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

Message from the Chair


David C. Singer

Thanks to our active and passionate membership, 2015-16 has been a terrific year for the Dispute Resolution Section. We had the highest attendance ever at our Annual Meeting on January 29, 2016 (Rona Shamoon and Lela Love, Co-Chairs) and Fall Meeting on October 30, 2015 (Abigail Pessen and Theo Cheng, Co-Chairs). At the Fall Meeting, we were honored to have Honorable Judith Kaye speak on one of the panels, shortly before she passed away in January 2016.

The Section presented its annual three day intensive training programs on arbitration in June (led by Charlie Moxley) and mediation in March (taught by Simeon Baum and Steve Hochman), which were both excellent and well attended. For the first time, a second intensive mediation training is scheduled for September 2016. Our Annual Diversity Program was held on April 12, 2016, with excellent panels that addressed the important challenge of increasing diversity within the dispute resolution bar, both as advocates and neutrals.

In order to expand its reach throughout New York State, the Section presented a program in Albany, entitled "Saving ADR—Maximizing Efficiency and Economy in Arbitration" (Paul Jureller, Chair); and Suffolk/Nassau Counties, entitled "Making the Most of Commercial and Real Estate ADR: Representing Your Clients in Arbitration and Mediation" (David Abeshouse and Erica Garay, Co-Chairs). Two presentations, entitled "Valuable Tools in Avoiding and Resolving Employment Related Disputes" and "Resolving Disputes through Arbitration and Mediation," respectively, were made to the New York State Council of Industry (Manufacturers Association of the Hudson Valley) in Newburgh and New Paltz (Carolyn Hansen and David Singer). All programs were highly successful and appreciated by those who attended.

The Section also created, developed and hosted its first law school arbitration competition, which took place in November 2015 and attracted 14 law school teams from throughout New York State and New Jersey that participated in the two-day arbitration competition (organized and run by John Wilkinson, Ross Kartez, Liz Shampnoi, Richard Mattiaccio, Rona Shamoon). The program was a tremendous success. The program will continue on an annual basis. The next competition will take place on November 18-19, 2016 and will be named the second annual "Judith S. Kaye Arbitration Competition."

The Section, determined to honor the memory of Judith Kaye in other ways, created a special edition of the *New York Dispute Resolution Lawyer* in her honor, which

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Message from the Co-Editors-in-Chief


Edna Sussman


Sherman Kahn


Laura A. Kaster

This has already been an eventful year for the ADR world. We have lost a great leader and shining light in Judge Judith Kaye and we have celebrated her contributions in a commemorative issue that also focused on New York law and her role in establishing a New York-based arbitration center for international disputes, NYIAC.

Less known to our community is the loss of another pioneering jurist across the river. Justice Marie L. Garibaldi, the first New Jersey Supreme Court woman justice, died only a few weeks after Judge Kaye. Justice Garibaldi was an important ADR proponent and invented Complementary Dispute Resolution in the New Jersey Court system. In New Jersey almost all cases are sent to mediation or may elect arbitration.

We also had the second New York meeting of the United Nations Commission on International Trade Law to consider an "instrument" that would assist parties to obtain more expedited enforcement of cross-border conciliated or mediated settlements. UNCITRAL describes the potential outcome as an instrument because there is no consensus yet on whether the result should be guidelines, a model law, or a convention akin to the New York Convention of 1958 that permits expedited enforcement of international arbitral awards and has been signed by over 150 countries. The New York convention has created an explosion of both international arbitration and international institutions as our own international arbitration center testifies. International arbitration is vastly preferred by international business because it aids certainty and avoids the vague results of national judicial judgments, which cannot be enforced in an expeditious manner outside the jurisdiction rendering the judgment.

The availability of international arbitration has facilitated international commerce but the options could be significantly enhanced if there were a viable settlement alternative. Parties do not often see the advantage of deferring international arbitration only to put them in the same contractual enforcement posture that they might have been in to begin with. They prefer to obtain an award that may be enforced subject to very limited defenses under the Convention. (In the U.S. the Convention is contained in the Federal Arbitration Action 9 U.S.C. § 201.)

Multinationals and businesses routinely conducting international business want an additional choice. At the initiation of the U.S., that choice would be created by a new convention analogous to the New York Convention for enforcing conciliated or mediated settlements. In early February 2016, Working Group II met again to see what progress can be made toward that goal or perhaps a model law or guideline, since the form of the instrument has not been resolved. The International Mediation Institute is supporting this effort, as is the U.S. Council for International Business, the U.S. branch of the International Chamber of Commerce. In reality, only a convention would be able to provide the kind of enforcement regime that would make mediation or conciliation an attractive alternative to arbitration

Last year Working Group II met both in New York and Vienna. The most recent meeting demonstrated that significant progress had been made. The Secretariat had developed a very clear and streamlined draft with specific alternatives suggested and reviewed during this session. http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V15/086/28/PDF/V1508628.pdf?OpenElement. All of the wording was in fact discussed and the consensus will be reported on and reviewed when the Working Group meets again in Vienna later this year.

There was general consensus that whatever its form, the instrument would apply only to commercial disputes, not to consumer, employment or family disputes. There was also discussion of settlements with governments and it appeared that the consensus was not to exclude governments from the instrument.

The tension is that several countries want to avoid an unsupervised conversion of ordinary contracts (or potentially illegal money laundering). For that reason, a neutral conciliator or mediator would have to be involved. Indeed, there was considerable concern about how to go about verifying that a mediation or conciliation had occurred. There was no real discussion about whether the perception was correct that there were "protections" that avoid these issues for arbitral awards that would not be available for mediated or conciliated settlements.

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was published in April 2016. The Section also established two scholarships—one for mediation training and one for arbitration training. A primary objective is to promote women and minorities for the scholarships, in recognition of Judge Kaye's transformative role as the first female judge and Chief Judge of the New York Court of Appeals and passionate advocacy for achieving greater diversity in the legal profession. The scholarships will include free registration for the Section's annual mediation training or arbitration training, as well as a free membership in the Section and access to its programs for one year.

Various committees of the Section engaged in important projects this year. The Arbitration Committee generated a wonderful new pamphlet—*An Arbitration Primer for Litigators*—which was published and is being disseminated to thousands. The International Committee created an updated brochure, *Choose New York for International Arbitration*, which is being distributed to thousands as well. The Legislation Committee has analyzed and commented on proposed legislation in the New York State Senate and Assembly that potentially would regulate and limit the use of arbitration in New York. The ADR within Governmental Agencies Committee is working on a directory of dispute resolution programs in the administrative agencies of New York State. The ADR in the Courts Committee is researching the use of court-annexed arbitration in New York State courts. The Mediation Committee is creating a videotape for use in court-annexed mediation programs throughout the federal and state courts of New York.

Various Section committees held meetings throughout the year. For example, the Negotiation Committee sponsored a well-attended presentation by Dr. Henry Weinstein, a noted attorney and psychiatrist who deals with issues relating to the subconscious mind and unconscious bias. The Ethical Issues and Ethical Standards Committee held a successful program with Stephen Gillers, a professor of ethics at NYU School of Law.

The Section's "Proposal for Court-Annexed Voluntary Mediation in the Civil Courts of New York State" was adopted by the Executive Committee of the New York State Bar Association. President David Miranda sent a letter to the New York State Office of Court Administration with the recommendation that the Proposal be adopted as a new court rule.

The Dispute Resolution Section provides a wonderful opportunity for people to meet, support each other, learn together and advance causes that increase access to justice through the use of dispute resolution processes. We have accomplished much, and there is much more that can be done. It has been an honor to serve as Chair of the Section, and I look forward to the Section's continued success.

David C. Singer

Proposal for Court-Annexed Voluntary Mediation in the Civil Courts of New York State

By David C. Singer

At its meeting on November 6, 2015, the Executive Committee of the New York State Bar Association adopted a Proposal that provides: Each civil court in New York State that does not have a court-annexed mediation program shall create and adopt a court-annexed mediation program that enables parties to participate in mediation on a voluntary basis. The Proposal originated from an ad hoc subcommittee created by the Mediation Committee and was later revised and adopted by the Executive Committee of the Dispute Resolution Section. The Proposal will be sent by the NYSBA to the NYS Office of Court Administration with the recommendation that it be adopted as a new court rule.

The text of the entire Proposal is as follows:

Dispute Resolution Section
New York State Bar Association

Proposal for Court-Annexed Voluntary Mediation in the Civil Courts of New York State

Approved by NYSBA Executive Committee January 28, 2016

I. Introduction

Disputes arise across a broad spectrum of relationships and substantive areas of the law. Alternatives to litigation may best serve client needs for resolving many of these disputes. Litigation can become a lengthy, stressful and expensive proposition. As some disputes will invariably arise, lawyers seeking to best serve their clients must consider other forms of dispute resolution as an alternative to traditional litigation. Mediation is often responsive to party needs in ways that are not possible in a court proceeding.

Mediation has applicability in a variety of substantive practice areas of law. It has become common in the resolution of commercial and non-commercial disputes between and among business entities and/or individuals. Mediation is routinely incorporated into contract dispute resolution clauses as a method of choice for resolving disputes that may arise in the future. Even in the absence of such clauses, mediation is routinely used after disputes arise and the parties are seeking an appropriate resolution.

Some judges have the authority to order the parties to mediation, for example in the Matrimonial Parts and Commercial Divisions of the Supreme Court of New York County. In addition, many judges who recognize how the parties can benefit from the early settlement of cases will suggest that parties try mediation even in the absence of a court rule authorizing the judges to order mediation.

A court-annexed mediation program provides an invaluable resource for courts, helping alleviate the burden of reduced resources and backlog of cases. Some courts in New York State have already adopted court-annexed mediation programs, which are listed in the New York State Court System website.

The proposal set forth herein is that each civil court in New York State that does not have a court-annexed mediation program shall create and adopt one that at least enables parties to participate in court-sponsored mediation on a voluntary basis. Each program can be tailored so that it is best suited to the needs of the particular court, with or without the need of additional court funding. Although this proposal is addressed to programs directed to voluntary mediation, the proposal is not intended to suggest any changes to existing programs or preclude any new programs that may provide for mandatory (or automatic) mediation.

The Dispute Resolution Section of the New York State Bar Association is available to assist with the development of court-annexed mediation programs. The Dispute Resolution Section is also available to provide training and other support regarding court-annexed mediation. In addition, trained mediators can be accessed through court websites, ADR provider organizations or the Mediator Directory maintained on the Dispute Resolution Section website.

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, and expenses, and waste of time." Abraham Lincoln (circa 1850)

II. The Benefits of Mediation

Mediation works. Mediation is a confidential process in which the parties engage a neutral third person to help them resolve their disputes. The growth of mediation over the past twenty years has been exponential, a tribute to the success of the process. User satisfaction is high as parties retain control and tailor their solutions in a less confrontational setting that can preserve relationships and result in a win/win instead of a win/lose. Any case that can be settled can be mediated, and there are many reasons why mediation works after direct settlement negotiations have failed.

The vast majority of civil lawsuits are settled even without the benefits of mediation. However, settlements typically are not reached until late in the litigation process, often not until the eve of trial or later. Mediation is most effective in reducing costs if used early in the litigation.

A mediator can assist the parties and their attorneys in obtaining the information they need in order to evaluate their case more quickly and efficiently than by formal discovery. With sufficient information in hand, the mediator can help establish the most conducive framework for facilitating settlement.

Confidential process and result. Mediation is conducted in private—only the mediator, the parties and their representatives participate. The mediator generally is bound not to divulge any information disclosed in the mediation. Confidentiality agreements are commonly entered into to reinforce the confidentiality of the mediation. Moreover, the parties may agree to keep their dispute and the nature of the settlement confidential when the matter is resolved. Mediation can enable parties to avoid the publicity that may accompany a public trial.

The mediator plays a crucial role. The mediator's goal is to help the parties settle their differences in a manner that meets their needs and interests and is preferable to trial. An experienced mediator can serve as a sounding board, help identify and frame the relevant issues, encourage parties make an objective risk/reward and cost/benefit analysis between settling their dispute or proceeding to trial, foster creative solutions and assist in removing impediments to settlement. A mediator can generate solutions not previously considered by the parties that may reach beyond the scope of remedies available in court. The mediator can also provide the patience and persistence that is often necessary to help parties resolve their differences.

Mediators can help parties communicate constructively and overcome hostilities that may interfere with making rational assessments of settlement compared to the costs and uncertainties of trial. Mediators can also serve as unbiased "agents of reality" who help the parties objectively assess their litigation alternatives. In this regard, attorney advocates may have advocacy bias whereby they tend to overvalue the strength of their client's positions. A mediator without any stake in the outcome can be effective in helping the parties be realistic as to the likely outcome at trial.

By meeting privately in confidential sessions with each party and counsel, participants can speak with total candor. The mediator can help the parties ascertain their real interests and concerns and objectively assess the weaknesses as well as the strengths of their case. This process typically leads to a mutually agreeable settlement.

Opportunity to listen and be heard. Parties to mediation have the opportunity to air their feelings and positions in the presence of their adversaries or the mediator. The process can thus provide a catharsis for the parties. Moreover, since their feelings and positions are heard in the presence of a neutral mediator, the parties may feel that they have had their "day in court." After that cathartic process, the parties can focus on resolving their dispute by comparing various settlement proposals to the likely court outcome.

More creative and long-lasting solutions. A mediator has no authority to make or impose any settlement on the parties. Any resolution through mediation is solely voluntary and within the discretion of the parties. Parties can develop their own solutions to issues addressed in mediation and may enter into innovative, creative solutions tailored to their own particular lives and business interests rather than being limited by the remedies available in court. Because the parties are involved in crafting their own solutions, they are more likely to be lasting ones.

Lessens the emotional burden. Since mediation can be conducted sooner, privately, more quickly, less expensively and in a less adversarial manner than court, there can be less emotional burden on individuals than if they were to proceed to trial. In contrast, proceeding through trial may involve publicly reliving a particularly unpleasant experience or exposing unfavorable business conduct which gave rise to the dispute.

Mediation can save existing relationships. Litigation can be stressful, time consuming, costly and personally painful. In the end, parties often are unable to continue or restart their relationship. In contrast, in mediated disputes—such as those between an employer and employee or partners in a partnership—issues can be resolved in a manner that saves business and personal relationships that the parties may prefer to preserve.

Avoiding the uncertainty of trial. Resolution through mediation avoids the inherently uncertain outcome of trial and enables the parties to control the outcome. Moreover, since resolution during mediation is completely voluntary, the option to proceed to trial is not lost in the event mediation is not successful in resolving all issues.

Mediation can save expense. A court may adopt a voluntary court-annexed mediation program such that no additional court funding is required. Alternatively, a court may adopt an administered court-annexed mediation program that requires court funding. In such programs, qualified mediators have been willing to serve on a reduced fee or even pro bono basis for at least a portion of their time.

In an analysis of 2,054 cases that went to trial from 2002 to 2005, plaintiffs realized smaller recoveries than the settlement offered in 61% of cases. While defendants made the wrong decision by proceeding to trial far less often—in 24% of cases—they suffered a greater cost—an average of $1.1 million—when they did make the wrong decision.[1]

III. Proposal for Court-Annexed Voluntary Mediation in the Civil Courts of New York State

We propose that the Administrative Board of the New York State Courts adopt the following rule:

Each civil court in New York State that does not have a court-annexed mediation program shall create and adopt a court-annexed mediation program that enables parties to participate in mediation on a voluntary basis.

Respectfully submitted,

DISPUTE RESOLUTION SECTION
NEW YORK STATE BAR ASSOCIATION[2]

David Singer, Chair

Endnotes

1. Randall Kiser, Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients, (Springer Science + Business Media LLC New York publ.) (2010).
2. Report prepared by the Subcommittee for the Adoption of Court-Annexed Voluntary Mediation in the Civil Courts of New York State; David C. Singer and Stephen A. Hochman, Co-Chairs.

Ethical Compass
...because it's not just about money

By Professor Elayne E. Greenberg

Is Settlement Just About Money?

In our professional lives, we often observe myopic lawyers and mediators who misperceive that most disputes are just about money. According to this skewed view, justice is measured by dollar signs. From the vantage point of these shortsighted colleagues, the negotiation metaphor "expanding the pie," in which negotiating parties make low-cost high-benefit trades that actually enhance the value of a their settlement, is misinterpreted to be just an academic smokescreen that obscures the real issue: money. Furthermore, the metaphorical settlement pie is incorrectly seen to be a fixed dollar amount whose apportionment is about how much of the fixed pie the winner will get and how much of the fixed settlement pie the payor will lose. After all, clients are just concerned about money. Right?

Offering a more enlightened perspective, the recent negotiated settlement reached between the family of Samuel DuBose and the University of Cincinnati reinforces the message that it is not all about money.[1] For those unfamiliar with the case, let me share the undisputed facts that were captured on a body-cam. In July 2015, a University of Cincinnati officer stopped Samuel DuBose, an unarmed black male, because the car DuBose was driving was missing its front license plate. When DuBose turned on his car, the officer reached into the car and fatally shot DuBose in the head.

A comprehensive settlement between the DuBose family and the University of Cincinnati was reached in January 2016. As part of the negotiated settlement the University of Cincinnati agreed to pay the DuBose family $4.85 million cash settlement.[2] Recognizing their culpability, the University apologized for this tragic occurrence. The University also agreed to provide a free college education for each of DuBose's twelve children. In addition, the University will establish a memorial for DuBose. Of importance to the family, the DuBose family will participate in the retraining of officers to help prevent this from ever happening to others in the future.

Al Gerhardstein, the civil rights lawyer who represented the DuBose family, talked about the value of non-monetary compensation to wronged parties in helping to restore their dignity:

> Well, I've been doing civil rights cases for 39 years, and I learned very early that these families who lose a loved one want more than money. Sure, they want fair compensation, but they want dignity for their loved one. So we have done apologies. We've done new-officer training and policies. We've done monuments and plaques. We've done shared experiences, where the victim can confront the perpetrator. And we do these things in order to meet this broader goal of restoring dignity to the family after such a horrible event.[3]

The President of the University of Cincinnati, Santa J. Ono also acknowledged that this comprehensive settlement that included more than a monetary settlement is "part of the healing process not only for the family but also for our university and Cincinnati communities."[4]

Even though many of you might agree that the compelling facts in this case warranted a settlement that was not just about money, you may still distinguish this case from the other cases such as those involving commercial, bankruptcy, sports,[5] divorce, intellectual property and personal injury disputes that you vehemently believe are just about money. You may even try to justify your point of view by pointing to the sophisticated and dispassionate business person or insurance representative, for whom you are convinced the settlement of a dispute is just about money, the cost of doing business.

However, astute attorneys and mediators appreciate that all people, including sophisticated business people and seemingly detached insurance representatives, are also human beings. Attorneys and mediators who understand that their clients are also human beings also appreciate that from their clients' perspectives, justice may take many forms based on each client's personal values and individual sense of fairness. Clients measure justice, not by money alone, but by the quality of the settlement that they hope to achieve. Moreover, for some defendants and plaintiffs, money might not be a responsive remedy for the wrong that they seek to be righted.

Offering further justification that settlement is not just about money, Fisher and Shapiro, in their groundbreak-

ing book *Beyond Reason: Using Emotions as You Negotiate* remind us that there are five core concerns that each human being in a negotiation needs to have addressed to help preserve clients' dignity and help them get the justice they seek.[6] The five core concerns are: the need to appreciate each person's contribution, the need for affiliation that recognizes the group's commonality, the need to be respected for each participant's autonomy, the need to select a fulfilling role, and the need to be acknowledged for each participant's status.[7]

Skillful negotiators understand that these core concerns are an integral, albeit sometimes unspoken, part of a comprehensive settlement.

The Ethical Mandates Reinforce That It Is Not Just About Money

The NY Rules of Professional Conduct reinforce that it is the client's decision to seek settlements that are not just about money. Moreover, when advising her client, a lawyer may consider the client's other interests beyond just a monetary resolution.

Specifically, Rule 1.2 (a) provides:

> Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation.[8]

Rule 2.1 provides:

> …In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.[9]

The Model Standards of Conduct for Mediators also emphasize a client's right to determine the dimensions of a settlement beyond just money. Standard IA states in relevant part:

> A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to…outcome. Parties may exercise self-determination at any stage of the mediation process including…outcomes.[10]

However, many lawyers and mediators may find it challenging to enforce these client-centered mandates when their own long-held beliefs remain that settlement is just about money. If you are among the group of lawyers and mediators whose beliefs collide with your client's more comprehensive view of settlement,[11] relax, you are still entitled to hold onto your beliefs. Yet, despite your personally held beliefs, you still have to advocate for your client's interest in a more comprehensive settlement.

Rule 1.2 (b) reassures that:

> A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.[12]

Thus, the ethical rules reinforce that representing your client's interest in a comprehensive settlement does not mean you personally adopt that point of view. Nevertheless, putting personal views aside, ethical lawyers still need to understand and advocate for the interests that the client values.

Conclusion

When lawyers represent their clients in party-decided dispute resolution processes such as negotiation or mediation, lawyers have a unique opportunity to work with their clients to help shape a comprehensive settlement beyond just a monetary settlement. This is an opportunity to address the client's human and core concerns and to help their client secure their personalized sense of justice. However, lawyers and mediators who myopically seek to resolve every legal conflict by just monetary resolution are akin to the carpenter who sees everything as a nail because the only tool available is a hammer. This column invites you to expand your perspective to help your clients achieve the interests they value most, not just the money.

Endnotes

1. *See* http://www.npr.org/2016/01/20/463740319/university-of-cincinnati-reaches-settlement-with-family-of-samuel-dubose.
2. *Id.*
3. *Id.*
4. *Id.*
5. *But, c.f.*, In January, 2016 the Mets left fielder Yoenis Cespedes renewed his playing contract with the Mets even though it was a less lucrative monetary offer than other offers, because Cespedes felt loyal to the team and wanted to remain in New York.
6. Roger Fisher and Daniel Shapiro, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE (2005).
7. *Id.*
8. NY ST RPC Rule 1.2(a) (McKinney) (2015).
9. NY ST RPC Rule 2.1 (McKinney) (2015).
10. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, SM090 ALI-ABA 1759, 1762.
11. *See, e.g.* Elayne E. Greenberg, *What Sally Soprano Teaches Lawyers About Hitting the Right Ethical Note in ADR Advocacy*, 6 NYSBA New York Dispute Resolution Lawyer (Fall 2013) 18.
12. NY ST RPC Rule 1.2(b) (McKinney) (2015).

Professor Elayne E. Greenberg is Assistant Dean of Dispute Resolution, Director of the Carey Center for Dispute Resolution and Professor of Law at St. John's Law School. **My special thanks to Stephen Di Maria, St. John's Law '17, for his assistance with this column.**

The Curious Tom Brady "Deflategate" Case[1]

By Kim Landsman

Justice Holmes once wrote that that "[g]reat cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."[2] The dispute over the suspension of Tom Brady garnered sufficient publicity and contained more than enough curious facts to appeal not just to the feelings of football fans, who have long had fairly strong feelings about the New England Patriots and their star quarterback, but to the general public. The arbitration that upheld the suspension, the federal district court decision overturning it, and the Second Circuit decision reinstating it, all made headlines not just in the sports section but on the front page of the national press.

Time will tell whether judgment was distorted by the notoriety of the case and its peculiar facts but what is curious and interesting in the context of arbitration law (rather than professional football) is how much the arguments to and decisions of the district and appellate courts differed. The district court applied the Federal Arbitration Act ("FAA") to a labor arbitration and, in vacating the award, threatened some cherished concepts of judicial deference to arbitral awards. The appellate decision noted that the FAA may "provide guidance" but does not apply to labor arbitrations brought under the Labor Management Relations Act ("LMRA"). Emphasizing the deference to arbitral awards both statutes require, the Second Circuit reversed and reinstated the award.[3]

Any professional football fan (which I am not) knows most of the underlying facts, but for those immersed instead in arbitration law, what follows is a quick summary.

A. Background Facts

The New England Patriots beat the Indianapolis Colts 45-7 in the January 2015 American Football Conference championship game. It wasn't a close game and will therefore be remembered in football and arbitration law for the accusation that certain equipment managers of the Patriots deliberately deflated the footballs used by their star quarterback, Tom Brady. Underinflating a football is said to make it easier to grip, throw, and catch, and may inhibit fumbling, especially in cold rainy conditions.[4]

Before 2006, the home team provided all of the game footballs. The rules were altered in 2006 so that each team uses its own specially prepared footballs while on offense. A team would handle a football provided by the opposing team only immediately after a fumble or interception. The rules were changed for the express purpose of letting quarterbacks use footballs that suited them, and teams do various things to adapt the game balls to the way their quarterback likes them. A 2013 article in The New York Times described the process:

> For every N.F.L. game, each team has 12 to 20 balls that it has meticulously groomed and prepared according to the needs of its starting quarterback. The balls, brushed and primed using various obvious and semi-secret techniques, bear the team logo and are switched out from sideline to sideline depending on which team is on offense.
>
> That means that from series to series, the ball in play can feel wholly different, but each team's quarterback always has a ball prepped by his equipment staff the way he likes it.[5]

There is, however, at least one constant, aside from the brand and model of the football: each one must be inflated to 12.5 to 13.5 psi.

The Colts intercepted a Brady pass in the first half of the AFC Championship game, and the ball was given to the Colts' equipment staff, who determined it was inflated to 11 psi. NFL officials measured the inflation level of all of the balls at halftime and found that all 11 of the Patriots' game balls were underinflated. None of the Colts' footballs were. The Patriots' footballs were reinflated to the correct amount and put back into play. The Patriots expanded their lead.

B. The Wells Report

The NFL paid the Paul Weiss firm over $3 million to investigate what happened and who did what. NFL Executive Vice President and General Counsel Jeff Pash and Paul Weiss' Ted Wells, Jr. were the co-lead investigators, though the resulting report was known as the Wells Report, and Pash was said to have played only an editing role. The Wells Report concluded that it is more probable than not that New England Patriots personnel deliberately circumvented the rules and that Brady was at least generally aware of their inappropriate deflation of the game balls. There was no direct evidence linking Brady to the tampering, but it was unlikely that it could happen without his knowledge and approval.[6]

Based on the Wells report, NFL EVP Troy Vincent informed Brady that he would be suspended without pay for four regular season games under the Collective Bargaining Agreement and NFL Player contract for "conduct detrimental to the integrity of and public confidence in the game of professional football."[7] Brady had been "at least generally aware of the actions of the Patriots' employees involved in the deflation of the footballs and…it was unlikely that their actions were done without your knowledge"; he had also "fail[ed] to cooperate fully and candidly with the investigation."[8]

C. The Appeal/Arbitration Heard by Commissioner Goodell

Brady[9] appealed and Commissioner Goodell appointed himself the arbitrator to hear that appeal, as he had discretion to do under the Collective Bargaining Agreement ("CBA").[10] Brady unsuccessfully moved to recuse Goodell based on the contentions that Goodell could not arbitrate whether he himself had violated the CBA by delegating to his EVP his exclusive disciplinary powers, that he couldn't arbitrate a hearing in which he was a central witness, that he had prejudged the issues in publicly praising the Wells Report, and that he couldn't arbitrate a matter implicating the competence and credibility of his NFL staff.[11]

Before the hearing, Goodell denied a request by Brady for all documents created, obtained or reviewed by NFL investigators and to compel the testimony of Pash about the NFL's involvement in the supposedly independent investigation and prior incidents involving violations of playing rules and failure to cooperate with such an investigation.[12]

At the hearing, Brady's principal legal challenge was that he was being disciplined according to the wrong policy: the policy for Chief Execs, Presidents, General Managers, and Head Coaches, rather than that applicable to players.[13] He also objected that while the hearing was denoted an appeal, Goodell made findings that went beyond those of the Wells Report.

