3-Day Commercial Arbitration Training

Volume II

Dispute Resolution Section
Benjamin N. Cardozo School of Law
American Arbitration Association
New York International Arbitration Center
Silicon Valley Arbitration & Mediation Center

June 18-20, 2018

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NEW YORK STATE BAR ASSOCIATION
Dispute Resolution Section
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COMMERCIAL ARBITRATION TRAINING
June 18-20, 2018

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PREFACE

I was invited to write the preface to this special Supplement to The Sedona Conference Journal® as a result of my participation in the Georgetown Data Deluge Summit in March, 2007, and concerns I expressed at the Summit about the legal system's capacity to handle the data deluge. The Sedona Conference® Cooperation Proclamation, and supporting document, The Case for Cooperation, suggest that if participants in the legal system act cooperatively in the fact-finding process, more cases will be able to be resolved on their merits more efficiently, and this will help ensure that the courts are not open only to the wealthy. I believe this to be a laudable goal, and hope that readers of this Journal will consider the articles carefully in connection with their efforts to try cases.

Associate Justice Stephen G. Breyer
Supreme Court of the United States
Washington, DC
October 9, 2009

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THE SEDONA CONFERENCE® COOPERATION PROCLAMATION

Author:
The Sedona Conference®

The Sedona Conference® launches a coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a "just, speedy, and inexpensive determination of every action."

The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system. This burden rises significantly in discovery of electronically stored information ("ESI"). In addition to rising monetary costs, courts have seen escalating motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes – in some cases precluding adjudication on the merits altogether – when parties treat the discovery process in an adversarial manner. Neither law nor logic compels these outcomes.

With this Proclamation, The Sedona Conference® launches a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery. This Proclamation challenges the bar to achieve these goals and refocus litigation toward the substantive resolution of legal disputes.

Cooperation in Discovery is Consistent with Zealous Advocacy

Lawyers have twin duties of loyalty: While they are retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner. Their combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court. Cooperation does not conflict with the advancement of their clients' interests - it enhances it. Only when lawyers confuse *advocacy* with *adversarial conduct* are these twin duties in conflict.

Lawyers preparing cases for trial need to focus on the full cost of their efforts – temporal, monetary, and human. Indeed, all stakeholders in the system – judges, lawyers, clients, and the general public – have an interest in establishing a culture of cooperation in the discovery process. Over-contentious discovery is a cost that has outstripped any advantage in the face of ESI and the data deluge. It is not in anyone's interest to waste resources on unnecessary disputes, and the legal system is strained by "gamesmanship" or "hiding the ball," to no practical effect.

The effort to change the culture of discovery from adversarial conduct to cooperation is not utopian.[1] It is, instead, an exercise in economy and logic. Establishing a culture of cooperation will channel valuable advocacy skills toward interpreting the facts and arguing the appropriate application of law.

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1 Gartner RAS Core Research Note G00148170, *Cost of eDiscovery Threatens to Skew Justice System*, ID# G00148170, (April 20, 2007), *available at* http://www.h5technologies.com/pdf/gartner0607.pdf (While noting that "several . . . disagreed with the suggestion [to collaborate in the discovery process] . . . calling it 'utopian,'" one of the "take-away's" from the program identified in the Gartner Report was to "[s]trive for a collaborative environment when it comes to eDiscovery, seeking to cooperate with adversaries as effectively as possible to share the value and reduce costs.")

Cooperative Discovery is Required by the Rules of Civil Procedure

When the first uniform civil procedure rules allowing discovery were adopted in the late 1930s, "discovery" was understood as an essentially cooperative, rule-based, party-driven process, designed to exchange relevant information. The goal was to avoid gamesmanship and surprise at trial. Over time, discovery has evolved into a complicated, lengthy procedure requiring tremendous expenditures of client funds, along with legal and judicial resources. These costs often overshadow efforts to resolve the matter itself. The 2006 amendments to the Federal Rules specifically focused on discovery of "electronically stored information" and emphasized early communication and cooperation in an effort to streamline information exchange, and avoid costly unproductive disputes.

Discovery rules frequently compel parties to meet and confer regarding data preservation, form of production, and assertions of privilege. Beyond this, parties wishing to litigate discovery disputes must certify their efforts to resolve their difficulties in good faith.

Courts see these rules as a mandate for counsel to act cooperatively.[2] Methods to accomplish this cooperation may include:

1. Utilizing internal ESI discovery "point persons" to assist counsel in preparing requests and responses;

2. Exchanging information on relevant data sources, including those not being searched, or scheduling early disclosures on the topic of Electronically Stored Information;

3. Jointly developing automated search and retrieval methodologies to cull relevant information;

4. Promoting early identification of form or forms of production;

5. Developing case-long discovery budgets based on proportionality principles; and

6. Considering court-appointed experts, volunteer mediators, or formal ADR programs to resolve discovery disputes.

The Road to Cooperation

It is unrealistic to expect a *sua sponte* outbreak of pre-trial discovery cooperation. Lawyers frequently treat discovery conferences as perfunctory obligations. They may fail to recognize or act on opportunities to make discovery easier, less costly, and more productive. New lawyers may not yet have developed cooperative advocacy skills, and senior lawyers may cling to a long-held "hide the ball" mentality. Lawyers who recognize the value of resources such as ADR and special masters may nevertheless overlook their application to discovery. And, there remain obstreperous counsel with no interest in cooperation, leaving even the best-intentioned to wonder if "playing fair" is worth it.

This "Cooperation Proclamation" calls for a paradigm shift for the discovery process; success will not be instant. The Sedona Conference® views this as a three-part process to be undertaken by The Sedona Conference® Working Group on Electronic Document Retention and Production (WG1):

> Part I: Awareness - Promoting awareness of the need and advantages of cooperation, coupled with a call to action. This process has been initiated by The Sedona Conference® Cooperation Proclamation.

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2 *See, e.g., Board of Regents of University of Nebraska v. BASF Corp.* No. 4 04-CV-3356, 2007 WL 3342423, at *5 (D. Neb. Nov. 5, 2007) ("The overriding theme of recent amendments to the discovery rules has been open and forthright sharing of information by all parties to a case with the aim of expediting case progress, minimizing burden and expense, and removing contentiousness as much as practicable. [citations omitted] If counsel fail in this responsibility—willfully or not—these principles of an open discovery process are undermined, coextensively inhibiting the courts' ability to objectively resolve their clients' disputes and the credibility of its resolution.")

Part II: Commitment - Developing a detailed understanding and full articulation of the issues and changes needed to obtain cooperative fact-finding. This will take the form of a "Case for Cooperation" which will reflect viewpoints of all legal system stakeholders. It will incorporate disciplines outside the law, aiming to understand the separate and sometimes conflicting interests and motivations of judges, mediators and arbitrators, plaintiff and defense counsel, individual and corporate clients, technical consultants and litigation support providers, and the public at large.

Part III: Tools - Developing and distributing practical "toolkits" to train and support lawyers, judges, other professionals, and students in techniques of discovery cooperation, collaboration, and transparency. Components will include training programs tailored to each stakeholder; a clearinghouse of practical resources, including form agreements, case management orders, discovery protocols, etc.; court-annexed e-discovery ADR with qualified counselors and mediators, available to assist parties of limited means; guides for judges faced with motions for sanctions; law school programs to train students in the technical, legal, and cooperative aspects of e-discovery; and programs to assist individuals and businesses with basic e-record management, in an effort to avoid discovery problems altogether.

Conclusion

It is time to build upon modern Rules amendments, state and federal, which address e-discovery. Using this springboard, the legal profession can engage in a comprehensive effort to promote pre-trial discovery cooperation. Our "officer of the court" duties demand no less. This project is not utopian; rather, it is a tailored effort to effectuate the mandate of court rules calling for a "just, speedy, and inexpensive determination of every action" and the fundamental ethical principles governing our profession.

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LTN Law Technology News

Arbitration's E-Discovery Conundrum[1]

Thomas L. Aldrich

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It's no secret that the recent expansion of document discovery in federal civil litigation has driven many corporations and their lawyers to eschew court battles for alternative dispute resolution.

Today, however, the experience of massive, uncontrolled document discovery, particularly with regard to electronic documents, has eviscerated most of the benefits of arbitration.

The broad scope of Federal Rule of Civil Procedure 26, which deals with discovery, as interpreted by the courts and exacerbated by electronic technology and creative trial counsel, has hugely increased litigation costs in terms of dollars, time to resolution and the burden on management. Thirty years ago, the specter of copying, storing and producing tens of millions of hard-copy documents caused many in-house and outside counsel to consider arbitration as a cheaper and faster alternative to litigation.

But as litigation discovery techniques have become more prevalent in arbitration, arbitration has become just as time-consuming, expensive and burdensome. Without the benefit of an appeal process for the losing party, the primary remaining benefit for binding arbitration -- privacy -- is often outweighed by the other negative factors.

Parties and their litigation counsel have pointed to runaway discovery as one major reason why they have abandoned arbitration in favor of mediation in the United States and even internationally.

How can the long-recognized benefits of arbitration -- speed and cost savings -- be restored? To regain favor among parties and their legal representatives, the process must address the needs and interests that led them to arbitration in the first place: to balance the need to discover those documents reasonably necessary for a party to prove its case with the cost, burden and time involved in producing such documents, while taking into account the need for fundamental fairness and to avoid surprise and trial by ambush.

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Understanding the problem requires a look at the development of electronic discovery rules and what some arbitral institutions are doing to address the situation. This article will describe briefly how we got here.

The 1925 Federal Arbitration Act created a body of federal substantive law that recognized contracting parties' obligations to honor a private agreement to submit a dispute to arbitration.

Although the FAA authorized arbitrators to subpoena witnesses and documents for testimony at hearings, it did not specifically address the subject of prehearing discovery. Many commentators and court decisions have differed on whether prehearing discovery is permitted under the act. At a minimum, one can infer that no right to discovery exists without an express agreement by the parties to the contrary.

Recent experience, however, has shown that arbitrators are reluctant to deny or limit discovery when confronted with trial counsel used to the breadth of discovery under Rule 26. Moreover, the threat of overturning an award or not being selected for a future case weighs heavily and has resulted in many arbitrators expanding the scope of prehearing discovery to more closely resemble that prevalent in the federal courts.

In addition, parties have adopted the approach of spelling out in detail in their predispute arbitration agreement the scope of discovery preferred in the event that a dispute arises.

The 1955 Uniform Arbitration Act, which was adopted by virtually all of the states except New York, was silent with respect to discovery. It was modeled after Article 75 of the New York Civil Practice Law and Rules, which still governs arbitrations in that state.

The 2000 Revised Uniform Arbitration Act includes several explicit provisions dealing with discovery. Section 17(c) provides that arbitrators "may permit such discovery as [they] decide ... is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious and cost effective." The RUAA has been adopted by at least 12 states and the District of Columbia and is currently under consideration for adoption in New York.

Although the RUAA provides that the scope and breadth of permitted discovery remain within the discretion of the arbitrator, the various factors described above have resulted in arbitrators acceding to the wishes of one party, or both, to expand discovery in prehearing arbitration proceedings to closely resemble that permitted in the courts.

Thus, the original benefits of arbitration perceived by the FAA and by corporate and legal proponents of arbitration -- speed, efficiency, low cost and control -- have fallen victim to the e-discovery morass. And companies and their lawyers who used to seek arbitration over litigation are now choosing mediation over arbitration.

What can be done to save arbitration from the e-discovery morass? To address this compelling need, arbitral institutions have assumed a greater role to provide comprehensive guidelines for shaping discovery and resolving disputes.

THE DRAFT CPR PROTOCOL

The International Institute for Conflict Prevention and Resolution arbitration committee has proposed and will soon promulgate a protocol that seeks to alleviate the problems created by runaway discovery.

Underlying the protocol is the philosophy that arbitration must be expeditious, cost-effective and fundamentally fair. Section 1(a) of the protocol reads, "[a]rbitration is not for the litigator who will 'leave no stone unturned.' ... [Z]ealous advocacy must be tempered by an appreciation for the need for speed and efficiency ... .[D]isclosure should be granted only as to those items that are relevant and materials for which a party has a substantial, demonstrable need."

The guidelines provide that the disclosure of electronic documents shall follow the general principles of narrow focus and balancing cost, burden and accessibility with the need for disclosure. Production of e-materials from a wide range of users or custodians, which is both costly and burdensome, should not be permitted without a showing of extraordinary need.

The CPR guidelines present a cafeteria list of potential modes of disclosure from which the parties may select as a practical approach to the breadth of permitted discovery. Mode A, the narrowest scope, provides for no prehearing disclosure other than copies of printouts of e-documents to be presented in support of each party's case. Mode B provides that each side produce e-documents maintained by an agreed limited number of designated custodians, that the disclosure be limited to e-documents created from the date of signing the arbitration agreement to the date of filing the request for arbitration, and that production be limited to e-documents from primary storage facilities. In other words, no documents from backup servers, backup tapes, cell phones, personal digital assistants or voicemails will be produced. And no information obtained through forensic methods will be admitted in evidence.

