation experience, sitting in, doing sort of a mentorship, can really help. One of the things that I would really hope stays consistent in this field is that mediators have different styles. People have said to me, “I chose you because you’re X, or I want to use so-and-so because they’re Y.”

SHAW: Changing topics, how would you define the similarities and differences between generations?

PRICE: I have to say what I’ve been most struck by, as I’ve come to have the privilege of getting to know your generation a little better, is the sense of wanting to create community among yourselves in different ways. For example, you have been part of a women mediators’ group that has met monthly for years. These groups are not for the purpose of advancement or networking in a kind of conventional sense. They arise from a real desire to create quite deep connections that run between people.

SHAW: Right. I mean, there are meetings of professional associations where people attend lectures, but that’s very different.

PRICE: Do you see generational differences in mediation?

SHAW: One of the things that I see is that just a normal part of the evolution is an expansion of styles of mediation, which is good in the sense that people can choose a style that they think is going to be appropriate for their case. I think for me, a downside, as mediation has gotten more popular, is that there

“A shared experience for many mediators of my generation is that it is very hard to become active. At this point, there are way more people who want to mediate than there are cases. My early years were really a huge mix of excitement and frustration, because I felt so many doors were closed.

—REBECCA PRICE”
is often exclusive focus on settlement itself. When my generation went into mediation, we were very idealistic in the sense of the full potential of mediation, promoting understanding and creative solutions, not just focusing on numbers.

PRICE: What immediately popped into my head when you were saying that was that now people may be put into situations where they feel they have to choose between their idealism and their paycheck. When you started, did you feel that there was that tension? Were you ever in a situation where parties wanted someone highly evaluative, or to do a caucus-only model, and they were only going to pay you to do that? Was that tension there when you were starting? Or did you feel that you could both be idealistic and have a career?

SHAW: I'm not quite sure how to answer that because of the way things have gradually evolved. In my pre-mediation call, I always ask about whether parties want to do a joint session, and I give a pitch for it. If they say no, I'll accept that. That's just fine. Then when I have everybody in the room, if I see an opening, that there are two people that really would benefit from getting together, I will suggest it. I'm always looking for that. I always say in my opening statement, "You know, in mediation we can talk about the issues and resolve them whatever way makes sense and be as creative as we choose."

PRICE: And, if you really hold party self-determination to be sacred, and people choose to do a different kind of process, then you want to respect that choice.

SHAW: Exactly.

PRICE: In terms of the generational difference, one of the things that strikes me as I'm listening to you is that you have your reputation and credibility already, and people come to you because of that. Maybe that's something you had 40 years ago, and maybe that's something that you've built over the course of your career, whereas with newer mediators, who knows what people's assumptions are? You have to cut your teeth and prove yourself on each case. You want to demonstrate that you're adding value, and the challenge is to figure out how to do that with integrity.

SHAW: Another difference, a stark difference that's sort of implicit in all the things that we've said, is that when I started out, there were not too many mediators except in the labor management area. Now there are, and with law firms going under, the field is flood- ing. It's harder to keep mediation vibrant, as opposed to formulaic. It's also harder to get into the field and be successful. What advice would you have for the generation after you?

PRICE: There are a lot of different ways to access this kind of work: through law, through restorative justice practices, through international work. If I met somebody from the next generation and they said, "What do you think?" I would say, "Cast a really wide net. Don't define yourself or your interests too early. Try everything." I would really encourage people not to think that there's only one way, if what they really have a passion for is doing conflict resolution work. How about you? I could use some advice from the first generation of mediators.

SHAW: I guess I'm sort of tempted to say something like, "Training is essential, but then figure out who you are personally and what you bring to the process. Don't copycat somebody else. You have to figure out what your approach is, what you do best, and be proud of it, stick with it, and do it." I would also say, "It's very intense work. If you're going to be a full-time mediator, it's helpful to have some well-honed places to have fun, because if you don't come to cases fresh, it's tough."

PRICE: That's really good advice.

SHAW: Mediators have a big influence on the process. Your presence, who you are, it's a very big influence, for better and for worse. I guess the only other thing I would say, Rebecca, and I know you'd agree with this, is that even if someone is not planning to be a full-time mediator, the skills and the training are so valuable for just being a human being.

PRICE: Absolutely.

SHAW: It opens windows rather than closes them somehow.

PRICE: It does.
Resuscitating Mediation. How Lawyers and Mediators Can Revitalize the Mediation Process

PRESENTED BY:
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1. Different Approach to Representation

This text serves one goal: to provide a comprehensive approach to representing clients in mediation. Although much has been written on the mediator’s role in facilitating problem-solving negotiations and many mediators have been trained as problem-solvers, surprisingly little attention has been paid to the role of attorneys. Attorneys can and should be zealous advocates in mediation. This text shows you how.


3. Even though I could not find a rigorous study of the approaches taught in mediation training programs, I came across ample anecdotal evidence that suggests that many, if not most, training programs teach mediators the interest-based or problem-solving approach. This approach is taught in many court-connected programs, by many private trainers, and at Harvard Law School (where Professors Fisher, Sander, and Mnookin train negotiators and mediators from around the world). Of course, other approaches are taught and followed, like transformative mediation, although mediators who learn other approaches also tend to be familiar with the widely taught problem-solving approach.
The problem-solving approach and style presented in this book is tailored to realize the full benefits of the mediation process, a dispute resolution option that offers you access to the other side and a neutral third party, the mediator. The mediator's sole purpose is to assist the disputing clients and their attorneys to resolve the dispute.

The mediation process is indisputably different from other dispute resolution processes such as arbitrations and judicial trials, where the third party makes decisions. The positional strategies and techniques that have proven effective in these other forums do not work optimally in mediation. The familiar partisan strategy of presenting your strongest arguments and aggressively attacking the other side's case may be effective when each side is trying to convince a judge to make a favorable decision. But in mediation there is no third-party decision maker, only a third-party helper. The third party may not even be your primary audience. The primary audience may be the other side, who surely is not neutral, can often be quite hostile, and ultimately must approve any settlement. In this different representational setting, the approach commonly used in adjudicatory proceedings can be less effective if not self-defeating.

You need a different representation approach for this burgeoning and increasingly preferred forum for resolving disputes. Instead of advocating as a zealous adversary, you should advocate as a zealous problem solver, a strategy that has been shown in various studies to be more effective.

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4. “Approach” refers to your underlying stable structure for representation; “style” refers to the mix of techniques that you choose to use and is independent of the approach, as will be examined in Chapter 1, on negotiations.

5. For a more complete definition of mediation as well as an explanation of the process, see Chapter 2, “Familiarizing Yourself with Mediation.”

6. For readers less familiar with the critical distinctions between mediation and arbitration, remember that arbitration is like a court where a third party adjudicates the dispute and renders a decision, although the parties usually select the third party. Mediation is a negotiation process where the parties are assisted by a third party. The mediator has no decision making power over the parties.

7. For a discussion on selecting your audience, see Section 5.10, “Select Your Primary Audience in Mediation.”

8. See Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. Empirical Legal Stud. 459, 459 (2004) (In this study, the author preliminarily documented that while the number of federal lawsuits filed has increased, the number of trials has decreased, from 11 percent in 1962 to 1.8 percent in 2002, with comparable trends in the state courts. One of the documented replacements for trials is mediation.); John Lande, Getting the Faith: Why Business Lawyers and Executives Believe in Mediation, 5 Harv. Negot. L. Rev. 137 (2000).

9. See Roselle L. Wissler, Representation in Mediation: What We Know from Empirical Research 37 Fordham Urb. L.J. 419, 433-434, 447, 457, 459, 470 (2010) (How clients are represented can affect the way parties assess mediation and the likelihood of settlement, with better preparation and a less adversarial approach increasing the likelihood of settlement. However, the article does point out the need for more empirical research on the “effect of how representation is carried out.”); Andrea Kupfer Schneider, Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style, 7 Harv. Negot. L. Rev. 143, 196 (2002) (In an extensive study of negotiation styles, 75 percent of true problem-solving negotiators were considered effective as compared with less than 50 percent of adversarial bargainers, a percentage that shrank to 25 percent for adversarial bargainers who were unethical.); Robert H. Mnookin, Scott R. Peppet & Andrew S. Tulumello, Beyond Winning: Negotiating
The prominent Schneider study of effective negotiation styles concluded:

Only 9% of those lawyers seen as adversarial were rated as effective by their peers and only 9% of all effective lawyers were described as adversarial. Furthermore, 90% of lawyers perceived as ineffective were also adversarial. In contrast, 91% of lawyers seen as effective took a problem-solving approach to negotiation. More than half of problem-solving lawyers were seen as effective and only 4% of these problem-solving lawyers were seen as ineffective. Contrary to the popular (student) view that problem-solving behavior is risky, it would seem instead that adversarial bargaining represents the greater risk. A lawyer is much more likely to be viewed as effective when engaging in problem-solving behavior.10

Within the smaller group of effective adversarial negotiators, Schneider’s study further revealed that the more adversarial the style, the less effective the negotiator becomes.11 In short, her empirical study rejected “the myth of the effective hard bargainer”12 while endorsing the effectiveness of the problem-solving style.

Even though many sophisticated and experienced litigators realize that mediation calls for a different plan, they still muddle through the mediation sessions guided by familiar strategies that have worked well in other forums, like arbitration and court. Many attorneys even prefer a problem-solving–type method to negotiations,13 although they may be unsure how that method translates into advocacy. Most senior attorneys have never taken a course on dispute resolution. They went to law school either before such courses were offered or before they became popular. And the alternative dispute resolution or mediation courses offered over most of the last 30 years have been largely limited to teaching students to be mediators, not advocates.14 Although numerous continuing legal education programs are now widely available, they seem to be limited to sharing anecdotal experiences and personal advice.

10. Schneider, supra note 9, at 167.
11. Id. at 189-190 (When comparing the results of the 1983 Williams study with the results of her study, Schneider learned that adversarial negotiators have become more adversarial and far less effective.).
12. Id. at 196.
13. See Milton Heumann & Jonathon M. Hyman, Negotiation Methods and Litigation Settlement Methods in New Jersey: “You Can’t Always Get What You Want”, 12 Ohio St. J. on Disp. Resol. 253, 309 (1997) (“While 61% of the lawyers would like to see more problem-solving negotiation methods, about 71% of negotiations are carried out with positional methods instead.”).
But new educational opportunities are taking shape. Many more U.S. law schools have begun offering mediation advocacy courses in small classes during the last eight years;\(^{15}\) law students can participate in mediation representation competitions, which are flourishing in the United States and globally;\(^{16}\) and lawyers can enroll in one of a scattering of intensive performance-based training programs.\(^{17}\) Unfortunately, practicing lawyers generally do not seem convinced of the need for formal training until they participate in a program and see firsthand what they do not know and what would be helpful to learn, as I have observed repeatedly. These training programs have not yet reached the maturity of trial practice trainings that are almost prerequisites for entering the courtroom. The value of trial practice training took years to be fully appreciated and embraced. Mediation advocacy training programs seem to be following a similarly measured path toward wide use.

In the absence of formal trainings, advocates learn on the job. It is rare that a practicing attorney will show up in U.S. mediations without some mediation experience, and those without any are likely to be embarrassed to say so. As many experienced mediators as well as advocates report, mediation practices may be reaching a point of “routine” where the process no longer feels novel and instead has become predictably scripted. I have heard full-time mediators report that they strive to keep the process fresh in order to keep the participants energized, engaged, and creative.

Even though advocates have gained considerable experience, and practices are solidifying in the United States, the skills of many attorneys seem strikingly unsophisticated, as I have heard from numerous mediators and observed in trainings. Practices do not routinely incorporate a nuanced understanding of how to select a suitable mediator, take full advantage of

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\(^{15}\) Although no survey has been compiled, when the first edition of this text was published in 2004, only a handful of law schools were known to offer a separate course on mediation advocacy. As of 2009, more than 35 law schools offered the course based on the adoptions of the first edition, and there are other courses using other books, but it is unclear how many. These courses tend to be small classes of around 24 or less. Furthermore, separate courses on mediation and ADR include segments on mediation representation, as reflected in the addition of materials to recently published mediation and ADR textbooks. Live mediation advocacy clinics also are now being offered by a number of law schools according to a 2013 survey by Alyson Carrel. See HYPERLINK http://www.law.missouri.edu/dri/adr_programs.html.

\(^{16}\) For a brief description of the competitions sponsored by the American Bar Association and the International Chamber of Commerce in Paris, see Appendix J, “Mediation Representation Competitions Judging Criteria.” Also, in 2008, a national competition was launched for Canadian law schools. Since then, it has expanded to become an international competition.

\(^{17}\) For example, NITA launched a national mediation advocacy training program that I helped design after conducting a pilot training in 2006 for them. The ABA Section on Dispute Resolution conducts an Advanced Mediation and Advocacy Skills Training Institute, which is held each year in a different region of the United States. And the CPR International Institute for Conflict Prevention and Resolution occasionally offers a mediation and mediation advocacy training program. Some law schools, like Pepperdine, offer intensive courses to practitioners. I also have conducted training programs for law firms, courts, and bar associations locally and abroad.
premediation contacts with the mediator or the other side, present effective opening statements, and optimally utilize the choice between joint sessions and caucuses. Training in mediation advocacy is needed, including training that accounts for the considerable practical experience of attorneys.

This text offers a comprehensive approach for improving your advocacy skills, an approach that applies from your first client phone call until the mediation process is concluded. During the course of your representation, you have numerous strategic choices to make, choices that are highlighted and analyzed in each chapter.

This text adopts a broad definition of problem solving that includes resolving disputes that are primarily about money—the classic distributive conflict. I feel a need to emphatically stress that it includes resolving distributive disputes for those readers who are inclined to dismiss problem solving for cases that are all about money—a point that will be more fully addressed in this section and in Chapter 1, on negotiations.

As a problem solver who is creative, you do more than try to settle the dispute. You try to locate the best possible resolution for your client. You search for solutions that go beyond the traditional ones based on rights, obligations, and precedent. Rather than pressing for win-lose outcomes, you search for solutions that might benefit both sides and therefore might be acceptable for settlement. You develop a collaborative relationship with the other side and the mediator, and participate throughout the process in a way that may produce solutions that are inventive as well as enduring. Inventive solutions may be uncovered because you advocate

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19. Many lawyers consider the idea that both sides can secure benefits as naive. However, the notion that both sides might be able to gain something in negotiations reflects an optimistic attitude that can open the mind to creative possibilities. The likelihood of finding such gains in negotiations is greater than in court. In negotiations, for instance, even the defendant who agrees to pay considerable damages may gain other benefits, such as no publicity, no precedent, and a continuing business relationship—benefits that are usually unavailable in court.

I refer to solutions that can benefit both sides in an effort to avoid using the more familiar and overused “win-win” jargon. That jargon carries baggage that can blind people to an underlying valuable point that still retains considerable vitality. The win-win attitude can be usefully contrasted with the win-lose attitude to capture a fundamental difference between the problem-solving and adversarial approaches.
your client’s interests instead of legal positions,20 listen attentively and proactively,21 use sophisticated techniques for overcoming impediments, create multiple options, and evaluate and package those options to meet interests of both sides. You avoid derailing the search when resolving any distributive issues by applying claiming techniques suitable for problem solving.22 Enduring solutions, whether inventive or not, are likely because both sides work together to fashion tailored solutions that each side fully understands, can live with, and knows how to implement.

In this pitch for a problem-solving approach and style, I do not blindly claim that it is the only one that results in settlements. Attorneys frequently cite success stories, even spectacular ones, when they use hard positional tactics or a hybrid of switching between adversarial and problem-solving strategies.23 I do claim, however, that the problem-solving method is more likely to produce consistently better results for your clients.

For problem-solving advocacy to be effective in practice, you should engage proactively in problem-solving strategies at every stage of representation. The sort of practical initiatives that are illustrated throughout this text should be used from the moment you interview your client and followed when calling the other attorney about trying out mediation, selecting the mediator, participating in premediation conferences, preparing any premediation submissions, presenting opening statements, and participating in joint sessions and caucuses.

You should avoid the hybrid method despite the claims of supporters that it is the best one due to its flexibility. You should not let the appeal of flexibility mask the inconsistency it promotes. Shifting between hard positional strategies and creative problem-solving ones during the course of mediation can undercut the problem-solving method. For instance, a hard positional move such as a take-or-leave it bluff can thwart integrative searching moves of sharing information to uncover fresh options for settlement.

You should be a persistent problem solver. It is relatively easy to engage in simple problem-solving moves such as responding to a demand with the question “why?” in order to bring to the surface the other party’s interests. But it is much more difficult to stick to this method throughout the mediation process when faced with an adversarial opponent. Trust the problem-solving approach and style. When the other side engages in adversarial tactics or tricks—a frequent occurrence in practice—you should react with responses that might convert the other side into a problem solver.24

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20. For a full discussion of how to identify client’s interests as opposed to positions, see Section 3.2(a).
21. See Appendix F, on cultivating information.
22. See Sections 1.2 and 1.3, on claiming techniques.
23. In the hybrid approach, attorneys switch between the two distinct approaches, depending on how the mediation is unfolding.
24. See infra Section 1.7, “Converting the Positional Negotiator into a Problem Solver.”
You should even strive to create a problem-solving process when your mediator does not.25 Your mediator may fail to follow this method (despite professing to) because he lacks the depth of experience or training to tenaciously maintain a consistent approach throughout the mediation process. Or your mediator may candidly disclose his practice of switching methods based on the needs of the parties—a philosophy that I have already suggested undercuts the problem-solving approach and style. Or your mediator may follow a recognized alternative method like an evaluative, transformative, or wisely directive one.26 This book provides a framework for responding to different practices of mediators.

Finally, I should respond directly to the skeptics who think that problem solving does not work for most legal cases because they are primarily about money. Plaintiffs want only money, and defendants want only to pay the least amount possible. They see no potential to uncover creative solutions. For the skeptics, I offer a four-part response.

First, the endless debate about whether or not legal disputes are primarily about money is distracting. Whether a dispute is largely about money varies from case to case, as experience and studies have demonstrated.27

Second, you have little chance of discovering whether your client’s dispute is about more than money if you approach the dispute as if it is only about money. Such a preconceived view backed by a narrowly focused positional strategy will likely blind you to other parties’ needs and inventive solutions. You are more likely to discover creative solutions if you approach the dispute with an open mind.

Third, if the dispute or any remaining issues at the end of the day turn out to be predominantly about money, then at least you followed a representation approach that may have created a hospitable environment for

25. You can reduce these risks by selecting the right mediator. See infra Sections 4.2-5.
26. See infra Section 5.3(b).
27. See Tamara Relis, “It’s Not About the Money!” A Theory on Misconceptions of Plaintiffs’ Litigation Aims, 68 U. Pitt. L. Rev. 701 (2007). In an empirical study of medical malpractice cases, the author uncovered a stark discrepancy between what attorneys for plaintiffs and defendants think clients want—money—and what clients in fact want—such extra-legal remedies as the defendant’s admitting fault, prevention of recurrences, explanations, and apology. Id. at 701-702. She concluded that plaintiffs’ extra-legal aims “remained invisible to virtually all lawyers.” Id. at 702. For Professor Relis’s full study, see Tamara Relis, Perceptions in Litigation and Mediation: Lawyers, Defendants, Plaintiffs, and Gendered Parties ch. 2 (2009). See also Dwight Golann, Is Legal Mediation a Process of Repair—or Separation? An Empirical Study, and Its Implications, 7 Harv. Negot. L. Rev. 301, 334 (2002) (In one of the few empirical studies on the subject, the author found that “almost two-thirds of all [mediated] settlements . . . were integrative in nature . . . The results suggest that both mediators and advocates should consider making a search for integrative outcomes an important aspect of their mediation strategy.”).

At least one category of disputes is usually primarily about money. The classic personal injury dispute between strangers who will never deal with each other again can be only about money and is therefore not open to creative resolutions other than a tailored payment scheme. But, even in these disputes, one side may occasionally want something more than money, such as vindication or fair treatment.
dealing with the moneyed issues. A hospitable environment can be beneficial even when there is no expectation of a continuing relationship between the disputing parties.

Fourth, and most important, the problem-solving approach and style provide a framework for resolving moneyed issues. These types of disputes can sometimes be resolved by using the familiar problem-solving claiming techniques of trading benefits and applying objective standards. The framework also includes using the traditional positional dance, although a version suitable for a problem-solving process that relies on justifications and conventional tactics while avoiding tricks.28

These points were illustrated in a case that I mediated where the parties arrived with only monetary claims on the table, a long history of frustrating and failed negotiations, and a case that was ready for trial. After more than three hours of structuring and applying a problem-solving approach and style to the mediation, the parties and attorneys discovered that the parties had much in common as founders of successful family businesses, that the fraudulent claims arose due to a rogue employee, and that each party had unmet, nonmonetary needs. The plaintiff was upset that any reputable business person would perpetrate such a fraud, and the defendant was losing business due to the claims in the litigation. With the benefit of an improved understanding of each side’s perspective and the facts, they proceeded to negotiate a written apology by the defendant and a written introduction to future buyers by the plaintiff. In this collaborative environment, they then confronted the remaining monetary issue and settled it in less than a minute! They quickly and civilly exchanged a few offers and counteroffers. The parties were apparently already on the same page for settling the money claim, but could not do so until some nonmonetary needs were met.

Skeptics also frequently inquire whether this method will work if the other side has not read this book. The answer is yes, it can, as will be illustrated in each chapter. And I will go one step further. Even if the other side has read this book or any other one on problem solving and has firmly rejected the method, the representation framework still offers guidance on how to proceed. This book will show you how to represent your client in the face of an aggressive and well-honed, adversarial other side. You will learn settlement strategies for trying to convert the other side into a problem solver and coaxing the mediator to help in the conversion. In case nothing works in the mediation, you also will learn to diagnose the reasons for the impasse as well as identify alternatives to the mediation process that might work.29

In short, the problem-solving approach and style provide a complete and effective framework for representation that offers a pathway through

28. See infra Section 1.3, “Problem-Solving Approach: Key Features.”
29. See infra Chapter 8, “Alternatives to Mediation.”
the mediation process. Within the parameters of this framework, you have many choices to consider and assess for your case—choices that are highlighted throughout the text. For the experienced advocate, you also have the opportunity to reflect on and evaluate your current choices while expanding the number of options for you to choose from. By adhering to the overall method in this text, you will be prepared to thoughtfully and effectively deal with the myriad unanticipated challenges that inevitably arise as the mediation unfolds.

2. Framework for Advocacy: The Mediation Representation Triangle

The approach in this book offers mediation advocates an alternative to relying on ad hoc, intuitive strategies as the mediation process unfolds. It offers a comprehensive and coherent framework that is configured into a Mediation Representation Triangle.

The triangle provides a fitting metaphor because of the inherent interdependence of the three sides. If one side is missing or weak, the entire structure collapses. When each side is strong, the three-sided structure provides a sturdy and reliable framework.
The Mediation Representation Triangle links three key features for effective representation: You need to effectively negotiate, enlist mediator assistance, and plan your representation. These three features form the three sides to a triangle and are interdependent. If you negotiate poorly, enlist the mediator ineffectually, or develop a weak representation plan, you will fashion a wobbly framework for mediation advocacy. If you do all three well, you will erect a sturdy one. You can remember these three features by remembering that you need to “negotiate with a MAP” (negotiate with mediator assistance and a Plan).

The first side of this structure focuses on your primary role as a negotiator. Mediation is simply the continuation of the negotiation with the assistance of a third party, as is so often remarked. So first and foremost, you need to give attention to how to negotiate effectively in the mediation. Do you want to primarily problem-solve or primarily be positional? The problem-solving negotiation method is developed in this book, and it is compared and contrasted with the more familiar positional method, a strategy popular among many U.S. trial lawyers as well as parties from bargaining cultures. The differences between the methods are reflected in the different beginnings, strategies, and likely outcomes. Your choice is a vital one when you are representing clients in mediation.

The second side of this structure focuses on the second central feature of mediation advocacy—enlisting mediator assistance. You are in mediation. So what can the mediator contribute to resolving the dispute? As an advocate, you need a nuanced understanding of what mediators are trained to do and what they actually do in practice. Your understanding will profoundly affect how you represent your client—a point that will be accentuated throughout the book. As the mediation unfolds, you should enlist the mediator to contribute what you think would be most helpful in resolving your client’s dispute.

The third side forms the base for the triangle—your mediation representation plan. As you formulate your negotiation approach and find ways to enlist help from the mediator, you need to develop a consistent and complete plan for effective representation.

30. See infra Chapter 1, “Negotiating in Mediations.”
31. See Sections 2.3-8, on what mediators can contribute, and Sections 5.3-5, on the impact of the mediator’s contributions on your representation.
32. See infra Chapter 5, “Preparing Your Case for Mediation.”
Your plan should further three goals, which can be configured into a planning triangle. You should advance your client’s interests, overcome any impediments, and share necessary information while minimizing the risk of exploitation. These three interdependent I’s make up the three sides of another triangle. These three I’s shape every detail of your plan. If your plan fails to further any of these three goals, you will form a weak triangle and plan. If your plan advances all three goals intelligently, you will fashion a sturdy one to guide your representation.

The first I, interests (first side of triangle), encapsulates the primary goal of any plan—to meet your client’s interests. Viewing a dispute through the lens of your client’s interests can dramatically transform your view of the dispute. Because the powerful concept of interests is not always accurately understood, it will be fully developed and applied repeatedly in this book. Any plan should effectively advocate your client’s interests; that is your bottom line.

The second I, impediments (second side), considers the reason that you are in mediation. You are likely to be in mediation because an impediment is blocking a negotiated settlement. Any plan should focus on how to negotiate with the assistance of the mediator to identify and overcome any impediments.

The third I, information (base of triangle), covers what information to gather, disclose, and withhold. Sharing information can help participants understand each other’s interests and the impediments as well as help uncover better solutions. But sharing poses a risk of exploitation. When

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33. See infra Section 3.2(a).
34. This goal of meeting interests is different from the goals in what has become known as “transformative mediation,” in which mediators focus on “empowerment” of parties and parties’ “recognition” of each other. See generally Robert A. Baruch Bush & Joseph P. Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (1994).
35. See infra Sections 3.2(b), 5.6(a).
the other side knows that something is important to you, for instance, they may try to extract a high price for giving you what you want. You need to resolve this notorious tension when considering what to share\textsuperscript{36} and elicit from the other side.

Any plan should be implemented at each of six key chronological junctures in the mediation process. You should advance your client’s interests, overcome impediments, and share and gather information consistently at each juncture. You want to take thoughtful advantage of the opportunities offered at each one. The six key junctures that are fully developed in the book are as follows.

\textbf{Juncture 1: Selecting a Mediator}\textsuperscript{38}

You first should assess what mediator training, orientations, and experiences would help you resolve the dispute, given the interests you want to advance and the impediments that you need to overcome. And then you should select a mediator suitable for your dispute, realizing that how the mediator approaches the mediation will shape how you represent your client during each of the remaining five junctures.

\textbf{Junctures 2 and 3: Premediation Conference and Submission}\textsuperscript{39}

At each of these premediation opportunities, you want to consider how the mediator might be helpful and what information you can safely share with the other side or the mediator. Premediation conferences are usually held between the attorneys and the mediator. Premediation submissions are materials that you send to the mediator, and sometimes to the other side, before the mediation session.

\textsuperscript{36} See infra Sections 1.3(b), 5.6(a).

\textsuperscript{37} See infra Section 5.6(b). The term \textit{junctures} is used to identify points in the process of representation when you should focus on staying in a problem-solving mode. Junctures and stages, however, do overlap.

Three of the six key junctures arise before the first mediation session: (1) selecting a mediator, (2) preparing premediation submissions, and (3) participating in a premediation conference. The other three junctures arise in the mediation session: (4) presenting opening statements, (5) participating in joint sessions, and (6) participating in caucuses.

The mediation representation framework also applies during other junctures in mediation representation. You should engage in problem solving to advance interests and overcome impediments in a way that takes advantage of the availability of a mediator when (1) initially interviewing your client, (2) approaching the other attorney about the use of mediation, (3) preparing your client, and (4) drafting a settlement agreement or developing an exit plan from an unsuccessful mediation.

\textsuperscript{38} See infra Chapter 3.

\textsuperscript{39} See infra Sections 5.15, 7.1.
Juncture 4: Opening Statements\textsuperscript{40}

When preparing opening statements, you want to consider how to productively commence the mediation session. You have the opportunity to set the groundwork for meeting interests and overcoming impediments by revealing how you plan to negotiate and how the mediator might help.

Junctures 5 and 6: Joint Sessions and Caucuses\textsuperscript{41}

As you plan for the mediation session, you should consider the critical choice between negotiating in a joint session with everybody in the room or in a caucus with just your client and the mediator. This choice will be influenced by how best to meet your client’s interests and overcome impediments, including how you think the mediator can contribute and whether you want to negotiate directly with the other side or indirectly through the mediator.

In short, to be an effective mediation advocate, you need to effectively negotiate, know how to enlist mediator assistance, and pull it all together in the form of a plan that advances your client’s interests and overcomes any impediments while intelligently sharing information at each of the six key junctures. The first three italicized concepts—negotiate, mediator assistance, and plan—constitute the Mediation Representation Triangle; the other four italicized concepts—interests, impediments, information, and junctures—cover the key features of your representation plan. Together, they provide the foundation for this book. Be sure to focus on these seven concepts throughout this book as you proceed to Negotiate with a MAP.

3. Answers to Essential Representation Questions

The mediation representation framework in this book offers answers to the numerous and persistent strategic questions that inevitably arise when you represent clients in mediations. The answers to the following essential questions are proffered throughout the book.

What types of cases are suitable for mediation?  
How do you approach the other attorney about using mediation without looking weak or desperate?  
What should you include in an agreement to mediate?  
What credentials and experience should you look for when selecting a mediator?

\textsuperscript{40} See infra Section 5.12.  
\textsuperscript{41} See infra Sections 2.6, 5.4, 7.2(d).
What do you want to accomplish in a premediation conference?  
What information do you need to prepare for the mediation session?  
What should you include in a premediation submission?  
How do you prepare a mediation representation plan?  
How do you prepare your client for the mediation session?  
How do you use the mediation process to overcome any impasses and advance your client’s interests?  
What information should you share with the mediator or the other side?  
How can you enlist the mediator to help you resolve your client’s dispute?  
How do you evaluate your client’s legal case using a decision tree analysis?  
How can you convert an adversarial adversary into a problem-solving one and coax your mediator?  
How do you shape creative and enduring resolutions?  
How do you deal with issues that are only about money?  
How do you learn the other side’s bottom line?  
How do you conclude a mediation?

4. Coverage of the Book

This book covers negotiation techniques, the mediation process, your role at each stage of your representation, and alternative processes to mediation if the mediation is not fully successful. This third edition more fully examines how to resolve the hard, distributive aspects of disputes and expands on techniques for moving the mediation forward. It takes a fresh look at confidentiality needs in mediations and expands coverage of legal issues and judicial decisions that relate to the mediation process, as well as ethical issues that can arise during the course of your representation. It also considers various psychological influences on the bargaining process, including how these influences affect the way participants evaluate information.

Chapter 1 covers the foundational subject of how to negotiate in mediations. Realizing that mediation is simply a continuation of the negotiation process, you need to give attention to the various choices for negotiating. The same skills for preparing and participating in a negotiation apply to mediation. If you use problem-solving strategies in negotiations, you will engage in similar strategies when representing clients throughout the mediation process. The third edition places negotiations into a framework of creating and claiming, distinguishes between choosing the suitable approach and suitable style for your dispute, and further compares the narrow and familiar positional approach with an expansive view of the problem-solving approach.
If you do not already have a strong foundation in the two primary methods for negotiating, you should read this chapter with care because the methods’ main points are built upon and applied throughout the text.

Chapter 2 explores the mediation process from the vantage point of an advocate. You should understand how the mediation process works, just as you need to understand how any other forum works in which you represent clients. When representing clients in court, for instance, you should know the procedures and norms of settlement conferences, court appearances, and judicial decision making. When representing a client in mediation, you should know its different stages, differences between joint sessions and caucuses, and the various approaches and techniques that mediators use to help parties resolve disputes.

Chapters 3 to 7 cover the distinctive knowledge and skills that you should possess to effectively perform four specific roles in mediation representation.

- Chapter 3 covers advising your clients about the mediation option.
- Chapter 4 covers negotiating an agreement to mediate with other attorneys and how to select a suitable mediator, including interviewing candidates and their references.
- Chapters 5 and 6 cover preparing your case and client for the mediation session. The material focuses on how to prepare a mediation representation plan that comports with the Mediation Representation Triangle. The third edition substantially expands the coverage of confidentiality, ethics, psychological influences, and judicial decisions that shape the mediation process. It also further examines the choice to negotiate in joint sessions or through a mediator in caucuses.
- Chapter 7 covers premediation conferences, the mediation session, and the postsession. The third edition expands the sections on generating movement after opening statements, proactively enlisting the mediator, and navigating legal issues when drafting agreements.

Chapter 8 prepares you for the possibility that the mediation may not result in settling all the issues. It describes a number of needs that may not be met in mediation and includes an analysis of alternative process solutions along with some guidelines on how to select the right process.

The book also includes more than 15 appendixes covering decision trees, sample agreements, attentive and proactive listening, selective mediation rules, cultural differences, and more. The book also provides access to 40 online video clips that illustrate the mediation process, exhibit particular mediator and advocacy techniques, and reenact litigated legal disputes arising out of the mediation process.
Representation in Any Culture or Country

Finally, this text provides a framework that is culturally neutral so that it should be helpful to you in representing clients in mediations between parties from different countries or between parties with different cultural upbringings within the same country.\(^{42}\)

In addition, the text examines how the different upbringings of parties in a dispute can produce distinctively different interests, impasses, and communication styles that you may need to recognize and bridge. For example, the key concept of interests is examined along with how interests can vary culturally—such as in Japan, where parties can have a deep interest in apology. That awareness can help you recognize uniquely local interests that you ought to test and possibly meet. The text also includes a method for bridging any differences.

Distinctive cultural practices are highlighted throughout the text and are noted alongside U.S. practices rather than being segregated in a separate chapter, although you should find useful Appendix G-1, “Glossary of Cultural Dimensions.” It informs the cultural references in the various chapters. However, the book does not provide you with an extensive catalogue of country-specific and comparative practices. There are excellent books that already do that.\(^{43}\)

How to address cultural differences in a representation plan is illustrated in Section 5.20.

5. Special Features of the Text

Special features have been incorporated in the text to facilitate your use.

1. Critical Choices boxes.\(^{44}\) You will see Critical Choices boxes inserted throughout the text. Each box signals a subject or moment in representation that is especially vital or particularly vexing and poses choices for you to consider when representing clients in mediation. At each Critical Choices box, you should pause to give additional attention to the highlighted question or topic. The inclusion of the boxes recognizes that even among those who subscribe to a problem-solving approach, there are challenging

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\(^{42}\) See Harold Abramson, Mediation Representation: Representing Clients Anywhere, in 2 ADR in Business, ch. 14 (Arnold Ingen-Housz ed., 2011) (In this chapter, I justify the claim that this representation framework works in any culture or country.).


\(^{44}\) This is a change from the first two editions, where these boxes were labeled “Critical Juncture.” I changed the label to focus on choices in order to more precisely describe the moment for the advocate—a moment of weighing and making choices.
choices to weigh and make; the best answer may depend on the needs of the particular dispute and your judgment on how best to meet those needs.

For the choices highlighted in each of the boxes, I suggest advantages and disadvantages in the body of the text. And you are not left rudderless: I also usually make recommendations, although they are contingent on the particular details of the dispute. By making choices transparent, you can independently determine whether to adopt or adapt the recommendations in your particular case.

2. Key concepts. Each key concept is developed primarily in one or more sections in the text, and those sections are referenced in footnotes whenever the key concept is applied in other sections. With the text organized in this way, key concepts that are used repeatedly in the text are presented and then further developed as you progress through the different stages of client representation. In order to reduce repetition, each time a key concept becomes relevant, cross-referencing footnotes are provided. If you skipped the section where the concept was initially presented or if you need to review the concept, be sure to look for the appropriate cross-reference in the footnotes.

For example, while the need to identify your client’s interests will arise many times throughout the book, the definition of interests and how to identify them are primarily discussed in Section 3.2(a), on interviewing your client about interests. Whenever the subject of interests is mentioned elsewhere in the book, the section of the book where it is primarily covered is cross-referenced in a footnote.

3. Common dispute resolution vocabulary. A common dispute resolution vocabulary needs to be established for this text in the face of the dearth of consensus in the dispute resolution field. Throughout the research literature, you see different labels associated with facially similar ideas, which can be confusing. Negotiations can be called problem-solving, interest-based, principled, integrative, joint gain, or collaborative, for instance. Although it might be an interesting intellectual project to identify precise differences and similarities in the use of these comparable terms, it will not be done here. Key vocabulary will be defined and used consistently throughout the text. Be sure to give attention to the following terms, which are initially defined in Chapters 1 and 2 and then used throughout the text:

- Problem-solving versus positional negotiations
- Negotiation approach versus negotiation style (including music)
- Positional negotiation approach versus adversarial negotiation style
- Creating–claiming strategies

45. Schneider, supra note 9, at 150-152.
Interests
Attentive and proactive listening
Personal and public BATNAs
Orientations of mediators

4. Checklists. At the end of most of the chapters, you will find handy checklists. Each checklist is designed to be copied and used as a portable reference tool to help you keep track of what you have done and what needs to be done for the covered subjects.

5. Questions and online videos. For this third edition, questions and exercises have been added to the chapter text at the end of related sections. Online videos also have been added to illustrate subjects in Chapters 1, 2, 5, and 7. You will see an icon in the right hand column to highlight the video for you to watch in connection with the question(s). The videos are from a variety of sources in order to give the reader diverse exposure to practices. These videos are available due to the generosity of the owners as acknowledged in the preface. However, because of the different sources and ages of the videos, the quality of the pictures can vary.
The Uses of Mediation*

_Lela P. Love and Joseph B. Stulberg_

Imagine a time you negotiated with someone and it ended in an impasse. You walked away from the discussion even though you sensed that a negotiated outcome was in your best interests. Perhaps you were called a name or accused of something you did not do. Maybe an insulting offer was made. You may have been tired or depressed and working on a “short fuse.” Perhaps it was simply too hard to establish a time to meet again with your counterpart. For whichever reason, the negotiation did not succeed. In that same scenario, something different might have happened if you had added a mediator.

**Why add a mediator to negotiations?**

Negotiations are neither self-generating nor self-sustaining. One party might want to talk, but others refuse to do so. Some talks never start—or collapse—because participants lack effective negotiating skills. Other discussions reach impasse due to misunderstandings, hostile comments or perceived rigidity. These familiar dynamics can disserve parties whose interests lie in resolving their dispute. Understandable—all too human—reasons cause negotiation melt down.

Negotiators can be trapped by other pitfalls. Sometimes parties refuse to initiate direct negotiations (or to request mediation) for fear that their counterpart interprets that move as a sign of weakness. Some take extreme public positions to protect themselves and their reputation, but in so doing eliminate workable options. Some make inaccurate assumptions about aspects of the situation or their counterpart’s motivation. Some fail to determine their priority interests. And some, because of such psychological phenomena

as loss aversion or overconfidence in their own judgment, make sub-optimal decisions. [Russell Korobkin & Chris Guthrie, Heuristics and Biases at the Bargaining Table]

A skilled mediator can defuse or transform these roadblocks into building blocks for movement by promoting constructive participation, minimizing misunderstandings, crystallizing significant interests, framing issues thoughtfully, urging parties to be realistic, and expanding discussion of possible outcomes. How?

What does a mediator do?
A mediator is a neutral intervenor committed to assist each negotiating party to conduct constructive conversations. She helps structure discussions. She stabilizes dialogue. She injects an attitude of hope and “going the distance.” She prods participants to clarify interests, establish priorities and transform rhetoric into proposals. She develops discussion strategies that minimize misunderstandings when tensions run high. She helps parties understand one another when ill chosen words create bitterness between them. She uses reframing and reality testing to encourage parties to examine and evaluate their assumptions and conclusions. She performs these basic tasks in order to help stakeholders enhance their collective understanding, spark creative problem solving, and settle their controversy.

A Posture of Optimism
George Mitchell, when referring to his intervention as a mediator in Northern Ireland and the Middle East, states, “Conflicts are created and sustained by human beings. They can be ended by human beings.”\(^1\) In mediating the conflict in Northern Ireland, Mitchell describes 700 days of failure followed by one final day of success. Though he became disheartened at times, he did not give up. The mediator is the very last person to give up. Desmond Tutu, the Nobel Peace Laureate who helped negotiate the transition of South Africa from the horrors of apartheid towards black political leadership and racial dignity, concludes that: “no problem anywhere can ever again be considered to be intractable.”\(^2\) A mediator is not naïve, but she is persistently optimistic that negotiations—even difficult and stalled negotiations—can be set on course.

Most of us faced with a negotiation that is not working tend to feel that the other person involved is stubborn, selfish, uncooperative, or unreasonable. The presence of an upbeat, optimistic third person can transform the environment of a negotiation. Once the mood is changed, positive momentum can be created.

A Variety of Applications
From disputes on the Internet to controversies erupting on city streets or in school settings to cases filed in court, mediation is increasingly used to address and resolve problems. Situations in very diverse arenas—divorce, labor and employment, construction, landlord-tenant, commercial matters, public policy, and international disputes—all regularly benefit from mediation.
Consider the following:

- A single parent with teenagers moves into an apartment above an elderly couple. The teenagers make noise walking around their apartment, playing loud music and entertaining friends, sometimes late at night. When the downstairs neighbors complain to the teenagers, they respond with crude comments. The elderly couple bangs a broom against the ceiling to signal that the sounds should stop, but this results in the volume increasing. When one of the downstairs neighbors goes upstairs to try to talk with the parent, no one answers the door despite the presence of sounds in the apartment. Vigorous knocking on the door results in a door panel breaking. The upstairs neighbor demands money to replace the door. When the neighbors do talk, conversation results in angry accusations. How will the spiral stop?

- Cheryl is an associate in a large law firm. An African American, she is the only lawyer in the group who is not Caucasian. When other office attorneys socialize, gossip and chat in the corridors, she feels excluded and isolated. She notices that she is not given training opportunities that others are offered and she is not called on in meetings as frequently as others. After her supervising attorney tells her that “B+ work is ok,” when an assignment is slightly late, Cheryl believes that she is being set up to fail. When she raises any of these issues, she is given an unsatisfactory explanation. Is her only option to file a racial discrimination complaint against her employer?

- In an Eastern European town, members of the Roma (gypsy) community regularly go through the town dump to scavenge for useable material that has been discarded by others. Various ethnic and religious groups in the town are upset because such scavenging results in the garbage being strewn in disarray, thereby making it impossible for recycling efforts to succeed. Feelings of distrust, hostility, and discrimination create a tinderbox environment capable of exploding instantly into violence. Efforts to identify a Roma group to talk with have proven futile. Is this situation simply a “law enforcement” problem?

For each situation noted, using a mediator would be helpful. How? A short list of negotiating dynamics that result from a mediator’s intervention includes:

- The presence of an energizing, yet calming, optimistic intervenor.
- A meeting site and environment that is safe, equitable, comfortable and inspiring for all participants.
- An opportunity for voices to be heard in a respectful way.
- A discussion format and agenda that guides participants to “tell their story” and organizes discussion topics in a clear, targeted manner.
- Procedural and communication tools designed to enhance understanding and movement. Examples of such tools include separate meetings (caucuses) and active listening or reframing.
It is easy to envision how a mediator’s attentive presence at a comfortable meeting site would enhance communications between the upstairs and downstairs neighbors. In the second scenario, the mediator transforms an adversarial contest over allegations of racial or gender discrimination into a constructive negotiation discussion by simply and accurately identifying the negotiating issues to include social interaction at the worksite, training opportunities, professional meeting protocols, and performance standards – i.e., items about which the parties can, indeed, bargain. And a mediator’s affirmative intervention in the final scenario – often by meeting separately with the various stakeholders to identify the necessary parties to a resolution and explore the concerns that must be addressed to secure stability and respect—can be the first step towards addressing differences. Sometimes such separate meetings provide a constructive “safe haven” through which persons with a history of profound conflict can communicate forcefully with one another without violence erupting.

**Different Destinations and Many Paths**

In one sense, mediation can be boiled down to a simple target shared by all mediators. Mediators help parties to negotiate more effectively. That often means to help parties communicate more constructively and, in many cases, reach agreements. Beyond that simple target, though, mediators have different goals and different means for achieving them.

What goals—or destinations—do different mediators and different schools of mediation have? Among the most often cited mediation goals are:

- Better understanding for each party of her own goals and interests (empowerment)
- Better understanding among parties (recognition of each other)
- Creative problem solving and option generation
- Agreements that are durable and optimal
- Settlements acceptable to all parties

One school of mediation only embraces the first two goals (empowerment and recognition). Other mediators only target settlement—an end to the dispute. And others will include all of these goals. Here is a continuum of mediation approaches (above the line) together with a continuum of goals (below the line). The continuum roughly matches mediation approaches or schools with corresponding goals or targets. In real cases, however, it is important to note that any linear depiction is a simplification of a dynamic and complex process.
Let’s examine these goals.

**Empowerment** and **recognition** means that disputing parties come away from mediation stronger in two important respects. They “experience a strengthened awareness of their own self-worth and their own ability to deal with whatever difficulties they face” and they “experience an expanded willingness to acknowledge and be responsive to” the other party.4 These goals are closely linked to the goal of **understanding** the overall situation better. It is easy to understand how Cheryl, in the employment scenario, imagined she was being excluded. Through mediated discussion about this potentially volatile situation, she can come to realize that others in the office wanted her participation in social life, but her own frequently closed office door deflected attempts to include her. Also, it might be that Cheryl’s supervisor’s comment about “B+ work” was meant to lessen any pressures Cheryl felt to get things perfect. The supervisor, in turn, might come to understand the adverse impact of his remark. Each party can feel sufficiently safe in mediation to “tell their story”—a more “empowered” state than letting confusion and anger fester. And each can come to understand the other.

The mediator who has **problem solving** as a goal hopes to engage participants in a forward looking exercise of developing options to address the concerns raised by the parties. Ideally, these options will represent creative—sometimes “out of the box”—solutions to the concerns raised. If the amount of money that a defendant will pay in a personal injury situation is an issue, the mediator might encourage the parties to determine whether there are things the defendant can do for the plaintiff in lieu of money—provide a job, insurance, housing, a vehicle, as a partial or total alternative to an immediate payment or payment over time—that will cost the defendant less and still promote the plaintiff’s interests. Or, in the Roma situation described above, perhaps the parties can achieve an arrangement where needy Roma citizens can help the recycling effort while obtaining necessary items for themselves. Any such resolution would build a better relationship and a capacity to engage in future problem solving should other issues arise.

For many mediators, **agreement** among the parties is a goal of mediation so long as agreement provisions are “reality tested” by the mediator to ensure that commitments are as durable [Wade & Honeyman, Negotiating Beyond Agreement] and optimal as possible. For example, the upstairs and downstairs neighbors might quickly agree to the following terms: “no communication, the upstairs neighbors will wear soft-soled shoes walking around in their apartment, the teenagers will have parties only on Saturday
nights, no music after 11 pm, and no banging on the ceiling.” Given the parties’ proximity as neighbors, some of these proposed arrangements appear implausible (no communication between neighbors?), even if well-meaning, so many mediators would want to test these terms for precision (what does “parties” mean?) and workability (will soft-soled shoes alone solve the problem?) and explore a solution that provides the neighbors with some method of communication and constructive interaction. Other mediators keep a sharp focus on settlement—coming to a resolution with respect to contested matters, so long as the settlement is acceptable to all parties. Mediators in pursuit of this goal might use a very forceful style to achieve the goal of settlement. One scholar has described that approach as mediator “trashing” and “bashing.”5 “Trashing” means tearing apart each party’s case to encourage them to put realistic numbers on the table.6 “Bashing” means trying to get parties to move from their entry settlement offers to some mid-point.7 Settlement-oriented mediators consider the mediation successful if the parties can reach a number they will both endorse.

**How Goals are Linked to Process Design**

Different mediator strategies and techniques follow from different goals.

- **Will** the mediator encourage active **participation by the parties**, instead of allowing the lawyer or other professional representatives to dominate the session? If the goal is empowerment and recognition or creative problem solving, the mediator would want to maximize party participation.
- **Will** the mediator use the **caucus** (individual meetings with each side)—never, sometimes, or exclusively? If the goal is for the parties to have an enhanced understanding, some schools of mediation encourage no caucus at all.
- **What types of** settings and time frames **should be employed**? In a settlement approach, twenty minutes in the hallway of a courtroom might be deemed an adequate attempt at mediation by mediators who are “trashing and bashing” their way toward a settlement.

**What mediator should you add?**

You must be clear about your goal before choosing a mediator to help you achieve it. Various benefits outlined above may not be available from all mediators. Some mediators stress stakeholder participation to generate understanding and collaboration, even when hostile responses might jeopardize settlement. Some convert controversies to a discussion of money damages only and try to help parties find an acceptable “number” in a forced march to settlement, thereby minimizing opportunities to enhance understanding and improve relationships.
In addition to inquiring into a particular mediator’s approach, other questions should be given consideration. For example, should parties and their representatives select a mediator who is an “expert” in the field? Does the mediator’s gender, race or age matter? Is cost a consideration? How does the mediator address the questions of process design? For example, does the mediator discourage “face-to-face” conversation (or joint sessions) in favor of “separate” meetings? Some are comfortable with party representatives assuming a primary role in the discussion while others are not. A careful negotiator can find the type of mediator – and mediation – she wants.8

Mediation and Justice
Mediation allows parties to find resolutions that are in keeping with their own preferences and values. Some mediator approaches—transformative or facilitative—systematically support democratic dialogue and decision-making, improving relations and building communities. Imagine:

- upstairs and downstairs neighbors able to communicate respectfully with one another, developing both an added degree of sensitivity and tolerance;
- an office which can set a precedent for displaying inter-racial and inter-gender cooperation, with Cheryl communicating more clearly her desire for inclusion and training, and a supervisor who comes to understand her perspective; and
- a community where different ethnicities find ways to appreciate their differences and resolve issues that are potentially divisive.

Other approaches to mediation, such as when an evaluative mediator presses parties to settle, are designed to secure speedy and cost-saving closure, thereby advancing administrative goals of a justice system.

Conclusion—an experiment worth trying
Perhaps the most important thing that negotiators should know about mediation is that it works. Frequently, it brings disputing parties a better understanding of each other and closure to their dispute. Given the emotional and financial costs that conflict can levy, a thoughtful negotiator should not ignore that mediation might provide a promising road out of a dispute.

President Theodore Roosevelt was the first American to be awarded a Nobel Prize for Peace. Like many recipients of the Nobel Peace Prize, he tackled a dispute which seemed intractable and was immensely costly—the war between Russia and Japan at the dawn of the 20th century. Writing to his son in 1905 about his efforts as a mediator, Roosevelt said:
I have finally gotten the Japanese and Russians to agree to meet to discuss the terms of peace. Whether they will be able to come to agreement or not I can’t say. But it is worthwhile to have obtained the chance of peace, and the only possible way to get this chance was to secure such an agreement of the two powers that they would meet and discuss the terms direct. Of course, Japan will want to ask more than she ought to ask, and Russia to give less than she ought to give. Perhaps both sides will prove impracticable. Perhaps one will. But there is a chance that they will prove sensible, and make a peace, which will really be for the interest of each as things are now. At any rate[,] the experiment was worth trying.9

Thanks to Roosevelt’s persistent efforts, enormous tact, and thoughtful prodding, an agreement was reached that ended the war. As testament to the significance of the accomplishment, the mayor of Portsmouth, NH, where the treaty was signed rang the town bells for a full half hour.10

While we should not expect town bells to toll when private disputes are resolved, we can nonetheless celebrate the impact on neighbors when a tense and volatile situation—like that of the upstairs and downstairs neighbors—is transformed into a neighborly relationship. We can celebrate the impact on a workplace when employees feel understood, included and supported by their colleagues and supervisors. And, for public disputes, we can celebrate the impact on a community when diverse ethnicities can collaborate with one another to address issues that divide them.

In many scenarios, mediation—a way to generate a possibility for negotiating success—is, as Teddy Roosevelt said, an experiment worth trying.

ENDNOTES

2 Desmond Tutu, No Future Without Forgiveness, in The Impossible Will Take a Little While, p. 396, Paul Rogat Loeb (ed.)(2004).
3 With respect to the effects of these goals on perceptions of mediator neutrality, see Honeyman, Understanding Mediators, in this volume.
6 Id. at 66.
7 Id. at 69.
8 For more on why mediators differ so much, see Honeyman, supra note 3.
Are the Courts Ruining or Revitalizing Arbitration? Recent Court Decisions and Their Implications for the Future of Arbitration

PRESENTED BY:
Deborah Masucci, Esq., Moderator
Marc J. Goldstein, Esq.
Laura A. Kaster, Esq.
Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DIRECTV, INC. v. IMBURGIA ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE


Petitioner DIRECTV, Inc., and its customers entered into a service agreement that included a binding arbitration provision with a class-arbitration waiver. It specified that the entire arbitration provision was unenforceable if the “law of your state” made class-arbitration waivers unenforceable. The agreement also declared that the arbitration clause was governed by the Federal Arbitration Act. At the time that respondents, California residents, entered into that agreement with DIRECTV, California law made class-arbitration waivers unenforceable, see Discover Bank v. Superior Court, 36 Cal. 4th 148, 113 P. 3d 1100. This Court subsequently held in AT&T Mobility LLC v. Concepcion, 563 U. S. 333, however, that California’s Discover Bank rule was pre-empted by the Federal Arbitration Act, 9 U. S. C. §2.

When respondents sued petitioner, the trial court denied DIRECTV’s request to order the matter to arbitration, and the California Court of Appeal affirmed. The court thought that California law would render class-arbitration waivers unenforceable, so it held the entire arbitration provision was unenforceable under the agreement. The fact that the Federal Arbitration Act pre-empted that California law did not change the result, the court said, because the parties were free to refer in the contract to California law as it would have been absent federal pre-emption. The court reasoned that the phrase “law of your state” was both a specific provision that should govern more general provisions and an ambiguous provision that should be construed against the drafter. Therefore, the court held, the parties had in fact included California law as it would have been without federal pre-emption.

Held: Because the California Court of Appeal’s interpretation is pre-
empted by the Federal Arbitration Act, that court must enforce the arbitration agreement. Pp. 5–11.

(a) No one denies that lower courts must follow Concepcion, but that elementary point of law does not resolve the case because the parties are free to choose the law governing an arbitration provision, including California law as it would have been if not pre-empted. The state court interpreted the contract to mean that the parties did so, and the interpretation of a contract is ordinarily a matter of state law to which this Court defers, Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U. S. 468, 474. The issue here is not whether the court’s decision is a correct statement of California law but whether it is consistent with the Federal Arbitration Act. Pp. 5–6.

(b) The California court’s interpretation does not place arbitration contracts “on equal footing with all other contracts,” Buckeye Check Cashing, Inc. v. Cardegna, 546 U. S. 440, 443, because California courts would not interpret contracts other than arbitration contracts the same way. Several considerations lead to this conclusion.

First, the phrase “law of your state” is not ambiguous and takes its ordinary meaning: valid state law. Second, California case law—that under “general contract principles,” references to California law incorporate the California Legislature’s power to change the law retroactively, Doe v. Harris, 57 Cal. 4th 64, 69–70, 302 P. 3d 598, 601–602—clarifies any doubt about how to interpret it. Third, because the court nowhere suggests that California courts would reach the same interpretation in any other context, its conclusion appears to reflect the subject matter, rather than a general principle that would include state statutes invalidated by other federal law. Fourth, the language the court uses to frame the issue focuses only on arbitration. Fifth, the view that state law retains independent force after being authoritatively invalidated is one courts are unlikely to apply in other contexts. Sixth, none of the principles of contract interpretation relied on by the California court suggests that other California courts would reach the same interpretation elsewhere. The court applied the canon that contracts are construed against the drafter, but the lack of any similar case interpreting similar language to include invalid laws indicates that the antidrafter canon would not lead California courts to reach a similar conclusion in cases not involving arbitration. Pp. 6–10.

225 Cal. App. 4th 338, 170 Cal. Rptr. 3d 190, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, ALITO, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined.
DIRECTV, INC., PETITIONER v. AMY IMBURGIA, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

[December 14, 2015]

JUSTICE BREYER delivered the opinion of the Court.

The Federal Arbitration Act states that a “written provision” in a contract providing for “settle[ment] by arbitra-
tion” of “a controversy . . . arising out of” that “contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U. S. C. §2. We here consider a California court’s refusal to enforce an arbitration provision in a contract. In our view, that decision does not rest “upon such grounds as exist . . . for the revocation of any contract,” and we consequently set that judgment aside.

I

DIRECTV, Inc., the petitioner, entered into a service agreement with its customers, including respondents Amy Imburgia and Kathy Greiner. Section 9 of that contract provides that “any Claim either of us asserts will be re-
solved only by binding arbitration.” App. 128. It then sets forth a waiver of class arbitration, stating that “[n]either you nor we shall be entitled to join or consolidate claims in arbitration.” Id., at 128–129. It adds that if the “law of your state” makes the waiver of class arbitration unen-
forceable, then the entire arbitration provision “is unenforceable.” Id., at 129. Section 10 of the contract states that §9, the arbitration provision, “shall be governed by the Federal Arbitration Act.” Ibid.

In 2008, the two respondents brought this lawsuit against DIRECTV in a California state court. They seek damages for early termination fees that they believe violate California law. After various proceedings not here relevant, DIRECTV, pointing to the arbitration provision, asked the court to send the matter to arbitration. The state trial court denied that request, and DIRECTV appealed.

The California Court of Appeal thought that the critical legal question concerned the meaning of the contractual phrase “law of your state,” in this case the law of California. Does the law of California make the contract’s class-arbitration waiver unenforceable? If so, as the contract provides, the entire arbitration provision is unenforceable. Or does California law permit the parties to agree to waive the right to proceed as a class in arbitration? If so, the arbitration provision is enforceable.

At one point, the law of California would have made the contract’s class-arbitration waiver unenforceable. In 2005, the California Supreme Court held in Discover Bank v. Superior Court, 36 Cal. 4th 148, 162–163, 113 P. 3d 1100, 1110, that a “waiver” of class arbitration in a “consumer contract of adhesion” that “predictably involve[s] small amounts of damages” and meets certain other criteria not contested here is “unconscionable under California law and should not be enforced.” See Cohen v. DirecTV, Inc., 142 Cal. App. 4th 1442, 1446–1447, 48 Cal. Rptr. 3d 813, 815–816 (2006) (holding a class-action waiver similar to the one at issue here unenforceable pursuant to Discover Bank); see also Consumers Legal Remedies Act, Cal. Civ. Code Ann. §§1751, 1781(a) (West 2009) (invalidating class-action waivers for claims brought under that statute). But

The California Court of Appeal subsequently held in this case that, despite this Court’s holding in Concepcion, “the law of California would find the class action waiver unenforceable.” 225 Cal. App. 4th 338, 342, 170 Cal. Rptr. 3d 190, 194 (2014). The court noted that Discover Bank had held agreements to dispense with class-arbitration procedures unenforceable under circumstances such as these. 225 Cal. App. 4th, at 341, 170 Cal. Rptr. 3d, at 194. It conceded that this Court in Concepcion had held that the Federal Arbitration Act invalidated California’s rule. 225 Cal. App. 4th, at 341, 170 Cal. Rptr. 3d, at 194. But it then concluded that this latter circumstance did not change the result—that the “class action waiver is unenforceable under California law.” Id., at 347, 170 Cal. Rptr. 3d, at 198.