Arbitrator Goodell found that Brady did not just fail to cooperate with the investigation, but deliberately obstructed it; he willfully destroyed potentially relevant evidence by telling his assistant to destroy his cellphone (a fact apparently disclosed only at the hearing). Goodell did not just find it unlikely that Brady did not know about the deflation of the footballs, but concluded that Brady "knew about, approved of, consented to, and provided inducements and rewards" for the deflation scheme. The four-game suspension was deemed equivalent to the collectively bargained discipline imposed for a first violation for using performance-enhancing drugs.[14]

D. The District Court's Decision Vacating the Arbitral Award

Brady asserted numerous grounds for vacating Arbitrator/Commissioner Goodell's award:

(1) The award violated the "law of the shop" embodied in the CBA by not giving Brady adequate notice of his potential misconduct and the penalties that could follow from it. Brady had no notice of any penalty for equipment tampering beyond a fine, of the policy under which he was disciplined (which, Brady contended, applied to Chief Executives, Club Presidents and General Managers, and Head Coaches, rather than players), that being "generally aware" of a violation could lead to discipline, and that obstructing or failing to cooperate with an NFL investigation could lead to discipline.[15]

(2) The arbitration violated fundamental fairness because Goodell denied Brady the opportunity to examine co-lead-investigator Pash.[16]

(3) The arbitration was also fundamentally unfair because Goodell denied Brady's document request for the investigative files, including Paul Weiss' witness interview notes. Compounding Brady's prejudice from this was that Paul Weiss acted as both "independent" counsel—the quotation marks are from Judge Berman, not this author—and as retained counsel for NFL during the arbitration.[17]

(4) Goodell, as the NFL Commissioner reviewing discipline meted out by his staff that he had authorized, was an evidently partial arbitrator.

The parties' motions to confirm or vacate the award were heard by Judge Berman in the Southern District of New York, who vacated the award based on Brady's first three arguments and declined to rule on the fourth.[18]

However one may feel about the ultimate merits, the decision was troubling because it devoted the most attention to—and accepted—the most controversial ground for vacatur under the FAA. To hold that an arbitrator violated the "law of the shop" by inadequate notice of the violation and of the severity of the discipline is essentially to conclude that the arbitrator misinterpreted the law. That reasoning sounds like vacating the award for manifest disregard of law, one of the most controversial and least defensible grounds under the FAA, and Brady argued it that way: "Goodell's refusal to apply—or even *cite*—the court order in *Peterson [National Football League Players Association v. National Football League*, 2015 WL 795253 (D. Minn. Feb. 26, 2015), *appeal docketed*, No. 15-1438 (8th Cir. Feb. 27, 2015)] amounts to a manifest disregard of governing law, a ground for vacatur maintained by the Second Circuit even after *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008)."[19]

Although "manifest disregard of the law" remains doctrinally alive, at least in the Second Circuit,[20] it is controversial because it is not among the explicitly stated bases for vacatur in the FAA. Moreover, many consider it to be on life support, and it has rarely been the basis for vacating an arbitral award governed by the FAA.[21]

E. The Second Circuit's Reinstatement of the Award

In a 2-1 decision, the Second Circuit (Parker, J.) reinstated the arbitral award in an opinion based on a few fundamental principles that clarified much of what the district court confused about arbitration law: (1) The applicable standards come from labor law and the LMRA, with the FAA providing whatever guidance may be useful.[22] (2) Even more than under the FAA, "a federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential—indeed, among the most deferential in the law."[23] An award must not be disturbed for "mistakes of fact or law" as long as "the arbitrator was 'even arguably construing or applying the contract and acting within the scope of his authority' and did not 'ignore the plain lan-

guage of the contract.'"[24] "It is the arbitrator's construction of the contract and assessment of the facts that are dispositive, 'however good, bad, or ugly.'"[25]

Accordingly, the Second Circuit had "little difficulty in concluding" that the disciplinary decision "was 'plausibly grounded in the parties' agreement'"[26] and that the penalty, including the analogy to steroid use, was "at least 'barely colorable,'" which was "all that the law requires."[27] The arbitrator was also within his discretion in finding Brady's culpability worse than that found in the Wells report—indeed, "the point of a hearing in any proceeding is to establish a complete factual record."[28]

Only in the discussion of the procedural objections to the award—denying Brady's request to cross-examine the NFL's General Counsel Pash and for access to interview notes and memoranda generated by the investigators at Paul Weiss—did the Second Circuit refer to the FAA, which provides for vacating an award where "'the arbitrators were guilty of misconduct…in refusing to hear evidence pertinent and material to the controversy. '"[29] That ground is also subject to considerable deference, in that an arbitrator's ruling on such procedural matters "can be revisited in court only if it violated fundamental fairness, and we see no such violation."[30]

Perhaps the most interesting issue in the case from a strictly arbitration perspective was Brady's challenge to Goodell on the FAA ground of "evident partiality," "which may be found only 'where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.'"[31] That would seem obvious where the CEO reviews the action of his EVP.

That concern was, however, brushed aside as a matter of contractual waiver: "the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen," and the parties contracted in their collective bargaining agreement to allow the Commissioner to arbitrate such disputes.[32] Where, as in this case, the parties on each side are well-financed, well-represented, have real negotiating power, and have exercised it, that probably makes sense, though the principle probably should not be extended beyond that limited situation.

Endnotes

1. *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 125 F.Supp.3d 449 (S.D.N.Y. 2015) ("Brady SDNY"), *rev'd & remanded*, 2016 WL 1619883 (2d Cir. Apr. 25, 2016) ("*Brady 2d Cir*.").
2. *Northern Securities Co. v. U.S.*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).
3. *Brady 2d Cir.*, n. 13.
4. Note, however, at least one dissent to that general statement: Aaron Rodgers of the Green Bay Packers has been quoted as preferring an overinflated football. See, e.g., Jared Dubin, "Aaron Rodgers: Deflated Footballs a 'Disadvantage' For Me," http://www.cbssports.com/nfl/eye-on-football/24982058/aaron-rodgers-deflated-footballs-a-disadvantage-for-me .
5. Bill Pennington, "Eli's Footballs Are Months in Making," The New York Times Nov. 23, 2013.
6. *Brady SDNY*, 125 F.Supp.3d at 454.
7. *Id.*
8. *Id.* at 457.
9. The NFL Players Association was the actual party that appealed the suspension on behalf of Brady, but referring to the beneficiary, Brady, seems simpler.
10. *Brady 2d Cir*., 2016 WL 1619883 at *4.
11. *Brady SDNY,* 125 F.Supp.3d at 458.
12. *Id.* at 458.
13. *Id.* at 460.
14. *Id.* at 461.
15. *Id.* at 463-470.
16. *Id.* at 470-72.
17. How Paul Weiss and the NFL justified this apparent conflict remains a mystery.
18. *Brady SDNY,* 125 F.Supp.3d at 463-474.
19. NFLPA Memorandum of Law in Support of Motion to Vacate Arbitration Award at 5 n.8 (*citing Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011)); *see id.* at 5 ("the Award does not mention *Peterson*, in manifest disregard of that law"); The NFLPA's Memorandum of Law in Opposition to the NFL's Motion to Confirm Arbitration Award at 2.
20. *See Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008), *rev'd on other grounds*, 559 U.S. 662 (2010) (doctrine of manifest disregard of law represents "a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA").
21. *See* Report by the City Bar's Committee on International Commercial Disputes on *The "Manifest Disregard of Law" Doctrine and International Arbitration in New York*, available at http://www2.nycbar.org/pdf/report/uploads/20072344-ManifestDisregardofLaw--DoctrineandInternationalArbitrationinNewYork.pdf.
22. B*rady 2d Cir*., 2016 WL 1619883 at *1, *4.
23. *Id.* at *1.
24. *Id.* (quoting *United Paperworks Int'l Union v. Misco, Inc.,* 484 U.S. 29, 38 (1987)).
25. *Id.* at *6 (quoting *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2071 (2013.)).
26. *Id*. at *8 (quoting *Wackenhut Corp. v. Amalgamated Local 515,* 126 F.3d 29, 32 (2d Cir. 1997)).
27. *Id*. (quoting *In re Andros Compania Maritima, S.A.,* 579 F.2d 691, 704 (2d. Cir. 1978)). The dissent, by comparison, would have found that Goodell's "strained reliance" on the penalty for steroid use and failure to discuss a more analogous penalty for use of stickum would lead to the conclusion that his decision "was based not on his interpretation of the CBA, but on 'his own brand of industrial justice.'" *Id.* at 21 (Katzmann, C.J., dissenting) (quoting *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).
28. *Id.* at *10. The dissent would find that the Commissioner went beyond his limited authority in hearing the appeal of a disciplinary action by basing his decision "on misconduct different from [and more culpable than] that originally charged." *Id*. at *18.
29. *Id.* at *14. (citing 9 U.S.C. § 10(a)(3)).
30. *Id.*
31. *Id.* at *17 (citing 9 U.S.C. § 10(a)(2) and quoting *Scandinavian Reins. Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 64 (2d Cir. 2012)).
32. *Id.* at 17.

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Architectural Underpinning: Consequences of Violating Provider Rules

By Gerald M. Levine

No arbitration decision is complete without the court acknowledging that public policy favors this form of dispute resolution.[1] The goal finds particular expression in judges' restraint from second-guessing arbitrators' awards.[2] The U.S. Supreme Court has held that "[a] party seeking to vacate an arbitration award must 'clear a high hurdle.'"[3] Even the fact "that a court is convinced [an arbitrator has] committed serious error does not suffice to overturn [an arbitrator's] decision."[4] Neither would it suffice if the court determines it would have decided the matter differently.[5]

"If judges agree with challengers at all it happens primarily in those rare circumstances in which arbitrators fail to follow providers' rules, and in particular the disclosure and award writing rules."

Ordinarily, in talking about vacating an award the focus is on the four theories set forth in section 10(b) of the Federal Arbitration Act (FAA) and (in New York) in section 7511(b) of the Civil Practice Law and Rules (CPLR). The applicability of these theories depends on the particulars of what the arbitrator did or failed to do that warrants vacating an award. An alternative approach that I take here is to focus on arbitrators' acts compelled by rules promulgated by providers rather than statutory labels. If judges agree with challengers at all it happens primarily in those rare circumstances in which arbitrators fail to follow providers' rules, and in particular the disclosure and award writing rules.

One other rule can trigger court intervention. It applies to decisions by providers rather than arbitrators. Because of the privacy of the arbitral proceedings the details of these provider decisions only become known if the request to the provider is denied and the requesting party challenges the decision in court. These decisions either involve disqualification of arbitrators or enforcement of key provisions of the agreement to arbitrate. Efforts to obtain mid-arbitration disqualification have been roundly rebuffed by the courts. Court interventions to challenge arbitrator authority can occur under the right factual circumstances and give courts jurisdiction to second-guess the provider.

In discussing arbitral rules I will refer to the rules of the American Arbitration Association (AAA) as representative of provider rules in general. The disclosure and award writing rules are uniform among the different sets of AAA rules but not always under the same rule number. I use the rule numbers from the Commercial Rules (2013) except where otherwise indicated. The AAA's procedure for deciding party requests to disqualify an arbitrator or for some other action can be found in the AAA Review Standards of the Administrative Review Council.

Vacatur for Not Observing the Disclosure Rule

The most emphasized rule in arbitration literature, drummed into students studying to be arbitrators, is disclosure. Rule 17(a)[6] of the Commercial Arbitration Rules provides

> Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives.

All the major providers have rules on disclosure, and it is also a prominent feature in the American Bar Association/American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes.[7] Canon II (D) reads "Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure."

Two cases illustrate how important it is to make timely and complete disclosure, one from the Supreme Court of Texas (the state's highest court) and the other from the Sixth Circuit. In the Texas case the arbitrator failed to disclose facts that "to an objective observer [might] create a reasonable impression of the arbitrator's partiality."[8] What the arbitrator failed to disclose during the course of the arbitration proceedings was that he had received a "substantial referral from the law firm of a non-neutral co-arbitrator."

The facts in the case before the Sixth Circuit are even more bizarre since the disclosure came nearly five years into the arbitration and after 50 hearing days:

> [Suddenly, it seems] Kowalsky announced to Kinkade that its adversary, David White, and the Whites' advocate on the arbitration panel, Mayer Morganroth, had each hired Kowalsky's firm for

> engagements that were likely to be substantial. Kinkade objected, to no avail. A series of irregularities in the arbitration followed, all of which favored the Whites. Kowalsky eventually entered a $1.4 million award in the Whites' favor.

The district court vacated the award on grounds of the arbitrator's "evident partiality" and the Sixth Circuit affirmed.

These two cases illustrate Justice White's observation that it is far better for a potential conflict of interest "[to] be disclosed at the outset" than for it to "come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award."[9] Vacatur is granted where it is not possible to overlook the violations of the arbitrator's duty.

The situation is different where a party challenges the arbitrator during the course of the arbitration. Here, the party's remedy (and really its sole remedy!) is found in Rule 18(c) (Disqualification of Arbitrator)[10]:

> Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

Within the AAA, objections to appointed arbitrators are heard by the Administrative Review Council, which is an executive level, administrative decision making authority to resolve certain administrative issues that arise in the AAA's large, complex domestic cases. Although "objections should be raised at the first available opportunity, any party may make an objection to an arbitrator at any time in the arbitration, up to the issuance of the Award or other terminating order."[11]

In a recent decision from the Ninth Circuit the respondent in the arbitration first made a request to the AAA to disqualify the arbitrator, which the AAA denied, then applied to the district court, which granted the application.[12] The district court anchored its reasoning for intervention and disqualification of the arbitrator on concern for the integrity of the process. It held:

> [t]he arbitrator's failure to [disclose his business plans]…gives rise to a reasonable impression of bias. The Court finds that the standard for evident partiality has been met.

The underlying concern was that to wait for the arbitration to be completed only for the court to later determine that the nondisclosure was material would be a costly failure.

The Ninth Circuit disagreed. It was no less concerned with the integrity of the process but framed the issue differently. It held that

> [E]ven if [the arbitrator's] undisclosed activities did create a reasonable impression of partiality, the district court's equitable concern that delays and expenses would result if an arbitration award were vacated is manifestly inadequate to justify a mid-arbitration intervention, regardless of the size and early stage of the arbitration.

The reason for this is that "mid-arbitration intervention and the removal and replacement of an arbitrator [would] have a disruptive effect on proceedings that are supposed to be speedy and efficient."[13]

Assuring the process is not disrupted or slowed down is more important than cost: "[w]e have repeatedly held that financial harm is insufficient to justify collateral review; 'mere cost and delay'…is no different from the injury a party wrongfully denied summary judgment experiences when forced to go to trial, and we have 'consistently rejected…[the] position that the costs of trying massive civil actions render review after final judgment inadequate.'"

Vacatur for Violating the Award Rule

Whether violations exist at all is only determined after arbitrators have concluded their work, when their "contractual powers have lapsed" and they are *functus officio*.[14] The term *functus officio* is a branch of the doctrine of *res judicata* that prevents the reopening of decisions by the tribunal that has finally resolved a matter. It means in arbitration that a matter once decided cannot be reopened before the same arbitrator or panel (that does not sit generally as a judicial panel) that rendered the final decision. It is a "fundamental common law principle that once an arbitrator has made and published a final award his authority is exhausted and…[he or she] can do nothing more in regard to the subject matter of the arbitration."[15]

In contrast to the consequences of violating the disclosure rule, failure to provide clarity or accuracy of the calculation of awards or failure to provide a required explanation under the rule that dictates the form of award (R-46 of the AAA Commercial Rules) is remand to the arbitrator or provider. The court's authority in this circumstance illustrates one of the several exceptions to *functus officio*. R-47(b) of the Construction Industry Arbitration Rules (2015), for example, provides that "[i]n all cases, unless waived by agreement of the parties, the arbitrator shall provide [i] concise written financial breakdown

of any monetary awards and, if there are non-monetary components of the claims or counterclaims, the arbitrator shall include a line item disposition of each non-monetary claim or counterclaim." (There is no counterpart of this rule in the Commercial Rules).

In a recent case from the U.S. District Court for the Southern District of New York the parties did not waive the rule and were therefore entitled to a reasoned award. In writing a bare award the Court concluded that the arbitrator had exceeded his authority: "In sum, this Court concludes that it is authorized to remand this matter to Arbitrator Krol for purposes of issuing a 'reasoned award,' and that the doctrine of *functus officio* presents no impediment to that approach."[16] In his carefully drafted decision Judge Gardephe cited widespread support for this conclusion.[17]

The same conclusion with consequential remand would not happen with awards involving commercial disputes unless the parties had expressly requested a reasoned award "in writing prior to the appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate."[18]

The remedy for failure to write a proper award, however, is generally inconsequential in comparison with other arbitrator violations that support vacatur. It does not require the parties to incur the expense and waste time starting again with another arbitrator. There are exceptions of course that focus on the parties' agreement rather than provider rules. For example, in a Ninth Circuit case the court vacated an arbitration award that failed to provide "findings of fact and conclusions of law" as required by the arbitration agreement. The court held that the FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."[19]

Pre-award Intervention

So far I have been discussing primarily post-award motions. I have noted that courts will not disturb provider decisions denying disqualification of arbitrators mid-arbitration because it interferes with the process. Neither will courts entertain suits to address pre-award general objections to the impartiality or expertise of an arbitrator.

The question is, will "our courts enforce the conditions of an arbitral agreement before the arbitral award has been issued when (1) the underlying subject matter of the arbitration involves complex technical and legal issues, (2) the arbitration agreement requires that the arbitrators possess a highly specialized professional background, and (3) the arbitration agreement specifically outlines a precise method to select said arbitrators?"[20]

This is a "narrow, but important, issue." The court explained in *Oakland-Macomb Drain Dist. v. Ric-Man* that intervention is appropriate "when suit is brought…to enforce the key provisions of the agreement to arbitrate—i.e., when the criteria and method for choosing arbitrators are at the heart of the arbitration agreement—then courts will enforce these contractual mandates." In this case, "[t]he AAA's refusal to comply with the arbitration agreement's stated terms robbed the Drainage District of its bargained-for terms, and AAA's repudiation of its obligation cannot be sanctioned by this Court."

Conclusion

Allowing for some overlap the AAA rules are divided into five groups: arbitral process, arbitrator duties, arbitrator power, party duties and obligations, and provider duties. The argument in this article has been that vacatur is limited to egregious violations of arbitrator and provider duties as expressed in their rules. Although mal-, non-, or misfeasance implicating the other rules are the most raised in motions, and thoroughly enjoyable to read, they are rarely (perhaps, never!) persuasive at the appellate level in supporting vacatur.

Endnotes

1. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) Congress enacted the FAA in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."); *United Bhd. of Carpenters & Joiners of Am. v. Tappan Zee Constructors*, LLC, __ F.3d __, 2015 WL 6143213, at *4 (2d Cir. Oct. 20, 2015) ("A court's review of an arbitration award is severely limited so as not to frustrate the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.").
2. A good example is the Second Circuit's instruction to the district court to confirm the award *in Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60 (2nd Cir. 2012).
3. 559 U.S. at 671.
4. *Tappan Zee Constructors*, 2015 WL 6143213, at *4 (2nd Cir.).
5. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) ("It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.").
6. The same rule can be found in the Construction Industry Arbitration Rules of the AAA at R-19.
7. The Code became effective March 1, 2004). Disclosure is covered in Canon II ("An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.).
8. *Burlington Northern Ry. v. Tuco Inc.*, 960 S.W.2d 629 (Tex. 1997) ("[A] prospective neutral arbitrator selected by the parties or their representatives exhibits evident partiality if he or she does not disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality. We emphasize that this evident partiality is established from the nondisclosure itself, regardless of whether the nondisclosed information necessarily establishes partiality or bias.").
9. *Commonwealth Coatings Corp v. Continental Casualty Co.*, 393 U.S. 145, 151, 89 S.Ct. 337 (White, J., concurring).

10. The same rule can be found in the Construction Industry Arbitration Rules of the AAA at R-20.

11. Review Standards at 2.

12. *In Re Sussex*, 781 F.3d 1065 (9th Cir. 2015) (Decisions amended March 27, 2015) (Mid-arbitration intervention disqualifying the arbitrator reversed.) A petition for certiorari was filed on June 25, 2015.

13. 781 F.3d at 13.

14. *Green v. Ameritech Corp*., 200 F.3d 967, 976-78 (6th Cir. 2000) ("The doctrine of *functus officio* contains several exceptions. This court has noted: '[The] rule [of *functus officio*] was based on the notion that after an arbitrator has rendered an award, his contractual powers have lapsed and he is `*functus officio*.'").

15. *La Vale Plaza, Inc. v. R.s. Noonan, Inc*., 378 F.2d 569 (3rd Cir. 1967).

16. *Tully Construction Company/A.J. Pegno Construction Company, J.V., v. Canam Steel Corporation*, No. 13 Civ. 3037 (PGG) (SDNY March 2, 2015).

17. See *Green v. Ameritech Corp*., *supra* note 14: "This rule [*of functus officio*], however, has its limits. A remand is proper, both at common law and under the federal law of labor arbitration contracts, to clarify an ambiguous award or to require the arbitrator to address an issue submitted to him but not resolved by the award.'" *Industrial Mut. Ass'n Inc. v. Amalgamated Workers, Local No. 383*, 725 F.2d 406, 412 n. 3 (6th Cir.1984)).

18. R-46(b) of the Commercial Arbitration Rules and Mediation Procedures: "[t]he arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate."

19. *W. Employers Ins. v. Jefferies & Co.*, 958 F.2d 258, 261 (9th Cir. 1992).

20. *Oakland-Macomb Drain Dist. v. Ric-Man*, 304 Mich. App. 46, 850 N.W.2d 498 (2014).

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The Case for Bringing Diversity to the Selection of ADR Neutrals[1]

By Theodore K. Cheng

Addressing the dearth of women and people of color who are selected to act as neutrals in the alternative dispute resolution (ADR) field has long been a challenge.[2] Historically, not only have the various rosters and lists maintained by private ADR providers (and courts, for that matter) failed to reflect the pool of available and qualified women and minority neutrals, but the selection process has also repeatedly afforded opportunities to only a small percentage of this growing pool. Corporate America's emphasis on diversity and inclusion over the past several decades demonstrates the growing understanding of the value added by promoting a diverse workforce and demanding that its suppliers also be similarly committed. However, while great strides have been achieved in many disparate areas, little to no improvement has been seen in the selection of ADR neutrals.

"[R]equests for proposals for legal work often mandate a certain level of diversity amongst the legal professionals who are anticipated to work on the matter."

It All Began With Workplace and Supplier Diversity

The awareness of the benefits of adopting principles of diversity and inclusion began with a close look at workplace diversity issues. In 1987, U.S. Secretary of Labor William Brock commissioned a study by the Hudson Institute (an independent non-profit organization) of various economic and demographic trends. This study was later turned into a book called *Workforce 2000: Work and Workers for the 21st Century*, which helped develop the business case for diversifying the workforce.[3] Specifically, the trends identified by the study suggested that companies needed to make workforce diversification an economic imperative if they wanted to remain competitive and continue to be able to attract workers in a dynamic demographic environment. Thus, companies began measuring diversity, and the costs for failing to pay it heed, in terms of metrics such as retention, turnover, productivity, stock value, revenue/market share, succession planning, and public image. Looking outward, companies sought to expand their customer base to market more to diverse customers. Concomitantly, looking inward, they promulgated policies to diversify their suppliers, principally setting forth criteria and requirements applicable to their procurement processes that looked to the diversity of a supplier's workforce as part of that supplier's eligibility for continued receipt of the company's business.

Because outside law firms are suppliers of legal services to in-house corporate legal departments, as a natural extension of the supplier diversity initiatives, some companies also began imposing similar criteria and requirements to the legal profession. In 1998, Charles Morgan, BellSouth Corporation's Executive Vice President and General Counsel, authored a document entitled, "Diversity in the Workplace: Statement of Principles."[4] This document, which was signed by the Chief Legal Officers of approximately 500 major corporations, proclaimed the dedication to diversity in the workplace by corporate legal departments. However, concerned with a lack of progress in this area, in 2004, Roderick A. Palmore, General Counsel of General Mills Corporation, issued "A Call to Action: Diversity in the Legal Profession," which reaffirmed corporate legal departments' commitment to diversity in the legal profession, espousing the mantra that clients deserve legal representation that reflects the diversity of their employees, customers, and communities.[5] In some sense, this was a natural extension of the companies' obligation to be an equal opportunity employer.

These efforts have resulted in marked changes to the way in which certain corporate legal departments work with outside law firms. Notable, recognizable examples of companies who have embraced these diversity ideals include Sara Lee, Coca-Cola, The Gap, AIG, Microsoft, Shell Oil, DuPont, Eli Lilly, Wal-Mart, Pitney Bowes, and International Paper, just to name a few. For example, requests for proposals for legal work often mandate a certain level of diversity amongst the legal professionals who are anticipated to work on the matter. Corporate legal departments may also more generally require disclosure by law firms of the demographic statistics relating to the legal professionals at the firm. Some companies also now more closely track their legal spending on women and minority-owned firms. As a result, many corporate legal departments have pared down their use of law firms who do not meet their criteria and have generally put pressure on law firms to similarly embrace diversity and inclusion. In doing so, corporate legal departments have clearly stated that they want to be represented by law firms that value diversity as much as they do. Law firms have also moved in parallel. In conjunction with a shift in demographics showing an increase in women and minorities in the legal profession, they have generally sought to diversify their attorney ranks, primarily through recruiting, and then through institutional changes, such as the creation of

affinity groups and sponsoring of mentoring programs to address retention issues.

Curiously, however, unlike the manner in which corporate legal departments select diverse outside counsel, corporations persist in pursuing an outdated approach to the selection of diverse neutrals. Companies largely continue to outsource both the drafting of dispute resolution clauses and the actual neutral selection to outside counsel, abdicating these fundamental strategic decisions to others. Far too much reliance is placed on established networks, word-of-mouth, and the recommendations of the same "usual suspects," leading to a reluctance to try out someone new and an attendant loss of opportunity to broaden the company's roster of preferred neutrals. Relatedly, there is a failure to acknowledge and address unconscious, implicit biases that permeate any decision-making process, which can exist just as easily in the decision to select the neutrals who will oversee the resolution of the dispute.[6] The end result—at least in the case with private ADR providers—is the existence of a double-screen problem: a neutral must generally first be appointed to a roster or list, and then either outside counsel or in-house counsel must select the neutral from that list.

Neutrals, after all, are suppliers of services to in-house corporate legal departments as well. Yet, they are not viewed in the same way as outside counsel, let alone the entity who sells the company its reams of copier paper. It is simply not in the consciousness of Corporate America in the same way as other suppliers and vendors. Perhaps some companies have not fully analyzed the tradeoffs—advantages or benefits gained vs. losses or disadvantages incurred—from pursuing diversity and inclusion as one component of a strategy for selecting neutrals. Maybe some companies do not construe law firms and similar professional services providers to be a part of their procurement process, thus exempting them from any applicable supplier diversity requirements. As a result, the diversity and inclusion mandate that appears to have permeated a large swath of corporate legal departments has not trickled down to the selection and hiring of mediators, arbitrators, and other types of ADR neutrals. At the same time, there has been a tremendous increase in the number of ADR practitioners, and, in particular, a large increase in the younger, unseasoned cohort of that population. This likely stems from law schools increasingly offering both substantive courses and experiential clinics devoted to ADR, thereby exposing students to the profession and encouraging them to consider a career as a prospective neutral. Thus, the lack of diversity we see in the ADR profession is not necessarily rooted in an issue of lack of supply. For example, the American Bar Association's Dispute Resolution Section has put together lists of women and minority ADR neutrals that are publicly available on its website.[7] There appear to be plenty of women and minority neutrals willing and able to serve. They just need to be given the opportunity to actually do so.

Why Is Diversity in ADR Important?