Mode C provides for a larger number of specified custodians and a wider time period than Mode B, and also provides that the parties may agree to allow documents obtained through forensic methods to be admitted. Finally, Mode D provides for disclosure of electronic information regarding nonprivileged matters relevant to any party's claim or defense, subject to limitations of reasonableness, duplicativeness and undue burden. It is a broad level of disclosure similar to that required or permitted under FRCP Rule 26.

Other arbitral institutions are issuing e-discovery guidelines similar to those of CPR.

CHARTERED INSTITUTE PROTOCOL

For example, the Chartered Institute Protocol for E-Disclosure in Arbitration, newly promulgated in October, shares many of the same purposes and concepts, including early consideration of the scope and conduct of e-disclosure; avoidance of unnecessary cost and delay; reasonable and appropriate steps for the retention and preservation of e-documents; agreements by the parties to limit the scope and extent of production; reduction of the cost and burden of production; and placement of the ultimate burden of persuasion on the requesting party.

The CIP authorizes the parties to confer at the earliest opportunity regarding the preservation and disclosure of e-documents and the scope and methods of production.

Matters for early consideration include the types of electronic documents, computer systems, devices, storage systems and media involved. Early consideration matters also include appropriate steps for the retention and preservation of e-documents; the applicable rules of practice; an agreement to limit the scope and extent of disclosure; the tools and techniques to consider in reducing the burden and cost of e-disclosure; and whether any party or the tribunal may benefit from professional guidance on information technology issues.

The Chartered Institute's Protocol for E-Disclosure in Arbitration, like the CPR Protocol, is quite comprehensive. A particular strength is the detail regarding IT capabilities, media and the potential use of professional IT experts. A possible weakness is the lack of detailed choices regarding potential modes of production, as provided by the CPR Protocol.

THE ICDR

The International Centre for Dispute Resolution, the international arm of the American Arbitration Association, issued guidelines for arbitrators concerning the exchange of information, which became effective in May.

While the introduction to the ICDR guidelines provides a general statement that international commercial arbitration should offer a "simpler, less expensive and more expeditious form of dispute resolution than resort to national courts," the guidelines themselves offer only limited suggestions for dealing with runaway discovery, especially e-discovery.

To that end, the guidelines provide that "[t]he tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy ... [by] avoid[ing] unnecessary delay and expense, while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly."

Under the ICDR guidelines, the only documents required to be exchanged are those on which a party intends to rely. The sole provision dealing with e-documents speaks primarily to the form in which such documents shall be disclosed (the form in which they are maintained, absent a showing of compelling need by the requesting party for production in a different form). Finally, requests for e-documents "shall be narrowly focused and structured to make searching for them as economical as possible."

IBA RULES

Similarly, the International Bar Association Rules on the Taking of Evidence (1999) provide little guidance in addressing the problems of runaway e-discovery in arbitration proceedings.

Article 3, Section 2 provides that any party may submit to the tribunal a request to produce documents (including electronic documents), subject to exclusion on grounds of relevance or

materiality, legal impediment or privilege, unreasonable burden to produce, or considerations of fairness or equality that the tribunal determines compelling. Section 9.2.

Thus, while the IBA Rules offer few specifics, one gets the sense that arbitrators armed with these rules may feel relatively secure exercising their discretion to resist e-discovery fishing expeditions.

In sum, the application of the broad discovery standards in arbitration proceedings has led to parties forgoing arbitration altogether in favor of mediation.

New arbitration protocols and guidelines seek to change the e-discovery landscape by narrowing the focus, providing a balancing test and shifting the burden to the requesting party to demonstrate that the need for disclosure outweighs the cost and burden of disclosure.

Thus, the protocols seek to recapture the traditional benefits of arbitration -- speed, efficiency and cost saving -- while preserving fundamental fairness.

Ultimately, the success of these efforts to stem the tide of runaway e-discovery in arbitration rests upon the parties' agreements to use the protocols and the arbitrators' willingness to exercise their discretion to enforce such agreements.

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Arbitrators hold significant power over discovery

Robert B. Davidson and Margaret L. Shaw/Special to The National Law Journal
November 27, 2006

The dominant form of business communication is now, and has been for some time, electronic in nature. E-mail servers and hard drives now contain the vast majority of business correspondence and information. Judicial rules of disclosure, at least in the United States, recognized this reality long before U.S. District Judge Shira A. Scheindlin focused the bar's attention in her *Zubulake* decisions. See *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422.

Indeed, electronic discovery has been with us a long time. While Rule 34(a) of the Federal Rules of Civil Procedure quaintly describes "designated documents" as including such things as "phonorecords, and other data compilations from which information can be obtained," local court rules have long made it clear that Rule 34 encompasses electronic material.

In recognition of the need for the federal rules to reflect the reality of electronic communication, the Judicial Conference of the United States approved a number of proposed amendments relating to electronic discovery. In April, the U.S. Supreme Court approved of these proposed amendments without comment or dissent. The new amendments, which come into force on Dec. 1, contain revisions and additions to several of the federal rules. These amendments and revisions reflect changes to Fed. R. Civ. P. 16, 26, 34, 37 and 45 as well as Form 35.

Among other things, the amendments broaden the definition of discoverable material to "electronically stored information," require early discussion of electronic discovery issues, provide for production of this information, incorporate a procedure to deal with the inadvertent production of privileged documents and provide a "safe harbor" against sanctions when data are destroyed or lost. The changes in the federal rules, many of which have been (or are in the process of being) mirrored in state procedural rules as well, play a role in litigation that unfolds fairly predictably in a courtroom.

But what do these changes bode for alternative dispute resolution? How do arbitrators, and the rules under which they operate, deal with electronic disclosure in a less formal setting that lacks many of the sanctioning tools available to a court? How do issues regarding electronic discovery play out in the context of a consensual process like mediation, and to what extent does the specter of such discovery drive settlement?

There are three ways in which arbitrators and the institutional rules under which they often operate deal-deliberately or incidentally-with electronic discovery. First, there are rules for demanding documents. Second, there are procedures by which arbitrators can order the production of missing material, through the exercise of subpoena power or otherwise. Third, institutional rules often authorize arbitrators to order sanctions against parties that fail to comply with disclosure obligations.

Of course, there is the unique reality in arbitration that the person who has ordered the disclosure is

the ultimate decision-maker who, in the absence of grounds to vacate an award-grounds that do not include the commission of mere errors of fact or law-will have the final word on the merits of the dispute.

The institutional provider rules

The rules of virtually all of the major arbitration providers in the United States attempt to assure, or at least permit, prehearing document discovery. The JAMS Comprehensive Arbitration Rules and Procedures, for example, require the parties to cooperate in good faith in the "voluntary, prompt and informal exchange of all non-privileged documents . . . relevant to the dispute immediately upon commencement of the Arbitration." JAMS Rule 17(a). The obligation to produce relevant documents is ongoing. Id., Rule 17(d). The parties can demand, and the arbitrator can order, additional disclosure. Id., Rule 17(e). JAMS also provides for one deposition for each side as of right. Id., Rule 17(c).

American Arbitration Association (AAA) Commercial Arbitration Rule R-21 contains similar provisions permitting a party, at the arbitrator's discretion, "consistent with the expedited nature of arbitration," to obtain documents from the other side. The AAA rules do not provide for depositions, but arbitrators may permit them. See, e.g., Rule L-4(d) of the AAA's large complex case procedures, which says that "the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information."

While the International Institute for Conflict Prevention & Resolution (CPR) rules do not mention the word "document"-speaking only in terms of "discovery"-it is clear that they, too, envision a document exchange as part of the process. CPR rules 11 and 12.3.

Neither the JAMS rules, the AAA commercial rules nor the CPR rules contain specific provisions related to the disclosure of electronically stored information (ESI). This is not to say that ESI is unavailable in arbitration-only that it is not treated differently than any other disclosure. In that regard, JAMS Rule 17(e) expressly permits the arbitrator to decide a discovery dispute and, if necessary, to "appoint a special master to assist in resolving a discovery dispute." This provision, which effectively shields the decision-maker from privileged documents, also provides a tool for managing complex discovery issues, such as those raised by ESI discovery. AAA Rule R-21(c) authorizes the arbitrator "to resolve any disputes concerning the exchange of information." There is no provision, however, for appointment of a special master.

Both the JAMS and the AAA rules give the arbitrator the authority to subpoena documents on his or her own initiative. See AAA Rule R-31(d) and JAMS Rule 21. CPR Rule 12.3 allows the tribunal to "require the parties to produce evidence in addition to that initially offered."

Sanctions

Here, of course, is where the rubber hits the road. Arbitrators are not judges and have no power of contempt. While the AAA rules do not provide expressly for sanctions, they permit an arbitrator to allocate specified costs in his or her award. AAA Rule R-43(c) permits the arbitrator to "assess [certain] fees, expenses and compensation" in that regard. JAMS Rule 24(f) permits an arbitrator to assess "Arbitrator fees, Arbitrator compensation and expenses [in the award] if provided by agreement of the Parties [or] allowed by applicable law." Both sets of rules limit the ability to award counsel fees. See, e.g., AAA Rule R-43(d)(ii).

Both JAMS and CPR explicitly provide for sanctions, including the default of a party for discovery or other abuses. JAMS Rule 29, entitled "Sanctions," provides that "The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules. These sanctions may include . . . in extreme cases ruling on an issue adversely to the Party who has failed to comply." CPR Rule 15, entitled "Failure To Comply With Rules," states in relevant part: "Whenever a party fails to comply with these Rules, or any order of the Tribunal pursuant to these Rules . . . the Tribunal may impose a remedy it deems just, including an award on default." While the AAA rules have no explicit provision dealing with sanctions, at least one court in Massachusetts (two justices dissenting) recently found such authority in the AAA rules when coupled with a broad arbitration clause. *Superadio L.P. v. Winstar Radio Productions LLC*, 446 Mass. 330, 844 N.E.2d 246 (2006), holding that a broad arbitration clause combined with AAA Rule 45(a) (providing that the

arbitrator can "grant any relief or remedy that the arbitrator deems just and equitable"), and Rule 23(c) (which authorizes the arbitrator "to resolve any disputes concerning the exchange of documents"), permits an AAA arbitrator to impose monetary sanctions.

Thus, at least theoretically, where e-discovery is concerned, a party under the JAMS or the CPR rules can be defaulted for a discovery abuse involving spoliation or the failure to disclose e-mails or other ESI. At least in Massachusetts, all three providers have the power to impose monetary sanctions for discovery abuses. To date, there does not appear to have been a case of an arbitrator defaulting a party for e-discovery abuses.

The real issue is whether an arbitrator will use his or her power to assess costs or to default a party when confronted with spoliation or a refusal to produce. Although training programs for arbitrators now emphasize the need to manage proceedings efficiently, arbitrators traditionally were trained to tolerate behavior that most courts would not. Arbitrators were encouraged to hear all of the evidence-even rank hearsay for what it might be worth. (The AAA still encourages short-form awards, largely to streamline the process and make it less expensive, and to insulate an award from subsequent attack. By contrast, CPR and JAMS provide for a reasoned award unless the parties agree otherwise. CPR Rule 14.2; JAMS Rule 24(g).)

The real difference in arbitration is found in the people who act as arbitrators and the fear of vacatur if an arbitrator exercises his or her sanctioning authority. A number of arbitrators are not judges or litigators. They have all the insecurities that accompany that inexperience and are reluctant to order sanctions. It is a challenge to the provider organizations to teach neutrals about the technical aspects of e-discovery and to educate them to use their coercive powers under the rules to assure that all parties receive a full and fair hearing. All three providers offer ongoing training for their neutrals. CPR has, at this moment, a committee discussing discovery guidelines. It also has a committee charged with addressing the challenges of e-discovery in CPR arbitrations.

One thing is certain, however. ESI is here to stay, and arbitrators now regularly deal with e-discovery and with some parties' reluctance or refusal to spend the time or money to comply with legitimate document requests. It is only a matter of time before sanctions become more common and case law gives arbitrators more guidance on how to react to abusive discovery practices.

Mediation

Both the burdens of e-discovery and uncertainties as to how arbitrators will handle these issues provide incentives for parties to consider mediation as an alternative. In mediation, parties sometimes can avoid e-discovery altogether, or at least greatly limit the kind of production required. While the specter of e-discovery often can promote settlement in mediation, one also sees creative solutions to the burdens of e-discovery worked out consensually between non-settling parties in a mediation context.

The potential cost of complying with discovery orders regarding electronic material sometimes approaches or exceeds the amount of potential damages at issue. This is particularly true in class actions, but may also be so in business, commercial and some kinds of employment cases in which documentary proof can be massive or expert investigation of backup tapes may be called for.

In some cases, parties may be able to reach resolution with the help of a mediator and avoid such production altogether. In a recent hotly contested sex discrimination and harassment case, for example, while the parties disagreed strongly about the facts of the case and the merits of the issues, they were able to reach agreement after 1 1/2 days of mediation. One of the prime motivating factors was the cost of the ESI discovery that otherwise would have been required. The settlement saved the cost, delay and aggravation of producing years of e-mails among brokers in an office, as well as reams of documents related to account distributions and other financial information.