In reaching that conclusion, the Court of Appeal referred to two sections of California’s Consumers Legal Remedies Act, §§1751, 1781(a), rather than Discover Bank itself. See 225 Cal. App. 4th, at 344, 170 Cal. Rptr. 3d, at 195. Section 1751 renders invalid any waiver of the right under §1781(a) to bring a class action for violations of that Act. The Court of Appeal thought that applying “state law alone” (that is, those two sections) would render unenforceable the class-arbitration waiver in §9 of the contract.
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Id., at 344, 170 Cal. Rptr. 3d, at 195. But it nonetheless recognized that if it applied federal law “then the class action waiver is enforceable and any state law to the contrary is preempted.” Ibid. As far as those sections apply to class-arbitration waivers, they embody the Discover Bank rule. The California Supreme Court has recognized as much, see Sanchez, supra, at 923–924, 353 P. 3d, at 757, and no party argues to the contrary. See Supp. Brief for Respondents 2 (“The ruling in Sanchez tracks respondents’ position precisely”). We shall consequently refer to the here-relevant rule as the Discover Bank rule.

The court reasoned that just as the parties were free in their contract to refer to the laws of different States or different nations, so too were they free to refer to California law as it would have been without this Court’s holding invalidating the Discover Bank rule. The court thought that the parties in their contract had done just that. And it set forth two reasons for believing so.

First, §10 of the contract, stating that the Federal Arbitration Act governs §9 (the arbitration provision), is a general provision. But the provision voiding arbitration if the “law of your state” would find the class-arbitration waiver unenforceable is a specific provision. The court believed that the specific provision “‘is paramount to’” and must govern the general. 225 Cal. App. 4th, at 344, 170 Cal. Rptr. 3d, at 195 (quoting Prouty v. Gores Technology Group, 121 Cal. App. 4th 1225, 1235, 18 Cal. Rptr. 3d 178, 185–186 (2004); brackets omitted).

Second, the court said that “‘a court should construe ambiguous language against the interest of the party that drafted it.’” 255 Cal. App. 4th, at 345, 170 Cal. Rptr. 3d, at 196 (quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U. S. 52, 62 (1995)). DIRECTV had drafted the language; to void the arbitration provision was against its interest. Hence the arbitration provision was void. The
Court of Appeal consequently affirmed the trial court’s denial of DIRECTV’s motion to enforce the arbitration provision.

The California Supreme Court denied discretionary review. App. to Pet. for Cert. 1a. DIRECTV then filed a petition for a writ of certiorari, noting that the Ninth Circuit had reached the opposite conclusion on precisely the same interpretive question decided by the California Court of Appeal. Murphy v. DirecTV, Inc., 724 F. 3d 1218, 1226–1228 (2013). We granted the petition.

II

No one denies that lower courts must follow this Court’s holding in Concepcion. The fact that Concepcion was a closely divided case, resulting in a decision from which four Justices dissented, has no bearing on that undisputed obligation. Lower court judges are certainly free to note their disagreement with a decision of this Court. But the “Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.” Howlett v. Rose, 496 U. S. 356, 371 (1990); cf. Khan v. State Oil Co., 93 F. 3d 1358, 1363–1364 (CA7 1996), vacated, 522 U. S. 3 (1997). The Federal Arbitration Act is a law of the United States, and Concepcion is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it. U. S. Const., Art. VI, cl. 2 (“[T]he Judges in every State shall be bound” by “the Laws of the United States”).

While all accept this elementary point of law, that point does not resolve the issue in this case. As the Court of Appeal noted, the Federal Arbitration Act allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions, including the law governing enforceability of a class-arbitration waiver. 225 Cal. App. 4th, at 342–343, 170 Cal. Rptr. 3d,
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at 194. In principle, they might choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia, or (as is relevant here) the law of California including the Discover Bank rule and irrespective of that rule’s invalidation in Concepcion. The Court of Appeal decided that, as a matter of contract law, the parties did mean the phrase “law of your state” to refer to this last possibility. Since the interpretation of a contract is ordinarily a matter of state law to which we defer, Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U. S. 468, 474 (1989), we must decide not whether its decision is a correct statement of California law but whether (assuming it is) that state law is consistent with the Federal Arbitration Act.

III

Although we may doubt that the Court of Appeal has correctly interpreted California law, we recognize that California courts are the ultimate authority on that law. While recognizing this, we must decide whether the decision of the California court places arbitration contracts “on equal footing with all other contracts.” Buckeye Check Cashing, Inc. v. Cardegna, 546 U. S. 440, 443 (2006). And in doing so, we must examine whether the Court of Appeal’s decision in fact rests upon “grounds as exist at law or in equity for the revocation of any contract.” 9 U. S. C. §2. That is to say, we look not to grounds that the California court might have offered but rather to those it did in fact offer. Neither this approach nor our result “steps beyond Concepcion” or any other aspect of federal arbitration law. See post, at 9 (GINSBURG, J., dissenting) (hereinafter the dissent).

We recognize, as the dissent points out, post, at 4, that when DIRECTV drafted the contract, the parties likely believed that the words “law of your state” included California law that then made class-arbitration waivers unen-
forceable. But that does not answer the legal question before us. That is because this Court subsequently held in Concepcion that the Discover Bank rule was invalid. Thus the underlying question of contract law at the time the Court of Appeal made its decision was whether the “law of your state” included invalid California law. We must now decide whether answering that question in the affirmative is consistent with the Federal Arbitration Act. After examining the grounds upon which the Court of Appeal rested its decision, we conclude that California courts would not interpret contracts other than arbitration contracts the same way. Rather, several considerations lead us to conclude that the court’s interpretation of this arbitration contract is unique, restricted to that field.

First, we do not believe that the relevant contract language is ambiguous. The contract says that “[i]f . . . the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 [the arbitration section] is unenforceable.” App. 129. Absent any indication in the contract that this language is meant to refer to invalid state law, it presumably takes its ordinary meaning: valid state law. Indeed, neither the parties nor the dissent refer us to any contract case from California or from any other State that interprets similar language to refer to state laws authoritatively held to be invalid. While we recognize that the dissent believes this phrase to be “ambiguous,” post, at 7, 9, or “anomalous,” post, at 10, we cannot agree with that characterization.

Second, California case law itself clarifies any doubt about how to interpret the language. The California Supreme Court has held that under “general contract principles,” references to California law incorporate the California Legislature’s power to change the law retroactively. See Doe v. Harris, 57 Cal. 4th 64, 69–70, 302 P. 3d 598, 601–602 (2013) (holding that plea agreements, which
are governed by general contract principles, are """"deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws"""" (quoting People v. Gipson, 117 Cal. App. 4th 1065, 1070, 12 Cal. Rptr. 3d 478, 481 (2004)). And judicial construction of a statute ordinarily applies retroactively. Rivers v. Roadway Express, Inc., 511 U. S. 298, 312–313 (1994). As far as we are aware, the principle of California law announced in Harris, not the Court of Appeal's decision here, would ordinarily govern the scope of phrases such as "law of your state."

Third, nothing in the Court of Appeal's reasoning suggests that a California court would reach the same interpretation of "law of your state" in any context other than arbitration. The Court of Appeal did not explain why parties might generally intend the words "law of your state" to encompass "invalid law of your state." To the contrary, the contract refers to "state law" that makes the waiver of class arbitration "unenforceable," while an invalid state law would not make a contractual provision unenforceable. Assuming—as we must—that the court's reasoning is a correct statement as to the meaning of "law of your state" in this arbitration provision, we can find nothing in that opinion (nor in any other California case) suggesting that California would generally interpret words such as "law of your state" to include state laws held invalid because they conflict with, say, federal labor statutes, federal pension statutes, federal antidiscrimination laws, the Equal Protection Clause, or the like. Even given our assumption that the Court of Appeal's conclusion is correct, its conclusion appears to reflect the subject matter at issue here (arbitration), rather than a general principle that would apply to contracts using similar language but involving state statutes invalidated by other federal law.

Fourth, the language used by the Court of Appeal fo-
cused only on arbitration. The court asked whether “law of your state” “mean[s] ‘the law of your state to the extent it is not preempted by the [Federal Arbitration Act],’ or ‘the law of your state without considering the preemptive effect, if any of the [Federal Arbitration Act].’” 225 Cal. App. 4th, at 344, 170 Cal. Rptr. 3d, at 195. Framing the question in such terms, rather than in generally applicable terms, suggests that the Court of Appeal could well have meant that its holding was limited to the specific subject matter of this contract—arbitration.

Fifth, the Court of Appeal reasoned that invalid state arbitration law, namely the Discover Bank rule, maintained legal force despite this Court’s holding in Concepcion. The court stated that “[i]f we apply state law alone . . . to the class action waiver, then the waiver is unenforceable.” 225 Cal. App. 4th, at 344, 170 Cal. Rptr. 3d, at 195. And at the end of its opinion it reiterated that “[t]he class action waiver is unenforceable under California law, so the entire arbitration agreement is unenforceable.” Id., at 347, 170 Cal. Rptr. 3d, at 198. But those statements do not describe California law. See Concepcion, 563 U. S., at 344, 352; Sanchez, 61 Cal. 4th, at 923–924, 353 P. 3d, at 757. The view that state law retains independent force even after it has been authoritatively invalidated by this Court is one courts are unlikely to accept as a general matter and to apply in other contexts.

Sixth, there is no other principle invoked by the Court of Appeal that suggests that California courts would reach the same interpretation of the words “law of your state” in other contexts. The court said that the phrase “law of your state” constitutes “‘a specific exception’” to the agreement’s “‘general adoption of the [Federal Arbitration Act].’” 225 Cal. App. 4th, at 344, 170 Cal. Rptr. 3d, at 195. But that tells us nothing about how to interpret the words “law of your state” elsewhere. It does not answer the relevant question: whether those words encompass laws
that have been authoritatively held invalid. Cf. *Prouty*, 121 Cal. App. 4th, at 1235, 18 Cal. Rptr. 3d, at 185–186 (specific words govern only “when a general and a particular provision are inconsistent”).

The court added that it would interpret “ambiguous language against the interest of the party that drafted it,” namely DIRECTV. 225 Cal. App. 4th, at 345, 170 Cal. Rptr. 3d, at 196 (quoting *Mastrobuono*, 514 U. S., at 62). The dissent adopts a similar argument. See post, at 7–9. But, as we have pointed out, supra, at 8, were the phrase “law of your state” ambiguous, surely some court would have construed that term to incorporate state laws invalidated by, for example, federal labor law, federal pension law, or federal civil rights law. Yet, we have found no such case. Moreover, the reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was. The fact that we can find no similar case interpreting the words “law of your state” to include invalid state laws indicates, at the least, that the antidrafter canon would not lead California courts to reach a similar conclusion in similar cases that do not involve arbitration.

* * *

Taking these considerations together, we reach a conclusion that, in our view, falls well within the confines of (and goes no further than) present well-established law. California’s interpretation of the phrase “law of your state” does not place arbitration contracts “on equal footing with all other contracts,” *Buckeye Check Cashing, Inc.*, 546 U. S., at 443. For that reason, it does not give “due regard . . . to the federal policy favoring arbitration.” *Volt Information Sciences*, 489 U. S., at 476. Thus, the Court of Appeal’s interpretation is pre-empted by the Federal Arbitration Act. See *Perry v. Thomas*, 482 U. S. 483, 493, n. 9 (1987) (noting that the Federal Arbitration Act pre-
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empts decisions that take their “meaning precisely from the fact that a contract to arbitrate is at issue”). Hence, the California Court of Appeal must “enforc[e]” the arbitration agreement. 9 U. S. C. §2.

The judgment of the California Court of Appeal is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.
THOMAS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 14–462

DIRECTV, INC., PETITIONER v. AMY
IMBURGIA, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF
CALIFORNIA, SECOND APPELLATE DISTRICT

[December 14, 2015]

JUSTICE THOMAS, dissenting.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, dissenting.

It has become routine, in a large part due to this Court’s decisions, for powerful economic enterprises to write into their form contracts with consumers and employees no-class-action arbitration clauses. The form contract in this case contains a Delphic provision stating that “if the law of your state” does not permit agreements barring class arbitration, then the entire agreement to arbitrate becomes unenforceable, freeing the aggrieved customer to commence class-based litigation in court. This Court reads that provision in a manner most protective of the drafting enterprise. I would read it, as the California court did, to give the customer, not the drafter, the benefit of the doubt. Acknowledging the precedent so far set by the Court, I would take no further step to disarm consumers, leaving them without effective access to justice.

This case began as a putative class action in state court claiming that DIRECTV, by imposing hefty early-termination fees, violated California consumer-protective legislation, including the Consumers Legal Remedies Act (CLRA), Cal. Civ. Code Ann. §1750 et seq. (West 2015). App. 58. DIRECTV did not initially seek to stop the law-
suit and compel bilateral arbitration. See *id.*, at 52–53. The reason for DIRECTV’s failure to oppose the litigation is no mystery. The version of DIRECTV’s service agreement applicable in this case (the 2007 version) requires consumers to arbitrate all disputes and to forgo class arbitration. *Id.*, at 128–129. If the relevant provision stopped there, the Court’s recent precedent, see *American Express Co. v. Italian Colors Restaurant*, 570 U. S. ___ (2013); *AT&T Mobility LLC v. Concepcion*, 563 U. S. 333 (2011), would control, and DIRECTV could have resisted the lawsuit. But DIRECTV’s form contract continued: The entire arbitration clause is unenforceable “[i]f . . . the law of your state would find” unenforceable the agreement’s class-arbitration prohibition. App. 129. At the time plaintiff-respondents Imburgia and Greiner commenced their court action, class-arbitration bars like the one in DIRECTV’s agreement were *per se* unenforceable as unconscionable under the law of California. See *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162–163, 113 P.3d 1100, 1110 (2005).

Nearly three years into the litigation, this Court held in *Concepcion*, 563 U. S., at 338–351, that the Federal Arbitration Act (FAA), 9 U. S. C. §1 et seq., preempts state rules that render class-arbitration bans unenforceable. DIRECTV then moved to halt the long-pending lawsuit and compel bilateral arbitration. App. to Pet. for Cert. 4a. The California Superior Court denied DIRECTV’s motion, No. BC398295 (Super. Ct. Los Angeles Cty., Cal., Jan. 26, 2012), App. to Pet. for Cert. 17a–20a, and the California Court of Appeal affirmed. The Court of Appeal first observed that, under the California law DIRECTV confronted when it drafted the clause in question, provisions relinquishing the right to proceed under the CLRA on behalf of a class would not be enforced. 225 Cal. App. 4th 338, 342, 170 Cal. Rptr. 3d 190, 194 (2014). The question dispositive of DIRECTV’s motion, the California court
explained, trains on the meaning of the atypical contractual phrase “the law of your state”: “does it mean ‘the law of your state to the extent it is not preempted by the FAA,’ or ‘the law of your state without considering the preemptive effect, if any, of the FAA?’” Id., at 344, 170 Cal. Rptr. 3d, at 195.

In resolving this question, the California court emphasized that DIRECTV drafted the service agreement, giving its customers no say in the matter, and reserving to itself the right to modify the agreement unilaterally at any time. Id., at 345, 170 Cal. Rptr. 3d, at 196. See also Brief for Respondents 1–2. DIRECTV used the same take-it-or-leave-it contract everywhere it did business. Ibid. “[T]o protect the party who did not choose the language from an unintended or unfair result,” the California court applied “the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it.” 225 Cal. App. 4th, at 345, 170 Cal. Rptr. 3d, at 196 (quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62–63 (1995)). That rule was particularly appropriate in this case, the court reasoned, for, “as a practical matter, it seems unlikely that plaintiffs anticipated in 2007 that the Supreme Court would hold in 2011 that the FAA preempts” state-law protection against compelled class-arbitration waivers. 255 Cal. App. 4th, at 345, 170 Cal. Rptr. 3d, at 196 (internal quotation marks omitted).

II

The Court today holds that the California Court of Appeal interpreted the language in DIRECTV’s service agreement so unreasonably as to suggest discrimination against arbitration in violation of the FAA. Ante, at 8. As I see it, the California court’s interpretation of the “law of your state” provision is not only reasonable, it is entirely right.
Arbitration is a matter of “consent, not coercion.” *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 559 U. S. 662, 681 (2010) (internal quotation marks omitted). The FAA “requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.” *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 478 (1989). “[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review.” *Id.*, at 474. See also *First Options of Chicago, Inc. v. Kaplan*, 514 U. S. 938, 944 (1995) (when interpreting arbitration agreements, courts “should apply ordinary state-law principles that govern the formation of contracts”). Historically, this Court has respected state-court interpretations of arbitration agreements. See *Mastrobuono*, 514 U. S., at 60, n. 4; *Volt Information Sciences*, 489 U. S., at 484. Indeed, in the more than 25 years between *Volt Information Sciences* and this case, not once has this Court reversed a state-court decision on the ground that the state court misapplied state contract law when it determined the meaning of a term in a particular arbitration agreement. Today’s decision is a dangerous first.

Beyond genuine debate, DIRECTV originally meant the “law of your state” clause to refer to its customer’s home state law untouched by federal preemption. As DIRECTV explained in a state-court filing, the clause prevented enforcement of the arbitration agreement in those States, California among them, where the class-arbitration prescription was unenforceable as a matter of state law, while requiring bilateral arbitration in States that did not outlaw purported waivers of class proceedings. App. 52 (“The Customer Agreement between DIRECTV and its customers provides that the customer’s home state laws will govern the relationship, and that any disputes will be resolved in individual arbitration if the customer’s home
state laws enforce the parties' arbitration agreement.” (emphasis added)).

According to DIRECTV, because the class-arbitration ban, post-

_Concepcion_, is enforceable in all States, this case must now be resolved, if at all, in bilateral arbitration. The Court agrees. After _Concepcion_, the Court maintains, it no longer matters whether DIRECTV meant California's “home state laws” when it drafted the 2007 version of its service agreement. But _Concepcion_ held only that a State cannot _compel_ a party to engage in class arbitration when the controlling agreement unconditionally prohibits class procedures. See 563 U. S., at 351 (“Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations,” so parties may consent to class procedures even though such procedures “may not be required by state law.”). Just as a contract itself may provide for class arbitration, so the parties may _choose_ to be bound by a particular state law, in this case, the CLRA, even if the FAA would otherwise displace that state law. _Hall Street Associates, L. L. C. v. Mattel, Inc._, 552 U. S. 576, 586 (2008) ("[T]he FAA lets parties tailor some, even many, features of arbitration by contract, including . . . procedure and choice of substantive law.").

“In principle,” the Court acknowledges, parties “might choose to have portions of their contract governed by the law of Tibet, [or] the law of pre-revolutionary Russia.” _Ante_, at 6; see Brief for Petitioner 20 (observing that the FAA would allow parties “to

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1 FAA preemption is distinct from federal preemption in other contexts. Unlike “state laws invalidated by, for example, federal labor law, federal pension law, or federal civil rights law,” _ante_, at 10, state laws are preempted by the FAA only to the extent that they conflict with the contracting parties’ intent. See _Mastrobuono v. Shearson Lehman Hutton, Inc._, 514 U. S. 52, 59 (1995) (“[I]n the absence of contractual intent to the contrary, the FAA would pre-empt” a particular state law. (emphasis added)); Brief for Law Professors as Amicus Curiae 10 (“FAA preemption cannot occur without reference to a particular agreement of the parties. . . .”).
bind themselves by reference to the rules of a board game\textsuperscript{2}). Pre-revolutionary Russian law, but not California’s “home state laws” operative and unquestionably valid in 2007? Makes little sense to me.

Nothing in Concepcion or the FAA nullifies provisions of the CLRA. They hold sway when parties elect judicial resolution of their disputes, and should similarly control when parties choose that consumer-protective law to govern their arbitration agreements. See Volt Information Sciences, 489 U. S., at 475 (where parties had “incorporat[ed] . . . California rules of arbitration into their agreement,” they had “no FAA-guaranteed right to compel arbitration” on terms inconsistent with those California rules).\textsuperscript{2} Thus, even after Concepcion, one could properly refer to the CLRA’s class-waiver proscription as “California law.” To repeat, the dispositive question in this case is whether the parties intended the “law of your state” provision to mean state law as preempted by federal law, as the Court today reads the provision, or home state law as framed by the California Legislature, without considering the preemptive effect of federal law, as the California court read it.

The latter reading is the better one. DIRECTV had no occasion to refer to “the law of [its customer’s] state” had it meant to incorporate state law as preempted by the FAA. That is, DIRECTV, like virtually every other company with a similar service agreement, could have employed a

\textsuperscript{2}The Court refers to the relevant California law as the “Discover Bank rule” and suggests that, “under ‘general contract principles,’ references to California law incorporate the California Legislature’s power to change the law retroactively.” Ante, at 7. But despite this Court’s rejection of the Discover Bank rule in Concepcion, the California Legislature has not capitulated; it has retained without change the CLRA’s class-waiver prohibition. The Discover Bank rule relied on an interpretation of the FAA, see 36 Cal. 4th 148, 162–173, 113 P. 3d 1100, 1100–1117 (2005); in contrast, the CLRA’s class-waiver proscription reflects California’s legislative policy judgment.
clause directly conditioning enforceability of the arbitration agreement on the exclusion of class arbitration. Indeed, DIRECTV has done just that in service agreements both before and after 2007. App. 121 (the 2004 version provides that “[a] Court may sever any portion of [the arbitration agreement] that it finds to be unenforceable, except for the prohibition on class or representative arbitration”); Brief for Respondents 35–36 (stating that the June 2015 version of DIRECTV’s agreement provides that “[a] court may sever any portion of [the arbitration agreement] that it finds to be unenforceable, except for the prohibition on [class arbitration]” (internal quotation marks omitted)). Had DIRECTV followed this pattern in its 2007 form contract, the arbitration agreement, post-Concepcion, unquestionably would have been enforceable in all States. In the 2007 version, however, DIRECTV chose a different formulation, one referring to the “law of [its customer’s] state.” I would not translate that term to be synonymous with “federal law.” If DIRECTV meant to exclude the application of California legislation, it surely chose a bizarre way to accomplish that result.

As earlier noted, see supra, at 3, and as the California court appreciated, courts generally construe ambiguous contractual terms against the drafter. See Mastrobuono, 514 U. S., at 63 (“Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt.”). This “common-law rule of contract interpretation,” id., at 62, reflects the principle that a party should not be permitted to write an ambiguous term, lock another party into agreeing to that term, and then reap the benefit of the ambiguity once a dispute emerges. The rule has particular force where, as here, a court is interpreting a “standardized contrac[t]” that was not the product of bilateral bargaining. Restatement (Second) of Contracts §206, Comment a (1979).

Allowing DIRECTV to reap the benefit of an ambiguity
it could have avoided would ignore not just the hugely unequal bargaining power of the parties, but also their reasonable expectations at the time the contract was formed. See Mastrobuono, 514 U. S., at 63 (it is particularly appropriate to construe terms against the drafter where the other party had no reason to anticipate or intend the drafter’s preferred result). See also Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U. S. 243, 262 (1984) (“[C]ontract[s] . . . are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the [parties] thereby contracting.” (quoting Rocca v. Thompson, 223 U. S. 317, 331–332 (1912); ellipsis in original)). At the time DIRECTV imposed this agreement on its customers, it assumed that the arbitration clause would be unenforceable in California. App. 52 (explaining in state-court filing that, “[b]ecause California law would not enforce the arbitration agreement . . ., DIRECTV has not sought and will not seek to arbitrate disputes with California customers”). Likewise, any California customer who read the agreement would scarcely have understood that she had submitted to bilateral arbitration of any and all disputes with DIRECTV. She certainly would have had no reason to anticipate the Court’s decision in Concepcion, rendered four years later, or to consider whether “law of your state” is a chameleon term meaning California legislation when she received her service contract, but preemptive federal law later on.

DIRECTV primarily responds that the FAA requires construction of all terms in arbitration agreements in favor of arbitrability. True, this Court has found in the FAA a “federal policy favoring arbitration.” Ante, at 10 (quoting Volt Information Sciences, 489 U. S., at 476). But the Court has also cautioned that an arbitration-favoring presumption applies “only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a
particular dispute is what the parties intended because their express agreement to arbitrate was validly formed, is legally enforceable, and is best construed to encompass the dispute.” *Granite Rock Co. v. Teamsters*, 561 U. S. 287, 303 (2010). DIRECTV acknowledges that “[t]his case . . . involves a threshold dispute over the enforceability of the parties’ arbitration agreement” in its entirety. Reply Brief 7. Like the California court, I would resolve that dispute by employing traditional rules of contract interpretation *sans* any arbitration-favoring presumption, including the rule that ambiguous language should be construed against the drafter. See *supra*, at 3, 7.

III

Today’s decision steps beyond *Concepcion* and *Italian Colors*. There, as here, the Court misread the FAA to deprive consumers of effective relief against powerful economic entities that write no-class-action arbitration clauses into their form contracts. In *Concepcion*, 563 U. S., at 336, customers brought a class action claiming that AT&T Mobility had improperly charged $30.22 in sales tax while advertising cellular telephones as free. AT&T Mobility’s form consumer contract contained a mandatory arbitration clause and a class-arbitration proscription. Because consumers lacked input into the contractual terms, and because few rational consumers would go through the hassle of pursuing a $30.22 claim in bilateral arbitration, the California courts deemed the arbitration agreement unenforceable as unconscionable. See *id.*, at 365 (Breyer, J., dissenting) (“[T]he maximum gain to a customer for the hassle of arbitrating a $30.22 dispute is still just $30.22.”) (quoting *Laster v. AT&T Mobility LLC*, 584 F. 3d 849, 856 (CA9 2009)); *Carnegie v. Household Int’l, Inc.*, 376 F. 3d 656, 661 (CA7 2004) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a luna-
tic or a fanatic sues for $30."), cert. denied, 543 U. S. 1051 (2005). Nonetheless, the Court held that the FAA mandated enforcement of the entire arbitration agreement, including the class-arbitration ban. Concepcion, 563 U. S., at 343. Two years later, in Italian Colors, 570 U. S., at ___ (slip op., at 5), the Court reaffirmed that class-arbitration prohibitions are enforceable even where claimants “have no economic incentive to pursue their . . . claims individually in arbitration.” Today, the Court holds that consumers lack not only protection against unambiguous class-arbitration bans in adhesion contracts. They lack even the benefit of the doubt when anomalous terms in such contracts reasonably could be construed to protect their rights.3

3It has not always been this way. In Wilko v. Swan, 346 U. S. 427, 435, 438 (1953), the Court unanimously held that an arbitration clause in a brokerage agreement was unenforceable. The Court noted that the Securities Act was “drafted with an eye to the disadvantages under which buyers labor” when negotiating brokerage agreements, id., at 435, and described arbitration as less protective of the rights of stock buyers than litigation, id., at 435–437. The Court later overruled Wilko, rejecting what it described as Wilko’s “suspicion of arbitration as a method of weakening the protections afforded in the substantive law.” Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U. S. 477, 481 (1989). See also Gilmer v. Interstate/Johnson Lane Corp., 500 U. S. 20, 33 (1991) (relying on Rodriguez de Quijas to conclude that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context”). Similarly, before Italian Colors, the Court had suggested that “the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum,” and when that is so, an arbitration agreement may be unenforceable. Green Tree Financial Corp.-Ala. v. Randolph, 531 U. S. 79, 90 (2000). Although the Court in Italian Colors did not expressly reject this “effective vindication” principle, the Court’s refusal to apply the principle in that case suggests that the principle will no longer apply in any case. See 570 U. S., at ___ (slip op., at 15) (KAGAN, J., dissenting); CompuCredit Corp. v. Greenwood, 565 U. S. ___, ___–___ (2012) (GINSBURG, J., dissenting) (slip op., at 1–2) (criticizing the Court
These decisions have predictably resulted in the deprivation of consumers’ rights to seek redress for losses, and, turning the coin, they have insulated powerful economic interests from liability for violations of consumer-protection laws. See N. Y. Times, Nov. 1, 2015, p. A1, col. 5 (“By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies [have] devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.”). Studies confirm that hardly any consumers take advantage of bilateral arbitration to pursue small-dollar claims. Resnik, Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights, 124 Yale L. J. 2804, 2900–2910 (2015) (Resnik, Diffusing Disputes). Because consumers lack bargaining power to change the terms of consumer adhesion contracts ex ante, “[t]he providers [have] won the power to impose a mandatory, no-opt-out system in their own private ‘courts’ designed to preclude aggregate litigation.” Resnik, Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers, 125 Harv. L. Rev. 78, 133 (2011). See also Miller, Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N. Y. U. L. Rev. 286, 323 (2013) (“[P]owerful economic entities can impose no-class-action-arbitration clauses on people with little or no bargaining position—through adhesion contracts involving securities accounts, credit cards, mobile phones, car rentals, and many other social amenities and necessities.”).
The proliferation of take-it-or-leave-it agreements mandating arbitration and banning class procedures, and this Court’s readiness to enforce such one-sided agreements, have disabled consumers from “shop[ping] to avoid arbitration mandates.” Resnik, Diffusing Disputes 2839. See also id., at 2872 (“[T]he numbers of clauses mandating arbitration are soaring across many sectors.”).

The Court has suggested that these anticonsumer outcomes flow inexorably from the text and purpose of the FAA. But Congress passed the FAA in 1925 as a response to the reluctance of some judges to enforce commercial arbitration agreements between merchants with relatively equal bargaining power. Moses, Arbitration Law: Who’s in Charge? 40 Seton Hall L. Rev. 147, 170–171 (2010). See also id., at 170 (contract disputes between merchants have been a proper subject of arbitration since the 1600’s). The FAA’s purpose was to “make the contracting party live up to his agreement.” H. R. Rep. No. 68–96, at 1 (1924). See also Moses, supra, at 147 (Congress sought to “provide federal courts with procedural law that would permit the enforcement of arbitration agreements between merchants in diversity cases.”). Congress in 1925 could not have anticipated that the Court would apply the FAA to render consumer adhesion contracts invulnerable to attack by parties who never meaningfully agreed to arbitration in the first place. See Resnik, Diffusing Disputes 2860 (“The merchants and lawyers who forged the public law of arbitration in the United States sought federal legislation to enforce consensual agreements.” (emphasis added)).

Nor does the text of the FAA compel this result. Section 2, on which the Court relied in Concepcion, Italian Colors, study documenting the proliferation of mandatory arbitration clauses containing class-arbitration waivers in consumer financial-services contracts, as well as the vanishingly small number of claims brought by financial-services consumers in bilateral arbitration. See Consumer Financial Protection Bureau, Arbitration Study §1, pp. 9–13 (2015).
and this case, prescribes simply that arbitration provisions are to be treated the same as other contractual terms: “[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U. S. C. §2. As Justice O’Connor observed when the Court was just beginning to transform the FAA into what it has become, “the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.” Allied-Bruce Terminix Cos. v. Dobson, 513 U. S. 265, 283 (1995) (concurring opinion). See also Miller, supra, at 324 (“[O]ver the years the Act has been transformed by the Supreme Court through constant expansion into an expression of a ‘federal policy’ favoring arbitration, whether it involves a bilateral business dispute or not.”).

The Court’s ever-larger expansion of the FAA’s scope contrasts sharply with how other countries treat mandatory arbitration clauses in consumer contracts of adhesion. A 1993 European Union Directive forbids binding consumers to unfair contractual terms, defined as those “not . . . individually negotiated” that “caus[e] a significant imbalance in the parties’ rights and obligations . . . to the detriment of the consumer.” Coun. Directive 93/13, Art. 3, 1993 O. J. (L. 95) 31. A subsequent EU Recommendation interpreted this Directive to bar enforcement of one-party-dictated mandatory consumer arbitration agreements. Comm’n Recommendation 98/257, 1998 O. J. (L. 115) 34 (“The consumer’s recourse to the out-of-court procedure may not be the result of a commitment prior to the materialisation of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.”). As a result of this Directive and Recommendation,
disputes between providers and consumers in the EU are arbitrated only when the parties mutually agree to arbitration on a “post-dispute basis.” Sternlight, Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World, 56 U. Miami L. Rev. 831, 847–848 (2002) (emphasis deleted); see id., at 852 (enforcement of mandatory arbitration clauses in consumer contracts of adhesion “is quite rare, if not nonexistent,” outside the United States).

* * *

The California Court of Appeal appropriately applied traditional tools of state contract law to interpret DIRECTV’s reference to the home state laws of its customers. Demeaning that court’s judgment through harsh construction, this Court has again expanded the scope of the FAA, further degrading the rights of consumers and further insulating already powerful economic entities from liability for unlawful acts. I resist the Court’s bent, and would affirm the judgment of the California Court of Appeal.
When the U.S. Second Circuit Court of Appeals speaks about arbitration, here at Arbitration Commentaries the ignition key turns, and the engine of this rusty old four-by-four squeals, wheezes, and eventually springs to life. This month's fuel is judicial provisional relief in aid of arbitration. (*Benihana, Inc. v. Benihana of Tokyo*, 2015 WL 1903587 (2d Cir. April 28, 2015)).

First, a few facts about the case. It is about restaurants and hamburgers. In simplified form with some innocent liberties taken: Franchisor asserts menu control rights over franchisee, which franchisee allegedly violates by allegedly selling hamburgers in its franchised restaurant in Hawaii. Arbitration ensues, but franchisor seeks and obtains judicial provisional relief of two kinds: first, to enjoin sale of hamburgers in Hawaii during the arbitration, second (more interesting and less caloric than the first), enjoining franchisee from arguing to the Tribunal for any extension of the default cure period in case the Tribunal should determine that the franchisee was in default and that termination of the franchise agreement was justified on that basis.

The Second Circuit affirmed branch one of the injunction and vacated part two. As you would expect. So I will not herald as a terrain-shifting development that a US appellate court rejected the notion that an injunction in aid of arbitration obtained from a federal district court may foreclose a party from making an argument for final relief to an arbitral tribunal (at least absent some very clear language in the arbitration agreement limiting the power of the arbitrators).

I would however suggest that the Court's eminently sound reasoning in support of this outcome speaks in favor of a broader reconsideration of the standards governing issuance of judicial provisional relief in aid of arbitration -- which at this time, whether in a domestic or international case, are in lockstep with the standards for issuance of preliminary injunctions in cases pending before the courts. In particular, the requirement of "likelihood" or "probability" of success on the merits as a criterion for issuance of injunctive relief (sometimes varied slightly in the federal courts to allow in the alternative "serious questions going to the merits" combined with serious hardship) is at odds with US arbitration jurisprudence that in most contexts reserves to the arbitrators unfettered jurisdiction to decide the merits.

The Second Circuit, cutting through the parties' arguments that the question of whether the tribunal could extend the default cure period was a question of
"arbitrability," rightly determined that this was "a merits argument masked as a jurisdictional one" and that the merits, obviously, were for the arbitrators. Said the Court: "Once arbitrators have jurisdiction over a matter, 'any subsequent construction of the contract and of the parties' rights and obligations under it' is for the arbitrators to decide." A court has "'no business weighing the merits of the claims..."' said the Second Circuit quoting a venerable and venerated US Supreme Court arbitration case. And later, in the same line of reasoning, the Second Circuit said: "Prohibiting a court's assessment of the merits until after the arbitral decision has been rendered is consistent with the structure of the Federal Arbitration Act ("FAA") and with the 'strong federal policy favoring arbitration as an alternative means of dispute resolution.'"

In federal and state courts in the US, "probability of success" prevails as a litmus test for a preliminary injunction because our legal tradition expresses reluctance to permit relief resembling what could be obtained in a final judgment when there has been only an accelerated and perhaps partial and perhaps skewed assessment of the facts and law relevant to liability. Lurking in the background is concern that the "preliminary" injunction will have a duration through the final adjudication, which could be quite a long time, and so there is a pressing need to try to get it right. But the judicial injunction in aid of arbitration serves a different function. The interval to which it is addressed is shorter: up to the time when the Arbitral Tribunal is able to hear and decide the application for provisional relief. That should ordinarily be a matter of a few weeks, and so there should be less concern in the courts about getting it right and a rather singular focus on preventing an alteration of the status quo so irreversible that, in a few weeks time, a provisional measure from the Tribunal would be ineffectual to address it.

It is of course possible to reconcile that traditional judicial injunction standard of "probability of success on the merits" with the Second Circuit's solemn incantation of the exclusivity of the arbitrators' power in regard to the merits. The findings of fact and conclusions of law provisionally made by a court for purposes of an injunction in aid of arbitration do not bind the Tribunal. But certainly the Tribunal will be influenced by those findings, often to the point of giving them tacit presumptive validity. Arguably this erodes the arbitral process, and transforms it into a hybrid judicial-arbitral process whenever judicial interim relief is sought. And this dilutes the practical effectiveness of the principles stated by the Second Circuit as quoted earlier in this post.

Perhaps the time has come in the USA for judicial re-thinking of standards for issuance of an injunction in aid of arbitration.
We are all collection lawyers, more or less. That is, those of us who act as advocates in international arbitration. If you don't have a good collection plan, enterprising Claimant counsels, maybe don't start the case until you do. A personal favorite move is to grab real estate in Canada on Day #1 of the arbitration. Vancouver is particularly lovely on the first day of an arbitration, when the demonstrably rogue Respondent owns three homes with substantial equity.

But sometimes even the well-heeled international finance types get ahead of themselves, and chart a course to win a battle (a Final Award) without a plan to fight the war (collection!). This seems to have been the recent plight of a foreign real estate vehicle of a U.S. bank that shall remain nameless here, lest they foreclose on your Commentator's mortgages and cut off his credit lines. But read: In re Harbour Victoria Investment Holdings Section 1782 Petitions, 2015 WL 4040420 (S.D.N.Y. June 29, 2015).

So, you ask, where does Section 1782, of fit into a collection plan on a Final Award confirmable under the New York Convention? Well, a Manhattan federal judge wondered also, in the case just cited and here reported. So please, do read on.

Petitioner won an Award in London against Respondents from India and first filed confirmation proceedings in India. But, fearing insufficiency of Respondent assets India, Petitioner started a confirmation action in New York, got an ex parte attachment order from a New York State judge against a $20 million apartment in Manhattan (nice!), and asked the judge to permit discovery so
Petitioner could show that the record owner of the glam flat was only a flimsy front for the Respondents. Removal to the federal court ensued (no surprise there), and the federal judge, doubting personal jurisdiction over Respondents and equally doubting the alter ego claim, vacated the attachment and denied the discovery.

Enter Section 1782! Petitioner says please let me have this alter ego discovery on ownership of the glam flat "in aid of" the pending foreign confirmation proceedings in India, and "in aid of" the further confirmation proceedings contemplated in Singapore and the UK if Petitioners' suspicions about who really owns the flat are confirmed. But "wait a minute," says federal judge #2, who gets the 1782 case as a separate file from the confirmation case pending before her colleague down the corridor (of the spectacularly-renovated old US Courthouse at 40 Centre St.) -- "Isn't this just the same discovery you were already denied by Judge #1, repackaged under 1782?" And moreover, she asked, "didn't you settle the confirmation action in India, so you really don't plan to use the discovery in a foreign proceeding?"

Petitioner had only lame (well OK, unpersuasive) answers to these questions -- mainly that other creditors were clamoring for the same assets in India, such that the settlement there might crumble. In the view of Judge #2, even if the proposed discovery could be seen as fitting in the 1782 cubbyhole as "in aid of" foreign proceedings, it was more likely than not that the main purpose of the 1782 petition was to end-run Judge #1's denial of discovery in the confirmation case about true ownership the glam flat, and to eventually use the 1782 discovery in that U.S action -- not foreign or international but right down the corridor -- a subversion of 1782. 1782 petition denied, case closed. (Except that WestLaw says an appeal was filed in the Second Circuit US Court of Appeals on August 19).
Is there a moral of the story here? As your Commentator I am committed to finding such, so let's try this: It is well and good that the New York Convention permits recognition and enforcement proceedings to be taken concurrently in multiple jurisdictions. But a sound collection strategy requires a careful sorting of the issues -- apart from whether the Award should be recognized -- that each court may be asked to address. Here I wonder why the enforcement court in India could not have been asked to enter a global Mareva injunction against the Respondents and taken measures to permit Claimant to ascertain by disclosure the scope of those assets. The instinct to seek out discovery in a US forum because US courts are generally pro-discovery needs to be reality-checked against the specific context of a complicated international asset hunt in an award enforcement context.
You are only human. You lead busy professional life, and, while you have a few precious hours to watch American football on Sunday afternoons, you have no time (or patience) to slog through 20 pages of the federal district court decision that vacated the arbitration award of NFL Commissioner Roger Goodell that had (in)famously upheld the four-game suspension imposed on a certain player known to be the husband of a famous fashion model. (National Football League Management Council v. National Football League Players Association, 2015 WL 5148739 (S.D.N.Y. Sept. 3, 2015)). If ever there were a task to delegate to Arbitration Commentaries, surely the parsing of this decision qualifies.

So, with full disclosure that your writer lacks independence -- he wears a Buffalo Bills wrist bracelet, not a Rolex -- here is all you need know to get through the coming rounds of lunches and cocktail receptions:

1. Commissioner Goodell's independence as an arbitrator and his denial of a motion for recusal were not adjudicated. But how much does a federal judge need to swaddle the word "independent" in a cloak of quotation marks for tea leaf readers to sense the aroma that would result he added boiling water?

2. The Second Circuit appeal will be heard orally, at the earliest, in the week of the Super Bowl in February 2016. Giselle's husband gets to play the full 2015 season.

3. Arbitration law has not been abused in the service of football. The evidence gathered in the league's investigation was not reviewed for sufficiency. Even a Buffalo Bills fan would agree that Giselle's betrothed deserves due process, a fair hearing, and adequate notice of the prospect
of employee discipline of the type that was imposed. He also deserves to be flattened by bloodthirsty linebackers.

4. This turns out to be a labor law case, and arbitral power has a particular coloration in the collective bargaining context. #12 with the golden arm is just a rank-and-file member of a union. A lunchpail guy. Discipline gets meted out under disciplinary policies bargained between the union and the league, and the policies are deemed part of the collective agreement from which an arbitral award concerning employee discipline must "draw its essence." There was no player disciplinary policy that notified players that they were subject to suspension for aiding and abetting, or condoning, or generally being aware of, violations of rules about "competitive integrity" which rules were themselves published only to owners not to players. And while players are on notice they might be suspended four games for a first offense involving performance enhancing drugs, players have no reason to know that condoning the manipulation of equipment by others would be treated the same for disciplinary purposes as manipulating their own physiology for competitive advantage. No notice = no connection of the sanction to the contract = arbitrator exceeding his powers. Easy.

5. Of course arbitrators have substantial leeway and discretion to exclude cumulative evidence. Do not become sleepless thinking arbitral discretion has been confined by this decision holding that the arbitrator denied a fair hearing by excluding evidence as cumulative. This is professional football mismanagement law, a special niche. NFL commissioners who decline to recuse themselves from serving as arbitrators in arbitrations about discipline they have imposed based on investigations jointly conducted by outside counsel and the NFL's General Counsel, had better provide very specific and well reasoned justifications for denying as "cumulative" the
aggrieved player's request to cross-examine the General Counsel. Judges, like referees, recognize illegal formations.

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Cheer. For arbitration law. For sound judicial discretion. And for all opponents of the New England Patriots, always.
What Does the Application of The New Jersey’s Version of the Revised Uniform Arbitration Act Say about the Success of the RUAA project 15 Years Later?

By Laura A. Kaster

The National Conference of Commissioners on Uniform State Laws finalized work on the RUAA in August 2000 and we celebrate its 15th anniversary this year. The work of the Commission was extraordinary. It was scholarly, thoughtful and very pragmatic, incorporating many legal developments, addressing lacunae in the Uniform Arbitration Act, and addressing problems that had arisen under the Federal Arbitration Act. It anticipated many issues that have subsequently been addressed by the rules of arbitration providers such as JAMS, the American Arbitration Association and the CPR Institute with respect to domestic arbitration. Because it was such a thorough process, many subsequent events have been influenced by the work that went into the RUAA.

However, the ongoing confusion of the state courts as to the role of FAA and the applicability of the RUAA, adopted in New Jersey as the NJAA in 2003, N.J.S.A. 2A:23B-1 et seq. and, in the case of New Jersey, a third act, the Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-1 to -19, has undermined general understanding. In addition, the force of the NJAA, and the extent of its use have been reduced by the broad preemptive effect of the FAA for matters that deal with interstate commerce and the fact that lawyers who draft arbitration clauses lack familiarity with the legal requirements for selecting the RUAA as the operative arbitration law (as opposed to the substantive law) of the agreement.

The RUAA is Innovative and Forward Thinking

Although a detailed catalogue of RUAA improvements and alterations cannot be undertaken here, some of the many innovations of the RUAA deserve mention: (1) the Act modernized arbitration law by referring to a “record” rather than a signed writing to evidence the agreement to arbitrate (2A: 23B-6); (2) clarified what forum (arbitrator or court) decides arbitrability of a dispute and by what criteria; (2A: 23B-6); (3) clarified what forum issues provisional remedies such as attachments, restraining orders, etc. (2A:23B-8); (4) established the process for initiating an arbitration (2A:23B-9); (5) provided authority to consolidate arbitrations (N.J.S.A. 2A:23B-10); (6) required arbitrators to disclose facts which might impact impartiality (N.J.S.A. 2A:23B-12); (7) provided for immunity of arbitrators and arbitration organizations (2A:23B-14); (8) addressed whether arbitrators can be required to testify in other proceedings (2A:23B-14(2)e); (9) established the discretion of arbitrators to order discovery, issue protective orders, decide motions for summary dispositions, hold prehearing conferences, and otherwise manage the arbitration process (2A:23B-17); (10) provided for court enforcement of pre-award rulings by the arbitrator (2A:23B-18); (11) defined arbitration remedies to include provisions for attorney’s fees, punitive damages and other exemplary relief; (2A:23B-21); (12) specified that particular sections of RUAA
are not waivable or may not be restricted unreasonably (to ensure fundamental fairness particularly in contract of adhesion situations) (2A:23B-4); (13) provided for enforcing subpoenas to witnesses who reside in states other than the arbitration state (23B-17f); (14) provided for vacatur when arbitrators fail to disclose facts which could reasonably affect impartiality; (2A:23B-12d); (15) provided standards for giving and receiving notice in arbitration proceedings. (2A: 23B-2); and (16) in the case of New Jersey, permitted the parties to agree in their arbitration clause to expand the scope of judicial review of an arbitration award. (2A: 23B-4c).

Those familiar with the landscape of arbitration case law over the last fifteen years will recognize that many of these issues had to be addressed and that the RUAA's resolutions were insightful.

**Preemption and Drafting Lapses have undercut the Impact of the RUAA**

But the developments in the law also reveal that the impact of the RUAA has not been maximized due to the focus of many decisions on the relative power balance between federal and state arbitration law. The preemptive effect of the FAA has meant that the law developed to address arbitration has been predominantly federal law and the states have not been able to achieve their historic role in other areas of the law as laboratories for the development of arbitration law. That may in part be the legacy of state hostility to arbitration that actually gave rise to the need for the FAA and the RUAA in the first place. In addition, confusion about the FAA, which is applicable in state courts to interstate matters defined broadly by the commerce clause and does not create an independent basis for federal jurisdiction, has contributed to the failure of the RUAA to have the intended impact.

The first hurdle to RUAA application is that the parties must specify that it applies -- and a New Jersey choice of law provision is not sufficient. In *Mastrobuono v. Shearson Lehman Hutton,* the Supreme Court held that a choice of law provision will dictate the applicable substantive law but not the procedural law of arbitration. In *Preston v. Ferrar,* The Supreme Court permitted the choice of AAA rules to govern arbitration procedure despite a choice-of-law provision specifying California law, which it held applied only to substantive law. Nevertheless, the decisions in *Volt Information Sciences v. Bd. of Trustees of Leland Stanford Jr. Univ,* and *Preston* suggest that a clear specification of the choice of arbitration law will be respected.

Because drafting of dispute resolution provisions in general is the stepchild of transactional practice, not many practitioners attend closely to this choice or evaluate the specific advantages of selecting New Jersey (or any RUAA) arbitration law to govern their agreements. In addition, the New Jersey courts have not evidenced the receptivity to arbitration reflected in the NJAA. Most recently, in *Atalese,* the Supreme Court of New Jersey held that to be valid, an arbitration provision must specify that it is a waiver of the right to trial or jury. This is clearly impermissible under controlling FAA law. But this court-made rule would surely
be imported if the arbitration clause included an affirmative selection of New Jersey arbitration law.

The RUAA in New Jersey is actually more flexible, more clearly defined, and more responsive to some of the expressed needs of the user community than the FAA. For example, there are the many clarifying provisions detailed above providing for easier process and defined interim remedies. In addition, although under the FAA and many other states’ RUAA provisions, the parties cannot obtain a judicial appeal of arbitration, they can under the NJAA and can specify the standard of review.  N.J.S.A. 2A: 23B-4(c). This (as well as the provider options for arbitral review) could address the bet your business case — a careful drafter could provide that for awards above a specified dollar value or providing for specified injunctive relief, court review would be required. Although this would import many of the costs of litigation by imposing the need for a record, a transcript and findings of fact and law, it would protect against a runaway panel for the most significant matters.

The RUAA was an important development in the law and provides a significant resource for resolving the repetitive issues that arise in arbitral administration. It is more than worth a second look by practitioners and scholars and its insights should not be permitted to fade. It is worth a renewed effort to mine its solutions and to reeducate the bench and bar on its value. The NJAA while underutilized is a very practical alternative to the FAA.

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1 In New Jersey, the RUAA is the New Jersey Arbitration Act, N.J.S.A. 2A: 23B-1 et seq.
3 Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 25, n. 32 (1983); see, e.g., 9 U.S.C. § 4 (providing for action by a federal district court “which, save for such [arbitration] agreement, would have jurisdiction under title 28”).

In Doctor’s Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996), the Supreme Court enforced an arbitration agreement under the FAA, preempting a Montana statute which required that “[n]otice that a contract is subject to arbitration ... shall be typed in underlined capital letters on the first page of the contract.” 517 U.S. at 688. It is difficult to see the principled basis for distinguishing the Atalese rule.

Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008) (Grounds stated in the Federal Arbitration Act (FAA) § U.S.C.A. §§ 10, 11, either for vacating, or for modifying or correcting, arbitration award constitute the exclusive grounds for expedited vacatur and modification of arbitration award pursuant to provisions of the FAA; parties cannot, by contract, expand upon these grounds.


Minkowitz v. Israel, 433 N.J. Super 111, 132 (2013) (Further, “parties may agree to a broader review than provided for by the default provisions in the ... Act.” Citing, Fawzy v. Fawzy, 199 N.J. 456, 482n 5 (2009). Their agreement must “accurately reflect the circumstances under which a party may challenge the award and the level of review agreed upon.” This New Jersey exception derives from Chief Justice Wilentz’ concurrence in Perini Corp. v. Greater Bay Hotel & Casino, Inc., 129 N.J. 479, (1992) in which he actually opposed broad review of arbitration awards because the purpose of arbitration is to avoid litigation but his comment that follows was incorporated in New Jersey’s NJAA: “For those who think the parties are entitled to a greater share of justice, and that such justice exists only in the care of the court, ... the parties are free to expand the scope of judicial review by providing for such expansion in their contract; that they may, for example, specifically provide that ... awards may be reversed either for mere errors of New Jersey law, substantial errors, or gross errors of New Jersey law and define therein what they mean by that.”

Imposing a broader standard of review in child custody arbitration, the New Jersey Supreme Court noted that “when parties in a dissolution proceeding agree to arbitrate their dispute, the general rules governing the conduct of arbitration shall apply, N.J.S.A. 2A: 23B–1 to –32. However, in respect of child-custody and parenting-time issues only, a record of all documentary evidence shall be kept; all testimony shall be recorded verbatim; and the arbitrator shall state in writing or otherwise record his or her findings of fact and conclusions of law with a focus on the best-interests standard. It *481 is only upon such a record that an evaluation of the threat of harm can take place without an entirely new trial. Any arbitration award regarding child-custody and parenting-time issues that results from procedures other than those that we have mandated will be subject to vacation upon motion. Fawzy v. Fawzy, 199 N.J. 456, 480-81, 973 A.2d 347, 362 (2009)
What’s Wrong with Arbitration and How Can We Make it Better? A General Counsel, Neutrals and Arbitration Counsel Share Their Insights Regarding Arbitration

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International Arbitration
Under Review

ESSAYS IN HONOUR
OF JOHN BEECHEY

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The topic of this contribution is one dear to John Beechey, who, as much as anyone, appreciates arbitration’s noble past, contributes to its present dynamism, and contemplates its future. I do not dwell here on the past. Historians of arbitration point to precursors in the practices of ancient times, medieval times and more recent centuries, all of which left a legacy upon which modern-day international arbitration has been built. Historians find in all periods what can only be described as surprisingly extensive reliance for the resolution of disputes on private adjudication rooted in the consent of the parties. The historical account also demonstrates something we already know – that, while international arbitration is today mostly tied to the resolution of private international disputes, it has a deeply distinguished pedigree in the resolution of disputes between states as well.

But international arbitration in its current incarnation is a relatively recent phenomenon, and its ascension is nothing short of dramatic. The prominence of arbitration in international dispute resolution is undeniable. Simply put, international commercial arbitration is a thriving phenomenon, becoming over recent decades the premier method for the resolution of international commercial disputes.

Among the most dynamic species is of course investor-state arbitration which falls within or outside the notion of commercial arbitration depending on how one defines ‘commercial’. But the story of investor-
state arbitration - which of course has its foundation in treaty rather than contract - is a highly distinctive one. There is scarcely any account of investor-state arbitration that disengages the arbitration of international investment disputes, as procedure, from the substance of the investor protection law and policy that is applied to those disputes. By contrast, it is possible - and common - to examine the health of international commercial arbitration, as a dispute resolution mechanism, without becoming deeply enmeshed in the content of the substantive law that is applied to the underlying disputes.

The present picture of international commercial arbitration is mostly a healthy one. In terms of volume, we clearly continue to witness growth.\textsuperscript{4} The caseload statistics of the leading international arbitration institutes readily attest to that fact. The city in which my university is situated - New York City - exemplifies the situation. In the past few years, New York City has seen the establishment of the New York International Arbitration Center (NYIAC) and the inauguration by the International Chamber of Commerce of an office to administer ICC arbitrations and promote ICC dispute resolution in North America. The London-based Chartered Institute of Arbitrators very recently created a New York Branch, with ambitious programming of its own. In this same brief period, a pair of the City’s leading law schools - Columbia and NYU - have launched Centers specifically devoted to study, research and programming in the international arbitration field. Each month sees well-attended meetings not only of the New York City Bar International Dispute Resolution Committee but also of a new and highly energetic International Arbitration Club of New York. What we observe in New York is also happening in other locations around the world: Paris, London, Stockholm, Geneva, Singapore and Hong Kong. Even within the US, the activity is widely dispersed, with energetic activity in such cities as Washington DC (due largely to the advent of treaty-based investor-state arbitration), Houston, Miami, Los Angeles, Chicago and Atlanta.

One needs of course to exercise caution in interpreting developments such as these. While they doubtless reflect international arbitration’s high level of appeal, they also reflect the international arbitration community’s extraordinary appetite for self-celebration. One must wonder whether the volume of arbitration cases, though great, is commensurate with the plethora of professional programming that surrounds international arbitration these days. One must equally wonder whether the volume of arbitration cases is commensurate with the droves of would-be arbitrators - young and old alike - entering the field, and whether it can possibly satisfy the enormous supply of talent and energy that will enter the market in the years ahead.

Still, even discounting for hyperbole and hyperactivity in the international arbitration field, we are witnessing a decades-long flourishing of international arbitration, which shows no signs of abating. This is not to suggest that contemporary international arbitration is without its shortcomings. Critiques of international arbitration come in three basic species, each of which warrants our attention.

A first species reflects nothing more or less than users’ disappointment with arbitration in light of some of the advantages that its advocates had promised. It is widely suggested that international arbitration is not delivering on its promises of speed and economy, or avoidance of the formalities associated with procedures in courts of law. These are justifiable critiques that need to be, and are being, addressed.

A second species of critique targets not arbitration’s practice, but its aptness - or inaptness - for the resolution of certain categories of disputes. Voices still lament the submission to arbitration of disputes that, while nominally between private parties, are seen as implicating important public interests; arbitration’s aptness for the resolution of consumer disputes thus comes in repeatedly for criticism, though consumer disputes form a trivial part of international disputes submitted to arbitration and even though the proposition that consumers are in fact disserved by arbitration remains a contested thesis. The US Supreme Court, it is argued in some quarters, has simply embraced arbitration a bit too enthusiastically, treating virtually all categories of disputes as arbitrable. Congress, it is argued, has also been derelict in the matter, paying too little attention to the suitability of arbitration for certain statutory causes of action and failing to adopt proposed legislation that would more generally shelter consumer, employment or civil rights claims from mandatory arbitration.

A third species of critiques aims not so much at arbitration as practised, or at arbitration’s suitability for certain kinds of disputes, as at the broader context in which arbitration is conducted. The questions raised in these critiques are particularly far-ranging. Has international arbitration remained too long the preserve of a small cadre of individuals having certain age, gender, race and other characteristics? Has it remained underdeveloped for too long in parts of the world? Does the level of transparency that prevails in international commercial arbitration allow counsel to select arbitrators knowledgeably and

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serve to awaken in arbitrators a sense of accountability? Do arbitrators have available to them adequate guidance in confronting the serious ethical issues that their activities raise? These are issues of a political and social dimension that are presently generating ferment within the international arbitration community, as well they should. At the same time, demographics are changing, reflecting a growing diversity among those entering the profession and the emergence of regional arbitration centres in places where arbitration has yet to establish a strong foothold.

Why, then, notwithstanding these warning signs, am I able to contemplate international arbitration’s future with equanimity, as I admittedly do? To put the matter differently, how and why, despite the steady flow of criticism, is international arbitration likely to prosper?

To be sure, the positive virtues of arbitration do not fully explain its success. A point seldom made, but doubtless true, is that even if international arbitration has not fully met the expectations created for it, it still strikes users as generally preferable to its principal alternative, which is of course litigation in a national court. Despite important civil practice reforms in certain jurisdictions, we have relatively little to suggest that national court litigation has become substantially less costly or time-consuming over time, or less procedurally cumbersome; depending on the jurisdiction, it may well have become more costly and time-consuming. Nor is that likely to change radically in the years ahead. To the extent that is so, the ‘advantage gap’ of arbitration over litigation will simply not have lessened, enabling arbitration to continue presenting itself as the preferred alternative. As international disputes grow larger in magnitude and complexity, the gap in favour of arbitration over litigation may become only more pronounced. Arbitration may benefit from the inconveniences associated with national court litigation, but it cannot of course take credit for them.

However, for much of its resilience, international arbitration itself can take credit. Here again we may point to three sets of factors that reflect well on arbitration as a means of international dispute resolution: (a) credit for positive features of arbitration that, while longstanding and well-established, have not receded in value or importance over time; (b) credit for not allowing risks that have in some measure, rightly or wrongly, been associated with arbitration to become realized; and (c) credit for yielding benefits that arbitration was not consciously expected to yield, but has yielded.