By any measure, the state of diversity in ADR is dismal.[8] Yet, there are sound rationales for why diversity is and should be an important (although perhaps not the sole or overriding) factor in selecting an appropriate neutral to resolve a dispute.

"That same dedication and resolve should be applied to improve the paucity of women and people of color who are selected to act as neutrals in the ADR field."

First, because ADR processes are essentially the privatization of a public function—namely, a proceeding brought in a judicial forum to resolve a dispute—the need for diversity is paramount.[9] As is the case for the judiciary, an ADR profession dominated by individuals of one background, perspective, philosophy, or persuasion is neither healthy nor ideal.[10] Rather, the professionals who sit as neutrals should reflect the diverse communities of attorneys and disputants whom they serve. A diverse pool of neutrals also instills confidence in those constituents and ensures a measure of fairness, public access, and public justice.

Second, particularly in situations where more than one decision-maker has been engaged (*e.g.*, a panel of arbitrators), the process of decision-making itself is generally improved, resulting in normatively better and more correct outcomes, when there exist different points of view.[11] Aside from the value of affording cognitive diversity to the panel, having a diverse panel typically adds new perspectives, while destroying the tendency to have the panel engage in unnecessary groupthink, so long as the decision-makers are able to exercise independence of opinion.

For these reasons alone, corporate legal departments should think more strategically when selecting neutrals to serve as arbitrators and mediators on their disputes. There is already a deep-rooted commitment stemming from Corporate America's workplace and supplier diversity initiatives, and the "Call to Action" has resulted in noticeable changes in the legal marketplace (although there is admittedly more that needs to be done). That same dedication and resolve should be applied to improve the paucity of women and people of color who are selected to act as neutrals in the ADR field.

Endnotes

1. An earlier version of this article was originally published in *ABA Just Resolutions e-News* (November 2015), available at http://nysbar.com/blogs/ResolutionRoundtable/The%20Case%20for%20Bringing%20Diversity%20to%20the%20Selection%20of%20ADR%20Neutrals%20%28T%20%20Cheng%29.pdf.

2. *See, e.g.*, David A. Hoffman and Lamont E. Stallworth, "Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity," *AAA Dispute Resolution Journal*, Vol. 63, No. 1 (Feb./Apr. 2008), at 36, available at http://lamontstallworth.org/Articles/PDFS/Leveling_the_Playing_Field.pdf.

3. *See* William B. Johnston and Arnold E. Packer, "Workforce 2000: Work and Workers for the 21st Century" (Hudson Institute 1987), available at http://files.eric.ed.gov/fulltext/ED290887.pdf.

4. *See* "Diversity in the Workplace: Statement of Principles," available at http://heinonline.org/HOL/LandingPage?handle=hein.journals/busiltom9&div=78&id=&page=.

5. *See* "A Call to Action: Diversity in the Legal Profession," available at http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=16074.

6. *See, e.g.*, Edna Sussman, "Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them," 24 *Amer. Rev. Int'l Arb.* 487 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2372307; Linda R. Tropp and Rachel D. Godsil, "Overcoming Implicit Bias and Racial Anxiety," *Psychology Today* website (Jan. 23, 2015), available at https://www.umass.edu/peacepsychology/sites/default/files/Overcoming%20Implicit%20Bias%20and%20Racial%20Anxiety%20|%20Psychology%20Today.pdf; Rachel D. Godsil, "Answering the Diversity Mandate: Overcoming Implicit Bias and Racial Anxiety," *New Jersey Lawyer Magazine* (Feb. 2014) at 44.

7. *See* Women in Dispute Resolution (WIDR) Member Directory of ADR Practitioners (ABA Mar. 2015), available at http://www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/widr_member_directory.authcheckdam.pdf; Minorities in Dispute Resolution (MIDR) Member Directory (ABA May 2015), available at http://www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/MIDR-Directory.authcheckdam.pdf.

8. *See, e.g.*, Beth Trent, Deborah Masucci, and Timothy Lewis, "The Dismal State of Diversity: Mapping a Chart for Change," *ABA Dispute Resolution Magazine*, Vol. 21, No. 1 (Fall 2014) at 21, available at http://www.americanbar.org/publications/dispute_resolution_magazine/2014/fall/the-dismal-state-of-diversity-mapping-a-chart-for-change.html; Gina Viola Brown and Andrea Kupfer Schneider, "Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey," 47 *Akron L. Rev.* 975 (2014), available at http://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1274&context=akronlawreview; Maria R. Volpe, Robert A. Baruch Bush, Gene A. Johnson, Jr., and Christopher M. Kwok, "Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field," 35 *Fordham Urban L. J.* 119 (2008), available at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2278&context=ulj; Hon. Ariel E. Belen, "We Need More Diversity in Mediation," *Law360* (Mar. 15, 2013) ("Anecdotally, the evidence is very strong that among the thousands of mediators and arbitrators selected to resolve disputes every year, it is rare that a minority ADR practitioner is chosen."), available at http://www.jamsadr.com/files/Uploads/Documents/Articles/Belen-Diversity-2013-03-15.pdf.

9. *See* Laura A. Kaster, "Why and How Corporations Must Act Now to Improve ADR Diversity," *Corporate Disputes* (Jan.-Mar. 2015) at 36, 37, available at http://www.corporatedisputesmagazine.com/why-and-how-corporations-must-act-now-to-improve-adr-diversity/; David H. Burt and Laura A. Kaster, "Why Bringing Diversity to ADR is a Necessity," *ACC Docket* (Oct. 2013), at 41, available at http://www.cpradr.org/Portals/0/Why%20Bringing%20Diversity%20D%20Burt.pdf.

10. *See* Vincent T. Chang, Theodore K. Cheng, and James P. Chou, "Reflecting the Communities it Serves: Increasing the Diversity of the Federal Bench," *AABANY Advocate* (Winter 2011) at 3, available at http://c.ymcdn.com/sites/www.aabany.org/resource/resmgr/imported/Advocate%20Winter%202011.pdf.

11. *See generally* Scott Page, The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies (Princeton Univ. Press 2007); James Surowiecki, The Wisdom of Crowds (Anchor Books 2004).

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Message from the Co-Editors-in-Chief

(continued from page 2)

The Working Group II effort will move forward. If it can create or maintain momentum, a convention is the possible outcome and such a convention would change the trajectory of mediation in the world. It would be the basis for a groundswell and a growth spurt for international mediation. Let's keep watching.

This year will also see the commencement of the Global Pound Conference, which will take place in many cities around the world in an attempt to map the future of ADR and better determine what ADR users want and need. The article this month by Deborah Masucci, who is involved with this project that is being spearheaded by the International Mediation Institute, describes this project for our readers.

We also have all the regular components of our journal reflecting on cases, developments, challenges and trends in ADR and we invite your suggestions and comments as we work to continually improve our efforts.

Laura A. Kaster, Edna Sussman and Sherman Kahn

Recovery of Attorneys' Fees and Costs: Displacing the "American Rule" in Petitions to Confirm International Arbitral Awards[1]

By Mark Stadnyk

Under the "American rule," each party bears its own counsel fees and costs incurred in court litigation. In principle, petitions to confirm arbitration awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") are no different. However, as illustrated by a recent decision of the District Court for the Southern District of New York, award creditors may in certain circumstances recover the reasonable attorneys' fees and costs incurred in pursuing confirmation of international arbitral awards in New York courts.

I. *Navig8 Chemicals Asia PTE, Ltd. and Navig8 Chemicals Pool, Inc. v. Crest Energy Partners, LP ("Navig8")*

In *Navig8*, Judge Paul A. Engelmayer considered a petition to confirm an international arbitral award and an associated application for attorneys' fees and costs.[2] The underlying arbitration award was issued in favor of Navig8, a ship owner and operator headquartered in Singapore, against an American company, Crest Energy. The dispute concerned liabilities arising out of a charter party for the Songa Peace, a chemical tanker. An arbitral tribunal seated in New York awarded Navig8 a total of USD 765,436.98, a sum that included reimbursement of attorneys' fees and costs incurred in the arbitration.

Crest Energy failed to pay the award, and Navig8 began court confirmation proceedings in New York. Crest Energy did not appear in the court proceedings to oppose confirmation. Following precedent, the court treated the petition to confirm the award as an "unopposed motion for summary judgment." Finding that Navig8 was entitled to judgment on the petition as a matter of law, the court confirmed the award in the amount of USD 765,436.98 plus interest.

The court then considered Navig8's application for attorneys' fees and costs incurred in prosecuting the petition to confirm the award. Although the arbitration clause in the charter party authorized the arbitral panel to include costs and a "reasonable allowance for attorney's fees" in the arbitral award, it did not mention costs or fees incurred in connection with an action before a court to enforce such an award. Nevertheless, the court noted that, pursuant to its inherent equitable powers, it "may award attorney's fees when the opposing counsel acts in bad faith, vexatiously, wantonly, or for oppressive reasons," such as "refus[ing] to abide by an arbitrator's decision without justification[.]"[3]

"The Navig8 decision affirms that, when an award debtor fails to pay a New York Convention award and fails to respond to a petition to confirm the award in federal court, an award creditor may be able to recover its reasonable attorneys' fees and costs incurred in the court proceedings."

Judge Engelmayer concluded that because the award debtor, "without justification, failed to abide by the Award or respond to the Petition," Navig8 would be awarded its reasonable attorneys' fees and costs in the confirmation proceedings. In a separate decision issued less than a week later, on November 24, 2015, Judge Engelmayer examined the detailed fee application by Navig8's counsel and, having determined the fees and costs incurred in the court proceedings to be reasonable, granted the full amount requested.

II. Lessons Learned from *Navig8*

The *Navig8* decision affirms that, when an award debtor fails to pay a New York Convention award and fails to respond to a petition to confirm the award in federal court, an award creditor may be able to recover its reasonable attorneys' fees and costs incurred in the court proceedings. This position has been adopted by the U.S. District Court for the District of Columbia[4] and the U.S. Court of Appeals for the Ninth Circuit,[5] in addition to the U.S. District Court for the Southern District of New York.

What situations constitute bad faith or an unjustified failure to abide by an award so as to open the door to fee-shifting? In *Navig8*, Judge Engelmayer referred to the award debtor's "fail[ure] to abide by the Award or respond to the Petition." The case law under the New York Convention suggests that this second factor could be especially important. Decisions granting such applications have noted that the "Respondents failed to submit opposition papers to the Petition as directed by the Court,"[6] the "defendant has not opposed the motion" to confirm and enforce an arbitration award,[7] and "the respondent has neither entered an appearance nor answered the petition."[8]

Additionally, the *Navig8* decision suggests that, if parties wish to increase the likelihood of fee-shifting in post-arbitration enforcement actions, they should address that issue in the underlying agreement to arbitrate. Typically, institutional rules do not consider the allocation of costs incurred in the judicial enforcement of any awards. To the extent most institutional rules address fee-shifting, it is in the context of fees incurred in the arbitration (*i.e.*, generally limited to the time period from request for arbitration to final award). For this reason, practitioners should consider an express provision in the arbitration agreement allowing for allocation of fees and costs incurred in enforcing an award.

Endnotes

1. An abridged version of this article, co-authored with Alexandra Dosman, Executive Director of the New York International Arbitration Center (NYIAC), was previously published on November 25, 2015 as NYIAC Case Law Chronicle #4. For a catalogue of international arbitration decisions issued by New York courts since January 1, 2015, please refer to NYIAC's Case Law Library, available at https://nyiac.org/case-law-library/.
2. On November 18, 2015, the court confirmed the award and indicated that it was prepared to grant the petitioner's application for reasonable attorneys' fees and costs following further submissions. *Navig8 Chemicals Asia PTE, Ltd. and Navig8 Chemicals Pool, Inc. v. Crest Energy Partners, LP*, No. 15 CIV. 7639 (PAE), 2015 WL 7302267 (S.D.N.Y. Nov. 18, 2015). On November 24, 2015, the court issued its decision evaluating the reasonableness of attorneys' fees and costs and awarding the request in full.
3. *Id.*, quoting *Celsus Shipholding Corp. v. Manunggal*, No. 06 Civ. 13598 (DLC), 2008 WL 474148, at *2 (S.D.N.Y. Feb. 21, 2008) (internal citations omitted).
4. *Concesionaria Dominicana de Autopistas y Carreteras, S.A. v. Dominican State*, 926 F. Supp. 2d 1, 3 (D.D.C. 2013) ("[T]his Court…holds that a party seeking to confirm a foreign arbitral award under the New York Convention may recover reasonable attorneys' fees and costs, at least where the respondent unjustifiably refused to abide by the arbitral award").
5. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1104 (9th Cir. 2011) ("It is well settled, however, that even absent express statutory authority, federal courts have authority to award attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. …'[A]n unjustified refusal to abide by an arbitrator's award,' moreover, 'may equate an act taken in bad faith, vexatiously or for oppressive reasons.' …Nothing in the New York Convention, or the federal statutes implementing it, expressly or impliedly negates this authority. …Accordingly, we hold that federal law permits an award of attorney's fees in an action under the Convention[.]").
6. *Leon Trading SA v. M.Y. Shipping Private Ltd.*, No. 10 CIV. 129 (PGG), 2010 WL 2772407, at *4 (S.D.N.Y. July 12, 2010).
7. *Celsus Shipholding Corp. v. Manunggal*, No. 06 CIV. 13598(DLC), 2008 WL 474148, at *1 (S.D.N.Y. Feb. 21, 2008).
8. *Swiss Inst. of Bioinformatics v. Glob. Initiative on Sharing All Influenza Data*, 49 F. Supp. 3d 92, 95 (D.D.C. 2014).

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Down the Path to Regulation: Arbitration Safe for Now, but the CFPB Is Moving to Bar Litigation Class Waivers

By Russ Bleemer

The Consumer Financial Protection Bureau is about to take its next step on a path that may lead to regulating arbitration in consumer contracts.

But for now, it's keeping its rulemaking intentions away from arbitration practices, and instead focusing on the arbitration clause's familiar consumer contract bedfellow, class waivers.

The CFPB, charged under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act with acting on arbitration if it finds that the alternative dispute resolution process hurts consumers, is preparing a new report on the impact for small business of the regulation it promises to propose.

A proposal announced by the federal agency at an October hearing in Denver, eliminates class waivers in consumer contracts and allows small-value claims complainants to band together in court. It would prohibit pre-dispute mandatory arbitration requirements that barred class actions in both litigation and arbitration. The proposal's release was expected at a CFPB in Albuquerque, NM on May 5.

Dodd-Frank banned arbitration in "residential mortgage loans or extensions of credit under an open-end consumer credit plan secured by the principal dwelling of the consumer," the CFPB explains.

But it didn't stop there. The six-year-old law also authorized its newly created CFPB to "prohibit or impose conditions or limitations" on the use arbitration for a future dispute over a consumer financial product or service "if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers."[1]

Though business interests strongly disputed the methodology leading to the conclusion, the CFPB declared—in a 728-page March 2015 study, released after three years' preparation—that consumer arbitration contracts need to be regulated. The report offered quantitative findings that the agency said show that consumers are reluctant to bring claims in arbitration, and don't do well if they do.[2]

Insurance, wireless, and credit card agreements frequently include commands barring litigation, and requiring complaints to go to arbitration with the product or services provider, often conducted by the American Arbitration Association or JAMS.

Business groups have long contended that individuals get a better deal in arbitration. Consumer forces counter that mandatory arbitration cuts off claims because individuals rarely wade through the extensive verbiage that accompanies sales contracts.

Both sides have vociferous representatives in law and academia—as well as Congress—that say they are right.

While the agency had been in a public holding pattern, it also has laid out exactly what it is doing. Regulations are coming. The CFPB in its Oct. 7 announcement said that a proposed rule was being prepared. It laid out the steps it would take before the rule was published in the Federal Register for comment and finalizing.

The path to regulation last fall has gone through small businesses. The same day as the Denver hearing, the CFPB released a 34-page hurdle to the proposal—a briefing paper to gather the input of a statutory Small Business Review Panel. The panel gathered "small entity representatives" at an Oct. 28 meeting.

A report on the representatives' reaction to the briefing paper, which will describe what the agency learned about regulatory concerns, as well as identify the panel and the participants, was due in December.

But the statutory deadline obligation under the so-called SBREFA process—review under the Small Business Regulatory Enforcement Fairness Act,[3] which applies to rulemakings at the CFPB and two other federal agencies—wasn't met. Nine days after the deadline, the agency said that the document was complete, but it had no release date.

Instead, the agency previously had announced that the report will emerge with the proposed regulation. The CFPB at this writing appears to be drafting the regulation to reflect whatever the small business owners told the special statutory panel, which the agency convened.

October Surprise

The proceedings are secret until the report is released, but it's likely someone in the room expressed surprise at the CFPB's October proposal. Arbitration practitioners—both on the business side and the consumer advocate side, and many academics—had long expected that the CFPB would go after the ADR practice with regulations.

Many had braced themselves when the agency began surveying users in 2012 with wide-ranging questions

about everything from the current frequency of arbitrations to how the agency should conduct its study.[4]

But instead of arbitration regulation, the CFPB announced in October that it was focusing on the class waivers that have become standard provisions in consumer contracts that require arbitration.

"The emphasis on regulating class waivers doesn't mean that arbitration got a free pass. The Consumer Financial Protection Bureau also said it intended to require companies to 'send to the Bureau all filings made by or against them in consumer financial arbitration disputes and any decisions that stem from those filings.' Accompanying data collection requirements, if enacted, could publicize the results of processes that may have been chosen for their privacy."

In stating it intends to eliminate class waivers, the agency emphasized waivers' preclusive effect on claims it said its March 2015 report demonstrated. The October 2015 briefing paper for small entity representatives explains that few consumers consider filing complaints against financial providers, and suggests that a principal reason is the low value of the claims, as well as a failure to detect a legal problem.

The study said that, in effect, consumers barely know that they have arbitration agreements.

As a result, "the Bureau believes that existing avenues of aggregate legal relief should be available to consumers who may be harmed by their consumer financial service providers."

It targets the waivers that send class matters to individualized arbitrations. Acknowledging criticism of class action litigation, the outline for small business input says that

> On balance, the Bureau believes that consumers are significantly better protected from harm by consumer financial service providers when they are able to aggregate claims. Accordingly, the Bureau believes that ensuring that consumers can pursue class litigation related to covered consumer financial products or services without being curtailed by arbitration agreements protects consumers, furthers the public interest, and is consistent with the [March 2015] [s]tudy.

The CFPB's proposal would "require any arbitration agreement included in a contract for a consumer financial product or service offered by an entity subject to the proposals to provide explicitly that the arbitration agreement is inapplicable to cases filed in court on behalf of a class unless and until class certification is denied or the class claims are dismissed."

The agency is expected to provide model language in its proposal.

More Arbitration Scrutiny, Too

The emphasis on class waivers doesn't mean that arbitration got a free pass, however. The CFPB also said it intended to require companies to "send to the Bureau all filings made by or against them in consumer financial arbitration disputes and any decisions that stem from those filings," according to CFPB Director Richard Corday at the Denver hearing.

The CFPB said it is considering publishing the results of the data collection, too—a move that could publicize the results of processes that may have been chosen for their privacy.

The consumer protection agency also announced that it will continue to study arbitration, which some believe will lead to elimination, or at least regulation, of mandatory predispute arbitration agreements.[5]

In fact, the CFPB notes that it considered banning arbitration agreements in consumer contracts entirely, but rejected the idea. It allows arbitration clauses that permit consumers to choose between class arbitration and class litigation, but it says it will require that the path to a court action remain open.

The Gathering

The agency had reached out to the small business owners in early October—about 15-20 "small entity representatives," identified with help from the U.S. Small Business Administration—concurrent with the release of the proposed regulation. The agency's Small Business Review Panel gathered the "individuals representative of affected small entities," as described under the statute, in Washington on Oct. 28.

The purpose of the SBREFA outreach meeting is supposed to provide the justification for the rulemaking—and, under the law, should guide or alter the regulatory path, which notes that after the meeting, "where appropriate, the agency shall modify the proposed rule…." 5 U.S.C. §609(b)(6).

The small entity representatives at the SBREFA proceedings "typically discuss the anticipated compliance requirements and potential costs of the proposed rule," according to the CFPB's site, and may submit written comments.

The Small Business Review Panel, which consists of members of the CFPB, the SBA, and the Office of Management and Budget's Office of Information and Regulatory Affairs, will make recommendations based on the information gathered from the small entity representatives via its report for the regulation's content.

The meetings aren't public, but the results are supposed to be summarized in 60 days under 5 U.S.C. § 609(b)(5). That Dec. 19 deadline has passed, and CFPB spokesman David Mayorga notes in an email that the report is complete, "but timing is forthcoming."

Other entities will be asked for input too, according to the CFPB's small entity representative briefing material. They include other federal agencies, "as well as tribal and possibly other governments."

To prepare for the SBREFA meeting, small entity representatives were asked to review the detailed briefing paper released by the CFPB with the rulemaking announcement. The paper, "Outline of Proposals under Consideration and Alternatives Considered," explains the CFPB's mission, its interest in arbitration, the results of the voluminous study released last March, and the goals of the SBREFA process.

The outline tells the small entity representatives that they

> will provide the [SBREFA] Panel with important feedback on the potential economic impacts of complying with proposed regulations. They may also provide feedback on regulatory options under consideration and regulatory alternatives to minimize these impacts. In addition, the Dodd-Frank Act directs the Bureau to collect the advice and recommendations of the [small entity representatives] concerning whether the proposals under consideration might increase the cost of credit for small businesses and not-for-profits and concerning alternatives to minimize any such increase.

Among the specific questions are how long small entities would need to implement the proposals under consideration. The CFPB says it intends to propose that existing arbitration agreements be grandfathered, and the class waiver restrictions would not apply to contracts entered into 210 days—that's a 180-day Dodd-Frank effectiveness requirement and another 30 days under the proposal—before the rule goes final.

The SBREFA prep document lists the businesses that the rulemaking would cover and asks whether current exclusions should be added to the list. The current excluded entities are those products or services "(1) already subject to arbitration rules issued by the Securities and Exchange Commission or the Commodity Futures Trading Commission, (2) provided by persons when not regularly engaged in business activity (e.g., an individual who may loan money to a friend), (3) provided by the federal government; (4) provided by state, local, and tribal governments and government entities to persons in their jurisdiction, or to persons outside their jurisdiction if not credit that is subject to the Truth in Lending Act or Regulation Z; and (5) credit a business extends for the consumer's purchase of its own nonfinancial goods or services when covered by Dodd-Frank Act section 1027(a)(2)(B)(ii)" [which addresses situations in which the provider extends credit beyond the value of the goods or services that "significantly exceeds the market value," or where the CFPB has determined the credit line is an end-run around Dodd-Frank Act limits on the Bureau's authority].

The outline says that the CFPB's SBREFA panel report intends to quantify the numbers of businesses to which the regulation will apply, and which of those use arbitration agreements.

It notes a "very preliminary estimate" of more than 40,000 small businesses in six key areas that that would be the target of regulation: "credit card, checking/debit card, prepaid card, payday loan, auto loan, and private student loan markets (including cases against debt collectors in these markets)."

The activities the CFPB seeks to cover are extensions of credit, as well as brokering, servicing and sales of the credit extension; depositary accounts; electronic fund transfers; credit reports, and debt collection, among others.

The outline indicates that the CFPB wants to know how the companies it is surveying operate, and what changes they would make in processes, operations, and dispute prevention if consumers' rights to proceeding against the companies are preserved.

It asked the small entities representatives to assess the extent of costs that would be passed on to customers because of a class waiver ban, "either in terms of higher prices or in other ways (for example, lower quality products)."

The small entity representatives briefing document first asks participants to assess their potential costs under a class arbitration waiver bar. The briefing paper says that small businesses could be affected by increased administrative costs in updating their contracts for compliance, particularly on the requirement that arbitration agreements must indicate that they do not apply to cases filed on a class basis.

It then inquiries about "costs related to additional potential liability due to class litigation exposure (includ-

ing defense costs, court costs, substantive settlement and damages exposure)."

The third SBREFA cost inquiry covers the potential "increased cost of compliance with existing consumer finance and other laws and other costs due to entities attempting to minimize any such additional class litigation exposure in the future."

The outline sums up the costs study by noting,

> Many of these costs are opportunity costs (e.g. management time involved and extra time spent on product design and development in additional rounds of legal and compliance review) that may be difficult to quantify. Nonetheless, the Bureau encourages [the small entity representatives] to attempt quantification to the extent possible and also to provide specific examples. To be able to measure these costs more accurately, the Bureau encourages [the participants] to consider similar costs that [they] presumably faced before they adopted their arbitration agreements.

The CFPB then asks for information on direct costs to entities on its potential arbitration reporting requirement, though the outline minimizes the potential for small business expenses as a result of submitting arbitration outcomes to the agency. The CFPB says it wants to gather information on arbitration use to chart use trends, and would publish decisions to enhance arbitration transparency.

* * *

You can find the SBREFA outline document at 1.usa.gov/1MpoIPr. The SBREFA analysis and the new class waiver regulation, which will offer a public comment period, will be posted at the CFPB's news page at www.consumerfinance.gov/newsroom.

Endnotes

1. Dodd-Frank Act § 1028, codified at 12 U.S. Code § 5518 (available at bit.ly/1Rw265R).
2. Consumer Financial Protection Bureau Arbitration Study Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a) (March 2015) (available at http://ow.ly/PiNMB)). For a discussion of the CFPB's findings, see Russ Bleemer, "Congress Seeks to Put New Requirements on the CFPB's Moves to Regulate Consumer Arbitration," Vol. 8, No. 2 *NYSBA New York Dispute Resolution Lawyer* 22 (Fall 2015) (information at bit.ly/1PL7ujv).
3. P.L. 104-121, 110 Stat. 857 (March 29, 1996) (as amended by P.L. 110-28, May 25, 2007), codified at 5 U.S.C. § 601 (available at 1.usa.gov/1VNxXQ7).
4. See "Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements," Docket No. CFPB-2012-0017 (available at 1.usa.gov/1Rbc7Xr); for a discussion, see "CFPB's Call for Data: A New Foundation for Arbitration Regulation?" 30 ALTERNATIVES TO THE HIGH COST OF LITIGATION 122 (June 2012).
5. See, e.g., George Friedman, "Consumer Arbitration: Five Things to Look for in 2016," *Securities Arbitration Commentator* (Dec. 29, 2015) (available at www.sacarbitration.com/blog/consumer-arbitration-five-things-look-2016/).

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The Global Pound Conference: The Journey to Determine the Needs of Users Has Started

By Deborah Masucci

Our world has changed dramatically in the last 30 years. The hand-held device has replaced the mainframe computer; driverless cars will shortly replace the human driver; snapchat/instagram and other social networks have replaced most physical mail; international travel has replaced vacation in the local mountains; and, internet sales accessing goods around the world have replaced the local department store.

Depending on whom you talk to, these changes and others benefit society or create new challenges. The changes definitely transformed how we work and how we manage and resolve disputes. During the last 30 years arbitration and mediation have developed as not only alternatives to the court, but the preferred way to resolve disputes. A new person decides to become a dispute resolver each day—whether an arbitrator, mediator, Ombuds, or other neutral. Law schools now offer dispute resolution courses and clinical programs understanding that mediation and arbitration are a central component of any lawyer's toolkit. There is recognition that transactional and business lawyers need to know how to deescalate conflict and manage disputes before litigation is filed. Alternative dispute resolution (ADR) techniques are major tools to efficiently and cost effectively resolve disputes at the right price. Online dispute resolution capitalizes on technology to resolve cross border disputes. However, we also hear that users and others are dissatisfied with the processes available. Dispute resolution professionals comment that the use of ADR has stalled and that users are not taking advantage of the power of the tools. But do we know what business users really need from ADR in our new world?