It might appear at first blush that the specter of e-discovery in litigation or arbitration provides a club for plaintiffs-not only to induce the use of mediation, but also to secure favorable settlements. Not only can the costs of e-discovery be prohibitive for defendants, especially for smaller companies and institutions, but some companies may employ different document-retention policies in different business locations. Spoliation may be an issue, given the difficulties of complying with preservation

demands and ensuring that all employees understand the need for them, leading defendants to settle on terms more favorable to plaintiffs than they might otherwise have considered.

Plaintiffs, however, are not free of the perils posed by e-discovery in mediation's alternative forum. Plaintiffs may face discovery-related cost-shifting if the case goes to trial or arbitration. This may shift the settlement dynamic in a dispute, such as an employment case in which the plaintiff has lost her job and has minimal resources, even though she is paying her attorney on a contingency basis.

The potential burdens of e-discovery also can be managed creatively in the context of mediation. In one large class action, for example, the cost of production would have been many times any potential settlement. The parties agreed to mediate the case and do informal, confidential discovery through data sampling. They engaged the services of a neutral to help them resolve issues related to the sampling. The neutral was asked to help the parties negotiate their respective sampling recommendations and, if they could not come to agreement, to arbitrate the issue so that limited discovery could proceed. The parties agreed that if the entire case could not be resolved in a mediation context, no conclusions reached by way of the sampling process could be used in a subsequent litigation in the absence of a judicial order.

Given that electronic communication is now the dominant form of business communication, counsel are advised to understand the ways electronic discovery may be handled not just in litigation, but also in alternative dispute resolution. Arbitrators will become increasingly comfortable in using their coercive powers in this context. Mediators will become more adept in helping the parties resolve these issues consensually.

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Accounting for the Costs of Electronic Discovery

David Degnan*

I. INTRODUCTION

Experts estimate that conducting an electronic discovery (e-discovery) event may cost upwards of $30,000 per gigabyte.[1] Given the complexity of the subject and the amount of money involved, many lawyers, litigation support vendors, experts, consultants, and forensic accountants have found e-discovery to be quite lucrative.[2] However, few commentators have offered guidance to help courts, attorneys, and clients predict and plan[3] for litigation.[4] Despite the lack of research, the civil procedure[5] and evidence rule[6] committees, Congress,[7] and courts[8]

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1. Herbert L. Roitblat, *Search & Information Retrieval Science*, 8 SEDONA CONF. J. 192, 192 (Fall 2007).

2. *See, e.g.*, *In re* Fannie Mae Sec. Litig., 552 F.3d 814, 817 (D.C. Cir. 2009) (noting that Fannie Mae spent approximately 9% of its total annual budget of six million dollars on the production of electronically stored information for the litigation at issue).

3. FED. R. CIV. P. 26 advisory committee note (2006 Amendment) ("The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the case.").

4. *See* Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456, 472 n.56 (S.D.N.Y. 2010) (relying on how many hours it took to write the opinion to describe the cost of electronic discovery).

5. *See generally* FED. R. CIV. P. 26 advisory committee's note (1993 Amendment) ("[Parties should] discuss how discovery can be conducted most efficiently and economically"); FED. R. CIV. P. 26 advisory committee's note (2006 Amendment) ("[The 26(f) conference and plan] can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party.").

6. FED. R. EVID. 502 initial advisory committee notes prepared by the Judicial Conference Advisory Committee on Evidence Rules (Revised

frequently address the cost of e-discovery. That said, the general consensus is that e-discovery is expensive, time-consuming, and risky.[9]

First, the discovery of electronic evidence is expensive for clients and the other parties involved. Few seriously debate this point; however, some argue that the costs of e-discovery are grossly exaggerated.[10] But to make such an accusation (of exaggerated costs), one must review the process as a whole[11] and analyze both the external costs of outsourcing and the internal costs that are borne by the client or insurer in administering and processing the e-discovery event. For instance, the client may hire an expert to help develop internal information management protocols, but it still has to train its employees on how to use the new email server or software program.[12] These steps require the time, talent, and expertise of the e-discovery team, which includes upper level management, in-house counsel, administrative staff, and information technology (IT) personnel.

Once the information management protocols are developed and implemented, employees must consistently use these

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11/28/2007), *available at* http://www.law.cornell.edu/rules/fre/ACRule502.htm ("[The purpose of the rule] is to respond[] to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern of that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery.").

7. Because FED. R. EVID. 502 had to go through Congress before passage, it is included in this list.

8. *See Pension*, 685 F. Supp. 2d at 472 n.56 (relying on how many hours it took to write the opinion to describe the cost of electronic discovery).

9. *See, e.g., id.* at 461 ("In an era where vast amounts of electronic information is [sic] available for review, discovery in certain cases has become increasingly complex and expensive.").

10. John B. v. Goetz, No. 3:98-0168, 2010 U.S. Dist LEXIS 8821 (M.D. Tenn. Jan 28, 2010); Spieker, et al. v. Quest Cherokee, LLC., No. 07-1225-EFM, 2009 WL 2168892 (D. Kan. July 21, 2009).

11. *See* Columbia Pictures v. Bunnell, No. CV 06-1093FMCJCX, 2007 WL 2080419, at *8 n.19 (C.D. Cal. May 29, 2007) (noting that the expert cost projections were not believable because the expert made assumptions about the process).

12. *Cf.* Arthur Andersen LLP v. United States, 544 U.S. 696, 700 n.4 (2005) (explaining that Arthur Anderson helped to train some of Enron's employees on proper document retention procedures when threatened with litigation, and outlining Arthur Andersen's document retention policy).

protocols until the company reasonably anticipates a lawsuit.[13] The company's counsel must then place a litigation hold on all relevant documents, suspend its document retention system and procedures, and monitor such hold until the proper documents are collected.[14] This process potentially involves every employee that worked on the litigated matter.[15]

After the litigants meet and develop the proper parameters of the electronic document search,[16] the data is collected and processed.[17] Data processing may involve the cost of retaining an outside vendor to erase duplicates and find documents responsive to the requests for production within a larger database of collected files.[18] The outside vendor(s) then charges to process, index, host, review, and finally produce the collected data in an agreed-upon format.[19]

Unprofessional discovery tactics may contribute to inflated estimates and costs. Litigation strategies have often utilized e-discovery to force settlement[20] or push opposing counsel into an unfavorable negotiating position.[21] This tactic is not new, and some refer to this practice as "blackmail."[22] Before the digital era, discovery may have consisted of thousands of unorganized paper documents produced in warehouses. The high cost and daunting task of organizing and reviewing all that material would often force a party into settlement.[23] Today, this practice

13. *See, e.g.*, Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506, 511 (D. Md. 2005) ("[Defendant] plainly had a duty to preserve employment and termination documents when its management learned of Broccoli's potential Title VII claim that could result in litigation.").

14. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003).

15. *Id.* at 218.

16. FED R. CIV. P. 26(f).

17. FED R. CIV. P. 34(b).

18. Steven C. Bennett & Marla S.K. Bergman, *Managing E-Discovery Costs: Mission Possible*, 832 PLI/LIT 177, 180–81 (2010) (outlining the services that an e-discovery vendor should provide).

19. *Id.*

20. Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH & INTELL. PROP. 171, 182 (2006) ("Commentators posited that savvy requesting parties could force settlement of cases simply by threatening electronic discovery.").

21. Michael R. Arkfeld, ARKFELD ON ELECTRONIC DISCOVERY & EVIDENCE § 1.3(g) (2d ed. 2008).

22. Daniel B. Garrie & Matthew J. Armstrong, *Electronic Discovery and the Challenge Posed by the Sarbanes-Oxley Act*, 2005 UCLA J. L. & TECH. 2, 2 (2005).

23. *See, e.g.*, Howard L. Speight & Lisa C. Kelly, *Electronic Discovery: Not*

still exists, but now the material is data-dumped onto the requesting party.[24]

Second, metadata and other electronically stored information (ESI) take time to review and understand.[25] The data processing stage includes finding important records, redacting sensitive information, and coding relevant and privileged documents.[26] These tasks require months or even years, even with the help of software vendors, attorneys, and contract reviewers.[27] If protocols for preserving ESI are called into question, the time consumed by this peripheral litigation may mean additional months or years before the parties can complete discovery and focus on the merits of the case.

Third, e-discovery is risky.[28] Judges have tired of sophisticated corporations trying to disregard, skirt, or ignore their obligations to understand, address, and preserve ESI.[29] Courts readily impose sanctions when parties destroy information contained in email accounts.[30] However, having an adequate storage system in place before litigation begins can save time and money. Otherwise counsel *and the client* risk paying both the costs (1) to reactively produce discovery by

Your Father's Discovery, 37 ST. MARY'S L. J. 119, 134 n.49 (2005).

24. Withers, *supra* note 20.

25. FED. R. CIV. P. 26 advisory committee's note (2006 Amendment) (acknowledging delay that electronic discovery causes and proposing compromise as a way to move the case forward).

26. Bennett & Bergman, *supra* note 18.

27. *See generally* Bensel v. Allied Pilots Ass'n, 263 F.R.D. 150, 151 (D.N.J. Dec.17, 2009) (noting that this case has become known for its eight year legal war).

28. Jason Fliegal & Robert Entwisle, *Electronic Discovery in Large Organizations*, 15 RICH. J.L. & TECH 7 (2009), http://law.richmond.edu/jolt/v15i3/article7.pdf ("Access to all this information may be helpful to the truth-seeking function of the courts, but several problematic side effects result: enhanced discovery compliance costs, enhanced discovery burdens, and the need for lawyers and judges to apply the law to highly technical topics generally beyond the knowledge of laymen.").

29. *See, e.g.*, Order on Motion for Sanctions and Motion to Strike at 1, Maggette v. BL Dev. Corp., No. 2:07CV182-M-A, 2009 WL 4346062 at *1 n.1 (N.D. Miss. Nov. 24, 2009) ("The court has already imposed sanctions upon defendants for what it views as a casual, if not arrogant, rebuff to plaintiffs' repeated efforts to obtain information which is ordinarily easily produced in litigation.").

30. Courts will not, however, impose sanctions if destruction was the result of "mere negligence." Swofford v. Eslinger, 671 F. Supp. 2d 1274, 1280 (M.D. Fla. 2009).

court order[31] and (2) for the other side's attorney's fees to investigate abuses,[32] depose custodians,[33] inspect opposing counsel's computer systems,[34] and file motions related to the spoliation of data.[35]

This article endeavors to explain all the moving parts and assumptions necessary to reach a cost estimate proportional to the litigation. By appreciating the cost assumptions related to e-discovery, the parties, bench, and bar may find ways to implement and create new cost effective solutions to approach e-discovery. In the next section, this article addresses a short, but noteworthy case in which the court found the cost of preserving ESI was too great.[36] In the third section, this article explains what the costs of e-discovery are at each step.[37] In the fourth section, this article explains the many tools that each party has to reduce costs and advance the case forward.[38] And in the fifth section, this article will discuss ethical issues that may impact and increase the client's budget for e-discovery.[39]

II. COSTS BURDENS: *RODRIGUEZ-TORRES V. GOVERNMENT DEVELOPMENT BANK OF PUERTO RICO*

In 2006, the Federal Rules of Civil Procedure (FRCP) were

31. *See, e.g.*, *In re* Fannie Mae Sec. Litig., 552 F.3d 814, 817 (D.C. Cir. 2009).

32. *See, e.g.*, Capellupo v. FMC Corp., 126 F.R.D. 545, 553 (D. Minn. 1989) (ordering the defendant to pay the fees the plaintiff "incurred in investigating, researching, preparing, arguing and presenting all motions touching upon the issue of document destruction.").

33. *See, e.g.*, Arista Records, LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, (S.D.N.Y. 2009) (finding that it is grossly negligent to send custodians to Europe to prevent them from being deposed).

34. *See, e.g.*, Eugene J. Strasser, M.D., P.A. v. Bose Yalamanchi, M.D., P.A., 669 So. 2d 1142, 1143–44 (Fla. Dist. Ct. App. 1996) (stating that discovery rules are broad enough to encompass plaintiff's request to enter defendant's computer system, but declining to allow access in this particular case). *See also* FED R. CIV. P. 34 (allowing for inspection of the opposing party's computer systems).

35. *E.g.*, TR Investors, LLC v. Genger, No. 3994-VCS, 2009 Del. Ch. LEXIS 203, at *63 (Del. Ch. Dec. 9, 2009) ("Finally, because Genger's misconduct has occasioned great expense, I award the Trump Group their reasonable attorneys' fees and expenses related to the motions for contempt and spoliation.").

36. *See infra* Part II.

37. *See infra* Part III.

38. *See infra* Part IV.

39. *See infra* Part V.

updated and specifically addressed the preservation and production of e-discovery.[40] Since that time, courts have broadly interpreted such rules to allow for expansive preservation and production of documents.[41] With that background, this section will analyze *Rodriguez-Torres v. Government Development Bank of Puerto Rico*, a noteworthy case where the court found that the costs and time necessary to produce ESI were too high—and, thus, prohibitive—making the emails and other ESI not reasonably accessible in the circumstances presented.[42] This case, therefore, serves as a good example of proportionality in the production of ESI.