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I start with certain advantages associated with international arbitration that, unlike speed and economy, have in fact been reaped and that strengthen arbitration’s appeal as much as they ever did. A first such advantage that international arbitration importantly retains is neutrality – neutrality that stems from the simple fact that international arbitral tribunals belong neither to the state of the claimant nor to the state of the respondent. A tribunal does not ‘belong’ to any state, including the state of the arbitral seat, even though it is subject to the mandatory rules of arbitration of that state and even if its awards are susceptible to annulment in that state’s courts. Unless the enforceability of an arbitration clause itself is called into question, arbitration should largely eliminate competition among national courts for jurisdiction over international disputes, and the parallel and multiple litigation scenarios thereby engendered. Within the arbitral process itself, neutrality is fostered by strict obedience to, and enforcement of, standards of independence and impartiality12 and, though infringements may on occasion occur,13 these requirements are predominately respected.

Confidentiality rules are in flux and no longer as categorical as they once were,14 but they nevertheless work to arbitration’s advantage.15 Some institutions may be changing their ‘default rule’ from confidentiality to non-confidentiality, but that does not mean that user preferences have changed in this regard. On the contrary, all evidence suggests that international arbitration’s commitment to confidentiality continues to be prized.

Other advantages associated with international arbitration inhere in the tribunal itself. I think of the satisfaction that parties derive from being able to nominate one member of a tripartite arbitral tribunal and to participate indirectly in the designation of the chair, as well as to select a panel that brings greater commercial or technical expertise to the case at hand than a generalist national court judge.

The advantages of neutrality, confidentiality and party autonomy in arbitrator selection do not of course exhaust the sources of international arbitration’s appeal. To those sources mentioned must be added both the value of finality in adjudication and the relative ease by which awards are recognized and enforced. Users of arbitration by and large favour the fact that awards, unlike national court judgments, are in principle sheltered from review on the merits in national appellate jurisdiction.

Also, international arbitration agreements and international arbitral awards stand a far more solid chance of being enforced on a worldwide basis than their counterparts in the litigation context.\(^{16}\) The advantage of arbitral awards over national court judgments in this regard is especially pronounced. To be sure, arbitration owes this advantage in turn to the network of international treaties that states have chosen to produce and to which they have chosen in exceptionally large numbers to subscribe. But the treaty-based enforceability of arbitral agreements and awards goes far enough back in time to be viewed, practically speaking, as if it were a feature of international arbitration itself. International arbitration’s reputation, in other words, profits from the international treaty regime established in order to support it.

None of the virtues associated with international arbitration – international arbitration’s neutrality, confidentiality (at least in the commercial as distinct from the investment variety), the opportunity for parties to influence the composition of the tribunal, the relative finality of awards, and arbitration’s recognition and enforcement advantages – comes unexpected. They are all part of international arbitration’s original promise and its original appeal. The point is that they have proved their worth, have not lost their appeal with the passage of time,\(^ {18}\) and are unlikely to do so down the road.

I turn, secondly, to the credit that arbitration derives from the bare fact that certain risks that might be associated with arbitration simply do not appear to have materialized. One of the fears expressed as arbitration gained ground as a form of international dispute resolution has been captured by the question ‘is arbitration lawless?’ Alleged ‘unlawfulness’ may stem from any number of sources, both procedural and substantive. Procedurally, might arbitrators cut procedural corners, lowering arbitral adjudication below the threshold of fundamental due process? Does arbitration suffer unduly from the absence of ordinary appellate review and the corrective function it performs? Substantively, will arbitrators faithfully apply the law the parties designated as applicable to the merits of their transaction, or instead resort to an ill-defined body of norms such as lex mercatoria, adjudication ex aequo et bono or, worse yet, sheer compromise? While we lack sufficient empirical evidence to dispel all fear of these worrisome scenarios, neither do we have positive evidence that they have come to pass.

The two forms of credit I have mentioned – credit for advantages realized and disadvantages averted – are reassuring. It has to be of comfort that many of arbitration’s putative benefits, compared to


\(^{17}\) Ibid. at 455.

litigation, continue to be realized. It has to be of further comfort that
the worst dangers one might have associated with arbitration, again as
compared to litigation, have not materialized.

But there is something more affirmative to be said for international
arbitration – that is, something over and above the conscious hopes
that arbitration has traditionally raised. To complete the picture, one
may also ask what benefits has it brought that were quite simply
unexpected or insufficiently anticipated at the outset.

Prominent in this respect, and too seldom recognized, is international
arbitration’s record of procedural adaptation and reform over time. Its
record in this regard cannot be matched by that of any national court
system known to me. How many judicial systems revisit their procedural
regimes with the frequency and regularity with which legislatures
revisit and revise their arbitration laws and arbitral institutions revisit
and revise their rules? I can think of few fields of law that undergo
the constant reexamination and reform that arbitration, and arbitral
procedure in particular, undergo almost as a matter of course. From my
vantage point, the rate of procedural experimentation and innovation
exhibited by arbitration law and practice, of which the emergency
arbitrator is only the latest example, is nothing less than remarkable.
That this pattern is mostly driven by keen competition among states
and arbitral institutions for arbitration business does not diminish
the fact that the functionality of arbitration has been under constant
review and has constantly improved as a result. This augurs well for
international arbitration’s future.

A closely related manifestation of international arbitration’s adaptability
is its embrace of new technologies – electronic or otherwise – for
the adjudication of disputes. There is nothing to suggest that the
arbitration community’s appetite for technological innovation in
the conduct of arbitration will lessen. On the contrary, the very
recent launch of a specialized journal, the Journal of Technology in
International Arbitration, has created considerable buzz. It is rare for a
national judicial system to take technological innovation on board with
the ease and alacrity with which international commercial arbitration
does. One need only compare the technological apparatus on view in
the typical international arbitration hearing room with that of a typical
courtroom in a court of first instance virtually anywhere in the world.
Looking forward, I expect that the pace of technological progress in
arbitral adjudication will only accelerate.

What also could not have been predicted at the outset is the emergence
of the dense and highly networked international arbitration community
that we have come to know but, by this time, mostly take for granted.

19 See E. Collins, ‘Pre-Tribunal Emergency Relief in International Commercial
20 See G. Kaufmann-Kohler & T. Schulz, ‘The Use of Information Technology in
the-use-information-technology-arbitration-jusletter-5-december-2005-
This community lies behind much of what I have just mentioned—namely, the reform of arbitration statutes and the amendment of procedural rules, by legislatures and arbitral institutions respectively. But it also pursues innovation and reform of its own design, at its own initiative, and through the work of its own professional associations. A good measure of this activity is the volume of arbitration ‘soft law’ produced by these institutions, of which the International Bar Association – producer of soft law on evidence-taking, conflicts of interest and party representation, among other subjects – is perhaps only the most notable example. The importance of this soft law in the arbitration field cannot be overestimated. Both the ‘hard law’ New York Convention and Federal Arbitration Act are in need of reform, the latter dramatically so. In this setting, soft law is and will continue to be a vital gap-filler. So too will the equally ‘soft’ ALI Restatement of the US Law of International Commercial Arbitration – itself very much a product of intensive collective deliberation by all segments of the international arbitration community.

That this pattern likewise is driven largely by the enlightened professional self-interest of the community’s members does not diminish the fact that the functionality of arbitration has been under that community’s constant review as well, and that it has constantly improved as a result. It has not hurt that international organizations, such as UNCITRAL – the United Nations Commission on International Trade Law – have made international arbitration and its improvement a conspicuous priority.

Although the impressive activity level of participants in international commercial arbitration has been highly beneficial, it also presents important challenges. As we contemplate international arbitration’s future, we must recognize that this field of endeavour is a mostly unregulated one, which means it is one in which self-policing prevails. Thus, international arbitration is played out today in a landscape populated by a plethora of actors, including institutions, whose own interests and the interests of arbitration itself are conflated, all the more so because they rely on arbitration’s becoming and remaining

22 IBA Rules on the Taking of Evidence in International Arbitration (2010).
the foremost means of private international dispute resolution. The investment that arbitration practitioners make in the profession brings them rewards, financial and otherwise, even as it moves international arbitration further in the direction of progress. This strong coincidence of interest between that of the profession, on the one hand, and of its practitioners, on the other, is of course by no means unique to international arbitration. There are many other professions in which their practitioners, rather than either their users or their regulators, largely establish the norms by which they are governed and police compliance with those norms. But in international arbitration, this pattern is pronounced.

The stewardship of the arbitration profession by its practitioners appears on the whole to have been sound and productive, and not unduly influenced by narrow professional interests. Going forward, however, the profession must remain alert: alert to the risk that, by action or inaction, it may jeopardize international arbitration’s well-deserved reputation not only for efficiency, but for legitimacy and integrity. Just as individual arbitration practitioners are admonished to avoid both the reality and appearance of impropriety in their practice, so too must the profession as a whole.
ICC Dispute Resolution Bulletin
2016 subscription, €180

It is an essential resource for practitioners and scholars. It includes:
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The Bulletin is published in June and December each year. Articles and extracts from awards are published in their original language with summaries in English, French and Spanish.

The Secretariat’s Guide to ICC Arbitration
A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration
ICC Pub. No. 729E, €119

The indispensable companion to the 2012 ICC Rules of Arbitration. Written by former top-level executives of the ICC Court, this authoritative guide provides clear, in-depth commentary, statistics and comparisons. It shows you how the rules are used by the ICC Court, its Secretariat, arbitrators and parties and gives practical tips on how to conduct proceedings efficiently.

Addressing Issues of Corruption in Commercial and Investment Arbitration
Dossier XIII of the ICC Institute of World Business Law
Co-editors: Domitille Baizeau, Richard H. Kreindler ICC Pub. No. 768E, €75

This publication addresses the issue of corruption in arbitration in a systematic way. The topics covered include the impact of corruption on “gateway issues” of arbitrability, jurisdiction, admissibility and procedure; the arbitrator’s rights and duties to investigate and report corruption. It also addresses the most recent thinking and case law on the burden and standard of proof for allegations of corruption as well as the consequences and effects of allegations or positive findings of corruption.
Nappert Prize in International Arbitration
Selected articles related to commercial or investment arbitration from the 2014 edition of the inaugural Nappert Prize-competition in International Arbitration organized by McGill University. The papers cover a range of subjects: the difficult choice-of-law and procedural questions raised by the interface of arbitration with bankruptcy proceedings or mass claims; the genesis of substantive law as developed by arbitral tribunals; the links between municipal and international law; and the principle of proximate causation and its transition to international investment arbitration.

Jurisdictional Choices in Times of Trouble
Dossier XII of the ICC Institute of World Business Law
Co-editors: Georges Affaki, Horacio Grigera Naon ICC Pub. No. 755E, €75
Written by arbitrators, academics and practitioners, this dossier addresses the multiple challenges facing the jurisdiction clause through an expert in-depth comparison of syndromes and proposed solutions in both arbitration and court proceedings.
ICC COMMISSION REPORT

CONTROLLING TIME AND COSTS IN ARBITRATION
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Techniques for Controlling Time and Costs in Arbitration

Second Edition

Report of the ICC Commission on Arbitration and ADR
Task Force on Reducing Time and Costs in Arbitration

PREFACE TO THE SECOND EDITION

Arbitration is a valuable tool for the resolution of disputes. However, if it is to serve the needs of its users, it must be time and cost effective. The first edition of this Report, published in August 2007, provided a range of techniques that could be used to increase the time and cost efficiency of arbitration. The final paragraph of the preface to that edition expressed the hope that the Report would be of use in the crafting of efficient arbitration procedures. That hope has become a reality. Since its publication, the Report has been positively received by the users of arbitration, as well as by arbitrators and counsel, and the techniques set out in the Report have been widely applied in institutional and ad hoc arbitrations all over the world. The need to focus on the time and cost efficiency of arbitration has become generally recognized, and the ideas in the Report have inspired much discussion as well as a large number of other publications.

In 2009, the ICC Commission on Arbitration (as it was then known) began its revision of the 1998 ICC Rules of Arbitration. A drafting subcommittee (the “DSC”) was established to propose modifications to the Rules, taking into account suggestions received from national committees, the ICC International Court of Arbitration and its Secretariat, and the arbitration community at large. The DSC included two in-house counsel who consulted with the user community worldwide. The users proposed that the approach to time and cost efficiency taken in the Report should be incorporated into the Rules. This was accomplished in Articles 22–24 and Appendix IV of the 2012 ICC Rules of Arbitration. Article 22(1) places an explicit obligation on both the arbitral tribunal and the parties to make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute. Article 22(2) empowers the arbitral tribunal, in the absence of an agreement of the parties, to adopt appropriate procedural measures to ensure effective case management. Article 24(1) requires the arbitral tribunal to convene a case management conference to consult the parties on appropriate procedural measures to be adopted pursuant to Article 22(2). It is expressly stated that those measures may include one or more of the techniques described in Appendix IV. Those techniques are taken directly from the Report.

In sum, the tailor-making of the arbitral procedure referred to in the preface to the first edition of the Report has become a formal requirement in the 2012 Rules, accomplished through the case management conference. Ideally, party representatives will be present so that they can participate in the choice of appropriate procedures for the case. To make an arbitration faster and cheaper, it may be necessary to forego certain steps, such as additional rounds of briefs, excessive document production, longer hearings, more experts, and the like. The goal at the case management conference is to arrive at procedures that are genuinely useful and necessary for the effective presentation of the case. Any additional procedures are likely to result in time and cost inefficiencies.

What, then, is the nature and function of this second edition of the Report? First, the Report has been updated to reflect the various modifications made in the 2012 Rules. Second, and more importantly, this edition of the Report should be seen as an adjunct to the 2012 Rules. It can be used to enhance the tailor-making process required by the Rules. In this edition the techniques set out in Appendix IV to the Rules are further discussed and explained. Additional techniques beyond those in Appendix IV are also presented. The hope that may be expressed for this edition of the Report is that it will help ensure the success of the tailor-making process under the 2012 Rules and thereby contribute to the increased effectiveness and attractiveness of international arbitration.

Peter M. Wolrich
Chairman, ICC Commission on Arbitration and ADR
The techniques suggested in the document are not intended to be exhaustive. On the contrary, they are open-ended, and the parties and the tribunal are encouraged to think of this document as a basis from which to develop the procedures to be used. Indeed, it is the intention of the ICC Commission on Arbitration to revise and republish this document in the future, taking into account further suggestions which will emerge from the use of the document. As a corollary, it should be clear that parties and arbitrators are in no way obligated to follow any of the techniques. Moreover, the document is a product of the ICC Commission on Arbitration and not of the ICC International Court of Arbitration and thus it is not part of or interpretative of the ICC Rules of Arbitration or in any way binding upon the Court. Rather, it is a practical tool designed to stimulate the conscious choice of arbitral procedures with a view to organizing an arbitration which is efficient and appropriately tailor-made. Finally, while this document was conceived with the ICC Rules of Arbitration in mind, the vast majority of the techniques as well as the dynamics generated by the document can be used in all arbitrations.

It is the sincere hope of the Task Force that this document will be used and be of use in the crafting of efficient arbitration procedures in which time and cost will be proportionate to the needs of the dispute.

Peter M. Wolrich
Chairman, ICC Commission on Arbitration
INTRODUCTION

Costs incurred by the parties constitute the largest part of the total cost of international arbitration proceedings. It follows that if the overall cost of the arbitral proceedings is to be reduced, special emphasis needs to be placed on steps aimed at lowering the costs connected with the parties’ presentation of their cases. Such costs are often caused by unnecessarily long and complicated proceedings with unfocused requests for disclosure of documents and unnecessary witness and expert evidence. Costs can also be unnecessarily increased when counsel from different legal backgrounds use procedures familiar to them in a manner that leads to needless duplication.

The increasing and, on occasion, unnecessary complication of the proceedings seems to be the main explanation for the long duration and high cost of many international arbitrations. The longer the proceedings, the more expensive they will be. The 2012 ICC Rules of Arbitration (the “Rules”) have expressly addressed these concerns.

These Techniques for Controlling Time and Costs in Arbitration (the “Techniques”) are designed to assist arbitral tribunals, parties and their counsel in devising tailor-made procedures for individual arbitrations pursuant to Articles 22–24 of the Rules.

In particular, the Techniques may be of benefit to the parties and the tribunal when preparing the case management conference and seeking agreement on procedures suitable for their case. If the parties cannot reach agreement, the Techniques may also assist the arbitral tribunal in adopting procedures that it considers appropriate, taking into account its obligation to conduct the arbitration in an expeditious and cost-effective manner. The Techniques are freely accessible online on the ICC’s website (www.iccwbo.org) and in the ICC Dispute Resolution Library (www.icdr.com). They are in no way prescriptive. Rather, they provide suggestions that may assist in arriving at procedures that are efficient and will reduce both cost and time. Certain procedures will be appropriate for one arbitration, but inappropriate for another. There may be other procedures not mentioned here that are well suited to a particular case. In all instances, it is for the parties and the arbitral tribunal to select the procedures that are best suited for the case. The table of contents to this document can serve as a checklist of points to consider.

While the main focus of the Techniques is to provide guidance on the procedure during the arbitration, the first two sections give suggestions on the drafting of arbitration agreements and the initiation of arbitral proceedings.

ARBITRATION AGREEMENT

1 Keeping clauses simple

Simple, clearly drafted arbitration clauses will avoid uncertainty and disputes over their meaning and effect. They will minimize the risk of time and costs being spent on disputes regarding, for example, the jurisdiction of the arbitral tribunal or the process of appointing arbitrators. In all cases, ensure that the arbitration clause conforms with any relevant applicable laws.

2 Use of the ICC model clause

Use of the standard ICC arbitration clause is recommended. It provides as follows:

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

Modifications to the standard clause can result in unintended and undesirable consequences and therefore should be made only with great care and for specific purposes. In addition to the standard clause, the parties may wish to specify in separate sentences the place of the arbitration, the language of the arbitration and the rules of law governing the contract. Be cautious about adding to this clause further provisions relating to the procedure for the arbitration.

The Rules permit any party in need of urgent or conservatory measures that cannot await the constitution of an arbitral tribunal to make an application to the ICC International Court of Arbitration (the “Court”) for the appointment of an emergency arbitrator to decide upon the request for such measures. The parties should consider whether the Emergency Arbitrator Provisions as set out in Article 29 and Appendix V of the Rules are desirable in their particular situation. If the parties do not want the Emergency Arbitrator Provisions to apply, they must agree to opt out of those provisions and may do so by using the following model clause:

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The Emergency Arbitrator Provisions shall not apply.

3 Selection and appointment of arbitrators

High-value and complex contracts can give rise to small disputes for which a three-member tribunal may be too expensive. Although parties may desire the certainty of appointing either a one- or a three-member tribunal in their arbitration agreement, consideration should be given to staying with the standard ICC arbitration clause and providing for one or more arbitrators. This will enable the ICC to appoint, or the parties to agree on, a sole arbitrator where the specific nature of any subsequent dispute does not warrant a three-member tribunal (Rules, Article 12(2)).
If the parties wish the ICC to select and appoint all members of the arbitral tribunal (see paragraph 11 below), then the following wording can be used: “All arbitrators shall be selected and appointed by the ICC International Court of Arbitration.”

Adding special requirements regarding the expertise and qualifications of arbitrators to be appointed will reduce the pool of available arbitrators and may increase the time taken to select a tribunal.

4 Fast-track procedures
Consideration may be given to setting out fast-track procedures in the arbitration clause. Indeed, Article 38(1) of the Rules enables the parties to shorten time limits provided for in the Rules, while Article 38(2) enables the Court to extend those shortened time limits when necessary. Fast-track procedures are designed to enable an arbitration to proceed quickly, given the specific nature of the contract and the disputes that are likely to arise. However, experience shows that in practice it is difficult at the time of drafting the clause to predict with a reasonable degree of certainty the nature of disputes and the procedures that will be suitable for those disputes. Also, disagreements can arise later over the interpretation or application of fast-track clauses. Careful thought should therefore be given before such provisions are included in an arbitration agreement. Once a dispute has arisen, the parties could at that time agree upon a fast-track procedure, if appropriate.

5 Time limits for rendering the final award
One commonly used provision that can give rise to significant difficulties is the requirement that a final award be produced within a certain number of weeks or months from the commencement of the arbitration. Such specific time limits can create jurisdictional and enforcement problems if it turns out that the time limit specified is unrealistic or not clearly defined.

6 More detailed arbitration agreement after the dispute has arisen
If the parties agree to submit a dispute to ICC arbitration after the dispute has arisen, they can consider specifying in some detail the procedure for the arbitration, taking into account the nature of the dispute in question. This procedure may include some of the suggestions set out below to control time and costs.

### INITIATION OF PROCEEDINGS

#### Selection of counsel

7 Counsel with experience
Consider appointing counsel with the skills necessary for handling the arbitration at hand and who are sensitive to the need for appropriate time and cost efficiency. Such counsel are more likely to be able to work with the arbitral tribunal and the other party’s counsel to devise an efficient procedure for the case.

8 Counsel with time
Ensure that the counsel you have selected has sufficient time to devote to the case.

#### Selection of arbitrators

9 Use of a sole arbitrator
After a dispute has arisen, consider agreeing upon having a sole arbitrator, when appropriate. Generally speaking, a one-member tribunal will be able to act more quickly than a three-member tribunal, since discussions between tribunal members are not needed and diary clashes for hearings will be minimized. A one-member tribunal will obviously also be cheaper.

10 Arbitrators with time
Whether selecting a sole arbitrator or a three-member tribunal, it is advisable to make sufficient enquiries to ensure that the individuals selected have sufficient time to devote to the case in question. If there is a particular need for speed, this must be made clear to the ICC so that it can be taken into consideration when making any appointments.

11 Selection and appointment by the ICC
Consider allowing the ICC to select and appoint the arbitral tribunal, whether it be a sole arbitrator or a three-person tribunal. This will generally be the quickest way to constitute the arbitral tribunal if there is no agreement between the parties on the identity of all arbitrators. It will also reduce the risk of challenges, facilitate the constitution of a tribunal having a variety of specialist skills and create a different dynamic within the arbitral tribunal. If the parties wish to have input into the selection of the tribunal by the ICC, they can request that the ICC provide a list of possible arbitrators to be selected in accordance with a procedure to be agreed upon by the parties in consultation with the ICC.

12 Avoiding objections
Any objection to the appointment of an arbitrator will delay the constitution of the arbitral tribunal. When selecting an arbitrator, give careful thought to whether or not the appointment of that arbitrator might give rise to an objection.
13 Selecting arbitrators with strong case management skills

A tribunal that is proactive and skilled in case management will be able to play its role in managing the arbitration so as to make it as cost and time effective as possible, given the issues in dispute and the number and nature of the parties. Careful consideration should therefore be given to selecting tribunal members, especially the sole arbitrator or chair.

Request for Arbitration and Answer

14 Complying with the Rules

The claimant should ensure that the Request for Arbitration includes all of the elements required by Article 4(3), subparagraphs (a)—(h), of the Rules. Failure to do so may make it necessary for the Secretariat to revert to the Claimant before the Request can be forwarded to the Respondent in accordance with Article 4(5). This causes delay. Similarly, when filing its Answer, the Respondent should include all elements required by Article 5(1), subparagraphs (a)—(f), of the Rules.

15 Setting out a detailed statement of case

The Rules do not require a Request for Arbitration or an Answer to set out a full statement of case for either the claim or the defence (or, where applicable, a counterclaim). Whether or not a full statement is made in the Request can have an impact on the efficient management of the arbitration. Where the Request does contain detailed particulars of the claim, and a similar approach is taken by the respondent in the Answer, the parties and the arbitral tribunal will be in a position to make informed decisions at a very early stage in the proceedings regarding the procedural measures and case management techniques that are appropriate for the case. This will help to optimize the first case management conference held pursuant to Article 24(1).

16 Submitting additional information

The Rules expressly allow the parties to submit with a Request or an Answer any further documents or information that may contribute to the efficient resolution of the dispute (see Articles 4(3) and 5(1)). Those provisions allow for the submission of a full statement of case but also allow the parties simply to submit additional useful information. Consideration should be given to exercising this option, whether or not a full statement of case is provided.

Language of the arbitration

17 Determination of the language by the arbitral tribunal

If the parties have not agreed on the language of the arbitration, the arbitral tribunal, when determining the language, should consider doing so by means of a procedural order pursuant to Article 20 of the Rules, prior to drawing up the Terms of Reference and after ascertaining the positions of the parties.

18 Proceedings involving two or more languages

Having two or more languages of the arbitration will normally increase time and cost. Consideration should be given to whether the use of two or more languages truly justifies the additional time and cost. On the other hand, where there is a single language of the arbitration, the use of an additional language should be considered if it would reduce time and cost. For example, where appropriate, the parties can agree that documents, legal materials and witness testimony in a particular language need not be translated into the language of the arbitration.

If the parties have agreed, or the arbitral tribunal has decided, that the arbitration will be conducted in two or more languages, the parties and the arbitral tribunal should consider agreeing upon practical means to avoid duplication. In cases where the members of the arbitral tribunal are fluent in all applicable languages, it may not be necessary for documents to be translated. Consideration should also be given to avoiding having the Terms of Reference, procedural orders and awards in more than one language. If this cannot be avoided, the parties would be well advised to agree upon the language that will prevail.
ESTABLISHING THE FRAMEWORK OF THE ARBITRAL PROCEEDINGS

The Rules call for the framework of the arbitral proceedings to be established in three steps: the Terms of Reference; the case management conference; and the procedural timetable. The paragraphs that follow provide suggestions on how to use each of these steps to optimize time and cost efficiency.

Terms of Reference

19  **Summaries of claims and relief sought**

The arbitral tribunal should consider whether it is appropriate for it to draft the summary of claims and/or the relief sought itself, or whether it would assist if each party were to provide a draft summary for inclusion in the Terms of Reference in accordance with Article 23(1), subparagraph (c), of the Rules. In the latter case, the arbitral tribunal should consider requesting the parties to limit their summaries to an appropriate fixed number of pages. Further guidance on preparing Terms of Reference can be found in the article of Serge Lazareff, “Terms of Reference”, ICC International Court of Arbitration Bulletin, Vol. 17/No. 1 (2006).¹

20  **Empowering the president of the arbitral tribunal on procedural issues**

Where there is a three-member tribunal, it may not be necessary for all procedural issues to be decided upon by all three arbitrators. The parties should consider empowering the president of the arbitral tribunal to decide on certain procedural issues alone. In all events, consider authorizing the president to sign procedural orders alone.

21  **Administrative secretary to the arbitral tribunal**

Consider whether or not an administrative secretary to the arbitral tribunal would assist in reducing time and cost. If it is decided to use such a secretary, the parties and the arbitral tribunal should take into account the Note of the Secretariat of the Court on the Appointment, Duties and Remuneration of Administrative Secretaries. It is distributed to arbitrators in all cases and is reproduced in the ICC International Court of Arbitration Bulletin, Vol. 23/No. 1 (2012).

22  **Need for a physical meeting**

Consider whether it is appropriate to agree upon and sign the Terms of Reference without a physical meeting (e.g. by way of a telephone or video conference). In making that decision, the advantages of having a physical meeting at the start of the proceedings should be weighed against the time and cost involved. The holding of the case management conference should also be taken into account when deciding whether or not to hold a physical meeting (see paragraph 31 below).

23  **Counterparts**

If there is no physical meeting for signing the Terms of Reference, the arbitral tribunal should consider having the Terms of Reference signed in counterparts.

24  **Compliance with Article 23(3)**

If a party refuses to take part in drawing up the Terms of Reference or refuses to sign them, the arbitral tribunal should make certain that the Terms of Reference to be submitted to the Court for approval pursuant to Article 23(3) of the Rules do not contain any provisions that require the parties’ agreement or a decision by the arbitral tribunal.

Case management conferences

25  **Timing**

Article 24(1) requires the arbitral tribunal to convene a case management conference when drawing up the Terms of Reference or as soon as possible thereafter. Consider whether it is most convenient and efficient to hold the case management conference immediately after the signing of the Terms of Reference and at the same meeting.

26  **Preparation**

For the case management conference to be most effective, the tribunal should consider asking the parties well in advance of the conference to submit joint or separate case management proposals. This will encourage them actively to consider and exchange views on the procedures and case management techniques that may be appropriate for the case. Any joint or separate proposals from the parties, any agreements between the parties, and any suggestions from the tribunal should be discussed at the case management conference. It should be noted that, in accordance with Article 22(2) of the Rules, the arbitral tribunal may not adopt procedural measures that are contrary to an agreement of the parties.

27  **Use of the Techniques**

Appendix IV of the Rules sets out examples of available case management techniques. These and additional examples are also contained in this Report. They can be used by the arbitral tribunal and the parties at the case management conference to assist in arriving at the most appropriate procedures for the case (see the section entitled “Subsequent procedure for the arbitration” below).

¹ The Bulletin is available from the ICC Store (www.storeiccwbo.org) and online in the ICC Dispute Resolution Library (www.iccdril.com).
28 Providing information in advance of the conference

The more information the arbitral tribunal has about the issues in the case prior to the conference, the better placed it will be to assist the parties in devising a procedure that will deal with the dispute as efficiently as possible. For example, a tribunal that has made itself familiar with the details of the case from the outset can be proactive and give appropriate, tailor-made suggestions on the issues to be addressed in documentary and witness evidence, the areas in which it will be assisted by expert evidence, and the extent to which disclosure of documents by the parties is needed to address the issues in dispute.

29 Scope

Whenever possible, the procedure for the entire arbitration should be determined at the first case management conference and reflected in the procedural timetable to be established pursuant to Article 24(2) of the Rules. However, it may not always be possible to do so, for example in very complex cases or in cases where insufficient detail has been provided prior to the first case management conference. In such situations, the procedural timetable would lay out the procedure as far as can be done (e.g. through a first round of briefs) and a second case management conference would be held promptly to determine the remainder of the procedure for the arbitration.

30 Client attendance

Article 24(4) of the Rules expressly allows the arbitral tribunal to request the attendance at the case management conference of the parties in person or through an internal representative. The tribunal should consider requiring such attendance. When clients are present at the case management conference, they can play an active role in the decision-making process. They should be empowered to make case management decisions. Such decisions call for a cost-benefit analysis. For example, is an additional round of briefs worth the time and expense? Is a degree of discovery-style document production likely to produce benefits justifying the time and cost?

31 Need for a physical meeting

As with the drawing up of the Terms of Reference (see paragraph 22 above) and as permitted by Article 24(d), consider whether it is appropriate to hold the case management conference by way of telephone, video conference or similar means of communication that do not involve a physical meeting. If the case management conference is to be held at the same time as the Terms of Reference are signed, consider whether that would justify a physical meeting for both purposes.

32 Use of discretion in apportionment of costs

Pursuant to Article 37(5) of the Rules, the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner may be taken into account by the arbitral tribunal in determining who shall bear what portion of the costs of the arbitration. The arbitral tribunal should consider informing the parties at the case management conference that in exercising its discretion to allocate costs pursuant to the Rules, it will take into consideration any unreasonable failure to comply with procedures agreed upon or ordered in the arbitration or any other unreasonable conduct (see paragraph 82 below).

33 Further case management conferences

Consider holding further case management conferences during the course of the arbitration, as appropriate. Such conferences may be held prior to significant phases in the procedure (e.g. the exchange of witness statements) so as to ensure that the procedure provided for that phase remains appropriate. Short telephone conferences may also be held at regular intervals (e.g. once a month) to enable the arbitral tribunal to check on progress and discuss with the parties any unforeseen procedural issues that have arisen or may shortly arise.

Procedural timetable

34 Compliance with the procedural timetable

Consistent with their obligation under Article 22(1) of the Rules to make every effort to conduct the arbitration in an expeditious and cost-effective manner, the arbitrators and the parties should make all reasonable efforts to comply with the procedural timetable. Extensions and revisions of the timetable should be made only when justified. Any revisions should be promptly communicated to the Court and the parties in accordance with Article 24(2) of the Rules.

35 Need for a hearing

Consider whether or not it is necessary for there to be a hearing in order for the arbitral tribunal to decide the case. If it is possible for the arbitral tribunal to decide the case on documents alone, this will significantly reduce costs and time.

36 Fixing the hearing date

If a hearing is necessary, then early in the proceedings (ideally at the first case management conference) consider fixing the date for this hearing. This will reduce the likelihood that the arbitral proceedings become drawn out and will enable the procedure leading up to the hearing to be adapted to the time available.

37 Pre-hearing conference

Consider organizing a conference with the arbitral tribunal, which may be by telephone, to discuss the arrangements for any hearing. At such a pre-hearing conference, held a suitable time before the hearing itself, the parties and the arbitral tribunal can discuss matters such as time allocation, use of transcripts, translation issues, order of witnesses and other practical arrangements that will facilitate the smooth conduct of the hearing. The arbitral tribunal may consider using the occasion of the
Controlling Time and Costs in Arbitration

SUBSEQUENT PROCEDURE FOR THE ARBITRATION

The paragraphs that follow give guidance on the points to be discussed by the parties and the arbitral tribunal at the case management conference. They provide suggestions that may assist in reducing the cost and duration of the proceedings.

Written submissions

Written submissions come in different forms and are given different names. They include the Request for Arbitration and the Answer, statements of case and defence, memorials and other written arguments, and opening and closing written submissions. These comments apply to written submissions generally.

43 Setting out the case in full early in the proceedings

If the parties set out their cases in full early in the proceedings, the parties and the arbitral tribunal will be better able to understand the key issues at an early stage. Doing so will help ensure that the procedure defined at the case management conference is efficient and that time and money are not wasted on matters that turn out to be of no direct relevance to the issues to be determined.

44 Avoiding repetition

Avoid unnecessary repetition of arguments. Once a party has set out its position in full, it should not be necessary to repeat the arguments at later stages (e.g. in pre-hearing memorials, oral submissions or post-hearing memorials), and the arbitral tribunal may direct that there be no such repetition.

45 Sequential or simultaneous delivery

Consider whether it is more effective for written submissions to be sequential or simultaneous. Whilst simultaneous submissions enable both parties to inform each other of their cases at the same time (and this may make things quicker), it can also result in inefficiency if the parties raise different issues in their submissions and extensive submissions are required in response.

46 Specifying form and content

Consider specifying the form and content of written submissions. For example, clarify whether the first round of written submissions should or should not be accompanied by witness statements and/or expert reports.

47 Limiting the length of submissions

Consider agreeing on limiting the length of specific submissions. This can help focus attention on the key issues to be addressed and is likely to save time and cost.
48 Limiting the number of submissions

Consider limiting the number of rounds of submissions. This may help to avoid repetition and encourage the parties to present all key issues in their first submissions.

Documentary evidence

49 Organization of documents

From the outset of the case the parties should consider using a coherent system for numbering or otherwise identifying documents produced in the case. This process can start with the Request for Arbitration and the Answer, and a system for the remainder of the arbitration can be established with the arbitral tribunal at the time of the first case management conference.

50 Producing documents on which the parties rely

The parties will normally each produce the documents upon which they intend to rely. Each party should consider avoiding requests for production of documents from another party unless such production is relevant and material to the outcome of the case. When the parties have agreed upon non-controversial facts, no documentary evidence should be needed to prove those facts.

51 Establishing procedure for requests for production

Consider whether requests for production of documents are genuinely necessary. If they are, the parties and the arbitral tribunal should consider establishing a clear and efficient procedure for the submission and exchange of documents. In that regard, they could consider referring to Article 3 of the IBA Rules on the Taking of Evidence in International Arbitration for guidance. In addition, the parties and the arbitral tribunal should consider establishing an appropriate time frame for the production of documents. In most situations, this is likely to be after the parties have set out their cases in full for the first time. If issues concerning the production of electronic documents arise, consider referring to the ICC Commission Report Managing E-Document Production2 for information and guidance on how to manage such production in an efficient and cost-effective manner.

52 Managing requests for production efficiently

Time and costs associated with requests for production of documents, if any, can further be reduced by agreeing upon one or more of the following:

• Establishing reasonable time limits for the production of documents;
• Using the Schedule of Document Production devised by Alan Redfern (often referred to as the Redfern Schedule) in the form of a chart containing the following four columns:
  First Column: identification of the document(s) or categories of documents that have been requested;
  Second Column: short description of the reasons for each request;
  Third Column: summary of the objections by the other party to the production of the document(s) or categories of documents requested; and
  Fourth Column: left blank for the decision of the arbitral tribunal on each request.

53 Avoiding duplication

It is common for each of the parties to produce copies of the same documents, appended to their statements of case, witness statements or other written submissions. Avoiding duplication where possible will reduce costs.

54 Selection of documents to be provided to the arbitral tribunal

It is wasteful to provide the arbitrators with documents that are not material to their determination of the case. In particular, it will usually not be appropriate to send to the arbitral tribunal all documents produced pursuant to production requests. This not only generates unnecessary costs, but also makes it harder for the arbitral tribunal to prepare efficiently.

55 Keeping hard copies to a minimum


56 Translations

Try to agree how translations of any documents are to be dealt with. Reducing the need for certified translations will help to lower costs. Certified translations may be required only where translation issues emerge from unofficial translations.

57 Authenticity of documents

Consider providing that documents produced by the parties are deemed to be authentic unless and until such authenticity is challenged by another party.

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Correspondence

58 Correspondence between counsel
Avoid unnecessary correspondence between counsel. The arbitral tribunal may consider informing the parties that the persistent use of such correspondence may be viewed as unreasonable conduct and be taken into consideration by the arbitral tribunal when exercising its discretion in allocating costs pursuant to the Rules (see paragraph 62 below).

59 Sending correspondence to the arbitral tribunal
Avoid sending correspondence between counsel to the arbitral tribunal unless a decision of the arbitral tribunal is required. Any such correspondence that is addressed to the arbitral tribunal should be copied to the Secretariat in accordance with Article 3(1) of the Rules.

Witness statements

60 Limiting the number of witnesses
Every witness adds to the costs, both when a witness statement is prepared and considered and when the witness attends to give oral evidence. Costs can be saved by limiting the number of witnesses to those whose evidence is required on key issues. The arbitral tribunal may assist in identifying those issues on which witness evidence is required and focusing the evidence from witnesses on those issues. This whole process will be facilitated if the parties can reach agreement on non-controversial facts that do not need to be addressed by witness evidence.

61 Minimizing the number of rounds of witness statements
If there are to be witness statements, consider the timing for the exchange of such statements so as to minimize the number of rounds of statements that are required. For example, consider whether it is preferable for witness statements to be exchanged after all documents on which the parties wish to rely have been produced, so that the witnesses can comment on those documents in a single statement.

Expert evidence

62 Presumption that expert evidence not required
It is helpful to start with a presumption that expert evidence will not be required. Depart from this presumption only if expert evidence is needed in order to inform the arbitral tribunal on key issues in dispute.

63 ICC expert services
If either the parties or the arbitral tribunal require assistance in identifying an expert witness, recourse can be had to the ICC International Centre for ADR pursuant to the ICC Rules for the Proposal of Experts and Neutrals or the ICC Rules for the Appointment of Experts and Neutrals. Where an ICC arbitral tribunal seeks a proposal from the Centre for a tribunal-appointed expert, the services of the Centre are available at no cost. Further information regarding the operation of the ICC’s rules and services relating to experts can be found on the ICC website at www.iccwbo.org/products-and-services/arbitration-and-adr/experts/.

64 Clarity regarding the subject matter and scope of reports
It is essential for there to be clarity at an early stage (by agreement, if possible) over the subject matter and scope of any expert evidence to be produced. This will help to ensure that the experts appointed by the parties have similar expertise and address the same issues.

65 Number of experts
Other than in exceptional circumstances, it should not be necessary for there to be more than one expert per party for any particular area of expertise.

66 Number of reports
Consider agreeing on a limit to the number of rounds of expert reports and consider whether simultaneous or sequential exchange will be more efficient.

67 Meetings of experts
Experts will often be able to narrow the issues in dispute if they can meet and discuss their views after they have exchanged reports. Consideration should therefore be given to providing that experts shall take steps to agree on issues in advance of any hearing at which their evidence is to be presented. Time and cost can be saved if the experts draw up a list recording the issues on which they have agreed and those on which they disagree.

68 Use of single expert
Consider whether a single expert appointed either by the arbitral tribunal or jointly by the parties might be more efficient than experts appointed by each party. A single, tribunal-appointed expert may be more efficient in some circumstances. An expert appointed by the arbitral tribunal or jointly by the parties should be given a clear brief and the expert’s report should be required by a specified date consistent with the timetable for the arbitration.

Hearings

69 Minimizing the length and number of hearings
Hearings are expensive and time-consuming. If the length and number of hearings requiring the physical attendance of the arbitral tribunal and the parties are minimized, this will significantly reduce the time and cost of the proceedings.
70 Choosing the best location for hearings

Pursuant to Article 18(2) of the Rules, hearings do not need to be held at the place of the arbitration. The arbitral tribunal and the parties can select the most efficient place to hold hearings. In some cases, it may be more cost-effective to hold hearings at a location that, for example, is convenient to the majority of the witnesses due to give evidence at that hearing.

71 Telephone and video conferencing

For procedural hearings in particular, consider the use of telephone and video conferencing, where appropriate. Also, consider whether certain witnesses can give evidence by video link, so as to avoid the need to travel to an evidentiary hearing.

72 Providing submissions in good time

The arbitral tribunal should be provided with all necessary submissions (e.g. pre-hearing briefs, if any) sufficiently in advance of any hearing to be able to read them, prepare and become fully informed of the issues to be addressed.

73 Cut-off date for evidence

In advance of any evidentiary hearing, consider setting a cut-off date after which no new documentary evidence will be admitted unless a compelling reason is shown.

74 Identifying core documents

Consider providing the arbitral tribunal, in advance of any hearing, with a list of the documents it needs to read in preparation for the hearing. Where appropriate, this can be done by preparing and delivering to the arbitral tribunal a bundle of core documents on which the parties rely.

75 Agenda and timetable

Consider agreeing on an agenda and timetable for all hearings, with an equitable division of time between each of the parties. Consider the use of a chess clock to monitor the fair allocation of time.

76 Avoiding repetition

Consideration should be given to whether it is necessary to repeat pre-hearing written submissions in opening oral statements. This is sometimes done because of concern that the arbitral tribunal will not have read or digested the written submissions. If the arbitral tribunal has been provided with the documents it needs to read in advance of the hearing and has prepared properly, no such repetition will be necessary.

77 Need for witnesses to appear

Prior to any hearing, consider whether all witnesses need to give oral evidence. This is a matter on which the parties’ counsel can confer and seek to reach agreement.

78 Use of written statements as direct evidence

Cost and time can be saved by limiting or avoiding direct examination of witnesses. When appropriate, witness statements can substitute for direct examination at a hearing.

79 Witness conferencing

Witness conferencing is a technique in which two or more fact or expert witnesses presented by one or more of the parties are questioned together on particular topics by the arbitral tribunal and possibly by counsel. Consider whether this technique is appropriate for the arbitration at hand.

80 Limiting cross-examination

If there is to be cross-examination of witnesses, the arbitral tribunal, after hearing the parties, should consider limiting the time available to each party for such cross-examination.

81 Closing submissions

Consider whether post-hearing submissions can be avoided in order to save time and cost. However, if post-hearing submissions are required, consider providing for either oral or written closing submissions. The use of both will result in additional time and cost. In order to give focus, the arbitral tribunal should consider providing counsel with a list of questions or issues to be addressed by the parties in the closing submissions. Any written closing submissions should be provided by an agreed date as soon as reasonable following the hearing.
SPECIAL CONSIDERATIONS

Multiparty and multicontract arbitrations

Subject to certain conditions set forth in the Rules, Article 7 expressly permits the joinder of additional parties; Article 8 expressly permits claims between multiple parties; and Article 9 expressly permits claims arising out of more than one contract to be brought in a single arbitration, even if the claims are made under more than one arbitration agreement. Clearly, time and cost will be wasted if a party seeks to apply those provisions when the conditions set forth in the Rules are not met. For example, a Request for Joinder pursuant to Article 7 will be successful only if the joined party is bound by the arbitration agreement under which the claims in the arbitration are made; in addition, no additional party may be joined after the confirmation or appointment of any arbitrator, unless otherwise agreed. While Article 9 allows claims to be made in a single arbitration under more than one arbitration agreement, those claims will be sustained only if the different arbitration agreements are compatible. The conditions imposed by Articles 7, 8 and 9 should be carefully studied so as to avoid wasting time and money by making claims that will be rejected or by claiming against parties over whom the tribunal will have no jurisdiction.

Adapting procedures to multiparty and multicontract cases

The presence of one or more additional parties, the existence of one or more claims between claimants or between respondents, and the existence of claims under more than one contract are likely to complicate the proceedings. Care should be taken at the case management conference to devise tailor-made procedures, appropriate to the specifics of the case at hand, for dealing with the presence of additional parties, cross-claims and multicontract claims.

Consolidation

Article 10 of the Rules provides for the consolidation of two or more separate arbitrations brought under the Rules when all of the parties to those arbitrations consent to the consolidation. Consider whether giving such consent would result in a more efficient resolution of the disputes.
Emergency arbitrator proceedings

Subject to the conditions set forth in the Rules, the Emergency Arbitrator Provisions allow a party to seek urgent interim or conservatory measures from an emergency arbitrator acting under the Rules. The emergency arbitrator offers an alternative forum to state courts for seeking such relief. In deciding whether to file an Application for Emergency Measures, a party should consider a number of issues: first, whether it is genuinely useful and necessary to spend time and money on seeking to obtain interim or conservatory measures; second, whether an application for Emergency Measures under the Rules is preferable to seeking interim measures in a state court. Furthermore, the party should make sure that the conditions for bringing emergency arbitrator proceedings under the Rules are met. For example, the party making the application must be able to demonstrate that it needs urgent interim or conservatory measures that cannot await the constitution of the arbitral tribunal. Also, emergency arbitrator proceedings may only be brought against a signatory of the arbitration agreement or the signatory’s successor. An attempt to bring emergency arbitrator proceedings that do not meet all of the conditions will result in needless expenditure and loss of time. Further information on ICC emergency arbitrator proceedings can be found in Jason Fry, Simon Greenberg, Francesca Mazza, *The Secretariat’s Guide to ICC Arbitration* (ICC Publication 729) and in Andrea Carlevaris and José Ricardo Feris, “Running in the ICC Emergency Arbitrator Rules: The First Ten Cases”, published in the ICC International Court of Arbitration Bulletin, Vol. 25/No. 1 (2014).

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4. The article is available as an e-chapter from www.storeiccwbo.org.
ICC COMMISSION ON ARBITRATION AND ADR

The ICC Commission on Arbitration and ADR is the ICC’s rule-making and research body for dispute resolution services and constitutes a unique think tank on international dispute resolution. The Commission drafts and revises the various ICC rules for dispute resolution, including arbitration, mediation, dispute boards, and the proposal and appointment of experts and neutrals and administration of expert proceedings. It also produces reports and guidelines on legal, procedural and practical aspects of dispute resolution. In its research capacity, it proposes new policies aimed at ensuring efficient and cost-effective dispute resolution, and provides useful resources for the conduct of dispute resolution. The Commission’s products are published regularly in print and online.

The Commission brings together experts in the field of international dispute resolution from all over the globe and from numerous jurisdictions. It currently has over 600 members from some ninety countries. The Commission holds two plenary sessions each year, at which proposed rules and other products are discussed, debated and voted upon. Between these sessions, the Commission’s work is often carried out in smaller task forces.

The Commission aims to:

- Promote on a worldwide scale the settlement of international disputes by means of arbitration, mediation, expertise, dispute boards and other forms of dispute resolution.
- Provide guidance on a range of topics of current relevance to the world of international dispute resolution, with a view to improving dispute resolution services.
- Create a link among arbitrators, counsel and users to enable ICC dispute resolution to respond effectively to users’ needs.

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EFFECTIVE MANAGEMENT OF ARBITRATION

A Guide for In-House Counsel and Other Party Representatives
A Guide for In-House Counsel and Other Party Representatives

The purpose of this guide is to provide in-house counsel and other party representatives, such as managers and government officials, with a practical toolkit for making decisions on how to conduct an arbitration in a time- and cost-effective manner, having regard to the complexity and value of the dispute. The guide can also assist outside counsel in working with party representatives to that effect.

Reflecting the ICC’s continuing efforts to provide arbitration users with means to ensure that arbitral proceedings are conducted effectively, the guide focuses on time and cost issues in the management of arbitration. While strategic considerations are of great importance in any arbitration and will have a significant impact on its management, they tend to be case-specific and are beyond the scope of this guide.

While the guide was conceived with the ICC Rules of Arbitration in mind, most of its contents, as well as the dynamic generated by it, can be used in any arbitration. The guide can be useful for both large and small cases.
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INTRODUCTION

Arbitration is a dispute resolution mechanism that provides diverse users worldwide with a neutral forum, a uniform system of enforcement and the procedural flexibility that allows parties to tailor-make a procedure to suit their needs in each case. With a joint commitment to efficient management by parties, outside counsel and arbitral tribunals, it can achieve a time- and cost-effective resolution of a dispute. Without that commitment, the opposite can be true: the very flexibility of arbitration can lead to increased time and cost.

As arbitration has become more complex and the scrutiny of dispute resolution mechanisms has intensified, users have expressed the concern that arbitration is often too long and too expensive. One user has queried why a bridge can be built in one or two years but an arbitration to determine responsibility for delays and defects can take as long as three to four years. In light of the concerns of users, the ICC decided to address time- and cost-efficiency in arbitration head-on.

As a first step, in 2007, the ICC Commission on Arbitration (as it was then known) published its report on controlling time and costs in arbitration. Prior research covering a wide range of ICC cases had showed that on average:

- 82% of the costs of an arbitration were party costs, including lawyers’ fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration;
- 16% of the costs covered arbitrators’ fees and expenses; and
- 2% of the costs covered ICC administrative expenses.

It followed that, to minimize costs, special emphasis needed to be placed on reducing the costs connected with the parties’ presentation of their cases. The report developed a series of suggested concrete measures for each phase of the arbitration that can be used to reduce time and cost.
Then, in 2009, the Commission began its revision of the ICC Rules of Arbitration. The revised Rules came into force on 1 January 2012. One of the guiding principles for the revision was to improve the time- and cost-efficiency of arbitration. Among the provisions directed to that end is the requirement of an early case management conference during which the parties and the tribunal can establish an appropriate, time- and cost-effective procedure for the arbitration. The suggestions in the 2007 report, many of which are now included as an appendix to the Rules, may be used for that purpose.

The present guide is a continuation of that effort and is designed to help party representatives implement the new provisions and make appropriate decisions for effective case management. The guide will also assist outside counsel in working with party representatives to ensure well-planned and well-managed proceedings.

As noted above, arbitration rules permit flexibility and do not specify precisely how an arbitration is to be conducted. For example, there is nothing in the ICC Rules of Arbitration about the number of rounds of briefs, document production, the examination of witnesses, oral argument, post-hearing memoranda or bifurcation. The open-ended nature of the Rules enables the parties and the arbitral tribunal to tailor-make an effective procedure that suits the needs and particularities of each case. However, when studying the matter, the Commission came to the conclusion that too often the parties and tribunals do not tailor-make the procedure at an early stage, but rather apply boilerplate solutions or simply decide procedural matters piecemeal as the case progresses. This was found to increase time and cost in many arbitrations. Under the new case management provisions in Articles 22–24 of the Rules, which are specifically designed to address that problem, the process of tailor-making the procedure has now become a formal requirement.

Tailor-making the procedure so that the arbitration will be faster and cheaper is not inherently difficult to accomplish. The parties can agree upon faster and cheaper procedures and, failing their agreement, the arbitral tribunal has the power to determine such procedures after consultation with the parties. This will normally be done at the first case management conference. What is more challenging is determining
the appropriate level of process and resources to match the value and complexity of the case. It is faster and cheaper to have one round of briefs rather than three, or to hold a three-day rather than a three-week hearing, but an extended opportunity to be heard will necessarily be given up. It is less expensive and less burdensome to present a witness by videoconference, but perhaps also less persuasive. The goal of each party is to present its case in a manner that is most likely to persuade the arbitral tribunal to find in its favour. The time and cost that a party should be willing to devote to that end will vary according to the importance, complexity and value of the dispute. For each phase of the arbitration, cost/risk/benefit decisions have to be made.

Appropriate time and cost decisions can be made when party representatives have a collaborative relationship with outside counsel and actively participate in the making of those decisions. Each party best knows its own internal processes, the value of the underlying transaction and what is ultimately at stake. It is the party’s case, the party’s risk and the party’s money, so the party itself is in the best position to decide what level of risk to accept and what strategic decisions to make. Outside counsel can assist in reaching such decisions on the basis of an informed evaluation of the pros and cons of the available alternatives. In addition, arbitral tribunals play an important role by bringing their experience to bear in devising cost-effective procedures and encouraging all of the parties to assist in conducting the arbitration in an expeditious and cost-effective manner, as contemplated by Article 22(1) of the Rules.

CASE MANAGEMENT CONSIDERATIONS

As a general matter, party representatives should consider the following when managing an arbitration:

**Early case assessment.** Much time and cost can be saved by not litigating matters with low chances of success, or that are not worth the cost/time/distraction to its personnel. This should be analysed before an arbitration has begun; however, case assessment should also continue during the arbitration.

**Maintaining realistic schedules.** Setting up of a realistic schedule for the entire arbitration as early as possible and sticking to that schedule, unless there are serious reasons for not doing so, are essential to controlled and
predictable proceedings. Parties will be able more accurately to foresee the date of the award and make appropriate financial plans. The arbitral tribunal also has an important role in establishing and maintaining a realistic schedule.

Establishing a tailor-made and cost-effective procedure. Using this guide, party representatives along with outside counsel can determine optimum procedures from the party’s perspective. The question then is how to implement those procedures. First, one party may consult with the other party with a view to reaching agreement on the applicable procedures. Any such agreement must be applied pursuant to Article 19 of the Rules. If the parties cannot agree on one or more of the procedures, each can present its position to the arbitral tribunal prior to or during the case management conference. The arbitral tribunal will decide after hearing the parties.

Awareness of settlement procedures. Settlement procedures such as mediation, neutral evaluation and direct settlement discussions can occur at any time before or during an arbitration. As an arbitration progresses, views on the case and parties’ needs may change, affecting the desirability and nature of a potential settlement. New facts may come to light, a partial award may be rendered, management changes may occur, and new perspectives in relations between the parties may emerge. The parties should continually reassess their case and determine whether, at any given point in time, there is an opportunity for a meaningful settlement.

STRUCTURE OF THE GUIDE

This guide is composed of three main parts, each of which is designed to assist in making effective time and cost decisions for an arbitration: first, a discussion of settlement considerations; second, a discussion of the case management conference; and third, a series of eleven topic sheets.

Each topic sheet deals independently with a specific step in the arbitration process where cost/risk/benefit decisions need to be made. The topic sheets are not intended to cover every aspect of an arbitration; rather,
they are designed to provide a methodology for decision-making. They may also serve as a tool to assist in making appropriate decisions on each topic. The following topics are covered:

- Request for arbitration
- Answer and counterclaims
- Multiparty arbitration
- Early determination of issues
- Rounds of written submissions
- Document production
- Need for fact witnesses
- Fact witness statements
- Expert witnesses
- Hearing on the merits
- Post-hearing briefs

Each topic sheet is designed to serve as an executive summary and follows a standard format consisting of a series of separate sections. The first section presents the topic and identifies the issue(s); the second section sets out the options available to the parties for that topic; the third section discusses the pros and cons of the different options; the fourth section analyses the different choices from a cost/risk/benefit perspective; and the fifth section lists useful questions that will help to focus on the key decisions that need to be made. The list of questions could, for example, serve as a basis for discussion between party representatives and outside counsel regarding the choices that need to be made for that particular phase of the arbitration. Where useful, a final section contains other general points to consider.

The topic sheets are not prescriptive and do not provide any definitive answers but rather contain suggestions that can be used to stimulate discussion and decision-making. It is the hope of the Commission that these topic sheets will help in taking the appropriate cost/risk/benefit decisions that need to be made in order to conduct an expeditious and cost-effective arbitration, having regard to the complexity and value of the dispute.
SETTLEMENT CONSIDERATIONS

A negotiated settlement of the dispute can save a great deal of time and cost, and parties would be well advised to maintain focus on the availability of settlement opportunities before and throughout an arbitration. The case management techniques listed in Appendix IV (h) to the ICC Rules of Arbitration indicate that the arbitral tribunal may inform the parties that they are free to settle all or part of the dispute at any time and, where agreed with the parties, may take steps to facilitate a settlement, subject to enforceability considerations under applicable law.

WHETHER OR NOT TO SETTLE

This is a complex question that will depend on each individual case. It is necessary to weigh the chances of success in an arbitration against a series of factors including the costs, burden and distraction caused by the proceedings and the time required to obtain the result. The choice may be affected by matters of principle or the need to eliminate financial or other uncertainties. Additional considerations include:

Preservation of relationships. Parties to an arbitration may have an ongoing relationship which they wish to preserve. Settlement may support that relationship better than litigating the dispute.

Difficulties of enforcement. If a claimant anticipates difficulties in enforcing an arbitral award against a particular respondent, it should factor that difficulty into its assessment of the strength of its case. When enforcement is uncertain, a settlement for a lower amount may be appropriate.

Reasons not to settle. Various factors may militate against settlement. For example, a claimant may wish to obtain a precedent or guidance from a tribunal for use in future cases or may consider that a given settlement offer does not match the chances of success in an arbitration. A respondent may prefer not to settle in order to discourage other potential claimants from seeking a settlement or because it is concerned that a settlement may be interpreted as an admission of liability.
Importance of confidentiality. A settlement may be preferable to an arbitration that is not confidential. ICC arbitration proceedings will not be confidential unless the parties have so agreed, the tribunal has so ordered or applicable law so requires.

METHODS OF SETTLEMENT

If the parties have decided to explore settlement, various methods are available to them. They may seek a settlement on their own, with the assistance of counsel or with the assistance of a mediator pursuant to the ICC Mediation Rules. Recourse to the Mediation Rules may be based on an agreement between the parties or a unilateral request by one party subsequently accepted by the other. While providing for mediation, the ICC Mediation Rules also allow the parties to choose any other settlement method that may be better suited to their dispute. Settlement methods that can be used under the ICC Mediation Rules include:

Mediation. The neutral acts as a facilitator to help the parties arrive at a negotiated settlement of their dispute. The neutral is not requested to provide any opinion on the merits of the dispute.

Neutral evaluation. The neutral provides a non-binding opinion or evaluation on any of a wide variety of matters including issues of fact or law, technical questions or the interpretation of a contract.

Mini-trial. A panel consisting of the neutral and an authorized executive of each party hears presentations by the parties, after which either the panel or the neutral can mediate the dispute or express an opinion on the merits.

A combination of methods, such as mediation with a neutral evaluation on a particular issue.

The report of an expert, selected pursuant to the ICC Rules for the Administration of Expert Proceedings to make findings on a disputed matter, may help to facilitate settlement. However, unlike a neutral evaluation and unless the parties agree otherwise, the expert’s report will be admissible in judicial or arbitral proceedings if no settlement is reached.
CASE MANAGEMENT TECHNIQUES

The parties and their counsel should keep in mind that even where settlement is not feasible before or at the outset of an arbitration, the arbitration can be managed in such a way as to facilitate settlement throughout the proceedings. Appendix IV to the ICC Rules of Arbitration highlights several case management techniques that can be used to that end:

**Bifurcation.** In appropriate cases, a partial award on jurisdiction or liability may facilitate settlement. For example, if the arbitral tribunal decides that it has jurisdiction, the parties will know that the arbitration will go forward. This could prompt them to discuss settlement. Similarly, if the tribunal finds a party to be liable, the parties may prefer to settle the issue of damages rather than incur the time and expense of completing the arbitration.