In late 2015, the International Mediation Institute (IMI) launched the Global Pound Conference[1] (GPC) Series to initiate a modern conversation about ADR around the world in commercial and civil conflicts. The goal is to determine the needs of users and what can be done to improve access to justice. The GPC Series started in Singapore on March 17-18 and will end in London in July 2017. Local events will engage users with other stakeholders in the fields of dispute prevention, management, and resolution. The events are organized locally but coordinated globally. As of January 30, 2016 there are events scheduled in 38 cities in 29 countries worldwide.[2] A New York event is scheduled for September 12, 2016.

Like the original Pound Conference for which it is named, the ambition of the GPC is to change the culture and methods of resolving conflicts. The GPC Series will culminate in a report at the end of 2017, which will interpret the data gathered globally to help shape how dispute resolution will be conducted for years to come. The resulting data from all of the events will be publicly available to anyone wishing to research stakeholder views on dispute resolution.

The GPC is an opportunity for stakeholders to come together to discuss the way disputes could be managed and resolved in the modern world. Stakeholders will collaborate at each of the events around the world to discuss existing tools and techniques available in dispute resolution. They will also stimulate new ideas and generate actionable data on what users of dispute resolution actually need and want, both locally and globally. Conversations about what dispute resolution should be today and for years to come will propel the field.

What Information Will Be Gathered?

Professor Frank E. Sander of Harvard Law School is credited with provoking the courts to adopt many innovative changes in the U.S. justice system aimed at providing more procedural choices to disputants. His paper, delivered almost 40 years ago, proposed the now familiar "multi-door courthouse" leading to the many forms of ADR now used. Today there is a relatively developed set of dispute resolution processes but do we understand how they are used globally and whether we can use them more effectively and appropriately in the future, possibly in combination and in more culturally adapted ways in the future?

The GPC events use a core set of questions[3] posed to gain an understanding of what and how the established forms of ADR are used globally. Cultural and definitional differences are acknowledged but a baseline should arise to further understanding and provoke conversation. Participants are encouraged to submit formal papers and impromptu thoughts through online technology. In this way a new thought leader like Frank Sanders might influence how dispute management and resolution is shaped in the future.

The topics of the questions range from what do users need, how is the market currently addressing the need, how can dispute management and resolution be improved, and what action needs to be taken and by whom. The questions may seem simple but the motives behind the answers will be far from simple. Each series of questions is followed by panel discussions and attendees are encouraged to comment through technological applications. Participants are physically present. The GPC will have available videos and other resources to deepen the conversation.

The information gathered at each event will be posted on the GPC website. A final report will be issued at the end of 2017. In the interim, each event will be informed by the interchange at previous events.

What Happened at the Singapore Event?

The first event was held in Singapore on March 17-18. Over 400 people participated in the event. Attendees came from all over the world including the U.S., Australia, New Zealand, Japan, China, Pakistan, Great Britain, Fiji, and more.

Chief Justice Sundaresh Menon used his Opening Address[4] to outline changes in the economic landscape that are leading to greater numbers of cross border disputes and the recognition that access to justice needs to take place outside of the courtroom. He announced three responses to this shift that Singapore is undertaking to better shape the future of dispute resolution and improve access to justice. The first response is to emphasize "appropriate" dispute resolution rather than "alternative" dispute resolution. This shift recognizes the broader tools available to disputants that may be invoked even before a lawsuit is filed. The key is customization of the dispute management and resolution process to meet the parties' needs. The Chief Justice emphasized that this shift will not diminish the role of the courts but instead the courts will hold a special place as "guardians of the rule of law and ultimate resolver of disputes."

The second response is greater collaboration and sharing of information among the courts and governments around the world that will create frameworks and international best practices that will create processes to meet the needs of users in both civil and common law countries. The exchange of information occurs through Conferences, memorandum of understanding and guidance adopted in multiple jurisdictions to address questions of law, and Conventions on enforcement of court judgments to name a few. These efforts will improve consistency of outcomes across jurisdictions and may reduce incentives for parties to "forum shop."

The third response is to recognize and embrace the internationalism of delivery of legal services. Singapore has already recognized the increase in foreign lawyers practicing in the country and instead of restricting access, established a common disciplinary and regulatory framework to manage and strengthen the global talent pool, thereby strengthening Singapore's position as a legal hub in Asia.

The Chief Justice proudly reviewed the many institutions established in Singapore to promote effective dispute resolution. The institutions include the Singapore International Arbitration Centre, the Singapore Mediation Institute and the Singapore International Mediation Centre. These institutions are now joined by the launch of the Singapore International Dispute Resolution Academy, dedicated to training and educational excellence in dispute resolution.

The Chief Justice's remarks kicked off two days of vigorous discussion that was "no holds barred." The information collecting is the beginning of the road. Success was demonstrated by the fact that participants returned for a second day and fifteen more events were added to the schedule.

For me, three themes were apparent. First, the courts will continue to play an important role in the development and evolution of dispute management and resolution. Second, law schools and continuing education programs will support and enhance knowledge of effective dispute process and sharing of best practices. Third, technology will play an important role in the future delivery of dispute management process. These are my reflections but there may be other areas seen by different stakeholders that may or may not form a thread with future events. You can access pictures, videos and other information collected in Singapore by going to the Facebook, Twitter and Linked-in links on the Singapore website at http://singapore2016.globalpoundconference.org/Pages/default.aspx#.VvCsMsfDNSV.

Next Steps

The GPC is an ambitious undertaking that has attracted substantial support. Many people from around the world are poised to see the results and act to shape the future of dispute management and resolution. The excitement is palpable and the possibilities are limitless, if we allow it.

Endnotes

1. The GPC was named after the 1906 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice where the dean of Harvard Law School, Roscoe Pound, delivered remarks on reforming the justice system. The event was followed in 1976 by a Conference—"2000AD—The Need for Systematic Anticipation" where remarks were made by the then Chief Justice of the U.S. Supreme Court, Warren Burger.
2. See http://www.globalpoundconference.org for a list of events and more information about the goals of the GPC.
3. To see the actual questions go to http://www.globalpoundconference.org.
4. A full copy of Chief Justice Menon's speech can be found at http://www.supremecourt.gov.sg/news/speeches/chief-justice-sundaresh-menon-global-pound-conference-series-2016--singapore-shaping-the-future-of-dispute-resolution-and-improving-access-to-justice.

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Precedential Value of Arbitral Awards in International Arbitration

By Josefa Sicard-Mirabal

Why do arbitrators and parties cite and rely on prior decisions?

First of all, why do we even talk about a precedential value in international arbitration?

Precedent in arbitration has recently received a lot of attention, particularly in Investor-State arbitration. The attention comes from the fact that some decisions are publicly available and the fact that we have seen differing and apparently contradictory decisions rendered by tribunals interpreting the law. Investor-State arbitration has also come under scrutiny, either because the amounts at issue and or awarded are astronomical or because the subject matter, for example health or the environment, is of great concern to the public.

Awards are now readily available either in their entirety or some redacted form. In the past, however, it was a different story and there was a completely different understanding of what work product of arbitral tribunals would be publicized. Indeed, when discussing this issue, Sir Robert Y. Jennings commented:

> And what do they all do? Where do they all sit? It is not easy to find out. There is no kind of structured relationship between most of them. There is not even the semblance of any kind of hierarchy or system. They have appeared as a need or desire or ambition. In this particular respect, contemporary international law is just a disorderly medley. Suffice it to say that it is very difficult to try to make a sort of pattern, much less a structured relationship, of this mass of tribunals, whether important or petty. It is sometimes too difficult to find out what is going on, much less to study it.

Sir Jennings expressed that sentiment in 1996, and probably some commentators would say the same today.

The term precedent is generally used to indicate a binding precedent under the doctrine of *stare decisis et non quieta movere* (meaning to stand by what is decided). Where this doctrine is applicable in public judicial systems, courts must follow precedents and treat like cases alike. The term is also used to refer to a persuasive precedent, a de facto stare decisis, which means that courts do not have a legal obligation to follow the prior decisions or precedents, but may use them under certain circumstances, depending on the facts of the case.

Under different national legal systems, precedents have a different binding value. The most common distinction is between civil law and common law systems. Civil law countries do not recognize a doctrine of stare decisis, whereas common law countries do. Although there are more civil law traditions around the world, the argument for consistency, certainty, predictability, reliability, and equality that stare decisis is based on is a powerful one. But what happens in international arbitration?

In international commercial arbitration, there is no doctrine of stare decisis and no tendency to follow or cite past cases. In fact, past cases may only have indirect influence on subsequent arbitral awards, but no precedential value. In commercial arbitration, awards have much less weight and authority because you rarely have the whole award—just extracts. There is no confidence that you are seeing the whole universe of decisions because there is no systematic reporting. Moreover, commercial cases are fact and contract specific, thus extracts are not very helpful.

In international investment arbitration, however, there is again no governing doctrine of stare decisis, but it is practice for arbitrators to consider and cite previous cases. The main reason for the distinction is that investment cases are generally published. Indeed, the ICSID Reports convey the concept of a system of precedent in order to develop a coherent interpretation of the law and a consistent jurisprudence. The parties themselves are bound by a decision as set forth under Article 53 of the ICSID Convection, stating: "The award shall be binding on the parties." The negative pregnant of that sentence is that the award is not binding on non-parties. For non-parties, we may only say that prior cases have a persuasive, and not binding, value. But if there is no binding system of precedent, why do arbitrators and parties cite and rely on prior decisions?

In trying to answer this question, arbitrators, academics, and users were interviewed for the purpose of reaching a conclusion regarding the value of arbitral awards. These were the questions posed:

1. Do you believe you are bound by prior awards?
2. Do you consider awards useful for developing a body of law?
3. How do you account for the different and sometimes contradictory awards by different tribunals?

4. Would you agree that, depending on your legal training and background (common or civil law), some arbitrators and practitioners will feel more or less inclined to "follow" prior decisions?

5. What are the consequences for not "following" a prior award?

These are some revealing answers from personalities and experts in the international arbitration arena.[1]

—In response to question 1. The unanimous position was that prior awards are not binding. However, the question elicited an additional response: "A prior award will have weight/authority if it is convincing." "Nothing happens if you don't follow a prior award." "I believe that prior awards are at times abused because they are used out of context and simply as moral support."—"I do not believe I am bound by prior awards. Yet, they [awards] have a convincing value, as they oblige the arbitrator to find good reasons not to follow them in a specific case." "They are very useful, especially when several awards have decided in the same way, there is a strong presumption that they are right." "All arbitrators are inclined to follow prior decisions. The consequence for not following an award is only the need to present a stronger and more elaborated reasoning."

"Although arbitrators are not bound by prior awards in the same sense as judges in hierarchical national legal systems, awards certainly can be useful in creating bodies of legal principles to inform arbitrators. Different and sometimes contradictory awards should not be a mystery. Even within the most hierarchical of national legal systems, courts take varying approaches, seeing facts from varying perspectives, and weighing competing policy considerations in different manners. Individual arbitrators certainly vary in their inclination to give deference to prior decisions. However, in my observation, this has nothing at all to do with common law vs. civil law backgrounds. The consequences for not 'following' a prior award depend on whether the earlier decisions were clearly wrong or were wise and sound. Arbitrators often use prior rulings to justify their decision to the rest of the world and to enhance the prospect that similar cases will be treated similarly. An arbitrator would need to be bold indeed to assume that nothing could be learned from reading how others struggled with comparable issues, even if their awards are not binding in the sense of precedent."

"I see awards as persuasive, and some are particularly influential when they deal with a procedural matter, especially under the same rule set and especially if the arbitral tribunal includes well-known arbitration experts. I would not rely on an award for substantive law. Even then, the award would be persuasive authority, creating a body of authority that should be respected and considered. Courts, even within the same jurisdiction, have equally contradictory outcomes on similar facts/law or even in the same case, through the string of appeals. These are difficult issues that are subject to interpretation. Some inconsistency is to be expected. I wouldn't see a breakdown by legal background. I think most arbitrators will consider the legal authorities submitted to them by the parties and give those authorities the weight they consider appropriate. However, since an award is not binding, I don't think there should be any consequences for not following a single previous award. If there is a large body of agreed principles, reflected in numerous awards, commentary and case law, then an anomalous decision is problematic, but failure to follow one single award is not. The issue is still somewhat open."

"Arbitrators are not bound by prior awards. Generally, they are not even useful as a body of law because they are not accessible. I would love it if this was the case, and awards were published. I don't also believe that the background plays a part. And there are no consequences for not following a prior award, and I think it is a problem."

"Prior awards are not binding. This does not imply that they lack value. I believe that they may be useful to inspire and confirm later decisions."

—I am not bound, under any circumstances. However, prior awards are definitively useful to create a body of law. There are various reasons for contradictory awards, including: arbitrator´s lack of responsibility to do his or her job to find out, study, and examine prior cases decided under similar facts; different facts, which the arbitrator in any event should disclose and highlight; and arbitrator´s lack of institutional responsibility. The legal background of course influences the arbitrator's practice. And there are no consequences for not "following" a prior award.—"A distinction should be made between commercial and investor-state arbitration, but in neither case awards are binding. Still, they are useful as jurisprudence constante—to create stability. Only when there is consensus does it become particularly authoritative. The consequence for not following a prior award is that the system suffers and people lose confidence."

Based on the content of the interviews, it is possible to summarize that the weight given to prior arbitral awards by arbitrators may be classified by:

1. Those who find them persuasive.

2. Those who distinguish them from prior awards.

3. Those who may use them to reinforce an interpretation.

4. Those who consider it a duty to take them into consideration.

It may also be summarized that there are generally no consequences for not following prior awards. In that respect, the response from the users clearly states that they

will be less inclined to use arbitration because they would prefer consistency.

"It behooves us all to work towards a more transparent, consistent, and cohesive body of jurisprudence constante in international arbitration."

In conclusion, arbitral tribunals consistently acknowledge that in international law there is no doctrine of binding precedent and that they are not bound by precedent. Based on the interviews conducted, it is not clear, and there is no general consensus on whether prior awards should be considered persuasive. The consequences of this conclusion are lack of certainty and lack of transparency, causing the system to suffer and people to lose confidence in it. It has been said that prior awards are not binding, unless convincing, but convincing to whom? It has also been said that prior awards have an inspirational function. What is the legal value of the term inspirational?

Jurisprudence constante is slow in developing, but it is useful to create a body of law and stability as a consequence. It behooves us all to work towards a more transparent, consistent, and cohesive body of jurisprudence constante in international arbitration. The entire arbitration system and community can only gain from interpreting prior awards and making them useful for future decisions.

Endnote

1. These experts include Bernardo Cremades, Yves Derains, William "Rusty" Park, Fernando Mantilla-Serrano, Stacie Strong, Eric Schwartz, Mark Morill, Michael McIlwrath, Mark C. Baker and many others.

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Increasing Internationalization of Chinese Arbitration

By Elizabeth Cheung-Gaffney

Foreign investment and cross-border transactions in China increased dramatically since the 1990s and the numbers continue to climb. When disputes arise, both foreign and local companies view the court system with skepticism, so arbitration has a long history as the favored method of dispute resolution.[1] To meet demand, China responded by building a more sophisticated and robust arbitration system.[2] Over the next two decades much of the discussion focused on the problems with Chinese arbitration commissions and the inconsistencies with other international arbitration commissions. However, not enough discussion has reflected how far arbitration in China has come. There have been significant developments such that one can now cautiously argue that Chinese arbitration is moving towards increasing internationalization.[3]

Foreign Arbitration Institutions in China—A Growing Body of Case Law

One of the questions most foreign practitioners outside of China are often curious about is whether foreign arbitration institutions can conduct proceedings in China. The traditional thinking is that Art. 10 of the China Arbitration Act prohibits foreign arbitral commissions from conducting proceedings in China. Article 10 states, in relevant part, "the establishment of an arbitration commission shall be registered with the administrative authority of justice of the relevant province, autonomous region or municipality directly under the central government."

The law in this area is continuing to evolve and a recent case, *Longlide Packaging Co., Ltd v. BP Agnati S.R.L.*,[4] may shed some light on this issue.

To date, the Supreme People's Court has not directly addressed the question of whether foreign arbitration institutions can legally conduct arbitrations in China. Prior to *Longlide*, Chinese courts addressed foreign arbitrations conducted in China on two occasions with mixed results; first in *Zueblin International GmbH, Germany* (2006)[5] and then in *Duferco v. Ningbo Arts and Craft Import and Export Co.*, (2008).[6] *Zueblin* involved an arbitration clause that stated: "ICC Rules Shanghai shall apply,"[7] while the *Duferco* arbitration clause provided: "The Arbitration Committee of the International Chamber of Commerce in China."[8]

In the case of *Zueblin*, while not addressing the legality of foreign arbitration institutions arbitrating in China, the court denied enforcement of the ICC award because the arbitration clause did not comply with Chinese law as it failed to designate a specific arbitral institution.[9] Citing Article 16 of the China Arbitration Act,[10] a valid arbitration clause contains 3 elements: (1) an expression of intent to apply for arbitration; (2) subject matters for arbitration; (3) a designated arbitration commission."[11] Because the clause only stated "ICC Rules Shanghai shall apply" without specifying an arbitration commission, the Court declared the clause invalid.[12]

In the next case, the *Duferco* court came to a different conclusion. Citing the Supreme People's Court Interpretation of the PRC Arbitration law Article 13,[13] the *Duferco* court held that the ICC award should be enforced since the objecting party to the arbitration failed to raise any objection prior to the commencement of the first hearing.[14]

Since neither court addressed the validity of foreign arbitral proceedings conducted in China, the legality of such proceedings post-*Zueblin* and *Duferco* was still an open question. *Longlide Packaging Co., Ltd v. BP Agnati S.R.L.*, like the aforementioned cases, called for an arbitration by the ICC in China, stating that "any dispute arising from or in connection with this contract shall be submitted by the International Chamber of Commerce (ICC) Court of Arbitration according to its arbitration rules, by one or more arbitrators. The place of jurisdiction shall be Shanghai, China…."[15]

The Supreme People's Court, affirming the Higher People's Court of Anhui, upheld the validity of the arbitration agreement on the grounds that all three criteria of the China Arbitration Law Art. 16 were met. The Court found that the Sales Contract expressed the (1) true intent of the parties to arbitrate all disputes relating to the sales contract, and (2) they designated the ICC Court of Arbitration as the arbitration commission, and therefore it was a valid arbitration clause under Chinese law.[16]

It is instructive to look at the articles of law that the courts relied on to decide these cases, and perhaps more importantly, the ones they did not rely on. Interestingly enough, the courts could have found all three arbitration clauses invalid as a violation of Article 10 of the China Arbitration Act, which some argue forbids foreign arbitration institutions from conducting arbitrations in China unless they first obtain permission and file registration papers with the administrative agency under the central government.[17]

The court's willingness to approach the legality of foreign arbitral commissions in China using Article 13 and Article 16 is encouraging. This approach signals efforts to foster a pro-arbitration environment that preserves the parties' desire to arbitrate wherever possible. It may also indicate an uncertainty surrounding meaning and application of Article 10.[18] Indeed some experts have argued that Article 10 may be defined narrowly and thus not apply to foreign institutions at all. Under this theory, Chinese law

is completely silent on the issue of foreign arbitration commissions in China.

This silence, coupled with the Supreme People's Court's failure to directly address the issue, has encouraged at least one international commission to provide a model clause in its materials specifically drafted for use in China.[19] In light of the recent decision in *Longlide*, more international commissions should consider their own model clauses for China.

Independence from CIETAC

Another positive development in China arbitration has been the Supreme People's Court's July 2015 directive resolving jurisdictional issues in connection with the splitting off of the Shanghai and Shenzhen CIETAC Subcommissions into new and independent commissions. In 2013 the Shanghai and Shenzhen offices of CIETAC broke away from CIETAC to become the Shanghai International Arbitration Commission (SHIAC) and the Shenzhen Subcommission became the Shenzhen Court of International Arbitration (SCIA).

After the split in 2013, disputes arose about whether the newly established SHIAC and SCIA had jurisdiction to hear cases arising out of the pre-split arbitration clauses that designated their former entities, CIETAC Shanghai Sub-commission and the CIETAC South-China Sea Sub-commission, as the arbitration institution. As SHIAC and SCIA began to hear cases arising out of these pre-split arbitration clauses, the awards were challenged in Chinese courts questioning the arbitration commissions' jurisdiction. [20]

However, the intermediate courts consistently found that objections based on the name change were more "form over substance" and held in favor of the newly formed SHIAC and SCIA.[21] First in December of 2014 the Shanghai No. 2 Intermediate People's Court recognized SHIAC's jurisdiction over the arbitration clause referencing CIETAC Shanghai Sub-commission.[22] The Shenzhen Intermediate Court followed suit in January of 2015, validating SCIA's jurisdiction over an arbitration clause that designated the CIETAC South-China Sea Sub-commission.[23]

Since cases in China are neither binding nor create precedent, it was still necessary for the Supreme People's Court to settle this issue. Before issuing a final decision, on September 4, 2013 the SPC issued a directive to all lower courts that all cases before them involving the CIETAC split needed to be reported to the SPC before a decision was made.[24] In July of 2015 the SPC issued the "Interpretation of the Supreme People's Court on Certain Issues concerning the Application of PRC Arbitration Law."[25] The SPC held that if the arbitration agreement was entered into before the Shanghai and Shenzhen Subcommissions split off, then the newly formed SHIAC and SCIA retain jurisdiction over the dispute. If the arbitration was entered into after the split, but before July 17, 2015, the first party to hear the dispute has jurisdiction over the dispute. Finally, if the arbitration agreement were entered into after July 17, 2015, CIETAC has jurisdiction over the dispute.

"In recent years, all the developments in Chinese arbitration have been in the direction of making China more arbitration friendly and welcoming to the international community."

The increase in the number of arbitration commissions in China has had clear benefits. For example, SHIAC's Arbitration Rules for the Free Trade Zone Court of Arbitration provide more flexibility than parties would otherwise have in areas such as interim measures, evidence, mediation, and joinder of additional parties.[26] SHIAC's most recent arbitrator panel contains experts from 61 different countries with 255 of them being from countries outside of China.[27] Even CIETAC has amended its rules to be consistent with SHIAC's rules, which has one commentator calling the development the "internationalization" of CIETAC.[28]

Recent Changes Are Increasingly Friendly to International Elements

In recent years, all the developments in Chinese arbitration have been in the direction of making China more arbitration friendly and welcoming to the international community. While some of the changes, such as the *Longlide* case are incremental changes, others, such as the two former sub-commissions declaring their independence from CIETAC, have been seismic.

Moreover, it is interesting to note that developments in Chinese arbitration have come from all sectors, beginning with the Courts and extending to the internal Chinese commissions themselves. Even the Chinese government is poised to change the arbitration landscape via the Free Trade Zone. The government State Council announced that the Shanghai Free Trade Zone will have a provision which provides for foreign arbitration commissions "entering into" the FTZ.[29] This is as yet untested but merits close observation. Taken together, these noteworthy developments are cause for cautious optimism that Chinese arbitration is indeed trending towards internationalization.

Endnotes

1. "There were 235 arbitration commissions in mainland China in 2014 and these administered a total of 113,660 cases, a rise of 9% from the previous year. The total value of claims was 265 billion yuan (US $42 billion), a 61% increase from 2013 and five times the value of claims in 2004." See http://www.out-law.com/en/articles/2015/september/chinese-arbitration-adapts-to-international-market--/.

2. Arbitration Law of the People's Republic of China, Order no. 31 of the People Republic of China on August 31, 1994.

3. One commentator explained the negative perceptions this way: "While it is true that arbitration proceedings in China and in particular enforcement can go terribly wrong and be puzzling to western parties used to the western concept of 'due process', there is also sufficient empirical evidence to suggest that things can work fine where the parties prepare well and seek experienced counsel. The major problem is that there is a lack of statistics and information about the situation regarding arbitration and enforcement in China. Therefore, personal experience from practitioners is often extrapolated and develop into ever growing rumors about how terrible arbitration in China is," http://kluwerarbitrationblog.com/2013/11/07/arbitration-in-china-the-common-misperceptions/.

4. SPC Docket Number: 2013-MinTa Zi No. 13.

5. Civil Case Decision No. 1, 2004 Wuxi Intermediate People's Court, Xi Min Zhong Zi Min 3 NO. 1, 2004 (Chinese edition). Wuxi District Court held that without naming a definite arbitration institution the arbitration clause was rendered invalid in accordance with the Arbitration law of the PRC.

6. *Duferco S.A. v. Ningbo Arts and Crafts Import and Export Co., Ltd*., (2007) Yong Zhong Jian Zi No. 4.

7. Dong, Arthur, *Does Supreme People's Court's Decision Open the Door for Foreign Arbitration Institutions to Explore the Chinese Market*? July 21, 2014 found at http://en.anjielaw.com/news_detail/newsId=139.html, last visited December 10, 2015.

8. Thorpe, Peter, China: *Duferco v. Ningbo Arts and Craft Import and Export Co.—first ICC arbitral award enforced in China*, Int. A.L.R. 2009, 12(6), N69-70.

9. Speech by Renmin University of China Professor Zhao Xiuwen, *Judicial Supervision in International Commercial Arbitration—Lessons from the Zueblin Case in Mainland China*. Speech delivered on November 2nd and 3rd, 2007, copy with the author.

10. China Arbitration Act, Art. 16.

11. *See* speech by Renmin University of China Professor Zhao Xiuwen, at page 1.

12. *Id*.

13. Thorpe, at 70. The Supreme People's Court's Interpretation on Several Issues Relevant to the Application of the PRC Arbitration Law provides that where the relevant party to an arbitral dispute has not raised any objection to the validity of the arbitral tribunal, the people's court will not accept any application for the determination of the validity of the arbitration clause or the setting aside of the tribunal's decision in respect of such validity.

14. *Id*.

15. Dong, Arthur, *Does Supreme People's Court's Decision Open the Door for Foreign Arbitration Institutions to Explore the Chinese Market?*, at p.2, July 21, 2014 found at China Law Vision, www.chinalawvision.com last visited December 8, 2015.

16. *Id*.

17. Rogers, James and Townsend, Matthew, *The Longlide Decision, PRC Upholds ICC arbitration in China*, International Arbitration Report 2015, issue 4 at 19-21, available at http://www.nortonrosefulbright.com/files/the-longlide-decision-127892.pdf. Last visited December 11, 2015.

18. The wording of Article 10, "*the establishment of an arbitration commission* shall be registered with the administrative authority of justice" could in theory relate to China's prohibition on *ad hoc* arbitration. While widely accepted internationally, *ad hoc* arbitration is not recognized in China because of the government's desire to ensure the quality of arbitration proceedings as well as arbitrators. Foreign arbitral institutions are already established and thus may not fit neatly into the meaning of "arbitration commission" within the definition of Article 10.

19. Kun, Fan, *ICC International Court of Arbitration Bulletin*, Vol. 19 No. 2 (2008) at 37. The ICC's standard arbitration clause for use in China was amended to contain a specific designation to the ICC Court of arbitration. The amended clause states: "All disputes arising out of or in connection with the present contract shall be submitted to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with said Rules."

20. Suzhou district court held that SHIAC no longer had jurisdiction over cases that referred to CIETAC Shanghai. See 2013 Su Zhong Shang Zhong Shen Zi No. 4; Shenzhen district court held that the newly formed SCIA did have jurisdiction over arbitration clauses referring to its old entity, CIETAC South-China Sea Sub-commission. *See* [2012] Shen Zhong Fa She Wai Zhong Zi No. 226.

21. D'Agostino, Justin, *The Aftermath of the CIETAC Split: Two Years On, Lower Courts take clashing views on arbitration agreements and awards—but higher courts strive for consistency.* Found at http://kluwerarbitrationblog.com/2014/05/02/the-aftermath-of-the-cietac-split-two-years-on-lower-courts-take-clashing-views-on-arbitration-agreements-and-awards-but-higher-courts-strive-for-consistency/.

22. (2012) Hu Er Zhong Min Ren (Zhong Xie Di 5 Hao) issued on December 31, 2014.