Rodriguez-Torres is a case about an employment discrimination dispute where the plaintiff requested the following electronic materials in discovery:

> For each year 2007, 2008, 2009, produce in native electronic format with its original metadata all e-mail communications and calendar entries describing, relating or referring to plaintiff Vicky Rodriguez, both inbound and outbound from co-defendant GDB's messaging system servers. Particular attention to the following definition of extract key-words needs to be exercised: a) identification of Rodriguez by different variations of her name; b) designation of pejorative and derogatory terms typically used to demean persons according to their age and gender (including but not limited to phrases such as: vieja, nena, arrugas, años, edad, etc .); c) designation of phrases which could be referring to the current and past litigations, and which could suggest retaliatory animus or activities (including but not limited to phrases such as: demanda, caso, testigos, demandada, plaintiff, etc.); d) designation of record custodians to include all co-defendants, and other unnamed GDB employees known to tease, insult and taunt Rodriguez based on her physical appearance and age (a description of the process is further detailed in the ESI Specialist Report).[43]

Predictably, the defendant bank objected to the production request, suggesting that it was "irrelevant, overbroad and not reasonably calculated to lead to the discovery of admissible

40. *See, e.g.*, FED. R. CIV. P. 26 advisory committee's note (2006 Amendment) ("Electronic storage systems often make it easier to locate and retrieve information. . . . But some sources of electronically stored information can be accessed only with substantial burden and cost.").

41. *See, e.g.*, Columbia Pictures v. Bunnell, No. CV 06-1093FMCJCX, 2007 WL 2080419, at *13 (C.D. Cal. May 24, 2007) (according the Federal Rules of Civil Procedure broad applicability with regard to E-discovery after the 2006 amendments).

42. Rodriguez-Torres v. Gov't Dev. Bank of P.R., 265 F.R.D. 40, 43–44 (D. P.R. 2010).

43. *Rodriguez-Torres*, 265 F.R.D. at 43.

evidence."[44] Moreover, the defendant bank argued that the plaintiff's request would result in the production of thousands of documents that its counsel must review for responsiveness and privilege, resulting in costs that well exceed the matter in controversy.[45] The plaintiff responded by filing two motions, one to compel discovery and one for sanctions relating to the failure to preserve and produce ESI, including emails.[46] After these motions were filed, the court requested that both parties file a joint informative motion, detailing the cost of e-discovery and time needed for production.[47]

The parties' joint informative motion advised the court of the anticipated costs of the requested discovery.[48] Based on an IT consulting group that prepared a cost report, the itemized[49] expenses totaled $35,000 to retrieve the requested information.

Without divulging the amount in controversy, the court ruled that the requested ESI was "not reasonably accessible" under 26(b)(2)(B) because of the undue burden and cost.[50] The Court reasoned that "$35,000 is too high of a cost for the production of the requested ESI in this discrimination action."[51]

However, even if the data is not reasonably accessible, the requesting party may still be able to obtain the same information upon a showing of good cause.[52] To that end, the plaintiffs argued that based on three articles, they "expect to find more relevant information than that which they have found from the hard copies of documents requested in the initial request for production of documents."[53] Moreover, "[p]laintiffs anticipate finding communications showing discriminatory animus such as derogatory and demeaning references, exclusion from meetings, communications and work activities, and general disregard for Plaintiff Rodriguez's

44. *Id.*
45. *Id.*
46. *Id.* at 42.
47. *Id.*
48. *Id.* at 44.
49. *Id.* ("(1) $5,000.00 for the configuration and creation of the Concordance Database; (2) $20,000.00 to import the twenty-four Microsoft Outlook mailboxes that were requested by the plaintiffs; and (3) $10,000 for the database search and retrieval, and the final ESI report.").
50. *Id.*
51. *Id.*
52. FED. R. CIV. P. 26(b)(2)(B).
53. *Rodriguez-Torres*, 265 F.R.D. at 44.

abilities."[54] The court noted that the plaintiffs must "provide [the court] with the basis of their belief specifically because the Court wanted to prevent Plaintiffs from requesting the ESI for the sole purpose of conducting a fishing expedition."[55] Indeed, the plaintiffs failed to show good cause under Rule 26(b)(2)(B) of the FRCP to attain much of what they requested.[56]

Rodriguez is one of a few cases that discuss the undue cost of ESI under FRCP 26(B)(2)(B).[57] As such, this case reintroduces the cost consideration into the discovery of ESI. It also allows judges and producing parties to determine if the requested amount of discovery would be proportional to the matter in controversy or the novelty of the issues. Armed with such information, counsel can properly suggest that a request for ESI be denied when the matter is of low value or when the discovery requests seek to do more than fully understand the applicable claims or defenses.[58] Moreover, this case provides a nice introduction and a springboard to discuss the costs of retrieving and producing ESI.

III. ADDRESSING THE COST OF PRESERVING AND THEN PRODUCING ELECTRONICALLY STORED INFORMATION

Evaluating the cost of e-discovery is complex. Additionally, lawyers, consultants, and litigation support professionals can easily inflate or marginalize the same cost data to their benefit in an attempt to impress the client or the court.[59] The problem is that it is difficult to predict and understand how many documents are in a gigabyte of data, how fast the contract reviewers will review the documents, or

54. *Id.*

55. *Id.*

56. *See id.* (describing the plaintiffs' request for documents as no more than a fishing expedition, devoid of the requisite good cause).

57. FED. R. CIV. P. 26(b)(2)(B).

58. *Cf.* Aguilar v. Immigration & Customs Enforcement Div. of the U.S. Dep't of Homeland Sec., 255 F.R.D. 350, 356–57 (S.D.N.Y. 2008) (describing the test for requirement of metadata as consisting of two primary considerations: the need for and probative value of the metadata, and the extent to which the metadata will make the electronic information more useful).

59. *Cf.* Columbia Pictures v. Bunnell, No. CV 06-1093FMCJCX, 2007 WL 2080419, at *8 (C.D. Cal. May 29, 2007) (noting that one defendant's estimate of space required to store daily Server Log Data was "significantly overstated.").

how much information will be culled out. This section will serve as a starting point in understanding the costs of conducting e-discovery. As a result of this uncertainty, professionals and experts take advantage of this ignorance when producing inflated bids and estimates for e-discovery.[60] This next section breaks down the variables of producing ESI (before attorneys' fees) and explains how those variables may be adjusted to conduct ESI discovery in the most proportional way possible for all parties involved.

A. THE COSTS OF PRESERVING AND PRODUCING ELECTRONICALLY STORED INFORMATION

Litigation support is a lucrative industry.[61] Before the days of ESI, the client would rent and retrofit warehouses to store mass quantities of paper for litigation.[62] Now, everything may be stored on a mainframe, personal digital assistant (PDA), or other computer device.[63] Vendors' jobs, therefore, have changed to meet the need of this emerging niche.[64] A recent study suggested litigation support industry would be worth $4.5 billion by 2009.[65] This is not shocking, given the amount of

60. *See, e.g., id.* (noting that the defendants' cost projections were not believable); Oracle Corp. v. SAP AG, No. C-07-01658 PJH (EDL), 2008 U.S. Dist. LEXIS 88319, at *3–6 (N.D. Cal. 2008) (holding that an additional $5 million for electronic discovery on top of an existing cost of $11.5 million outweighs the benefits that additional discovery may provide, according to proportionality).

61. *See generally* Charles Skamser, *The Cost of eDiscovery*, THE EDISCOVERY PARADIGM SHIFT (Sept. 10, 2008, 9:49 AM), http://ediscoveryconsulting.blogspot.com/2008/09/cost-of-ediscovery.html (describing the changes to electronic discovery and the confusion in its application since the FRCP change in 2006, especially regarding the increase in commercial expenditures).

62. *Cf.* Withers, *supra* note 20, at 181–82 (noting that in the past, the main costs were storing and copying documents, while today those costs are non-factors as other considerations, such as inaccessibility and custodianship, have become the significant cost factors).

63. *Cf.* Garrie & Armstrong, *supra* note 22, at 16 ("Although courts have extrapolated traditional discovery principles from paper documents to digital ones, courts have also been challenged by production costs differences between paper and digital documents.").

64. *See generally* Skamser, *supra* note 61 (describing several vendors who have emerged to support demand for specialized electronic discovery services).

65. *See* George Socha & Thomas Gelbmann, *EDD Showcase: EDD Hits $2 Billion*, L. TECH. NEWS (Aug. 2007), http://sochaconsulting.com/2007_Socha-Gelbmann_ED_Survey_Public_Report.pdf (predicting growth in the electronic discovery market based on consumer and provider expectations).

information that must be screened and reviewed before trial.[66] This section discusses the variables of ESI discovery and explains how those variables may impact e-discovery cost calculations. For purposes of this article, the costs of e-discovery will be based on 100 gigabytes of information unless suggested otherwise. Speaking in terms of paper documents, 100 gigabytes is the equivalent to 100 truckloads of documents.[67] And when that much information is in play, the client should expect to pay for culling, organizing, and reviewing of the data, unless it has the capabilities and the know-how to conduct such services in-house.[68]

Aside from ESI and trial counsel's fees, there are several other outsourced processing costs to consider (see Table 1). Table 1 is particularly helpful because it shows where the money is spent in a hypothetical litigation scenario. Manual collection costs $250 to $500 per hour, depending on the complexity.[69] But with 94 percent of the ESI costs spent on processing and review, the processing and review costs receive most—if not all—the attention in literature and practice.[70] Bringing various elements of discovery in-house may save some of these costs, but the client must also factor in the time and opportunity cost when employees are performing e-discovery instead of their normal job duties.[71]

66. *Cf.* Craig Ball, *Worst Case Scenario*, L. TECH. NEWS (Oct. 1, 2006), http://www.law.com/jsp/lawtechnologynews/PubArticleLTNC.jsp?id=1202435547745 (describing how delegating electronic discovery to vendors and outside experts can blur the line between lawyer and service provider and can be both sensible due to the amount of information that must be reviewed and risky because it wrests control away from the lawyer and can adversely affect the client and the case).

67. *Cf.* E-DISCOVERY TEAM, www.e-discoveryteam.com (last visited July 5, 2010) (describing in a sidebar on the site's landing page that 1 gigabyte of data is equivalent to about 75,000 pages of documents, which would fill a pickup truck).

68. *See generally* Jason Krause, *Don't Try This at Home: Doing E-Discovery is Best Left to Outside Experts*, ABA J., Mar. 2005, at 59, 59–60 (describing one law firm that does in-house electronic discovery tasks, noting that it is a rarity and that for more complicated cases, the firm relies on outside consultants).

69. *See* Skamser, *supra* note 61.

70. *See, e.g.*, *Predictive Pricing Estimator*, ORANGE LEGAL TECH., http://orangelt.us/estimator/pricing1.html (last visited Mar. 11, 2010) (providing a cost estimator for electronic discovery services focusing on the cost to process and review the data).

71. Withers, *supra* note 20, at 182 ("Organizations without state-of-the-

Table 1: Expenses from E-Discovery for 25 Gigabytes (GB) of Information[72]

EDRM Stage	Total Dollar Cost (in thousands)	Share of Total
Collection	10	4%
Processing	94	36%
Review	153	58%
Production	4	2%
Total	261	100%
Total for Processing and Review	247	94%

B. WHERE IS THE MONEY GOING?

Client, counsel, and the court must understand the costs of e-discovery to make informed decisions about litigation support vendors and the scope of litigation. There are also several types of litigation support vendors to consider. Specifically, some vendors are helpful in front-end analysis and review; others are helpful copying, scanning, warehousing, or managing documents online in a document repository; and still others are helpful at cumulating and packaging all this information in a manner that will ensure the proper presentation of documents for deposition, witnesses, and trial.[73] By calculating the tangible cost of outsourcing segments of the review and accounting for the intangible costs of company employees' time, in-house counsel may evaluate the real costs associated with a typical review and make the appropriate staffing decisions. Using the industry averages outlined by others as baselines and reasonable ranges to articulate highs and lows, this article extrapolates those numbers to provide costs analysis for 100 gigabytes of data. Therefore, the following sections outline the variables that are used to calculate costs of document reviewers

art electronic information management programs in place, which classify information and routinely cull outdated or duplicative, data face enormous (often self-inflicted) costs and burdens.").

72. Will Uppington, *E-Discovery 911: Reducing Enterprise Electronic Discovery Costs in a Recession*, E-DISCOVERY 2.0, (Feb. 20, 2009, 4:40 PM), http://www.clearwellsystems.com/e-discovery-blog/2009/02/20/e-discovery-911-reducing-enterprise-electronic-discovery-costs-in-a-recession/.

73. While acknowledging that such companies exist, it is beyond the scope of this article to recommend any such vendor or service. The author will merely note that he has used several of these companies with success.

and litigation support vendors.

1. Litigation Support Vendor Services

Litigation support vendors help with data deduplication, culling, processing, and analyzing the information before the contract document reviewers see the documents.