**Early consideration of controlling issues.** In some cases there are issues of law, fact or a mixture of fact and law, which necessarily affect the determination of the claims in the arbitration, yet can be resolved independently at relatively little expense. Examples include the determination of the applicable law, statute of limitations, the interpretation of a particular contractual provision, the determination of a key fact or technical issue or the measure of damages. The parties may find it easier to arrive at a settlement after such issues have been resolved by the tribunal.

**Engagement of the arbitral tribunal.** Where the parties agree and the applicable law permits, the arbitral tribunal can actively facilitate settlement either by encouraging the parties to pursue one of the settlement methods described above, or through discussions with the parties.

CREATIVITY AND OPEN-MINDEDNESS

Arbitrations often take on a life of their own once the parties have developed their positions and incurred costs. Parties and their counsel should keep in mind that a settlement can occur at any time during an arbitration and that the ICC Rules of Arbitration encourage the parties to explore this possibility. When exercising their will and their creativity in seeking a settlement, parties often arrive at solutions that are unavailable through arbitration.
CASE MANAGEMENT
CONFERENCE

The case management conference provides the mechanism for determining the manner in which the arbitration will be conducted. If it is not possible to determine the entire procedure at the first case management conference, the remaining issues may be decided at a subsequent conference. The decisions made at the case management conference can be modified during the course of the arbitration by agreement of all of the parties or, failing such agreement, by a decision of the arbitral tribunal.

Article 24(1) of the ICC Rules of Arbitration requires the arbitral tribunal to convene an early case management conference to consult the parties on the conduct of the arbitration. Thereafter, pursuant to Article 22(2) of the Rules, the arbitral tribunal may adopt procedural measures for the conduct of the arbitration, provided that they are not contrary to any agreement of the parties. Article 22(1) requires the arbitral tribunal and the parties to make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

Issues to be decided include: the number of rounds of briefs; the extent of document production, if any; the early determination of issues; fact and expert witnesses; and the conduct of the hearing, if any. The topic sheets contained in this guide are designed to assist the parties, along with their counsel and the arbitral tribunal, in making appropriate choices for the conduct of the arbitration.

In practice, after receiving the case file, the arbitral tribunal may invite the parties to make case management proposals. If it does not do so, the parties can seek to agree between themselves upon the conduct of the proceedings. If they arrive at an agreement, it must be followed, subject to any proposals of the arbitral tribunal that are accepted by all of the parties. If the parties do not reach an agreement, the arbitral tribunal, after listening to the parties, will adopt procedural measures that it deems to be appropriate for the case at hand.
While Article 22(1) of the Rules refers to expeditious and cost-effective proceedings, it also makes clear that speed and low cost are not ends in themselves. The complexity and value of the dispute must be taken into account. A cost-effective and expeditious arbitration will be one in which the time and cost devoted to resolving the dispute is appropriate in light of what is at stake. In each case, it is necessary to make a cost/benefit analysis in order to see whether a particular procedural measure is cost-justified.

The objectives of the parties will play a crucial role in making such choices. Some examples of how parties’ goals may translate into case management strategy are set forth below:

• When an important matter of principle is at stake, it may be worth the time and expense needed for a thorough examination of the facts and a full articulation of all legal arguments. A party with this objective may be willing to incur the expense of more extensive document production, multiple rounds of written submissions, a larger number of fact and expert witnesses, and the like.

• When neither an important principle nor great sums are at stake, parties may wish the arbitration to be as inexpensive and rapid as possible. Here, in contrast, parties may seek to limit document production, limit the number of witnesses, shorten hearings or minimize submissions.

• When parties wish to settle the case, for example in order to maintain their relationship or mitigate the risk of loss, they may use the case management conference to seek bifurcation of the proceedings or an early determination of controlling issues, the resolution of which might facilitate settlement. The parties may also agree to undertake settlement procedures either before or during the remaining phases of the arbitration.
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1. REQUEST FOR ARBITRATION

PRESENTATION

An ICC arbitration is commenced by the filing of a Request for Arbitration with the Secretariat of the ICC International Court of Arbitration (Article 4 of the ICC Rules of Arbitration). In all cases, the Request must contain the information required by Article 4(3) of the Rules. That provision is intended to elicit sufficient information to enable the respondent to respond to the claimant’s claims, as required by Article 5(1) of the Rules, and for the International Court of Arbitration to fulfil its functions under the Rules with respect to the constitution of the arbitral tribunal and the setting in motion of the arbitration.

Issue: Should the Request contain only the minimum requirements of the Rules or provide a more elaborate statement of the case?

OPTIONS

A. File a short Request that satisfies the Rules without providing any more content or evidence than is strictly required by the Rules.

B. File a comprehensive Request that constitutes a full statement of the case, including exhibits.

The above options represent two ends of a spectrum. However, there is also the option of filing a Request that provides a level of content and evidence anywhere between those two ends.

PROS AND CONS

A shorter and less comprehensive Request can be prepared more economically and more quickly than a more comprehensive document.

On the other hand, a more comprehensive Request may avoid the need for multiple rounds of subsequent submissions and thereby help to expedite the arbitration. In addition, providing more information may increase the impact of the Request on the respondent. Additional detail may also enable the parties and the
arbitral tribunal to focus on the key issues in the case as early as possible and thereby facilitate the drawing up of the Terms of Reference and the conduct of the case management conference.

COST/BENEFIT ANALYSIS

In all circumstances, the claimant should seriously consider conducting an early assessment of the nature, strengths and weaknesses of its case before filing a Request. This will allow it to determine, in the first instance, whether the claims are sufficiently strong to warrant bringing the arbitration or whether it would be better to seek a settlement of the dispute. If it decides to proceed with the arbitration, the early case assessment will help to ensure that the Request does not contain errors and that the claimant’s claims are correctly described and set forth in the most effective manner. While this assessment requires some time and expenditure, it typically results in a saving of both over the arbitration as a whole.

If the claimant decides to proceed with the arbitration, it must determine whether to file a shorter or longer Request. The decision on how comprehensive the Request should be will be heavily influenced by the circumstances of the case and strategic considerations. Some time and cost may be saved by drafting a shorter Request although this may be a temporary saving if the claimant is ultimately required to supplement such a Request with additional detailed information. When the Request and the Answer respectively constitute a full statement of the case and a full statement of defence, time and cost can be saved by avoiding one or more further rounds of submissions. However, in complex cases this may not be possible, and the Request and Answer may be ultimately superseded by subsequent written submissions.

If a primary purpose for filing a Request is to elicit settlement discussions, consideration should be given to whether this is best accomplished with a shorter or a longer Request. A shorter Request may be preferable if the respondent is unlikely to discuss settlement unless an arbitration has been commenced and the substantive aspects of the claim would be best dealt with in the
settlement discussions. A longer Request may be preferable if the goal is to show the respondent in writing the strengths of the claimant’s case before commencing settlement discussions.

QUESTIONS TO ASK

1. What is the desired result of filing the Request (e.g. triggering settlement discussions or having the dispute resolved by arbitration)?

2. Are there any valid reasons for not conducting an early case assessment?

3. Are there any real cost savings in filing a shorter Request? Would they be outweighed by the benefits of filing a longer Request for any of the reasons described above?

4. Are there any other strategic or legal considerations that may affect the timing of the filing of the Request and consequently whether it should be shorter or longer?

OTHER POINTS TO CONSIDER

In certain cases, questions of timing may militate in favour of a shorter Request. For example, a Request may need to be filed quickly to avoid being barred by a statute of limitations. A Request may also have to be filed within ten days of receipt by the Secretariat of an application for emergency measures pursuant to Article 1 of the Emergency Arbitrator Rules (Appendix V to the Rules).

Pursuant to Article 23(4) of the Rules, after the Terms of Reference have been established, no new claims may be made without the authorization of the arbitral tribunal. It is therefore prudent for the claimant to make all of its claims prior to the signing of the Terms of Reference.

Article 5(6) of the Rules provides that the claimant shall submit a reply to any counterclaim raised by the respondent pursuant to Article 5(5) of the Rules. The topic sheet relating to the Answer and counterclaims offers guidance on this matter.
2. ANSWER AND COUNTERCLAIMS

PRESENTATION

The respondent is required to file an Answer to the Request for Arbitration with the Secretariat (Article 5 of the ICC Rules of Arbitration). In all cases, the Answer must contain the information required by Article 5(1) of the Rules. The Answer may contain a counterclaim pursuant to Article 5(5) of the Rules.

Issue: How detailed or extensive should the Answer and any counterclaim be, above and beyond what is required by the Rules?

OPTIONS

A. File a short Answer that satisfies the Rules without providing any more content or evidence than is strictly required by the Rules.

B. File a comprehensive Answer that constitutes a full statement of defence, including evidentiary exhibits.

The above options represent two ends of a spectrum. However, there is also the option of filing an Answer that provides a level of content and evidence anywhere between those two ends.

In deciding on the appropriate length of the Answer, the respondent should consider whether or not to match the length and level of detail chosen by the claimant. Specifically, the respondent may choose between the following options:

a) File an Answer that reflects the approach taken by the claimant (e.g. a shorter or a longer document).

b) File an Answer in a form that is different from the form of the Request filed by the claimant.

C. Assert a counterclaim, irrespective of the length and content of the Answer. The raising of a counterclaim is subject to considerations similar to those described in the topic sheet on the Request for Arbitration.
PROS AND CONS

The pros and cons of filing a shorter or a longer Answer may vary depending on the form of the Request filed by the claimant. If the claimant has filed a shorter Request and the respondent reciprocates with an equally short Answer, the arbitration should be able to proceed more expeditiously to the Terms of Reference and the case management conference, in part because the respondent is less likely to need an extension of time for filing the Answer pursuant to Article 5(2) of the Rules. On the other hand, if the claimant files a longer and more detailed Request, then the respondent may be required to seek an extension of time in order to respond with a detailed Answer.

A shorter and less comprehensive Answer can be prepared more economically and more quickly than a more comprehensive document.

If the claimant has filed a comprehensive Request and the respondent decides to file a comprehensive Answer, this may avoid the need for multiple rounds of subsequent submissions and thereby expedite the arbitration.

In addition, providing more information may increase the impact of the Answer. Additional detail may also increase the ability of the parties and the arbitral tribunal to focus on the key issues in the case as early as possible and thereby facilitate the drawing up of the Terms of Reference and the conduct of the case management conference.

COST/BENEFIT ANALYSIS

To the extent possible in the time available, the respondent should conduct an early assessment of the nature, strengths and weaknesses of its case before filing an Answer. This will allow it to determine, in the first instance, whether the case should be defended or whether settlement should be pursued. If the respondent decides to defend the arbitration, and possibly assert counterclaims, the early case assessment will help to ensure that the Answer does not contain errors and that the respondent’s defence and/or counterclaims are correctly described and set forth in the most effective manner. While this assessment
requires some time and expenditure, it typically results in a saving of both over the arbitration as a whole.

An additional consideration for the respondent is the limited amount of time available under the Rules for making an early case assessment and filing its Answer. If the respondent has prior knowledge of the dispute, then it may be able to undertake an early case assessment before receiving the Request for Arbitration. If, on the other hand, the receipt of the Request for Arbitration is the respondent’s first real opportunity to assess the claimant’s claims, the time available to it under the Rules for this purpose will be limited.

Depending on the circumstances described above, the respondent must decide whether to file a shorter or a longer Answer. The decision on how comprehensive the Answer should be will be heavily influenced by the circumstances of the case, strategic considerations and the limited time available for submitting the Answer under the Rules. Some time and cost may be saved by drafting a shorter Answer although this may be a temporary saving if the respondent is ultimately required to supplement such an Answer with additional detailed information.

If the claimant has filed a full statement of the case in its Request and if in the time available it is possible to file a full statement of defence in the Answer, time and cost can be saved by avoiding one or more rounds of further submissions. However, this may not be possible in complex cases.

Consideration should be given to whether filing a shorter or a longer Answer might facilitate settlement discussions. A shorter Answer may be preferable if the substantive aspects of the settlement would best be dealt with in negotiations and there is a reasonable prospect of a settlement. A longer Answer may be preferable if the goal is to show the claimant in writing the strengths of the respondent’s defence and any counterclaims for purposes of settlement discussions.
QUESTIONS TO ASK

1. Are there any real cost savings or any other advantages in filing a shorter Answer? Would they be outweighed by the benefits of filing a longer Answer for any of the reasons described above?

2. Is there sufficient time to conduct an early assessment of the defence and file the Answer within the 30 days specified in the Rules, or is it necessary to request an extension of time for filing the Answer pursuant to Article 5(2)?

3. Are there any serious counterclaims that can and should be raised in the arbitration? Should they comply with only the minimum requirements set out in the Rules or be more detailed and accompanied by evidentiary exhibits?

OTHER POINTS TO CONSIDER

Pursuant to Article 23(4) of the Rules, after the Terms of Reference have been established, no new claims may be made, without the authorization of the arbitral tribunal. It is therefore prudent for any counterclaims to be made by the respondent prior to the signing of the Terms of Reference.

If the respondent wishes to join an additional party pursuant to Article 7(1) of the Rules, it must be careful to do so within the time limits specified in that Article.

If there are serious objections to jurisdiction, the respondent may consider keeping the Answer short with respect to the merits.
3. MULTIPARTY ARBITRATION

PRESENTATION

Under the ICC Rules of Arbitration, an arbitration having more than two parties may occur when all of the parties have so agreed. Multiparty arbitrations may result from various procedural choices:

• A claimant may commence an arbitration pursuant to Article 4 of the Rules against two or more respondents.

• Two or more claimants may commence an arbitration pursuant to Article 4 of the Rules against one or more respondents.

• Before the confirmation or appointment of any arbitrator, any party may join another party to the arbitration pursuant to Article 7 of the Rules.

• Upon any party’s request, two or more pending arbitrations may be consolidated into a single arbitration by the Court, subject to the requirements of Article 10 of the Rules.

Issue: When is it beneficial to choose a multiparty arbitration?

OPTIONS

A. A single arbitration that includes all relevant parties when they have all so agreed.
B. Two or more separate arbitrations.

PROS AND CONS

A single multiparty arbitration, when possible, results in more comprehensive proceedings and avoids duplication. It also avoids the risk of conflicting decisions in separate arbitrations.

On the other hand, a single multiparty arbitration may result in more complex proceedings, which could increase the length and cost of the arbitration. For example, a party with a small role in the dispute may not wish to participate in a multiparty arbitration and could
refuse to do so in the absence of a binding arbitration agreement. Further, in an arbitration where there is to be a three-member arbitral tribunal, choosing to have more than two parties in the arbitration may deprive the parties of their ability to choose a co-arbitrator, because the ICC International Court of Arbitration may decide to appoint the entire tribunal pursuant to Article 12(8) of the Rules.

**COST/BENEFIT ANALYSIS**

Consideration should be given to whether a single multiparty arbitration, as opposed to two or more separate arbitrations, would save time and money. While a single arbitration will usually be more cost-efficient, there could be situations in which separate arbitrations may still be the more efficient option for one or more parties.

If a single multiparty arbitration is the more time- and cost-efficient option, the parties should consider whether the time and cost benefits outweigh any of the potential disadvantages, such as the risk of losing the opportunity to choose a co-arbitrator because the International Court of Arbitration may find it necessary to appoint the arbitral tribunal pursuant to Article 12(8) of the Rules.

Another important factor to consider in deciding whether a single multiparty arbitration would be beneficial is the contractual role of each party and the specific interests flowing from that role. Arbitration of your dispute with one party may weaken your position with respect to another party. Where, for example, parties share potential liability with respect to their contractual counterparty, it may be tactically imprudent for them to have their internal disputes heard in the arbitration with the contractual counterparty, since their allegations against each other may support the counterparty’s case against them.
4. EARLY DETERMINATION OF ISSUES

PRESENTATION

Issue: In what circumstances would it be beneficial to break out certain issues for early determination by the arbitral tribunal in a partial award?

Various kinds of issues lend themselves to such treatment:

First, there may be threshold issues that could be dispositive of the entire arbitration. Such issues might include:

- whether the tribunal has jurisdiction over the dispute;
- whether the dispute is barred by an applicable statute of limitations;
- whether there is liability;
- whether the dispute is arbitrable;
- whether the parties have capacity to sue or be sued.

For example, were a tribunal to decide that it lacks jurisdiction over the entire dispute, that would result in a final award dismissing all claims made in the arbitration. If the tribunal decides that it has jurisdiction, that decision would result in a partial award and the arbitration would continue, unless the tribunal’s decision leads to a settlement. The same pattern would apply, mutatis mutandis, to the other examples given above.

Second, there may be discrete issues which could be usefully broken out and decided in a partial award, even though their resolution would not be dispositive of the entire arbitration. The early resolution of a particular issue may narrow or simplify the issues to be decided in the remainder of the arbitration or may facilitate settlement. Such issues may include:

- a decision on the meaning of a contractual provision;
- a decision on the applicable law;
- a decision on certain key facts in dispute;
4. EARLY DETERMINATION OF ISSUES

• A decision on an issue that may significantly affect a party’s exposure to one or more claims, such as determination of the types of recoverable damages.

For example, a decision on applicable law may save the parties from having to incur time and cost pleading their case on the basis of alternative applicable laws. The same analysis applies to the other examples above.

OPTIONS

A. Do not break out any issues for early determination.

B. Break out one or more issues for early determination by means of an award.

PROS AND CONS

The early determination of one or more issues in a partial award may resolve the entire dispute, simplify the remainder of the arbitration or facilitate settlement. However, if the award does not achieve one of those objectives, the early determination procedure may result in added time and cost. In addition, breaking out a discrete issue rather than having it decided along with the other issues may affect the way the tribunal decides one or more of the issues.

COST/BENEFIT ANALYSIS

Breaking out issues that could be dispositive of the entire arbitration

A cost/benefit analysis of this question is complicated by the fact that the decision has to be made in the face of important unknowns. When deciding whether or not to break out an issue, the parties cannot know what the arbitral tribunal’s decision will be. For example, in a case involving issues of liability and damages, if the issue of liability is broken out and the tribunal decides that there is no liability, a great deal of time and cost will be saved since there will be no need to exchange briefs and hold hearings on damages. On the other hand, if the tribunal finds that there is liability, unless such finding encourages the parties to settle the case, there will have to be a damages phase, and the breaking out of the issue of liability may then actually add to the overall time and cost of the proceedings.
Given these unknowns, the cost/benefit analysis must turn on an appreciation of probabilities and an estimate of potential cost. In deciding whether to break out an issue, it may be useful to estimate likely outcomes as well as time and cost in answer to certain specific questions:

- What is the likelihood that the tribunal’s decision will be dispositive of the entire arbitration?
- If the tribunal’s decision will not be dispositive of the entire arbitration, what is the likelihood that the tribunal’s early determination of the issue may result in a settlement of the case?
- What is the added time and cost likely to result from early determination of the issue in comparison with the likely overall cost, i.e. how much more time and cost would there be if the arbitration were conducted in two parts rather than one?

The answers to these questions can help in deciding whether or not to break out an issue for early determination. The following factors would tend to favour the breaking out of an issue for early determination:

- the likelihood of a dispositive determination is high;
- the likelihood of a settlement, even if there is no dispositive determination, is high;
- the remaining phases are likely to be long and expensive;
- the additional cost caused by early determination is low.

A decision on whether to break out an issue can be made by weighing these factors in relation to each other.

**Breaking out issues in a partial award not dispositive of the entire arbitration**

A similar type of cost/benefit analysis would apply here, although the relevant questions are slightly different:

- What is the likelihood that the tribunal’s early determination of a particular issue will significantly narrow or simplify the other issues to be decided in the remainder of the arbitration?
What is the likelihood that early determination of a particular issue may result in a settlement of the case?

What is the additional time and cost likely to result from early determination of a particular issue?

Once again, weighing the answers to those questions against each other can help in deciding whether it is beneficial to break out a particular issue for early determination.

**QUESTIONS TO ASK**

1. Does the case contain any threshold or discrete issues that could be determined in a separate award?

2. Would the early determination of those issues by the arbitral tribunal be beneficial, in light of the cost/benefit analysis discussed above?

3. Would early determination (a) potentially resolve the entire dispute, (b) facilitate settlement or (c) simplify the rest of the arbitration?

**OTHER POINTS TO CONSIDER**

Article 37(5) of the Rules permits the arbitral tribunal, when allocating the costs of the arbitration, to take into account the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner. The arbitral tribunal might allocate some amount of costs against a party that loses in the early determination of a potentially dispositive issue if that party is considered to have acted in bad faith or otherwise not to have acted in an expeditious and cost-effective manner.

There may be logistical reasons for breaking out one or more issues for early determination, such as the availability of witnesses, hearing facilities, counsel or arbitrators. In addition, it may allow a complex case to be conducted in a more orderly manner.

There may be compelling reasons for deciding certain issues early in an arbitration, e.g. whether claims made under different arbitration agreements may be heard together in a single arbitration. The breaking out of an issue for decision in a partial award could be agreed upon by the parties or determined by the arbitral tribunal in the absence of an agreement by the parties.
5. ROUNDS OF WRITTEN SUBMISSIONS

PRESENTATION

An ICC arbitration is commenced by the filing of a Request for Arbitration (Article 4 of the ICC Rules of Arbitration). Thereafter, the respondent files an Answer (Article 5). If the Answer contains a counterclaim, the claimant files a reply (Article 5). The Terms of Reference for the arbitration are then established (Article 23).

Issue: How many subsequent rounds of written submissions are appropriate in a particular arbitration?

OPTIONS

A. No further written submissions are necessary, since the Request and the Answer sufficiently state the case.
B. One subsequent round of written submissions.
C. Two or more subsequent rounds of written submissions.
D. Post-hearing briefs (assuming there is a hearing).

PROS AND CONS

Additional rounds of written submissions enable the parties to articulate their positions more extensively and respond to the developing arguments on each side. However, additional rounds of briefs may lead to unnecessary repetition, excessive detail or dilatory tactics.

COST/BENEFIT ANALYSIS

Each round of written submissions increases the length and cost of the arbitration. It is therefore essential to determine whether, in a particular case, the benefits of an additional round are worth the extra time and cost.

Additional submissions may be particularly useful in certain cases, e.g. where there are complicated issues of fact or law or issues of strategic importance for a party. In such cases, it is very common to have two rounds of pre-hearing written submissions after the initial submissions.
QUESTIONS TO ASK

1. Does the case justify the extra time and cost caused by additional written submissions?
   And, in particular,

2. Are additional rounds of submissions genuinely useful or necessary for a party to make its case to the arbitral tribunal, and if so, why?

3. What is the estimated cost of such additional rounds?

4. Is the benefit worth the cost, and if so, why?

OTHER POINTS TO CONSIDER

Consider limiting the number of pages of written submissions.

Consider limiting the scope of such submissions, e.g. to issues raised by the other side in its immediately preceding submission.

Consider having the arbitral tribunal indicate issues on which it wishes the parties to focus in any further round of submissions.

Consider whether any subsequent rounds of submissions should be simultaneous or sequential. For example, it may be efficient for post-hearing briefs to be filed simultaneously.

Consider whether post-hearing briefs are genuinely useful or necessary, or whether one round of pre-hearing briefs and one round of post-hearing briefs are sufficient.

The foregoing suggestions could be put into effect either through an agreement between the parties or in an order from the arbitral tribunal upon a party’s request.
Document production can involve substantial time and cost. Obviously, every party may unilaterally submit documents to support its case. Document production refers to the extent to which one party may demand that another party produce documents.

The ICC Rules of Arbitration contain no specific provisions governing document production. Article 19 of the Rules allows the parties to agree upon the procedures to be applied and empowers the tribunal to decide in the absence of an agreement of the parties. Article 22(4) requires the arbitral tribunal to ensure that each party has a reasonable opportunity to present its case. Article 25(1) provides that the arbitral tribunal shall establish the facts of the case by all appropriate means and Article 25(5) allows it to summon any party to provide additional evidence.

In short, the Rules leave the question of whether and how much document production will occur to the parties and the arbitrators, provided that the parties are treated fairly and impartially and that each party has a reasonable opportunity to present its case. When document production is to occur, the manner in which the process is executed and the degree of production can have a significant impact on time and cost.

In-house counsel or other party representatives, working with outside counsel, should consider whether and to what extent document production is genuinely useful and cost-beneficial. When document production is to occur, time and cost can be significantly reduced by establishing an efficient document production procedure.

**Issue**: Is document production desirable and, if so, how much document production should there be?

**OPTIONS**

Options range from no document production at all to full document production.
A. No document production.

- The parties may decide to seek no documents from each other and to rely solely on the documents each of them possesses.
- The parties are always free to submit their own documents.
- The parties are also free to request the arbitral tribunal to order the production of specific documents.

B. Production limited to specific documents or narrow categories of documents, which are relevant and material to deciding an issue in the arbitration.

Consider using:

- the IBA Rules on the Taking of Evidence in International Arbitration (“IBA Rules”) as a standard;
- the suggestions in the report of the ICC Commission on Arbitration and ADR entitled “Controlling Time and Costs in Arbitration”;
- the report of the ICC Commission on Arbitration and ADR entitled “Managing E-Document Production”.

C. Broad document production as used in some common law jurisdictions.

- The parties may agree upon broad requests for documents.
- In rare cases, the parties may agree to common law style “discovery” including depositions and/or interrogatories.

When document production is to occur, the parties may agree upon the ground rules for requesting documents from and producing documents to each other.

If the parties cannot agree on whether to have document production or on the extent of document production or the ground rules for such production, the tribunal will decide.

**PROS AND CONS**

Document production can be very expensive and time-consuming and the broader the document production the more expensive and time-consuming it
tends to be. It requires time and expenditure from the party that searches for and produces documents as well as from the party that must study and analyse the documents that are produced.

On the other hand, if one of the parties has sole possession of documents needed by the other party, document production may be essential. Moreover, document production can provide the parties and the tribunal with a more complete understanding of the case. Given that parties are unlikely to submit documents spontaneously when they are detrimental to their own case, document production puts them under an obligation to do so.

**COST/BENEFIT ANALYSIS**

In view of the time and cost required for document production, a cost/benefit analysis is necessary in order to decide whether to seek document production at all and, if so, to determine the desired extent of such production. The parties should explore whether they can effectively meet their burden of proof with the documents that are already in their possession and whether the other side is likely to have documents that are genuinely useful for the first party to make its case.

Each party should then estimate the extra time and cost caused by document production and weigh this against the likelihood that document production will genuinely assist it in making its case. For example, if document production is estimated to cost USD 500,000 and it is considered that there is at best a 10% chance that it will yield valuable results, the question arises as to whether that 10% chance is worth the expense of USD 500,000. This is a decision that can best be made jointly by the party, typically represented by in-house counsel, and outside counsel. Many factors may come into play, such as the amount in dispute, whether there are policy issues, whether there is concern about precedent and whether the benefit of obtaining documents from the other side may be outweighed by the detriment of being required to produce documents oneself.
QUESTIONS TO ASK

1. Are any requests for document production genuinely useful or necessary for a party to make its case or can the party rely effectively on the documents in its possession?

2. What extent of document production is genuinely useful and necessary?

3. When should document production occur?

4. What is the estimated cost of searching for and producing documents, as well as the cost of reviewing and analysing documents that have been produced?

5. Is the benefit of document production worth the cost, and if so, why?

OTHER POINTS TO CONSIDER

Consider whether it is appropriate to deal with document production in the arbitration clause, for example by agreeing that there will be no document production (e.g. in contracts where it is relatively certain that document production will not assist in resolving potential disputes); by agreeing to limited document production in accordance with the IBA Rules; or by agreeing to broad document production or “discovery”.

Consider whether document production should occur once or more than once. Consider whether it should occur prior to or after written submissions.

Consider whether it is appropriate to limit documents transmitted to the arbitral tribunal to a manageable quantity.

Take into account any costs of translation when estimating the cost of document production.

Consider the ground rules to be adopted for implementing document production, including the use of a Redfern Schedule and the setting of the shortest reasonable time frames for production.

Special considerations may be needed if the parties agree upon or the tribunal orders the production of electronic documents. In such cases, the report of the ICC Commission on Arbitration and ADR entitled “Managing E-Document Production” can be used to assist in choosing the most efficient methods of e-document production.
7. NEED FOR FACT WITNESSES

PRESENTATION

Article 25(1) of the ICC Rules of Arbitration requires the arbitral tribunal to establish the facts of the case by all appropriate means. This can include the hearing of fact witnesses. Article 25(3) of the Rules specifically allows the arbitral tribunal to decide to hear witnesses. However, Article 25(6) allows the arbitral tribunal to decide the case solely on documents, unless a party requests a hearing. This would permit an arbitration with no hearing and no fact witnesses.

Issue: Is there a genuine need for fact witnesses?

OPTIONS

A. No fact witnesses at all.

B. One or more fact witnesses.

- Identify the issues on which fact witness testimony is necessary.
- Identify the appropriate fact witnesses for the issues.

PROS AND CONS

Fact witnesses can be essential to proving a case. However, they significantly increase the length and cost of an arbitration, since there will typically be one or more written witness statements for each witness and the oral testimony of each witness may be required at a hearing.
7. NEED FOR FACT WITNESSES

COST/BENEFIT ANALYSIS

Fact witnesses may be genuinely necessary in order to prove disputed facts or to present a broader picture of the circumstances surrounding the dispute. In determining whether fact witnesses are needed, the following issues can be considered:

- Are there any disputed facts? It may appear from the pleadings that there are disputed facts, but it may turn out after discussion between the parties that those facts are not really disputed. In addition, a party may agree not to contest certain disputed facts in order to save time and cost when the dispute over those facts is not sufficiently important.

- If there are disputed facts, are they relevant and material for deciding an issue in the dispute? There is no need to incur the extra time and cost involved in having a fact witness testify on disputed facts that will not affect the determination of an issue in the dispute.

- If there are disputed facts that are relevant and material, can they be proved by documents alone or do they genuinely need to be proved through fact witnesses?

- Is it useful to call fact witnesses to make a general presentation on the circumstances of the dispute?

When a party has decided to use fact witnesses, time and cost can be reduced by avoiding having many witnesses testify as to the same facts and by carefully focusing the scope of the testimony of each witness.

QUESTIONS TO ASK

1. Is there a genuine need for fact witnesses at all?

2. If so, who should they be? What should be the scope of their testimony? How many fact witnesses are genuinely necessary to establish a particular fact or present the circumstances of the case?
OTHER POINTS TO CONSIDER

Consider using videoconferencing for oral witness testimony to save time and cost.

Consider what is the most effective way of examining the fact witnesses at a hearing: e.g. direct examination and cross-examination; opening presentation by the witness followed by cross-examination; use of the witness’s written statement as a substitute for direct examination and proceeding straightaway with cross-examination; questioning of fact witnesses by the tribunal only or by the tribunal followed by questions from counsel.

Determine whether it is preferable for a given witness to testify in the language of the arbitration or in his or her native language. When a witness is testifying in a language other than the language of the arbitration, appropriate translation will often need to be arranged, which will increase time and cost.
8. FACT WITNESS STATEMENTS

PRESENTATION

Issues arising when a party has decided to present fact witness evidence: Should witness statements be submitted? What should their scope be? When should they be submitted?

OPTIONS

Form
A. No written witness statements.
B. Brief summary of the scope of witness evidence (witness summary).
C. Full witness statements.

Scope of full witness statements
A. Lengthy and comprehensive statement.
B. Short statement limited to key factual issues in dispute.

Number and timing
A. One or more rounds of witness statements.
B. Witness statements submitted with written submissions.
C. Witness statements submitted following the exchange of written submissions.
D. Witness statements submitted simultaneously or sequentially.

PROS AND CONS

Form
Written witness statements increase the length and cost of the pre-hearing phase, but can reduce the length and cost of the hearing by replacing direct examination and allowing for a more focused cross-examination. The absence of witness statements, or the submission of witness summaries only, will reduce pre-hearing costs but can increase the length and cost of the hearing.
Scope
Comprehensive witness statements can be a valuable part of case presentation, allowing witnesses to tell the story of the dispute and place documentary evidence in its context. However, lengthy witness statements will increase time and cost as well as the scope of cross-examination.

Number and timing
More than one round of witness statements provides witnesses with the opportunity to rebut the evidence of other witnesses, but will increase time and cost prior to the hearing.

Submitting witness statements with the written submissions provides direct proof of the facts at the time they are alleged. It also allows the parties to identify and progressively narrow down the factual issues, which may make for shorter, more targeted submissions later.

Submitting witness statements only after the exchange of written submissions may allow the parties to narrow down the factual issues in dispute before preparing and submitting witness statements, which may consequently be more focused on the disputed issues.

COST/BENEFIT ANALYSIS
While witness statements can provide valuable evidence in support of a party’s position, they can add significantly to time and cost. The importance of the evidence to be presented must therefore be weighed against the time and expense required to present it. For example, if alternative sources of evidence are available (e.g. contemporaneous documentary evidence), there may be no cost justification for providing a witness statement on those facts. Similarly, if a witness is submitting a statement on a given fact, the submission of another witness statement evidencing the same fact may not be cost-justified, particularly if the fact is of little importance.
Full witness statements require more work and are therefore more expensive to prepare than witness summaries. However, they may subsequently save time and cost during a hearing by obviating the need for lengthy direct examination of the witness at the hearing.

The case management techniques set out in Appendix IV to the Rules include limiting the length and scope of written witness evidence so as to avoid repetition and focus on key issues. In line with Appendix IV, parties may wish to consider how to structure their fact witness evidence as efficiently as possible.

QUESTIONS TO ASK

1. In light of the other sources of evidence available, is the preparation of a given witness statement justified in terms of time and cost?

2. Is a witness statement required to prove a disputed question of fact or provide necessary background information? Is more than one witness statement necessary to accomplish this? Is there a good reason not to limit the witness statement to the key factual issues in dispute?

3. Should the witness evidence be presented in the form of full witness statements or witness summaries?

4. Is it necessary to have more than one round of witness statements?

5. Should the witness statements be filed concurrently with, or only after, the parties’ written submissions?
9. EXPERT WITNESSES (PRE-HEARING ISSUES)

PRESENTATION

Article 25(3) of the ICC Rules of Arbitration contemplates the possibility of experts appointed by the parties, while Article 25(4) provides that, after consulting the parties, the arbitral tribunal may appoint one or more experts, define their terms of reference, and receive their reports.

Issues: Is there a genuine need to appoint experts? Should they be appointed by the parties, the tribunal, or both? How should they be selected? How should the written expert reports be produced?

OPTIONS

Whether and how to appoint experts
A. No experts at all.
B. Party-appointed expert(s) only.
C. Tribunal-appointed expert(s) only.
D. Both party-appointed and tribunal-appointed experts.

How to select party-appointed experts
A. Selection of an expert by the parties or their counsel.
B. Selection of an expert proposed by the ICC International Centre for ADR at a party’s request.

How to select tribunal-appointed experts
A. Selection by the tribunal alone after obtaining the parties’ comments on the expert to be appointed, including with respect to the expert’s independence and impartiality. This option includes the tribunal’s selection of an expert proposed by the ICC International Centre for ADR at the tribunal’s request.
B. Selection by the tribunal of an expert agreed by the parties or from a list of experts jointly submitted by the parties.
Production of written reports
A. Separate reports by each party-appointed expert.
   - These reports can be produced with the parties’ briefs or after the parties have produced their fact witness statements.
   - These reports can be produced either simultaneously or sequentially.
B. Instead of, or subsequent to, the production of separate reports, the party-appointed experts meet to determine points of agreement and disagreement and produce reports laying out their respective positions on the points of disagreement.
C. Preparation by the tribunal of terms of reference for tribunal-appointed experts after submitting a draft to the parties for comment. Thereafter, the expert produces a written report based upon the terms of reference.

PROS AND CONS

Certain technical issues may need to be presented through expert opinions. In some cases, expert opinions can be decisive for a case. However, expert witnesses significantly increase the length and cost of an arbitration.

If there are to be experts, the pros and cons of party-appointed experts and/or tribunal-appointed experts must be considered. In particular cases, a tribunal-appointed expert may be the most persuasive expert for arbitrators from certain legal cultures, but reliance on a tribunal-appointed expert deprives the parties of some degree of control. Whether a tribunal-appointed expert should be requested is an important matter of strategy to be considered on a case-by-case basis.

Recourse to a tribunal-appointed expert alone, with no party-appointed experts, will no doubt be the least expensive option. However, there may be cases where a tribunal-appointed expert’s views cannot be adequately questioned or tested by the parties without the assistance of party-appointed experts. Recourse to both will increase time and cost.
COST/BENEFIT ANALYSIS

Whether and how to appoint experts

Whether or not to appoint experts can be a complex question requiring consideration of a number of factors, including the nature of the issues, the legal and cultural background of the tribunal, the availability of experts, case strategy and the impact on time and cost. A key consideration will be whether the cost and time associated with expert witnesses is justified by a genuine need in the case at hand.

How to select party-appointed experts

A. Selection of an expert by the parties or their counsel

In order to present evidence on issues requiring expertise, the parties or their counsel may select an outside expert to produce an expert report. Alternatively, evidence on such issues can be presented by the parties’ in-house technical experts. The in-house experts may be very knowledgeable in their field and have hands-on knowledge of the specific technical matters at issue. Yet, there is a risk that the tribunal could perceive them as being partial. Outside experts are more expensive and more time-consuming but, depending on their qualifications and professional demeanour, could be viewed as more impartial.

B. Selection of an expert proposed by the ICC International Centre for ADR at a party’s request.

The ICC International Centre for ADR offers parties and tribunals a service of finding experts from a wide range of sectors and countries. This may speed up the process of identifying experts and minimize the cost. In addition, the fact that a party-appointed expert has been identified by the ICC International Centre for ADR can reflect well upon the expert’s qualifications, independence and impartiality.

How to select tribunal-appointed experts

A. Selection by the tribunal alone after obtaining the parties’ comments on the expert to be appointed, including with respect to the expert’s independence and impartiality. This option includes the selection by the tribunal of an expert proposed by the ICC International Centre for ADR at the tribunal’s request.
The selection of an expert by the arbitral tribunal alone may be more expeditious and may avoid disputes between the parties over the suitability of their respective proposals. Moreover, the appointment of one expert will reduce time and cost. However, this method excludes the parties from the selection process and creates a risk that the chosen expert may fall short of the parties’ expectations. From the parties’ perspective, a further disadvantage is that the content of the expert’s opinion may remain unknown to them until produced before the arbitral tribunal.

B. Selection by the tribunal of an expert agreed by the parties or from a list of experts jointly submitted by the parties.

This is a more time-consuming process than the appointment of an expert by the tribunal alone, but has the advantage of restricting selection to an expert acceptable to the parties and the tribunal. Moreover, the appointment of a single expert will reduce time and cost. However, a potential disadvantage from the parties’ perspective will again be that the content of the expert’s opinion remains unknown to the parties until produced before the arbitral tribunal.

Production of written reports

A. Separate reports by each party-appointed expert.

- These reports can be produced with the parties’ briefs or after the parties have produced their fact witness statements.

The submission of expert evidence with a party’s briefs has the advantage of enabling a more comprehensive understanding of that party’s case. It may help to focus the content of any subsequent briefs on the actual rather than the assumed areas in which expert evidence may be submitted. The disadvantage is that the expert evidence may not take account of any evidence introduced by the other party in subsequent witness statements, expert reports or subsequent briefs and may either be incomplete or create a need for supplemental expert evidence.

- These reports can be produced either simultaneously or sequentially.
In cases where the points of disagreement are sufficiently clear, simultaneous filings will generally be faster than sequential filings because there will be fewer rounds. However, when the points of disagreement are not sufficiently clear, simultaneous filings may result in expert reports that do not correspond or respond to each other, which could actually increase time and cost.

The ultimate choice will also depend upon tactical or strategic considerations that go beyond issues of time and cost.

B. Instead of, or subsequent to, the production of separate reports, the party-appointed experts meet to determine points of agreement and disagreement and produce reports laying out their respective positions on the points of disagreement.

The production of written expert reports can be time-consuming and expensive. Reducing the scope of those reports will reduce time and cost. If the party-appointed experts are given the opportunity to meet and clearly identify the points over which they disagree, their reports can be shortened and focus on the points of disagreement.

C. Preparation by the tribunal of terms of reference for tribunal-appointed experts after submitting a draft to the parties for comment. Thereafter, the expert produces a written report based on the terms of reference.

It is important to ensure that the tribunal-appointed expert focuses and provides an opinion on the specific issues in dispute within the relevant area of expertise. The terms of reference are designed to serve this purpose. By being allowed to comment on and provide input into the terms of reference, the parties will have a degree of control over the process.
QUESTIONS TO ASK

1. Is there a genuine need to appoint experts or can the case be effectively made without expert evidence?

2. Should there be party-appointed experts, tribunal-appointed experts or both?

3. What is the appropriate method for selecting party-appointed experts or tribunal-appointed experts, as the case may be?

4. If there are to be party-appointed experts, how many experts are genuinely necessary?

5. When and in what form should expert reports be produced?

6. Should reports be submitted simultaneously or sequentially?

7. Should party-appointed experts be required to meet in order to determine points of agreement and disagreement?

8. If such a meeting is held, should counsel be present at the meeting?

OTHER POINTS TO CONSIDER

Consider avoiding more than one party-appointed expert per topic on each side.

Consider whether it is genuinely necessary to have an expert witness on issues of law. A great deal of time and cost can be saved if legal issues are argued by outside counsel in their briefs and at the hearing.
10. HEARING ON THE MERITS (INCLUDING WITNESS ISSUES)

PRESENTATION

Pursuant to Article 25(2) of the ICC Rules of Arbitration, a hearing must be held if requested by any party. In addition, pursuant to Articles 25(2) and 25(3), the arbitral tribunal may hear the parties, witnesses, experts or any other person, if it so decides of its own motion.

Hearings are expensive to hold and the longer they are, the more costly they become.

Issues: Is it genuinely necessary to hold a hearing at all? If so, is there a need for more than one hearing? What is the appropriate length for the hearing and how should it be organized?

OPTIONS

A. Hold no hearing and have the case decided solely on the documents submitted by the parties.

B. Hold one or more hearings, as appropriate.

When a hearing is to be held, a certain number of choices need to be made, including:

• appropriate location;
• dates;
• attendees;
• appropriate duration;
• allocation of time between the parties;
• whether there are to be opening and/or closing statements and their duration;
• whether there should be direct examination, cross-examination and/or witness conferencing for fact and expert witnesses;
• whether the hearing should be transcribed and if so, whether daily transcripts and/or live transcripts (i.e. real-time transcripts available electronically to participants during the hearing) should be made;
• when interpreting is needed, whether it should be consecutive or simultaneous;
• whether to use videoconferencing for all or part of the hearing.

PROS AND CONS

Oral hearings are often considered as a key opportunity for the parties to present their case and for the arbitrators to understand it and assess the evidence.

On the other hand, oral hearings are typically one of the most expensive and time-consuming phases of the arbitral process. Costs are generated by a number of factors, including the extensive preparation that is usually necessary and the number of people attending the hearing. In addition, the arbitration is often delayed by the difficulty of finding a mutually convenient time in the calendars of all relevant participants.

Cost and time can nevertheless be reduced by making appropriate choices with respect to the organization of the hearing.

COST/BENEFIT ANALYSIS

In deciding whether to request or agree upon a hearing, the parties should take various factors into consideration. Hearings tend to be most useful when there are disputed issues of fact to be addressed by fact and expert witnesses. Parties may consider proceeding without a hearing, for example, when:
• the case turns exclusively on questions of contract interpretation that do not require witness testimony;
• the case turns exclusively on a question of law;
• no respondent is participating;
• the value of the dispute is low;
• there is a need for a quick decision.

It should be determined whether the potential benefits of a hearing justify the associated time and cost. The choices made with respect to the organization of the hearing may reduce time and cost and may affect the decision on whether or not to hold a hearing at all.
Appropriate location

Pursuant to Article 18(2) of the Rules, hearings may be conducted at any location and not necessarily at the place of the arbitration. The cost of the hearing can be reduced if a location likely to be advantageous in terms of cost is chosen.

Dates

To avoid delay, the dates for the hearing should be set at the earliest reasonable opportunity and recorded in everyone’s calendars. Ideally, the hearing dates should be fixed during the first case management conference.

Attendees

Attendees should be limited to those genuinely necessary for the conduct of the hearing.

Time and cost can be reduced if an informed and knowledgeable party representative with decision-making authority participates in the preparation of and attends the hearing. Such a person will be in a position to make cost/benefit decisions in consultation with outside counsel. For companies, the party representative is often an in-house counsel. For states or state entities, an individual with decision-making authority can be appointed.

Appropriate duration

Under the Rules, there is no prescribed length for hearings. In practice, parties often request hearings that are longer than necessary. However, the longer the hearing, the greater the cost. The length of the hearing should be carefully chosen so as to allow no more time than is necessary for adequately presenting the case.

Use and duration of opening/closing statements

An opening statement is an opportunity to make a summary and synthesis of the case and can help focus the arbitral tribunal’s attention on the key issues. The longer the statement, the greater the cost. When the case has already been fully developed in briefs with supporting documents and witness statements, it may not be necessary to repeat these matters in an opening statement.
A closing statement is an opportunity to make a summary and a synthesis of what happened at the hearing. However, if the parties are not given sufficient time to prepare a closing statement, it may be of little use. Furthermore, it may not be necessary to have both a closing statement and a post-hearing brief, as they are likely to repeat each other and unnecessarily increase time and cost.

**Direct examination, cross-examination, witness conferencing**

In some legal systems, the questioning of witnesses is largely conducted by the arbitral tribunal, with counsel for each side being invited to ask follow-up questions. Under this approach there is no direct examination or cross-examination.

In other legal systems, and increasingly in international arbitration, the questioning of witnesses is largely conducted by counsel through direct examination and cross-examination, with the arbitral tribunal having the right to interject questions or ask questions at the end of the witness’s testimony.

The first approach will often result in a shorter and less expensive hearing. The second approach will often allow a more comprehensive examination of the witnesses. Since the first approach leaves the arbitral tribunal largely in control, there is little scope for the parties to make cost/benefit decisions. While the overall duration and cost of the second approach will often be greater, a number of choices can be made to reduce the time and cost, as follows:

**Direct examination**

Direct examination is the questioning of a witness by the party presenting that witness. In international arbitration, witnesses often submit written witness statements setting forth their evidence. When such statements have been submitted, direct examination may be dispensed with entirely or kept short (e.g. 10 or 15 minutes). This will reduce the length and cost of the hearing.

**Cross-examination**

Cross-examination is the questioning of a witness presented by the opposing party. If each side is given an
overall allocation of time at the hearing, a party is free to determine how much time to use for each witness so long as the total time is not exceeded. Alternatively, time and cost can be reduced by setting time limits on the cross-examination of witnesses.

Consideration should also be given to the appropriate scope of cross-examination. Limiting its scope to matters covered in a witness’s statement or in direct examination, if any, may reduce the length and cost of the hearing.

If it is not necessary to cross-examine certain witnesses who have provided statements for the other side, time and cost can be saved by not doing so. However, in that case, it may be necessary to obtain agreement from the other side or an order from the tribunal stipulating that the decision not to cross-examine a witness does not constitute an admission of the truth of that witness’s written statement.

**Witness conferencing**

Witness conferencing can function as an alternative or an addition to cross-examination. In witness conferencing, two or more witnesses dealing with the same area of evidence are questioned together either by the arbitral tribunal first and then by counsel, or vice versa. The witnesses are also given the opportunity to debate with each other.

Witness conferencing (in particular of expert witnesses) can save time and cost insofar as it helps to focus on, clarify and resolve areas of evidential disagreement.

If the witness conferencing is directed by the arbitral tribunal, the arbitrators will need to prepare carefully beforehand in order to be able to fulfil their inquisitorial role effectively. It may deprive the parties of some control over the presentation of the case.

If the witness conferencing is directed by counsel, they retain greater control over the process and debate can still occur between the witnesses. In addition, the tribunal will have the opportunity to ask its own questions. However, some of the benefits of witness conferencing may be lost as the process is likely to be longer, more expensive and less focused.
Nature of transcripts, if needed

Transcripts are expensive, especially daily transcripts and live transcripts (i.e. real-time transcripts available electronically to participants during the hearing). A cost/benefit decision should be made on what is genuinely necessary. A transcript enables the parties and the tribunal to have a complete and accurate record of the evidence adduced at the hearing. It can be very helpful to the parties when preparing post-hearing briefs, if any, and to the tribunal when preparing the award. In very low value or simple cases, it may be possible to save the expense of a transcript at no great loss. In complex cases with many witnesses, the additional cost of daily transcripts and live transcripts may well be justified. They will facilitate effective cross-examination and be useful when preparing further witness questioning.

Consecutive or simultaneous interpreting, if needed

A choice must be made between simultaneous and consecutive interpreting.

Consecutive interpreting requires fewer interpreters and equipment, but is more than twice as long as simultaneous interpreting, which makes it more costly due notably to the extra time lawyers and experts will have to spend at the hearing. While it may be easier to control the accuracy of consecutive interpreting, that benefit must be weighed against the considerable time and cost it may add to the hearing.

Use of videoconferencing for all or part of the hearing

While it is generally preferable to hold hearings in the physical presence of the arbitrators, the parties and the witnesses, the significant time commitment and travel expenditure this may require from certain witnesses can be avoided by using videoconferencing.

QUESTIONS TO ASK

1. Is an oral hearing necessary for the fair determination of the issues in dispute so as to justify the extra time and cost it involves?

2. Is it necessary to test a written witness statement by cross-examining the witnesses at a hearing?
3. Is there a more convenient location for the hearing than the place of arbitration?

4. What is the earliest time at which dates for the hearing can be set?

5. Who genuinely needs to attend the hearing?

6. Should fact witnesses and/or expert witnesses be allowed to attend the hearing while other witnesses are giving testimony?

7. Taking into account the nature of the issues in dispute, the value of the dispute and the number of witnesses, what is the total number of days genuinely necessary for the hearing? Is the proposed length of the hearing justified in terms of cost?

8. How should the total time of the hearing be allocated between the parties?

9. Should there be an opening statement and if so, how long should it be? Is it genuinely necessary to have both a closing statement and a post-hearing brief? If there is to be a closing statement, how long should it be and how much time should be allocated for its preparation?

10. Does every witness need to be cross-examined?

11. Which areas of evidence require examination and what is the most efficient method of examination (cross-examination or witness conferencing)?

12. Should the hearing be transcribed and if so, should there be daily transcripts and/or live transcripts?

13. If interpreting is needed, should it be consecutive or simultaneous?

14. Should videoconferencing be used for all or part of the hearing?
11. POST-HEARING BRIEFS

PRESENTATION

Parties in an arbitration have the opportunity to present their legal arguments and the relevant facts in pre-hearing submissions and during the hearing itself. The issue here is whether it is necessary or useful for the parties to submit post-hearing briefs.

Post-hearing briefs may be used to draw the arbitral tribunal’s attention to relevant facts that have emerged at the hearing and place them in the context of the parties’ claims and defences. They may be drafted in a manner that assists the arbitral tribunal with drafting the arbitral award. In some cases, the arbitral tribunal may identify key issues to be addressed by the parties in their post-hearing briefs.

If closing statements are made at the end of a hearing, post-hearing briefs may be unnecessary. Conversely, if there are post-hearing briefs, closing statements may be unnecessary.

**Issue:** Should there be post-hearing briefs and/or closing statements?

**OPTIONS**

A. Proceed directly from the hearing to an award with no closing statements or post-hearing briefs.

B. Provide for closing statements immediately after the hearing or at some agreed time thereafter, but no post-hearing briefs.

C. Provide for post-hearing briefs but no closing statements.

D. Provide for both closing statements and post-hearing briefs.

E. Post-hearing briefs, if any, can be submitted simultaneously or sequentially, and there can be more than one round of post-hearing briefs.

**PROS AND CONS**

The submission of post-hearing briefs can serve a number of useful purposes, as mentioned above. In a
long and complex hearing, it may be useful for each party to sum up what they consider to have been demonstrated at the hearing. Post-hearing briefs can include valuable references to the hearing transcript and present a short final synthesis of the evidence and facts of the case, which can be of great value to the arbitral tribunal when drafting the award.

On the other hand, post-hearing briefs add to the cost of the arbitration and may delay the rendering of the award. In addition, they may be of little use if they merely repeat facts and arguments already well understood by the arbitral tribunal.

**COST/BENEFIT ANALYSIS**

The additional time and expense required for post-hearing briefs need to be balanced against the likelihood that they will genuinely serve one of the purposes indicated above. For example, post-hearing briefs will be especially useful where there are numerous witnesses, complicated or disputed facts, or extensive cross-examination. In all cases, the time and cost associated with post-hearing briefs should be weighed against their likely impact on the arbitral tribunal’s decision.

The time and expense required for post-hearing briefs can often be reduced if measures are agreed to keep them relatively short and concise, e.g. limiting the number of pages.

**QUESTIONS TO ASK**

1. Does the case justify the extra time and expense required for post-hearing briefs, closing statements, or both?

   And, in particular,

2. Are post-hearing briefs genuinely useful or necessary for a party to make its case to the arbitral tribunal, and if so, why?

3. What is the estimated cost of preparing the post-hearing briefs?

4. Is the benefit worth the cost, and if so, why?
OTHER POINTS TO CONSIDER

Consider limiting the scope, length and timing of any post-hearing briefs.

Consider having post-hearing briefs filed simultaneously to save time.

In some cases, it may be genuinely necessary to allow each party a short period of time in which to reply briefly to the other party’s post-hearing brief.

In some cases, simultaneous post-hearing briefs may have the undesirable consequence of creating a need for further rounds of submissions. Care should therefore be taken to define properly the parameters of post-hearing briefs.

Post-hearing briefs may include submissions on costs, which are normally not discussed at the hearing. This can also save time.
The ICC Commission on Arbitration and ADR is the ICC’s rule-making and research body for dispute resolution services and constitutes a unique think tank on international dispute resolution. The Commission drafts and revises the various ICC rules for dispute resolution, including arbitration, mediation, dispute boards, and the proposal and appointment of experts and neutrals and administration of expert proceedings. It also produces reports and guidelines on legal, procedural and practical aspects of dispute resolution. In its research capacity, it proposes new policies aimed at ensuring efficient and cost-effective dispute resolution, and provides useful resources for the conduct of dispute resolution. The Commission’s products are published regularly in print and online.

The Commission brings together experts in the field of international dispute resolution from all over the globe and from numerous jurisdictions. It currently has over 600 members from some ninety countries. The Commission holds two plenary sessions each year, at which proposed rules and other products are discussed, debated and voted upon. Between these sessions, the Commission’s work is often carried out in smaller task forces.

The Commission aims to:

• Promote on a worldwide scale the settlement of international disputes by means of arbitration, mediation, expertise, dispute boards and other forms of dispute resolution.

• Provide guidance on a range of topics of current relevance to the world of international dispute resolution, with a view to improving dispute resolution services.

• Create a link among arbitrators, counsel and users to enable ICC dispute resolution to respond effectively to users’ needs.
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1. INTRODUCTION

1. The purpose of this note is to provide guidance to parties, and to their representatives, on conducting arbitrations under the LCIA Rules. It addresses, amongst other things, commencement of an arbitration, filing of a Response, appointment of an Arbitral Tribunal (including applications for expedited formation and for the appointment of an emergency arbitrator), presentation of evidence, confidentiality and determination of the costs of an arbitration.

2. This note is by no means intended to provide an exhaustive list of “best practices” in the conduct of arbitration, nor does it supplant or interpret the LCIA Rules. Rather, the note highlights points for parties to consider in the conduct of LCIA arbitrations.

3. Members of the LCIA Secretariat are always available to assist parties with any points of procedure relating to the LCIA Rules, although we cannot engage in any unilateral written correspondence or conversations with parties about matters of substance.

4. Further details about the LCIA, and the services we can provide (including, for example, administration of mediations and of ad hoc arbitrations), can be found on our website, www.lcia.org.

5. If you have any questions about LCIA arbitration or the other services we can provide, please email us at casework@lcia.org.

2. THE LCIA RULES – THE BASICS

6. The LCIA Arbitration Rules are a set of arbitral rules that parties can, by agreement, adopt to provide the framework for the resolution of their dispute by arbitration. If parties choose the LCIA Arbitration Rules, they also receive the benefit of having an institution (the LCIA) to administer their arbitration and to help the process run more efficiently.

7. The LCIA Rules are of universal application, being suitable for all types of arbitrable disputes, regardless of the seat of the arbitration, the nationality of the parties, the language of the arbitration or the substantive law applicable to the dispute. Typically, around 85% of parties who use the LCIA are from outside of the UK (see our reports at www.lcia.org/LCIA/reports.aspx).

8. The LCIA Arbitration Rules presently in force are the LCIA Arbitration Rules 2014, which came into effect on 1 October 2014 (the 2014 Rules). With the exception of the Emergency Arbitrator provisions (discussed below), the 2014 Rules apply to all arbitrations subject to the LCIA Rules commenced on or after 1 October 2014, regardless of when the underlying agreement to arbitrate was concluded.

9. The LCIA Rules effective 1 January 1998 (the 1998 Rules) continue to apply to arbitrations that were commenced before 1 October 2014, as well as to arbitrations where the parties’ agreement expressly refers to the LCIA Rules 1998 or, for example, to “the LCIA Rules in force as at the date of the agreement” (where that date was before 1 October 2014).

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1 Also available on the LCIA website at www.lcia.org.
10. For ease of reference, and because most principles apply equally to both sets of Rules, this note refers generically to “the Rules”. Where, however, there are substantive differences between the 2014 Rules and the 1998 Rules, these are identified.

11. The Rules offer to parties a state of the art arbitration, including:

- maximum flexibility for parties and Arbitral Tribunals to agree on procedural matters;
- speed and efficiency in the appointment of arbitrators;
- a combination of the best features of the civil and common law systems;
- emergency procedures, including expedited formation of the Arbitral Tribunal (and, under the 2014 Rules, emergency arbitrator);
- an Arbitral Tribunal's power to decide on its own jurisdiction;
- ethical guidelines for the parties' legal representatives (under the 2014 Rules);
- an Arbitral Tribunal's power to order security for claims and for costs, as well as to grant a range of interim and conservatory measures;
- special powers for joinder of third parties (and, under the 2014 Rules, consolidation);
- waiver of right of appeal, assisting parties to obtain finality;
- costs computed on an hourly basis, rather than as a percentage of the amount in dispute; and
- staged deposits - parties are not required to pay for the whole arbitration in advance.

3. THE LCIA RULES – SCOPE OF APPLICATION

12. Since arbitration is a consensual process, a party who wishes to use the LCIA Arbitration Rules must first agree with the other parties to the transaction or the dispute (most usually at the time of contracting or once a dispute has arisen) that their dispute should be resolved by arbitration under the Rules. If there is no pre-existing agreement and one party wishes to refer a dispute to the LCIA, but the other does not, the LCIA will not be able to assist the parties with their dispute.

13. The LCIA’s recommended dispute resolution clauses are available on our website. You should feel free to contact the LCIA Secretariat (casework@lcia.org) if you have questions about any of our clauses or proposed modification to them.

14. A clause that refers only to “arbitration in London”, but without any reference to the LCIA, does not provide for LCIA arbitration; instead, it likely provides for ad hoc arbitration, in accordance with the English Arbitration Act 1996. Should parties arbitrating pursuant to such a clause nevertheless wish to adopt the LCIA Rules or to ask the LCIA to administer their ad hoc arbitration, we would be pleased to assist.