23. (2013) Shen Zhong Fa She Wai Zhong Zi Di 133 Hao issued on January 6, 2015.

24. *See* D'Agostino, at 2.

25. *Reply of the Supreme People's Court at the Request of the Shanghai and Other High People's Courts for Instructions on Cases Involving the Judicial Review of Arbitral Awards Made by the CIETAC and its Former Sub-Commissions*, Adopted at the 1655th meeting of the Judicial Committee of the Supreme People's Court on 23 June 2015, Fa Shi [2015] No.15.

26. Unlike the other PRC arbitration rules, SHIAC's Pilot Free Trade Zone Arbitration Rules ("FTZ") permit parties to adopt other internationally accepted evidentiary rules. In addition to more freedom to select evidentiary rules, the FTZ rules allow for mediation prior to the composition of the arbitral tribunal. When it comes to adding additional parties, Article 36 of the FTZ Rules allow the joinder of additional parties upon agreement of all the parties.

27. SHIAC May 1, 2015 announcement of New Panel of Arbitrators. Available at http://www.shiac.org/English/NewsDetails.aspx?tid=7&nid=952.

28. CIETAC's New Arbitration Rules 2015, found at http://www.allenovery.com/publications/en-gb/Pages/CIETAC's-New-Arbitration-Rules-2015-.aspx.

29. Chen, Helena, *Chinese Arbitration Adapts to International Market*, available at http://www.out-law.com/en/articles/2015/september/chinese-arbitration-adapts-to-international-market--/. Chen discusses the State Council's announcement's regarding the Free Trade Zone where it announced that foreign arbitration commissions were going to be allowed to "enter into" the FTZ. The State Council did not elaborate on the meaning of "enter into" and whether that would mean conducting proceedings within the FTZ. There has been little information on this and no examples of successful arbitrations conducted by foreign arbitral institutions to date but this area is worth watching.

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Is New York Law Appealing to Asian Parties?

By Gilles Cuniberti

Received wisdom is that, despite the diversity of international commercial parties, and of international business transactions, the world of international contracts is dominated by two laws: English and New York law. A recent empirical study of contracts going to arbitration suggests that this is true in Asia (outside Mainland China), and that parties to Asian international transactions essentially choose three laws to govern their contracts: U.S. laws, English law and Singapore law.[1]

The study analyzed data provided by three of the four main arbitral institutions active in Asia outside Mainland China[2] for years 2011 and 2012. Unfortunately, ICDR, which handles an equivalent number of cases involving Asian parties as the three other institutions, was unable to provide data on choice of law, but ICDR officials and some experienced practitioners have confirmed that it is reasonable to assume that the vast majority of ICDR cases involving Asian parties have their seat in the U.S. and that the parties provide for the application of a U.S. law, typically New York or California law. It was thus possible to conclude that, combined, U.S. laws, English law and Singapore law represented almost 85% of all choices made in Asian arbitrations handled by the four institutions in 2011 and 2012. No other law was chosen in more than 5% of the cases.

While the success of U.S. laws in Asia is certainly good news for U.S. practitioners, it must be underscored that the study also suggests that U.S. laws are virtually always chosen in the same circumstances. First, the contract was concluded between an Asian and an American party. Secondly, the parties had chosen the U.S. as the seat of the arbitration. The vast majority of cases where U.S. laws were probably chosen are cases which were arbitrated in the U.S. under the aegis of ICDR. In other words, U.S. laws are very rarely chosen in arbitrations handled by the other big Asian institutions. They are virtually never chosen in SIAC and HKIAC arbitrations. They are chosen more often in ICC arbitrations involving Asian parties.

English law is chosen in Asian business transactions in a much wider range of situations and circumstances. First, it is chosen in cases with their seat in Asia, in particular in Hong Kong and Singapore. Secondly, and most importantly, there are very few English corporations active in Asia, which means that English law is typically chosen in cases where none of the parties is English.

The Asian Market for Third Contract Laws

The fact that U.S. laws are often chosen in transactions involving a U.S. party is unsurprising. It simply shows that U.S. corporations often have a bigger bargaining power than their Asian counterpart, and are able to impose U.S. law and an arbitral seat in the U.S. What is remarkable is the fact that English law is so often chosen as a third law. It seems that, when parties to Asian business transactions are unable to impose their own law and look for a third state law, they almost systematically choose English law. While the success of U.S. laws in Asia seems to be a direct function of the power of U.S. corporations, English law is chosen for itself by parties who could freely choose any law that would appear to be suitable to govern their transaction.

This difference is of course essential from a business perspective. The choice of the law of a given jurisdiction to govern a contract will bring business to lawyers admitted to practice the law of that jurisdiction, whether at the stage of the conclusion of the contract, or later if any dispute arises. Both English and U.S. lawyers benefit from the fact that their laws are often chosen in Asian business transactions. For U.S. lawyers, the origin of this additional business is the U.S. economy, and the activity of U.S. corporations in Asia (or of Asian corporations in the U.S.). For English lawyers, by contrast, the origin of this additional business seems to be the attractiveness of English law. This means that, remarkably, the English legal profession generates its own business irrespective of the economic activity of English corporations.

Why would Asian parties systematically prefer English law over other laws and, in particular, New York law? Put differently, there is an Asian market for third contract laws, and it seems to be entirely dominated by English law. Could U.S. lawyers better compete on that market?

The first reason that comes to mind for explaining the attractiveness of one contract law over others is its intrinsic quality. Commercial parties should be sophisticated, and English law might thus have special features which are appealing to them. It is difficult, however, to identify any special rule of English law which might make such a difference. Scholars and practitioners have often insisted on the existence of a duty of good faith under New York law that English lawyers have always rejected.[3] Could this explain the higher attractiveness of English law, as some have argued[4] New York law is typically preferred in U.S. domestic transactions because it is more formalist than other U.S. laws? There is no evidence supporting and contradicting such claim.

Could it be that, after all, commercial parties are not always so sophisticated, and that extrinsic factors play a much more important role that the perceived qualities of the competing laws? Here are two factors which might indeed have a much bigger impact.

International Law Firms in Asia

The involvement of counsel in the process of choosing the law governing international commercial contracts creates an obvious agency problem. Lawyers are typically admitted to practice one law and will naturally be more familiar and

more comfortable with that law., This raises the question whether an important factor in the success of English law in Asia could be that there are simply far more English lawyers involved in Asian international business transactions and, in particular, far more English than U.S. lawyers.

A good proxy for determining the profile of lawyers advising parties to Asian international business transactions should be the profile of lawyers based in Asia. Of course, lawyers assisting such parties need not be based in Asia, but it is reasonable to assume that many will be. The growing number of international law firms with offices in major Asian centers demonstrates that a significant part of Asian legal business is done in Asia.

Today, U.S. firms are widely present in those Asian centers which allow foreign attorneys to practice, i.e. essentially Singapore, Hong Kong and Japan. However, there is a big difference between, on the one hand, Singapore and Hong Kong, and, on the other hand, Japan. The vast majority of partners and counsels in Singapore or Hong Kong offices of U.S. firms received their education in a law school of the British common law world, i.e. essentially Singapore, Hong Kong, England and Australia. This means that there are very few U.S. educated practitioners in these cities. The consequence is very simple: most lawyers based there are most familiar with English law.

The situation in Japan is different. Unlike South East Asia, offices of U.S. firms in Japan are staffed with U.S. educated lawyers (together with Japanese lawyers). They rarely have British common law educated lawyers as partners. As a result, there is roughly an equal number of U.S. trained and British common law trained lawyers based in Japan. And there is a correlation between the number of U.S. lawyers practicing in Japan and the number of transactions where parties choose a U.S. law as the applicable substantive law. The comparison of the data of the four Asian arbitral institutions reveals that there are more Japanese parties in ICDR arbitration than in arbitrations handled by all other Asian institutions combined (including the Japanese institution), which very likely means that Japanese parties more often than not elect U.S. law to govern their international transactions.

Fear of the American Way of Law

American lawyers and scholars underscore American exceptionalism. They are right. The American way of law is unique.[5] As a result, a number of rules of U.S. law are not found in any other jurisdiction, and are looked at with amazement by the rest of the world. Those particularities do not make the American legal system better or worse. But there is no doubt that they generate incomprehension and wonder in the rest of the world, and that incomprehension stirs up suspicion and fear. In this respect, stories of old ladies obtaining millions in damages for being served a hot coffee in a fast food restaurant[6] can be extremely damaging.

In 2011, a Task Force of the New York State Bar Association circulated a questionnaire among New York legal professionals on the factors which make New York law less desirable as governing law for cross-border commercial transactions. One of the two responses which were published stated: "U.S. litigation time, cost and anomalous aspects such as punitive damages; submission to U.S. jurisdiction for foreign entities and U.S. style discovery."[7] The same questionnaire also asked about factors which make New York courts less desirable as fora for resolution of international legal disputes. One of the published responses stated: "Generally, three things put off foreign contracting parties: punitive damages, jury trials and absence of loser pays."[8]

However, many of the peculiarities of U.S. law that are procedural in character: jury trials, discovery, class actions are plainly irrelevant in the context of arbitration in Singapore or Hong Kong, and so are punitive damages.[9] Parties to Asian business transactions could thus associate New York as the law governing the substance of their transaction with a clause providing for arbitration in Asia without fearing that any of these peculiarities would come into play. But the distinction between the venue and the law is a delicate one for non-lawyers, and possibly for some lawyers. For many commercial parties, it is likely that the distinction is simply too sophisticated, and that it will appear safer to simply avoid any reference whatsoever to the American legal system: venue or applicable law.

Endnotes

1. Gilles Cuniberti, *The Laws of Asian International Business Transactions*, 25 Washington Int'l L.J. 35 (2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622573.
2. They are the Singapore International Arbitration Center ("SIAC"), the Hong Kong International Arbitration Centre ("HKIAC"), the International Center for Dispute Resolution (hereinafter the "ICDR") and the International Court of Arbitration of the International Chamber of Commerce (hereinafter the "ICC").
3. See, e.g., Michael W. Galligan, *Choosing New York Law as Governing Law for International Commercial Transactions* 9 (2012); Michelle F. Herman and Nick J. Xu, *Choosing Between New York and English Law in Chinese Aviation Agreements*, Jones Day Airlines and Aviation Alert (2012); Paul Cohen & Gabrielle Farina, *Rue Britannia: Why English law is a poor choice for international commercial arbitration*, 9 Global Arb. Rev. (April 1, 2014).
4. See Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 Cardozo L.R. 1475 (2010).
5. Robert A. Kagan, Adversarial Legalism – The American Way of Law (2001).
6. *Stella Liebeck v. McDonald's Restaurants, P.T.S., Inc. and McDonald's International, Inc.* 1994 Extra LEXIS 23 (Bernalillo County, N.M. Dist. Ct. 1994). The award was reduced by the judge, and the parties eventually settled, but the story remains.
7. Final Report of the New York State Bar Association's Task Force on New York Law in International Matters 73 (June 25, 2011), available at http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=49552.
8. *Id*. at 75.
9. Punitive damages are typically excluded in international commercial arbitration, except in the U.S.

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Virtual International Arbitration: The Fast Development of Technology and Its Impact on Arbitration Proceedings

By Fabio Cozzi

New technologies are having an impact in ADR.

On 11 June 2015, the first conference of the newborn *Journal of Technology in International Arbitration* was held on "The Virtual Arbitration: Undesirable or Inevitable (or Both)?"[1] The conference was carried out using just the telepresence which, compared to the traditional videoconferencing, makes use of sophisticated audio and video technologies to create an effect very close to the "physical presence." The most familiar telepresence technologies make use of high-definition video and sound systems to give a broader and more realistic effect than traditional videoconferencing. To achieve this, the user is provided with a wraparound or very large screen, where life-size, three-dimensional images of the participants are displayed. Typically, each participant can also change the direction of the camera and the area displayed on the screen. Moreover, the conversation and interaction between participants is made more natural and fluid through high-resolution and low delay audio systems,[2] automatic voice-activated switching, and lights able to provide a bright, shadow-free view. The main goal is to avoid the "talking heads" experience, typical in traditional videoconferencing, in favor of a wide stimulation of all senses, through extremely defined full size images and fluid motion, giving the feeling of "eye contact" and making it possible to catch all the details of the experience, such as a smile, a small change in the tone of voice, or even the raising of an eyebrow.[3]

The speakers (well-known arbitrators, lawyers and academics)[4] and the delegates to the conference were able to join thanks to Cisco Telepresence technology from New York, Washington D.C., London, Buenos Aires, Toronto, Dublin, Paris, Brussels, Dusseldorf, Zurich, Vienna, Florence, Madrid, Hong Kong and Singapore. The heart of the experiment was the simulation of a witness examination in an investor-state arbitration case. The "witness," accompanied by his lawyer, was in New York, the legal opponent was in London, and the three members of the tribunal were in three different places: Stockholm, Singapore and London. Lawyers, and arbitrators, spoke to one another remotely, sharing documents in real time on the screen—asking the witness to comment on them—and even proceeding with the simultaneous translation of a document not drafted in English, using Google Translator. The result of the translation appeared simultaneously on the screens of all participants. Arbitrators conferred and decided on the admissibility of the translation in real time.

The simulation was a significant example of how modern technologies can overcome distance and allow for the enactment of a real court hearing and the virtual examination of a witness, with parties thousands of kilometers away from one another, but still able to see each other simultaneously and share documents or written memos on the same screen. However, the debate that followed demonstrated not only the impressive prospects that the use of these technologies offers, but also the skepticism and some delicate issues that will continue to be considered and debated.

"[M]odern technologies can overcome distance and allow for the enactment of a real court hearing and the virtual examination of a witness, with parties thousands of kilometers away from one another, but still able to see each other simultaneously and share documents or written memos on the same screen."

First, the skepticism: many professionals—and in particular many arbitrators—expressed strong resistance to a completely virtual meeting as a substitute for a real meeting with direct contact among all the parties. Particularly, major doubts were raised about the object of the simulation, the virtual examination of witnesses. At least at first, arbitrators were concerned that the monitor might constitute a "filter," depriving them of the ability to gauge all the nuances, both verbal and non-verbal communication, and so prevent arbitrators and advocates from perceiving the whole context. Concern was also expressed about communications between the arbitrators, who sometimes find the need to confer privately. Others admitted that even though examining a witness via videoconferencing is often not much different from examining a witness in person, their preference would be for the personal meeting.

Some of these limitations and the skepticism might be mitigated by the technology itself: allowing arbitrators to have a private space or by improving the camera shots to take different perspectives, with very large and detailed images, high quality audio, suitable to give a feeling very similar to a personal meeting. Other advanced forms of telepresence, already available, make use of glasses or even contact lenses that can reproduce 3-D images and transmit to the camera the movement of the head, creating the impression of sitting in the same room. More sophisticated technologies—that will be ready and widely available in the near future—do not even require the use of

glasses or lenses, thanks to the projection of holographic images (holography uses the transmission of light to beam a three-dimensional image into another room).[5] This system "allow[s] parties to communicate to the fullest extent possible. The spoken word is heard, including voice inflection and intonation, which can strengthen or distort a message through sarcasm or emotion. The unspoken word can be quite powerful via silence, body language, a reddening face, perspiration, etc."[6]

As to the arbitrators' need to confer separately during the hearing, participants in the virtual meeting can exchange messages privately via chat during the meeting.

Technical issues can always occur, and may have an impact. Just think of a case (one of many issues raised during the conference) in which a lawyer of one of the parties, connected through a videoconference, temporarily loses his connection to the videoconference leaving him unable to either see or hear the arbitrators and the lawyer of the other party, maybe without those participants realizing it immediately. Such a situation could have repercussions on the course of the hearing. Moreover, it may be difficult for the tribunal to ensure that the witnesses or experts examined (and physically in the same location of a party's counsel) are really excluded from hearing the examination of other witness or experts.

Delicate issues remain about the protection of personal data and information processed in the proceedings. The telepresence system can ensure the protection of the data exchanged, but once the participants use public systems, like Google or Google Translator (as in the simulation made during the above-mentioned conference), a security issue may arise since these systems retain data on third party systems. The cybersecurity issue is a hot topic, as the recent episode involving the Permanent Court of Arbitration's website confirms. In fact, on July 2015 the cybersecurity platform *ThreatConnect Intelligence* reported that Chinese APT (Advanced Persistent Threat) actors exploited an exposed Adobe Flash security flaw in pages of the PCA website related to "a noteworthy international legal case between the Philippines and China."[7] Basically, that action seems to have exposed an untold number of interested parties that visited the webpages to potential exploitation: anyone who accessed those pages using computers installed with Windows and Adobe Flash may have unknowingly downloaded a malicious URL, in the end enabling the hackers to access their computers remotely. The issue was promptly resolved, but the episode highlights actual risk that confidential information may be illegally acquired by hackers and how important is the use of secure systems.

Moreover, the fact that the virtual arbitration is carried out, simultaneously, in multiple jurisdictions, can lead to a conflict between the potentially applicable privacy laws. A similar issue has been raised with respect to the ethical norms applicable to the involved professionals. As Prof. Catherine Rogers noted during the conference, different ethical regimes may apply where–during the same testimony–different counsel are in different jurisdictions. A possible approach, suggested by Michael McIlwrath, may be to presume that the ethical guidelines of the seat of arbitration would apply, but the issue is still open and needs to be properly discussed. In any case, in a virtual arbitration, the seat of the arbitration becomes more and more a place of convenience, one in which the arbitration proceedings may not take place and which is important only for the determination of the applicable rules.

At present, what is clear from the direct experience of arbitrators, lawyers for the parties and in-house counsel is that most practitioners are only comfortable with the use of this type of technology when it is not possible for all parties and arbitrators to get together in the same place, or when a witness cannot travel and then examination is done by videoconference. Moreover, the IBA Rules on the Taking of Evidence (which parties can include in their arbitration clause) establish that witnesses have to be physically present, unless the tribunal allows the use of a videoconference or similar technologies with regard to a specific witness. The examination of a "distant" witness is, thus, an exception and videoconference or telepresence are rarely used in practice,[8] even if younger professionals feel more comfortable and positive about the use of such technology as it seemed from their comments.

From the reactions to this experience, it appears that a widespread use of telepresence will certainly take time before it becomes a routine practice for the examination of witnesses (and in general for hearings on the merits).[9] However, it is likely to expand more rapidly in all other contexts and stages of arbitration proceedings. By way of example, the *China International Economic and Trade Arbitration Commission* (CIETAC) introduced a set of rules in 2009, subsequently amended in 2014 and put into force from January 1, 2015, specifically related to online or virtual arbitration, marked mainly by the use of e-mails, by online management of the arbitration proceedings, with the help of video conferences, and any other internet technology useful to the management of the proceeding. This rule applies to the resolution of electronic commerce disputes, but it may also be applied to the resolution of other economic and trade disputes upon agreement of the parties.[10] In that case, online hearings, via videoconference or any other technology, are the rule, and the arbitration tribunal decides whether, given the specific circumstances of the case, hearings with the physical presence of the parties must be held and, similarly, whether witnesses could be heard in videoconference.

The general availability of the technologies and fundamental fairness of equal access also impacts on the guarantee of a fair process. In this regard, in the future arbitration institutions may contribute even more actively, both through their rules, that may address more precisely

the issue of the use of technology, and the technologies they offer at reasonable costs, so as to mitigate the negative impact of unequal access to technology. In fact, technology helps to significantly reduce costs, but it requires an initial investment to get a top quality equipment that can ensure an experience really similar to a personal meeting.

The drive to reduce costs in international arbitration is increasing and in-house counsel for large corporations and major groups, especially multinationals, have been expressing this need for a long time. In general, they are the most responsive to issues of technological progress and the opportunities it offers.[11] As noted by Mark Kantor, current resistance expressed by arbitrators and legal counsel, essentially connected to lack of familiarity with new technologies, will be overcome: demand will ultimately control. Therefore, when clients and in-house counsel expect a modern and efficient management of the proceedings, even by using previously unknown technologies, arbitrators will necessarily need to educate themselves and adapt. The ability to be flexible with regard to technologies that can control the costs of the arbitration will acquire increasing importance, in particular where technology can guarantee a full compliance with due process[12] and where the differences from traditional tools and in-person meetings and hearings are really limited, as it may be with telepresence and advanced translation technologies.[13]

There is no reason to believe that technological development will stop. Only time will tell whether arbitration will be a laboratory for the application of futuristic technologies.

Endnotes

1. See also Douglas Thomson, Virtual Arbitration Spells End to Air Miles? in Global Arbitration Review, June 23, 2015, at http://globalarbitrationreview.com.
2. For instance, Cisco AAC-LD technology "combines the advantages of high-fidelity encoding with the low delay necessary for real time, bidirectional communications." See T. Szigeti, K. McMenamy, R. Saville, A. Glowacki, Cisco TelePresence Fundamentals, 2009, p. 69.
3. The potential advantages of technology in international arbitration have been initially highlighted by Prof. Paul D. Carrington; see P.D. Carrington, Virtual Arbitration, in 15 Ohio State Journal on Dispute Resolution 669-74 (2000).
4. Paul Cohen (Perkins Coie LLP) was the chair of the event. Kristen Campbell-Wilson (Stockholm Chamber of Commerce), Thomas D. Halket (Halket Weitz LLP), Mark Kantor, Michael McIlwrath (GE Oil & Gas), Karen Mills SC (KarimSyah Law), Sophie Nappert (3 Verulam Business), Peter Rees QC, Prof. Catherine Rogers (Queen Mary University of London School of Law), Prof. Vikki Rogers (Pace Law School), Erik Schaefer, Greig Taylor (FTI Economic and Financial Consulting Group) and Eduardo Zuleta (Gomez, Pinzon, Zuleta) participated.
5. "Holograms are made taking a single laser beam and splitting it in two. One beam falls on the object you want to photograph, which then bounces off and falls onto a special screen. The second laser beam falls directly onto the screen. The mixing of the two beams creates a complex interference pattern containing the "frozen" 3-D image of the original object, which is then captured on a special film on the screen. Then, by flashing another laser beam through the screen, the image of the original object comes to life in full 3-D." M. Kaku., Physics of the Future: How Science Will Shape Human Destiny and Our Daily Lives by the Year 2100, 2011, pp. 35, 57.
6. See S.N. Exon, The Next Generation of Online Dispute Resolution: the Significance of Holography to Enhance and Transform Dispute Resolution, 12 Cardozo J. Conflict Resol., 19, 2010-2011, p. 20.
7. See A. Ross, Cybersecurity and confidentiality shocks for the PCA, in Global Arbitration Review, July 23, 2015, at http://globalarbitrationreview.com.
8. See P. Pinsolle, Arbitration and New Technologies, in A. Van den Berg (ed.), International Arbitration: The Coming of a New Age?, ICCA Congress Series, Volume 17, pp. 643-51.
9. See S.A. Haridi, J. Bart, What to Do When Pressing the Flesh Means Breaking the Bank: Trade-Offs Between Remote and In-Person Hearings in International Arbitration, in The Journal of Technology in International Arbitration, Vol. 1, No. 1, 2015, pp. 83 and ff. See also P.D. Carrington, Virtual Arbitration, cit., p. 673.
10. See China International Economic and Trade Arbitration Commission Online Arbitration Rules, Art. 1, at http://www.cietac.org.
11. See D.E. Gonzalez, M.C. Carmona, R. Potts, Controlling the Rising Costs in Arbitration: Where Technology Can Help (and Where It Can't), in The Journal of Technology in International Arbitration, Vol. 1, No. 1, 2015, pp. 47 ff.
12. As Yves Derains noted in his keynote speech at the Helsinki International Arbitration Day on May 28, 2015, in international arbitration due process always trumps efficiency, and if there is a conflict between due process and efficiency, due process will always prevail. See V. Heiskanen, Key to Efficiency in International Arbitration, at http://kluwerarbitration.com/blog.
13. As noted by Robert H. Smit (Simpson, Thatcher & Bartlett LLP) during the conference entitled The Evolution and Future of International Arbitration: The Next 30 Years, held from April 19, to April 21, 2015 in London, celebrating the 30 years of Queen Mary School of International Arbitration: "as regards hearings, currently extremely costly and disruptive, the future resides not in videoconferencing but in telepresence, a projection of 3D figures so that parties can attend 'holographically,' and one may not know until one tries to hand over a document to a virtual party, that they are in fact not actually there. (…) Linguistic differences will be managed not through human translators but through universal translation technology using electrodes that read reverberations and translate them into sound, or through computers that lip-read and synthesise, thereby cutting costs and improving accuracy and fluidity. Reliability of witness evidence will also been enhanced enormously by scanners that have a vastly superior record in detecting truth compared to human arbitrators." See J. Greenway, Celebrating a Vision: Queen Mary School of International Arbitration Turns 30 and Looks Ahead to the Next 30 Years, May 1, 2015, at http://kluwerarbitrationblog.com.

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The Trans-Pacific Partnership Investment Chapter: Setting a New Standard in International Investment Agreements

By Mélida Hodgson

The Investment Chapter ("Chapter") of the Trans-Pacific Partnership (TPP)[1] sets the new standard for an international investment agreement ("IIA") by significantly re-balancing the rights and interests of investors and host States, particularly in the context of investor-State dispute settlement ("ISDS"). If TPP passes the United States Congress, and the other States' implementing systems, the Chapter will be a state-of-the-art IIA covering a large and important economic sector that includes Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, Viet Nam, and the United States. In order to understand the import of the Chapter, it is necessary to understand the backdrop against which the negotiation of this Chapter took place.

Introduction

Many of us recall the controversy surrounding the negotiation of the NAFTA—the free trade agreement between Canada, México and the United States—particularly the opposition of labor unions for fear of loss of U.S. jobs, and opposition of other groups that feared an invasion of bad products into the United States and weakened regulation. Soon after the NAFTA went into force in 1994,[2] claims by investors started to be brought against all three countries under the agreement's investment chapter (Chapter 11)—to the shock and dismay of Americans. For while the United States had long entered into bilateral investment treaties (BITs—a form of IIAs) with similar provisions, they were almost all with capital-importing countries, none of whose investors had ever sued the United States.[3]

The NAFTA claims that raised alarm in the United States involved environmental regulation, laws protecting certain sectors of the U.S. economy, and the U.S. judicial system.[4] Indeed, Judge Abner Mikva, the U.S.-appointed arbitrator in the *Loewen* case and also a former congressman and federal appeals court judge, famously remarked *"If Congress had known that there was anything like this in NAFTA, they would never have voted for it*."[5] For those opposed to free trade agreements, these cases were a new lightning rod to rally around.

Although the U.S. had not lost a case, when George W. Bush went to the U.S. Congress seeking authority to negotiate free trade agreements on a "fast track,"[6] including with investment protection provisions, the opposition in Congress was strong, and in addition to fearing a "regulatory chill" over U.S. policymaking, also raised concerns that foreign investors received "greater substantive rights" under these agreements than domestic investors who had access only to U.S. courts.[7] President Bush eventually negotiated a number of free trade agreements with investment protection provisions—but only after the model for these provisions (and the U.S. Model BIT) was revised from about 10 pages to 30-something pages filled with definitions, clarifications, and instructions to arbitrators regarding how to interpret these provisions. The intent was to balance the interests of investors and States and make ISDS more transparent.

To this context must be added the prism of the contemporaneous experience of Argentina, which has had in excess of 50 claims[8] initiated against it arising out of measures taken after its 1999-2000 financial crisis. Whatever one thinks of Argentina's actions, and its defenses, the resulting inconsistent awards and legal reasoning further deepened the distrust and opposition of a variety of civil society groups to investment protection provisions, and particularly investor-State arbitration as a broken, illegitimate system. Indeed, fast forward to today, with Germany, France, Spain and Italy facing investment claims; the opposition in Europe to ISDS as threatening the regulation of health and public welfare and the environment grew so strong that in 2014 even EU officials were calling for excluding ISDS from any of their trade agreements.[9]

What Needs Fixing?