Table 2: Expected Vendor Fees for 100 Gigabytes (GB) of Information[74]

	Price per GB (low)	Price per GB (average)	Price per GB (medium)	Price per GB (high)
Price per GB	$750	$1000	$1200	$1800
100 GB Total Price	$75,000.00	$100,000.00	$120,000.00	$180,000.00

The process of outsourcing to litigation support vendors to load and cull data in its proprietary software program ranges in cost from $350 to $500 per gigabyte.[75] The end cost of culling is typically $750 to $1800 per gigabyte for the vendor services, considering all the extra fees for hosting, software licensing, advanced culling, consulting services, and technical support.[76] Industry average is approximately $1000 per gigabyte for hosting and processing.[77]

74. There is information to support the industry average is $1000 per gigabyte. For the purposes of this study, it is reasonable to assume it would cost an additional $400 to $700 per gigabyte for vendor services at the low and medium range. With such information, the test parameters of $750, $1000, $1200, and $1,800 were developed. *See* Chris Egan & Glen Homer, *Achieve Savings By Predicting And Controlling Total Discovery Cost*, METROPOLITAN CORP. COUNS., (Dec. 1, 2008), http://www.metrocorpcounsel.com/pdf/2008/December/08.pdf; Eric Rosenberg, *Getting Smart About Analyzing ESI*, L. TECH. NEWS (Feb. 15, 2008), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=900005503372 ("On average, it costs $1,800 to process and prepare data for analysis, and $250 per hour to analyze and review it.").

75. *See Predictive Pricing Estimator*, *supra* note 70 (comparing its rate of $350 against the competition's rate of $500 for additional processing cost per gigabyte).

76. *See* Egan & Homer, *supra* note 74; Rosenberg, *supra* note 74.

77. Egan & Homer, *supra* note 74.

2. Costs of Contract Document Reviewers

The cost of contract document reviewers are dependent on the volume of information per gigabyte, the hourly rate of the reviewers, the speed of the reviewers, and the cull rate achieved. The below section attempts to define each of the necessary variables needed to predict the cost of hiring document reviewers.

Estimates, with respect to volume suggest that one gigabyte contains between 5000 to 25,000 documents.[78] However, 10,000 documents is the presumed number of documents per gigabyte.[79] A production with 5000 documents will have more files with attachments, graphics, or TIFF images, which take up more storage space. On the other hand, a production with 25,000 documents in a gigabyte will contain more short emails, word documents, or other files that do not take up much space. For example, a Microsoft Word document averages 9 pages per document, and an email averages 1.5 pages per document in length.[80] The chart below suggests, visually, how many documents there are in one gigabyte.

Table 3: Range of Estimates for Documents per Gigabyte (GB)

	Low Amount	Industry Standard	Medium	High
Amount of Docs in One GB	5000	10,000	15,000	25,000

The process of document review is often extremely expensive. The literature suggests that it costs $28 per hour to outsource the first-pass attorney review to another country (India) and upwards of $65 to do the same review in New

78. *See Clearwell E-Discovery Savings Calculator*, CLEARWELL SYSTEMS, INC., http://www.clearwellsystems.com/e-discovery-customers/eDiscovery-savings-calculator.php (last visited Mar. 11, 2010) (providing a range of 5,000–25,000 docs per gigabyte for calculating the cost of processing data) [hereinafter *Savings Calculator*]. *See also* Egan & Homer, *supra* note 74.

79. Egan & Homer, *supra* note 74.

80. How Many Pages are in a Gigabyte, LexisNexis Discovery Fact Sheet, http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf (last visited Dec. 5, 2010).

York.[81] Additionally, one can hire in-house staff attorneys at the rate of $80,000 a year or $40 per hour, depending on the workload.[82] Using the same assumptions, one can calculate the costs of contract reviewers at $28, $40, $52.50, and $65 dollars per hour, assuming 2000 hours a year or 40 hours a week for 50 weeks. For a higher price, some staffing and litigation agencies combine document review with other services, this can be helpful given the reviewer's closeness to the documents and the facts of the underlying case.[83]

Table 4: Rates for Document Review Attorneys

Hourly Rate	$28 / hour	$40 / hour	$65 / hour	$52.50 / hour
Rate per Year	$56,000	$80,000	$130,000	$105,000

3. Speed of Document Review

Review speed is based on how many documents there are in a gigabyte, the number of document decisions that are required per document, and the speed of the document reviewers. The industry average is approximately 10,000 documents per gigabyte,[84] although this number can vary widely. The chart below compares the number of documents based on assumptions of 5000, 10,000, 15,000, and 25,000 documents per gigabyte. The review speed also depends on what tasks the reviewers are performing. Some reviewers only review for privilege; some review for privilege, mark hot documents, and make recommendations on sensitive information; and still other reviewers sample, run reports, and mark categories of documents. The diagram below shows the

81. Egan & Homer, *supra* note 74.

82. This also considers the prospect of hiring a contract worker at $30 per hour and adding in $10 per hour of overhead costs. *See* Gabe Acevedo, *All Play and No Work Made Lance a Disbarred Boy*, ABOVE THE LAW (June 2, 2010, 2:35 PM) (noting that a contract attorney is paid $30 per hour), http://abovethelaw.com/2010/06/all-play-and-no-work-made-lance-a-disbarred-boy/.

83. Uppington, *supra* note 72.

84. Egan & Homer, *supra* note 74.

review speed as constant and assumes that the reviewers are making many decisions per document and are doing more than simply looking for privileged documents, requiring a linear review.

Table 5: Rate of Document Review

	Low	Standard	Medium	High
Documents per day	5000	10,000	15,000	25,000
Hourly Rate Per Reviewer	400	400	400	400
Pay for Review for One GB	12.5	25	37.5	62.5

But the amount and type of documents reviewed also plays a significant role in how one calculates vendor rates and review speed.[85] Industry standards suggest that document reviewers can read, understand, and mark 50 documents per hour[86] or 400 documents per day.[87] If the reviewers work at a faster pace, they are likely not doing more than reading the subject line.[88] As a result, this variable should stay constant, although the parties, counsel, and the court should be made aware that review speed is subject to manipulation (and negotiation) in vendor cost projections.[89]

4. Cull Rate

In every collection, there is a certain amount of "junk" or irrelevant files that must be removed, or culled out, before the

85. Richard Stout, *In E-Discovery, It's Not About the Hourly Rate*, TRICOM DOC. MGMT. (Mar. 6, 2009), http://tricom.wordpress.com/2009/03/09/in-e-discovery-its-not-about-the-hourly-rate/.

86. *Id.* This article acknowledges analytic tools that are suggested to save time due to the focus of the review. However, those tools are not always appropriate depending on the type of decision that is being made, as an analytic tool focuses more on a single element, such as a privilege review.

87. Egan & Homer, *supra* note 74.

88. *See, e.g.*, Egan & Homer, *supra* note 74; Uppington, *supra* note 72 (discussing studies suggesting that the reviewers can review 100 documents in this time). Interestingly, pages and documents appear to be used interchangeably in the literature.

89. Perhaps the distinction that is being made is the number of document decisions per hour, meaning that one document may require several document decisions for privilege, relevance or necessary redactions.

contract reviewers see the files and the data is produced.[90] The percentage of information that is culled out is known as the cull rate, and that number will depend on how specific the collection is, the key-terms used, the search parameters, and the amount of risk that counsel is willing to take in defining the scope of the review and collection.[91] A broad collection will result in a high cull rate and the elimination of more documents. On the other hand, a narrow collection, using precise search terms, will cause more irrelevant files to be deleted before the review starts. For the ease of presentation, this paper suggests three standard review rates: 30% (low); 50% (medium) and 80% (high). The charts below attempt to show the impact that cull rates have on costs of a document review.

90. Withers, *supra* note 20, at 182.

91. Roland Bernier, *Avoiding an E-Discovery Odyssey*, 36 N. KY. L. REV. 491, 501 (2009) ("Culling rates are often used by vendors to define, or at least illustrate, success. . . . If you culled 60% of documents from a population, then that is, roughly, a 60% savings in attorney review time, with attendant reductions on certain costs associated with production and related processes.").

Table 6: 30% cull rate[92]

	5000	10,000	15,000	25,000
	500,000	1,000,000	1,500,000	2,500,000
	30%	30%	30%	30%
	350,000	700,000	1,050,000	1,750,000
	400	400	400	400
	875	1750	2625	4375
	$28.00	$28.00	$28.00	$28.00
	$24,500.00	$49,000.00	$73,500.00	$122,500.00
	$40.00	$40.00	$40.00	$40.00
	$35,000.00	$70,000.00	$105,000.00	$175,000.00
	$65.00	$65.00	$65.00	$65.00
	$56,875.00	$112,750.00	$170,625.00	$284,375.00

92. *See Savings Calculator, supra* note 78 (Clearwell's calculator put this at the low end of the assumed cull rate).

Table 7: 50% cull rate

	5000	10,000	15,000	25,000
	500,000	1,000,000	1,500,000	2,500,000
	50%	50%	50%	50%
	250,000	500,000	750,000	1,250,000
	400	400	400	400
	625	1250	1875	3125
	$28.00	$28.00	$28.00	$28.00
	$17,500.00	$35,000.00	$52,500.00	$87,500.00
	$40.00	$40.00	$40.00	$40.00
	$25,000.00	$50,000.00	$75,000.00	$125,000.00
	$65.00	$65.00	$65.00	$65.00
	$40,625.00	$81,250.00	$121,875.00	$203,125.00

Table 8: 80% Cull Rate[93]

	5000	10,000	15,000	25,000
	500,000	1,000,000	1,500,000	2,500,000
	80%	80%	80%	80%
	100,000	200,000	300,000	500,000	
	400	400	400	400
	250	500	750	1250
	$28.00	$28.00	$28.00	$28.00
	$7,000.00	$14,000.00	$21,000.00	$35,000.00
	$40.00	$40.00	$40.00	$40.00
	$10,000.00	$20,000.00	$30,000.00	$50,000.00
	$65.00	$65.00	$65.00	$65.00
	$16,250.00	$32,500.00	$48,750.00	$81,250.00

In short, the cost range to review 100 gigabytes of information is between $7000 and $284,375, a difference of approximately $277,375.00, and the cost range to process 100 gigabytes of information is between $75,000 and $180,000, a difference of $105,000. The ranging assumptions that must be accounted for create nightmare scenarios for those who must

93. *Cf.* Skamser, *supra* note 61 (noting that litigation support vendors may change the assumptions to assert an exceptional cull rate—such as 90%).

plan a realistic litigation budget.[94] As a result, this is an area that needs further research and study to help counsel, the client and the court develop predictable solutions for the client.

C. ESTIMATING THE COSTS OF HIRING E-DISCOVERY COUNSEL

Hiring counsel is the primary expense in any e-discovery project. E-discovery counsel is needed to implement and set up a document retention program, hire and supervise a litigation support vendor, oversee document reviewers, review and categorize documents, and package the requested documents in a manner that is most helpful to trial counsel.[95] As a result, it is helpful that e-discovery counsel also be an experienced trial lawyer, so that she understands what type of documents to use and how to present them.[96] In short, counsel's job is to ensure e-discovery is executed in a timely, transparent, and defensible fashion.

Estimating the costs of hiring ESI counsel is difficult because attorneys from firms around the country command different salaries based on experience, skill, and prestige. E-discovery counsel must provide superior work product and constantly re-evaluate its processes to avoid sanction, which means the end costs to the client are in the thousands or millions of dollars.[97] Roughly speaking, the total cost of

94. Others have offered different reasoning for the varied costs outcomes. *Cf. Electronic Discovery: A View from the Front Lines*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 18 (2008) ("[L]aw firms are afraid of looking incompetent by admitting to a lack of e-discovery knowledge or practice. In other cases, lawyers talk their clients into spending more than necessary on e-discovery, taking deliberate advantage of the client's lack of experience and knowledge in this area. Unfortunately, other commentators support Socha's conclusion.").

95. *Costs Associated with a Manual eDiscovery Strategy*, IRON MOUNTAIN, http://www.mimosasystems.com/html/ediscovery_worksheet.htm (last visited Mar. 11, 2010).

96. *Electronic Discovery: A View from the Front Lines*, *supra* note 94, at 18 ("For organizations that cannot staff an in-house team (as Verizon and other corporations have done), Patrick Oot recommends either hiring an outside boutique law firm that focuses exclusively on e-discovery or a larger firm with an e-discovery practice group headed by senior leadership. Oot says that a partner-level firm leader will have the credibility to direct the group competently and have the courage to give the best advice. Be wary, he says, of the law firm that assigns a junior associate to manage the discovery on any case.").

97. Ralph Losey, *The Multi-Model "Where's Waldo?" Approach to Search and My Mock Debate with Jason Baron*, E-DISCOVERY TEAM (Feb. 27, 2010),

discovery is suggested to be between $2.70 and $4.00 per document or $2.5 to $3.5 million to handle an e-discovery case.[98] However, prior articles discussing costs may present higher numbers than it actually costs in practice, given the amount of unknown variables.