15. The LCIA will be able to assist parties under certain other clauses, notwithstanding that the clauses do not refer to the LCIA by name, including, for example, agreements that refer to the “London Court of Arbitration” (which is the name by which the LCIA was formerly known).
16. The LCIA might also have a role where an arbitration clause provides for administration, or appointment, by the “London Chamber of Commerce”: by-law 6.01 of the London Chamber of Commerce and Industry (the Chamber) provides that references to the rules of the Chamber are deemed to be references to the LCIA Rules, and by-law 6.02 provides that, in the case of a dispute referred to the Chamber for the appointment of an arbitrator, the appointment shall, at the discretion of the President of the Chamber, be made either by the President of the Chamber or by the LCIA.

17. If a clause refers to an arbitration institution that appears not to exist, and where the Claimant asserts that it was the parties’ intention to refer to the LCIA, the LCIA Secretariat may, in consultation with the LCIA Court, register the Request for Arbitration on the understanding that it will be for the Claimant to satisfy the Arbitral Tribunal, in due course, that the clause provides for arbitration under the LCIA Rules and that the Arbitral Tribunal does have jurisdiction.

4. COMMENCING AN LCIA ARBITRATION

18. To commence an arbitration under the Rules, a party should file with the LCIA a Request for Arbitration (a Request).

19. A party should address its Request to the LCIA Registrar, Sarah Lancaster, and ensure that it includes or encloses all of the information and documentation required by Article 1 of the Rules, including:

- the full names and all contact details of all of the parties;
- the full names and all contact details of the legal representatives of all of the parties;
- the full terms of the written arbitration agreement invoked by the Claimant, together with a copy of any relevant contractual documentation;
- a statement briefly summarising the nature and circumstances of the dispute, its estimated monetary amount or value, and the claim advanced by the Claimant against any other party to the arbitration;
- a statement of any procedural matters for the arbitration upon which the parties have already agreed in writing or in respect of which the Claimant makes any proposal;
- if the arbitration agreement calls for any form of party nomination, the full name and contact details of the Claimant’s nominee;
- confirmation that the registration fee has been or is being paid to the LCIA (the Request will be treated as not delivered and the arbitration as not having been commenced unless and until the LCIA receives actual payment); and
- confirmation that copies of the Request (and all accompanying documents) have been or are being delivered to all other parties, with details of the means by which delivery is being effected (to be followed as soon as possible, under the 2014 Rules, by documentary proof of actual delivery).

20. There is no standard form for a Request. The format of any Request is therefore for a Claimant to decide, although it should be careful to ensure that all of the documentation and information required by Article 1 of the Rules has been provided. We would normally expect a Request to be a summary document of around 4 or 5 pages, rather than an extensive written pleading,
unless a party intends to elect in due course that its Request stand as its Statement of Case (see further below).

21. You may file your Request online (see further below), in hard copy or by email to casework@lcia.org. If you are filing in hard copy, you should provide two or four copies of your Request (depending on whether the parties’ agreement provides for a sole arbitrator or a three-member tribunal), so that we have sufficient hard copies to provide to the Arbitral Tribunal once appointed.

22. It is the responsibility of the Claimant (and not of the LCIA) to deliver a copy of the Request to all Respondents, using any of the means prescribed in Article 4.1 of the Rules. Parties should note, however, that under Article 4.3 of the 2014 Rules, delivery by electronic means (including email and fax) may only be effected to an address agreed or designated by the receiving party.

23. As mentioned above, a Request should confirm that the Claimant has paid the registration fee. The registration fee, as prescribed by the Schedule of Cost, is presently £1,750, plus VAT of £350 if applicable. VAT will be applicable if the Claimant is based in the United Kingdom (or registered for UK VAT). If the Claimant is based elsewhere within the European Union, VAT will not be charged if the Claimant is in business and has economic outputs. In line with HM Revenue & Customs guidelines, the Claimant should provide its EU VAT registration number as evidence; otherwise VAT will be applicable. If the Claimant is outside of the European Union, no VAT will be payable.

24. A Claimant may pay the registration fee by bank transfer to our account, by cheque payable to “LCIA”, or by credit card (using our online filing process or by telephone to our accounts team). If the Claimant wishes to pay by bank transfer, the Claimant should contact the LCIA accounts team (at accounts@lcia.org) to request our bank account details.

25. As mentioned above, in accordance with Article 1 of the Rules, until actual receipt of the registration fee, the Request is treated as not having been received and the arbitration is deemed not to have commenced. If paying by bank transfer, it might therefore be advantageous to effect the transfer before sending to the LCIA your Request.

26. The LCIA will write to the parties to the arbitration within one working day of our receipt of a Request and the requisite registration fee.

5. FILING A REQUEST FOR ARBITRATION, A RESPONSE OR AN EMERGENCY APPLICATION ONLINE

27. From 1 October 2014, a party may file a Request electronically through our new online filing system, available at onlinefiling.lcia.org. It is also possible to file a Response through our online system, as well as an application for the appointment of an Emergency Arbitrator or an application for expedited appointment of the Arbitral Tribunal.

28. In order to use the online filing system, individuals need to complete a simple registration process, which generates a unique username and password and provides access to our various online forms.

29. The online filing system is designed to be user-friendly, requesting, step-by-step, all of the information required by the Rules. In this way, it acts as a useful checklist for parties unfamiliar with LCIA arbitration to ensure that they have included in their Request or Response (or in their
If a party does not wish to use the inter-active Request form on our online system, it may nevertheless upload a PDF copy of its Request through our online filing system. We recommend that if you have a PDF copy of a Request to upload, you do not also fill out the inter-active form, in order to avoid the risk of inconsistencies in the two versions.

Parties submitting a Request or an application for the appointment of an Emergency Arbitrator via our online filing system will be asked to pay the relevant fee by credit card online, thus avoiding the delays that can be caused by raising a cheque or effecting payment by bank transfer.

The filing of a Response or of an application for expedited formation does not attract a separate filing fee.

6. RESPONDING TO A REQUEST FOR ARBITRATION

If a party receives a Request for Arbitration, the next step is for it to prepare a Response.

Article 2 of the 2014 Rules provides that a Respondent shall file any Response to a Request within 28 days of the date that the arbitration commenced (namely, within 28 days of the date on which the LCIA received the Request and registration fee). This is a change from the 1998 Rules, which provide that a Response should be sent within 30 days of receipt by the Respondent of the Request, rather than being dependent on the date that the Request was filed with the LCIA.

Failure to deliver a Response (or any part of a Response) would not by itself preclude a Respondent from denying a claim, nor from advancing any defence or cross-claim in the arbitration. If, however, the parties have agreed on party nomination of arbitrators, then failure to deliver a Response in time (or to otherwise nominate an arbitrator) would constitute an irrevocable waiver of that party’s opportunity to nominate or propose an arbitrator.

Article 2 of the Rules sets out the information and documentation any Response should include. As with a Request, there is no prescribed form for a Response, although we would usually expect a Response to be only a few pages in length (unless the party intends for its Response to stand as its Statement of Defence). A Respondent may, therefore, decide on the format of its Response, but should be careful to include all information required by the Rules.

Under the 2014 Rules, the LCIA Court has a discretion to extend the deadline for service of a Response on the application of a party: the LCIA Court might consider it appropriate to extend the deadline where, for example, there has been a lengthy delay between commencement of the arbitration and delivery by the Claimant of the Request to the Respondent.

7. APPOINTMENT OF ARBITRATORS

Unless the parties have agreed express timing, the LCIA Court will take steps to appoint the Arbitral Tribunal promptly after receipt of the Response or, if no Response is received, after 7 days from the date on which the Response was due.

The time it takes to complete the appointment process varies from case to case, depending on a number of factors, including: the number of arbitrators to be appointed; the time it takes for a candidate arbitrator to return his/her statement of independence and availability; any
disclosure made by a candidate arbitrator; any mechanism agreed between the parties for the selection of the Arbitral Tribunal (such as a list procedure) and the timeframes under that mechanism.

40. The default position under the Rules is that the LCIA Court will select the arbitrators. If parties wish to have a right to nominate an arbitrator, they should therefore agree this with the other parties, either by including appropriate wording in their arbitration agreement or by agreeing to party nomination at the time that the dispute arises.

41. If the parties have not agreed to party nomination, but wish to be involved in the selection of the Arbitral Tribunal, the LCIA is happy to provide to the parties (where all parties have agreed that we should do so) a list of suitable candidates for them to discuss and from which they may, as appropriate, agree a nominee or separately rank the individuals in order of preference.

42. Alternatively, the parties might submit to the LCIA details of any attributes or qualifications they consider the arbitrator(s) should possess.

43. Under the Rules, the LCIA Court is the body that formally appoints an arbitrator, whether or not there is party nomination. This provision ensures that the LCIA can, before confirming the appointment of the Arbitral Tribunal, check with each candidate arbitrator that he / she is independent and impartial and, under the 2014 Rules, has the requisite availability to proceed expeditiously with the arbitration.

44. Where it falls to the LCIA Court to select an arbitrator or to provide a shortlist of candidates, it is well-placed to do so, drawing from the vast experience of the senior members of the Court and of the Secretariat, and from our extensive internal database of neutrals.

45. In all cases, whether or not the parties have nominated arbitrators, the basic LCIA procedure for the appointment of arbitrators is as follows (save that steps d, e and g are omitted in the case of party nomination):

   a) the LCIA Secretariat reviews the Request and accompanying contractual documents, and the Response (if any);

   b) a résumé of the case is prepared;

   c) key criteria for the qualifications of the arbitrator(s) are established;

   d) the criteria are entered into the LCIA’s database of arbitrators; an initial list is then drawn from the results and from the Secretariat’s own extensive knowledge;

   e) the Secretariat is not restricted to the database and, as appropriate, other sources are consulted for further recommendations;

   f) the résumé, the relevant documentation, and the names and CVs of the potential arbitrators are forwarded to a senior member of the LCIA Court (the President or a Vice President);

   g) the senior member of the LCIA Court advises which arbitrator(s) the Secretariat should contact (who need not be, but often will be, from among those put forward by the Secretariat) to ascertain their availability and willingness to accept appointment and the Court confirms the maximum hourly rate that is appropriate for the particular case;

   h) in the case of party nomination, the LCIA Court advises whether it considers the nominee(s) suitable, subject to conflicts checks;
i) the Secretariat sends the candidate(s) an outline of the dispute and asks if each candidate is willing and able to accept appointment;

j) when the candidate(s) have confirmed their availability, independence and impartiality, and agreed to the maximum fee rate set by the LCIA Court (with the maximum the Court could set currently standing, under the Schedule of Costs, at £450 per hour), the Secretariat prepares a form of appointment; and

k) the senior member of the LCIA Court formally appoints the Arbitral Tribunal and the Secretariat notifies the parties of the appointment.

46. Where the parties have jointly requested that the LCIA provide a list of candidate arbitrators, from which they may endeavour to select the Arbitral Tribunal (whether in straightforward negotiation, or by adopting an UNCITRAL-style list procedure), the selection process described above is carried out in respect of all candidates to be included on the list, so that any candidate(s) selected by the parties have already confirmed their willingness and ability to accept appointment and have been pre-approved for appointment by the LCIA Court before the list is sent to the parties.

47. At the same time as being concerned that each arbitrator should be appropriately qualified as to experience, expertise and language, the LCIA is also mindful of any other criteria specified by the parties in their agreement and/or in the Request and Response.

48. The LCIA is keen to ensure the right balance of experience, qualifications and seniority on a three-member tribunal; in particular, what qualities the third and presiding arbitrator should have to complement those of his/her co-arbitrators. The LCIA is mindful also of any particular national and/or cultural characteristics of the parties to which it should be sensitive, so as to minimise conflict, and will always have regard to the nature of the case (including sum in issue, nature of relief sought, technical and legal complexity).

49. The LCIA strives to maintain strong diversity (in all its guises) among the candidates selected. This includes, wherever possible and where appropriate in the particular case, widening the pool of arbitrators through first time appointments.

50. Under the Rules, there is a presumption in favour of a sole arbitrator unless the parties have agreed in writing otherwise, or unless the LCIA Court decides that the circumstances of the case demand three arbitrators.

51. By Article 6.1 of the Rules, if the parties are of different nationalities, a sole arbitrator or the third and presiding arbitrator may not be of the same nationality as one of the parties, unless the other parties agree.

8. URGENT CASES – EXPEDITED FORMATION OF THE ARBITRAL TRIBUNAL

52. As explained above, the LCIA Court takes steps in all cases to appoint an Arbitral Tribunal promptly after delivery of a Response or expiry of the deadline for delivery of a Response.

53. In rare cases, however, there is such exceptional urgency that a party requires immediate appointment of an Arbitral Tribunal. In such a case, a Claimant or a Respondent may apply to the LCIA Court, at the same time as, or after, the filing of the Request, for the constitution of the Arbitral Tribunal on an expedited (i.e. urgent) basis.
A party making an application for expedited formation under Article 9 of the Rules must set out the specific grounds of exceptional urgency that require the expedited formation of the Arbitral Tribunal. There is no prescribed list of what would, or would not, constitute exceptional urgency, but it might include, for example, that the applicant would suffer some irreversible harm if an Award or order on some issue is not made by some date (see further our Emergency Procedure Guidance Note). It is common, although not necessary, for an application for expedited formation to be accompanied by an application for urgent interim relief under Article 25 of the Rules.

The provisions on expedited formation and Emergency Arbitrator are not mutually exclusive—meaning that a party might, in an appropriate case, decide to make an application for both expedited formation of the Arbitral Tribunal and, in the interim, for the appointment of an Emergency Arbitrator (see further below).

On receipt of an application for expedited formation, the Secretariat will consult a senior member of the LCIA Court, whose usual practice is to invite the other parties to the arbitration to respond within a short timeframe. The LCIA Court is not, however, obliged to seek comments and may proceed with an expedited appointment notwithstanding the absence of comments by a responding party.

If the senior member of the LCIA Court accepts the applicant’s contention that there is exceptional urgency, the LCIA Court will appoint an Arbitral Tribunal as expeditiously as possible. The senior member consulted may also decide to abridge the time for service of any Response or for nomination of an arbitrator.

Once appointed, the Arbitral Tribunal will address with the parties the procedure to be adopted in the arbitration. Although there is no obligation on an Arbitral Tribunal to follow an expedited procedure in a case where it has been appointed on an expedited basis, it may decide to do so.

Further information about expedited formation is available in our Emergency Procedure Guidance Note.

9. URGENT CASES – EMERGENCY ARBITRATOR PROCEDURE UNDER THE 2014 RULES

The 2014 Rules introduced a new Emergency Arbitrator procedure, which complements the existing expedited formation provision.

The Emergency Arbitrator procedure, contained in Article 9B of the 2014 Rules, applies only to arbitration agreements concluded on or after 1 October 2014 (rather than, like the balance of the 2014 Rules, to arbitrations commenced on or after that date). Parties to an arbitration agreement concluded before 1 October 2014 may nevertheless expressly agree that this provision should apply to their arbitration.

Unlike expedited formation, the Emergency Arbitrator procedure allows a party to seek the appointment of a temporary sole arbitrator, whose role is confined to addressing a request for urgent interim relief pending formation of the Arbitral Tribunal that will determine the merits of the dispute. In its application, a party must set out the specific grounds requiring, as an emergency, the appointment of an Emergency Arbitrator and the specific claim, with reasons, for emergency relief.

A party wishing to apply for the appointment of an Emergency Arbitrator should use the online form available at onlinefiling.lcia.org and ensure that it pays the Special Fee specified by the
Schedule of Costs (presently £28,000, plus VAT if applicable), which may be paid by credit card online.

64. If the LCIA Court grants the application for the appointment of an Emergency Arbitrator, there are short time-limits for the LCIA to appoint a candidate and for the Emergency Arbitrator to then issue his/her decision, which may take the form of an order or Award.

65. Article 9B of the 2014 Rules expressly clarifies that the Emergency Arbitrator provision does not prejudice a party’s right apply to a state court for any interim or conservatory measure should it wish to do so.

66. Further information about the Emergency Arbitrator provision is available in our Emergency Procedures Guidance Note.

10. SETTING A TIMETABLE FOR THE ARBITRATION

67. The LCIA will write to the parties once an Arbitral Tribunal has been appointed by the LCIA Court. The Secretariat will also write to the Arbitral Tribunal to provide to them any relevant background held by the LCIA about the arbitration and to invite the Arbitral Tribunal to make contact with the parties as soon as practicable to discuss the future conduct of the arbitration.

68. In accordance with Article 14 of the 2014 Rules, the Arbitral Tribunal and the parties are encouraged to make contact within 21 days of the appointment of the Arbitral Tribunal. The parties may agree on joint proposals for the conduct of their arbitration and the Arbitral Tribunal may exercise its discretion to set a timetable appropriate for the particular case, bearing in mind its duty to act fairly and impartially and to provide a fair, efficient and expeditious means for the final resolution of the parties’ dispute.

69. If the parties have not made any proposals, and the Arbitral Tribunal has not made any alternative orders, then the default timetable set out in Article 15 of the Rules will apply. The first step in this default timetable is for a Claimant, within 28 days of written notification from the LCIA of the formation of the Arbitral Tribunal (30 days under the 1998 Rules), to deliver its written election to have its Request treated as its Statement of Case or to deliver its written Statement of Case. The Statement of Case should set out in sufficient detail the relevant facts and legal submissions, as well as details of the relief claimed, and should attach all essential documents.

70. The adoption of a clear timetable (whether tailor-made or the default under Article 15) allows the LCIA to monitor and ensure the efficient progress of an arbitration. This is also true of the preparation of Awards where, under the 2014 Rules, the Arbitral Tribunal must notify the parties and the LCIA of its estimated timing for the Award (see further below).

11. USE OF WRITTEN EVIDENCE

71. A party should file, with its Statement of Claim or its Statement of Defence, copies of all essential documents.

72. If a party wishes to rely on witness evidence to support its case, then it should inform the Arbitral Tribunal. The Arbitral Tribunal may request that a party present the testimony of any witness in written form, whether as a signed statement or otherwise and, in accordance with Article 20.3 of the Rules, the Arbitral Tribunal may decide the time, manner and form in which
that written testimony should be exchanged between the parties and presented to the Arbitral Tribunal.

73. As highlighted in the Annex to the 2014 Rules, a party’s legal representative should not knowingly procure or assist in the preparation of any false evidence, nor knowingly conceal or assist in the concealment of any document.

74. The Arbitral Tribunal has a discretion under the Rules to refuse or limit both the written and oral testimony of witnesses (whether witnesses of fact or experts).

12. THE RIGHT TO AN ORAL HEARING

75. Under Article 19 of the LCIA Rules, any party has the right to request a hearing before the Arbitral Tribunal at any appropriate stage of the arbitration unless the parties have agreed in writing upon a documents-only arbitration.

76. The Arbitral Tribunal has discretion as to the conduct of a hearing, including as to any time-limits to be applied and as to the date, time and geographical location of any hearing.

77. Unless otherwise agreed in writing by the parties, all hearings of LCIA arbitrations are held in private.

13. REPRESENTATION IN AN LCIA ARBITRATION

78. Although many parties choose to instruct lawyers to advise them and to represent them in arbitral proceedings, it is not a requirement that a party must be represented by a lawyer in an LCIA arbitration.

79. Instead, in accordance with Article 18 of the Rules, a party may be represented by anyone who is lawfully authorised to represent that party. The LCIA or the Arbitral Tribunal may ask any party to provide proof of the authority granted to its representative.

80. The 2014 Rules introduce new provisions on representatives. Article 18.5 of the 2014 Rules requires each party to ensure that all of its named legal representatives have agreed to comply with the guidelines contained in the Annex to the Rules. The guidelines are intended to promote the good and equal conduct of the parties’ representatives and provide, for example, that a party’s representative should not engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any Award.

81. If a party complains that another party’s representative has violated the guidelines, the Arbitral Tribunal may, if it considers the complaint to be well-founded, issue a written reprimand, issue a written caution as to future conduct in the arbitration, or take any other measure necessary to fulfil the Arbitral Tribunal’s duties to act fairly and impartially and to adopt procedures suitable to the arbitration, so as to avoid unnecessary delay and expense.

82. Under Articles 18.3 and 18.4 of the 2014 Rules, a party must notify to the Arbitral Tribunal any intended change or addition to its named representatives, and the Arbitral Tribunal may withhold approval of that intended change or addition where the change or addition could compromise the composition of the Arbitral Tribunal or the finality of any Award (on the grounds of possible conflict or similar).

83. In deciding whether or not to grant approval, the Arbitral Tribunal will have regard to the particular circumstances before it, including the general principle that a party may be
represented by a legal representative chosen by that party, the stage which the arbitration has reached, the efficacy of maintaining the composition of the Arbitral Tribunal and any likely wasted costs or loss of time resulting from the proposed change or addition.

14. CONDUCT OF THE ARBITRAL TRIBUNAL

84. Before an arbitrator is appointed, the LCIA will ask him/her to complete a statement of independence, impartiality and availability.

85. If a party feels that an arbitrator is not acting fairly or impartially during the arbitration, that party may challenge the arbitrator under Article 10 of the Rules.

86. Any challenge by a party must be made within 14 days of the formation of the Arbitral Tribunal or (if later) within 14 days of becoming aware of any circumstances that give rise to justifiable doubts as to the arbitrator’s impartiality or independence (15 days under the 1998 Rules).

87. The challenge should be made by way of written statement to the LCIA Court, the Arbitral Tribunal and all other parties, detailing the reasons for the challenge.

88. Unless all the parties agree to the challenge or unless the challenged arbitrator resigns within 14 days of the written statement, the LCIA Court shall decide the challenge and will provide to the parties and the Arbitral Tribunal reasons for its decision.

15. THE COSTS OF AN LCIA ARBITRATION

89. The LCIA’s charges, and the fees charged by the Arbitral Tribunals it appoints, are calculated by reference to hourly rates. This is because the LCIA is of the view that a substantial monetary claim (and/or counterclaim) does not necessarily mean a technically or legally complex case and that arbitration costs should be based on time actually spent by administrator and arbitrators alike.

90. Details of the LCIA’s charges are contained in our Schedule of Costs, which is available on our website. The current maximum hourly rate, at or below which any arbitrator must set his or her fees, is £450. However, in every case, the LCIA Court will make a recommendation, having regard to the nature and the circumstances of the case and the amount in dispute, as to what the maximum hourly rate should be in that particular case, and may (and often does) recommend that the maximum hourly rate be capped to an amount lower than £450.

91. Unlike other arbitral institutions, the LCIA does not direct the parties to pay the full costs of the arbitration upfront. As the LCIA adopts time-based charges, the full costs of arbitration cannot be predicted at the outset. The LCIA will, therefore, direct the parties to lodge staged deposits, the first of which is normally directed following the appointment of the Arbitral Tribunal. The amount of the deposit directed is not fixed, and will be decided by the LCIA in consultation with the Arbitral Tribunal, having regard to the dispute at hand, the hourly rate being charged by the Arbitral Tribunal, and the anticipated timetable for the conduct of the proceedings.

92. Both the LCIA Secretariat and the LCIA Court monitor the charges levied by arbitrators in arbitrations under our Rules. Arbitrators are required to provide fee notes, which must include, or be accompanied by, details of the time spent on a case. The LCIA notifies the parties of payments on account of arbitrators’ fees in advance. If a party wishes to know the costs of an arbitration at a particular time, it may call for a financial summary.
93. Under the Rules, the LCIA Court must determine the costs of each arbitration. At the conclusion of the arbitration (or at the time of a partial Award), the Secretariat will therefore provide to a senior member of the LCIA Court a financial dossier, including a complete financial summary of sums lodged by the parties, sums paid to the arbitrators, outstanding fees and expenses, and interest accrued on deposits. The dossier also includes a copy of the original confirmation to the parties of the arbitrators’ fee rates, a copy of the arbitrators’ accounts, a copy of the LCIA’s own time and disbursements ledger, a copy of directions for deposits and a copy of all notices given to the parties of payments made from deposits.

94. The senior member of the Court then reviews the dossier and, if necessary, calls for any further information, or initiates any investigation it may require to satisfy itself that the costs are reasonable and are in accordance with the LCIA Schedule of Costs, before notifying the Secretariat of the amount to be notified to the Arbitral Tribunal for inclusion in the Award.

95. If a party raises a dispute regarding administrative charges or the fees and expenses of the Arbitral Tribunal, that dispute will be determined by a different senior member of the LCIA Court than the one who determined the costs.

16. DURATION OF AN LCIA ARBITRATION

96. There is no such thing as an “average” arbitration. Sums in issue, and technical and legal complexity, may vary greatly between one case and another, as may the volume of evidence, oral and written, that may be required to determine the dispute. The LCIA carefully monitors the conduct of the proceedings, and the time taken by the Arbitral Tribunal to write its award.

97. The LCIA takes a proactive and robust approach throughout an arbitration, in order to minimise any unnecessary delay on the part of the Arbitral Tribunal. Our ability to do so is enhanced under the 2014 Rules, which contain additional obligations on an Arbitral Tribunal, including to:

- confirm in writing, before appointment, that each arbitrator is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration (Article 5.4);

- consult with the parties promptly after the Arbitral Tribunal’s appointment to set an appropriate procedure, avoiding unnecessary delay and expense (Article 14.1);

- seek to make its final Award as soon as reasonably possible following the last submission from the parties, in accordance with a timetable notified to the parties and the LCIA (Article 15.10); and

- inform the LCIA and the parties, as soon as it establishes a time for what it contemplates shall be the last submission from the parties, of the time the Arbitral Tribunal has set aside for deliberations (Article 15.10).

98. The LCIA does not formally scrutinise Awards and, consequently, subject to the LCIA holding sufficient funds to release the award, there is no delay caused by a formal scrutiny process. However, if the Secretariat is requested by an Arbitral Tribunal to review a draft for typographical and similar errors, we are happy to do so.
17. PROCEDURE FOR SMALL CLAIMS

99. The LCIA does not presently have a separate set of rules for the arbitration of small claims. We are, however, happy to provide to parties suggested wording providing for a fast-track process under the LCIA Rules. Any enquiries in this regard should be directed to casework@lcia.org.

18. CONFIDENTIALITY AND PUBLICATION OF AWARDS

100. Confidentiality is still generally regarded as one of the primary underpinnings of arbitration and this is reflected by Article 30 of the Rules.

101. The LCIA will not provide to anyone, who is not a proper party to an arbitration or a legal representative of a party, any information about pending or completed LCIA arbitrations. Our response to any such request will be that we cannot comment, irrespective of whether we have any knowledge of the matter about which we are being asked.

102. All LCIA awards are confidential. By virtue of Article 30 of the Rules, the LCIA does not publish Awards, or parts of Awards, even in redacted form.

103. The LCIA may publish abstracts of decisions by the LCIA Court on challenges to arbitrators, as well as sanitised statistical information about cases referred to us.

19. IMPORTANT NOTE

104. The LCIA is a neutral and independent arbitral institution, providing administrative services only, and neither practices law, nor renders legal services. Neither parties, nor legal representatives, nor arbitrators should, therefore, interpret, or rely upon, these notes as any form of legal advice. Rather, these notes are drafted only with a view to explaining LCIA arbitration to those unfamiliar with our Rules and to facilitating the diligent and timely conduct of arbitrations under the LCIA Rules.

Issue date: 29 June 2015
BY RONA G. SHAMOON

AN ADR SPECIALIST SHARES 10 WAYS THAT DRAFTERS OF ADR PROVISIONS CAN AVOID MAKING SERIOUS MISTAKES.
Dispute resolution provisions often get short shrift from transactional lawyers, who are mainly concerned with closing a business deal that will be profitable all around. Their involvement usually ends after the closing, so unless they have been educated to consider what might go wrong and the importance of providing appropriate dispute resolution provisions, more often than not, they just toss in a dispute resolution provision that was used in another deal on the premise that it worked before.

Rona G. Shamoon is a litigator in the New York office of Skadden, Arps, Slate, Meagher & Flom LLP, and a member of Skadden’s International Arbitration Group. She has represented parties to commercial arbitrations and mediations (both domestic and international), and negotiates and drafts dispute resolution provisions in domestic and international contracts. On June 1, 2012, she became the chair of the New York State Bar Association Dispute Resolution Section. The views expressed herein are hers alone and should not be attributed to Skadden, its clients, or any other person or organization.
Ideally, a dispute resolution specialist would be brought in during the contract negotiation process to work on the dispute resolution provisions, in much the same way that a tax lawyer would be brought in to deal with the tax implications of the deal. The job of a dispute resolution specialist is to try to focus the parties on the types of disputes that could occur and devise a suitable mechanism for their resolution. However, the real world is far from ideal. Either the transactional lawyer does not work with a dispute resolution specialist, or calls one in at the eleventh hour when the most that can be done is replace the most problematic provisions and try to insert a few improvements. What are the most problematic provisions? Every ADR specialist has her own list. This article sets out my top 10 pitfalls and how to avoid them. These drafting tips, which are based on my 18 years of practice as a dispute resolution specialist at a large law firm, would be applicable to virtually any business-to-business arbitration.

Pre-Arbitration Mechanisms with Indeterminate Duties and No Time Limits

Many lawyers seem to believe that if a contract provides that the parties are supposed to negotiate or mediate in “good faith,” they will miraculously and promptly do so to resolve their differences. Reality contradicts this belief. Most of the time one party wishes to have the dispute resolved expeditiously, and the other prefers to put off resolution as long as possible. Inevitably, the delaying party will take advantage of both the “good faith” requirement and the lack of any time limits in the dispute resolution provision for completion of negotiation or mediation, by arguing first that arbitration cannot commence because the other party has not negotiated “in good faith,” or alternatively that the negotiation or mediation period has not ended. Thus, one pitfall is using words like “good faith,” which can only inspire collateral litigation, and another is not putting a clear time limit on the period for negotiation and mediation. The lessons to be learned: Leave out “good faith” requirements and include unconditional time limits for the completion of each ADR process.

Where to Arbitrate?

The venue of the arbitration is another potential pitfall. I have seen many arbitration provisions that either lack a venue for the arbitration, or contain multiple venues, depending on who brings the arbitration. Venue is a critical component of an arbitration provision and should not be left out or decided on the whim of the party that initiates the arbitration. Nor should there be multiple conflicting venues. All of these situations can also be a source of collateral disputes.

Selecting the proper venue is particularly critical in international arbitrations. Venue should be in a country that is a signatory and ratifier of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention) because this convention makes arbitration agreements and awards enforceable. Moreover, if possible, venue should not be in the home country of any party to the proceeding, since only the courts of the country in which the arbitration officially takes place will have the power to set aside the award.

Omitting the Governing Rules, the Governing Law, and the Language of the Arbitration

Leaving out critical components is another pitfall to be avoided. One critical component is the procedural rules that are to govern the arbitration. Despite the thousands of hours that have been spent drafting and revising the institutional and ad hoc rules of the various arbitral institutions, a surprising number of parties try to make up their own, leaving critical gaps that need to be filled by arbitrators and courts. Another critical component is the substantive law governing the dispute. If the law applicable to the substance of the dispute is not stated in their agreement, the parties are like-
ly to spend considerable time and money litigating which law will apply. In international arbitration, the language of the arbitration should also be specified, or the parties may end up in a collateral dispute over which language should be used for the parties’ submissions.

**Number of Arbitrators**

People who are familiar with arbitration know that the only realistic choices for an arbitral panel are one arbitrator or three. An even number of arbitrators could produce a tie, and five arbitrators would create a nightmarish scheduling problem. When there are three arbitrators, only two can be appointed by parties to the arbitration. The third arbitrator must serve as the chair and, therefore, cannot be party-appointed. In the event that the arbitration potentially involves multiple parties (claimants and/or respondents) with disparate interests, it would be prudent to provide in the arbitration agreement that if all parties cannot agree on their party-appointed arbitrators, then all of the arbitrators will be chosen by the administering institution. As arbitral awards are largely not appealable on substantive grounds, I always recommend having three arbitrators for disputes involving large dollar amounts or other “bet the company” disputes.

If you fail to provide for the number of arbitrators, the applicable arbitration rules will make that determination for you (assuming that you have provided for a set of arbitration rules), although it may not be the number you would have chosen.

**Expedited Appointment of the Arbitrator for Expedited Disputes**

Selecting an arbitrator can often take weeks and selecting three arbitrators can take much longer, sometimes even months. If expedited resolution is important, I suggest that the parties agree before any disputes arise on a pre-approved panel of arbitrators who would be tapped in the event of a dispute. If this approach it taken, it is essential to jointly contact these individuals to see if they will be available. If that approach is not possible, the parties should agree to an expedited method of appointment, such as providing that the appointment be made from a list provided by the designated arbitral institution, and limiting the number of names that may be stricken from the list by each party.

**Overly Precise Arbitrator Qualifications**

The perfect arbitrator for a dispute may exist only on paper, or may be one of only a handful of individuals, some or all of whom may be disqualified by a conflict or unavailable when you need them. Always resist the temptation to be overly specific when it comes to arbitrator qualifications.

**Unrealistic Discovery**

I literally shudder when I see the words “Federal Rules of Civil Procedure” in an arbitration provision. Providing for the FRCP to apply in arbitration, particularly to discovery, can lead to a ridiculously burdensome and drawn-out process. If your client expects arbitration to be fast and efficient (and they always do), limiting discovery is a necessity, not merely an option to consider. Before placing limits on discovery, however, you must determine what information your client will need in the event of a dispute, and make sure that there is an appropriate mechanism in place for the collection of such information. Thus, explicitly providing for discovery of certain specific types of electronic information, or for depositions of certain key individuals, may be essential to your client in proving its case.

**Unrealistic Timing**

You would be amazed at how many arbitration provisions provide for three arbitrators, broad discovery, and an award issued within 30 days of the filing of the arbitration! Of course, that is unrealistic. It can take months to agree on a panel of arbitrators, and even after the panel is assembled, much needs to be done before the hearing on the merits. Even if an expeditious award is required, the time period allocated for the entire arbitration must be realistic. Moreover, the drafter should include a safety valve to enlarge the time (for example, in the discretion of the arbitrators) in order to prevent the award from being challenged under Section 10(a)(4) of the Federal
Arbitration Act on the ground that the arbitrators “exceeded their powers” by taking longer to issue the award than the period allotted in the arbitration agreement. In an international dispute, enforcement of an award could be denied under Article 5(c) of the New York Convention, which provides that an award may be refused enforcement if “the award deals with a difference not contemplated or not falling within the terms of the submission to arbitration...."

**Appeal Mechanisms**

I have never understood the attraction of appeal mechanisms. In *Hall Street Associates, L. L. C. v. Mattel, Inc.* (552 U.S. 576, 2008), the U.S. Supreme Court effectively curtailed the ability of parties to provide for expanded judicial review of arbitration awards by federal courts, leaving only the mechanism of having an award reviewed by a second arbitral tribunal. Unlike appellate courts, however, appellate arbitral tribunals that take a second look at an award are often no more knowledgeable than the original panel that issued the award. Moreover, the second panel will not have the advantage of hearing and seeing witnesses testify. In addition, if the parties provide for an appeal mechanism, the loser is almost guaranteed to take advantage of it. The best insurance against a bad award is having a panel of three competent arbitrators for potentially significant cases.

**Vague Scope of Arbitrable Disputes**

Limiting the scope of arbitrable issues is truly a major pitfall. The safest arbitration clauses (meaning those least likely to be successfully challenged) are broadly drafted to provide for arbitration of all disputes. If only certain disputes are to be arbitrated, these must be very clearly defined to avoid collateral disputes about whether or not a particular dispute is covered by the arbitration clause.

Also, avoid at all costs any attempt to split claims by limiting the relief that arbitrators can award to damages and reserving injunctive relief to the courts. The only relief that is properly reserved to the courts is preliminary injunctive relief *prior to the appointment of the arbitral tribunal*. An alternative source of such provisional relief is found in certain institutional arbitration rules. For example, the AAA International Arbitration Rules provide for an “emergency arbitrator” to be appointed at a party’s request, prior to the constitution of the tribunal, to respond to a request for emergency injunctive relief. (The parties to a dispute arbitrated under the AAA Commercial Arbitration Rules may explicitly provide in their arbitration clause that the AAA Optional Rules for Emergency Measures of Protection apply to their arbitration proceedings.) In any event, an award of permanent injunctive relief (including but not limited to specific performance) should be reserved for the arbitral tribunal.

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Eric P. Tuchmann, Esq.
Hon. Barry H. Cozier
James M. Hosking, Esq.
A MODEL FEDERAL ARBITRATION SUMMONS
TO TESTIFY AND PRESENT DOCUMENTARY
EVIDENCE AT AN ARBITRATION HEARING

By the International Commercial Disputes Committee
and the Arbitration Committee of the New York City Bar Association
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Introduction

This annotated model federal arbitration witness summons (so titled because the Federal Arbitration Act ("FAA") uses the term "summon" rather than "subpoena" in Section 7) brings together in one resource guidance on law and practice in regard to the issuance by arbitrators of compulsory process for evidence to be obtained from non-party witnesses.¹ A major impetus for this project was the amendment of Rule 45 of the Federal Rules of Civil Procedure in December 2013, which in relevant part provided for nationwide service of a federal judicial subpoena. By implication, a federal arbitral witness summons, which per FAA Section 7 is to be served in the same manner as a federal judicial subpoena, now may be served nationwide. The consequences are likely to be (i) more extensive proposed and actual use of arbitral subpoenas than was the case when an arbitrator could compel attendance only of a witness found within 100 miles of the place of arbitration, and (ii) a greater frequency of litigation concerning the witness’s duty of compliance.

The structure of this document, as the Table of Contents indicates, is to provide a Model Summons and a series of annotations that discuss applicable law and/or issues of practice and policy. The annotations are keyed to aspects of the Model Summons by footnotes (or hyperlinks) in the Model Summons, so the reader can readily refer to the analysis that underlies the various components of the Model Summons.

CASE NO. [if applicable]2

[OPTIONAL: CAPTION IDENTIFYING THE PROVIDER ORGANIZATION AND/OR APPLICABLE RULES OF ARBITRATION]

IN THE MATTER OF AN ARBITRATION BETWEEN:

X COMPANY, INC.,

Claimant,

And

Y LLC,

Respondent.

ARBITRATION SUMMONS3 TO TESTIFY AND PRESENT DOCUMENTARY EVIDENCE AT AN ARBITRATION HEARING4

TO: [J. Smith]5
    [Z Corporation]6
    [address]
    [City], [State]7

By the authority conferred on the undersigned arbitrators8 by Section 7 of the United States Arbitration Act (9 U.S.C. § 7), you are hereby SUMMONED to

2 See Annotation L (Procedure in Regard to Arbitral Subpoenas Governed by FAA Section 7).
3 See Annotation A (Denomination as “Witness Summons”).
4 See Annotation K (Arbitral Role in Deciding Enforceability of Subpoenas).
5 See Annotation B (Natural Person As Witness Summons Recipient).
6 See Annotation J (Arbitral Subpoena Based on FRCP 30(b)(6)).
7 See Annotation C (Location of the Witness/Nationwide Service).
attend as a witness at a hearing before one or more of the undersigned arbitrators⁹ to be held on [insert date providing reasonable notice] at 10:00 a.m. at the offices of the [X Law Firm], [insert address], [City], [State],¹⁰ and to bring with you to the hearing the documents identified in Schedule A annexed to this SUMMONS.¹¹

Provided that this SUMMONS has been served upon you in the same manner as is required of a judicial subpoena under Rule 45 of the Federal Rules of Civil Procedure,¹² then if you shall refuse or neglect to obey this SUMMONS, upon petition the United States District Court for the District of [State]¹³ or a competent court of the State of [State]¹⁴ may compel your attendance, or punish you for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

You may address questions concerning this SUMMONS to the attorneys [or the Case Manager [if applicable]]¹⁵ identified below. Any application by you to quash or modify this SUMMONS in whole or in part should be addressed to the arbitral tribunal¹⁶ in writing [and sent via the Case Manager [if applicable]], with copies to counsel for the parties, except that a motion upon the ground that the SUMMONS is unenforceable under Section 7 of the U.S. Arbitration Act may also

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⁸ *See* Annotation D (Who May Issue a Subpoena).

⁹ *See* Annotation E (Viability of Pre-Hearing Discovery Subpoenas).

¹⁰ *See* Annotation F (Place of Hearing).

¹¹ *See* Annotation G (Scope of “Duces Tecum” Witness Summons).

¹² *See* Annotation C (Location of the Witness/Nationwide Service).

¹³ *See* Annotation F (Place of Hearing).

¹⁴ *See* Annotation H (Subject-Matter Jurisdiction to Enforce Witness Summons).

¹⁵ The Model encourages the witness to communicate with counsel for the parties and the Case Manager, if applicable, to avoid *ex parte* communications between the witness and the arbitral tribunal.

¹⁶ *See* Annotation I (Proper Setting for Witness to Raise Objections)
be addressed to the United States District Court for the District of [State] or a competent court of the State of [State].

The attorneys for the Claimant in this arbitration are [identify firm] (attn. [responsible attorney]), [address] [phone] [email address].

The attorneys for the Respondent in this arbitration are [identify firm] (attn. [responsible attorney]), [address] [phone] [email address].

[The Case Manager [if applicable] is [identify] [phone] [email address].]

Dated: [Month] [Day], [Year]

[Name], Arbitrator
[Address]

[Name] Presiding Arbitrator
[Address]

[Name], Arbitrator
[Address]

17 Annotation H (Subject-Matter Jurisdiction to Enforce Witness Summons).
Annotation A: Denomination as “Witness Summons”

FAA Section 7 refers to the compulsory process issued by an arbitrator as a “summons” and states that it should be served “in the same manner as subpoenas.” We therefore make this formal distinction in the text of the Model Summons. In our annotations, however, we use interchangeably the terms “summons” and “subpoena” to refer to an arbitrator’s compulsory process to a non-party witness.
Annotation B: Natural Person as Witness Summons Recipient

It is recommended to identify a natural person as the witness whenever possible. In a judicial proceeding, a party might in discovery serve a subpoena based on Rule 30(b)(6) of the Federal Rules of Civil Procedure ("FRCP") and require the corporate recipient to identify a representative to testify. Uncertainty exists about whether such an approach is permissible in arbitration. For further explanation, see Annotation J (Arbitral Subpoena Based on FRCP 30(b)(6)).
The Summons may be issued to a witness residing at a considerable distance from the place of the arbitration. This is the consequence of amendments to Rule 45 of the Federal Rules of Civil Procedure (“FRCP”) in December 2013 that provide for nationwide service of process of a judicial subpoena. See Annotation F (Place of Hearing). Section 7 of the FAA provides that the arbitral witness summons “shall be served in the same manner as subpoenas to appear and testify before the court.” FRCP 45(b)(2) as amended December 1, 2013 provides that “[a] subpoena may be served at any place within the United States.”
Annotation D: Who May Issue a Subpoena

Statutory background. Section 7 of the FAA provides that “the arbitrators, or a majority of them” (emphasis supplied) may “summon in writing any person to attend before them or any of them.” Section 7 further provides that “[said] summons shall issue in the name of the arbitrator or arbitrators, or a majority of them.” Section 7 therefore provides no authority for the issuance by counsel of a summons or subpoena, signed by such counsel, for a party to testify or produce records in an arbitration. In this respect Section 7 of the FAA differs from Section 7505 of the New York Civil Practice Law and Rules (“CPLR”), which provides: “An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas” (emphasis supplied).

Caselaw. Federal court decisions suggest, even if they do not squarely hold, that state laws and rules conferring power on attorneys to issue subpoenas are not applicable in an arbitration to which the FAA applies, at least unless the parties have expressly agreed upon use of state law rules of arbitral procedure. See, e.g., Nat’l Broadcasting Co. v. Bear Stearns & Co., 165 F.3d 184, 187 (2d Cir. 1999) (Section 7 “explicitly confers authority only upon arbitrators; by necessary implication, the parties to an arbitration may not employ this provision to subpoena documents and witnesses”); St. Mary’s Med. Center v. Disco Aluminum
Prods., 969 F.2d 585, 591 (7th Cir. 1992); Burton v. Bush, 614 F.2d 389, 390 (4th Cir. 1980); Kenney, Becker LLP v. Kenney, 2008 WL 681452, at *2 (S.D.N.Y. Mar. 10, 2008) (citing NBC for the proposition that “under the Federal Arbitration Act . . . only arbitrators – and not parties to an arbitration – have the authority to issue subpoenas”); Suratt v. Merrill Lynch, Pierce Fenner & Smith, Inc., 2003 WL 24166190, at *2 (S.D. Fla. July 31, 2003) (granting motion to quash attorney-issued subpoena because “[t]he FAA does not allow attorney-issued subpoenas in arbitration actions”). To the extent these cases held that an attorney-issued subpoena was improper, they did so on the basis that FAA Section 7 did not provide for it.

But these courts were not asked to find that a state law or rule allowing attorney-issued subpoenas in arbitration was pre-empted by the FAA. No federal court, to our knowledge, has directly answered the question whether FAA Section 7 pre-empts state arbitration rules concerning the powers of arbitrators or parties to issues subpoenas to non-parties for evidence to be used in an arbitration. Thus if an attorney in a New York-seated arbitration issued a subpoena upon the purported authority of CPLR 7505, in a case involving interstate or international commerce, it would apparently be a question of first impression in the Second Circuit whether CPLR 7505 is pre-empted by FAA Section 7.
Party agreement on state procedures. Federal case law suggests that one approach that may authorize use of state law procedures in an FAA arbitration would be for the parties to agree to such procedures, thereby triggering the federal policy in favor of enforcing the parties’ agreed-upon procedures. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995) (generic choice-of-New-York-law clause in contract containing arbitration clause to which the FAA applies should be construed to make applicable only substantive principles of New York law and not New York law restricting the powers of arbitrators); *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Univ.*, 489 U.S. 468, 476 (1989) (FAA does not reflect congressional intent to occupy the entire field of arbitration, and FAA does not prevent enforcement of agreements to arbitrate under rules different from those set forth in the FAA itself); *Savers Prop. & Cas. Ins. Co. v. Nat’l Union Fire Ins. Co.*, 748 F.3d 708, 715-16 (6th Cir. 2014) (“Although the FAA generally preempts inconsistent state laws and governs all aspects of arbitrations concerning ‘transaction[s] involving commerce,’ parties may agree to abide by state rules of arbitration, and ‘enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA’”); *Bacardi Int’l Ltd. v. V. Suarez & Co.*, 719 F.3d 1, 13 n.16 (1st Cir. 2013) (“[T]o use local arbitration rules instead of the FAA, the contract must say so
unequivocally”); *Ario v. Underwriting Members of Syndicate 53 at Lloyd's*, 618 F.3d 277, 288 (3d Cir. 2010) (“We have interpreted the FAA and *Volt* to mean that ‘parties [may] contract to arbitrate pursuant to arbitration rules or procedures borrowed from state law, [and] the federal policy is satisfied so long as their agreement is enforced.’”).
Annotation E: Viability of Pre-Hearing Discovery Subpoenas

Federal court decisions addressing pre-hearing document discovery.

Some federal courts of appeals have interpreted the text of Section 7 to require the appearance of the witness at a hearing before one or more members of the arbitral tribunal, and thus have concluded that Section 7 does not permit a documents-only arbitral subpoena for pre-hearing production of documents by a non-party witness. This was the position taken by the Third Circuit (in an opinion authored by then Circuit Judge Samuel Alito) in Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004). The Second Circuit agreed with the Third Circuit in Life Receivables Trust v. Syndicate 102 at Lloyd’s of London, 549 F.3d 210 (2d Cir. 2008).

The implication of the reasoning in both decisions – that the language of Section 7 requires the attendance of a witness at a hearing before one or more arbitrators – is that Section 7 also precludes an arbitral subpoena for a pre-hearing discovery deposition, but this issue was not directly presented in either case. Both of these courts rejected the view adopted by the Eighth Circuit that, under Section 7, “implicit in an arbitration panel’s power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.” In Re Sec. Life Ins. of Am., 228 F.3d
865, 870-71 (8th Cir. 2000). The Second and Third Circuits also rejected the view adopted by the Fourth Circuit that, while Section 7 generally precludes discovery subpoenas, discovery subpoenas may be allowed exceptionally upon a showing of special need or hardship. *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999).

New York State court decisions addressing pre-hearing document discovery. The Appellate Division of New York Supreme Court, First Department, in a 2005 case (pre-dating Life Receivables) held that in a case governed by the FAA, it would apply Section 7 to permit discovery depositions of non-parties pursuant to a summons “where there is a showing of ‘special need or hardship,’ such as where the information sought is otherwise unavailable.” ImClone Sys. Inc. v. Waksal, 22 A.D.3d 387, 388 (1st Dep’t 2005). The Court stated that it would adhere to this view “in the absence of a decision of the United States Supreme Court or unanimity among the lower federal courts.” Id. We are not aware of any New York State appellate decision after Life Receivables that either follows or overrules ImClone in light of Life Receivables. At least one New York State trial court has followed Imclone after and notwithstanding Life Receivables, finding that pre-hearing document discovery by subpoena under FAA Section 7 to a non-party may be ordered upon a showing of special need or hardship (although in that case the court found that this test was not satisfied). Connectu v. Quinn Emanuel Urquhart Oliver & Hedges, No. 602082/08, slip op. at 10 (Sup. Ct. N.Y. Cnty. Mar. 11, 2010).

Implications of federal-state split in New York. For New York practitioners, the divergence between the position of the Appellate Division of the New York
Supreme Court and the Second Circuit, if it continues, may be significant, as many Section 7 subpoenas in domestic cases involving interstate commerce may have to be enforced in the New York courts because federal subject matter jurisdiction is absent. See, e.g., Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 572 (2d Cir. 2005) (holding that Section 7 of the FAA does not, by virtue of its reference to federal district courts as courts that may compel compliance, create federal question subject matter jurisdiction for enforcement of subpoenas in FAA-governed arbitrations, and that Section 7, like other provisions of FAA Chapter 1, requires an independent basis for federal subject matter jurisdiction). See Annotation H (Subject-Matter Jurisdiction to Enforce Arbitral Witness Summons).

**Practice question: how should a tribunal conduct document production?**

Assuming that a tribunal adopts the position in Life Receivables and Hay Group, a practice question is presented: How should the tribunal conduct the procurement of documents from the non-party witness if the parties and witness do not agree? (If there is agreement, the non-party often will elect to avoid the inconvenience of a testimonial appearance by a documents custodian by delivering the requested documents to counsel for the parties. Thus pre-hearing non-party discovery may often occur simply because it is the path of least resistance).
The Model Summons contemplates that, absent agreement of the parties, the documents sought will be received into evidence in conjunction with testimony from a non-party witness at a hearing at which the parties and one or more members of the tribunal would be present. We believe this is required by the text of Section 7, which contemplates that document production should be an adjunct to the testimony of a witness. This interpretation of Section 7 is supported by the fact that, as the Third Circuit in *Hay Group* observed, the forerunner of modern Rule 45 of the Federal Rules of Civil Procedure (“FRCP”) as it was at the time Section 7 was adopted did not permit a documents-only subpoena.

Tribunals retain discretion, however, to conduct a witness hearing in any fashion that comports with due process and so it is not inevitable that the physical presence of the arbitrator and the witness in the same place is necessary. If the parties waive cross-examination, the witness’s testimony could be presented through a witness statement or declaration. There should be no obstacle to the fulfillment of the testimonial requirement, if the witness consents, via a telephonic or video-conferenced hearing during which the documents are received by an
electronic submission. In order to comply with the view that this is not discovery but a hearing preceding the final merits hearing, the tribunal should receive the documents as evidence and may then rely upon them in an award whether or not the parties in their further submissions refer to them.

In practice, arbitrators will continue to be asked to issue pre-hearing subpoenas for discovery, especially when the witness resides in a location within a federal judicial circuit that either takes an approach to Section 7 that permits an arbitral summons for discovery in at least some instances (e.g., the Fourth and Eighth Circuits) or has not taken a position on the question. We believe the Second and Third Circuit decisions are well reasoned, and faithful to the text of Section 7, and that in practice it makes sense for arbitrators to issue witness summonses that conform to the evidentiary-hearing model. The Model Summons is therefore structured along those lines. If the witness agrees to a discovery-like procedure, the interests of the party that sought compulsory discovery are not prejudiced, and the subpoena functions as a sort of predictable back-up method for obtaining the non-party’s evidence.

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18 As we discuss in Annotation F, while we believe that taking testimony telephonically or by videoconference does not require a witness to consent, it may be prudent to obtain that consent where possible.
Subpoenas for pre-hearing witness testimony. In the *Life Receivables* and *Hay Group* cases, the Second and Third Circuits, respectively, reversed orders of the district courts that had enforced subpoenas for pre-hearing document production by non-party witnesses. The decisions therefore implied that a subpoena requiring pre-hearing document production at a hearing held in the presence of one or more of the arbitrators would be enforceable. But the question of enforceability of a subpoena for witness testimony was not directly involved in the *Life Receivables* and *Hay Group* cases, and therefore those decisions did not squarely answer the question of whether Section 7 permits a non-party subpoena for witness testimony at a proceeding held in the presence of one or more arbitrators that is not the arbitration hearing on the merits.

Prior to *Life Receivables*, the Second Circuit in *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 577 (2d Cir. 2005), had affirmed enforcement of a subpoena for witness testimony at a hearing before the arbitrators to be held prior to the arbitration merits hearing, and rejected the contention that the pre-merits timing of the non-party witness hearing converted the proceeding into a deposition not permitted under Section 7. The Second Circuit held that “there is nothing in the language of Section 7 that requires, or even suggests,” that the non-party witness may only be required to attend and testify at the merits hearing. *Id.* at 579-80.
Based upon *Life Receivables* and/or *Hay Group*, arbitral subpoenas that specifically required a witness to appear and give testimony at a pre-merits hearing have been enforced. *E.g.*, *Bailey Shipping Ltd. v. Am. Bureau of Shipping*, 2014 WL 3605606 (S.D.N.Y. July 18, 2014); *In re Nat’l Fin. Partners Corp.*, 2009 WL 1097338 (E.D. Pa. April 21, 2009).
Annotation F: Place of Hearing

The Model Summons envisions that the arbitrators will convene a hearing to secure the testimony of a witness (or receive documents) at or near the place where the witness is located, rather than at the place of arbitration. This procedure results from the interplay of the nationwide service of process provisions of Rule 45 of the Federal Rules of Civil Procedure (“FRCP”), the limitations in that Rule on how far a witness may be compelled to travel and the language of FAA Section 7 that calls for the summons to be enforced by “the United States district court for the district in which such arbitrators, or a majority of them, are sitting.”

Nationwide service of process and distant witnesses. FAA Section 7 provides in part that the arbitral witness summons “shall be served in the same manner as subpoenas to appear and testify before the court.” As amended effective December 1, 2013, FRCP 45(b)(2) provides that a judicial subpoena may be served anywhere in the United States. Previously the subpoena could be served only within the judicial district of the issuing court, within 100 miles of the courthouse of the issuing court, or state-wide where the judicial district was within a state whose civil procedure law provided for state-wide service of process. The new availability of nationwide service of process has implications for a witness
summons issued by an arbitral tribunal under FAA Section 7 to a witness located at a considerable distance from the seat of the arbitration.

If the witness does not indicate willingness to comply, the arbitral summons served in a far-flung corner of the country with the benefit of the new Rule 45 provision for nationwide service of process may need to be enforced by the federal court or a competent state court in the judicial district where the arbitrators are “sitting.” See Annotation H (Subject-Matter Jurisdiction to Enforce Arbitral Witness Summons). Section 7 states: “[T]he United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.” (Emphasis added.)

**Court decisions on place of hearing prior to nationwide service rule.** The new statutory authorization for nationwide service of process clears at least one procedural hurdle to such enforcement: that there must be statutory authorization for the service of process as a precondition to personal jurisdiction over the witness in the enforcing federal district court. That was a problem under FAA Section 7 before the recent Rule 45 amendment. In *Dynegy Midstream Servs., LP v.*
Trammochem, 451 F.3d 89 (2d Cir. 2006), an arbitral tribunal sitting in New York issued a subpoena to a Houston witness calling for production of documents at a Houston location. When the witness ignored the subpoena, a motion to compel compliance was made in the U.S. District Court for the Southern District of New York, the motion was granted, and the Houston witness appealed on grounds that the New York federal district court lacked personal jurisdiction. The Second Circuit agreed, holding that personal jurisdiction over the Houston witness could not exist because FAA Section 7 in conformity with Rule 45 did not authorize a New York-based arbitral tribunal summons to be validly served on a Houston witness in Houston, just as Rule 45 would not allow a Southern District of New York trial subpoena to be validly served on a Houston witness in Houston.

A similar outcome occurred in Legion Ins. Co. v. John Hancock Mutual Life Ins. Co., 33 Fed. Appx. 26 (3d Cir. April 11, 2002). There, the Third Circuit held that the U.S. District Court for the Eastern District of Pennsylvania did not have power to enforce a subpoena, issued by an arbitral tribunal in Philadelphia, directed to a non-party witness located in Florida, which required the witness to appear for deposition in Florida and to bring with him certain documents and papers. The Court relied on the language in Section 7 that arbitration subpoenas “shall be served in the same manner as subpoenas to appear and testify before the
court,” and held: “In light of the territorial limits imposed by Rule 45 upon the service of subpoenas, we conclude that the District Court did not commit error in denying John Hancock’s motion to enforce the arbitration subpoena.” *Id.* at 28.

**Remaining limits on personal jurisdiction.** Rule 45(b)(2) as amended to permit nationwide service of a judicial subpoena, and by extension nationwide service of an arbitral summons to a non-party witness, solves the threshold personal jurisdiction problem found to exist in *Dynegy* and in *Legion Insurance*. But this does not mean that the federal district court at the seat of the arbitration will always have personal jurisdiction over a witness upon whom valid personal service of the arbitral summons has been made. Statutory authorization for nationwide service of process is a necessary step to establish personal jurisdiction, but there are two more steps: personal jurisdiction must be available under the law of the state in which the district court is located, and if that law extends personal jurisdiction to the federal Constitutional limit, the subpoena must also comport with due process under the U.S. Constitution. *See Licci v. Lebanese Canadian Bank*, 673 F.3d 50, 60-61 (2d Cir. 2012).

Now that nationwide service of an arbitral summons is possible, two questions linked to personal jurisdiction over the non-party witness for enforcement purposes arise:
1) Can an arbitral summons require the witness to appear at a hearing at the place of arbitration even though it is far distant from his or her domicile?

2) If the summons calls for a hearing near the domicile of the witness, with arbitrators in attendance, do the local courts have power under Section 7 to enforce compliance?

**Can a summons require the witness to travel to the place of arbitration?**

On the first question, as to where the witness might be required to attend a hearing, the Rule 45 amendments have not fundamentally changed the Rule’s geographic boundaries for the place of compliance, but merely consolidate them in amended Rule 45(c). Rule 45(c)(1) now provides, “A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party’s officer; or (ii) is commanded to attend a trial and would not incur substantial expense.” Thus, an arbitral summons cannot properly call for a non-party witness to travel to a hearing more than 100 miles from where the witness resides, is employed or regularly transacts business, except that the witness can be required to travel further within the state if the witness would not incur substantial expense.
What court enforces the summons? As for the enforcing court, the amendments to Rule 45 now make it clear that the federal district court at the place of compliance with a judicial subpoena is the court in which enforcement should be sought, unless that court elects to transfer the enforcement case to the federal district where the action is pending. This effects no real change in judicial practice as to enforcement, except that previously the federal district court at the place of compliance was the court in whose name a judicial subpoena for pre-trial discovery was issued by an attorney as an “officer of the court,” and now such a subpoena is issued in the name of the federal district court where the action is pending. In parallel to federal judicial subpoena practice, we believe that the federal district court at the place of proposed compliance with the arbitral subpoena (or a state court if there is no basis for federal subject-matter jurisdiction, see Annotation H (Subject-Matter Jurisdiction to Enforce Arbitral Witness Summons)) should be the enforcement court.