Given the strong objections to investment protections from labor, environmental and civil society groups, and with an eye to the coterminous negotiations with Europe, the United States and its negotiating partners knew that in order for the TPP Chapter to stand a chance it would have to address certain issues: fears of regulatory chill in the area of public welfare policymaking; the perceived inequity in IIAs, particularly ISDS provisions favoring investors; concerns about encroaching upon financial/prudential regulatory space (the financial crisis situation); and, partial arbitrators and "runaway" tribunals.

How the TPP Chapter "Fixes" the Problems

Looking at the first category, public welfare policymaking, key in TPP is the "tobacco exception" which allows States the option to prevent or stop claims based on tobacco regulations under a denial of benefits provision found in the Exceptions Chapter.[10] In addition, the Chapter provides that its substantive protections are not to be construed so as to prevent a Party from adopting, maintaining or enforcing measures necessary to ensure

that investment in its territory is "undertaken in a manner sensitive to environmental, health or other regulatory objectives."[11] This kind of provision has actually existed since the NAFTA but has been gradually strengthened in the modern U.S. Model BIT, and free trade agreements such as DR-CAFTA and Peru.[12]

In the second category—balancing investor and States' rights—there are a few "firsts." Among the most interesting is the new provision on corporate social responsibility which seemingly protects a Party's right to demand that investors "voluntarily" abide by international best practices, standards, guidelines or principles.[13] In addition, the long-controversial coverage of investment authorizations and agreements (direct contracts between investors and States, their governmental subdivisions or State-owned entities) has been restricted, both in substance[14] and with respect to access to ISDS in a key, if limited, first—States are allowed to bring counterclaims in those disputes.[15]

Perhaps most surprising in the "balancing" category is the explicit direction in the Minimum Standard of Treatment provision that "actions inconsistent" with investors' expectations are not covered by TPP—even if there is loss or damage to the covered investment as a result.[16] Similarly, TPP has sought to define (or limit) the scope of "in like circumstances" under the National Treatment and Most-Favored-Nation provisions, which prohibit discriminating in favor of national investors or investors of third countries in like circumstances.[17]

In addition, with an eye to giving States room to prescribe financial regulation, and a second eye on the stream of current cases against Spain and Italy for withdrawing energy subsidies, the Minimum Standard of Treatment provision now excludes subsidies from its scope,[18] and a tweak of the expropriation provision seems aimed at preserving States' discretion to grant or modify subsidies.[19] Indeed, soon after the U.S. government bailed out banks in 2009 there were murmurings that these were discriminatory subsidies in favor of U.S. investors—but no claims were brought. Nonetheless, these provisions are circumscribed by the fact that they are subject to ISDS.

In the third category, and less subject to the scrutiny of arbitrators, and so perhaps more true to protecting "financial/prudential" regulatory space are provisions allowing balance of payment measures free from or subject only to limited dispute settlement.[20] Specifically, the Exceptions Chapter allows temporary financial safeguards in "exceptional circumstances."[21] Clearly, the shadow of Argentina and the 2008 financial crisis lingers—and various Asia-Pacific countries themselves had to deal with a scarring financial crisis in the late 1990s.

In the last category of changes, addressing perceptions of "runaway" or partial tribunals, recalls the old adage that an award is only as good as the arbitrators, there are some changes worth noting. In addition to specific directions to tribunals regarding the scope and interpretation of certain existing provisions described above, the Chapter maintains its instruction to tribunals regarding the management of the proceedings themselves.[22] Moreover, the States have also committed to adopting a code of conduct to which arbitrators will be bound.[23]

"Perhaps the most surprising provision in the 'balancing' category is the explicit direction…that 'actions inconsistent' with investors' expectations are not covered by TPP—even if there is loss or damage to the covered investment as a result."

But surprising, and contradictory from a U.S. policy perspective, is the apparent abandonment of a serious effort to negotiate an appellate mechanism. Post-2000 U.S. IIAs have either required or strongly aspired to establishing an appellate mechanism. But in TPP if a review mechanism is established somewhere else, the States "shall consider" whether to subject TPP awards to that mechanism. Perhaps the U.S. knew that the European Commission was to reveal a proposal in the Transatlantic Trade and Investment Partnership pending ("TTIP") negotiations incorporating the review of awards. Indeed, on September 16, 2015 the European Commission released its TTIP proposal for a standing investment court of first instance *and* an appellate review court that would review both factual and legal error, and both composed of arbitrators chosen by the States.[24]

Conclusion

Perhaps the best explanation of the TPP Chapter changes is the recently noticed $15 billion Keystone XL pipeline NAFTA case challenging the United States' decision (made on environmental grounds) not to approve a pipeline from Canada through to the Gulf Coast—it is precisely what policymakers and negotiators are trying to protect against.

Endnotes

1. *See* http://www.mfat.govt.nz/Treaties-and-International-Law/01-Treaties-for-which-NZ-is-Depositary/0-Trans-Pacific-Partnership.php, released on 5 November 2015.
2. North American Free Trade Agreement, 32 I.L.M. 289 and 605 (1993).
3. The United States has concluded 47 BITs, 41 of which have entered into force. *See* "U.S. International Investment Agreements: Issues for Congress" by Shayerah Ilias Akhtar and Martin A. Weiss (Congressional Research Service, April 29, 2013).
4. *Methanex Corp. v. United States of America,* UNCITRAL Final Award (August 3, 2005) (challenging California environmental regulations), *ADF Group Inc. v. United States of America,* NAFTA Case No. ARB(AF)/00/1, Award (January 9, 2003) (Buy American

Act); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB/99/2, Award (October 11, 2002) (U.S. judicial system and domestic preference rules); and *The Loewen Group Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003) (U.S. judicial system). Mexico and Canada had a similar experience, with arguably Mexico bearing the brunt of claims and unfavorable awards.

5. Adam Liptak, "Review of U.S. Rulings by Nafta Tribunals Stirs Worries," New York Times, 18 April 2004 (available on www.nytimes.com).

6. Fast track, or Trade Promotion Authority, gives presidents the ability to negotiate agreements that will not be substantively altered by Congress as it requires Congress to accept the deal—"yea" or "nay"—as negotiated by the Administration. President Bush was able to obtain this authority in 2002, and in 2015 so did President Barack Obama.

7. President's Transmittal to Congress, June 15, 2005, *see* https://ustr.gov/archives/Trade_Agreements/Regional/CAFTA/transmittal (DR-CAFTA Statement on how the Agreement Achieves the Objectives of the TPA Act submitted to the U.S. Congress with the Agreement's implementing legislation, pp. 6-7); Congressional Record V. 149, PT. 14, page 19457 (July 24, 2003) (debate on floor of House of Representatives regarding the Chile and Singapore free trade agreements).

8. *See, e.g.*, https://icsid.worldbank.org. Relating to, for example, concession contracts governing everything from electricity generation to water supply.

9. *See* statements of Cecilia Malmström and the EU president Jean-Claude Juncker in 2014-2015, https://euobserver.com/news/125797. It should be noted that if there is no ISDS, espousal claims by States would still be likely.

10. Article 29.5 (Tobacco Control Measures). This provision allows a State to deny the benefit of ISDS for claims relating to tobacco control measures, including after a claim has been filed, and directs that arbitral tribunals must dismiss such claims. The U.S. Chamber of Commerce will likely target it for amendment or elimination during the Congressional consideration of TPP, perhaps citing Australia's recent victory against Philip Morris. This exception should not be confused with the Chapter's Denial of Benefits provision (Article 9.14) which generally allows States to deny the benefits/protections of the Chapter to categories of non-Party investors or shell corporations. It should be noted, however, that the invocation of a denial of benefit exception is itself subject to ISDS, even as an exception.

11. Article 9.15 (Investment and Environmental, Health and Other Regulatory Objectives).

12. *See, e.g.*, https://ustr.gov/trade-agreements, DR-CAFTA and Perú Trade Promotion Agreement (Art. 10.11 in both) U.S. Model BIT 2012 (Arts. 12 and 13).

13. *See* Article 9.16 (Corporate Social Responsibility).

14. *See* footnotes 5-11. Note that agreements concerning land, water, or radio spectrum are not covered. Moreover, there is a direction to respect exclusive forum selection clauses in these types of agreements, arguably favoring commercial arbitration. Annex 9-L directs that if the agreements provide for contractual arbitration under the ICC, LCIA or ICSID, those clauses should be respected, but the annex also provides for consolidation of the contractual and investment disputes in ISDS.

15. Article 9.18(2)(Submission of a Claim to Arbitration). Further, the States have agreed that actions taken to enforce competition, environmental, health, and other regulatory laws are not to be mistaken for authorizations. TPP footnote 10.

16. Article 9.6(4). In addition, in Article 9.22(7) (Conduct of the Arbitration), there is a clear statement that in alleging a violation of the Minimum Standard of Treatment provision, the investor bears the burden of proof on all elements.

17. *See* Articles 9.4, 9.5 and footnote 14; note also the direction to tribunals to consider legitimate public welfare objectives in assessing a claim under these provision.

18. Known as the "Fair and Equitable Treatment" provision in most non-U.S. IIAs. Article 9.6(5) (the "mere fact that a subsidy or grant has not been issued, renewed or maintained…does not constitute a breach…even if there is loss or damage to the covered investment as a result."). This is subject to the existence of a specific commitment having been made to an investor.

19. Article 9.7(6)(a)(b).

20. Article 29.3 (Temporary Safeguard Measures) and Annex 9-G (Public Debt). The latter, which limits (and delays) claims related to restructurings to National Treatment and MFN claims, has existed in various forms in U.S. free trade agreements and BITs since the mid-2000s. *See, e.g.,* the Chile and CAFTA agreements.

21. Article 29.3. Although note that the provision is subject to the National Treatment, MFN, and Expropriation protections.

22. So for example in: (i) States that are not members to a particular dispute get to participate in those disputes—including to submit briefs and participate in oral hearings regarding the interpretation of the Chapter's provisions (9.22(2) (Conduct of the Arbitration)); (ii) Tribunals must take interpretations of the Free Trade Commission, including regarding annexes, into account in their awards (Art. 9.24 (Governing Law); (iii) if a State requests a jurisdictional phase, it must be held (and if requested on an expedited schedule) (9.22(5)); (iv) *amicus curiae* participations are allowed (9.22(3); and (v) the proceedings must be open to the public (Art. 9.23 (Transparency of Arbitral Proceedings)).

23. Article 9.21(6). This is to be based on the code of conduct of the TPP's general Dispute Settlement Chapter (Chapter 28), as well as international standards and best practices.

24. *See* www.trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf, Article 9 (Tribunal of First Instance) and Article 10 (Appeal Tribunal). The proposal was finalized in November 2015.

Methods of Facilitating Mediation by Arbitrators in China

By Jessica Fei and David Gu

A. Introduction

China is a nation that favors amicable resolution of disputes.[1] This tradition can be traced back to ancient times—Confucianism promoted "quelling disputes," the idea that "harmony is most precious" and "the doctrine of the middle-way."[2] These ideas have been instilled into Chinese dispute resolution practice. For example, mediation is one of the fundamental principles in the *PRC Civil Procedural Code* (2012).[3] In 2014, approximately 57% of the accepted civil and commercial cases before first-instance Chinese courts were resolved by mediation and voluntary withdrawal of suit by claimants.[4]

Not surprisingly, the Chinese tradition and practice of promoting mediation have also permeated the practice of arbitration in China. When the *PRC Arbitration Law* came into force in 1995, Article 51 conferred upon the arbitral tribunal the discretion to mediate a dispute between the parties before rendering a final arbitral award. In 2014, 235 arbitration institutions nationwide accepted 113,660 cases, with a total value of RMB 265.6 billion.[5] Of these cases, 74,200 were resolved by mediation.[6] This amounts to approximately 65% of the entire caseload.[7]

B. The Med-Arb Mechanism in China

The promotion of mediation in arbitration proceedings in China has led to the Med-Arb mechanism. The mechanism has two types of application.

In the first, the parties reach settlement by mediation prior to the commencement of arbitration and stipulate an agreement to have an arbitration institution to render a consent award. Subsequently, at the request of either party, an arbitral tribunal (a sole arbitrator in most occasions) will be constituted to render a final arbitral award in accordance with the arbitration agreement and settlement agreement of the parties.

This variation of the Med-Arb mechanism was introduced by the China International Economic and Trade Arbitration Commission (*CIETAC*) in its Arbitration Rules.[8] Several leading arbitration institutions in China follow this practice.[9] The arbitral tribunal's task is as simple as recognizing whether the settlement agreement reached by the parties during mediation is legal; if it is, the tribunal will incorporate the content of the settlement agreement into a consent award.[10] The enforcement of such an award is guaranteed under Chinese law[11] and under the New York Convention.

Med-Arb conducted this way helps to ensure that the settlement agreement reached by parties at the relevant mediation centre will be endorsed by an arbitral tribunal in accordance with the arbitration rules of the arbitration institution. This is particularly so when the arbitration institution is closely related to the centre providing the mediation services (CIETAC, for example, has a strong relationship with the CCPIT Mediation Centres[12]). That said, there might be a risk where parties conspire to reach a "sham" settlement agreement and have it converted into an award. In practice, use of this version of the Med-Arb mechanism is not common.

"Arbitrators in China enjoy wide discretion to adopt any method that would be useful and effective in encouraging parties to settle their dispute amicably, subject to any duties and obligations expressly imposed on the arbitrators by law and the applicable arbitration rules."

The second type of Med-Arb is applicable after arbitration is commenced, where arbitrators could assist the parties in trying to mediate their dispute. Notably, according to the arbitration rules of several leading arbitration institutions in China, the arbitral tribunal may mediate the dispute in the manner that it thinks appropriate.[13]

Generally, arbitrators in China enjoy wide discretion to adopt *any method* that would be useful and effective in encouraging parties to settle their dispute amicably, subject to any duties and obligations expressly imposed on the arbitrators by law and the applicable arbitration rules.

This article will address the second type of Med-Arb in detail.

C. Methods of Facilitating Mediation in Arbitration in China

Generally, there are three circumstances in which arbitrators prefer to propose mediation during arbitration proceedings. First, when the tribunal considers the facts of a case too complex to render a final award in a short period, it will often encourage parties to consider mediation to save time and costs.

Second, in dealing with a dispute involving multiple parties and multiple contracts, the tribunal expects to resolve all disputes involving the parties once and for all. For example, where several parties have entered into dozens of contracts, the value of each of which is modest, and affiliates of the parties are involved in those transactions, the tribunal might invite all parties to consider a "catch-all" mediation process, rather than leaving the individual disputes to be resolved through separate arbitration proceedings or litigations.

Third, Med-Arb would come into the tribunal's mind in circumstances where the tribunal anticipates that even if an arbitral award is rendered, its enforcement against one party would not be straightforward or might damage the commercial relationship between the parties. The typical situation is when the relief sought in the award includes specific performance, in which case enforcement against a party in China is often challenging. Under such circumstances, the tribunal might call for mediation in lieu of rendering an award, the enforceability of which might be compromised due to resistance from the losing party.

As a general principle, Med-Arb can be triggered only by the parties' express consent and will be terminated on the basis of either party's freewill.[14] Moreover, under this mechanism arbitrators and parties are required not to use any information obtained from the mediation session in any further proceedings (arbitration or litigation).[15]

There are no specific guidelines as to the methods to be adopted by arbitrators in facilitating mediation in arbitration proceedings. Based on the authors' own experience sitting as arbitrator and acting as counsel, as well as observation of general practice in China, there are three well-recognized methods adopted by arbitrators. Arbitrators may (i) invite the parties to consider mediation; (ii) attend back-to-back meetings separately with each party; and/or (iii) proactively participate in settlement discussions with the parties.

Arbitrators would usually start to facilitate mediation at the end of a hearing on the merits.[16] At that time, arbitrators would have examined documentary evidence of parties, heard each party's case fully, and raised necessary questions to parties, their counsel and witnesses to clarify points of fact and law. As such, arbitrators would be in a better position than before the hearing to assess the dispute on the merits and suggest solutions to parties.

The first method—inviting parties to consider mediation—could be simple or complex, depending on the personal style and experience of an arbitrator. The simple approach is most often adopted, with the tribunal simply giving a routine reminder[17] to the parties to consider mediation. Sometimes, however, a tribunal will make more concerted efforts to persuade the parties to consider mediation.

In one instance, a Chinese arbitrator, acting as chairman of the tribunal, made a long speech during an arbitration hearing to encourage the parties to reach settlement, after he had heard the dispute for two days.[18]

In his speech, the arbitrator (i) acknowledged that it was understandable that the parties and their counsel had presented their cases vigorously, because the parties had high stakes in the dispute, and their counsel only "did their job" to serve their clients' best interests; (ii) invited the parties to think over the strategic and commercial rationales behind the dispute; (iii) asked the parties to take into account the potential legal costs for each side—a figure likely to exceed USD 1 million in this case; (iv) reminded the parties that additional hearings would be needed and told them that the tribunal considered no party would obtain a complete win in the arbitration; and (v) suggested that the parties cooperate with each other to make money in the market, rather than burn money in the arbitration. The parties took the presiding arbitrator's advice seriously and settled the dispute by negotiation.

In his speech, the arbitrator used several techniques sometimes seen in Western-style mediation, such as providing suggestions to the parties about the tribunal's view on the merits of the case, highlighting the time and costs of the dispute to the parties and focusing on the commercial needs and perspectives of the parties. Moreover, this Chinese arbitrator quoted Chinese sayings, e.g., "a person who has a strong case should consider leniency toward its opponent" and "a person will find a lot of space if he is willing to move a step back." By combining Western mediation techniques and Chinese wisdom favoring harmony, the arbitrator not only persuaded the parties to consider mediation, but also set a solid tone for the subsequent negotiation between the parties.

The second method is that the arbitral tribunal may hold back-to-back meetings separately with each party after they consent to mediation. The tribunal may hold a meeting first with the claimant, followed by another meeting with the respondent. In private conversations, the parties may be more open to the tribunal, and the tribunal can gauge the seriousness of each party's intention to settle the dispute. In private meetings, the tribunal may ask each party to make its settlement proposal, i.e., naming a price. In most instances, the tribunal will keep conversations informal and short, so that the conversing party would not feel pressure to make any commitment, and the other party waiting outside the hearing room will not become suspicious of lengthy conversations between the tribunal and the conversing party. Also, the tribunal will generally not intervene too much in the parties' making of their proposals. In this way, the tribunal can be used as a buffer to reduce tensions arising from the parties' conflict in the dispute, and as a conduit for exchanging information between the parties.

The third method, which is not frequently adopted, allows the tribunal to participate in the parties' settlement discussions, if the parties so request. In these circumstances, the tribunal would be seen as "wearing a mediator hat." The tribunal may hold a relatively lengthy meeting with the parties, subtly share the tribunal's view about each party's case, highlight legal costs and time associated with the arbitration, and even suggest possible solutions for the parties' reference. If the settlement discussions fail,

the tribunal will resume the arbitration proceeding and render a final award.

By proactively participating in mediation, the tribunal can obtain information from the parties that they would not have willingly shared in the arbitration proceedings. As such, can the tribunal continue to function as arbitrator in the arbitration proceeding? Arbitration rules of the leading arbitration institutions are silent in this aspect.[19] Neither does Chinese law expressly deal with this issue.[20] In most cases, arbitrators who proactively participate in mediation are able to undertake the arbitrator role, if they can satisfy themselves that their views have not been affected by information obtained in the course of mediation. That said, an arbitrator is at liberty to withdraw from the arbitration, if he or she thinks that he/she cannot remain independent and impartial following participation in a mediation. Given this risk, many arbitrators in China exercise caution before extensively participating in settlement discussions between the parties.

D. Conclusion

Since amicably resolving a dispute is favored in Chinese culture and is enshrined in the Chinese legal system, mediation is frequently used in arbitration proceedings in China.

Arbitrators enjoy wide discretion to adopt any method that they think appropriate and effective in furthering mediation, as long as the parties agree. The personal style and experience of an arbitrator may be significant to the success of mediation in arbitration proceedings.

The above three methods, which can be used alone or together, represent the common practice in China, although there are no uniform guidelines as to mediation approaches adopted by arbitrators.

Endnotes

1. This article will mainly touch upon how arbitrators conduct mediation in arbitration proceedings, although parties are free to resolve a dispute by negotiation at any time.
2. *On Mediation In Commercial Dispute Resolution*, authored by Mr. Sibao Shen, in *Citizen and Law*, Issue No. 9 (2010), on page 3.
3. Article 9 of *PRC Civil Procedural Code* (2012) provides that when mediating civil cases, PRC courts must respect parties' freewill and abide by law. If mediation fails, a civil judgment must be rendered. Article 8 is put into Chapter 1 of *PRC Civil Procedural Code* (2012), where the overriding objective, scope of applicability and fundamental principles of the Code are set out.
4. *To Achieve the Goal of Normal Situation of Social-Economic Development by Trial—Analysis of Civil and Commercial Trials in National Courts in 2014*. Please note that the figure 57% includes cases resolved by both mediation and withdrawal of suit. Therefore, the percentage of cases resolved by mediation out of all civil and commercial cases in first-instance courts in 2014 is less than 57%. http://www.chinacourt.org/article/detail/2015/05/id/1617615.shtml.
5. *Shiming Yuan's Remarks (in Chinese) on 2015 National Arbitration Annual Working Conference*. Mr. Yuan is the Deputy Director of Legislative Affairs Office of the State Council of PRC. http://www.hfac.net.cn/a/News/20151119/161.html.
6. http://epaper.legaldaily.com.cn/fzrb/content/20150613/Articel06004GN.htm, *Chinese Law Daily* 13 June 2015.
7. *Id*.
8. Article 47(10) *CIETAC Arbitration Rules* (2015) provides: "Where the parties have reached a settlement agreement by themselves through negotiation or mediation before the commencement of an arbitration, either party may, based on an arbitration agreement concluded between them that provides for arbitration by CIETAC and the settlement agreement, request CIETAC to constitute an arbitral tribunal to render an arbitral award in accordance with the terms of the settlement agreement. Unless otherwise agreed by the parties, the Chairman of CIETAC shall appoint a sole arbitrator to form such an arbitral tribunal, which shall examine the case in a procedure it considers appropriate and render an award in due course." This mechanism was first introduced in Article 44(4) *CIETAC Arbitration Rules* (2000).
9. Please see Article 41(1) Shanghai International Arbitration Court (*SHIAC*) Arbitration Rules (2015); Article 49(2) Shenzhen International Arbitration Court (*SZIAC*) Arbitration Rules (2012); Article 43(2) Beijing Arbitration Commission (*BAC*) Arbitration Rules (2015).
10. *Med-Arb: A New Type of Combination of Arbitration and Mediation*, Shengchang Wang, *China Foreign Trade*, Issue 6 (2001), p. 16.
11. Article 237 *PRC Civil Procedural Code* (2012).
12. China Council for the Promotion of International Trade (CCPIT), also called the China Chamber of International Commerce, has mediation centres nationwide. CIETAC is under CCPIT as well.
13. Article 47(2) *CIETAC Arbitration Rules* (2015); Article 41(3) *SHIAC Arbitration Rules* (2015); Article 48(2) *SZIAC Arbitration Rules* (2012) and Article 42(1) *BAC Arbitration Rules*.
14. Article 47(1), (2) and (3) *CIETAC Arbitration Rules* (2015).
15. Article 47(9) *CIETAC Arbitration Rules* (2015).
16. Sometimes, arbitrators may ask parties to consider mediation in the middle of a hearing, so long as arbitrators feel confident that they have understood the parties' cases and examined the evidence thoroughly.
17. In practice, some arbitrators in China do not think it necessary to invite parties to consider mediation at the end of an arbitration hearing.
18. *The Essence of Law is Practice—a Selection of Sibao Shen's Speeches* (3rd edition), Sibao Shen, Beijing University Press (2013), pp. 129-131.
19. Article 48 (1) *SZIAC Arbitration Rules* (2012) provides that if the parties agree that the tribunal may preside over a mediation, they shall agree whether any arbitrator who participates in the mediation may continue to sit as arbitrator in subsequent arbitration proceedings, should mediation fail. *CIETAC Arbitration Rules* (2015), *SHIAC Arbitration Rules* (2015) and *BAC Arbitration Rules* (2015) are silent on this issue.
20. In accordance with Article 67 of *Several Rules Concerning Evidence in Civil Action Promulgated by the Supreme People's Court* (2002), a party's admissions of fact in a case, made as a concession so as to reach a mediated or negotiated agreement, shall not be recognised as admissible evidence in subsequent civil litigation proceedings against the party who has made such admission.

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Promoting Settlements in Arbitration: Is the "German Approach" Really Incompatible With the Role of the Arbitrator?

By Klaus Peter Berger

Introduction

It is well-know that German and Swiss arbitrators tend to adopt a settlement-friendly approach in arbitration.[1] This does not mean that the tribunal merely informs the parties "that they are free to settle all or part of the dispute at any time during the course of the ongoing arbitration."[2] Rather, this "German" approach to settlement is characterized by the arbitrators' proactive attitude towards the promotion of a settlement of the dispute, an attitude which he or she maintains throughout the proceedings. S. 278 (1) of the German Code of Civil Procedure requires German judges to adopt the same approach during court proceedings before German courts. From there it has found its way into the Arbitration Rules of the German Institution of Arbitration (DIS). Section 32.1 DIS Arbitration Rules provides:

> At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute.[3]

This basic procedural value enshrined in this provision influences a German arbitrator's attitude towards the promotion of settlements in arbitration. In fact, there is a clear correlation between an arbitrator's propensity to encourage an amicable solution, and the treatment of settlements in his or her home jurisdiction.[4]

How the "German Approach" Works in Arbitral Practice

Common law arbitrators and counsel have always looked with skepticism and even with some dismay at this pragmatic approach to settlement in arbitration.[5] This is surprising from the perspective of both U.S. and English law. In the U.S., the judge's role as a pro-active facilitator of settlements was introduced into the Federal Rules of Civil Procedure as early as 1983.[6] In England, it was one of the declared purposes of the *Woolf*-Reform of English procedural law "to promote more, better and earlier settlements."[7] Consequently, the English Civil Procedure Rules (CPR) which entered into force as a result of that reform on April 26, 1999 provide as an "Overriding Objective" of the court's duty to manage cases actively and effectively that the court shall "help the parties to settle the whole or part of the case."[8] If, however, it is the declared objective of these jurisdictions to promote and encourage the settlement of disputes in their courts, why should international arbitration be different?[9]

Apart from these policy considerations, the objections to the "German approach" to settlement in arbitration are due to some fundamental misunderstandings and uncertainties as to how exactly this proactive settlement technique works in practice. Typically, the tribunal uses a "settlement conference" to explore and discuss with the parties in a dialectic and interactive process the chances for and the possible content of a settlement agreement. Often, the party-appointed arbitrators play an important role in these discussions because a party may be more likely to understand (and accept) the arguments of the tribunal if they are presented to it by the arbitrator it has appointed.[10] As a result of such a conference, a settlement agreement may then be concluded by the parties, either with the assistance of the arbitral tribunal or outside the hearing room.

This abstract description of the tribunal-hosted settlement conference, however, does not provide the full picture of the tribunal's role in the parties' settlement negotiations. It is important to understand that adopting a proactive approach towards settlement in arbitration is not routine. The proactive approach to settlement does not imply a corresponding affirmative obligation on the part of the arbitrator.[11] Whether such an approach is taken in a given case depends on the tribunal's careful evaluation of the nature of the dispute and the underlying commercial interests of the parties. Overt or covert "signals" by the parties as to their willingness to settle which are sometimes sent to the tribunal either during the case management conference or during the hearing are another important factor in this regard. Also, the tribunal never adopts a proactive approach towards a settlement of the dispute as a "surprise move," for example, at the outset or even before the taking of evidence. The timing of the settlement talks is crucial because typically the discussion of possible settlement terms is preceded by a preliminary determination ("*vorläufige Rechtsansicht/Rechtsgespräch*") of the legal issues at stake by the arbitral tribunal.[12] It is only after the evidence has been taken that the arbitrators are in a position to provide such preliminary determination because they (and the parties) have acquired a profound understanding of the facts and their impact or the legal issues at stake in the dispute. The IBA Rules on the Taking of Evidence in International Arbitration encourage international

arbitrators to provide the parties with such a preliminary view.[13] They provide in Art. 2 (3):

> The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues:
>
> (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or
>
> (b) for which a preliminary determination may be appropriate.