D. UNDERSTANDING THE AVOIDABLE COSTS OF DISCOVERY: THE COSTS OF INVESTIGATIONS AND SANCTIONS

The other side of the cost equation is the cost of failing to preserve ESI. Courts have held that the failure to preserve and produce ESI is dishonest, inexcusable, or worse.[99] Such conduct is not limited to discovery. In an open records request case, the failure to produce native files may result in an order to produce and attorneys' fees awarded to the requesting party.[100] This section will briefly explore the costs of failing to preserve and produce ESI.

Courts will commonly impose monetary sanctions for the failure to preserve ESI. For example, in *Cache la Poudre*,[101] the court issued a $5000 sanction for failing to provide all available information to meet the requesting party's discovery request. Similarly, *in Phoenix Four, Inc. v. Strategic Res. Corp*,[102] the court gave a sanction of $30,000 for failing to take measures to provide ESI. As the discovery abuses become more distinct, so too does the amount of the monetary sanctions awarded.[103] For example, in *Qualcomm*, the court ordered the law firm and its client to pay over $8.5 million dollars in attorney's fees for the client's failure to preserve ESI.[104] Qualcomm's attorneys were

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http://e-discoveryteam.com/2010/02/27/the-multi-modal-wheres-waldo-approach-to-search-and-my-mock-debate-with-jason-baron/ (opining that the costs of an electronic discovery case is in the millions).

98. *Electronic Discovery: A View from the Front Lines*, *supra* note 94, at 5 ("If a 'midsize' case produces 500 gigabytes of data, this means organizations should expect to spend $2.5 to $3.5 million on processing, review, and production of ESI.").

99. Gamby v. First Nat'l Bank of Omaha, No. 06-11020, 2009 U.S. Dist. LEXIS 7687, at *14, 24 (E.D. Mich. Jan 20, 2009).

100. *See* Lake v. City of Phoenix, 218 P.3d 1004, 1008 (Ariz. 2009).

101. Cache La Poudre Feeds v. Land O'Lakes, Inc., 244 F.R.D. 614, 637 (D. Colo. 2007).

102. Phoenix Four, Inc. v. Strategic Resources Corp., No. 05 Civ. 4837(HB), 2006 WL 1409413, at *9 (S.D.N.Y. May 23, 2006).

103. *Id.*

104. Gregory D. Shelton, Qualcomm v. Broadcom*: Lessons for Counsel and a Road Map to E-Discovery Preparedness*, INT'L ASS'N OF DEF. COUNSEL, Feb. 2008.

also ordered to appear before the California State Disciplinary Board as a result of the failure to preserve.[105]

The differences between monetary sanctions and attorneys' fees are astronomical. It is incorrect for courts and commentators to refer to attorneys' fees as mild sanctions, as they are typically in the thousands or millions of dollars.[106] The costs of investigating, analyzing, and answering a sanctions motion is in many cases far more burdensome than most realize. Additionally, few cases ever reach trial in the first place, so a sanction of attorneys' fees might be the most effective sanction that does not punish the client for the attorney's conduct.

Moreover, the costs of sanctions extend well beyond monetary payments based on the severity of the abuse.[107] These punishments range from attorneys' fees, as discussed above, to adverse inferences, issue preclusion, and terminating sanctions.[108] The costs of losing one's case, or an important issue in one's case, because of the attorney's misconduct is unacceptable to most clients, but it is a remedy that the courts have employed.[109] Indeed, many of these more severe sanctions often accompany attorneys' fees and costs.[110]

Moreover, a brief discussion about insurance agencies is warranted. Insurance agencies must appropriately calculate and respond to malpractice claims and allocate the appropriate reserves. E-discovery is a very complex and risky area because minute details are often missed and opposing counsel frequently challenges production. All it takes for a decent protocol to be challenged is showing of unproduced emails, as was the case in *Zubulake I*.[111] As a result, insurance companies

105. *Id.*

106. *In re* Fannie Mae Sec. Litig., 552 F.3d 814, 817 (D.C. Cir. 2009) (Fannie Mae spent 6 million dollars to conduct discovery).

107. McDowell v. Gov't of Dist. of Columbia, 233 F.R.D. 192, 204 (D.D.C. 2006).

108. *See* Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., 685 F. Supp. 2d 456, 469 (S.D.N.Y. 2010).

109. Columbia Pictures Inc. v. Bunnell, No. 2:06-cv-01093, 2007 WL 4877701, at *8 (C.D. Cal. 2007) (granting terminating sanctions).

110. *Id.*

111. *See generally* Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309 (S.D.N.Y. 2003) (requiring the defendant to produce more than 450 emails and to restore 5 backup tapes based on a few emails that Ms. Zubulake had in her possession that defendant had not preserved).

should not hire just any malpractice attorney. Indeed, the absolute worst situation would be an insurance company hiring a malpractice attorney who is not competent in e-discovery matters, resulting in the malpractice attorney being sued for malpractice.

IV. CONTROLLING COSTS: THE KEY TO MANAGING E-DISCOVERY

Despite the ranging costs of e-discovery, there are ways to control the costs and to do so in a defensible and transparent manner. The key to controlling costs is to make sure the amount requested in discovery is proportional, reasonable, and appropriate for the matter in controversy.[112] Cost considerations have their origin in the FRCP, namely, Rule 26(b).[113] Within the Rule, ESI discovery will be required unless "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."[114] But, controlling costs is difficult to achieve because it requires some knowledge of mathematics, information technology, and statistics.

Courts, arbitrators, mediators, and special masters all strive to fashion a fair remedy. To reach such a remedy, each overseer needs to understand the tools available to limit costs and advance the case forward. In recent years, e-discovery has changed the idea of what is necessary to reach trial. This next section, therefore, addresses the tools that are necessary to lower the cost of litigation. With the framework provided by Rules 26(b)(1), 26(b)(2)(C), and the accompanying advisory committee's notes in mind, this article proposes four main tools to cut costs: sampling, gap testing, indexing, and cooperation.

A. SAMPLING

Sampling and quality control testing are among the most common and cost effective tools in e-discovery. Sampling allows the requesting parties to take a snap shot of the producing party's files and draw conclusions of the whole population

112. *See* Garrie & Armstrong, *supra* note 22 at 7–8.
113. FED. R. CIV. P. 26 advisory committee's note (1993 Amendment).
114. FED. R. CIV. P. 26(b)(2)(C).

based on those findings.[115] To do this, the sample must be random, must compare the same type of variables, must have a representative sample size,[116] and must use a statistically valid method that is planned beforehand.[117] In the same respect, sampling allows a party or the court to determine if expensive and costly discovery is likely to lead to relevant information or if the burdens outweigh the benefit.[118]

A sample cannot be extrapolated if is not statistically valid, because the margin of error would not produce results that are accurate with a high degree of certainty.[119] A court will likely overturn any such sampling protocol on due process grounds if the margin of error is too high.[120] For example, in *Bell*, the court noted that a 32 percent margin of error was too high.[121] In *Scottsdale Memorial Health Systems*,[122] a noteworthy statistical sampling case involving over 30,000 medical claims brought through a wide variety of circumstances, the court held that:

> [U]nder the principles of fairness and justice that underlie our Rules of Civil Procedure, the superior court may adopt statistical sampling and extrapolation as a case management tool only when the specific methodology to be used is tailored to produce a result at least as fair and accurate as would be produced by traditional particularistic fact-finding methods. In making this determination, the court must at a minimum consider the number of claims in the relevant universe, the number and nature of the variables present in those claims, the sample size and whether the sample is truly representative of the universe of claims. The court also must make detailed findings that permit the reviewing court a clear understanding of the entire

115. *Commentary on Achieving Quality in the E-Discovery Process*, SEDONA CONF., 24 (Mar. 2009), http://www.thesedonaconference.org/dltForm?did=Achieving_Quality.pdf; *Best Practices & Recommendations for Addressing Electronic Document Production*, SEDONA CONF. (June 2007), http://www.thesedonaconference.org/content/miscFiles/7_05TSP.pdf.

116. *See, e.g.*, Bell v. Farmers Ins. Exch., 9 Cal. Rptr. 3d 544, 575-78 (Cal. Ct. App. 2004).

117. *Commentary on Achieving Quality in the E-Discovery Process*, *supra* note 115 at 24–26.

118. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

119. *Commentary on Achieving Quality in the E-Discovery Process*, *supra* note 115, at 24–26.

120. Bell v. Farmers Ins. Exch., 9 Cal. Rptr. 3d 544, 576–78 (Cal. Ct. App. 2004).

121. *Id.*

122. Scottsdale Mem. Health v. Maricopa Cnty., 228 P.3d 117 (Ariz. Ct. App. 2010).

methodology and its application.[123]

The court found that this case dealt with "thousands of individual factual issues" without an explanation about how each of those facts and issues could be extrapolated in any meaningful way.[124] The court reasoned that "[w]hile the use of extrapolation to reduce the number of claims [may be] permissible, there simply is no lawful substitute for detailed findings of fact and conclusions of law."[125]

As applied to e-discovery, sampling is a valuable tool to ensure proper litigation hold management, to review non-responsive and responsive documents, and to identify whether further review is necessary.[126] Similarly, sampling allows the quality control document reviewers to investigate non-responsive documents that were culled out by a software program to show good faith compliance with discovery protocols.[127] Finally, as will be discussed in other sections, sampling helps define what information and issues may need further investigation and analysis.[128]

More importantly perhaps, sampling provides insight into what the cost numbers for a project will be. After sampling a cross-section of the documents, the attorney can properly educate his client on how responsive the documents are, what the likely cull rate will be, and how many documents will likely be in the average gigabyte. By performing such samples, the client or the insurer will gain at least some predictability and can budget the case accordingly.

B. GAP TESTING

Gap testing—commonly referred to as sequenced discovery—is another important tool to move the case forward through the e-discovery process.[129] Similar to sampling, gap

123. *Id.* at 134.

124. *Id.* at 135.

125. *Id.* at 136.

126. *See, e.g.*, D'Onofrio v. SFX Sports Group, Inc., 256 F.R.D. 277, 278 (D.D.C. 2009) (determining whether a sampling of a 9,400 item privilege log was necessary).

127. *See, e.g., id.* at 279–80 (finding that courts will only interfere and determine what is discoverable when there is good cause that discovery of certain information is harmful to the proponent of a protective order).

128. *See, e.g.*, McPeek v. Ashcroft, 212 F.R.D. 33, 34 (D.D.C. 2006) (determining whether a second search of backup tapes will produce additional relevant data).

129. Jay E. Grenig & William C. Gleisner, *Saving Time and Money,*

testing involves using small searches and negotiating issues in controversy before undertaking a full and expensive discovery process.[130] Such a tool is recommended for preparing high volume cases or responding to a motion to dismiss.[131] Gap testing allows both sides to negotiate, advocate, and cooperate with each other and perhaps even reach the resolution of at least some of the pretrial or trial issues.[132]

But gap testing means more than merely allowing for some discovery at the front end of litigation. It forces the parties to agree on what is relevant and to focus on the most efficient and inexpensive way to obtain the most responsive information.[133] It does this by requiring the parties to gauge the responsiveness of the proposed search terms, which significantly reduces the number of documents in the original database. Gap testing also creates a recorded and reasoned position from which counsel can choose which documents are responsive.[134]

The whole idea of gap testing cannot be pigeonholed, however, into simply testing and negotiating the responsiveness of search terms. Counsel has an opportunity to openly discuss several topics, including the case, the witnesses, and the merits, to determine if the parties have enough information to proceed. Additionally, parties may identify what areas can be resolved without litigation, what areas would benefit from more 26(f) conferences, what areas of discovery are necessary, and what counsel can do to reach the merits while still "in the gap."[135] Drafting initial disclosure statements,

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EDISCOVERY & DIGITAL EVIDENCE § 7.3 (2010).

130. *See, e.g.*, William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 136 (S.D.N.Y. 2009) (resolving an argument as to the proper, narrowly-tailored search terms required to retrieve the relevant emails).

131. *Cf. id.* at 135 (determining that to allow a broad search would result in the unwarranted "production of the entire Hill email database . . . .").

132. Steven S. Gensler, *Bulls Eye View of Cooperation in Discovery*, 10 SEDONA CONF. J. 363, 369 (2009).

133. *See The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 200–01 (2007).

134. *Cf.* Equity Analytics, LLC v. Lundin, 248 F.R.D. 331, 332–33 (D.D.C. 2008) (using an expert to certify search terms meant to indentify the relevant information on a computer, allowing for a more focused search).

135. *See The Sedona Principles: Second Edition*, SEDONA CONF., 21 (June 2007),

identifying and testing jury instructions, or presenting closing arguments, for example, would provide enormous benefit in determining if more expansive discovery is needed, and, if so, where any additional discovery should be focused.[136]

Although gap testing is different from sampling, its effectiveness as a means by which to calculate fees accomplishes a similar goal. By conducting limited and sequenced discovery and testing that discovery to see if one has enough information to prove its case, one can narrow and manipulate the cull rate by changing the parameters of the search. In so doing, counsel can achieve a higher cull rate and produce less irrelevant documents for the review stage. This will save the client money on hosting fees, reviewer fees, and quality control counsel's fees. More importantly, perhaps, this allows trial counsel to stay involved in the e-discovery process.