Limitations in FAA Section 7 on where the witness hearing can take place. The question arises whether an arbitral summons can call for attendance at a hearing to be held at a place other than the seat/locale of the arbitration. As illustrated by the Dynegy and Legion Insurance cases, before the December 1, 2013 amendment, Rule 45’s territorial limitation on service of process answered
the place-of-compliance question, making it impossible to secure non-party evidence from witnesses not within striking distance of the place of arbitration. But now that an arbitral summons, like a federal subpoena, may be served nationwide, the question is squarely presented whether there are territorial limits on where a witness served with an arbitral summons may be required to appear to give evidence in the arbitration.

Section 7 lodges power to enforce the arbitral summons by an order compelling the witness to appear, or by an order of contempt for non-compliance, in “the United States district court for the district in which such arbitrators, or a majority of them, are sitting.” If the arbitrators (or a majority of them) elect to convene a hearing in the district where the witness resides, there is no obstacle to personal jurisdiction over the witness in the local federal district court, and that court (provided it has subject-matter jurisdiction (Annotation H)) may enforce the subpoena under Section 7 if the arbitrators “are sitting” in that district. Federal courts to our knowledge have not considered this question. In the case of a federal judicial discovery subpoena, whether for documents or a deposition, amended Rule 45 specifically provides that the enforcement court shall be the federal district court embracing the place of residence or employment of the witness. If that is the correct paradigm for arbitral subpoena practice, then it would follow that the
federal district court embracing the place of compliance with the arbitral subpoena, or the competent state court at that place, should be the enforcement court.

If, by contrast, the place where the arbitrators “are sitting” under Section 7 refers to a single fixed location that has been designated as the place of arbitration – the seat of the arbitration, in international arbitration parlance – then there is only one federal judicial district where courts (federal and state) have enforcement power, and their ability to exercise that power over a distant witness would depend upon those courts having personal jurisdiction over the witness. But if the arbitrators “are sitting,” in Section 7 terms, at the hearing location specified in their summons, then enforcement power will be lodged in the federal judicial districts where witnesses served with arbitral summonses are found.

We favor this interpretation for several reasons. First, it ensures that enforceability of an arbitral subpoena will not depend on personal jurisdiction over the witness in a court at the place of arbitration, a criterion which would make the availability of non-party testimony unpredictable and would invite collateral litigation over the personal jurisdiction issue. Second, it is logical that the witness should not face the inconvenience and cost of defending a motion to compel compliance in a court at a distant place of arbitration, when that burden is not imposed on a witness served with a federal deposition subpoena because such a
witness must be compelled in a proceeding before the federal district court in the locale of the witness. Third, this interpretation aligns judicial enforcement power in international arbitrations seated in the United States with the typical provisions of international arbitration rules permitting arbitrators to convene hearings at any place convenient for obtaining evidence.\textsuperscript{19} Fourth, this interpretation does no violence to the language of Section 7 because the term “sitting” does not clearly and unambiguously refer to the legal seat of the arbitration as opposed to the place where the arbitrators gather to hear evidence. Fifth, this interpretation does not violate, and indeed can be seen as consistent with, the expressed intent of Congress

\textsuperscript{19} From an arbitration procedure perspective, there is usually no difficulty in having the arbitrators venture out physically or virtually to a location other than the place of arbitration to conduct proceedings. For example, under Rule 11 of the Commercial Arbitration Rules of the American Arbitration Association: “The arbitrator, at the arbitrator’s sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations (i.e., other than the agreed or designated ‘locale’ of the arbitration) if reasonably necessary and beneficial to the process.” Further, Rule 32(c) of the Commercial Rules provides: “When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination.” \textit{See also}, to similar effect, Rules 17(2) and 20(2) of the International Arbitration Rules of the International Centre for Dispute Resolution, and Article E-9 of the International Expedited Procedures, effective as of June 1, 2014. This is in conformity with the provisions that have long been included in the UNCITRAL Arbitration Rules and most institutional rules for international arbitration, permitting the tribunal to convene hearings at locations other than the seat of the arbitration.
in the enactment of Section 7 – as it appears to have been Congress’s intent that Section 7 would evolve in parallel with changes in federal judicial practice with regard to non-party witnesses. If, after the 2013 Rule 45 amendments, the “are sitting” language were construed to refer only to the court at the place of arbitration, the ability of the parties and arbitrators in an arbitration to obtain relevant and material testimony from non-parties would be significantly less than in litigation before the federal courts.

The more restrictive interpretation, i.e., that only a court at the place of arbitration is located where the arbitrators “are sitting,” significantly limits the actual impact on arbitral evidence gathering of the extension of nationwide service of process to arbitral witness summonses. This may be said to conform to a view of arbitration as a private method of dispute resolution between the parties that involves less fact gathering and places fewer burdens on non-disputants than does court litigation. As set forth in a separate annotation to this Model Summons (see Annotation E (Viability of Pre-Hearing Discovery Subpoenas)), our interpretation of Section 7 supports this view of arbitration in the requirement that evidence should be gathered from non-parties in the presence of the arbitrator. We believe that the Congress that enacted Section 7 in 1925 left the matter of where arbitrators might “sit” to hold such hearings without specific restriction.
**Hearing witnesses by video link.** Suppose, for example, that an arbitral tribunal sitting in New York does wish to hear from an unwilling non-party witness residing in Seattle. Suppose the tribunal issues a subpoena that calls for the witness to appear and give testimony by video conference at the offices of a Seattle law firm or in the Seattle regional office of the AAA, with a video link to a New York location where the arbitrators, or at least one of them, will be present. In our view, Section 7’s objectives (as considered by some courts) of requiring a hearing are achieved, even though the witness and the arbitrators come together by electronic means. Electronic presence of the arbitrator is an adequate substitute for physical presence, because the arbitrator *could* lawfully attend in person. However, the use of technology in this fashion ought not to become entangled with the enforceability of the witness summons by a federal or state court where the witness is located. Some recalcitrant witnesses may argue that the tribunal is not “sitting” in the federal district where the witness is found if the subpoena provides for a video link.

While we believe FAA Section 7 is reasonably read not to impose any requirement that the arbitrator appear in the physical presence of the witness – that *adjudicative* presence of the arbitrator (to rule on objections and declare evidence admitted) is the touchstone of Section 7 according to the interpretation given in the
Life Receivables and Hay Group decisions – it is prudent to avoid controversy on this point by providing in the subpoena that the arbitrators will attend in person unless otherwise agreed. However, if a subpoena does call for video-linked hearing, enforceability of the subpoena might be supported by reference to FRCP 43, which expresses the judicial preference for testimony in open court but provides that “for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.” FRCP 43(a).
Annotation G: Scope of “Duces Tecum” Witness Summons

Section 7 of the FAA refers to production of a document or record that “may be deemed material as evidence in the case.” Under the present version of Rule 26(b)(1) of the Federal Rules of Civil Procedure, “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” That Rule further provides, “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” The latter clause is widely understood – and evidently misunderstood\textsuperscript{20} – as the benchmark for a very broad scope of discovery in federal litigation.

\textsuperscript{20} The Judicial Conference of the United States has proposed an amendment of Rule 26(b)(1) that would replace the “reasonably calculated to lead” phrase with the following language: “Information within this scope of discovery \textit{i.e.}, relevant to a claim or defense\right] need not be admissible in evidence to be discoverable.” The report of the Judicial Conference observes that the original intent of the “reasonably calculated” language was only to prohibit objections to discovery based on rules governing admissibility of evidence at trial, and that the amendment should dispel the common misperception that the phrase expands the scope of discovery beyond what is relevant to sources that \textit{might contain} relevant information. \textit{See} Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States, Appendix B-1 at pp. 9-10 (September 2014), \textit{available at} http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf.
“Materiality” embraces an assessment of the importance of the evidence to resolution of the case. When requests for information are reasonably specific, arbitral tribunals can more effectively assess the importance of the evidence than when a request seeks all documents containing information within a broad category of subject matter. As a general practice, tribunals should require a high degree of specificity in the “duces tecum” portion of a subpoena, aiming for non-cumulative evidence known to exist (or perhaps reasonably believed to exist), not available from sources within the party’s control, and reasonably necessary to establish a fact in dispute. While in exceptional cases a party may demonstrate a clear need for a broader search for evidence, this narrower approach will fulfill the statutory mandate that the subpoena seek material evidence, not sources or repositories of potential evidence.

21 Specificity of requests for information, and/or a substantial showing of importance of the requested information, is emphasized in many rules and guidelines applicable to international and U.S. domestic commercial arbitration. See, e.g., International Arbitration Rules of the International Centre for Dispute Resolution, Rule 21(4) (“Requests for documents shall contain a description of specific documents or classes of documents . . . .”); CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, Section 1(a) (“[D]isclosure should be granted only as to items that are relevant and material and for which a party has a substantial, demonstrable need in order to present its position.”); JAMS Recommended Arbitration Discovery Protocols For Domestic, Commercial Cases (document requests “should be restricted in terms of time frame, subject matter and person or entities to which the requests pertain, and should not include broad phraseology such as ‘all documents directly or indirectly related to.’”); IBA Rules on the Taking of Evidence in International Arbitration, Article 3(3)(a)(ii) (“A Request to Produce shall contain . . . a description in
Annotation H: Subject-Matter Jurisdiction to Enforce Arbitral Witness Summons

Court decisions holding that FAA Section 7 does not provide subject-matter jurisdiction. The text of the Model Summons takes into account that a federal district court may or may not have subject-matter jurisdiction to enforce the arbitral witness summons, and that enforcement may have to be sought in a state court if there is no independent basis for federal subject-matter jurisdiction. The two federal circuit courts of appeals that have addressed the issue have held that Section 7 of the FAA does not confer subject-matter jurisdiction on federal district courts, notwithstanding that Section 7 empowers those courts to compel compliance and punish non-compliance with an arbitral witness summons. The position taken in these decisions is that an “independent” basis of subject-matter jurisdiction, i.e. a source of subject-matter jurisdiction other than the text of Section 7, must exist. Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 572 (2d Cir. 2005); Amgen, Inc. v. Kidney Ctr. of Delaware Cnty., Ltd., 95 F.3d 562, 567 (7th Cir. 1996).

sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist . . . .”)}

**FAA Chapters 2 and 3 provide jurisdiction in international cases.** When the witness summons is issued by a tribunal in an international arbitration seated in the United States, FAA Chapter 2 and/or 3 provides the necessary basis for subject-matter jurisdiction. An action or proceeding under Chapter 2 or 3 is deemed to arise under the laws and treaties of the United States because the eventual award in the arbitration is subject to recognition and enforcement under either the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) or the Inter-American Convention on International Commercial Arbitration (“Panama Convention”). See 9 U.S.C. §§ 202, 203, 302. FAA Section 7 is included in FAA Chapters 2 and 3 covering international arbitrations by virtue of the provisions in those chapters for residual application of non-conflicting sections of FAA Chapter 1. See 9 U.S.C. §§ 208, 307.
Federal court may have jurisdiction if it has previously acted with respect to the arbitration. Federal subject-matter jurisdiction may also exist if the federal district court had previously entered an order relating to enforcement of the agreement to arbitrate. See, e.g., Stolt-Nielsen, 430 F.3d at 572 (admiralty jurisdiction provided basis for jurisdiction to enforce subpoena because the parties to the arbitration had previously appeared before the court, based on admiralty jurisdiction, in the context of a motion to stay the arbitration).

Diversity jurisdiction to enforce an arbitral summons. The application of diversity jurisdiction principles to an enforcement proceeding under FAA Section 7 is not a well-developed area of law. The few decisions on point in federal district courts have held that diversity jurisdiction must exist over the enforcement proceeding, i.e., between the movant and the witness. See, e.g., In re Application of Ann Cianflone, 2014 WL 6883128, at *1-2 (N.D.N.Y. Dec. 4, 2014) (dismissing petition to enforce arbitral subpoena, finding no diversity jurisdiction where there was “no allegation or plausible indication” that the amount in controversy between the petitioner and the witness exceeded $75,000); Chicago Bridge & Iron Co., 2014 WL 3796395, at *2 (rejecting amount in controversy in the underlying arbitration as reference point for diversity jurisdiction over arbitral subpoena enforcement case, and finding no facts of record to support amount in controversy
exceeding $75,000 between movant and the witness). But if the amount in controversy between movant and witness is decisive, it may be wondered how the requirements for diversity jurisdiction may be satisfied in most cases.

**Jurisdiction based on the underlying arbitration?** Federal courts may wish to consider whether federal subject-matter jurisdiction based on diversity should be measured by the citizenship of the parties to the underlying arbitration and the amount in dispute in that arbitration (and likewise whether federal question jurisdiction may be based on the subject matter of the underlying arbitration). Even if Congress did not intend Section 7 to be a jurisdiction-conferring statute, the enforcement of a subpoena brings before the court one aspect of enforcing the parties’ agreement to arbitrate – not the right to arbitrate itself, but the enjoyment of a key procedural attribute of the arbitration the parties bargained for. In this view, a federal court would have jurisdiction to enforce the subpoena whenever it would have jurisdiction to compel arbitration – that is, whenever the court would have plenary jurisdiction over the dispute but for the agreement to arbitrate.\(^2^2\)

Further, from a broader perspective, Section 7 does clearly contemplate

\(^{22}\) Section 4 of the FAA provides “any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties” has jurisdiction to enter an order compelling arbitration under a written arbitration agreement.
proceedings in federal district courts and calls upon judges to invoke the remedies provided by federal law to compel compliance or punish non-compliance. The statutory language indicates at least that Congress intended that there would be a meaningful involvement of federal district courts in arbitral subpoena enforcement, and that level of involvement would not exist if, for example, the “amount in controversy” requirement for diversity jurisdiction must be measured as between the movant and the witness.

**State court jurisdiction to enforce FAA summons.** In all events, the FAA applies in state courts when the arbitration involves interstate or foreign commerce. See, e.g., *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500, 501 (2012); *Vaden v. Discover Bank*, 556 U.S. 49, 58-59 (2009), *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Thus, a state court would be obligated either to enforce the arbitral subpoena under Section 7 or to provide for enforcement of the arbitral subpoena in a fashion that does not derogate from the enforcement rights the applicant would enjoy under Section 7 before a federal district court.
Annotation I:  Proper Setting for Witness to Raise Objections

We have included in the Model Summons a sentence that directs that any motion to quash the subpoena should be made to the arbitral tribunal, except that a motion to quash based on the position that the subpoena violates FAA Section 7 may also be made to a competent court. This language is based on court decisions described below that direct that objections to the relevance, materiality, privileged nature or confidentiality of evidence sought, as opposed to objections based on the limitations imposed by FAA Section 7, be asserted before the arbitral tribunal in the first instance, rather than a court. Witnesses unfamiliar with the arbitral process might naturally assume that the proper forum in which to raise such issues is a competent court. The inclusion of such language may tend to overcome that assumption, and thus avoid the delay associated with a judicial adjudication that may well lead to such issues being remanded to the arbitral tribunal for determination.

Objections to power to issue subpoena under FAA Section 7. The text of Section 7 refers only to a potential motion to compel compliance with an arbitral subpoena. Unlike Rule 45 of the Federal Rules of Civil Procedure, Section 7 does not refer to a motion to quash by the recipient of an arbitral subpoena. We know of no federal decision that squarely holds, based on the text of Section 7, that a

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motion to quash made by the recipient is improper. However, those instances in which courts have granted motions to quash have largely been where the witness asserted that the arbitrators lacked power to issue the subpoena under Section 7, and the subpoena was found to have transgressed a specific textual limitation on arbitral power under Section 7. See, e.g., In re Proshares Trust Sec. Litig., 2010 WL 4967988, at *1 (S.D.N.Y. Dec. 1, 2010) (granting motion to quash arbitral third-party document discovery subpoena that was “plainly inappropriate” under Section 7 in view of the Second Circuit’s holding in the Life Receivables case); Ware v. C.D. Peacock, Inc., 2010 WL 1856021, at *3 (N.D. Ill. May 7, 2010) (granting motion to quash arbitral deposition subpoena, based on district court adopting position of Second and Third Circuits that Section 7 only empowers arbitrators to compel testimony at a hearing in presence of one or more arbitrators).

Objections to relevance, materiality, privilege, confidentiality, etc. In contrast, when motions to quash made by the witness, or a witness’s objections to a motion to compel, have presented such issues as relevance and materiality of the evidence sought, attorney-client privilege, or confidentiality, courts have denied these motions or objections on the basis that the determination of these matters in the first instance is left to the arbitrators. See, e.g., In re Sec. Life Ins. Co. of Am., 228 F.3d 865, 870, 71 (8th Cir. 2000) (Section 7’s requirement that information
sought by arbitral subpoena be “material as evidence” does not entitle the witness to judicial assessment of materiality, as such a requirement would be “antithetical to the well-recognized policy favoring arbitration, and compromises the panel’s presumed expertise in the matter at hand”); Am. Fed. of Television & Radio Artists v. WJBK-TV, 164 F.3d 1004, 1010 (6th Cir. 1998) (relevance of information sought by arbitral subpoena should be determined by arbitrator in the first instance); Bailey Shipping Ltd. v. Am. Bureau of Shipping, 2014 WL 3605606, at *2-4 (S.D.N.Y. July 18, 2014) (denying motion to quash that sought independent judicial review of materiality of evidence sought by arbitral subpoena and holding that once an arbitral tribunal has determined that evidence sought by subpoena may affect the outcome of its deliberations, a court may not “draw[] an independent conclusion on the same topic”) (citing and quoting from In re Security Life with approval); Walt Disney Co. v. Nat’l Ass’n of Broadcast Emps. & Technicians, 2010 WL 3563110, at *4 (S.D.N.Y. Sept. 10, 2010) (denying motion to quash and granting cross-motion to compel compliance with arbitral subpoena, on the ground that issues of attorney-client privilege associated with information sought by the arbitral subpoena are reserved to the arbitrator “at least in the first instance”); Festus & Helen Stacy Found. v. Merrill Lynch, Pierce Fenner & Smith, Inc., 432 F. Supp. 2d 1375, 1379 (N.D. Ga. 2006) (denying motions to quash and granting
cross-motions to enforce subpoena on the basis that issues of relevance and materiality should be determined by the arbitrators); *Odfjell Asa v. Celanese AG*, 348 F. Supp. 2d 283, 288 (S.D.N.Y. 2004) (denying motion to quash on basis that “objections on the grounds of privilege and the like should first be heard and determined by the arbitrator before whom the subpoena is returnable” and expressing “considerable doubt” that a district court is the proper forum to hear such matters “since the FAA nowhere explicitly gives a person subpoenaed to an arbitration the right to move in a federal district court to quash the subpoena”).
Annotation J: Arbitral Subpoena Based on FRCP 30(b)(6)

The Model Summons, by naming in brackets both a natural person and a corporation as the witness, seeks to identify a possible enforcement problem where only a legal person such as a corporate entity is named, and the entity is expressly or by implication directed to designate a representative. This problem is avoidable if the subpoena can be addressed to an individual located in the United States. Parties and arbitrators are therefore encouraged to avoid the potential enforceability issues by using available means to identify an individual witness who is subject to arbitral subpoena power pursuant to Section 7 of the FAA.

But if the individual witness with most pertinent knowledge cannot be so identified, or is located abroad but in the employ of a U.S. company, there is uncertainty as to whether an arbitral witness summons may, like a deposition subpoena under Rule 30(b)(6) of the Federal Rules of Civil Procedure (“FRCP”), be addressed to the corporation and call for the appearance of a corporate representative found within the United States to testify about the designated subject matter. Only one federal district court decision, to our knowledge, has addressed this question, and that decision held that Section 7 does not permit enforcement of

Our Committees take no position on whether a FRCP 30(b)(6) type of procedure should be available under Section 7, but do think it is helpful to identify issues that may arise when courts or arbitrators consider this question.

**FRCP 30(b)(6) as a pre-trial discovery procedure.** One way of framing the issue is to focus on the fact that FRCP 30(b)(6) is a pre-trial discovery procedure. Thus, courts that interpret Section 7 of the FAA as not permitting pre-hearing discovery — as perhaps most now do (see Annotation E “Viability of Pre-Hearing Discovery Subpoenas”) — may conclude that the FRCP 30(b)(6) procedure has no place under Section 7. However, a court might read cases like *Life Receivables* and *Hay Group* only to say that, under Section 7, non-party evidence must be adduced in the presence of an arbitrator, and not that such evidence must (or should) be received at “the” merits hearing. Under this view, the “discovery

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23 In another recent case, the arbitral subpoena was issued to a New York bank, not an individual, and the subpoena was enforced, although the bank evidently did not raise the “30(b)(6)” objection. The court stated that the subpoena was “a straightforward exercise of the panel’s power to command third parties to appear for testimony before it and to bring with them documents related to the subject of their testimony.” *Bailey Shipping Ltd. v. Am. Bureau of Shipping*, 2014 WL 3605606, at *4 (S.D.N.Y. July 18, 2014).
objection” to proceeding with an arbitral subpoena by analogy to Rule 30(b)(6) is not necessarily an obstacle to enforcement.

*FAA Section 7 and federal trial subpoenas.* A second issue flows from reading the statute to mean that the Section 7 arbitral summons procedure must be in procedural lockstep with a federal trial subpoena. This reading focuses on the final sentence of Section 7, which provides that the arbitral summons shall be enforceable by a federal district court by the same methods (orders compelling compliance, contempt) used to “secure[] the attendance of witnesses . . . in the courts of the United States.” Under this reading, one must answer the question whether a FRCP 30(b)(6)-type of subpoena may be used at trial. The courts seem to be split on this issue. *Compare Donoghue v. Orange County,* 848 F.2d 926, 932 (9th Cir. 1987) (affirming district court order quashing “30(b)(6)” trial subpoena) *and Dopson-Troutt v. Novartis Pharm. Corp.*, 295 F.R.D. 536, 539-40 (M.D. Fla. 2013) (quashing “30(b)(6)” trial subpoena) *with Conyers v. Balboa Ins. Co.*, 2013 WL 2450108, at *1-2 (M.D. Fla. June 5, 2013) (enforcing trial subpoena that required corporate witness to designate representative) *and Bynum v. Metro. Transp. Auth.*, 2006 WL 6555106, at *2-3 (E.D.N.Y. Nov. 21, 2006) (upholding “30(b)(6)” trial subpoena to labor union).
Interpreting Section 7’s final sentence to require procedural lockstep with judicial trial subpoenas is not, however, the only possible interpretation. The language might be understood to mean simply that judges have available to enforce arbitral subpoenas the same arsenal of coercive devices as federal law provides for enforcing judicial subpoenas. And the statutory phrase “attendance . . . in the courts” might be understood to refer to any testimonial appearance in a judicial proceeding, not only an appearance at a trial. 9 U.S.C. § 7. If this language in Section 7 is given this less restrictive construction, then the enforcement of an arbitral witness summons to a corporation would not be linked to the question whether a trial subpoena may be addressed to an entity by analogy to Rule 30(b)(6). Further, because Section 7 specifically contemplates a separate hearing to obtain evidence from the non-party witness that is not the merits hearing – the hearing may be held before only one of three arbitrators – there is specific support in the text for the view that Section 7 enforceability need not turn on whether the same procedure could be used to compel a witness to testify at a judicial trial.

Policy issues relating to use of Rule 30(b)(6) procedures. There are also a number of policy issues to consider. On the view that, by agreeing to arbitrate, a party agrees to a more limited evidentiary process that does not involve all the evidence gathering tools available in court, a court may hesitate to say that Section
7 permits a hybrid procedure that combines elements of a federal trial subpoena and a federal deposition subpoena. Furthermore, with regard to international arbitration, there is already a perception abroad that arbitration in the United States is characterized by discovery similar in scope to what occurs in our courts. Importing Rule 30(b)(6) into Section 7 will further reinforce that perception. There is a concern that foreign criticism of U.S. evidence gathering methods will intensify, and the perception in some foreign circles of the United States as an inhospitable environment for international arbitrations will be reinforced, if a common practical effect of Rule 30(b)(6) arbitral subpoenas is to compel foreign-resident employees of U.S.-based companies to testify in U.S.-seated arbitrations.

Another possible view is that concerns about expansion of evidence gathering from non-parties in arbitration should not necessarily lead to the position that Section 7 categorically provides no power to enforce a “30(b)(6)” arbitral subpoena. Under this view, such concerns may be addressed on a case-by-case basis (i) by arbitrators in considering whether to issue a particular subpoena, and/or (ii) by courts in the enforcement context under the rubric of “undue burden” under FRCP 45.
Annotation K: Arbitral Role in Deciding Enforceability of Subpoenas

The tribunal’s handling of a request for issuance of a subpoena is properly subject to judicial review during the arbitration to the extent provided for in Section 7 of the FAA, unlike other procedural orders the tribunal may issue. Section 7 provides that “if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person for contempt.” The prospect of interlocutory review in the context of subpoena enforcement raises the question of what is the proper role of the tribunal, at the time a proposed subpoena is presented for signature, with respect to the legal validity and enforceability of the subpoena.

The role of the tribunal – administrator or gatekeeper. As to the interplay between Rule 45 of the Federal Rules of Civil Procedure (“FRCP”) and the effectiveness of the subpoena, some tribunals conceive their role as more or less administrative. On this view, the tribunal acts as a proxy for the requesting party, provides the signature for issuance that a party’s attorney is permitted to furnish in a judicial proceeding (or in arbitration under some state statutes, including Section 7505 of New York’s Civil Practice Laws and Rules), and leaves questions about
the conformity of the subpoena with FAA Section 7 and the requirements of FRCP 45 to be decided by a judge if the recipient of the subpoena resists enforcement and the proponent of the subpoena moves in court to compel compliance.

An alternative view is that Section 7 of the FAA is – uniquely among the provisions of the FAA – a rule governing the conduct of arbitrators during the arbitration and not a rule mainly concerning judicial enforcement of arbitration agreements and awards. We believe this view is to be preferred, for reasons that are both textual and practical, but we say this with an important caveat: The law concerning the permitted scope of subpoenas under Section 7 is not uniform nationally, and the implications for arbitration of the recent Rule 45 amendment to permit nationwide service of process have yet to be addressed by courts. Arbitral tribunals should hesitate to deny issuance of a proposed subpoena based on their preferred view of the law, or based upon a prediction of how an issue may be decided by a court that is not bound by stare decisis to decide it in a particular fashion.

**Reasons supporting view that arbitrators should consider enforceability of proposed subpoenas.** With that caveat, we encourage arbitrators to consider carefully the enforceability of proposed subpoenas as a condition of issuance. First, had Congress intended the arbitral role to be purely administrative, it could
have permitted attorneys in arbitrations to issue subpoenas as they do in cases before the courts, or the FAA might have provided for signature by any member of a three-member tribunal rather than a majority or for the pre-issuance reference of any Rule 45 issue to the federal district court. The fact that Section 7 was written to require issuance by a majority of a three-member tribunal connotes that the issuance is adjudicative. The fact that no distinctions were drawn between elements primarily in the domain of the tribunal (relevance and materiality) and matters relating to Rule 45 suggests that Congress intended that arbitrators should apply Rule 45 subject to judicial review as provided in Section 7.

Second, Section 7 vests arbitrators with the same authority that courts possess in regard to a subpoena, to command a party to appear and give testimony. The subpoena, if drafted by reference to standard judicial subpoena forms, will “command” the witness to appear, and the fact that a tribunal rather than counsel for a party has issued the subpoena carries a stronger implication of the legal validity of the “command” than does a judicial subpoena signed not by a judge but by the attorney for a party. Arbitral tribunals that allow an inference of validity to be drawn by a non-party witness who may not be represented by counsel, if the tribunal has in fact formed a judgment that the subpoena would not be enforced by
the relevant court, risk misleading a non-party, and inducing compliance through the apparent authority of the subpoena.

Third, on a purely practical level, the tribunal should handle subpoenas in a fashion that minimizes, to the extent possible, collateral litigation over enforceability, by making well-conceived decisions based on clearly applicable case law, so that the tribunal rules at the point of issuance of a subpoena as it would rule if it were a judge deciding a motion to compel compliance. This is of course subject to the caveat stated above. If the law in the relevant jurisdiction that would have power to enforce the subpoena concerning permissibility of non-party discovery under FAA Section 7 is unsettled, the tribunal by issuing the subpoena permits judicial review of that issue if the witness does not agree to appear. If the tribunal on the other hand denied issuance of the subpoena based on its own preferred view of that issue, and the issue is unsettled in the court where enforcement could be sought, the tribunal’s denial of issuance of the subpoena is not judicially reviewable and the party seeking the subpoena is deprived of the opportunity to establish enforceability through the courts.

Illustrations of the proper role of the arbitral tribunal. As illustrations of the approach a tribunal might take, in different situations, we provide the following:
Illustration #1 – The “Discovery” Subpoena: The party proposing a subpoena submits a draft that calls for production of documents at an office of the witness or in proximity to the witness’ place of residence, but does not provide for the documents to be brought to a hearing to be held in the presence of one or more arbitrators. It is a “discovery” subpoena. We believe the tribunal should modify the proposed subpoena to provide for a hearing before one or more of the arbitrators, at which the witness will testify and bring the requested documents. Although some federal courts may permit the “discovery” subpoena, by providing for the hearing any doubts about enforceability are removed. The proponent of the subpoena may seek the consent of the witness to produce the documents without a hearing. See Annotation E (Viability of Pre-Hearing Discovery Subpoenas).

Illustration #2 – The Subpoena Calls for the Witness to Travel to the Place of Arbitration: The party proposing a subpoena submits a draft that calls for a witness residing in Alaska to appear for a hearing before one or more of the arbitrators in New York, which is the seat of the arbitration. We believe the tribunal should modify the proposed subpoena to provide for a place of compliance that is within 100 miles of the place of residence or place of business of the witness. As it is relatively clear that the geographic limitations of compliance under Rule 45 apply to arbitral subpoenas, and that a subpoena that does not
respect these geographic limitations would not be enforced, the tribunal should not, by issuing a subpoena that is likely to be unenforceable, imply the contrary. To do so, in the Committees’ view, risks an abuse of power by the tribunal. See Annotation F (Place of Hearing) and Annotation C (Location of the Witness/Nationwide Service).

Illustration #3 – The “30(b)(6)” Subpoena: The party proposing a subpoena submits a draft that identifies a corporation or other legal person as the witness and directs the legal person to designate a natural person as its representative to appear at a witness hearing and bring along the requested documents. The tribunal may wish to inquire of the parties whether there is a natural person with particular knowledge of the matters in issue who might be identified as the recipient of the subpoena, calling the attention of the parties to the uncertain status of arbitral subpoenas to legal persons. If no natural person can be identified, the tribunal should issue the subpoena to the legal person. Where the enforceability of the subpoena is uncertain because the law is not well developed, as is the case for example with regard to a subpoena that seeks a corporate representative witness designation by analogy to FRCP Rule 30(b)(6), the tribunal should not deprive the subpoena proponent of the opportunity to obtain the evidence with the consent of the witness nor should the tribunal, by denying
issuance, deprive the proponent of a judicial forum to litigate the enforceability question. *See* Annotation J (Arbitral Subpoena Based on FRCP 30(b)(6)).
Annotation L: Procedure in Regard to Arbitral Subpoenas Governed By FAA Section 7

Addressing need for use of arbitral subpoenas at early procedural conferences. Procedure relating to requests to arbitral tribunals for issuance of arbitral subpoenas often receives less attention than it deserves in early-stage procedural conferences. One possible explanation is that counsel may be less familiar than arbitrators with the nature of arbitral subpoena power and the procedure surrounding it. Or they may assume that, as is the case under the arbitration law of New York and some other states, attorneys themselves may issue subpoenas as they routinely do in judicial proceedings. See Annotation D (Who May Issue a Subpoena). Thus, even in those arbitrations in which the parties are invited to agree insofar as possible on an initial procedural order, it is not unusual to find that the parties do not establish a timetable or a procedure for dealing with subpoenas for non-party witnesses.

If not addressed in the procedural timetable, subpoena-related issues may threaten delay and disruption of the schedule. Parties and arbitrators will open their calendars to find mutually available dates for merits hearings, but they may overlook the need to hold pre-merits hearings to obtain evidence from non-party witnesses. Parties and arbitrators need to focus on the need for these hearings to be
held in the presence of one or more of the arbitrators unless the parties and the 
Witnesses otherwise agree, and identify dates when members of the tribunal can be 
available to attend in person a hearing in a location where the witness will agree to 
attend or could be compelled to attend. An adverse party may not agree that a 
proposed subpoena should be issued, and the briefing, hearing and determination 
of that issue (and ancillary issues such as the scope of the subpoena and the timing 
of the witness’ appearance) may require considerable time. Judicial proceedings 
that might ensue concerning enforcement of a subpoena bring into play the 
timetable applicable in the enforcement court, which may or may not be able to 
tailor its schedule to the timetable of the arbitration.

It is therefore suggested that the tribunal advise the parties that the issue of 
subpoenas is one the parties should address in their draft of the initial omnibus 
procedural order, and that the tribunal should endeavor to resolve disagreements 
over this aspect of procedure at the time the initial procedural order is made.

*Matters relating to subpoenas that might be addressed in initial procedural 
order.* The tribunal might provide for a deadline for: the parties to submit 
proposed subpoenas, the submission of an accompanying statement as to 
relevance, materiality and need, *see* Annotation G (Scope of “Duces Tecum” 
Witness Summons), and a timetable for briefing and resolving disputes over
proposed issuance. The parties might also be invited to declare by a particular date whether it is proposed to receive the testimony at the merits hearing or in advance thereof, and if the latter, at what location and whether it is proposed that the full tribunal or one of its members should be present. If a party proposes to seek issuance of a discovery subpoena, either for document production or a deposition, the party should be invited to make a *prima facie* legal showing that, in the relevant jurisdiction(s) (e.g., embracing the place of arbitration or the place where the witness will attend), Section 7 of the FAA is applied to permit such practice, and the tribunal may wish to draw the attention of the parties to the conflicting positions of federal circuit courts of appeals in this respect, *see* Annotation E (Viability of Pre-Hearing Discovery Subpoenas), and the uncertainty about enforcement that may arise if a subpoena seeks discovery.

*Risks of denying a requested subpoena.* The tribunal’s refusal to issue a requested subpoena might lead the aggrieved party to challenge the award based on denial of a fair hearing. For examples of unsuccessful challenges, *see, e.g.*, *Doral Fin. Corp. v. Garcia-Velez*, 725 F.3d 27 (1st Cir. 2013), and *Rubenstein v. Advanced Equities, Inc.*, 2014 WL 1325738 (S.D.N.Y. 2014). Reasons for refusal to issue a requested subpoena might include – in addition to territorial scope, *see* Annotation F (Place of Hearing) – that the proposed evidence is not relevant and
material, that it is cumulative, or that the request is untimely. In one decision, *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997), the Second Circuit refused to confirm an award on the ground that the arbitrators decided not to keep hearings open to hear from a witness whom one of the sides wanted to call (albeit not through a subpoena) but who became unavailable as a result of family medical issues. The district court confirmed the award but the Second Circuit reversed, holding that the arbitrators did not sufficiently explain why they believed the excluded evidence would merely be cumulative. Although it would be a truly exceptional case where an award would be vacated because a party was denied the opportunity to obtain evidence from a non-party witness, the risk of this contention being made in a motion to vacate context to obstruct enforcement of an award is sufficiently present that arbitrators who elect to deny issuance of a subpoena might find it useful to explain in a written procedural order the basis for having refused to issue a subpoena rather than merely issuing a one-sentence order stating that the proposed subpoena is denied.
Appendix: Model Subpoena Without Annotations

CASE NO. [if applicable]

[OPTIONAL: CAPTION IDENTIFYING THE PROVIDER ORGANIZATION AND/OR APPLICABLE RULES OF ARBITRATION]

IN THE MATTER OF AN ARBITRATION BETWEEN:

X COMPANY, INC.,

Claimant,

And

Y LLC,

Respondent.

ARBITRATION SUMMONS TO TESTIFY AND PRESENT DOCUMENTARY EVIDENCE AT AN ARBITRATION HEARING

TO:    [J. Smith]
       [Z Corporation]
       [address]
       [City], [State]

       By the authority conferred on the undersigned arbitrators by Section 7 of the United States Arbitration Act (9 U.S.C. § 7), you are hereby SUMMONED to attend as a witness at a hearing before one or more of the undersigned arbitrators to be held on [insert date providing reasonable notice] at 10:00 a.m. at the offices of the [X Law Firm], [insert address], [City], [State], and to bring with you to the hearing the documents identified in Schedule A annexed to this SUMMONS.

       Provided that this SUMMONS has been served upon you in the same manner as is required of a judicial subpoena under Rule 45 of the Federal Rules of
Civil Procedure, then if you shall refuse or neglect to obey this SUMMONS, upon petition the United States District Court for the District of [State] or a competent court of the State of [State] may compel your attendance, or punish you for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

You may address questions concerning this SUMMONS to the attorneys [or the Case Manager [if applicable]] identified below. Any application by you to quash or modify this SUMMONS in whole or in part should be addressed to the arbitral tribunal in writing [and sent via the Case Manager [if applicable]], with copies to counsel for the parties, except that a motion upon the ground that the SUMMONS is unenforceable under Section 7 of the U.S. Arbitration Act may also be addressed to the United States District Court for the District of [State] or a competent court of the State of [State].

The attorneys for the Claimant in this arbitration are [identify firm] (attn. [responsible attorney]), [address] [phone] [email address].

The attorneys for the Respondent in this arbitration are [identify firm] (attn. [responsible attorney]), [address] [phone] [email address].

[The Case Manager [if applicable] is [identify] [phone] [email address].]

Dated: [Month] [Day], [Year]

[Name], Arbitrator
[Address]

[Name] Presiding Arbitrator
[Address]

[Name], Arbitrator
[Address]
The Committee on International Commercial Disputes

Joseph E. Neuhaus, Chair
Thomas W. Walsh, Secretary

Committee Members – May 2015

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IBA Guidelines on Party Representation in International Arbitration

Adopted by a resolution of the IBA Council
25 May 2013
International Bar Association
IBA Guidelines
on Party
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Established as a Committee of the International Bar Association’s Legal Practice Division, which focuses on the laws, practise and procedures relating to the arbitration of transnational disputes, the Arbitration Committee currently has over 2,600 members from 115 countries, and membership is increasing steadily.

Through its publications and conferences, the Committee seeks to share information about international arbitration, promote its use and improve its effectiveness.

The Committee has published several sets of rules and guidelines, which have become widely accepted by the arbitration community as an expression of arbitration best practices, such as the IBA Rules on the Taking of Evidence in International Arbitration, as revised in 2010, the IBA Guidelines on Conflicts of Interest in International Arbitration, which are currently under revision, and the IBA Guidelines on Drafting Arbitration Agreements. The Committee also publishes a newsletter twice a year and organises conferences, seminars and training sessions around the globe.

The Committee maintains standing subcommittees and, as appropriate, establishes task forces to address specific issues.

At the time of the issuance of these Guidelines the Committee has – in addition to its Task Force on Counsel Conduct – three subcommittees, namely, the Investment Treaty Arbitration Subcommittee, the Conflicts of Interest Subcommittee and the Young Arbitration Practitioners Subcommittee.
The Guidelines

Preamble

The IBA Arbitration Committee established the Task Force on Counsel Conduct in International Arbitration (the ‘Task Force’) in 2008.

The mandate of the Task Force was to focus on issues of counsel conduct and party representation in international arbitration that are subject to, or informed by, diverse and potentially conflicting rules and norms. As an initial inquiry, the Task Force undertook to determine whether such differing norms and practices may undermine the fundamental fairness and integrity of international arbitral proceedings and whether international guidelines on party representation in international arbitration may assist parties, counsel and arbitrators. In 2010, the Task Force commissioned a survey (the ‘Survey’) in order to examine these issues. Respondents to the Survey expressed support for the development of international guidelines for party representation.

The Task Force proposed draft guidelines to the IBA Arbitration Committee’s officers in October 2012. The Committee then reviewed the draft guidelines and consulted with experienced arbitration practitioners, arbitrators and arbitral institutions. The draft guidelines were then submitted to all members of the IBA Arbitration Committee for consideration.

Unlike in domestic judicial settings, in which counsel are familiar with, and subject, to a single set of professional conduct rules, party representatives in international arbitration may be subject to diverse and potentially conflicting bodies of domestic rules and norms. The range of rules and norms applicable to the representation of parties in international arbitration may include those of the party representative’s home jurisdiction, the arbitral seat, and the place where hearings physically take place. The Survey revealed a high degree of uncertainty among respondents regarding what rules govern party representation in
international arbitration. The potential for confusion may be aggravated when individual counsel working collectively, either within a firm or through a co-counsel relationship, are themselves admitted to practise in multiple jurisdictions that have conflicting rules and norms.

In addition to the potential for uncertainty, rules and norms developed for domestic judicial litigation may be ill-adapted to international arbitral proceedings. Indeed, specialised practises and procedures have been developed in international arbitration to accommodate the legal and cultural differences among participants and the complex, multinational nature of the disputes. Domestic professional conduct rules and norms, by contrast, are developed to apply in specific legal cultures consistent with established national procedures.

The IBA Guidelines on Party Representation in International Arbitration (the ‘Guidelines’) are inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings.

As with the International Principles on Conduct for the Legal Profession, adopted by the IBA on 28 May 2011, the Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation. They are also not intended to vest arbitral tribunals with powers otherwise reserved to bars or other professional bodies.

The use of the term guidelines rather than rules is intended to highlight their contractual nature. The parties may thus adopt the Guidelines or a portion thereof by agreement. Arbitral tribunals may also apply the Guidelines in their discretion, subject to any applicable mandatory rules, if they determine that they have the authority to do so.

The Guidelines are not intended to limit the flexibility that is inherent in, and a considerable advantage of, international arbitration, and parties and
arbitral tribunals may adapt them to the particular circumstances of each arbitration.

Definitions

In the IBA Guidelines on Party Representation in International Arbitration:

‘Arbitral Tribunal’ or ‘Tribunal’ means a sole Arbitrator or a panel of Arbitrators in the arbitration;

‘Arbitrator’ means an arbitrator in the arbitration;

‘Document’ means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means;

‘Domestic Bar’ or ‘Bar’ means the national or local authority or authorities responsible for the regulation of the professional conduct of lawyers;

‘Evidence’ means documentary evidence and written and oral testimony.

‘Ex Parte Communications’ means oral or written communications between a Party Representative and an Arbitrator or prospective Arbitrator without the presence or knowledge of the opposing Party or Parties;

‘Expert’ means a person or organisation appearing before an Arbitral Tribunal to provide expert analysis and opinion on specific issues determined by a Party or by the Arbitral Tribunal;

‘Expert Report’ means a written statement by an Expert;

‘Guidelines’ mean these IBA Guidelines on Party Representation in International Arbitration, as they may be revised or amended from time to time;

‘Knowingly’ means with actual knowledge of the fact in question;

‘Misconduct’ means a breach of the present Guidelines or any other conduct that the Arbitral Tribunal determines to be contrary to the duties of a Party Representative;

‘Party’ means a party to the arbitration;
‘Party-Nominated Arbitrator’ means an Arbitrator who is nominated or appointed by one or more Parties;

‘Party Representative’ or ‘Representative’ means any person, including a Party’s employee, who appears in an arbitration on behalf of a Party and makes submissions, arguments or representations to the Arbitral Tribunal on behalf of such Party, other than in the capacity as a Witness or Expert, and whether or not legally qualified or admitted to a Domestic Bar;

‘Presiding Arbitrator’ means an arbitrator who is either a sole Arbitrator or the chairperson of the Arbitral Tribunal;

‘Request to Produce’ means a written request by a Party that another Party produce Documents;

‘Witness’ means a person appearing before an Arbitral Tribunal to provide testimony of fact;

‘Witness Statement’ means a written statement by a Witness recording testimony.

Application of Guidelines

1. The Guidelines shall apply where and to the extent that the Parties have so agreed, or the Arbitral Tribunal, after consultation with the Parties, wishes to rely upon them after having determined that it has the authority to rule on matters of Party representation to ensure the integrity and fairness of the arbitral proceedings.

2. In the event of any dispute regarding the meaning of the Guidelines, the Arbitral Tribunal should interpret them in accordance with their overall purpose and in the manner most appropriate for the particular arbitration.

3. The Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules, in matters of Party representation. The Guidelines are also not intended to derogate from the arbitration agreement or to undermine either a Party representative’s primary duty of loyalty to the party whom he or she represents or a Party representative’s paramount obligation to present such Party’s case to the Arbitral Tribunal.
Comments to Guidelines 1–3

As explained in the Preamble, the Parties and Arbitral Tribunals may benefit from guidance in matters of Party Representation, in particular in order to address instances where differing norms and expectations may threaten the integrity and fairness of the arbitral proceedings.

By virtue of these Guidelines, Arbitral Tribunals need not, in dealing with such issues, and subject to applicable mandatory laws, be limited by a choice-of-law rule or private international law analysis to choosing among national or domestic professional conduct rules. Instead, these Guidelines offer an approach designed to account for the multi-faceted nature of international arbitral proceedings.

These Guidelines shall apply where and to the extent that the Parties have so agreed. Parties may adopt these Guidelines, in whole or in part, in their arbitration agreement or at any time subsequently.

An Arbitral Tribunal may also apply, or draw inspiration from, the Guidelines, after having determined that it has the authority to rule on matters of Party representation in order to ensure the integrity and fairness of the arbitral proceedings. Before making such determination, the Arbitral Tribunal should give the Parties an opportunity to express their views.

These Guidelines do not state whether Arbitral Tribunals have the authority to rule on matters of Party representation and to apply the Guidelines in the absence of an agreement by the Parties to that effect. The Guidelines neither recognise nor exclude the existence of such authority. It remains for the Tribunal to make a determination as to whether it has the authority to rule on matters of Party representation and to apply the Guidelines.

A Party Representative, acting within the authority granted to it, acts on behalf of the Party whom he or she represents. It follows therefore that an obligation or duty bearing on a Party Representative is an obligation or duty of the represented Party, who may ultimately bear the consequences of the misconduct of its Representative.
Party Representation

4. Party Representatives should identify themselves to the other Party or Parties and the Arbitral Tribunal at the earliest opportunity. A Party should promptly inform the Arbitral Tribunal and the other Party or Parties of any change in such representation.

5. Once the Arbitral Tribunal has been constituted, a person should not accept representation of a Party in the arbitration when a relationship exists between the person and an Arbitrator that would create a conflict of interest, unless none of the Parties objects after proper disclosure.

6. The Arbitral Tribunal may, in case of breach of Guideline 5, take measures appropriate to safeguard the integrity of the proceedings, including the exclusion of the new Party Representative from participating in all or part of the arbitral proceedings.

Comments to Guidelines 4–6

Changes in Party representation in the course of the arbitration may, because of conflicts of interest between a newly-appointed Party Representative and one or more of the Arbitrators, threaten the integrity of the proceedings. In such case, the Arbitral Tribunal may, if compelling circumstances so justify, and where it has found that it has the requisite authority, consider excluding the new Representative from participating in all or part of the arbitral proceedings. In assessing whether any such conflict of interest exists, the Arbitral Tribunal may rely on the IBA Guidelines on Conflicts of Interest in International Arbitration.

Before resorting to such measure, it is important that the Arbitral Tribunal give the Parties an opportunity to express their views about the existence of a conflict, the extent of the Tribunal’s authority to act in relation to such conflict, and the consequences of the measure that the Tribunal is contemplating.

Communications with Arbitrators

7. Unless agreed otherwise by the Parties, and subject to the exceptions below, a Party Representative should not engage in any Ex Parte Communications with an Arbitrator concerning the arbitration.
8. It is not improper for a Party Representative to have Ex Parte Communications in the following circumstances:

(a) A Party Representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.

(b) A Party Representative may communicate with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator.

(c) A Party Representative may, if the Parties are in agreement that such a communication is permissible, communicate with a prospective Presiding Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.

(d) While communications with a prospective Party-Nominated Arbitrator or Presiding Arbitrator may include a general description of the dispute, a Party Representative should not seek the views of the prospective Party-Nominated Arbitrator or Presiding Arbitrator on the substance of the dispute.

Comments to Guidelines 7–8

Guidelines 7–8 deal with communications between a Party Representative and an Arbitrator or potential Arbitrator concerning the arbitration.

The Guidelines seek to reflect best international practices and, as such, may depart from potentially diverging domestic arbitration practices that are more restrictive or, to the contrary, permit broader Ex Parte Communications.

Ex Parte Communications, as defined in these Guidelines, may occur only in defined circumstances, and a Party Representative should otherwise refrain from any such communication. The Guidelines do not seek to define when the relevant period begins or ends. Any communication that takes place in the context of, or in relation to, the constitution of the Arbitral Tribunal is covered.
Ex Parte Communications with a prospective Arbitrator (Party-Nominated or Presiding Arbitrator) should be limited to providing a general description of the dispute and obtaining information regarding the suitability of the potential Arbitrator, as described in further detail below. A Party Representative should not take the opportunity to seek the prospective Arbitrator’s views on the substance of the dispute.

The following discussion topics are appropriate in pre-appointment communications in order to assess the prospective Arbitrator’s expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest: (a) the prospective Arbitrator’s publications, including books, articles and conference papers or engagements; (b) any activities of the prospective Arbitrator and his or her law firm or organisation within which he or she operates, that may raise justifiable doubts as to the prospective Arbitrator’s independence or impartiality; (c) a description of the general nature of the dispute; (d) the terms of the arbitration agreement, and in particular any agreement as to the seat, language, applicable law and rules of the arbitration; (e) the identities of the Parties, Party Representatives, Witnesses, Experts and interested parties; and (f) the anticipated timetable and general conduct of the proceedings.

Applications to the Arbitral Tribunal without the presence or knowledge of the opposing Party or Parties may be permitted in certain circumstances, if the parties so agreed, or as permitted by applicable law. Such may be the case, in particular, for interim measures.

Finally, a Party Representative may communicate with the Arbitral Tribunal if the other Party or Parties fail to participate in a hearing or proceedings and are not represented.

Submissions to the Arbitral Tribunal

9. A Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal.

10. In the event that a Party Representative learns that he or she previously made a false submission of fact to
the Arbitral Tribunal, the Party Representative should, subject to countervailing considerations of confidentiality and privilege, promptly correct such submission.

11. A Party Representative should not submit Witness or Expert evidence that he or she knows to be false. If a Witness or Expert intends to present or presents evidence that a Party Representative knows or later discovers to be false, such Party Representative should promptly advise the Party whom he or she represents of the necessity of taking remedial measures and of the consequences of failing to do so. Depending upon the circumstances, and subject to countervailing considerations of confidentiality and privilege, the Party Representative should promptly take remedial measures, which may include one or more of the following:

(a) advise the Witness or Expert to testify truthfully;

(b) take reasonable steps to deter the Witness or Expert from submitting false evidence;

(c) urge the Witness or Expert to correct or withdraw the false evidence;

(d) correct or withdraw the false evidence;

(e) withdraw as Party Representative if the circumstances so warrant.

Comments to Guidelines 9–11

Guidelines 9–11 concern the responsibility of a Party Representative when making submissions and tendering evidence to the Arbitral Tribunal. This principle is sometimes referred to as the duty of candour or honesty owed to the Tribunal.

The Guidelines identify two aspects of the responsibility of a Party Representative: the first relates to submissions of fact made by a Party Representative (Guidelines 9 and 10), and the second concerns the evidence given by a Witness or Expert (Guideline 11).

With respect to submissions to the Arbitral Tribunal, these Guidelines contain two limitations to the principles set out for Party Representatives. First, Guidelines 9 and 10 are restricted to false submissions of fact. Secondly, the Party Representative must have actual knowledge of the false nature of the submission,
which may be inferred from the circumstances.

Under Guideline 10, a Party Representative should promptly correct any false submissions of fact previously made to the Tribunal, unless prevented from doing so by countervailing considerations of confidentiality and privilege. Such principle also applies, in case of a change in representation, to a newly-appointed Party Representative who becomes aware that his or her predecessor made a false submission.

With respect to legal submissions to the Tribunal, a Party Representative may argue any construction of a law, a contract, a treaty or any authority that he or she believes is reasonable.

Guideline 11 addresses the presentation of evidence to the Tribunal that a Party Representative knows to be false. A Party Representative should not offer knowingly false evidence or testimony. A Party Representative therefore should not assist a Witness or Expert or seek to influence a Witness or Expert to give false evidence to the Tribunal in oral testimony or written Witness Statements or Expert Reports.

The considerations outlined for Guidelines 9 and 10 apply equally to Guideline 11. Guideline 11 is more specific in terms of the remedial measures that a Party Representative may take in the event that the Witness or Expert intends to present or presents evidence that the Party Representative knows or later discovers to be false. The list of remedial measures provided in Guideline 11 is not exhaustive. Such remedial measures may extend to the Party Representative’s withdrawal from the case, if the circumstances so warrant. Guideline 11 acknowledges, by using the term ‘may’, that certain remedial measures, such as correcting or withdrawing false Witness or Expert evidence may not be compatible with the ethical rules bearing on counsel in some jurisdictions.

Information Exchange and Disclosure

12. When the arbitral proceedings involve or are likely to involve Document production, a Party Representative should inform the client of the need to preserve, so far as reasonably possible, Documents, including electronic
Documents that would otherwise be deleted in accordance with a Document retention policy or in the ordinary course of business, which are potentially relevant to the arbitration.

13. A Party Representative should not make any Request to Produce, or any objection to a Request to Produce, for an improper purpose, such as to harass or cause unnecessary delay.

14. A Party Representative should explain to the Party whom he or she represents the necessity of producing, and potential consequences of failing to produce, any Document that the Party or Parties have undertaken, or been ordered, to produce.

15. A Party Representative should advise the Party whom he or she represents to take, and assist such Party in taking, reasonable steps to ensure that: (i) a reasonable search is made for Documents that a Party has undertaken, or been ordered, to produce; and (ii) all non-privileged, responsive Documents are produced.

16. A Party Representative should not suppress or conceal, or advise a Party to suppress or conceal, Documents that have been requested by another Party or that the Party whom he or she represents has undertaken, or been ordered, to produce.

17. If, during the course of an arbitration, a Party Representative becomes aware of the existence of a Document that should have been produced, but was not produced, such Party Representative should advise the Party whom he or she represents of the necessity of producing the Document and the consequences of failing to do so.

Comments to Guidelines 12–17

The IBA addressed the scope of Document production in the IBA Rules on the Taking of Evidence in International Arbitration (see Articles 3 and 9). Guidelines 12–17 concern the conduct of Party Representatives in connection with Document production.

Party Representatives are often unsure whether and to what extent their respective domestic standards of professional conduct apply to the process of
preserving, collecting and producing documents in international arbitration. It is common for Party Representatives in the same arbitration proceeding to apply different standards. For example, one Party Representative may consider him- or her-self obligated to ensure that the Party whom he or she represents undertakes a reasonable search for, and produces, all responsive, non-privileged Documents, while another Party Representative may view Document production as the sole responsibility of the Party whom he or she represents. In these circumstances, the disparity in access to information or evidence may undermine the integrity and fairness of the arbitral proceedings.

The Guidelines are intended to address these difficulties by suggesting standards of conduct in international arbitration. They may not be necessary in cases where Party Representatives share similar expectations with respect to their role in relation to Document production or in cases where Document production is not done or is minimal.

The Guidelines are intended to foster the taking of objectively reasonable steps to preserve, search for and produce Documents that a Party has an obligation to disclose.

Under Guidelines 12–17, a Party Representative should, under the given circumstances, advise the Party whom he or she represents to: (i) identify those persons within the Party’s control who might possess Documents potentially relevant to the arbitration, including electronic Documents; (ii) notify such persons of the need to preserve and not destroy any such Documents; and (iii) suspend or otherwise make arrangements to override any Document retention or other policies/practises whereby potentially relevant Documents might be destroyed in the ordinary course of business.

Under Guidelines 12–17, a Party Representative should, under the given circumstances, advise the Party whom he or she represents to, and assist such Party to: (i) put in place a reasonable and proportionate system for collecting and reviewing Documents within the possession of persons within the Party’s control in order to identify Documents
that are relevant to the arbitration or that have been requested by another Party; and (ii) ensure that the Party Representative is provided with copies of, or access to, all such Documents.

While Article 3 of the IBA Rules on the Taking of Evidence in International Arbitration requires the production of Documents relevant to the case and material to its outcome, Guideline 12 refers only to potentially relevant Documents because its purpose is different: when a Party Representative advises the Party whom he or she represents to preserve evidence, such Party Representative is typically not at that stage in a position to assess materiality, and the test for preserving and collecting Documents therefore should be potential relevance to the case at hand.

Finally, a Party Representative should not make a Request to Produce, or object to a Request to Produce, when such request or objection is only aimed at harassing, obtaining documents for purposes extraneous to the arbitration, or causing unnecessary delay (Guideline 13).

**Witnesses and Experts**

18. *Before seeking any information from a potential Witness or Expert, a Party Representative should identify himself or herself, as well as the Party he or she represents, and the reason for which the information is sought.*

19. *A Party Representative should make any potential Witness aware that he or she has the right to inform or instruct his or her own counsel about the contact and to discontinue the communication with the Party Representative.*


21. *A Party Representative should seek to ensure that a Witness Statement reflects the Witness’s own account of relevant facts, events and circumstances.*

22. *A Party Representative should seek to ensure that an Expert Report reflects the Expert’s own analysis and opinion.*
23. A Party Representative should not invite or encourage a Witness to give false evidence.

24. A Party Representative may, consistent with the principle that the evidence given should reflect the Witness’s own account of relevant facts, events or circumstances, or the Expert’s own analysis or opinion, meet or interact with Witnesses and Experts in order to discuss and prepare their prospective testimony.

25. A Party Representative may pay, offer to pay, or acquiesce in the payment of:

(a) expenses reasonably incurred by a Witness or Expert in preparing to testify or testifying at a hearing;

(b) reasonable compensation for the loss of time incurred by a Witness in testifying and preparing to testify; and

(c) reasonable fees for the professional services of a Party-appointed Expert.

Comments to Guidelines 18–25

Guidelines 18–25 are concerned with interactions between Party Representatives and Witnesses and Experts. The interaction between Party Representatives and Witnesses is also addressed in Guidelines 9–11 concerning Submissions to the Arbitral Tribunal.

Many international arbitration practitioners desire more transparent and predictable standards of conduct with respect to relations with Witnesses and Experts in order to promote the principle of equal treatment among Parties. Disparate practices among jurisdictions may create inequality and threaten the integrity of the arbitral proceedings.

The Guidelines are intended to reflect best international arbitration practice with respect to the preparation of Witness and Expert testimony.

When a Party Representative contacts a potential Witness, he or she should disclose his or her identity and the reason for the contact before seeking any information from the potential Witness (Guideline 18). A Party Representative should also make the potential Witness aware of his or her right to inform or instruct counsel about this contact and involve such
counsel in any further communication (Guideline 19).