This "meet and consult" approach results from the drafters' conviction that in some cases a preliminary resolution of certain issues can resolve all or part of the dispute.[14] Para. h ((ii) of Appendix IV ("Case Management Techniques") of the 2012 ICC Arbitration Rules acknowledges the intrinsic value of the promotion of settlements in arbitration by the tribunal in that it encourages the arbitral tribunal to "take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law."

The proactive approach to settlement described above should not be confused with forcing parties into having to agree on settlement terms they do not want. An essential prerequisite of this technique—which includes *both* the tribunal's preliminary determination *and* the conduct of the "settlement meeting"—is that it is always based on an "informed consent" of both parties, *i.e.* of an agreement concluded by the parties during (not before) the arbitration and recorded in the transcript.[15] The requirement of a prior party-agreement is contained in Para. h) (ii) Appendix IV ("Case Management Techniques") of the 2012 ICC Rules of Arbitration. The significance of party consent is also reflected in General Standard 4 d) of the IBA Guidelines on Conflict of Interest which provides:

> An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such process or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to final settlement of the case, the parties remain bound by their waiver.[16]

The IBA Arbitration Committee has added the following official comment to General Standard 4 (d):

> *Informed consent* by the parties to such a process prior to its beginning should be regarded as an effective waiver of a potential conflict of interest. Certain jurisdictions may require such consent to be in writing and signed by the parties. Subject to any requirements of applicable law, express consent may be sufficient and may be given at a hearing and reflected in the minutes or transcript of the proceeding.[17]

To foster and safeguard an open exchange with the parties, the tribunal will also seek an agreement of the parties that it will disregard any settlement proposals made by it, but rejected by the parties during the settlement conference in case it has to render a final award because the settlement negotiations have failed. This includes new facts and allegations made by the parties during these settlement negotiations.[18]

"The proactive approach to settlement… should not be confused with forcing parties into having to agree on settlement terms they do not want."

It follows from the above considerations that the arbitrator's participation in a settlement conference with the parties does not affect his or her independence and impartiality. Even without an express waiver of the parties' right to challenge, the mere fact that an arbitrator has actively participated in such a meeting with the parties during the arbitration does not qualify as a ground for challenge under German arbitration law:

> The fact that an arbitrator has participated in settlement negotiations with the parties and has supported a settlement proposal which is far away from the expectations of the party that challenges him, does not justify, in and of itself, doubts as to his independence and impartiality. …From the perspective of a reasonable party, this would be the case only if that party could have the legitimate impression that the conduct of the arbitrator is based on bias or arbitrariness. If a settlement shall be reached in the course of settlement negotiations, the arbitrator must be granted a wide latitude for own proposals. The considerations which the arbitrator makes in such a context must not be regarded as

> final determinations [of the legal issues at stake], but as mere thought-provoking impulses for the parties' settlement negotiations. If one of the parties discovers errors in the tribunal's arguments and proposals, it may always argue against them and reject a settlement based on those arguments or proposals and may, through further submissions and motions for the taking of evidence, try to make the arbitrators change their minds.[19]

"The proactive promotion of settlements by arbitrators emphasizes the potential of arbitration to preserve the business relationship between the parties."

Integration of Mediation Techniques

In conducting a settlement conference with the parties, the arbitral tribunal may integrate mediation techniques such as decision-tree analysis[20] into the arbitral proceedings.[21] However, it is important to understand that integrating such techniques into an arbitration does not convert these proceedings into a mediation process unless the parties agree with the arbitrators on such a complete transformation of the process (which rarely happens in practice). Rather, the settlement meeting is integrated into the arbitration. This means that, unlike a mediator, the arbitral tribunal remains bound by the mandatory procedural principles of due process embodied in the German *lex loci arbitri* while conducting the settlement talks with the parties. This applies, *e.g.,* to the parties' rights to due process. For that reason, a caucus session should not be conducted.[22] The tribunal discusses the case in the presence of all parties because the due process rules of the German Arbitration Act, and the parties' right to be heard in particular, have not ceased to apply. Because the process remains an arbitration, the tribunal has no difficulty in converting any settlement terms agreed upon by the parties during the arbitration into an award on agreed terms pursuant to s.1053 of the German Arbitration Act.[23] This strict distinction between settlement conferences as an integral part of court proceedings and mediation as a separate dispute resolution process is also reflected in German procedural law. While s.278 (1) of the German Code of Civil Procedure allows the judge to encourage an amicable settlement of the dispute during the proceedings, s.278a of the same Code allows the judge to "propose to the parties a mediation or any other form of alternative dispute resolution." In such a case, however, the court proceedings are suspended for the duration of the separate ADR process and the judge is usually not involved in that process.

Conclusion

If used properly, the proactive approach to settlement described above is an essential tool to reduce costs and time in international arbitration, and thereby as a means to meet the increased pressure coming from the users. It must be stressed, however, that this approach is never an end in itself. Arbitrators who adopt a settlement-friendly approach are always mindful of the fact that the parties have appointed them to *decide* their dispute:

> The wording of Sec. 32.1 [DIS Arbitration Rules]…should not be interpreted to mean that it is the main task of the arbitral tribunal to cause the parties to settle the dispute amicably. The arbitrators are primarily appointed to make a final decision resolving the dispute and, in the course of the arbitral proceedings, they should never give the impression to the parties that they are more interested in the parties entering into a settlement agreement than they are to decide the dispute through a final award.[24]

From this perspective, the proactive approach to settlements in arbitration reflects an understanding of the arbitral process, which maintains the strict distinction between arbitration and mediation. At the same time, it emphasizes the potential of arbitration to preserve the business relationship between the parties. According to recent surveys on the use and acceptance of arbitration in international business,[25] this aspect is of major concern to the users of the arbitral process, whether domestic or international.

Endnotes

1. See generally Berger, The International Arbitrator's Dilemma: Transnational Procedure vs. Home Jurisdiction, A German Perspective, *Arb. Int'l* (2009), 217, 223 *et seq.*; see also Langbein, The German Advantage in Civil Procedure, *U. Chi. L. Rev.* (1985), 823, 831 *et seq.*: "In this business-like system of civil procedure, the tradition is strong that the court promotes compromise. The judge who gathers the facts soon knows the case as well as the litigants do, and he concentrates each subsequent increment of fact-gathering on the most important issues still unresolved."
2. See ICC Commission on Arbitration (ed.), *Techniques for Controlling Time and Costs in Arbitration* (2007), 28; see also 2012 ICC Arbitration Rules, Appendix IV (Case Management Techniques), Para. h) (i).
3. The German and English text of the DIS Arbitration Rules is available at http://www.dis-arb.de/en/16/rules/overview-id0.
4. Kaufmann-Kohler and Bonnin, Arbitrators as Conciliators: A Statistical Study of the Relation between an Arbitrator's Role and Legal Background, *ICC International Court of Arbitration Bulletin* (2007), 79, 85, emphasizing that in their study on settlement rates of civil and common law ICC arbitrators, Swiss and German arbitrators come out on top.
5. See Born, *International Commercial Arbitration*, 2nd ed (2014), p. 2006.

6. Provine, *Settlement Strategies for Federal District Judges,* Federal Judicial Center 1986, 8 et seq: "Judges are moving towards a more managerial conception of their role in the settlement process. The judge as case manager relies on settlement-enhancing procedures to help contain the costs of litigation and to keep cases moving forward." (id., 18).
7. Woolf, Access to Justice—Final Report, Chapter 10, http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/sec3a.htm#c10.
8. CPR r. 1.4 (2) (f).
9. Raeschke-Kessler, Making Arbitration More Efficient, Settlement Initiatives by the Arbitral Tribunal, *International Business Lawyer* (2002), 158, 159.
10. Raeschke-Kessler, *id.* 161.
11. Note the language used in Section. 32.1 DIS Arbitration Rules ("should," not "shall").
12. See for the advantages of such a preliminary determination ("*Rechtsgespräch*") with respect to early transparency and the parties' ability to evaluate their chances and risks Hafter, Gespräche zwischen Schiedsgericht und Parteien—Ein Beitrag zur Technik der Führung von Schiedsgerichten in Reymond and Bucher (eds), *Recueil de Travaux Suisses sur l'Arbitrage International* (1984), 203, 209 *et seq*.
13. International Bar Association (ed.), *IBA Rules on the Taking of Evidence in International Arbitration* (2010).
14. 1999 IBA Working Party/2010 IBA Rules of Evidence Review Subcommittee, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration*, 6, available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.
15. See Elsing, *in Böckstiegel/Kröll/Nascimiento (eds.)*, Arbitration in Germany, 2nd ed. 2015, Commentary to Sec. 32 DIS Arbitration Rules, p. 690*:* "Before presenting a proposal for the settlement of the dispute, the arbitral tribunal should obtain the approval of the parties"; see also Raeschke-Kessler, *supra* note 9, 161.
16. International Bar Association (ed.), IBA Guidelines on Conflicts of Interest in International Arbitration (2014), 10.
17. *Id.*, 11 *et seq.* (emphasis added).
18. Raeschke-Kessler, *supra* note 9, 162.
19. OJG Munich Judgement of January 3, 2008, German Arbitration Journal (2008) 102, 104; see also OLG Frankfurt, Judgement of April 27, 2006, German Arbitration Journal (2006), 329, 331; see also Dendorfer, Aktives Vergleichsmanagement—Best Practice oder Faux Pas schiedsrichterlicher Tätigkeit, German Arbitration Journal (2009) 276, 282 *et seq.*
20. See Berger, Private Dispute Resolution in International Business, 3rd ed. 2015, Vol. II (Handbook), Paras. 10-33 *et seq*.
21. Blessing, Streitbeilegung durch 'ADR' und 'Pro-Aktive' Verhandlungsführung, ASA Bull. (1996), 123, 150 *et seq*.; Cremades, Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration, Arb. Int'l (1998), 157, 161 et seq.; Berger, Integration of Mediation Elements into Arbitration, Arb. Int'l (2003), 387 *et seq*.
22. But see Wolff, Verzicht auf rechtliches Gehör im Schiedsverfahren, in: Nueber/Przeszlowaska/Zwirchmayr (eds.) Privatautonomie und ihre Grenzen im Wandel (2015) 171, 174; Raeschke-Kessler, supra note 9, 161 ("separate meetings with the parties should…not be ruled out.").
23. The German Arbitration Act is contained in the Tenth Book of the Code of Civil Procedure which adopts the UNCITRAL Model Law on International Commercial Arbitration.
24. See Elsing, *supra* note 15, at 690.
25. See Queen Mary School of International Arbitration and PricewaterhouseCoopers (eds), International Arbitration: Corporate attitudes and practices 2006, 2.

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Dispute Board Rules Currently in Force: A Selective Overview, Comparison and Practical Considerations

By Paul G. Taggart and Yasemin Çetinel

Introduction

Dispute boards experienced a high rise in their use as an alternative dispute resolution method from the mid-70s in America, as a concept tailored and created for dispute resolution on construction industry contracts. Not surprisingly the first international regulation of the concept was carried out by FIDIC,[1] which introduced dispute boards in its contract types first in 1995[2] and then made it an obligatory step in the dispute resolution mechanism as of the release of its 1999 rainbow suite of contracts.[3]

Since then, the practice and need were recognized by almost all the bodies involved in international alternative dispute resolution area: the Dispute Resolution Board Foundation ("*DRBF*")[4] and Dispute Board Federation ("*DBF*")[5] have their own recommended rules, arbitration centers such as ICC,[6] AAA,[7] CiARB,[8] BIAC[9] published (and for ICC, even revised in 2015) their set of rules and finally, the UK NEC[10] and ICE[11] forms of contract also adopted their own set of rules for dispute boards.

In this article, naturally due to space constraints, the authors will elaborate and compare only the revised rules of ICC and newly introduced rules by CiARB with FIDIC dispute board rules and practice. In this elaboration, the authors preferred to address only the major items of consideration that constitute differences with the said prominent rules.

Revised ICC Dispute Board Rules and Recently Introduced CiARB Dispute Board Rules: Comparison with FIDIC Dispute Board Practice

One of the major points of difference between the FIDIC rules and ICC or CiARB rules lies in the parties' discretion to choose the type of the dispute board. Accordingly, both ICC and CiARB rules provide the option for the parties to constitute a dispute board that has the authority to give recommendations which are not binding in nature ("*Dispute Review Boards*") or a dispute board that has the authority to give decisions which are binding in nature ("*Dispute Adjudication Boards*").[12] The rules of the ICC go further than that and describe a hybrid form of dispute board that may give and recommendations and decisions ("*Combined Dispute Board*").[13] However, the issue often criticized with the Combined Dispute Board remains existent in the revised ICC rules: the board may only give a decision when it is requested to do so and if the other party does not object to it. In case there is party objection, the board has to decide whether to give a recommendation or a decision. The CiARB rules seem to have considered this system rather less effective and do not provide a hybrid board mechanism.[14] FIDIC rules, on the other hand, only provide for dispute boards that may render decisions.

Another natural difference concerns the appointing body of the dispute board members (or the chairman) in case of parties' disagreement. The ICC and CiARB rules each refer to their own entity[15] for such appointments whilst FIDIC rules refer to the entity agreed by the parties in the contract data (or appendix to tender document, as appropriate). Generically and in practice, though, FIDIC contracts tend to refer to FIDIC itself as the appointing body or FIDIC's local affiliates so as to provide flexibility for local content, especially for the contracts where both parties are local.

The ICC and CiARB, being institutions with administrative services, inherently provide in their dispute board rules services for appointing the dispute board member(s) in case of parties' disagreement or inaction, removal of a member upon a party's request, or decision on the board member(s)' remuneration.[16] The ICC Rules further provide the option of a review of a board's decision[17] by the Center. All these services are charged at a fixed filing fee and relevant application whilst FIDIC does not charge any sums while exercising its appointing duties.

Yet another point of concern relates to the requirements for a referral to the dispute board. The ICC Rules do not establish any condition precedent for a dispute to be referred to the board.[18] The CiARB Rules on the other hand refer to "*pre-review requirements or prior dispute resolution process as provided for by the Contract*" which are to be complied with in the first instance for a dispute to be referred to the board.[19] FIDIC rules are embodied in the construction contract itself and are harmonized with the contract's multi-tiered claim and dispute resolution mechanism which refer to the Engineer or the Employer's Representative's determination of any sort for the purposes of defining a dispute varying upon the type of the contract.

Appointment deadline and intervention of the relevant institution in case of non-appointment by the parties are other significant additions in both ICC and CiARB rules[20] as opposed to the FIDIC rules, which are silent. Both ICC and CiARB rules provide that in case there is no establishment of the board by the parties within a certain time limit after the execution of the contract, any party may request ICC or CiARB to make such appointment.

Finally, the authors find it useful to mention that both ICC rules and CiARB rules deal with the issue of a failure by a party to comply with the dispute board's decision. Both rules are sufficiently clear to establish that in case of one party's failure to comply with a dispute board decision, the other party may directly refer such failure to arbitration or to the courts, as the case may be,[21] rather than the dispute itself, de novo. FIDIC rules on the other hand, whilst seeking to do so, only expressly made this the case in the provisions of the Gold Book.

Practical Considerations and Conclusion

A review of the main rules and comparison with FIDIC suggest consideration of the following:

Appointing Body: In case of a request for the appointment of a DB, FIDIC maintains a Panel of Adjudicators which has been selected pursuant to a very strict assessment procedure. This list, complete with CVs, is publicly available. In contrast, the ICC and CiARB retain discretionary power to select dispute board members or chairmen whose identity is revealed by the Centre only upon appointment. Both systems are reliable.

Costs: FIDIC does not charge for the appointment procedure; however, both ICC and CiARB have separate charges for registration and services they offer on the selection/appointment of dispute board members and review of the dispute board decisions.

Broad Regulation: Many optional provisions may be preferable to cover a global range of contracts and industries; however, specific regulations are generally required to correspond the sectoral needs and the established practice and relevant know-how on specific type of contracts and transactions. For example, FIDIC's DB rules are fully integrated terms and conditions of the various versions of the FIDIC suite and have served the international construction industry well since their introduction. Given this, a unification of all sets of rules is not a viable argument as it would suggest ignoral of the know-how, experience, and jurisprudence in the international construction industry acquired thus far. The attraction of the adoption of the conventional wisdom on a sectoral and industry basis is preferred, as leaving matters to the discretion of the parties decisions on the various procedural issues may not turn out to be cost effective and at worst purpose-effective.

Lessons to be learned: On the other hand, there are lessons to be learned and therefore parts to be improved in the FIDIC suite of contracts in light of certain problems experienced since the first introduction of the dispute board concept, especially with the FIDIC 1999 rainbow suite. Certain matters left to the discretion of the parties such as term of appointment and the default authority should be addressed, for example, the term for the appointment of the dispute board at the initial stage of the contract, and the default authority in the event of a failure of either party to appoint. Similarly, the ability to enforce an award following a party's failure to comply with a DB decision, which is binding but not yet final, should be directly referable[22] under FIDIC rules to arbitration/courts in the same manner as their ICC and CiARB counter parts. In this respect it is to be hoped that the new revision of FIDIC suite of contracts, currently under production, follows the correction made in the 2008 Gold Book as well as the discussions[23] in publications, courts and arbitral awards and which for the time being seems to be settled law for the most part.

"Given this, a unification of all sets of rules is not a viable argument as it would suggest ignoral of the know-how, experience, and jurisprudence in the international construction industry acquired thus far."

Endnotes

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4. http://www.drb.org/manual/2A_final_12-06.doc.
5. http://www.dbfederation.org/downloads/new-website-ad-hoc-rules.pdf.
6. International Chamber of Commerce, ICC Dispute Board Rules, http://www.iccwbo.org/products-and-services/arbitration-and-adr/dispute-boards/dispute-board-rules/.
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10. New Engineering Contract, NEC3 published in 2005, authors wish, however, to underline that the adjudication procedure envisaged by the NEC3 is slightly different than the conventional dispute board concept and rather aligns with the obligatory adjudication in the UK. For a detailed analysis and opinion please refer to Murphy, S., Spillane, J., Hendron, C., and Bruen, J. (2014). *NEC Contracting: Evaluation of the Inclusion of Dispute Review Boards in lieu of Adjudication in the Construction Industry in the United Kingdom*, J. Leg. Aff. Dispute Resolut. Eng. Constr., 10.1061/(ASCE)LA.1943-4170.0000147, 04514002.
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12. ICC Rules Articles 4 and 5, CiARB Rules Articles 3 and 4.

13. ICC Rules Article 6.
14. In this view, Nicholas Gould, 2014 Chartered Institute of Arbitrators Dispute Board Rules, DRBF Forum Newsletter, Volume 18, Issue 4, December 2014/January 2015.
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16. ICC Rules Article 34 and CiARB Rules Article 18.
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18. ICC Rules Article 18 which states that: "*Any Party may at any time formally refer a Disagreement to the DB for a Conclusion, at which point the Disagreement becomes a Dispute* […]."
19. CiARB Rules Article 13.
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A Method for Efficient and Transparent Decision Making—A German Experience Suitable for International Arbitration?

By Jan K. Schäfer

1. Introduction

In recent decades, international arbitration has evolved into complex and sometimes lengthy legal proceedings. This development comes at substantial costs for litigants. Many users of international arbitration, who generally expect an efficient and cost-effective dispute resolution process, have ended up frustrated about lengthy proceedings and their associated costs. In response to these concerns, arbitral institutions, such as the ICC in Paris, have become increasingly responsive to the needs of their global users by crafting their arbitration rules to achieve more effective resolution of international disputes. They are doing this in part also by providing increased oversight of arbitrator conduct and issuing guidelines to help arbitrators and parties design more efficient proceedings.

However, in the debate about improving international arbitration, one aspect has not received much attention, namely, how arbitrators deal with their task of decision making. Unlike mediators, arbitrators are tasked with rendering final and binding decisions. Is this arbitral mission informing the entire proceeding, or does decision making become the relevant focus only once the parties have had their day in court and the arbitral tribunal is in deliberations?

For civil law practitioners, this question has particular relevance because it could suggest that arbitrators should take a more proactive role during the proceedings with respect to the substantive issues in dispute, such as flagging critical issues to be addressed by the parties, discussing with counsel the applicable abstract legal tests for winning a claim, or limiting the taking of evidence to dispositive issues. These potential tribunal tasks are often dismissed, most notably by U.S. practitioners, as creating the unacceptable risk of pre-judging the matter.

However, due to a lack of knowledge regarding what the arbitrator(s) think regarding the substantive issues in dispute, counsel necessarily has to argue, present, and defend issues that they think are potentially relevant, but which might not be dispositive from the arbitrator's perspective. In such scenarios, arbitration proceedings are becoming burdened with irrelevant and time-consuming issues as a result of the fear the arbitrator will otherwise pre-judge the dispute. Is there a way to resolve this problem?

To develop an answer, it is worth considering a comparative legal perspective. For centuries, German judges have been guided in their decision making by a specific method, the so-called *Relationstechnik*.[1] This concept is largely unknown outside of Germany. A strict adherence to the method ensures that a judge does not pre-judge a matter and grants strict equal treatment to both parties. Simultaneously, it also allows the judge to take a proactive approach on substantive issues that helps counsel understand those issues that he/she has identified as critical to the matter.

This article explains the *Relationstechnik* method and explores whether it could be effectively used in the context of international arbitration.

2. A Three-Step Analytical Approach

Once one or two rounds of written submissions have been exchanged between the parties, the judge will review them critically by applying the *Relationstechnik*. The method is logical and straightforward. It is applied in three analytical steps,[2] which will be outlined below.

2.1 The Review of the Claimant's Case

First, the judge will turn to the claimant's submissions (usually the statement of claim and reply) in order to gain an understanding of the relief the claimant is seeking. As a part of this exercise, the judge accepts all facts advanced by the claimant as being true, no matter what the respondent has stated. This approach ensures that the judge is not engaging in pre-judging any conflicting factual narratives of the parties. Here, all that factually matters is what the claimant alleged in its submissions.

The judge evaluates on what legal basis the claimant could claim the requested relief. In so doing, the judge reviews any legal arguments submitted by the parties and makes his own preliminary legal analysis. It is possible that the claimant's claim could be based on concurring or alternative legal theories. The legal basis determines the applicable legal test, which is derived from statute or case law, as applicable. The relevant legal test in turn informs the judge about those factual assertions that the claimant must make in order to satisfy the test.

By way of example, if the claimant requests a monetary payment for an alleged contractual violation, the judge would review whether the claimant asserted (i) the existence of a contract; (ii) the violation of a contractual duty; and (iii) resulting damage. If the claimant alleged all these preconditions for a contractual damages claim, the judge would then be satisfied that the claimant had fully substantiated its case for a contractual damages claim. If

the claimant also asserts a tort claim, the claimant would also need to substantiate the preconditions for such a claim.

Once the judge is satisfied that the claimant has properly substantiated its case, he has a good understanding of the claimant's position. If any factual questions arose in the context of the judge's review, the judge can take note of them and pose them to the parties either before or during the hearing.

2.2 The Review of the Respondent's Defenses

After accomplishing the first step of his/her analysis, the judge will then turn to the respondent's submissions, the statement of defense and the rejoinder, with a view to understand what defenses they raised. In this analysis, the judge will again accept all factual allegations made by the respondent as being correct. All that is considered in this second stage of the analysis is the respondent's narrative.

In the above example, relevant defenses could be, *inter alia*: (i) that the contract was not concluded with the respondent; (ii) that the contract does not create the obligations asserted by the claimant (e.g., certain performance parameters); or (iii) the alleged damages do not result from the alleged violation.

Some of the respondent's defenses will rest on denying the claimant's factual allegations (e.g., there is no contract between the parties), establishing a factual or legal defense (e.g., the statute of limitations has expired), or submitting legal arguments on the applicable legal test relevant to the claimant's case (e.g., discussing the preconditions for statutory or contractual claims).

The judge will analyze which legal tests apply to the defenses raised by the respondent. If the statute of limitations is raised, the judge will review whether the respondent has alleged all facts necessary to satisfy the legal test to prove the statute of limitations has indeed expired. The judge will not consider potential defenses *sua sponte*.

Once the second step of the analysis is completed, the judge will have a good understanding of the respondent's case. The judge is then in a position to draft a preliminary decision tree, identifying the critical junctions or threshold issues in dispute which will lead to either the granting or denial of the claimant's claim. The judge then transparently shares his/her roadmap with the parties at an early hearing, elaborating upon his/her understanding of the case. The parties will then be given an opportunity to comment.

2.3 Checking the Disputed Factual Allegations for Their Relevance

Third, the judge will turn to the critical issues in the case and their underlying factual narratives. If the claimant's and respondent's narratives conflict with regard to a dispositive factual issue, the judge will know that he/she needs to take evidence on this issue. In contrast, if the narratives of the parties do not conflict, the judge will not need to engage in an inquisitorial examination, and can instead accept the parties' agreed storyline. As such, the judge's list of issues that require the taking of evidence is effectively determined by the parties' disputed allegations.

Once this step has been accomplished, the judge will have a list of issues that require the taking of evidence. He will then review the evidence the parties have offered. The judge will scrutinize any documents submitted as evidence and determine which witnesses and experts need to be examined in an evidentiary hearing. At this stage, the judge would not inquisitorially request the submission of further evidence, but instead would work only with what has been offered by the parties.

2.4 The Benefits of the *Relationstechnik*

As the judge accepts the parties' respective allegations as true for the sake of his/her analysis and does not consider any evidence supporting these allegations during the analysis, there is no risk of pre-judgment of the evidence.

Yet, on the basis of the *Relationstechnik*, the judge is put in a position to proactively manage the proceedings by focusing on specific threshold issues early in the proceeding. For example, if the statute of limitations is an issue, the judge will not emphasize the damages calculation unless it is clear that the statute of limitations defense will be dismissed.

The three-step analytical process puts considerable emphasis on thorough written pleadings by counsel. Counsel thus need to be comprehensive in their written submissions. Otherwise, they will face disadvantages in the judge's analysis, e.g., if the respondent failed to dispute one of the claimant's allegations, the judge will not note any need for taking of evidence on this point.

Similarly, the judge needs to critically consider the case early in the procedure. Generally, he/she will make a decision after the evidentiary hearing, but simultaneously prepare his decision making during the entire proceeding when applying the *Relationstechnik*. The entire proceedings are geared towards his/her decision making on the basis of the applicable law and what allegations and means of evidence the parties posed.

3. What Is the Relevance of the *Relationstechnik* Method for International Arbitration?

The *Relationstechnik* method is a German peculiarity. It is applied in court and in domestic German arbitration proceedings. Does this German experience have any relevance for international arbitration?

In contrast to U.S. litigation, international arbitration places a great deal of emphasis on written advocacy, more closely mirroring the civil law tradition in this respect. It would help the arbitral process if counsel undertook a thorough case analysis and provided the arbitral tribunal with comprehensive submissions rather than developing their case over time leading up to the evidentiary hearing, which will then likely include the examination of a number of issues that may eventually turn out to be non-dispositive.

If properly briefed through comprehensive written submissions, the arbitral tribunal could analyze the case on the basis of the *Relationstechnik* method without any risk of pre-judging any issues. The arbitral tribunal could proactively notify the parties of any questions they might have with respect to the parties' factual or legal arguments and share with them the result of their analysis and the decision tree, should the parties find this helpful.