C. CRAWL SYSTEM

Indexing—commonly referred to as crawling—allows for otherwise inaccessible data to become accessible by mapping the files that are on a backup tape or computer system.[137] Crawling refers to a software program that will identify what documents are available and where those documents are located.[138] Technology, such as the crawl system, now enables backup tapes to be indexed so guessing which tape to sample is no longer a problem.[139] As a result, the otherwise inaccessible data outlined by *Zubulake I* would now be accessible due to the

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http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf.

136. *See, e.g.*, ARIZ. R. CIV. P. 26.1(a)(3) (requiring the prompt disclosure of electronically stored information and the date(s) that it will be "available for inspection, copying, testing or sampling").

137. Michael D. Berman, et al., *Has Indexing Technology Made* Zubulake *Less Relevant?*, INDEX ENGINES 1–2, 4, http://www.indexengines.com/download/Has%20Indexing%20Technogy%20Made%20Zubulake%20Less%20Relevant.pdf (last visited Oct. 25, 2010) ("As predicted by Mr. Rice's treatise, because of technological improvements, 'the currently inaccessible ('or difficult to access'), may become accessible,' and crawling and indexing technologies may change the technological analysis related to 'proportionality' and when ESI is 'not reasonably accessible because of undue burden or cost.'").

138. *Id.* at 4.

139. *Id.* ("The key concept of an 'enterprise solution' is that it is 'proactive' and deploys a re-usable search engine. Once the crawl is complete, the firm's data is indexed and repeatedly searchable without a new project-based expenditure.").

minimal burden in producing fewer relevant backup tapes.[140] Moreover, the cost of producing backup tapes has significantly declined in the past seven years, making the burden to produce such documents significantly lower.[141] As a result, crawling is a particularly useful new technology to obtain information without resort to blind statistical sampling.

Crawling and other such technologies, although in their infancy, have enormous potential to create predictability and transparency in e-discovery cost calculations.[142] If a software program can simply go through the database, report the size of the files searched, and discover the amount of documents per gigabyte, then counsel or the vendor may properly find the appropriate level on the chart in section III. Using crawling technologies allows insurance carriers and corporate counsel to achieve enormous benefits because they can withhold the proper amount of reserves to spend on vendors and consultants.

D. COOPERATION

Cooperation is the attorney's first and best line of defense to lower costs and get through an e-discovery event.[143] Cooperation is easy to write about in an academic context, but in practice can be most difficult to accomplish in an adversarial context. However, it is evident that courts routinely reward parties that cooperate and punish those who do not.[144] For instance, courts uphold ESI discovery agreements, including those agreeing not to produce certain information; courts allow for parties to stipulate evidentiary issues; and courts let parties define the format of production and the scope of the lawsuit, so

140. *Id.* at 3–4 ("The cost disparity between restoration and indexing, however, remains substantial and it is even more pronounced because of another cost that was required in 2003—the infrastructure to hold restored backup data—has been rendered insignificant due to indexing.").

141. *Id.* at 2 (comparing the $166,000 cost of making the 77 tapes in 2003 versus the $38,500 cost in 2009).

142. *Cf.* Fliegal & Entwisle, *supra* note 28, at 31 ("Advanced forms of technology are being explored that are intended to reduce costs while enhancing accuracy. While in its infancy, such methods show great promise.").

143. Gensler, *supra* note 132, at 370–71; *see also The Sedona Conference Cooperation Proclamation*, SEDONA CONF., 3 (July 2008), http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf.

144. *E.g.*, *In re* Seroquel Prods. Liab. Litig, 224 F.R.D. 650, 664–65 (M.D. Fla. 2007).

long as such agreements do not violate the FRCP.[145] Similarly, if the parties cooperate or at least attempt to cooperate, they appear more reasonable, even if judicial involvement becomes required.[146]

Moreover, cooperation is necessary. According to FRCP 26, parties that undertake a discovery plan must do so within the scope of the rule.[147] And the plan should articulate the following:

> (A) What changes should be made in the timing, form, or requirement for disclosure under Rule 26(a), including a statement of when initial disclosures were made or will be made; (B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular items; (C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced; (D) any issues about claims of privilege or of protection as trial-preparation materials including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in the order; (E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and (F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).[148]

Essentially, the rule makers are making it easier on the litigants, providing an outline of the important issues that must be addressed and contemplated before counsel may start reviewing documents.[149]

However, cooperation must exist between all members of the litigation team.[150] There is a need to coordinate efforts and tasks with in-house counsel to ensure that tasks are not duplicated and that the proper information is discovered.[151] *The Sedona Principles* recommend a team approach to ensure everyone is working together towards the final goal of reaching the merits of the case.[152] This article does not deviate substantially from that position, except to note that ESI

145. FED. R. CIV. P. 26 advisory committee's note (1993 Amendment).

146. *See, e.g.*, MICHAEL ARKFELD, ARKFELD'S BEST PRACTICES GUIDE FOR ELECTRONIC DISCOVERY AND EVIDENCE § 4.6(A) (2d ed. 2007) (outlining criteria for selecting an e-discovery service vendor to facilitate parties' cooperation).

147. FED. R. CIV. P. 26(f)(2).

148. FED. R. CIV. P. 26(f)(3).

149. *See* FED. R. CIV. P. 26(f) advisory committee's note (2006 Amendment).

150. *See The Sedona Principles: Second Edition*, *supra* note 135, at 19.

151. *Id.*

152. *Id.*

counsel and the client should be aware that they too, may be liable for discovery abuses; each is not insulated from e-discovery abuses by its position, even if she is not the counsel of record.[153]

Cooperation will reduce the risk and, thus, costs associated with e-discovery. By cooperating, counsel can decrease the amount of motion practice and "gotcha" tactics (e.g., mismarking five of twenty million documents) that typically happen when one is handling a large e-discovery case. In that respect, it is difficult to know what the other party wants—or needs—without a frank conversation of the issues and the type of discovery the opposing counsel is looking for. Therefore, counsel may agree to: narrow, limit, and define the search; define a set of protocols for resolving disputes before judicial involvement; and employ other such techniques to eliminate motion practice and to reach a resolution on the pending matters.

With all these tools, counsel can request a reasonable and proportional amount of discovery to fully develop the claims or defenses necessary to proceed forward to trial. Once the clients, bench, and bar appreciate the true costs of e-discovery, each may take steps to make discovery more predictable. Also, each party can make decisions based on known information, rather than "exaggeration." Judicial involvement (or the involvement of a special master) also ensures that the discovery disputes may be resolved and the case may proceed to the merits, as originally planned.[154] However, in the best case, the parties and their counsel will cooperate (without judicial involvement and the threat of sanctions) to reach agreements about the nature, scope and expense of the ESI discovery using the five tools discussed above.

E. TAXING COSTS: WE'RE NOT COPYING DOCUMENTS ANYMORE

If a party is willing to pay for exhaustive discovery, then it may seek a disproportional amount of discovery. Ordinarily,

153. Swofford v. Eslinger, 671 F. Supp. 2d 1274, 1279 (M.D. Fla. 2009).

154. *E.g.*, Newman v. Borders, 257 F.R.D. 1, 4 (D.D.C. 2009) (ending a bitter discovery dispute by drafting nine questions that the opposing party's expert had to answer); *see also* FED. R. CIV. P. 26 advisory committee's note (2006 Amendment) (noting that while court involvement in extrajudicial discovery is supposed to be kept at a minimum, the rule tightens judicial sanctions to unjustified impediments to discovery).

the non-requesting party covers the costs of meeting opposing counsel's discovery requests.[155] However, certain situations arise where the requesting party should pay. For example, the benefits of production compared to the costs or attempts to access otherwise inaccessible data are two reasons to share costs.[156] Indeed, while the above serves as a good introduction to sharing costs in the context of e-discovery, a full discussion of both state and federal court's cost sharing rules is beyond the scope of this article. Instead, this section seeks to identify the split between the courts on the type of costs that may be shared with the opposing party, because determining who pays for discovery may be of greater concern than how much discovery costs.

The concept of costs is much more unique in terms of what costs may be transferred to the other party in e-discovery disputes.[157] Some courts hold that the fees associated with collecting documents is "the modern day equivalent of 'exemplification and copies,'" and, therefore, consider these costs taxable under 42 U.S.C. § 1920.[158] On the other hand, other courts have held these costs to be non-recoverable because "assembling records for production is ordinarily a task done by attorneys and paralegals."[159] As a result, several judicial opinions have set the framework for what may not be taxed as costs.[160]

In *CBT Flint Partners, LLC v. Return Path, Inc.*, the court ordered nearly $230,000 in attorneys' fees and costs as sanctions for litigation misconduct.[161] The court reasoned that "[t]he services are highly technical" and that producing "in paper form . . . the 1.4 million documents plus 6 versions of source code would have cost far more than the fees sought for the e-discovery consultant."[162] The court also held that vendor

155. *Zubulake I*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003).

156. Semroth v. City of Wichita, 239 F.R.D. 630, 637–38 (D. Kan. 2006).

157. *See generally* 28 U.S.C. § 1920 (2010) (the various fees the court may tax as costs).

158. CBT Flint Partners, LLC v. Return Path, Inc., 676 F. Supp. 2d 1376, 1381 (N.D. Ga. 2009).

159. *Id.*

160. This section hopes only to survey the legal landscape to give a brief overview of the split. It is not meant to be an exhaustive listing of such cases addressing the types of costs encountered in e-discovery, as the technology is still in its infancy.

161. *CBT Flint Partners*, 676 F. Supp. 2d at 1381.

162. *Id.*

services "are the 21st Century equivalent of making copies."[163] Therefore, the court allowed the taxation of costs under 28 U.S.C. § 1920.

Prevailing parties must show that e-discovery was necessary to share the costs. In *Kellogg Brown & Root International v. Altanmia Commercial Marketing Co.*, the court held that the prevailing party's consultants were not taxable.[164] Defining the limitations of costs under 28 U.S.C. §1920, the court held that data extraction and storage are not taxable as costs because they provide work similar to an attorney in responding to discovery requests.[165] Furthermore, in *Fells v. Virginia Department of Transportation*, the court did not allow the taxation of $15,000 to extract metadata.[166] Specifically, the court reasoned that taxable costs did not extend to include "processing records, extracting data, and converting files."[167]

The distinctions drawn between the courts have created an area where further discussion and negotiation is necessary. For example, if someone is sanctioned and required to pay costs, such punishments are meaningless if the producing party must still pay the vendor and consulting portions of the e-discovery bill, as addressed in Section III(A). Indeed, as the costs of discovery continue to be defined by courts and litigation support vendors, courts may better understand the importance of their decisions.[168]

V. ETHICAL CONCERNS THAT LIKELY RAISE THE COSTS OF ELECTRONIC DISCOVERY

Counsel has an obligation to represent his or her client competently under the Model Rules of Professional Conduct.[169] Model Rule 1.1 defines competent representation as the "legal knowledge, skill, thoroughness and preparation reasonably

163. *Id.*

164. Kellogg Brown & Root Int'l, Inc. v. Altanmia Commercial Mktg. Co., No. H-07-2684, 2009 WL 1457632, at *5 (S.D. Tex. May 26, 2009).

165. *Id.*

166. Fells v. Virginia Dep't of Transp., 605 F. Supp. 2d 740, 743 (E.D. Va. 2009).

167. *Id.*

168. *See* Withers, *supra* note 20, at 182 ("The costs for the producing side, however, have increased dramatically, in part as a function of volume, but more as a function of inaccessibility and the custodianship confusion.").

169. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2007).

necessary for the representation."[170] This section will address cost concerns impacted by one's ethical obligations. These ethical rules are helpful in diagnosing and understanding an e-discovery project. The rules also suggest that some shortcuts may not produce the savings that the client or his counsel originally hoped.

A. OUTSOURCING

Document review is the primary cost associated with an e-discovery event.[171] Due to the large amount of information, contract reviewers are often hired because it would take years for one attorney to review the millions of documents that are produced.[172] These contract attorneys and reviewers can perform document review from anywhere in the world.[173] Accordingly, outsourcing the review to other countries is common, but often implicates the unauthorized practice of law and other ethical concerns.[174]

Pursuant to Model Rule 5.5, "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so."[175] Moreover, Model Rule 5.3(b) requires "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."[176] In addition, ABA Formal Op. 08-451 suggests that even attorneys in foreign countries may need to be treated as

170. *Id.*

171. *See generally* Steven C. Bennett, *The Ethics of Legal Outsourcing*, 36 N. KY. L. REV. 479 (2010) ("Increasing costs for legal services, wider regulatory obligations . . . and the explosive growth of electronic discovery . . . have all driven businesses (and law firms) to consider outsourcing of certain functions as a means to reduce costs, while maintaining high-quality service.").

172. *See id.* at 480–81.