Domestic professional conduct norms in some jurisdictions require higher standards with respect to contacts with potential Witnesses who are known to be represented by counsel. For example, some common law jurisdictions maintain a prohibition against contact by counsel with any potential Witness whom counsel knows to be represented in respect of the particular arbitration.

If a Party Representative determines that he or she is subject to a higher standard than the standard prescribed in these Guidelines, he or she may address the situation with the other Party and/or the Arbitral Tribunal.

As provided by Guideline 20, a Party Representative may assist in the preparation of Witness Statements and Expert Reports, but should seek to ensure that a Witness Statement reflects the Witness’s own account of relevant facts, events and circumstances (Guideline 21), and that any Expert Report reflects the Expert’s own views, analysis and conclusions (Guideline 22).

A Party Representative should not invite or encourage a Witness to give false evidence (Guideline 23).

As part of the preparation of testimony for the arbitration, a Party Representative may meet with Witnesses and Experts (or potential Witnesses and Experts) to discuss their prospective testimony. A Party Representative may also help a Witness in preparing his or her own Witness Statement or Expert Report. Further, a Party Representative may assist a Witness in preparing for their testimony in direct and cross-examination, including through practice questions and answers (Guideline 24). This preparation may include a review of the procedures through which testimony will be elicited and preparation of both direct testimony and cross-examination. Such contacts should however not alter the genuineness of the Witness or Expert evidence, which should always reflect the Witness’s own account of relevant facts, events or circumstances, or the Expert’s own analysis or opinion.
Finally, Party Representatives may pay, offer to pay or acquiesce in the payment of reasonable compensation to a Witness for his or her time and a reasonable fee for the professional services of an Expert (Guideline 25).

**Remedies for Misconduct**

26. If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may:

(a) admonish the Party Representative;

(b) draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the Party Representative;

(c) consider the Party Representative’s Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative’s Misconduct leads the Tribunal to a different apportionment of costs;

(d) take any other appropriate measure in order to preserve the fairness and integrity of the proceedings.

27. In addressing issues of Misconduct, the Arbitral Tribunal should take into account:

(a) the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award;

(b) the potential impact of a ruling regarding Misconduct on the rights of the Parties;

(c) the nature and gravity of the Misconduct, including the extent to which the misconduct affects the conduct of the proceedings;

(d) the good faith of the Party Representative;

(e) relevant considerations of privilege and confidentiality; and

(f) the extent to which the Party represented by the Party Representative knew of, condoned, directed, or participated in, the Misconduct.
Comments to Guidelines 26-27

Guidelines 26–27 articulate potential remedies to address Misconduct by a Party Representative.

Their purpose is to preserve or restore the fairness and integrity of the arbitration.

The Arbitral Tribunal should seek to apply the most proportionate remedy or combination of remedies in light of the nature and gravity of the Misconduct, the good faith of the Party Representative and the Party whom he or she represents, the impact of the remedy on the Parties’ rights, and the need to preserve the integrity, effectiveness and fairness of the arbitration and the enforceability of the award.

Guideline 27 sets forth a list of factors that is neither exhaustive nor binding, but instead reflects an overarching balancing exercise to be conducted in addressing matters of Misconduct by a Party Representative in order to ensure that the arbitration proceed in a fair and appropriate manner.

Before imposing any remedy in respect of alleged Misconduct, it is important that the Arbitral Tribunal gives the Parties and the impugned Representative the right to be heard in relation to the allegations made.
Privilege and Confidentiality in Third Party Funder Due Diligence: The Positions in the United States and Switzerland and the Resulting Expectations Gap in International Arbitration

by A. Frischknecht and V. Schmidt

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Privilege and Confidentiality in Third Party Funder Due Diligence: The Positions in the United States and Switzerland and the Resulting Expectations Gap in International Arbitration

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**Introduction**

Before investing hundreds of thousands or even millions of dollars in a commercial dispute, third party funders routinely conduct extensive due diligence into the factual and legal background of the dispute. Ultimately, of course, the purpose of such due diligence is to enable the third party funder to make an informed decision as to whether there is a sufficient likelihood of success on the merits to justify the funder’s investment.

A prudent funder will base its investment decision on a comprehensive assessment of the strengths and weaknesses of the claimant’s position. That assessment will often require access to documents and other evidence as well as candid discussions with counsel. This raises a variety of issues concerning legal privilege and confidentiality: where a document is protected by applicable rules of legal privilege or is otherwise immune from disclosure, does a claimant risk waiving that protection if it discloses the document to the funder in the course of due diligence? What if counsel has prepared a written analysis of the strengths and weaknesses of the client’s case for the benefit of the client—could an adverse party subsequently obtain disclosure of that analysis if it has been shared with the funder? Could the funder be called to testify as a witness concerning its own investigation in the course of due diligence?

In international arbitration, these issues become even more complex. It is often difficult, if not impossible, for a party to assess in advance how an arbitral tribunal will approach issues of legal privilege and confidentiality. It has been said that “arbitral tribunals should do justice to the legitimate expectations of the parties”\(^3\) when it comes to evidentiary privileges. This implies an understanding of what the parties’ legitimate expectations are, which in turn requires an understanding of the applicable privilege and confidentiality rules in each party’s home jurisdiction.

In Sections 1 and 2 of this article, we examine the principles governing legal privilege and confidentiality in the United States and Switzerland, respectively. Based on those principles, we then examine the legitimate expectations a party to litigation in each of the two countries might have in respect of matters of legal privilege and confidentiality in connection with a third party funder’s due diligence. Finally, we conclude in Section 3 with some brief comments on how an arbitral tribunal might approach these issues where the parties’ legitimate expectations differ. We also offer some practical suggestions to minimize the risk of waiver where possible and to ensure that clients understand any risk that remains.
Before proceeding any further, however, we note that there are a multitude of other considerations that will be relevant in practice but are beyond the scope of this article. One of these is whether, and if so under what circumstances, a party could be required to disclose the existence of the third party funding relationship itself to the court or tribunal and/or to an adverse party or parties. For present purposes, we assume that the existence of the third party funding relationship per se is already known to the adverse party or parties. Nor do we address whether any particular form of funding arrangement is permissible under the ethical rules that may apply in any given jurisdiction. Our focus here is on the specific issues of privilege and confidentiality.

1. **Privilege and Confidentiality Considerations in Respect of Funder Due Diligence in the United States**

1.1 **Status of Third Party Litigation Funding in the United States**

Third party litigation funding generally, and third party financing of commercial claims in particular, is a relatively recent, but growing phenomenon in the United States. The total value of third party investments in U.S. lawsuits has been estimated to exceed US$1 billion, although only a portion of that amount will be attributable to the financing of commercial claims. Major funders of commercial claims include hedge funds, insurance companies, financial institutions, high net worth individuals as well as specialized litigation financing firms.

The rules that apply to third party funding vary substantially from jurisdiction to jurisdiction within the United States, and a detailed analysis of the current state of the law is beyond the scope of this article. In any event, however, counsel will want to give careful consideration to the specific state laws and local attorney rules of professional conduct in the relevant jurisdiction(s) within the United States when contemplating a potential third party funding arrangement.

1.2 **Attorney-Client Privilege and Work Product Doctrine**

The rules governing the attorney-client privilege and work product doctrine are not uniform throughout the United States. Instead, each state has its own rules, and there is also a body of federal law that applies in the federal courts.

Although the details will differ from jurisdiction to jurisdiction within the United States, the principles governing the application of the attorney-client privilege and work product
doctrine are broadly comparable. This article will focus primarily on federal court cases from New York and the Second Circuit Court of Appeals.

1.2.1 Privilege as a Limited Exception to Otherwise Broad Disclosure

The attorney-client privilege and work product doctrine are best understood in the broader context of the discovery process in the United States. That process differs significantly from the procedures governing disclosure in civil litigation in most other countries. Among the key features of U.S.-style discovery are the following:

First, discovery is controlled by the parties, and most discovery disputes are resolved through negotiations among counsel. Courts become involved in discovery disputes only where the requesting party moves to compel disclosure, or where the objecting party moves for a protective order.

Second, document requests are often very broad and typically seek “all documents concerning or relating to” a particular issue. Although there is a requirement that the documents sought must be relevant to the dispute, “relevance” in the context of discovery is defined broadly “to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.”8 The general rule in the U.S. is that a party may not “pick and choose” among documents that are responsive to the opposing party’s document requests but instead “must provide [the requesting party] with all non-privileged responsive documents in [the disclosing party’s] possession.”9 The attorney-client privilege and work product doctrine thus operate as a limited exception to the general rule that a party must hand over all relevant material in its possession, custody or control at the request of the other party.

Third, a unique feature of discovery in the United States is the widespread use of depositions, i.e., witness examinations before trial. Depositions provide a valuable opportunity to explore the source and extent of a witness’s knowledge and the witness’s expected testimony at trial. The outcome of depositions also informs the parties’ assessment of the strengths and weaknesses of their respective cases and the likelihood that one side or the other ultimately will prevail on the merits. As a result, depositions often influence whether (and on what terms) the parties agree to settle their dispute.10

The Federal Rules of Civil Procedure provide that counsel may instruct the witness not to answer a question posed during a deposition only on limited grounds, including “when necessary
to preserve a privilege.”

By contrast, where counsel objects to the question on some other basis, “the examination still proceeds; the testimony is taken subject to any objection.” Here again, the privilege operates as a limited exception to the general rule that a witness must answer questions from an adverse party’s counsel even where the question is objectionable for some other reason.

1.2.2 Scope of Attorney-Client Privilege

“The attorney-client privilege protects confidential communications between client and counsel made for the purpose of obtaining or providing legal assistance.” There are two key limitations to the attorney-client privilege. First, the communication between client and counsel must be confidential. Accordingly, the attorney-client privilege generally does not extend to “communications made in the presence of third parties who are objectively not necessary to informed attorney-client contact.”

Second, “the privilege is triggered only by a client’s request for legal, as contrasted with business, advice.” To qualify for protection, “the predominant purpose of the communication [must be] to render or solicit legal advice.” Where a document contains legal advice that is merely “incidental to the nonlegal advice that is the predominant purpose of the communication,” redaction of the legal advice, rather than withholding of the entire document, is generally appropriate.

1.2.3 Scope of Work Product Doctrine

“The attorney work product doctrine provides qualified protection for materials prepared by or at the behest of counsel in anticipation of litigation or for trial.” In the words of the United States Supreme Court in the seminal case of Hickman v. Taylor, the work product doctrine is a reflection of “the general policy against invading the privacy of an attorney’s course of preparation [that] is so well recognized and so essential to an orderly working of our system of legal procedure.”

As codified in Fed. R. Civ. P. 26(b)(3), the doctrine applies to “(1) a document or tangible thing, (2) that was prepared in anticipation of litigation, and (3) was prepared by or for a party, or by or for his representative.” In the Second Circuit and most other Circuits, any document prepared “because of” pending or anticipated litigation may qualify for protection as
work product.\textsuperscript{23} The work product doctrine is thus broader than the attorney-client privilege because it extends to documents prepared for a business-related purpose as long as they were prepared because of litigation.\textsuperscript{24} Whether a document was prepared because of litigation “turns on whether it would have been prepared irrespective of the . . . litigation.”\textsuperscript{25}

On the other hand, the work product doctrine is narrower than the attorney-client privilege in that the former does not protect documents reflecting legal advice that is unrelated to pending or anticipated litigation.\textsuperscript{26} Moreover, under Fed. R. Civ. P. 26(b)(3), only documents or tangible things qualify for protection as work product.\textsuperscript{27} However, some federal courts have found that the underlying common law doctrine extends more broadly to “all trial preparation activities and all communications made principally for the purpose of preparing for litigation or trial.”\textsuperscript{28}

There are two basic categories of work product. The first category is generally referred to as “opinion work product” and consists of the “mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.”\textsuperscript{29} Under the Federal Rules of Civil Procedure, a party may be required to disclose opinion work product to an adversary only in exceptional circumstances (if at all). The Second Circuit has left open the possibility of “whether such opinion work product is ever discoverable upon a showing of necessity and unavailability by other means” but has made clear that “at a minimum, such material is to be protected unless a highly persuasive showing is made.”\textsuperscript{30}

The second category of work product, often referred to as “fact work product,” includes all other documents prepared because of litigation and “may encompass factual material, including the result of a factual investigation.”\textsuperscript{31} Fact work product may include documents prepared by the agents of a party’s attorney, \textit{i.e.}, by non-attorneys “enlisted by legal counsel to perform investigative or analytical tasks to aid counsel in preparing for litigation,”\textsuperscript{32} or by non-attorney employees of the party itself, provided that the employees were acting at the direction of counsel.\textsuperscript{33}

The Federal Rules of Civil Procedure afford less protection to fact work product in comparison to opinion work product. Indeed, a party may be required to disclose documents that qualify as fact work product where the requesting party “shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.”\textsuperscript{34} Whether compelled disclosure of fact work product is warranted
in a given case will depend on all of the facts and circumstances, but the requesting party generally will need to demonstrate more than “[m]ere inconvenience or expense” in order to satisfy the requirement of undue hardship.\textsuperscript{36}

\subsection*{1.2.4 Choice of Law Considerations}

Where the underlying facts implicate the laws of more than one jurisdiction (whether they are different states or foreign countries), courts in the United States will sometimes engage in a choice of law analysis to determine which jurisdiction’s law should govern the attorney-client privilege.\textsuperscript{37} As a result, a court may apply the rules of a foreign party’s home jurisdiction to determine whether communications that took place there are protected from disclosure in the U.S. For example, courts have held that communications between a Swiss party and its in-house counsel occurring in Switzerland may not be protected by the attorney-client privilege in the United States because (as discussed in Section 2.4 below) such communications are not privileged under Swiss law.\textsuperscript{38}

In contrast, because “the work-product doctrine is a procedural immunity and not an evidentiary privilege,”\textsuperscript{39} it follows that the law of the forum should determine whether a particular document is protected from disclosure on work product grounds, regardless of where the document was prepared. In the few reported cases that discuss the issue in any detail, however, courts have not uniformly adopted this analysis.\textsuperscript{40} Still, where the materials in question were prepared in anticipation of U.S. litigation (as opposed to litigation in a foreign country), a U.S. court in a transnational case will likely apply the law of the U.S. forum to determine whether the materials are protected from disclosure as work product.\textsuperscript{41}

\subsection*{1.3 Protection of Confidential or Sensitive Material on Grounds Other Than Privilege}

Disclosure of particularly sensitive information that is not subject to attorney-client privilege or work product protection may be conditioned or limited in a variety of ways by agreement of the parties or by order of the court. Disclosure on an “attorneys’ eyes only” basis (or, even more restrictively, on an “outside counsel’s eyes only” basis) is a common means of restricting access to sensitive information such as trade secrets.\textsuperscript{42}

Additionally, federal courts have authority in appropriate circumstances under Rule 26(c) of the Federal Rules of Civil Procedure to order that “a trade secret or other confidential
research, development, or commercial information” need not be disclosed at all. However, where the requesting party demonstrates a need for access to the confidential information said to be a trade secret, and that the information in question is relevant to the dispute, courts are often more inclined to order disclosure subject to a protective order, rather than no disclosure at all.43

1.4 Risk of Waiver in Connection with Third Party Funder’s Due Diligence

1.4.1 Attorney-Client Privilege

Because the attorney-client privilege is intended to protect confidential communications between attorneys and their clients, voluntary disclosure to a third party outside the confines of the attorney-client relationship generally results in waiver of the privilege.44 Under certain limited circumstances, however, the “common interest doctrine” (sometimes also referred to as the “common interest rule” or the “common interest privilege”) may allow for disclosure to a third party that does not result in waiver.45

The common interest doctrine applies only where the following requirements are met: “(1) the party who asserts the rule must share a common legal interest with the party with whom the information was shared and (2) the statements for which protection is sought [must have been] designed to further that interest.”46

Where a third party funder finances a party’s litigation costs, the party and the funder certainly share a common interest in succeeding in the litigation, but that interest would likely be deemed a common commercial interest, rather than a common legal interest. A common commercial interest does not meet the requirements for protection under the common interest doctrine.47 As one court put it, “[s]haring a desire to succeed in an action does not create a ‘common interest.’”48 Nor does the payment of legal fees, in and of itself, give rise to a common legal interest.49 Accordingly, disclosure of documents or other information protected by the attorney-client privilege to a third party funder will likely result in waiver of the privilege.50

Consistent with this analysis, a federal district court in Delaware, in a June 2010 opinion in a patent infringement action against the social networking site Facebook,51 affirmed a magistrate judge’s order requiring the plaintiff in that case to disclose documents it had exchanged with litigation financing companies interested in funding the litigation. The magistrate judge found that the case “presented a close question”52 but ultimately concluded that the documents at issue were not protected from disclosure under the common interest privilege.
That conclusion appears to have been based at least in part on a finding “that no common legal interest . . . could exist because a deal [to fund the litigation] was not consummated between [the plaintiff] and the litigation financing companies.”53 This raises an interesting question as to whether the outcome would have been different if the funders’ due diligence had resulted in an agreement to finance the litigation—a question that the district court’s opinion leaves unanswered.

1.4.2 Work Product Doctrine

Disclosure of documents to a third party is considerably less likely to result in waiver of the work product protection in comparison to waiver of the attorney-client privilege. While “disclosure of confidential material to a third party waives any applicable attorney-client privilege,” courts have held that “work product protection is waived only when documents are used in a manner contrary to the doctrine's purpose, when disclosure substantially increases the opportunity for potential adversaries to obtain the information.”54

The cases appear to require only that the disclosing party and the third party must share a “common interest.”55 There does not appear to be a requirement of a common legal interest (as opposed to a common commercial interest). Rather, “[w]ork product may be shown to others when there is some good reason to show it.”56 Accordingly, a federal court in the Southern District of New York held that “counsel-drafted or counsel-selected materials” disclosed by counsel to a public relations firm on the one hand, and documents prepared by the public relations firm that “implicitly reflect[ed] [counsel’s] work-product” on the other hand, were protected from disclosure by the work product doctrine.57 The court reasoned that “the public relations firm need[ed] to know the attorney’s strategy in order to advise as to public relations, and the public relations impact b[ore], in turn, on the attorney’s own strategizing as to whether or not to take a contemplated step in the litigation itself and, if so, in what form.”58

In light of these principles, there appears to be a fairly strong argument that disclosure of documents protected by the work product doctrine to a third party funder in the course of due diligence should not result in waiver of the protection, particularly where the third party funder undertakes to avoid any further disclosure of the work product pursuant to a confidentiality or non-disclosure agreement with the disclosing party.59 Indeed, at least one commentator has
deemed it likely that “courts will ultimately find that communications with third-party litigation lenders are protected by the work product rule, but not by the attorney-client privilege.”

A recent opinion by a federal district court in the Eastern District of Texas in *Mondis Technology, Ltd. v. LG Electronics, Inc.* supports this conclusion. That case involved efforts by the plaintiff’s parent company in a patent infringement case to find “investors to join the company and fund its efforts to license and litigate its various patent programs.” In that context, the parent company had “provided a number of investment brokers and potential investors with slide presentations and other documents that contained disclosures of [its] licensing and litigation strategies and also estimates of licensing and litigation revenues.”

One of the defendants sought to compel production of a portion of those documents. The defendant argued that “the documents [we]re not covered by the work product protection because that protection does not extend to materials created to assist in raising funds for litigation.”

The court flatly rejected this argument, concluding that documents prepared “with the intention of coordinating potential investors to aid in future possible litigation” are protected from disclosure by the work product doctrine. The court added that “although these documents were disclosed to third parties, the disclosures do not create a waiver because they were disclosed subject to non-disclosure agreements and thus did not substantially increase the likelihood that an adversary would come into possession of the materials.”

Having found that the documents in question were protected as work product, the court concluded that it “need not reach the issue of attorney-client privilege.” However, another recent opinion by the same federal district court judge, Judge John T. Ward, suggests that if it had reached the issue, the court likely would have concluded that disclosure to potential investors of materials that are subject only to the attorney-client privilege will result in waiver of that privilege. Consistent with the principles outlined above, Judge Ward described the work product doctrine as “very different from the attorney-client privilege.” Whereas “the work product protection exists to promote the adversary system by safeguarding the fruits of an attorney’s trial preparations from the discovery attempts of an opponent,” he wrote, “the attorney-client privilege exists to protect the confidential communications between an attorney and client.” It follows that “the attorney-client privilege . . . is waived by disclosure of [such] confidential communications to third parties.”
In contrast, the court in the Facebook case discussed in Section 1.4.1 above does not appear to have considered the materially different standards for waiver of work product protection on the one hand and waiver of the attorney-client privilege on the other. The magistrate judge in that case appears to have concluded that the plaintiff’s disclosure of documents to prospective third party funders resulted in waiver not only of the attorney-client privilege, but also of work product protection. In affirming the magistrate judge’s opinion, however, the district court appears to have focused solely on the waiver of attorney-client privilege, particularly the requirement of a common legal interest for protection under the common interest doctrine. Accordingly, there is reason to question the precedential value of the district court’s opinion in respect of whether disclosure to a third party funder will result in waiver of work product protection (as opposed to waiver of the attorney-client privilege).

Still, the Facebook case underscores the risk that a U.S. court might find that a party’s disclosure of work product to a third-party funder will result in waiver of work product protection. Indeed, in the wake of the Facebook opinion, a November 2010 Issues Paper prepared by a working group of the American Bar Association’s Commission on Ethics 20/20 went so far as to conclude that it is “very likely” that disclosures by a lawyer to a third party funder will result in “losing the benefit of the privilege and work product doctrine.” In light of that assessment, the working group solicited comments from the legal community as to whether “a change in the common interest doctrine” is required. The working group’s investigation is still ongoing.

1.4.3 Trade Secrets

Disclosure of a trade secret to a third party may result in waiver of the secret in the absence of a contractual or other legal obligation on the part of the third party to maintain secrecy. Indeed, the United States Supreme Court has stated that “[i]f an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right [in the secret] is extinguished.”

“A failure to require a third party to enter a confidentiality agreement to protect alleged trade secrets” or even “[e]ntering into an agreement, but placing few or no restrictions on the uses a third party can make of a trade secret” has been deemed “a sure path to waiver.” As a
result, a party contemplating disclosure of trade secrets or similar information to a third party funder should take pains to ensure that an appropriate confidentiality agreement with the funder is in place prior to any disclosure.

1.4.4 Choice of Law as to Waiver

As discussed above in Section 1.2.4, at least where the attorney-client privilege is concerned, courts in the United States sometimes engage in a choice of law analysis to determine which jurisdiction’s privilege rules should apply where the underlying facts implicate the laws of more than one jurisdiction. There is support in the case law for the proposition that the same choice of law considerations also apply to the specific issue of whether a privilege existing under the law of another jurisdiction has been waived.77

Therefore, a foreign party to litigation in the United States should have a reasonable argument that to the extent foreign law determines whether a document or communication is protected from disclosure under the attorney-client privilege, foreign law should also govern whether disclosure of the privileged information to a third party in the same foreign jurisdiction resulted in a waiver of the privilege. However, one can easily imagine a scenario where the law of the foreign party’s home jurisdiction is deemed to determine whether a document or communication is protected from disclosure under the attorney-client privilege in the first place, while the law of another jurisdiction (such as the jurisdiction where the funder is based) is deemed to govern whether disclosure to the funder resulted in a waiver of protection.

1.5 Third Party Funder as Potential Witness in Funded Case

It is hard to imagine a scenario in which an employee or other representative of a third party funder would be called as a witness in the funded case to give testimony concerning the funder’s due diligence. Indeed, the employee’s testimony concerning any after-the-fact analysis or investigation the funder may have conducted in the course of due diligence likely would be inadmissible for lack of personal knowledge of the underlying facts78 and/or on hearsay79 or relevance80 grounds.81

1.6 Legitimate Expectations of a Party to U.S. Litigation: A Hypothetical

In light of the principles outlined above, what are (or should be) the reasonable privilege and confidentiality expectations of a party contemplating litigation in the United States in respect
of documents and other information disclosed to a third party funder? In this respect, a simple
hypothetical may be instructive.

Our hypothetical assumes a contract dispute between two American parties arising from an
agreement for the sale of widgets. The plaintiff-purchaser intends to assert that the widgets
delivered by the defendant-seller were not in conformity with the contract specifications. We
further assume, however, that there is an ambiguity in the pertinent specifications. In the course
of contract negotiations, plaintiff’s outside deal counsel as well as its in-house counsel have
given advice on the ambiguous contract term in separate e-mails to plaintiff’s management.

a) What is the likely effect of providing copies of the e-mails from plaintiff’s outside
and in-house counsel to the third party funder? Because the e-mails were not prepared in
anticipation of litigation, they are not protected by the work product doctrine. However, both e-
mails are protected from disclosure by the attorney-client privilege, which generally applies to
communications with in-house counsel as well as outside counsel in the U.S. Yet the plaintiff
will probably waive that protection if it discloses the e-mails to the funder, which likely will not
be deemed to share a common legal interest with the plaintiff. Of course, savvy counsel may
find practical ways around this problem, for example by describing the e-mail to the third party
funder without actually furnishing a copy of the document. Oral, rather than written,
communications with the funder generally will be preferable in any event given the remoteness
of the risk that the funder, or an employee of the funder, will be called as a witness in the funded
case.

b) What if plaintiff’s outside counsel has prepared a comprehensive written analysis
of the strengths and weaknesses of plaintiff’s case for the benefit of the plaintiff: what is the
likely effect of disclosure of counsel’s analysis to the funder? The answer here is less clear.
Counsel’s analysis is protected from disclosure on both attorney-client privilege and work
product grounds; indeed, counsel’s analysis qualifies as opinion work product, which courts
seldom (if ever) require a party to disclose to an opposing party in litigation. However, for the
reasons identified in paragraph a) above, disclosure of the analysis to the funder will likely result
in waiver of the attorney-client privilege. In contrast, there is good reason to argue—particularly
where the party and the funder have entered into a confidentiality agreement—that disclosure of
counsel’s analysis to the funder should not result in waiver of work product protection because
such disclosure does not materially increase the likelihood that an adversary will gain access to
counsel’s analysis. Nonetheless, the risk that a court might reject that argument and conclude that disclosure of counsel’s analysis to the funder resulted in waiver of both the attorney-client privilege and work product protection cannot be excluded.

c) As a further variation on our hypothetical, we will assume that a member of plaintiff’s in-house technical staff—at the request of plaintiff’s in-house counsel and to assist the company in determining whether to proceed with legal action against the defendant—has prepared a technical report documenting testing conducted on a sample widget and confirming the suspected deviation from the contractual specifications. Again, what is the likely effect of disclosure of the technical report to the funder? The technical report likely will not be protected from disclosure by the attorney-client privilege, but it does enjoy qualified immunity from disclosure as fact work product because it was prepared in anticipation of potential litigation at the direction of plaintiff’s (in-house) counsel. Plaintiff may be required to disclose the technical report to the defendant if the latter can demonstrate substantial need and an inability to obtain the information in the report from other sources. However, plaintiff would have good reason to argue that the sharing of the technical report with the third party funder should not result in any waiver of the qualified immunity from disclosure that the report otherwise enjoys.

What if the above hypothetical were amended so that it now involves a dispute between a Swiss plaintiff and an American defendant and e-mails from plaintiff’s (Swiss) outside and in-house counsel, respectively: what impact would this have on the likely result?

a) Assuming that the court were to apply Swiss law in this scenario to determine whether the e-mails are privileged, the e-mail from plaintiff’s in-house counsel to plaintiff’s management would not be protected from disclosure in the first place, regardless of whether the plaintiff discloses the e-mail to the funder. On the other hand, the plaintiff would have a reasonable argument that if Swiss law determines the scope of the attorney-client privilege, Swiss law should also govern whether disclosure of the e-mail from plaintiff’s outside deal counsel to the third party funder resulted in waiver of that privilege (at least where disclosure of the e-mail is deemed to have occurred in Switzerland). As discussed below in Section 2.7, disclosure of outside counsel’s e-mail to the funder would not waive any applicable privilege under Swiss law.

b) As for counsel’s written analysis of the plaintiff’s case, the fact that the plaintiff is Swiss and/or that disclosure of the analysis to the funder occurred in Switzerland likely would
have little or no impact on a U.S. court’s analysis of whether disclosure resulted in waiver of work product protection because the court would likely apply forum law to determine that issue. In respect of waiver of the attorney-client privilege, the plaintiff again would have a reasonable argument that disclosure of counsel’s analysis to the third party funder in Switzerland should not result in waiver of the privilege if such disclosure would not result in a waiver under Swiss law.

c) Insofar as the technical report is concerned, the result would remain the same as in the prior iteration of the hypothetical because a U.S. court likely would apply forum law to determine whether the report enjoys qualified immunity from disclosure as fact work product, and whether plaintiff’s sharing of the report with the third party funder resulted in any waiver of such protection.

In summary, a party to civil litigation in the United States would have a legitimate expectation that disclosures to a third party funder in the course of due diligence will entail a risk of waiver of the attorney-client privilege and/or work product protection. At least where the law of a U.S. jurisdiction governs waiver (as will be the case in most disputes involving American parties and funders or where disclosure to the funder is deemed to have occurred in the U.S.), the risk that disclosures to a third party funder will result in waiver of the attorney-client privilege is high. Where materials disclosed to the funder are protected from disclosure on work product grounds, the risk of waiver is significantly lower, but even in respect of those materials, a degree of risk remains.
2. Privilege and Confidentiality Considerations in Respect of Funder Due Diligence in Switzerland

2.1 Status of Third Party Litigation Funding in Switzerland

Third party funding is a new phenomenon in Switzerland. Until recently, whether third party funding should be permitted at all remained controversial due to concerns that it would infringe on the independence of attorneys. Indeed, the Canton of Zurich deemed third party funding improper and amended its Attorney Act to outlaw the practice outright, effective January 1, 2005.82

Before those new provisions could take effect, however, the Swiss Federal Supreme Court (Bundesgericht83) invalidated Zurich’s prohibition on third party funding in a decision issued on December 10, 2004.84 The court found the prohibition to be unconstitutional, concluding that third party funding does not generally impair an attorney’s independence. Accordingly, the court held that a blanket prohibition on third party funding constitutes a disproportionate, and therefore impermissible, intrusion into the freedom of commerce guaranteed by the Swiss constitution. Since that decision by the Supreme Court, third party funding has been legal throughout Switzerland. Likewise, the Swiss Federal Attorney Act, which regulates the professional duties of attorneys practicing in Switzerland, (implicitly) permits third party funding.85

In the wake of the Supreme Court’s decision, the role of third party funding in Swiss litigation has grown steadily in recent years. Initially, the funders that were active in Switzerland were based in neighboring countries, particularly Germany. Increasingly, however, Swiss funders are also entering the market. Particularly in light of the prohibition on contingency fees in Switzerland as elsewhere in Europe, third party funding can fill a gap in litigation financing for parties contemplating litigation, especially where the amounts in dispute are high.

2.2 Brief Overview of Document Disclosure in Switzerland

At the request of a party, a Swiss court may order a party to the proceeding or a third party to produce certain documents (Edition).86 As is generally the case in civil law countries, the court determines whether, and to what extent, document disclosure is warranted in a particular case, and there is no analog to the party-driven discovery that occurs in the United States.
In general, document disclosure occurs only after the court has issued an Order of Proof (Beweisverfügung) framing the material issues in dispute, and identifying which party bears the burden of proof on each disputed issue. Unlike in the U.S., a party cannot simply request “all documents concerning or relating to” a particular issue; instead, a party’s request must be limited to comparatively few, specifically identified or identifiable documents. As a result, a request for production of documents presupposes that the requesting party has at least some idea of what documents the other party is likely to have in its possession. The prevailing view is that a request for production cannot amount to an attempt to explore what documents an opposing party or a third party might have. Therefore, a request for production of “all correspondence” or “all books and records” of a company would not be permissible.

2.3 The Concept and Protection of Secrecy in Swiss Law

At the outset, it should be emphasized that a fact need not be absolutely confidential in order to constitute a “secret” under Swiss law. A review of provisions protecting secrecy in various areas of Swiss law makes clear that a secret generally will be found to exist where the information in question is neither obvious nor widely available and the holder of the secret has a legitimate interest in maintaining secrecy as well as the intention of doing so. Disclosure of a secret to a third party, such as a third party funder, generally does not abrogate secrecy, particularly where such disclosure is subject to a contractual obligation on the part of the recipient to maintain confidentiality, as is typically the case in a funding relationship. Where a secret holder (or, with his consent, his counsel) discloses documents or information that qualify as secrets to a third party funder, such disclosure does not result in forfeiture of secrecy. The same principle applies where the secret holder discloses documents or information that qualify as secrets to other third parties, such as public relations agencies or other advisors and consultants, where there is a relationship of trust and the recipient has an obligation to maintain confidentiality. The notion that disclosure to a third party may result in a waiver of secrecy (including secrecy by dint of legal privilege) does not exist in Swiss law.

Various provisions of substantive civil and criminal law, civil and criminal procedure, as well as professional and regulatory obligations in the Swiss legal system are designed to protect secrecy. Of particular interest here is the protection Swiss law extends to legal privilege (Anwaltsgeheimnis, or literally, “attorney secrecy”), both as a matter of the attorney’s
professional obligations and as a matter of criminal law in the Swiss Criminal Code (\textit{Strafgesetzbuch} or “StGB”).\textsuperscript{94} In Swiss civil and criminal procedure, this protection is given effect in provisions that grant a corresponding right to refuse testimony and the production of documents.\textsuperscript{95} Also noteworthy is the protection of manufacturing and commercial secrets in the Swiss Code of Obligations (\textit{Obligationenrecht} or “OR”),\textsuperscript{96} which requires employees to maintain such secrets, and in the Criminal Code,\textsuperscript{97} which sanctions violations of statutory or contractual obligations to maintain manufacturing and commercial secrets.\textsuperscript{98} The following section will address the protection of legal privilege and other protectable secrets in Swiss civil procedure in greater detail.

2.4 Legal Privilege in Switzerland

Pursuant to Article 13 of the Federal Attorney Act,\textsuperscript{99} all attorneys admitted to practice in Switzerland are required to maintain the secrecy of information disclosed to them by clients in their capacity as attorneys.\textsuperscript{100} In addition, attorneys will incur criminal liability if they disclose a secret entrusted to them in their capacity as attorneys or of which they became aware while performing their duties as attorneys. The scope of these two provisions is not entirely identical. In particular, the Federal Attorney Act applies only to attorneys admitted to practice in Switzerland who are registered in one of the attorney registries maintained by each Canton, while the criminal sanctions set out in the Criminal Code also apply to foreign counsel.\textsuperscript{101} Yet a common feature of both provisions is that they apply only to the independent practice of law and thus do not apply to in-house counsel.\textsuperscript{102} Further, both provisions apply only to those activities that are specific to the attorney’s role as an attorney. Where an attorney engages in other activities that are beyond the scope of his role as an attorney, for example by serving as a corporate director or acting as an asset manager, those activities are not subject to legal privilege. If the attorney’s activities encompass multiple roles, the particular role in which a secret was entrusted to him will be the decisive criterion in determining whether or not the secret is protected by legal privilege.\textsuperscript{103}

Swiss civil procedure gives effect to the protection of legal privilege in at least two ways. First, attorneys have the right to refuse to give testimony or otherwise to participate in the taking of evidence. Second, not only the attorney, but also the client and even third parties have the
right to withhold documents on the basis of legal privilege that they otherwise would be required to produce.

Article 166 of the Swiss Civil Procedure Code (Zivilprozessordnung or “ZPO”) provides that a person has the right to refuse participation in the proceedings (including a refusal to testify as well as a refusal to produce documents or tangible things) to the extent that he or she would incur criminal liability under Article 321 of the Criminal Code for violation of a duty to maintain secrecy. Accordingly, attorneys have the right to refuse to give testimony in respect of any information that falls within the scope of legal privilege protected by criminal law. As the relevant provision in the Criminal Code also applies to foreign attorneys, foreign counsel have the right to refuse to give testimony to the same extent as Swiss attorneys. As for foreign in-house counsel, Swiss courts will not accord them the right to refuse testimony under Article 160 of the Civil Procedure Code. An attorney’s right to refuse participation in the taking of evidence is absolute: even where the secret holder (i.e., the client) expressly releases the attorney from his duty of secrecy, the attorney maintains the right (though not the obligation) to refuse participation.

In comparison to the civil procedure codes of the various Cantons that were in force until the end of 2010, the new Federal Civil Procedure Code that took effect on January 1, 2011 has significantly expanded the right to refuse production of documents on the basis of legal privilege. Whereas the former civil procedure codes of the Cantons typically provided only for a right to refuse production of documents in the possession of an attorney, the Federal Civil Procedure Code now extends such protection to all attorney correspondence regardless of where such correspondence is maintained. Specifically, Article 160, paragraph 1, letter b of the Federal Civil Procedure Code provides that attorney correspondence, to the extent it relates to the professional representation of a party to the proceeding or of a third party, need not be produced in civil cases. Not only the attorney, but also the parties to the proceeding as well as third parties may avail themselves of the right to refuse production of any such documents in their possession.

The scope of protected “attorney correspondence” (anwaltliche Korrespondenz) will be a matter for the courts to clarify. In the literature, at least one commentator has opined that other materials such as memoranda which are not literally “attorney correspondence” should also be protected under Article 160. This appears to be the correct approach, as the protection of a
particular document cannot depend on whether the document happens to be in the form of a letter or other correspondence to the client as opposed to a memorandum, for example, which typically would be transmitted to the client with a separate cover letter.

Consistent with the underlying purpose of the protection, all materials prepared by, or entrusted to, the attorney in his capacity as an attorney in the course of advising the client should be deemed protected. Again, however, protection extends only to activities that are specific to the attorney’s role as an attorney. Documents pertaining to an attorney’s other activities do not enjoy such protection. Nor does Article 160 protect correspondence with in-house counsel from disclosure. Consistent with the right of foreign attorneys to refuse to give testimony, correspondence with foreign attorneys and other materials stemming from a foreign attorney’s representation of a client should likewise be protected under Article 160.

In substance, therefore, what would be termed “attorney work product” in the United States (with the important exception of materials prepared by in-house counsel) will be protected from disclosure in a civil case in Switzerland. In contrast to the work product doctrine in the United States, however, there is no requirement that a document must have been prepared in anticipation of litigation. Thus, documents reflecting an attorney’s transactional advice unrelated to any pending or threatened litigation—which, in the United States, would qualify only for protection under the attorney-client privilege—enjoy the same degree of protection under Swiss law as litigation-related materials.

2.5 Measures to Protect Endangered Interests

Beyond the right discussed above to refuse participation in the taking of evidence and the production of documents where necessary to protect legal privilege, the Federal Civil Procedure Code allows for additional measures to protect other legitimate interests. Where the taking of evidence threatens the interests of a party to the proceeding or of a third party that are worthy of protection, including in particular the commercial secrets of such a party, Article 156 of the Civil Procedure Code authorizes the court to take appropriate measures to protect those interests.

With the exception of an explicit reference to commercial secrets, Article 156 does not define the scope of “interests worthy of protection” (schutzwürdige Interessen). Courts therefore retain substantial judicial discretion in this respect and may take appropriate measures to protect secrets of all kinds as well as any private or public interests that may be worthy of protection in a
particular case. The court will need to balance the interests deemed worthy of protection on the one hand against the general need for disclosure and the opposing party’s right to be heard (rechtliches Gehör) on the other.\textsuperscript{114}

Nor does Article 156 enumerate the measures that may be taken to protect endangered interests. That, too, is committed to the court’s discretion. In deciding which measures are appropriate, however, the court must adhere to the principle of proportionality. Any such measures must be confined to what is necessary in a given case.\textsuperscript{115} Depending on the specific interests at issue and the degree to which they are threatened, a court may consider such measures as proceedings in closed session, the exclusion of one party (or both parties) from participating in the taking of evidence, limitations on the right to inspect records, providing only for the inspection (but not the handing over) of documents, providing for the redaction of sensitive information within a document, permitting access only to a summary of the documentary evidence (but not the evidentiary materials themselves), and restricting access to the parties’ attorneys on an “outside counsel’s eyes only” basis.\textsuperscript{116}

Almost invariably, there will be some tension between court-ordered measures pursuant to Article 156 that have the effect of limiting a party’s right to inspect records and the principle that each party to the proceeding has a right to be heard. This is particularly so where the court, in rendering judgment, relies on documents that were not (or not fully) disclosed to all parties. However, the resulting limitation of a party’s right to be heard has been deemed acceptable by the courts and in the literature and does not give rise to a violation of a party’s constitutional right to be heard, provided that the court gives appropriate consideration to balancing all of the relevant interests and to the principle of proportionality.\textsuperscript{117}

2.6 Third Party Funder’s Right to Invoke Privilege and Confidentiality Protections

In addition to a third party funder’s right to refuse production of “attorney correspondence” and to refuse participation in the taking of evidence (including the right to refuse to give testimony in particular) where other legally protected secrets (such as manufacturing and commercial secrets\textsuperscript{118}) are concerned, Article 156 of the Civil Procedure Code offers third party funders a further means of protecting information disclosed to them.

To the extent that disclosure of information protected by legal privilege to the third party funder occurs solely and precisely for the purpose of facilitating litigation financing and on the
basis of a confidentiality agreement, persuasive grounds exist under Article 156 to absolve the third party funder entirely of the duty to give testimony. The shared interest of funders and claimants in financing litigation that the claimant cannot, or does not wish to, fund out of its own resources, accompanied by a contractual duty on the part of the funder to maintain the confidentiality of any facts or materials protected by legal privilege, are plainly interests worthy of protection. Ensuring that those interests are protected effectively requires that the third party funder be absolved of the duty to give testimony.

2.7 Legitimate Expectations of a Party to Swiss Litigation: A Hypothetical

Which are the legitimate privilege and confidentiality expectations of a party contemplating litigation in Switzerland in respect of documents and other information disclosed to a third party funder? For the sake of comparison, we will, mutatis mutandis, assume the same hypothetical set out in Section 1.6 above: a dispute between two parties involving an agreement for the sale of widgets and an ambiguous contract term. In the course of contract negotiations, plaintiff’s (Swiss and/or U.S.) outside deal counsel as well as its (Swiss and/or U.S.) in-house counsel have given advice on the contract term at issue in separate e-mails to plaintiff’s management.

a) What is the likely effect of providing copies of these e-mails to the third party funder? The short answer is that disclosure to the funder will have no effect on any existing privilege or confidentiality protection for the following reasons: (i) The e-mail from plaintiff’s outside deal counsel is protected by legal privilege. The disclosure or handing over of that e-mail to the third party funder does not result in any loss of such protection. The plaintiff itself, plaintiff’s outside deal counsel as well as the third party funder may all refuse to produce the e-mail in the litigation. Further, outside deal counsel has the right to refuse to give testimony pursuant to Article 166 of the Federal Civil Procedure Code. Nor is an attempt by the opposing party to call the third party funder (or an employee of the third party funder) as a witness likely to meet with success. (ii) The e-mail from plaintiff’s in-house counsel is not protected by legal privilege to begin with and must be produced at the request of the opposing party. Setting aside the protection of manufacturing and commercial secrets and/or protective measures pursuant to Article 156 of the Civil Procedure Code, plaintiff’s in-house counsel will be required to give testimony if called as a witness as Swiss law treats a party’s in-house counsel no
differently than any other employee. Yet plaintiff’s obligation to produce the e-mail from in-house counsel, and in-house counsel’s obligation to give testimony if called as a witness, exist independently of any disclosure to the third party funder. In other words, disclosure to the third party funder will not have any detrimental impact on plaintiff’s position in the litigation.

b) What if plaintiff’s outside counsel has prepared a comprehensive written analysis of the strengths and weaknesses of plaintiff’s case for the benefit of the plaintiff: what is the likely effect of disclosure of counsel’s analysis to the funder? Here again, disclosure to the funder will have no impact. Counsel’s analysis is protected by legal privilege and the funder may refuse to produce it in the litigation.

c) Turning to the technical report prepared by plaintiff’s in-house technical staff at the request of its in-house counsel, disclosure to the funder once again will have no impact on any protection from disclosure that otherwise may apply. Under Swiss law, an internal report of this kind is not subject to legal privilege to begin with, as such protection does not extend to documents prepared by in-house counsel (or non-legal staff acting at the direction of in-house counsel). Accordingly, assuming that the plaintiff has possession of the report, it may not refuse production of the same on grounds of legal privilege. Depending on the circumstances, however, there may be other grounds to refuse production of the report to the extent it contains commercial secrets or where other interests worthy of protection justify its withholding. If the plaintiff has a right to refuse production on that basis, disclosure of the report to a third party funder will not result in a loss of that right. Further, if the technical report is forwarded or handed over to plaintiff’s outside counsel, any resulting correspondence with outside counsel (including any copies of the report in outside counsel’s possession) may be withheld from production as privileged. In any event, from a purely practical perspective, an opposing party ordinarily will not be aware that a particular internal document of this kind even exists. As a result, the risk that the report will be the subject of a request for production (which must be confined to specifically identified or identifiable documents) generally will be very low.122

In summary, a party to civil litigation in Switzerland would have a legitimate expectation that the engagement of a third party funder, including any due diligence the funder may conduct before agreeing to extend financing, will not have any negative impact in terms of legal privilege and confidentiality.
3. Giving Effect to the Parties’ Legitimate Expectations in International Arbitration

As the preceding two sections show, the rules governing legal privilege and confidentiality in the United States and Switzerland are quite different. Indeed, as far as the impact of disclosures to a third party funder on any applicable privilege or confidentiality protection is concerned, the differences between the two legal systems are not merely differences in degree but differences in kind.

While U.S. parties and counsel will be mindful that any disclosure of privileged or confidential information to a third party funder generally will entail at least some risk of waiver, Swiss parties and counsel may find it surprising that waiver would even be considered an issue under those circumstances. This may lead to what the title of this article refers to as an “expectations gap” in an arbitration involving a Swiss and an American party.

As previous commentators have noted, if parties approach issues of privilege in the manner they are used to in their home jurisdictions, they may be faced with an unpleasant surprise if the arbitral tribunal later applies the rules of another jurisdiction (such as the law of the situs of the arbitration) that affords less, or different, protection than the corresponding rules in their home jurisdictions. Although the parties could avoid any uncertainty by specifying in their arbitration clause that the law of a particular jurisdiction will govern matters of privilege and confidentiality, few parties are inclined to devote much attention to that issue when they agree to arbitrate what at the time appear to be hypothetical future disputes.

3.1 Considerations for the Tribunal

The various institutional rules generally do not specify the criteria a tribunal may wish to consider when determining issues of privilege and confidentiality. As a result, assuming that the parties have not agreed in advance as part of their arbitration clause which jurisdiction’s laws will govern privilege and confidentiality issues, the tribunal will have broad discretion to determine how those issues should be resolved. Various potential approaches that a tribunal might adopt have been suggested in the literature but can be broadly categorized as based either on an analysis of which jurisdiction bears the closest connection to a particular document or communication or alternatively on the principal of equal treatment of the parties or “equality of arms.” The latter approach may be further divided into a “most favored nation” rule—i.e.,
application to both parties of whichever jurisdiction’s rules afford the greatest degree of protection—on the one hand and a “lowest common denominator” or “least favored nation” rule—i.e., equal application of whichever jurisdiction’s rules offer less protection—on the other.\textsuperscript{127} Parties will be less likely to object to the “most favored nation” rule in comparison to the “lowest common denominator” rule given that a party ordinarily will have little reason to complain if the protection it receives \textit{exceeds} its legitimate expectations.\textsuperscript{128}

Article 9.3 of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”) provides additional guidance in the form of five considerations that the tribunal “may take into account” when considering “issues of legal impediment or legal privilege . . . insofar as permitted by any mandatory legal or ethical rules that are determined by [the tribunal] to be applicable.”\textsuperscript{129} The criteria set out in Article 9.3 are broadly compatible with the “most favored nation” approach outlined above. Of particular interest here are the following three considerations:

- “the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen” (Article 9.3(c));
- “any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein” (Article 9.3(d)); and
- “the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules” (Article 9.3(e)).

The Commentary on the IBA Rules states that “[a]lthough the standard to be applied is left to the discretion of the arbitral tribunal, it is desirable that the tribunal take account of the elements set forth in Article 9.3, in particular if the parties are subject to different legal or ethical rules.”\textsuperscript{130} The Commentary explains that Article 9.3(c) “expresses the guiding principle that expectations of the parties and their advisors at the time the legal impediment or privilege is said to have arisen should be taken into consideration,” while Article 9.3(e) “emphasizes the need to maintain fairness and equality among the parties,” which may be of particular concern “when the approach to privilege prevailing in the parties’ home jurisdictions differs.”\textsuperscript{131} As an example, the Commentary specifically refers to a scenario in which “one jurisdiction may extend the attorney-client privilege to in-house counsel, whereas another may not.”\textsuperscript{132} In such cases, the
Commentary concludes, “applying different rules to the parties could create unfairness by shielding the documents of one party from production but not those of another.”

In light of these considerations, adoption of a “most favored nation” approach in respect of legal privilege and confidentiality in connection with third party funder due diligence will be sensible in most cases. While one could argue that there can be no true “equality of arms” as between the parties in this respect—given that only one party (usually, though not invariably, the claimant) typically will have sought or procured third party financing—it is worth emphasizing that the issue addressed here is a fairly narrow one. If the tribunal applies a “most favored nation” approach to all issues of privilege and confidentiality in the arbitration, both parties will enjoy the same protection. The only issue in respect of which the funded party may be said to be “favored” pertains to whether disclosure to the funder of material that is otherwise privileged or confidential will have the effect of waiving existing protection. Simply put, a “most favored nation” approach in this context does not create any additional, independent basis for protecting documents or communications from disclosure. Rather, it simply ensures that the risk of waiver for a funded party in international arbitration will be no greater than the corresponding risk the funded party reasonably would anticipate under analogous circumstances when litigating a dispute in its home jurisdiction.

3.2 Considerations for Counsel

Regardless of the tribunal’s ultimate approach to matters of privilege and confidentiality, there are a number of practical steps counsel can take to minimize the risk of waiver and to ensure that the client fully understands any risk that remains. Examples of relevant considerations might include the following:

- When drafting an arbitration clause, counsel may wish to consider including a provision to the effect that the tribunal in any potential arbitration shall be guided by the IBA Rules. Of course, the arbitration clause could also provide that a particular jurisdiction’s laws shall govern matters of privilege and confidentiality, or even that either party may assert a claim of privilege or confidentiality under the laws of either party’s home jurisdiction. An agreement of this kind would preclude any uncertainty concerning the scope of available protection and the risk
of waiver (in connection with disclosures to a third party funder or otherwise) but may appear impractical.

- Where a dispute has already arisen, in circumstances where disclosures to a third party funder will entail at least some risk of waiver (as is typically the case in U.S. litigation and may also be the case in international arbitration), counsel should discuss any contemplated disclosures with the client in advance to ensure that the client fully understands the risk of waiver and is prepared to proceed with the disclosures notwithstanding that risk. This is certainly good practice in any jurisdiction but may even be required in some jurisdictions under applicable ethical rules. Indeed, a recent Formal Opinion by the New York City Bar Association provides that “a lawyer may not disclose privileged information to a financing company unless the lawyer first obtains the client’s informed consent, including by explaining to the client the potential for waiver of privilege and the consequences that could have in discovery or other aspects of the case.”134

- Before making any disclosures to a third party funder, it is essential that the party concerned enter into an appropriate confidentiality agreement with the funder. Again, this is good practice in any jurisdiction (and a precaution the funder itself will often insist on) but will be particularly important in cases where a real risk of waiver exists.

- In circumstances where there is a real risk of waiver, disclosure of written materials to the third party funder should be limited to materials that are essential to the funder’s due diligence. Otherwise, oral communications with the funder generally will be preferable. Given the remoteness of the risk that the funder will be called as a witness in the funded case, oral communications between counsel and the funder will rarely, if ever, be subject to disclosure in practice.

**Conclusion**

Even sophisticated parties may approach matters of privilege and confidentiality with engrained expectations derived from the legal systems with which they are most familiar. This is particularly true when it comes to issues of waiver. A party may give little consideration to the risk of waiver in connection with disclosures to a third party funder if such disclosures would not
result in waiver under the laws of the party’s home jurisdiction. The subsequent application of a different jurisdiction’s law to determine whether the disclosures resulted in waiver of an otherwise applicable privilege or protection may frustrate that party’s legitimate expectations. Indeed, had the party been aware of the true risk of waiver, it might have opted not to make certain disclosures to the third party funder (or to make them in a different form).

The adoption of a “most favored nation” approach to the specific issue of waiver in this context would appear to be a sensible solution that gives effect to the disclosing party’s legitimate expectations. Nor is this approach likely to result in any real prejudice to the opposing party. A party could only withhold materials disclosed to a funder in the course of due diligence on this basis where the materials themselves are independently protected from disclosure under existing rules of privilege and confidentiality. A “most favored nation approach” merely provides a degree of certainty that a party’s disclosures to a third party funder will not result in a waiver of existing protection in circumstances where the disclosing party would not reasonably have expected that result.

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6 See generally Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 68, 98-99 (Jan. 2011) (noting that at present, some 28 of the 51 jurisdictions in the United States, i.e., the 50 states and the District of Columbia, explicitly allow at least some forms of champerty, defined as a stranger’s offer “to support a party’s litigation costs in exchange for a payment contingent on the outcome of the case,” although with varying limitations).

7 Where some or all of the parties’ claims arise under federal law, federal courts apply federal common law to determine whether documents or other forms of evidence are protected from disclosure by the attorney-client privilege. See Fed. R. Evid. 501 (“Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the
privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

However, state law determines the scope of the attorney-client privilege in federal court litigation where the parties' claims are grounded solely in state law and subject matter jurisdiction is based on diversity of citizenship under 28 U.S.C. § 1332. In both types of cases, federal law determines whether documents are protected from disclosure under the work product doctrine. See, e.g., Orbit One Commc'ns, Inc. v. Numerex Corp., 255 F.R.D. 98, 103 (S.D.N.Y. 2008) (“[W]here state law supplies the rule of decision, state law determines the existence and scope of the attorney-client privilege. However, federal law always controls application of the attorney work product doctrine.”) (citations omitted).


11 Fed. R. Civ. P. 30(c)(2) (emphasis added).

12 Fed. R. Civ. P. 30(c)(2).

13 In re County of Erie, 473 F.3d 413, 418 (2d Cir. 2007).


16 In re County of Erie, 473 F.3d at 420.

17 Id. at 421 n.8.

18 In re Grand Jury Subpoena Dated July 6, 2005, 510 F.3d 180, 183 (2d Cir. 2007).


20 Id. at 512.


22 The Fifth Circuit is a notable exception. See U.S. v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981) (stating that a document will be protected as work product where “the primary motivating purpose behind the creation of the document was to aid in possible future litigation”).

23 U.S. v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998) (“[D]ocuments should be deemed prepared ‘in anticipation of litigation,’ and thus within the scope of the Rule, if ‘in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.’”) (quoting Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 FEDERAL PRACTICE & PROCEDURE § 2024, at 343 (1994)) (emphasis in original).

24 See Adlman, 134 F.3d at 1200.

25 Id. at 1204.

26 See Fed. R. Civ. P. 26(b)(3)(A) (work product protection extends only to “documents and tangible things that are prepared in anticipation of litigation or for trial”).

27 Id.

28 In re Terrorist Attacks on Sep. 11, 2001, No. 03-MDL-1570, 2008 WL 8183819, at *6 (S.D.N.Y. May 21, 2008) (“Although Rule 26(b)(3), by its terms, is limited to the protection of documents, the work-product rule, which traces its roots to Hickman . . ., extends to ‘all trial preparation activities and all communications made principally for the purpose of preparing for litigation or trial.’”) (quoting In re Gulf Oil/Cities Serv. Tender Offer Litig., Nos. 82-cv-5253, 87-cv-8982, 1990 WL 108352, at *3 (S.D.N.Y. Jul. 20, 1990); see also Export-Import Bank of the U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103, 112 (S.D.N.Y. 2005) (“Pre-deposition conversations [with a witness] may . . . be work product; to the extent [a party’s] attorneys communicated their legal opinions and theories of the case, their conversations are immune from discovery.”).


30 Adlman, 134 F.3d at 1204.
In re Grand Jury Subpoena Dated July 6, 2005, 510 F.3d 180, 183 (2d Cir. 2007).


See S.E.C. v. Strauss, No. 09-cv-4150, 2009 WL 3459204, at *6 (S.D.N.Y. 2009) (interview notes and memoranda prepared by non-attorney staff of the Securities Exchange Commission were protected on work product grounds where non-attorney staff was “supervised by and acting at the direction of an attorney”).

Some courts have held that documents prepared by non-attorneys may even qualify as opinion work product. See, e.g., Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1219 (4th Cir. 1976) (noting that “opinion work product immunity now applies equally to lawyers and non-lawyers alike”) (internal quotation omitted); Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc., No. 00-cv-0783, 2001 WL 1180694, at *2 (D. Mass. Sep. 25, 2001) (“[T]he mental impressions, opinions, or litigation theory of a party’s non-attorney employee may qualify as opinion work-product when the party’s non-attorney employee is acting on the party's behalf.”).


See Morgan Stanley High Yield Sec., Inc. v. Jecklin, No. 2:05-cv-01364, 2011 WL 69206, at *2 (D. Nev. Jan. 10 2011) (ordering Swiss defendants to produce documents concerning communications with their in-house counsel that occurred in Switzerland); In re Rivastigmine Patent Litigation, 237 F.R.D. 69, 76-78 (S.D.N.Y. 2006) (ordering Swiss pharmaceutical company to produce documents reflecting communications with the company’s in-house counsel and rejecting argument that although the documents in question may not have been privileged under Swiss law, a Swiss court would not have ordered the documents to be produced in the first place given the limited scope of document disclosure in Switzerland).


As to federal court cases, compare Giucci America, 271 F.R.D. at 73 (“Because the [work product] doctrine is procedural in nature, the rules of the forum court apply and it is therefore not subject to a choice of law analysis.”) with Astra Aktiebolag v. Andrx Pharm., Inc., 208 F.R.D. 92, 97, 102 (stating that “determination of the applicability of attorney-client privilege or work product protection [in respect of foreign documents] . . . implicates issues of foreign law” without drawing any apparent distinction between the attorney-client privilege and the work product doctrine but ultimately applying federal law because “ordering discovery without any protection . . . offends the public policy of this forum”).

As to state court cases, compare In re Arterial Vascular Engineering, Inc., No. 05-99-01753-cv, 2000 WL 1726287, at *11-12 (Tex. Ct. App. Nov. 21, 2000) (engaging in choice of law analysis to determine which state’s law should determine whether documents were protected by the work product doctrine after concluding that “the same principles favoring use of the most significant relationship test for deciding the attorney-client privilege also apply to the attorney work product privilege”) with Brandman v. Cross & Brown Co. of Florida, Inc., 125 Misc.2d 185, 186 (Sup. Ct. Kings County 1984) (applying choice of law analysis to determine which state’s law governed whether documents were protected by the attorney-client privilege but holding that “claims of . . . work product . . . are governed by the New York [Civil Practice Law and Rules] as a matter of pure procedure”).