This approach would have an impact on the current design of international arbitration proceedings. It would require more case management conferences during the proceedings in order to facilitate more dialogue between the arbitrators and counsel. This in turn requires more coordination between the arbitrators. Accordingly, this approach involves a much more intensive time commitment by arbitrators, who will need to read and analyze submissions rather than relying on opening statements about the substance of the matter. To be sure, busy arbitrators will not necessarily appreciate this additional workload. Similarly, counsel might prefer to treat written submissions as mere preparatory steps and wait for their clients' "day in court" to prove their clients' case through their oral advocacy.

Is this in the interest of the users? Probably not. Providing the parties with the option of an early case assessment on the basis of the *Relationstechnik* method might save the parties a great deal of time, cost, and frustration, thereby increasing the appeal of international arbitration as an efficient mechanism for the resolution of international disputes. The latter should arguably be the concern of all actors in international arbitration.

Endnotes

1. *See* e.g. S. Elsing, "Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds," *SchiedsVZ* 2011, pp. 114-123 also advocating the *Relationstechnik* at p. 117:

   > *One measure that seems fit to help counter the negative development is a three-step technique known as the 'Relationstechnik' ('Relevance Method'), which is widely used in Germany, particularly by judges, to identify those disputed facts of a case that are critical to its outcome ('relevant' in the strictest sense; 'facts in issue' or 'ultimate facts'). […] the Relevance Method would prove useful as well in assisting arbitral tribunals to direct parties early on in the proceedings to focus submissions—for example, on evidence going to the truly critical facts—and, in turn, to expedite the proceedings. It serves to discipline arbitrators and parties alike. Experience indicates that a proper implementation of the Relevance Method will in many cases result in a one-day hearing (and sometimes even less)*

   and F. Semler, "Schnelligkeit und Wirtschaftlichkeit in Schiedsverfahren," *SchiedsVZ* 2009, pp. 149-152, setting forth *Relationstechnik* in detail.

2. *See* R. Oberrhein, *Zivilprozessrecht für Referendare*, Munich, Vahlen, 9th ed., 2012 at p. 190 *et seq.*

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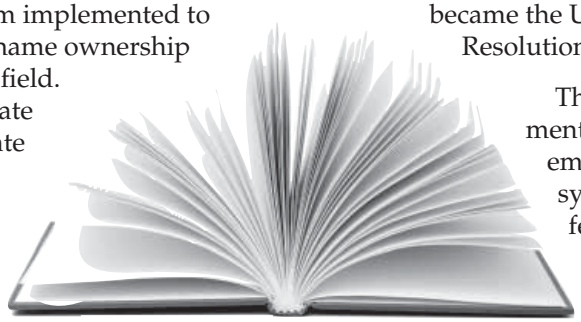
Book Review
Domain Name Arbitration

By Gerald M. Levine
(Legal Corner Press 2015)
Reviewed by Laura A. Kaster

Gerald Levine has created a book that is accessible, well ordered, and complete as both a history of the specialized dispute resolution system implemented to resolve disputes regarding domain name ownership and a guide to those working in the field. Anyone who has tried to communicate specialized knowledge will appreciate the way this volume makes finding the answer to any specific question straightforward and also allows a reader to meander through its clear and interesting history of the field. For those who assert and defend claims of cybersquatting, this book is a must. For the ADR professional this book is even more interesting as the story of meeting a change in technology with a well-designed and cost-effective dispute solution for a type of dispute that the technology generated. The dispute-resolution solution also created a panel of expert arbitrators who oversee the growth of a body of law that has developed in very short order and provides thoughtful, fair and practical solutions for the real world.



The problem arose from the invention of the World Wide Web and its transformation from an academic endeavor to an international marketplace starting in the 1990s. The address or domain name registration process permitted new Internet cowboys to squat on virtual property in cyberspace that should have been the exclusive property of those who held trademarks in the names selected. The domain name registrants held trademarks for ransom, impersonated trademark holders and diverted traffic to unsavory activities, or competitors. This was a problem that corporations were obligated to monitor and address to protect their registered marks and it was an unduly expensive project because of the number of cybersquatters, the costs of litigating, the inherent delay in getting relief, and the fact that most of the offenders were either difficult to locate (sometimes registering under false names or addresses) or impecunious. Damages were no realistic possibility and ultimately the registrar for the domain name had to be involved in order to cancel or transfer the offending registration. In 1999, the World Intellectual Property Organization (WIPO) agreed to an arbitration system specifically for challenges to domain name registrations. WIPO made its recommendations to what was then a U.S.-government sponsored corporation, the International Corporation for Assigned Names and Numbers (ICANN) that managed domain name questions. WIPO's recommendations for dispute solutions became the Uniform Domain Name Dispute Resolution Policy (UDRP).

The solution that ICANN implemented was a totally electronic (via email), written-filings-only arbitration system administered by WIPO and a few other specified providers, which appoint prestigious trademark practitioners around the world to panels of arbitrators who, three to a panel, promptly and cost effectively decide whether a domain name which incorporates a trademark had been registered and used in bad faith. If the panel so finds, the abusively registered domain name must be cancelled or transferred to the complaining trademark holder.

The U.S. Congress addressed the cybersquatting issue by amending the Trademark Act of 1946 with the Anticybersquatting Consumer Protection Act, which the book also addresses. The ACPA standard is slightly easier to meet for trademark holders but it requires litigation and not ADR. Therefore, this review will focus on the UDRP's novel arbitration solution.

Under the UDRP, a trademark owner must serve the domain name holder with a complaint that includes proof of trademark rights and files that complaint with an ICANN–certified provider (WIPO, in Switzerland, NAF in the U.S. and other centers around the world). The domain name must be identical or confusingly similar to the mark. Even if the respondent does not appear, the complainant must prove its case to support cancellation or transfer of the domain name—that requires proof of both registration and use in bad faith.

Before the UDRP, there was no law on these issues. The published decisions of the WIPO UDRP panels (there is full transparency) reflect the development of the law of domain names. Many of the decisions are discussed in the book. In adopting the WIPO report, ICANN provided that the panels may apply rules and principles of law they determine to be applicable. Panelists have relied on the national trademark and unfair competition laws, scholarship and decisional law to develop precedent. There is no appellate authority. Power of persuasive reasoning has impacted the development of the law and the desire for fairness and consistency has assisted the formation of the

jurisprudence. Where free speech and generic usage are issues, U.S. law has had a significant impact, but this is really a supranational body of law.

This interesting model is based on the contract the registrant enters into when registering its domain name. That agreement requires the registrant to submit to jurisdiction under the UDRP for any challenge to the domain name (without prejudice to other potential jurisdictions). Therefore, even if the registrant defaults, it is subject to the UDRP's *in rem* authority over the domain name. The respondent at its election may at any time before or during the proceeding commence a plenary action—in the U.S. that would be a legal proceeding under the ACPA for a declaratory judgment that its registration was not unlawful and that it is not a cybersquatter.

The remedy here—a full and fair hearing on paper and the transfer or cancellation of the domain name if cybersquatting is found—precisely solves the problem presented. When combined with the prompt and cost-effective, electronic exchange of filings and the thoughtful results of most of the panels, it is hard to imagine a more appropriate dispute solution. It is very interesting that this arbitral system proceeds without the privacy that typically attends arbitration. Instead, because the decisions are published, they give the kind of guide to action that is appropriate for a specialized tribunal. The WIPO model for creating the UDRP by determining the needs of users and a fair and efficient way to balance rights and remedies and the way the parties have initiated their business should be carefully examined as a potential model to meet the changing needs of a global and increasingly technical world.

This book is an excellent source of information for the specialist and the dispute resolution designer.

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Book Review
You, Too, Can Be a Superforecaster

A Review of *Superforecasting* by Philip Tetlock and Dan Gardner
Reviewed by Michael Palmer

"Prediction is very difficult, especially about the future."

Niels Bohr

As a group, lawyers are not good at predicting litigation outcomes. Research conducted by Randall Kiser and his colleagues confirms that when plaintiffs reject a settlement offer, 64% of the time they get worse results at trial (not counting the additional fees and expenses), and defendants end up paying on average $1.4 million more than the plaintiff's last demand in 24% of the cases that go to trial.[1]

What if you could get much more accurate forecasts of litigation events, including the eventual outcomes of cases you're working on right now? Would you as a litigator or mediator be willing to invest at least as much time as you now spend preparing for any major legal event? Or do you feel the quest is illusory? After all, we don't have a crystal ball.

Meet Philip Tetlock, the man with a crystal ball. In his new book, *Superforecasting*, Professor Tetlock tells the story of normal people who became superforecasters. These people repeatedly make highly accurate predictions about very specific questions, such as "Will conservatives retain their majority in the Majles after Iran's upcoming parliamentary elections?" and "Will Montenegro become a NATO member in 2016?"

Superforecasters are not subject matter experts but people who know next to nothing about Iran's parliamentary elections and might not even be able to find Montenegro on a map. Yet, time and again, they make highly accurate predictions about the answers to questions like these. Their record is not the result of a string of lucky guesses, like getting heads five times in a row when flipping a coin. Rather, their numerical probability assessments are routinely much closer to the eventual outcome than those of others. (More about this later.)

So, do superforecasters have some special gift?

No, superforecasters are not freaks of nature. They are freaks of *method*.

If you want to learn how to make or how to help others make more accurate predictions of what the judge will decide on a potential motion to dismiss, whether the jury will find for or against the plaintiff on liability, and, most importantly, how much the damage award will be if it does, then use a method designed to produce such predictions.

That is the overall lesson of *Superforecasting*. The superforecasters Professor Tetlock describes in the book are intelligent and comfortable with numbers. But most of all, they find information and funnel it into a method that helps them overcome the subconscious biases and intuitive shortcuts that make accurate forecasting so difficult.

Why are the rest of us so bad at predicting the outcomes of complex events such as the outcome of a trial three years hence? Why do plaintiffs and defendants make the settlement errors Randall Kiser writes about in *Beyond Right and Wrong*?

The answer can be found, in part, by looking at how our minds make decisions.

Our brains are biased against thinking because conscious, directed thought is costly and inefficient. It takes time, burns energy, and diverts us from vital work such as finding food or getting shelter from the storm. As a result, our brains' basic command—our cognitive default mode—is Don't Make Me Think.

If we had to use directed thought to make every decision, we could scarcely get out of bed in the morning. If your adversary asks a leading question, not only must you correctly identify it as such, but you must also determine whether you're better off objecting or letting it slide—all before the witness answers the question. You don't have time to ponder the right answer.

To help us avoid costly thought, evolution equipped our brains with a system of built-in judgments together with the ability to add thousands more encapsulated judgments. It's a system of stored-up judgments, making judgments from our ancestors as well as from our own experience available to us without our having, in each instance, to figure it out anew. We call the built-in judgments cognitive biases and intuitive shortcuts (heuristics).[2] Habits and rules are the encapsulated judgments we acquire through culture and experience.

All of it together makes up an automatic predictive judgment system that steers us away from reflective thought and achieves remarkably good results. This system enabled our ancestors to quickly conclude that a crooked stick might be a snake and jump out of the way, reflexively.

Better to be wrong about the stick than to mull it over and get bitten by the snake. (Those who dithered didn't get to pass on their analytically biased genes.)

Thanks to our automatic prediction system, we can get out of bed in the morning, object to leading questions when we should, and otherwise get on with life.[3]

But despite its value in most decisions throughout the day, the automatic prediction system is really bad at making predictions about events with multiple contributing factors that take place weeks, months, or years from now—decisions involving a high degree of uncertainty and complexity. For the task of predicting the eventual outcome of a large, multi-party lawsuit, our automatic prediction system is worse than useless. It misguides us, leading us to think we know what will happen, when we really don't.

Then how do superforecasters get such good results when the rest of us get trapped by the biases and intuitive shortcuts bequeathed by evolution?

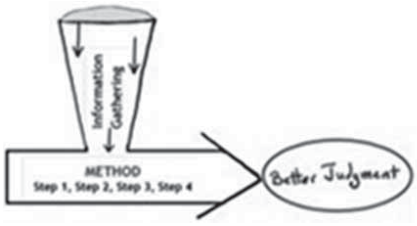
Superforecasters don't rely solely on the subconscious automatic prediction system to predict whether Montenegro will join NATO in 2016. Instead, a superforecaster would probably first google Montenegro to gather some information about it and then take a look at the Wikipedia article on NATO or perhaps go to NATO's website. If she had access to LexisNexis or Westlaw, she might run some queries on the subject. At the end of this process she would have collected relevant facts along with some conjectures of various people in positions of leadership.

Sound familiar? This is the same kind of thing litigators do in lawsuits. In fact, if the lawsuit were about what happened to *prevent* Montenegro from joining NATO, we would pose discovery requests to find out what our adversary knows, store the information in binders, folders, and special software programs such as CaseMap or MasterFile, and have it available when needed for motions, direct and cross examinations, and arguments to the jury.

So, if superforecasters and litigators do the same kind of evidence gathering, why aren't litigators superforecasters? Why are litigators, like experts in other professions,[4] not better at predicting case outcomes?

First, litigators gather evidence to be able to show what happened, not what is likely to occur in the future. We use the evidence and law to build a theory of the case, but it's all be about what happened in the past.

Second, superforecasters use a method to make use of the information they gather for the express purpose of making predictions.



Superforecasters do not always use the same method, but, according to Professor Tetlock, their methods tend to have certain features in common, which he summarizes at the end of the book as the 10 Commandments of Superforecasting:

1. Triage. Focus on questions where your hard work is likely to pay off. Doug Hubbard advises much the same when he suggests we consider the Expected Value of Perfect Information (i.e., weigh the costs of getting the information against its benefits for the task at hand).[5]
2. Break seemingly intractable problems into tractable sub-problems.
3. Strike the right balance between inside and outside views. Until we achieve a minimum level of competency, we can't see what we can't see or know what we don't know. We get must outside ourselves, meaning bring in other perspectives. Otherwise, we will (a) be blinded by our own biases and intuitive shortcuts and (b) fail to see what is around the corner but which others who already are around the corner could tell us about.
4. Strike the right balance between under- and overreacting to evidence. This is related to the saliency and recency effects, i.e., remembering and giving undue emphasis to salient or recently viewed evidence, a problem that plagues litigators, since we tend to focus more on the evidence supporting our case than that which our adversary has fallen in love with. (This tendency is broadly known as the confirmation bias, which distorts litigators' judgment as well.)
5. Look for the clashing causal forces at work in each problem. This is litigation 101. Extraordinary litigators—people like David Boies, Ron Olson, Irving Younger, and John Edwards—understand the opposing side's evidence and legal arguments at least as well as the opposing lawyers do. But we often neglect to give full weight to this part of the case when making estimates about future outcomes.
6. Strive to distinguish as many degrees of doubt as the problem permits but no more. "[Y]our uncertainty dial needs more than three settings [certain, maybe, and impossible]. Nuance matters. The more degrees of uncertainty you can distinguish, the better a forecaster you are likely to be." As you become more adept at forecasting litigation outcomes, you will increasingly appreciate the wisdom of this rule.
7. Strike the right balance between under- and overconfidence, between prudence and decisiveness.

8. Look for the errors behind your mistakes but beware of rearview-mirror hindsight biases. Own your mistakes; don't try to justify or excuse them. "Conduct unflinching postmortems: Where exactly did I go wrong?" And, equally important, conduct premortems to discover the blunders you might make.

9. Bring out the best in others and let others bring out the best in you. The best forecasting is produced by diverse teams that avoid groupthink.

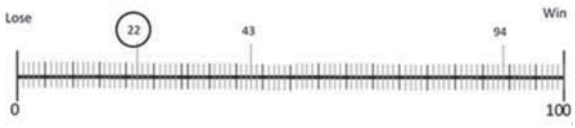
10. Master the error-balancing bicycle. "Implementing each commandment requires balancing opposing errors. Just as you can't learn to ride a bicycle by reading a physics textbook, you can't become a superforecaster by reading training manuals. Learning requires doing, with good feedback that leaves no ambiguity about whether you are succeeding."[6]

Alas, Professor Tetlock omitted from this list perhaps the most important rule: *Always express your probability statements in numbers, not words*. Professor Tetlock discusses the basis for this rule at length (pages 53-65) and comes back to the point repeatedly throughout the book. It cannot receive too much emphasis. "We've got a good shot," "there's a decent chance," "it doesn't look good," "we're likely to win (lose)," and similar phrases are not only vague and ambiguous, they lead to serious miscommunication. Whenever a lawyer says "there's a good chance we will win," all the typical clients hear is the word "win." They believe the lawyer has told them they definitely will win the case. Of course, the lawyer did not say and does not mean they definitely will win the case. Even in slam dunk cases, there is always the possibility, as the late Phil Saxer put it, of a gross miscarriage of justice. But the client doesn't hear the hedge, even if you tell him that nothing is certain.[7]

On the other hand, if the lawyer expresses any doubt at all about winning, the client will often look for another lawyer, one who "believes in the case."[8]

The solution to this dilemma is not to lie about the probability of winning. Rather, the solution is to prepare for the conversation: (1) Use a transparent method for making predictions, one that can be laid out in detail for the client. (2) Express probability estimates in numbers, not words.

Using numbers does not necessarily mean using a mathematical formula. The numerical estimate is not an objective measure. Rather, it is a way of refining and expressing our subjective estimate as closely to the eventual truth as possible. To get maximum value from this method, consider using a visual tool such as the following scale.



In this case, the person who gave the eventually losing plaintiff a 22% chance of winning was much more accurate than the person who pegged it at 43 and worlds apart from the person who thought 94 was the right number. Notice that both 22 and 43 thought the plaintiff would lose.

But 22 was much closer to the eventual truth. Degree of accuracy matters, as you will learn when you read *Superforecasting*.

Take heart. You too can learn how to make more accurate predictions. A good way to start is by keeping a log of predictions in which you record the prediction and then record what eventually happens. For example, if you have a brief to write, spend 10-15 minutes thinking about what you must do to complete and file the brief, break the process down into components (e.g., research, outline, drafting each section, revising, proofreading, printing, photocopying, binding, and filing), and estimate the time it will take to complete each component. Enter your time for each component as you go. After you file the brief, compare the estimates with the actual times, perhaps noting what you failed to consider that resulted in your having to spend less or more time on a given component than estimated.

By using a process like this, you are calibrating your predictive judgment system. Participants in the Good Judgment Project routinely get this kind of feedback, allowing superforecasters to calibrate their judgment and make even more accurate predictions next time.

Superforecasting makes a significant contribution to the small but growing shelf of books on forecasting.[9] Putting its lessons into practice will help litigators and mediators overcome the settlement error problem studied by Randall Kiser, saving them and their clients money and grief.

Endnotes

1. See Randall Kiser, Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients (New York: Springer, 2010).

2. For more than 50 years, scientists have studied the overconfidence bias, the confirmation bias, the accountability effect, the sunk cost bias, the anchoring effect, the endowment effect, the saliency effect, recency bias, risk aversion, risk seeking, and more through numerous, creative experiments. See Daniel Kahneman, Thinking Fast and Slow (New York: Farrar, Straus & Giroux, 2011); Beyond Right and Wrong, *supra*, at 89-139. To date, the definitive resource for lawyers on this subject is Paul Brest and Linda Hamilton Krieger, Problem Solving, Decision Making, and Professional Judgment: A Guide for Lawyers and Policy Makers (Oxford: Oxford University Press, 2010).

3. Cf. Marc Jeannerod, "Consciousness of Action as an Embodied Consciousness," Chapter 2 in Susan Pockett, William P. Banks,

and Shaun Gallagher, Does Consciousness Cause Behavior? (Cambridge, MA: MIT Press, 2006).

4. *See, e.g.*, Elizabeth Loftus *et al.*, "Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes," 16 *Psychology, Public Policy, and Law* 133 (2010); Philip Tetlock, *Expert Political Judgment: How Good Is It? How Can We Know?* (Princeton, NJ: Princeton University Press, 2005).
5. Douglas Hubbard, *How to Measure Anything: Finding the Value of Intangibles in Business* 92-93 (New York: John J. Wiley & Sons, 2007).
6. *Superforecasting*, *supra*, at 277-285.
7. There are studies on this too. *See, e.g.*, Gerd Gigerenzer *et al.*, "A 30% Chance of Rain Tomorrow": How Does the Public Understand Probabilistic Weather Forecasts?" 25 *Risk Analysis* 623 (2005).
8. Knowing that our clients might kill the messenger if we share a pessimistic view of the chances of success, lawyers are susceptible to the accountability effect, a subconscious bias studied in depth by Professor Tetlock and other social psychologists. Oversimplified, the accountability effect leads us subconsciously to tailor our judgments to what we subconsciously assume our audience wants to hear. We tell clients what we assume they want to hear, often without being aware that we are pandering. But, if we have no way of knowing the views and expectations of our audience (for example, when giving a speech to a diverse group of colleagues), we tend to make more balanced, objective presentations. *See, e.g.*, Philip Tetlock, "Accountability and Complexity of Thought," 45 *Journal of Personality and Social Psychology* 74 (1983); Philip Tetlock and Erika Henik, "Accountability," in N. Nicholson, P. Audia, & M. Pillutla, (eds.) Blackwell *Encyclopedic Dictionary of Organizational Behavior* (Cambridge, MA: Blackwell Publishers, 2004).
9. *See* J. Scott Armstrong, *Principles of Forecasting: A Handbook for Researchers and Practitioners* (Boston: Kluwer Academic Publishers, 2001); Nate Silver, *The Signal and the Noise* (New York: Penguin Books, 2012); Rob Hyman and George Athanasopoulos, *Forecasting: Principles and Practice* (Otexts, 2013).

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DirecTV v. Imburgia— What Does It Mean?

By Laura A. Kaster

The most recent U.S. Supreme Court pronouncement in an arbitration case took place in a most peculiar case. *DirecTV v. Imburgia*[1] is the kind of highly fact-specific case that rarely makes the cut for the few cases the Court determines to review. The arbitration clause and class waiver provision in the consumer contracts that DirecTV provided its service customers contained a proviso that if a class waiver provision would be invalid under the law of the consumer's state, the entire arbitration provision would be invalidated—resulting in a court proceeding rather than arbitration. At the time the clause was drafted in 2007, California law did invalidate class waivers under its *Discover Bank* rule.[2] That rule was subsequently held to be preempted by the Federal Arbitration Act in the *Concepcion* case.[3] In construing the DirecTV proviso, the California court determined that the *Discover Bank* invalidating rule that predated *Conception* should apply because the phrase "law of your state" was ambiguous and that reading would construe the contract against the drafter resulting in invalidation of the entire arbitration agreement.

Justice Breyer, writing for a six-justice majority, recognized, as was required, that the state court construction of state law could not be challenged. Instead, he focused on the fact that the failure to recognize the invalidating impact of the intervening Supreme Court decision appeared to be a rule of construction that applied uniquely to arbitration. For that reason, the rule was preempted under the Federal Arbitration Act, because the interpretation did not place arbitration agreements on an equal footing with all other contracts. As Justice Breyer states in the opening paragraph of his opinion: "In our view (the California] decision does not rest 'upon such grounds as exist…for the revocation of any contract,'" and we consequently set that judgment aside."[4] The Court held that the arbitration agreement had to be enforced.

The holding will have wider impact than the facts suggest. There are many state court rules that have been created to apply uniquely to arbitration provisions that are now vulnerable. For example, the New Jersey courts have recently held that to be valid an arbitration provision must clearly notify the parties that they are waiving a judge and jury—a proviso focused on arbitration law.[5] *Atalese* and similar focused rulings are likely invalid now in cases that fall under the Federal Arbitration Act. Given the expansive reach of the Commerce Clause, this means virtually all arbitration agreements where the parties do not specify that state *arbitration* law controls in addition to the applicable substantive choice of law provision will be subject to this ruling.

Justice Ginsburg dissented—as did Justice Thomas on his consistent position that the FAA should not apply to state courts. Justice Ginsburg (joined by Justice Sotomayor) felt that the ruling provided an unnecessary leg up for the powerful companies that impose form contracts on consumers. In her view, the construction of the California court should have been allowed to stand. She noted that the underlying dispute was a challenge to hefty early termination fees that violate California consumer-protection law. She also relied on the law applicable at the time the relevant contracts were drafted. It was not until Imburgia's case had been pending for three years that the *Concepcion* decision was issued. Justice Ginsburg found the California construction of the contract reasonable and correct. She stated that this was the first arbitration case in which the Court reversed the state-court decision on the ground that the state law was misapplied.

The states have lost considerable ground in enforcing their consumer and employment laws when corporations elect arbitration. The tension that ensues reflects this underlying conflict. *DirecTV v. Imburgia* imposes a roadblock to the workaround that the states have been attempting by imposing limits on the effectiveness of an arbitration clause.

Endnotes

1. 577 U.S. ___ (Dec. 2016).
2. 36 Cal. 4th 148, 113 P.3d 1110 (2005).
3. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).
4. Slip Op. at 1.
5. *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430 (2014).

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* * *

Goldman, Sachs & Co. v. Athena Venture Partners, L.P., No. 13-3461 (3d Cir. Sept. 29, 2015)

By David Zaslowsky, Grant Hanessian and Michael Bloom

Athena Venture Partners, L.P. ("Athena") is a limited partnership that invested in several funds through Goldman Sachs & Co. ("Goldman"). In 2007, Goldman approached Athena with an investment opportunity in "Liquidity Partners," describing it as a "terrific, low principal risk, short term investment with potential higher yields than other available cash investments." In supposed reliance upon these representations, Athena invested $5 million in the Liquidity Partners fund. By late 2008, however, Athena incurred about $1.4 million in losses on the investment. Believing that Goldman misrepresented the risks associated with the investment, Athena initiated arbitration proceedings under Financial Industry Regulatory Authority ("FINRA") rules.

The parties presented evidence at two separate hearings. After the first hearing, FINRA disclosed to the parties that one of the panel members, Demetrio S. Timban, Jr., had been charged with the unauthorized practice of law in connection with an appearance in a New Jersey municipal court (Timban was admitted in New York and Michigan, but not New Jersey). Neither party objected to Timban's presence on the panel at that point; nor did they conduct any further due diligence about him. Following the second hearing, the panel ruled in favor of Goldman. Two of the panel members signed the award, but Timban did not. Under the Subscription Agreement, only two members of the panel needed to sign the award for it to have binding effect.

After the award, Athena conducted further due diligence on Timban and concluded that Timban's disclosure was misleading and that he had also been accused, prior to the second arbitration hearing, of several other acts of misconduct that were never disclosed to the parties. Athena then brought a motion to vacate the arbitration award on the basis that Timban's conduct and failure to disclose violated both FINRA rules and the parties' arbitration agreement. The district court agreed with Athena and vacated the award.

On appeal, the Third Circuit reversed the district court's decision on the basis that Athena waived its right to challenge Timban's presence on the panel by not raising the issue during the arbitration proceedings. Noting that the standard for waiver in the arbitration context was an issue of first impression in the Third Circuit, the court adopted a "constructive knowledge" approach, holding that "if a party could have reasonably discovered that any type of malfeasance, ranging from conflicts-of-interest to non-disclosures such as those at issue here, was afoot during the hearings, it should be precluded from challenging the subsequent award on those grounds." According to the court, Timban's initial disclosure provided enough alarming information to compel the parties to conduct further research on Timban at that time. By waiting to conduct due diligence on Timban until after the proceedings concluded, Athena appeared to be a "sore loser" that was "trying for a second bite at the apple." The Third Circuit explained that "a party should not be permitted to game the system by rolling the dice on whether to raise the challenge during the proceedings or wait until it loses to seek vacatur on the issue." The court refused to reward such conduct and ruled that Athena's constructive knowledge, during the arbitration hearings, of Timban's misconduct prevented it from later attempting to vacate the award on the same basis.

The Third Circuit reversed the district court's order vacating the arbitration award and remanded for further proceedings on Goldman's motion to confirm the award.

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