See Morgan Stanley High Yield Sec., 2011 WL 69206, at *2 (denying request to compel production of documents containing “the advice, thoughts, and impressions of counsel regarding legal matters within the United States and/or between attorney and client or between co-counsel [that] concern events that took place in the United States”); cf. Astra Aktiebolag, 208 F.R.D. at 98 (“Where . . . alleged privileged communications took place in a foreign country or involved foreign attorneys or proceedings, this court defers to the law of the country that has the ‘predominant’ or ‘the most direct and compelling interest’ in whether those communications should remain confidential, unless that foreign law is contrary to the public policy of this forum.”) (emphasis added).
See, e.g., Aqua Products, 2006 WL 2884913 (where defendants produced only a portion of the materials responsive to plaintiff’s document requests, withholding other materials on the basis that they contained confidential business information, including customer addresses which, if disclosed to the plaintiff, might cause the defendants to lose customers, court ordered defendants to produce the withheld materials on an “attorneys eyes only” basis).

See Chembio Diagnostic Systems, Inc. v. Saliva Diagnostic Systems, Inc., 236 F.R.D. 129, 136 (E.D.N.Y. 2006) (where the party resisting discovery demonstrates that the documents or other information sought constitute a highly confidential trade secret, the burden shifts to the party seeking discovery “to establish that disclosure pursuant to [a] protective order, rather than no disclosure, is warranted because the confidential information is relevant and necessary”).

See, e.g., U.S. v. Stewart, 287 F. Supp. 2d 461, 464 (S.D.N.Y. 2003) (“[T]he law in this Circuit is clear: apart from a few recognized exceptions, disclosure to third parties of attorney-client privileged materials results in a waiver of that privilege.”).

See, e.g., SR Int’l Business Ins. Co. v. World Trade Center Properties LLC, No. 01 Civ. 9291, 2002 WL 1334821, at *3 (S.D.N.Y. Jun. 19, 2002) (the common interest doctrine is “a limited exception to the general rule that the attorney-client privilege is waived when a protected communication is disclosed to a third party”).


See Bank of America, N.A. v. Terra Nova Ins. Co., 211 F. Supp. 2d 493, 497 (S.D.N.Y. 2002) (as borrower’s payment of bank’s attorneys’ fees in connection with negotiation of letter of credit agreement was not indicative of identity of interest and did not give rise to common interest privilege, bank was required to produce documents concerning letter of credit agreement to borrower’s reinsurer).

Compare this to the situation in other common law jurisdictions in which confidential communications by third parties made for the dominant purpose of a lawyer providing a client with legal advice may be protected by privilege. See, e.g., in Australia, Brookfield Multiplex Ltd v. International Litigation Funding Partners Pte Ltd (No 2) [2009] FCA 449; Spotless Group Ltd v. Premier Building & consulting Group Pty Ltd (2006) 16 VR 1.

Leader Techs., Inc. v. Facebook, Inc., 719 F. Supp. 2d 373 (D. Del. 2010).

Id. at 376.

Id.


See Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc., 229 F.R.D. 441, 445-46 (S.D.N.Y. 2004) (“The work product privilege is not automatically waived by any disclosure to third persons. Rather, the courts generally find a waiver of the work product privilege only if the disclosure substantially increases the opportunity for potential adversaries to obtain the information. Implicit in this analysis is the question of whether the third party itself can or should be considered an adversary. Accordingly, courts have generally held that where the disclosing party and the third party share a common interest, there is no waiver of the work product privilege.”) (internal quotations and citations omitted).

Costabile, 254 F.R.D. at 164.


Id.

has a strong incentive to comply with the agreement since breaching it would surely result in the inability to attract clients in the future.”).

60 Lyon, supra note 5, at 605.


62 Id. at *2.

63 Id.

64 Id.

65 Id. at *3.

66 Id.

67 Id.


69 Id. (internal quotations and citations omitted).

70 Id.

71 See Leader Techs., 719 F. Supp. 2d at 375-76 (plaintiff challenged the magistrate judge’s “finding that no common legal interest protecting attorney-client or work product privileged information could exist because a deal was not consummated between [plaintiff] and the litigation financing companies”) (emphasis added).

72 See id. at 376-77.


74 Id. at 8.


77 See, e.g., Microsoft Corp. v. Fed. Ins. Co., No. M8-85, 2003 WL 548758, at *2 n.1 (S.D.N.Y. Feb. 25, 2003) (“The specific matter at issue here is whether the attorney-client privilege has been waived by Microsoft, a Washington state corporation, in regard to materials created and held by [the law firm of] Sullivan & Cromwell throughout the United States, including New York, New Jersey, Washington D.C., and Los Angeles. It would appear that Washington state, where [Microsoft] is headquartered, has the most contacts with the issue raised here, and accordingly Washington state law should apply.”); ICI Americas Inc. v. John Wanamaker of Philadelphia, No. 88-cv-1346, 1989 WL 38647, at *2 (E.D. Pa. Apr. 18, 1989) (engaging in choice of law analysis and concluding that “the court shall apply the law of Pennsylvania on the question of waiver of the attorney-client privilege”); see also In re IPCOM GmbH, Misc. No. 972, 2011 WL 2490984 (Fed. Cir. Jun. 22, 2011) (where German defendant in patent infringement action argued that German law should govern whether attorney-client privilege had been waived as to correspondence maintained in German law firm’s files, court declined to engage in choice of law analysis where “the issue of a possible waiver under German law was never . . . briefed by any of the parties” and defendant thus could not “establish [that] a conflict exists between German and United States law”).

78 See Fed. R. Evid. 602 (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”).

79 See Fed. R. Evid. 801(c) (defining “hearsay” as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted”).

80 See Fed. R. Evid. 402 (“Evidence which is not relevant is not admissible.”).

81 It is at least conceivable that a party might seek to depose an employee of the third party funder. Information-gathering is often one of the principal objectives of a deposition, and a party might pursue the deposition of a third party funder’s employee for purposes of learning more about the opposing party’s case, regardless of whether the employee’s testimony would be admissible at trial. In that scenario, opposing counsel would almost certainly seek a protective order pursuant to Federal Rule of Civil Procedure 26(c) to prevent the deposition from going forward. Unless the party seeking to depose the third party funder could plausibly show that the deposition is reasonably calculated to yield admissible evidence and amounts to more than just a
“fishing expedition” into the other party’s case, the court would likely grant the protective order. See, e.g., Braga v. Hodgson, 605 F.3d 58, 60 (1st Cir. 2010) (affirming grant of protective order where party seeking deposition had not “plausibly suggested that the [witness to be deposed] had any personal knowledge” of relevant events and the “request to depose was not reasonably calculated to yield discoverable materials and was instead closer to a fishing expedition”).

§ 41 of the Attorney Act of the Canton of Zurich (Anwaltsgesetz des Kantons Zürich), in force since January 1, 2005.

For the sake of simplicity, all references to Swiss statutes and legal terms in this article will be in German only. It should be noted, however, that there are four national/official languages in Switzerland (German, French, Italian and Rumantsch), and that all federal statutes are published in three languages (German French and Italian), which are deemed co-equal, e.g., for purposes of statutory interpretation.

Federal Supreme Court Decision (Bundesgerichtsentscheid or “BGE”) 131 I 223.


An exception exists in family law and other similar proceedings, where the court can order the production of documents of its own accord, even in the absence of a request by a party.

See Art. 154 of the Swiss Civil Procedure Code (Zivilprozessordnung or “ZPO”).


Id.

Relevant provisions include, e.g., the duty of employees to maintain manufacturing and commercial secrets, etc. pursuant to Art. 321a para. 4 of the Swiss Code of Obligations (Obligationenrecht or “OR”), which is complemented by the protection of manufacturing and commercial secrets in criminal law pursuant to Art. 162 of the Swiss Criminal Code (Strafgesetzbuch or “StGB”). Concerning protection under criminal law, see Amstutz/Reinert, Basler Kommentar zum Strafrecht II (2d ed. Basel 2007), Art. 162, at note 11 et seq.

See Amstutz/Reinert, supra note 90. As stated there, the relevant criterion is whether the secret holder retains control over the dissemination of the secret. As long as the secret holder (legally or de facto) has the power to control or prevent dissemination of the information in question (e.g., by de facto limiting the sphere of those with knowledge of the information or through the use of legal safeguards such as a confidentiality agreement), the information is not deemed to be known.

Concerning attorney secrecy, see in particular Fellmann, Anwaltsrecht, Bern 2010, at note 507; BGE 131 I 223, at 235.

Concerning the confidentiality of information necessary for protection under attorney secrecy, see Fellmann, supra note 92, at note 430 (stating that the number of people with knowledge of the information is irrelevant, as long as the party in question does not yet have knowledge of the information and could not gain access to it other than through the attorney without facing substantial obstacles).

See Art. 321 StGB, which also applies to members of the clergy, medical practitioners, notaries and certain other professionals including their staff.

Art. 160 ZPO; Art. 264 letter b StPO.

Art. 321a para. 4 OR.

Art. 162 StGB.

A third party funder will regularly be subject to an obligation of this kind.

Federal Attorney Act, supra note 85.

The same requirement applies to information that attorneys obtain from third parties with the client’s knowledge and will. See Fellmann, supra note 92, at note 447.


In respect of attorney secrecy pursuant to Art. 13 of the Federal Attorney Act, this is a result of the fact that in-house lawyers lack the necessary independence to be registered in an attorney registry and thus are not subject to the Act. In respect of Art. 321 StGB, see Oberholzer, supra note 101, Art. 321 StGB, at note 5. In-house
counsel is therefore subject only to the obligation to maintain manufacturing and commercial secrets, which is likewise protected by the penal law (Art. 162 StGB). The status of in-house counsel is unlikely to change in the near future, given that the Swiss cabinet withdrew draft legislation concerning in-house counsel in June 2010 after it became clear that the legislation lacked majority support for passage.

See Oberholzer, supra note 101, Art. 321 StGB, at note 13; see also BGE 115 Ia 197 concerning the right to refuse testimony in criminal proceedings.

Art. 321 StGB.

See Schmid, supra note 88, Art. 160 ZPO, at note 77. In respect of manufacturing or commercial secrets, however, in-house counsel should be in a position to invoke the limited right to refuse participation pursuant to Art. 166 paragraph 2 ZPO. Pursuant to that provision, holders of statutorily protected secrets other than those listed in paragraph 1 of Art. 166 ZPO are entitled to refuse participation in the proceedings if they can credibly show that the interest in maintaining the secret in question outweighs the interest in ascertaining the truth.

A different rule applies where in-house counsel is examined as a witness pursuant to the Hague Convention of 18 March 1970 on the Taking of Evidence in Civil or Commercial Matters (SR 0.274.132). Article 11 of the Convention provides that “[i]n the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence - a) under the law of the State of execution; or b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.”

The attorney retains the right to refuse participation notwithstanding the fact that the client’s release removes the risk of criminal liability pursuant to Art. 321 StGB.

Art. 160 para. 1 letter b ZPO.

This is particularly true in situations where the attorney correspondence in question was disclosed to a third party, such as a third party funder, with the knowledge and will of the client.


This also corresponds with the protection afforded by Article 264 of the Swiss Code of Criminal Procedure, which refers broadly to “materials” rather than “correspondence.” Any protection is, however, subject to the general prohibition on abuse of a legal right (Rechtsmissbrauchsverbot), which would be implicated, for example, where materials are handed over to an attorney solely for the purpose of safekeeping or to create a basis for refusing production of the materials.


See Frank/Sträuli/Messmer, Kommentar zur zürcherischen Zivilprozessordnung (3d ed. Zurich 1997), § 145 note 3a. The new Federal Civil Procedure Code, which took effect on January 1, 2011, adopted this provision almost verbatim from the prior civil procedure codes of the Cantons, particularly the Civil Procedure Code of Zurich. Accordingly, the literature and case law concerning the parallel provisions in the prior civil procedure codes of the Cantons remains relevant.


See Guyan, Basler Kommentar zur schweizerischen Zivilprozessordnung, Art. 156 ZPO, at note 6; Frank/Sträuli/Messmer, supra note 114, § 145 note 3 et seq.

See BGE 95 I 107, 445.

In this context, it could also be argued that information a third party funder has obtained from clients constitutes a commercial secret of the third party funder.

This assumes that the third party funder’s testimony as a witness is not already barred by operation of Art. 169 ZPO, which provides that only facts that the witness has observed first-hand are susceptible to witness testimony. Hearsay is generally excluded from testimony. That rule alone will usually preclude the examination of the third party funder as a witness concerning information obtained from a party or the party’s counsel in the course of due diligence.
This is the case for the following reasons: The opposing party would need to demonstrate that the witness made first-hand observations in respect of a specific issue to be proved. Moreover, the witness could invoke Art. 166 para. 2 ZPO (commercial secrets of the third party funder) as well as Art. 156 ZPO (protection of legitimate interests).

This assumes a sufficiently specific request for production.

Where the opposing party does have knowledge of particular internal documents, however, a request for production may be expected. This may be the case, for example, where criminal proceedings are pending in addition to civil litigation and the documents in question have been seized by the authorities in the criminal proceedings.


See generally Tevendale & Cartwright-Finch, *supra* note 125, at 830-34.


Tevendale & Cartwright-Finch, *supra* note 125, at 834.


Id.

Id.

Id.

Third-party funding update: New York court narrowly applies champerty law while Florida court holds investors can be liable for costs

Through ‘third-party funding’, an entity underwrites all or some of the costs associated with litigation or arbitration, typically in exchange for a share of any successful outcome. Perhaps because of the presence of an active plaintiffs’ bar and the availability of contingency fees, this model has been slow to take root in the US. However, this initial reticence to embrace third-party funding seems to be waning. ¹

Moreover, international arbitration cases are seen as particularly well-suited to the financial products available today.

Those watching developments in the US will be interested to note two recent cases that provide relatively rare judicial commentary on third-party funding. While both decisions arose from litigation matters, they should also provide useful signposts in the international arbitration context.²

Love Funding: An assignment of rights does not violate the doctrine of champerty where the acquirer has a pre-existing proprietary interest in the subject matter of the claim

The recent opinion by the New York Court of Appeals in Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors, Inc

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Mortgage Pass-Through Certificates v Love Funding Corp focuses on a challenge to the validity of the assignment of a claim in the context of purchasing distressed debt. In addressing that issue, the state’s highest court also commented on the scope of New York’s statute codifying the old English common law doctrines of maintenance and champerty. That statute, in summary, provides that a corporation or association may not ‘solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of . . . any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon.’

Background on maintenance and champerty

‘Maintenance’ has been defined as ‘assistance to a litigant in pursuing or defending a lawsuit provided by someone who does not have a bona fide interest in the case’, while ‘champerty’ is a form of maintenance that ‘involves the unlawful maintenance of a suit in consideration of a bargain for some part of the thing involved.’ The rules governing champerty vary significantly from state to state within the US, ranging from an outright prohibition on champertous arrangements, to the application of a narrower form of the champerty doctrine, to outright abolition of the traditional champerty defence. In some states, entering into a champertous relationship may even be a criminal offence.

In the specific context of third-party funding, some courts have explicitly held that litigation funding arrangements do not run afoul of state champerty law, while others have reached the opposite conclusion. A few have also attempted to regulate certain forms of litigation funding. In any event, anyone contemplating such an arrangement must analyse the specific state laws and local attorney rules of professional conduct.

The dispute in Love Funding

The case arose out of a dispute between a trust representing certain Merrill Lynch investors (the ‘Trust’) and Love Funding Corporation (Love Funding), a mortgage loan originator. Pursuant to an April 1999 Mortgage Loan Purchase Agreement (‘MLPA’) between Love Funding and Paine Webber, Love Funding arranged a US$6.4 million mortgage loan (the ‘Arlington Loan’) in July 1999. As part of a larger package of loans, Paine Webber subsequently sold the Arlington Loan to Merrill Lynch in November 1999. The loans were then pooled, securitised and sold to investors, and Merrill Lynch assigned all of its rights to the Trust.

In 2002, the Trust demanded that UBS (which had since acquired Paine Webber) repurchase a number of loans, including the Arlington Loan, that had been negatively impacted by defaults. The parties subsequently engaged in lengthy litigation before settling their dispute in September 2004. As part of the settlement, UBS assigned to the Trust all of its rights against Love Funding pursuant to the original MLPA with Love Funding.

The Trust then sued Love Funding under the original MLPA. Following a bench trial, the federal trial court judge ruled in Love Funding’s favour that the assignment of UBS’s claims against Love Funding to the Trust violated New York’s champerty statute. In short, the court concluded that the champertous nature of the assignment was evidenced, inter alia, by: (i) the Trust’s belief that it could recover more in a lawsuit against Love Funding than by pursuing a cash settlement with UBS; and (ii) the possibility that, pursuant to the Love Funding MLPA, the Trust might seek indemnification for UBS’s legal fees incurred in litigating against the Trust.

The critical issue is the purpose behind the acquisition of rights that enabled the acquirer to bring suit

On appeal, the US Court of Appeals for the Second Circuit (the Second Circuit) determined that the case presented issues that were not clearly answered by established New York precedent and therefore certified the following questions to the New York Court of Appeals:

1. whether New York’s champerty statute applies only to transactions where the assignee’s ‘sole’ purpose is to engage in champerty, or whether it also applies where champerty is the assignee’s ‘primary’ purpose;

2. whether a party ‘commit[s]’ champerty when it “buys a lawsuit” that it could not otherwise have pursued if its purpose is thereby to collect damages for losses on a debt instrument in which it holds a pre-existing proprietary interest;
(3) (a) whether a party ‘commit[s]’ champerty when, as the holder of a defaulted debt obligation, it acquires the right to pursue a lawsuit against a third party in order to collect more damages through that litigation than it had demanded in settlement from the assignor; and

(3) (b) whether ‘the answer to question 3(a) [is] affected by the fact that the challenged assignment enabled the assignee to exercise the assignor’s indemnification rights for reasonable costs and attorneys’ fees.’

The Court of Appeals answered questions 2, 3(a) and 3(b) in the negative and determined that it was unnecessary to answer the first question. In declining to answer the first question, however, the Court agreed with the Second Circuit that the question of whether champerty was the assignee’s ‘sole’ or merely ‘primary’ interest in entering into the transaction was, at least in this case, not critical. Instead, the ‘critical issue’ was ‘the purpose behind [the Trust’s] acquisition of rights that allowed it to sue’ Love Funding. In this respect, ‘[i]f, as a matter of fact, the Trust’s purpose in taking assignment of UBS’s rights under the Love [Funding] MLPA was to enforce its rights, then, as a matter of law, given that the Trust had a preexisting proprietary interest in the loan, it did not violate’ the champerty statute. In accordance with the Court of Appeals’ opinion, the Second Circuit has since remanded the case to the district court for entry of judgment in favour of the Trust and a calculation of damages, concluding ‘as a matter of law that the trial record does not permit the Trust’s acquisition of UBS’s rights under the Love MLPA to be held champertous in violation of New York Judiciary Law § 489(1).’

In reaching the conclusion that UBS’s assignment of rights to the Trust did not violate New York’s champerty statute, the Court of Appeals summarised the historical background to the New York champerty statute, emphasising its ‘narrow scope’. The court referred to the doctrine of champerty as being ‘limited in scope and largely directed toward preventing attorneys from filing suit merely as a vehicle for obtaining costs’. According to the court, the statute still prohibits ‘the purchase of claims with the intent and purpose of bringing an action [such] that [the purchaser] may involve parties in costs and annoyance, where such claims would not be prosecuted if not stirred up.’ While identifying such a scenario is likely to be fact-intensive, the court was unequivocal that the champerty statute ‘does not apply when the purpose of an assignment is the collection of a legitimate claim’. On its face, the Court of Appeals’ opinion further shrinks the reach of the champerty doctrine.

Abu-Ghazaleh v Chaul: Non-party investor can be liable for attorneys’ fees and costs

While funders may take heart from the Love Funding decision, a 2 December 2009 Florida state appellate court ruling may strike a raw nerve. In Abu-Ghazaleh v Chaul, the District Court of Appeal for the Third District reversed the trial court to find that an investor who had funded an unsuccessful litigation could be liable for attorneys’ fees and costs. The case was remanded to determine the amount of the award.

The underlying litigation arose from a dispute in which shareholders of a Mexican corporation brought suit against the purchasers of two of the Mexican company’s subsidiaries, alleging that the purchasers had committed civil theft. A jury eventually returned a verdict in favour of the defendants. As a result of collateral litigation in New York, the successful defendants discovered that the plaintiffs’ claim was being funded by a Mr van Diepen and CSI Financial Investments Company, Inc (the ‘Investors’).

The defendants then filed motions for recovery of attorneys’ fees and costs, as permitted under the relevant Florida statutes, against the unsuccessful plaintiffs and also the Investors. The trial court denied the motion. The appellate court reversed the trial court, holding that the Investors, although not named as parties to the litigation, were still ‘parties’ for purposes of the statutes because on the face of the investment agreement, they ‘financed and controlled the litigation’. Specifically, the Investors stood to receive a percentage of any award and reimbursement of expenses. Moreover, they had to approve filing the lawsuit, selecting counsel, retaining witnesses and payment of counsel’s bills. The Investors also had the power to veto any settlement offer. The court thus found that the Investors had ‘such control… as to be entitled to direct the course of the proceedings’, and were therefore to be treated as ‘part[ies] to the suit’ for purposes of awarding costs.
What do these cases mean for the future of third-party funding?

The Love Funding decision can be read as applying only to the specific scenario of assigning claims in the context of buying and selling distressed debt. Moreover, its precedential value may be further circumscribed by the court’s focus on a situation in which the assignee has a preexisting ‘proprietary interest’ in the underlying subject matter of the claim (although the subject matter of the claim here was extended to the Arlington Loan and not just the Love Funding MLPA). Therefore, depending on the specific structure employed, the case should have no direct bearing on most forms of ‘pure’ litigation funding. Nevertheless, the opinion is significant as a pronouncement by New York’s highest court that the champerty statute should be construed narrowly and not so as to interfere with the assignment of a right to collect on a legitimate claim.

Similarly, the impact of the court’s opinion in Abu-Ghazaleh may be limited to the context of statutory awards of attorneys’ fees and costs in the Florida courts. Such awards are rare in the US, and professional funders (unlike the Investors in Abu-Ghazaleh) are unlikely to underwrite a claim that is so weak as to result in a costs award. Interestingly, however, the issue of whether third-party funders should be liable for costs has already been grappled with in non-US jurisdictions where costs awards are more common. The English Court of Appeals, for example, opined in 2005 that in certain circumstances, a litigation funder may be held liable for costs to the extent of the funding provided.

As the third-party funding market matures in the US, there will undoubtedly be more judicial attention given to such arrangements. In the meantime, cases like Love Funding and Abu-Ghazaleh provide useful guidance on the direction in which the law is developing.

Notes
1 See, eg, Jonathan D Petrus, ‘Legal and Ethical Issues Regarding Third-Party Litigation Funding’, Los Angeles Lawyer 16 (November 2009); Anne Urda, ‘Legal Funding Gains Steam But Doubts Linger’, Laa360 (27 August 2008).
2 To date, it appears that there are no reported cases in which a US court has had to address any challenge to an arbitration award that is the product of a third party-funded claim. But see Fausone v US Claims, Inc, 915 So.2d 626 (Fla Ct App 2d Dist 2005) (upholding confirmation of arbitration award in favour of litigation funder’s claim for recovery of unpaid amounts under funding agreement).
4 N Y Judiciary Law § 489(1).
5 Rancman v Interim Settlement Funding Corp, 99 Ohio St.3d 121, 123, 789 N E.2d 217, 219 (Ohio 2003).
7 See, eg, Rancman, 99 Ohio St.3d at 125, 789 N E.2d at 221 (‘Except as otherwise permitted by legislative enactment or the [Ohio] Code of Professional Responsibility, a contract making the repayment of funds advanced to a party to a pending case contingent upon the outcome of that case is void as champerty and maintenance.’) (but subsequent legislation permits certain forms of litigation funding); Schwartz v Eboues, 113 Nev 586, 589, 939 P.2d 1034, 1056 (Nev 1997) (‘To maintain the suit of another is now, and always has been, held to be unlawful, unless the person maintaining has some interest in the subject of the suit.’) (quoting Lam v Stennett, 87 Nev 402, 408, 488 P.2d 347, 350 (Nev 1971)).
8 See, eg, Odell v Legal Bucks, LLC, 192 N C App 298, 309, 665 S E 2d 767, 775 (N C Ct App 2008). ([North Carolina] Courts have held for at least a century that an outsider’s involvement in a lawsuit does not constitute champerty or maintenance merely because the outsider provides financial assistance to a litigant and shares in the recovery. Rather, a contract or agreement will not be held within the condemnation of the principle[s] ... unless the interference is clearly officious and for the purpose of stirring up ‘strife and continuing litigation.’) (internal quotation omitted, alteration in original).
9 See, eg, Oipry, Inc v Cabana Ltd, P’ship, 340 S C 367, 382, 532 S E 2d 269, 277 (S C 2000) (‘[W]e abolish champerty as a defence. We are convinced that other well-developed principles of law can more effectively accomplish the goals of preventing speculation in groundless lawsuits and the filing of frivolous suits than dated notions of champerty.’); Saladin v Righellis, 426 Mass 231, 235, 687 N E.2d 1224, 1226-27 (Mass 1997) (‘We ... no longer are persuaded that the champerty doctrine is needed to protect against the evils once feared: speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position. There are now other devices that more effectively accomplish these ends.’).
12 See, eg, Rancman, 99 Ohio St.3d, at 125, 789 N E.2d at 221 (‘[A] lawsuit is not an investment vehicle. Speculating in lawsuits is prohibited by Ohio law. An intermeddler is not permitted to gorge upon the
fruits of litigation.

13 See, eg, N Y State Bar Ass’n, Comm on Prof’l Ethics, Op 769, at *2-3, 2003 WL 23099781 (2003) (attorneys are permitted to negotiate agreements with litigation-funding companies on behalf of their clients in personal injury matters, provided that the agreements are legal under New York law and the attorney discloses potential conflicts of interest and threats to the attorney-client privilege, and provided that the attorney either disclaims any endorsement of the litigation funding arrangement or alternatively ‘advise[s] the client of the costs and benefits of the proposed transaction, as well as possible alternative courses of action’).
15 Ibid, at 322-323.
16 Trust for Certificate Holders of Merrill Lynch Mortg Investors, Inc v Love Funding Corp, 556 F.3d 190 (2d Cir 2009).
17 The procedure by which the federal appellate court can certify questions of law to the New York Court of Appeals is invoked only rarely; See NY Constitution, Article VI, § 3(b)(9) and 22 NYCRR § 550.27.
18 Love Funding, 13 N.Y.3d at 198.
20 Ibid, at 199.
21 Ibid, at 199 (citing Bluebird Pns, L.P. v First Fidelity Bank N.A., 94 N Y 2d 726, 734 (N Y 2000)).
22 Ibid, (citing Wightman v Catlin, 98 N Y S 1071, 1074 (N Y App Div 2d Dep’t 1906)).
23 Ibid, at 201.
24 Ibid, at 201.
26 The appellate court found that the Investors could be liable under the general Florida statute for recovery of attorneys’ fees and under the civil theft statute. Ibid, at *2-3. But it further found that the Investors had not been served with an offer of judgment to be held liable under that statute. Ibid. The appellate court also declined to reverse the trial court’s denial of defendants’ motion for discovery to investigate the extent of the Investors’ involvement in the litigation, as there was already adequate information regarding this issue on the face of the agreement by which the investment was made. Ibid.
27 Ibid, at *2 (citing Visoly v Security Pac Credit Corp, 768 So.2d 482, 489 (Fla Ct App 3d Dist. 2000) (holding that shareholders of, and counsel to, a party could fall within the statute)).
28 Ibid, at 201.
29 Arkin v Bashford Lines Ltd & Ors (No. 3) [2005] EWCA 655 (Eng C.A.).

Aurelis Capital Partners, LP v The Republic of Argentina: A further step in our understanding of the Foreign Sovereign Immunities Act

On 15 October 2009, the United States Court of Appeals for the Second Circuit handed down its decision in Aurelis Capital Partners, LP v The Republic of Argentina, in a long-running dispute between the Republic of Argentina and Argentine debt bondholders. The case has significant implications in the areas of sovereign debt default and the enforcement of judgments and arbitral awards against states, including investor-state arbitral awards.

The Argentine pension system

In 2001, in the midst of an infamous financial crisis, Argentina defaulted on debt payments to an assortment of bondholders. Because Argentina had waived its sovereign immunity in order to entice potential purchasers to acquire Argentine debt instruments in the first place, many of the bondholders obtained United States court judgments against Argentina based on breaches of the bondholder agreements. However, as a consequence of the strictures of the United States Foreign Sovereign Immunities Act (FSIA), early enforcement attempts were unsuccessful because they attempted to seize ‘property that was immune from execution under the [FSIA] or property that did not belong to the Republic.’

On 21 October 2008, Argentine President Cristina Fernandez de Kirchner announced that the country’s retirement system would be restructured. In broad terms, from 1993 until 2008, Argentina’s social security system had been bifurcated into a government-run plan called the ‘Distribution System’ and a private plan called the ‘Capitalisation System.’ Under the Capitalisation System, Argentine workers contributed funds to individual accounts administered by private corporations who issued payments and benefits to the workers in exchange for management fees. Some of the Capitalisation System funds were held in

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Biographies
Hal Abramson is a Professor of Law at Touro Law Center, NY, has conducted mediation trainings throughout the United States and on five continents (17 countries). He is an active commercial mediator and has been selected for the International Who’s Who of Commercial Mediation since its inaugural year in 2011. He has chaired numerous national and international ADR committees including chairing the IMI Task Force in The Hague that launched the first ever program for certifying inter-cultural mediators.

For his contributions to the field of dispute resolution, he received the 2013 Peace Builder Award from the New York State Dispute Resolution Association. His widely used book, MEDIATION REPRESENTATION, received the annual book award from the CPR International Institute for Conflict Resolution and Prevention. He serves as the first scholar-in-residence for the International Academy of Mediators and as a Senior Saltman ADR Scholar at UNLV School of Law (Las Vegas).
JAMES H. CARTER is a Senior Counsel in the New York office of Wilmer Cutler Pickering Hale and Dorr LLP, where he serves as counsel and as an arbitrator. Mr. Carter has participated in more than 150 international commercial and investment arbitration cases. He has served as Chair of the Board of Directors of the American Arbitration Association, President of the American Society of International Law, Chair of the American Bar Association Section of International Law, Chair of several committees of the New York State Bar Association and a member of the London Court of International Arbitration. Mr. Carter is a Vice Chair of the New York International Arbitration Center, a member of the Court of Arbitration for Sport and Co-Chair of the Public Policy Committee of the College of Commercial Arbitrators. He is a graduate of Yale College and Yale Law School.
HON. BARRY A. COZIER (Ret.)

Barry A. Cozier is a member of LeClairRyan in its litigation practice, where he represents institutions and individuals in complex business and commercial litigation, real estate litigation, estates litigation, federal and state appeals, arbitration and mediation, as well as serves as special master in state and federal court discovery proceedings. From 2006 to 2011, Mr. Cozier was a member of Epstein Becker & Green, P.C., in the firm's national litigation and labor and employment practice groups. He was formerly an Associate Justice of the Appellate Division of Supreme Court, Second Judicial Department (2001-2006), Justice of the New York Supreme Court (1993-2001), Deputy Chief Administrative Judge for the New York State Courts (1994-1998), and a Judge of the Family Court of the State of New York (1986-1992). From 1998 to 2007, he also was an Adjunct Professor at Fordham University School of Law. Prior to his judicial service, Mr. Cozier was in private practice with a concentration in civil litigation, and served in various public sector legal positions.

Mr. Cozier currently is Vice-Chair of the Mayor's Advisory Committee On The Judiciary, a member of the New York State Judicial Screening Committee for the First Department, a Commissioner of the NYS Commission on Legislative, Judicial and Executive Compensation, the Board of Directors of the New York University School of Law Alumni Association, a Fellow of the New York Bar Foundation, a member of the Executive Committee of the Commercial and Federal Litigation Section, and co-chair of the Ethics Committee of the Dispute Resolution Section of the New York State Bar Association, as well as a member of the Advisory Board of Poverty Justice Solution (Center For Court Innovation). Mr. Cozier was a contributing author to the Thomson West New York Practice publication entitled "Commercial Litigation in New York State Courts," where he authored the chapter on Summary Judgment. Mr. Cozier received his Bachelor of Arts, magna cum laude, from the State University of New York at Stony Brook in 1971 and his Juris Doctor from New York University School of Law in 1975.
William (Bill) Crosby, Jr. is Vice President, Associate General Counsel and Managing Attorney at Interpublic Group, a New York based advertising and marketing company with over 45,000 employees worldwide. At Interpublic, where he has been since 2002, Bill oversees global litigation and manages the Latin American practice. He was an associate at Davis Polk & Wardwell from 1993 until 1995 and at Kay, Collyer & Boose (now defunct) from 1995 until 2002. Since 2009, Bill has served as a member of the commercial panel of arbitrators for the American Arbitration Association. He has served as arbitrator in more than seventy actions, involving such areas as franchising, intellectual property, and general commercial disputes. Bill has spoken on arbitration related issues at conferences sponsored by the New York State Bar Association Dispute Resolution Section, the Association for Conflict Resolution of Greater New York and the Association of Corporate Counsel, among others. Bill is a 1990 graduate of Yale College and a 1993 graduate of Stanford Law School.
Hon. John P. DiBlasi (Ret.)
Judge DiBlasi is a former Justice of the New York State Supreme Court. His ADR practice encompasses a wide and varied range of cases, inclusive of commercial, class actions, civil rights, corporate dissolution, employment, debtor/creditor, investor fraud, libel and slander, professional liability—breach of loyalty/fiduciary duty, usury as well as multi-party catastrophic personal injury actions. In addition to hearing cases throughout New York State, he has handled significant, high-stakes matters in Boston, Chicago, Hartford, Las Vegas and Miami.
Judge DiBlasi’s many years of experience as a full-time arbitrator and mediator in commercial disputes are supplemented by his past tenure as the presiding justice of the commercial division of the Supreme Court, where he resolved hundreds of matters. As the first justice of the commercial part in the court in which he sat, he developed the rules for discovery practice and for the trial of commercial matters which are similar to those used in the federal courts. Judge DiBlasi created the Commercial Alternative Dispute Resolution Program, which was successfully implemented by the Court.


John D. Feerick  
Former Dean of Fordham Law

Professor Feerick is a graduate of Fordham College (1958) and Fordham Law School (1961), where he was editor-in-chief of the *Fordham Law Review*. He served as a practicing lawyer with the firm of Skadden, Arps, Slate, Meagher and Flom, 1961–82. He served as Dean of Fordham Law School, 1982–2002, and as a professor at Fordham, 1982–present, where he is the occupant of the School’s Sidney C. Norris Public Service Chair and senior counsel of its poverty center, the Feerick Center for Social Justice.

PUBLIC SERVICE

Served the Judiciary as a director of the American Judicature Society, chair (1995–1999) of the Fund for Modern Courts in New York, and chair (2003) of the New York State Commission to Promote Public Confidence in Judicial Elections, which recommended and helped secure the adoption of a statewide system of judicial qualification commissions; charter member of the New York State Continuing Legal Education Board for lawyers (1998–2002); Chair of the New York State Committee to Review Audiovisual Coverage of Court Proceedings (1996–97); and a member of the New York State Commission to Promote Public Trust and Confidence in the Legal System and of the Judicial Salary Commission.

Served the community as President (1987–1998) of Citizens Union Foundation; chair of the Board of Directors and Executive Committee of the American Arbitration Association (1997–2000); co-chair of a Statewide Coalition to promote ethics reforms in New York State; and chair of the board of the Center for Information on America.

Served New York Government as chair of the New York State Commission on Government Integrity (1987–1990); Chair of the New York State Ethics Commission; founding chair of the New York State Public Integrity Commission; a member of the New York State Law Revision Commission; Representative of New York City to the Office of Collective Bargaining; Special Master of Family Homelessness in New York City; and Judicial Referee in the public funding litigation known as Campaign for Fiscal Equity v. New York State.

COMMUNITY SERVICE

Professor Feerick has served widely as an arbitrator and mediator of disputes as a result of appointments by courts, provider organization, and parties, including as NFL special master and arbitrator, NBA arbitrator, chair of labor disputes at the New York Jacob Javits Convention Center, and as designated chair of labor disputes occurring at national political party conventions (1992 and 2004). He chaired the committee that produced the 1994 Model Standards for Mediators of Disputes.

Has served the Catholic Church in various capacities, most recently as a facilitator of a national dialogue on issues of worker rights resulting in a major document entitled “Just Rights for Workers.”

ARTICLES

Author of hundreds of articles and speeches on topics of constitutional and ethics reforms and other subjects of public interest. Author of several books, one of which, *The Twenty Fifth Amendment*, was nominated for a Pulitzer Prize, and acted as principal draftsmen of ABA publications on electing the President, amending the Constitution, and voter participation.

Professor Feerick is the son of Irish immigrants and is married to the former Emalie Platt and they have six children and 11 grandchildren.
Eric Galton is a principle mediator in Lakeside Mediation in Austin, TX. He is considered by many to be a pioneer and defining force in the field of Alternative Dispute Resolution. Since 1989 he has mediated over forty four hundred cases, employing a variety of mediation styles, and consistently maintains a 91% settlement rate. Mr. Galton is highly versatile; he mediates disputes ranging from a half day to two weeks in length, in cities all over Texas and elsewhere in the country, involving anywhere from two to 125 parties from a broad spectrum of ethnic, socioeconomic, political, and business backgrounds. He mediates disputes in over 17 areas of law. In addition to his wealth of practical experience, Eric Galton inspires and motivates participants through his uncompromising ethics, incisiveness, compassion, and genuine love of the mediation process.

Eric was listed as a Texas Super Lawyer in 2006 and 2007 by Texas Monthly Magazine and was one of five mediators listed in the Texas Lawyer Go-to-Guide in 2007. Eric is both a fellow and Governor of the International Academy of Mediators. Eric earned an undergraduate degree from Duke University in 1973, Magna Cum Laude with Distinction in History and a Juris Doctorate from the University of Texas School of Law in 1976.
Marc Goldstein

As author since 2009 of *Arbitration Commentaries* (http://arbblog.lexmarc.us), Marc Goldstein (www.lexmarc.us) is an essayist on developments in the law and practice of international arbitration in North America for an international readership. Engaged mainly as an arbitrator since 2006, he frequently sits in cases involving complex financial products and transactions, and has also conducted nearly 60 mediations. He has represented investors in arbitrations against States and State-owned entities, and has acted for U.S. and foreign clients in dozens of arbitrations and litigations in sectors as diverse as pharmaceuticals, real estate, construction, franchising, securities, banking, and sports/entertainment, and on legal subject matters ranging from public international law to U.S. antitrust and securities law. He is a member of the American Law Institute and the International Arbitration Clubs in New York and London. He is a Fellow of the College of Commercial Arbitrators and the Chartered Institute of Arbitrators. His name is included in the rosters of the AAA (ICDR and Large/Complex Case); CPR Distinguished Panels of Neutrals (international, accounting, banking-finance), and the International Arbitration Centres of Hong Kong, Singapore, and Kuala Lumpur. Mr. Goldstein was graduated from the University of Pennsylvania and the University of Virginia Law School, was admitted to the New York Bar in 1980, and led the international arbitration practices in two large New York firms between 1999 and 2007. He is a visiting lecturer in the professional development program at Osgoode Hall Law School in Toronto. His most recent journal article is "Annulled Awards in the U.S. Courts: How Primary Is Primary Jurisdiction?" found in Vol. 25 No. 1 of the American Review of International Arbitration.
Brad Heckman is Chief Executive Officer of New York Peace Institute, one of the nation's largest community mediation services. He is also an Adjunct Professor at New York University's Center for Global Affairs, where he received the Excellence in Teaching Award. He serves on the boards of the National Association for Community Mediation, the New York State Dispute Resolution Association, and was a founding Trustee of the New York City Peace Museum. Brad has trained labor unions, the NYPD, NASA, community organizations, United Nations programs, emerging women leaders in the Persian Gulf, and corporations in more than twenty countries. His interest in promoting peaceful dialogue began while he was teaching at a University in Poland in 1989, witnessing the transition from Soviet rule to democracy through round-table negotiations. Brad was previously a Vice President of Safe Horizon, a leading victims services and violence prevention agency, where he oversaw their Mediation, Families of Homicide Victims, Legal Services, Anti-Trafficking, Batterers Intervention, and Anti-Stalking Programs. He also served as International Director of Partners for Democratic Change, where he helped develop the first mediation centers in Eastern Europe, the Balkans, the former Soviet Union and Latin America. Brad received a Master of Arts in International Relations from the Johns Hopkins University School of Advanced International Studies.
James has 20 years of experience in international dispute resolution. Prior to co-founding New York litigation/arbitration boutique Chaffetz Lindsey in 2009, he was a partner with Clifford Chance in New York, and previously practiced in New Zealand.

James has handled arbitrations under the rules of the ICC, AAA/ICDR, LCIA, ICSID, SIAC, CRCICA and WIPO, as well as the UNCITRAL Rules. His current cases involve disputes concerning construction/infrastructure projects, corporate acquisitions, energy/power projects, pharmaceuticals, distribution agreements, mining ventures and investment treaties. In addition, James regularly sits as an arbitrator and has experience as a sole arbitrator, chairperson, co-arbitrator and emergency arbitrator.

Since moving to New York, much of James’s practice has focused on Latin America-related disputes. He is currently handling matters involving Argentina, Brazil, Chile, Colombia, Costa Rica, Guatemala, and Venezuela. He has a special interest in Asia-Latin America disputes.

James is also a litigator, having appeared in all levels of the courts in New York state as well as in federal court. Much of his litigation practice focuses on cross-border transactions, judgment/award enforcement and sovereign disputes.

James regularly writes and speaks on international arbitration, including co-authoring “Arbitration in the United States” in World Arbitration Reporter (Juris, 2013) and A Guide to the ICDR International Arbitration Rules (OUP, 2011). He is a member of the New York City Bar committee on arbitration, the International Arbitration Club of New York, and the American Society of International Law. He is currently on the ICC Task Force on Emergency Arbitration Proceedings and was on the committee that produced the 2014 revised ICDR International Arbitration Rules. He was previously New Zealand’s delegate at the UNCITRAL Working Group on arbitration and was co-chair of the ICDR’s young practitioners’ group.

James’s expertise has been recognized in Who’s Who of International Commercial Arbitration, Chambers Global, Chambers USA, Chambers Latin America, Legal 500 Latin America, and PLC Which Lawyer. In 2011, he was selected in Global Arbitration Review’s ranking of the “top 45 under 45” arbitration lawyers worldwide. Chaffetz Lindsey is recognized as a leading arbitration practice in several guides, including in Global Arbitration Review’s annual ranking of best 100 firms, in which it was also named “small firm of the year” in 2011.

James earned an LL.M. from Harvard Law School in 2000; he attended the University of Auckland from 1990-1994, receiving a B.A./LL.B. (Hons). He speaks English and German and has a basic knowledge of French and Spanish. He is admitted in New York and New Zealand.
Laura A. Kaster brings to her work as a neutral over 30 years of experience with arbitration, mediation and settlement negotiation in a wide variety of complex commercial and intellectual property disputes. In 2014 she received the Boskey Award recognizing the ADR Practitioner of the Year from the New Jersey State Bar Association. In 2015, she was selected for the Master Mediators Panel of the American Arbitration Association and Who’s Who Legal, Mediation. She is a Fellow in the College of Commercial Arbitrators and an Executive Committee member for the National Academy of Distinguished Neutrals and the New Jersey Academy of Mediators and Arbitrators. She is on the New Jersey Supreme Court Committee on Complementary Dispute Resolution. She serves as a neutral in the greater New York metropolitan area, as an arbitrator and a mediator for CPR (and on its technology panel), the American Arbitration Association, ICDR, FINRA and the New Jersey and New York Courts. She is CEDR accredited and IMI Certified. She is also a member of the Silicon Valley Arbitration and Mediation Center. Ms. Kaster is President of the Judge Marie Garibaldi Inn of Court, devoted exclusively to alternative dispute resolution, and a past Chair of the NJSBA Dispute Resolution Section. She has published and spoken widely on issues involving arbitration and mediation. She is co-editor in chief of New York Dispute Resolution Lawyer, the Journal of the NYSBA Dispute Resolution Section and a member of its executive committee.

She was chief litigation counsel for AT&T Corporation and AT&T Labs for almost 10 years. Prior to her work at AT&T, as a partner at Jenner & Block, where she worked for over twenty years. More information can be found at www.AppropriateDisputeSolutions.com.
Panel Discussion Biography

Daniel F. Kolb
Senior Counsel, Davis Polk & Wardwell LLP

Dan Kolb has for over 45 years been a practicing litigator and trial lawyer in both federal and state courts throughout the United States. His clients have typically been major accounting firms, financial and industrial corporations, law firms, and a range of public interest organizations.

Mr. Kolb has been appointed to serve as a Mediator in the Second Circuit Court of Appeals, the U.S. District Court for the Southern District of New York and New York’s Supreme Court Commercial Division and Appellate Division for the First Department. He is also a member of the AAA Commercial and Accounting Panels of Arbitrators and Mediators and CPR’s Panel of Distinguished Neutrals. He is currently Vice-Chair of the NYSBA Dispute Resolution Section and Co-Chair of its Ethics Committee.

(Source: Abbreviated from Davis Polk’s website.)
Gregory A. Litt represents clients in complex commercial disputes before trial and appellate courts in the United States and in U.S. and international arbitration tribunals. Named a “Rising Star” by Euromoney’s 2013 Guide to the World’s Leading Commercial Arbitration Experts, his work spans a wide range of industries, including accounting, aviation, construction, energy, finance, hospitality, insurance and sports.

Mr. Litt regularly represents clients in disputes arising out of international business transactions and advises clients on a variety of issues relating to international dispute resolution, including forum selection, jurisdiction, service of process, the enforcement of arbitration agreements, extraterritorial discovery and the international enforcement of judgments.

He has represented or advised, among others:

- a French investment bank in a multibillion-dollar series of disputes in New York, London and the Channel Islands relating to collateralized debt obligations, credit default swaps and related structured finance transactions;
- a U.S. fiberglass manufacturer in a multiparty AAA arbitration concerning the construction of a fiberglass manufacturing facility;
- an international sports marketing company in an ongoing dispute with a major international soccer federation and its affiliates over the commercial rights to one of the world’s largest soccer tournaments, including issues relating to arbitration before FIFA;
- an Irish bank in an ICDR arbitration against a U.S. real estate development firm in a dispute over the plans and costs of construction to completely renovate and rebrand large New York City hotels;
- an Indian financial services company in an ongoing series of disputes relating to the international enforcement of an ICDR arbitration award;
- a Canadian bank in its successful effort to obtain dismissal of an international judgment enforcement action in U.S. federal court;
- a Channel Islands-based aircraft leasing company in its successful efforts to obtain a judgment for breach contract in New York State Supreme Court for approximately $400 million against a major European commercial aircraft manufacturer;
- a U.S. energy company in an ICC arbitration against a Korean gas company over the ownership and control of a Korean joint venture, resulting in a successful settlement;
- a group of U.S.-based insurance agencies in a series of U.S. and international litigations and arbitrations concerning the break-up of a substantial 40-year business relationship;
- an oil and gas exploration company in its successful effort to obtain dismissal of a class action filed against it under the U.S. securities laws and affirmance of the dismissal by the United States Court of Appeals for the Fifth Circuit;
- a “Big 4” accounting firm in its successful effort to obtain dismissal of all claims against it in a significant accounting malpractice action; and
- a U.S.-based car rental company in an ICC arbitration against a French bank concerning a complex post-closing adjustment dispute with respect to the sale of a business in England.

Since 2011, Mr. Litt has played a substantial role in the development of the New York International Arbitration Center, and currently serves as co-chair of NYIAC’s technology committee and a member of its audit committee. Previously, Mr. Litt was a U.S. representative to the ICC Task Force on Reducing Time and Costs in Arbitration. He frequently lectures on a variety of topics relating to arbitration and international disputes.

Mr. Litt also is a trained and experienced mediator who successfully has represented clients in numerous complex mediations.

**Publications**

“Class Arbitration Decisions in 2013 Confirmed the Importance of Class Action Waivers,” *NYSBA New York Dispute Resolution Lawyer*, Spring 2014, with Lea Haber Kuck

“Recent U.S. Court Decision Confirm Arbitrator Discretion to Limit Discovery,” *Mealey’s International Arbitration Report*, August 2013, with Colm P. McInerney

“Advantages of Mediation and Alternative Dispute Resolution,” *Corporate Disputes*, January/March 2013


“International Class Arbitration,” in *World Class Actions: A Practitioner’s Guide to Group and Representative Actions Around the Globe* (Oxford University Press 2012), with Lea Haber Kuck


“Desirability of International Class Arbitration,” *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Nijhoff 2009), with Dana Freyer

Lela Porter Love is Professor of Law and Director of the Kukin Program for Conflict Resolution at Benjamin N. Cardozo School of Law. She started one of the first law school mediation clinics in the U.S.; regularly conducts mediation and arbitration training programs, teaching both nationally and internationally; and has an active practice as a neutral, ranging from community disputes to complex litigated matters. She has written widely on the topic of dispute resolution, including co-authoring three law school textbooks. She mediated a simulated product liability dispute for COURT TV. She co-authored, with Joseph Stulberg, The Middle Voice: Mediating Conflict Successfully, 2d ed. and has recently co-edited, with Eric Galton, Stories Mediators Tell.

She is a past chair of the American Bar Association Section of Dispute Resolution; in her chair year, she pioneered the International Mediation Leadership Summit in the Hague, bringing together practitioners from around the world. Both the American College of Civil Trial Mediators and the International Academy of Mediators have presented her with Lifetime Achievement Awards. She received her B.A. from Harvard University, M.Ed. from Virginia Commonwealth University, and J.D. from Georgetown University Law School.
Deborah Masucci is currently Chair and Board Member of the International Mediation Institute (IMI) and was former Chair of the ABA Section for Dispute Resolution where she was a founding member of Women in Dispute Resolution. She is co chair of the NYSBA Dispute Resolution’s CLE Committee and Vice Chair of the Dispute Resolution Section. Deborah was head of American International Group Inc.’s (AIG) Employment Dispute Resolution Program. She was recruited to AIG in 2003 to establish its Office of Dispute Resolution in the Litigation Management Division where she was responsible for the strategic use of alternative dispute resolution (ADR) and increasing the effective methods of appropriate dispute resolution used within the Claims Organization. In 2013 she led the rollout of the Company’s employee dispute resolution program. In June 2005, the AIG Companies were honored by Dispute Resolution Services of Los Angeles with the Corporate Achievement Award for establishment of the Office of Dispute Resolution. In June 2011, Deborah was honored by the Association for Conflict Resolution, Greater New York Chapter with its ADR Achievement Award. Prior to joining AIG, Deborah was Vice President of the East Central Region and head of Professional Development for JAMS The Resolution Experts. She made her mark in ADR at FINRA, (previously NASD) where she led the dispute resolution program for 15 years. She also is an adjunct professor of law at several law schools notably Director of the Securities Arbitration Clinic at Brooklyn Law School in 2003-4, Co Teacher for Comparative International Mediation at Fordham Law School (Spring 2015), lecturer on International Dispute Resolution at Cardozo Law School (Fall 2015), and instructor in the Pace Law School on Line Program teaching Mediation Advocacy: Domestic and International Commercial Disputes (Spring 2016). She is Co Dean of the School of Claims Mediation for the Claims Litigation Management Alliance (2015/2016).
Deborah has been appointed as an arbitrator in over 150 matters covering employment, commercial, breach of contract and professional fee disputes. She also serves as a mediator. She is on the American Arbitration Association Commercial and Employment panels, the American Health Lawyers Association, and the Agency for Dispute Resolution panels. Deborah is a member of the Board of Editors for the Securities Arbitration Commentator.

She is a global expert in alternative dispute resolution and dispute management with over thirty years’ experience in promoting and effectively use of ADR in many capacities. She is a published author on ADR issues and frequently speaks on the topic at legal and bar association meetings.
Jed D. Melnick, Esq. is a panelist at JAMS and the managing partner for Weinstein Melnick LLC. He has been involved in the mediation and successful resolution of thousands of complex disputes with an aggregate value in the billions of dollars (including, complex, multi-party actions in the securities, D&O coverage, bankruptcy and anti-trust arenas). In addition to mediating over one thousand disputes, he has also published articles on mediation, founded a nationally ranked dispute resolution journal and taught young mediators. Two specific highlights of his mediation career include, the successful mediation of a pro bono case between the Disability Rights Advocates and the New York City Taxi and Limousine Commission, which led to a historic settlement raising the number of taxi cabs that are accessible for people with disabilities from 300 out of 13,000 to 50% of the entire fleet by 2020. The settlement led the Judge overseeing the case to comment, “[T]his is one of the most significant acts of inclusion in this city since Jackie Robinson joined the Brooklyn Dodgers.”. Another significant career highlight of his is his appointment (by Judge Kaplan) as one of the mediators in the Lehman ADR Derivative Contract Program, the program that was designed to cause the efficient settlement of the multitude of cases that came out of the Lehman bankruptcy.

Mr. Melnick was selected to the 2010 list of Pennsylvania “Lawyers on the Fast Track,” a recognition given to 30 Pennsylvania Lawyers under the age of 40 by Legal Intelligencer and the Pennsylvania Law Weekly. Additionally, three years in a row, he was selected as a Pennsylvania Super Lawyers “Rising Star,” the only “Rising Star” in the Alternative Dispute Resolution category in Pennsylvania. He received his B.A. from Grinnell College, and J.D. from the Benjamin N. Cardozo School of Law.
Jacqueline Nolan-Haley is a Professor at Fordham Law School where she directs the ADR & Conflict Resolution Program. She teaches courses in ADR, International Dispute Resolution, Interethnic Conflict Resolution, Catholic Perspectives on Conflict Resolution, and Mediation. Professor Nolan-Haley is a member of the Standing Committee on Mediator Ethical Guidance of the ABA Dispute Resolution Section, and the Ethics Committee of the ABA’s Section on Dispute Resolution. She is chair of the Education Committee of the New York State Bar Association’s Dispute Resolution Section. Her scholarship focuses on ethical and justice issues related to ADR processes. Her recent publications include: Designing Systems for Achieving Justice after a Peace Agreement: The Case of Northern Ireland, 13 University of St. Thomas L. Journal. (forthcoming 2016); Mediation and Access to Justice in Africa: Perspectives from Ghana, 21 Harvard Negotiation L. Rev. forthcoming 2016); Mediation: The Best and Worst of Times, 16 Cardozo J. Dispute Resolution 731 (2015); Procedural Justice Beyond Borders: Mediation in Ghana, Harvard Negotiation Law Review Online, (co-author) http://www.hnlr.org/2014/03/procedural-justice-beyond-borders/.
Rebecca Price is the Director of the ADR Program at the U.S. District Court for the Southern District of New York. Prior to this position she directed the Mediation Clinic at Brooklyn Law School, was a Supervising Attorney in the Mediation Clinic at CUNY School of Law, and taught Alternate Dispute Resolution at the New York University School of Continuing Professional Studies. Rebecca has also taught lawyering/legal writing and interviewing and counseling at Cardozo Law School, and was supervising attorney in the Economic Justice Program at CUNY School of Law. Rebecca is the former Coordinator of the Special Education/Early Intervention and ACCES VR Mediation Programs for Safe Horizon Mediation Program (now the New York Peace Institute). She is an experienced mediator and litigator with an extensive background working with people with disabilities. Before turning her focus to ADR, Rebecca was the Assistant Director of Visual AIDS, created and oversaw the Children’s Mental Health Project at New York Lawyers for the Public Interest, and was a Senior Attorney in the Special Litigation and Appeals Unit of Mental Hygiene Legal Service. Rebecca is certified as an Initial Mediation Trainer for the Community Dispute Resolution Centers Program of the Unified Court System of the State of New York.
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Eric Schwartz is a partner in the New York and Paris offices of King & Spalding, where he specializes in international arbitration. He is a former Secretary General, Court member and Vice-President of the ICC International Court of Arbitration. Over the course of nearly four decades of legal practice, he has acted as counsel on behalf of some of the world’s largest companies as well as numerous sovereign states and public authorities in international arbitration proceedings in all of the principal European arbitration venues, as well as in Africa, Asia and the United States.

In addition to his work as counsel, Mr. Schwartz regularly sits as an arbitrator. He has appeared as president, sole arbitrator or co-arbitrator in proceedings under the rules of the AAA, CIETAC, ICC, ICDR, ICSID, LCIA, SCC and UNICTRAL in arbitrations throughout the world. He is also the author of dozens of articles on international arbitration practice as well as the co-author (with Yves Derains) of *A Guide to the ICC Rules of Arbitration* (Kluwer, 2nd ed. 2005).

Mr. Schwartz has been listed as one of the 25 "most highly regarded individuals" in the world in his field in *Who's Who Legal - Commercial Arbitration* 2014 and has been recognized in *Chambers Global, Chambers Europe* and *Legal 500* as a leading international arbitration practitioner.

Mr. Schwartz is a graduate of Dartmouth College (B.A. 1973) and Yale Law School (J.D. 1976) and is a member of the California and Paris Bars.
Rona G. Shamoon

Rona G. Shamoon is a former litigator at Skadden, Arps, Slate, Meagher & Flom LLP where she was a member of the General Counsel's Office and Skadden's International Arbitration Group. She is currently a member of the Commercial Arbitration Panel of the American Arbitration Association. Ms. Shamoon has served as an advocate for parties in international and domestic commercial arbitrations and mediations and has negotiated and drafted numerous dispute resolution provisions in domestic and international contracts.


Ms. Shamoon graduated summa cum laude from Pace University School of Law in 1993, where she served as Research and Writing Editor of the Pace Law Review and was the recipient of the Faculty Award for Academic Excellence. She has served on a number of advisory committees for various dispute resolution organizations including the National Advisory Committee on Large, Complex, Commercial Cases of the American Arbitration Association and the Arbitration and Program Committees of the CPR International Institute for Dispute Resolution, and has given numerous workshops on drafting dispute resolution clauses.

In 2009, Ms. Shamoon was a recipient of the Cornerstone Award from the Lawyer's Alliance for her outstanding pro-bono service.

Ms. Shamoon is currently a member of the New York State Bar Association House of Delegates, a Member-at Large of the Section Delegates Caucus and a Member of the Association's Membership Committee. She was also formerly Chair of the NYSBA's Dispute Resolution Section where she previously chaired the Section's CLE Committee, and is currently co-chair of the Section's Membership Committee. She is also a past member of the Arbitration Committee of the Association of the Bar of the City of New York and is currently a member of the Association's ADR Committee.
Eric P. Tuchmann
General Counsel and Corporate Secretary
American Arbitration Association

Eric P. Tuchmann is General Counsel and Corporate Secretary for the American Arbitration Association. In that capacity, he is responsible for managing the Association’s legal and governance affairs, and he spearheads strategic initiatives directed at the use of alternative dispute resolution. His specific responsibilities include the management of litigation related matters involving the Association and its arbitrators. Mr. Tuchmann has also served as counsel of record for amicus curiae briefs filed in various courts, and cited by the Supreme Court of the United States. Mr. Tuchmann is involved in numerous policy related initiatives related to alternative dispute resolution, and he also analyzes state and federal legislation impacting alternative dispute resolution, the unauthorized practice of law, and attorneys’ professional rules of responsibility. He has served as the Association’s liaison to the committee to revise the Uniform Arbitration Act and to the committee revising the Model Standards of Conduct for Mediators. Mr. Tuchmann was the Association’s Associate General Counsel before being named as General Counsel. Prior to joining the Association’s legal department, he was Director of the International Centre for Dispute Resolution (ICDR) where he managed the Association’s division responsible for providing international arbitration and mediation services.