173. *See generally* ABA Comm. on Ethics and Prof's Responsibility, Formal Op. 08-451 (2008) (opining that there is nothing inherently wrong with outsourcing, in fact it is a salutary goal to reduce the end costs to the client).

174. *See generally id.* at 6 ("[T]he outsourcing lawyer must be mindful . . . to avoid assisting others to 'practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction . . . . Ordinarily, an individual who is not admitted to practice law in a particular jurisdiction may work for a lawyer who is so admitted, provided that the lawyer remains responsible for the work being performed and that the individual is not held out as being a duly admitted lawyer.").

175. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2007).

176. MODEL RULES OF PROF'L CONDUCT R. 5.3(b) (2007).

nonlawyers, shifting the burden for their failures to local counsel and heightening local counsels' duty to supervise.[177]

Supervising nonlawyer work in another country raises concerns that impact the cost and quality of the review.[178] For example, counsel must overcome culture, language, confidentiality, quality control, and communication issues.[179] On the other hand, the cost saved by sending the discovery overseas may be worth the added headache. Some scholars have noted that outsourcing to India is expected to be a $4 billion dollar industry by 2015.[180] Additionally, to save costs, many very respectable firms open up satellite offices overseas, in countries such as India, where the cost of review is around $30 per hour.[181]

Adding to the already difficult ethical duties of a lawyer, the Indian legal system contains its own hurdles to outsourcing as well.[182] The 1961 Indian Advocates Act requires that only attorneys with Indian citizenship may work on matters in India.[183] Under this Act, corporations cannot outsource to India without meeting strict guidelines.[184] This Act, coupled with the

177. ABA Comm. on Ethics and Prof's Responsibility, Formal Op. 08-451 (2008) ("[I]t will be more important than ever for the outsourcing lawyer to scrutinize the work done by the foreign lawyers—perhaps viewing them as nonlawyers—before relying upon their work in rendering legal services to the client.").

178. *See id.* at 4–6.

179. *See generally id.* at 3–6 (discussing the issues in foreign outsourcing, including issues relating to a foreign country's legal education, professional regulatory scheme, and judicial system).

180. Anthony Lin, *Legal Outsourcing to India is Growing, but Still Confronts Fundamental Issues*, N.Y.L.J. at 1 (Jan. 23, 2008), *available at* http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1201169145823) (citing predictions that legal outsourcing to India may grow to $4 Billion level by 2015).

181. *Id.*

182. *See generally* Kian Ganz, *A New Writ Filed Against Entry of Foreign Firms in Madras HC*, LEGALLY INDIA (March 22, 2010, 8:01 PM), http://www.legallyindia.com/20100322609/Law-firms/a-new-writ-filed-against-entry-of-foreign-law-firms-in-madras-hc (stating that an advocate in India filed a writ petition against 30 foreign law firms to prohibit the firms from practicing any legal matter in the country).

183. *Id.*

184. *See generally id.* (stating that the Advocates Act 1961 requires an attorney to be an Indian citizen and possess a law degree from a university within the country in order to practice law in India).

local unauthorized practice of law concerns,[185] may be enough to steer counsel away from outsourcing.[186] As applied to e-discovery, nonlawyers practicing in India may run into several ethical problems that require counsel to consider its breakeven point on costs.[187] The client must determine whether the additional hours of supervision by local counsel[188] outweigh the $13 dollar per hour difference between local and foreign document reviewers.[189] The results of this decision will be crucial in determining if outsourcing is best for the client.

As an alternative to outsourcing, counsel should consider hiring other paralegals and law clerks to conduct a review in-house. In-house review must be done in a place where the review can be supervised and confidentiality can be assured.[190] When a review involves law clerks and paralegals within the United States, the unauthorized practice of law is less of a concern because courts have consistently allowed paralegals and law clerks to perform this type of work.[191] The author is unaware of any research or case law suggesting that using a paralegal to conduct document review amounts to the unauthorized practice of law. In addition, during in-house document review, it is likely that an attorney will be in the same building, enhancing the frequency and the level of communication between the attorney and her staff.

185. ABA Comm. on Ethics and Prof's Responsibility, Formal Op. 08-451 (2008) ("The challenge for an outsourcing lawyer is, therefore, to ensure that the tasks are delegated to individuals who are competent to perform them, and then to oversee the execution of the project adequately and appropriately.").

186. *Id.* at 3 ("[T]he professional regulatory system should be evaluated to determine whether members of the nation's legal profession have been inculcated with core ethical principles similar to those in the United States . . . .").

187. *See id.*

188. *See generally id.* (stating that attorneys must oversee the execution of the project, even when it is outsourced).

189. *See generally* Legal Process Outsourcing [LPO], *Document Review: The X-Files Revealed* (Aug. 16, 2009), http://lpowatch.blogspot.com/2010/01/document-review-x-files-revealed.html (stating that the average attorney in India is paid $10–$30 an hour for document review).

190. *See generally* MODEL RULE OF PROF'L CONDUCT R. 5.3 (2007)

191. *See generally* Covad Commc'n Co. v. Revonet, Inc., 254 F.R.D. 147, 151 (D.D.C. 2008) (requiring both parties to share the cost of a paralegal to conduct a privilege review).

B. COMPETENCE

Counsel is required to be competent.[192] According to Model Rule 1.1, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[193] For example, an attorney unfamiliar with email technology should not supervise the collection of emails.[194] Moreover, a client pays not only for the attorney to be competent, but to ensure that other members of the review team are competent, including litigation support vendors.[195] The more steps counsel can take to understand the company's architecture and orchestrate a document retention program, the easier it will be to supervise the review.[196] Further, following these steps may result in less information that will be available to review and produce.[197] Competent counsel will take such steps necessary to ensure that as few irrelevant documents as possible make it to the review stage and effectively negotiate to such ends on behalf of the client.[198]

192. MODEL RULE OF PROF'L CONDUCT R. 1.1 (2007).

193. *Id.*

194. *C.f.* MODEL RULE OF PROF'L CONDUCT R. 1.1cmt 6 ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education").

195. *See* MODEL RULE OF PROF'L CONDUCT R. 5.3 (stating that lawyers who employ nonlawyers "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer."); *See generally In re* A & M Fla. Prop. II, LLC v. GFI Acquisition, LLC, Bankr. No. 09-15173, 2010 WL 1418861, at *6 (Bankr. S.D.N.Y. Apr. 7, 2010) (reiterating the importance of a lawyer's obligations during document review, holding that "[w]hile the delays in discovery were not caused by any intentional behavior, GFI's counsel did not fulfill its obligation to find all sources of relevant documents in a timely manner. Counsel has an obligation to not just request documents of his client, but to search for sources of information.").

196. *See In re A & M Fla. Prop. II*, at *6 ("Counsel must communicate with the client, identify all sources of relevant information, and 'become fully familiar with [the] client's document retention policies, as well as [the] client's data retention architecture.'").

197. *See generally* Essential Discovery, *Best Practices Case Study: A Guide to Complex Document Review* (2009), http://www.essentialdiscovery.net/media/ed/Guide-to-Complex-Document-Review.pdf (last visited April 19, 2010).

198. *See generally* The Sedona Conference Working Group on Electronic Document Retention and Production, *The Sedona Conference Commentary on Email Management: Guidelines for the Selection of Retention Policy*, 8 SEDONA CONF. J. 239 (2007) (discussing the importance of establishing a set of email

Acquiring competence in this field is an intensive undertaking. However, often by cooperating, agreeing to the search terms,[199] establishing document destruction protocols,[200] developing advance searches,[201] and prohibiting document reviewers and vendors from seeing confidential data not associated with the case,[202] counsel can limit the number of documents available and avoid complications in the review where one's competence would be called into question.[203] Indeed, counsel has several tools to limit the review and decrease the cost for her client. Counsel needs to be competent enough to understand how to use these tools and/or obtain the necessary training to do so.

Competent counsel may also negotiate more favorably, or with a better end goal in mind. For example, one cannot accurately measure what a reasonable settlement or compromise is without understanding the tools of proportionality.[204] The result of hiring competent counsel includes having fewer documents to review, a greater command of what the documents say, and an ability to understand where the documents are going through each stage of the review.[205] Hiring competent counsel is preferable to exclusively trusting

management policies during the discovery phase of litigation and following these policies through the discovery review team).

199. *See* Thomas Y. Allman, *The Sedona Principles After the Federal Amendments: The Second Edition (2007)*, THE SEDONA CONF. (August 17, 2007), http://www.thesedonaconference.org/dltForm?did=2007SummaryofSedonaPrinciples2ndEditionAug17assentforWG1.pdf (discussing Principle 11).

200. *See generally* Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005) ("'Document retention policies,' which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business.").

201. *See generally The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, *supra* note 133, at 206–07 (discussing the importance and efficiency of search terms).

202. FLA FORMAL OP. 07-02 (2007).

203. *See generally* Essential Discovery, *Best Practices Case Study: A Guide to Complex Document Review* (2009), http://www.essentialdiscovery.net/media/ed/Guide-to-Complex-Document-Review.pdf (last visited April 19, 2010) (discussing the importance of establishing well-organized and well managed discovery practices).

204. Kenneth J. Withers, *Ephemeral Data and the Duty to Preserve Discoverable Electronically Stored Information*, 37 U. BALT. L. REV. 349, 367–68 (2008).

205. *Id.*

vendors—primarily nonlawyers—with one's information. [206]

Simply put, an experienced ESI counsel will cost less in the long-run. Counsel will limit the review as much as possible, understand case law, and work with opposing counsel to reduce the costs of discovery, within the bounds of ethical and civil rules. By ensuring that counsel is well-versed in ESI, the client can decrease costs and effectively navigate through all the e-discovery traps that present themselves along the way.

C. CANDOR WITH THE COURT & TRANSPARENCY

Candor means that counsel cannot feign cooperation or trick the court into a position that will inhibit the full and fair adjudication of the pending matter.[207] The ethical rules[208] and the Civil Rules prohibit shuffling documents into an unusable form,[209] data dumping, hiding documents from trial counsel,[210] or failing to follow up on requests for production.[211] According to Model Rule 3.3, candor requires that "[a] lawyer shall not knowingly: (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."[212] Similarly, Model Rule 3.4 requires fairness, stating, "[a] lawyer shall not . . . unlawfully obstruct another party's access to the

206. *Id.*

207. FED. R. CIV. P. 26 advisory committee's note (1993 Amendment) ("litigants should not indulge in gamesmanship with respect to disclosure obligations"); *see generally* MODEL RULES OF PROF'L CONDUCT R. 3.3 (discussing a lawyer's ethical duty of candor to the court).

208. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4 (discussing a lawyer's ethical duty of fairness to the opposing party and opposing counsel).

209. *See generally* FED. R. CIV. P. 26 (discussing the duties and obligations of lawyers during disclosure); *id.* at 1 (stating that the rules should "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").

210. *See generally* Qualcomm Inc. v. Broadcom Corp., No. 05cv1958-B (BLM), 2010 WL 1336937 at *4 (S.D. Cal. Apr. 2, 2010) (noting that the discovery failures by the attorneys were exacerbated by an "incredible lack of candor on the part of the" client, when employees failed to provide the attorneys with necessary information, resulting in six attorneys defending sanctions motions for over two years).

211. *See* Swofford, 671 F. Supp. 2d 1274, 1279 (M.D. Fla. 2009) ("[I]t is no defense to suggest . . . that particular employees were not on notice. . . . The obligation to retain discoverable materials is an affirmative one; it requires that . . . corporate officers having notice of discovery obligations communicate those obligations to employees in possession of discoverable materials.").

212. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2007).

evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."[213]

Attorneys may think they are being tactical by resisting efforts to cooperate and ignoring their opportunity to engage in e-discovery at the initial 26(f) conference.[214] However, by failing to cooperate, the lawyer is only hurting their client's ability to economically resolve the dispute through cooperation.[215] Associate Justice Stephen Breyer exemplifies this point in his recent preface to the Sedona Conference Journal on Cooperation stating:

> The Case for Cooperation [articles] suggest that if participants in the legal system act cooperatively in the fact-finding process, more cases will be able to be resolved on their merits more efficiently, and this will help ensure that the courts are not open only to the wealthy. I believe this to be a laudable goal, and hope that readers of this Journal will consider the articles carefully in connection with their efforts to try cases.[216]

When parties cooperate and avoid gamesmanship, the courts become a place where justice may be reached by all, even large corporations that are sensitive to their litigation budgets and bottom lines.

Consistent with the original 1938 comments to the FRCP, counsel would be wise to put its advocacy hat aside during discovery, and cooperate with opposing counsel, attempt to meet with opposing counsel and, at the very least, agree to the scope of production.[217] Alternatively, counsel can agree to resolve the issues through arbitration, where the parties can decide on the level of discovery amongst themselves.

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213. MODEL RULES OF PROF'L CONDUCT R. 3.4 (2007).

214. *See* MODEL RULES OF PROF'L CONDUCT R.3.4 cmt.2 (2007) ("Documents and other items of evidence are often essential to establish a claim or defense . . . [t]he exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed.") Thus, by failing to place a litigation hold on documents, the documents are often destroyed without the user's knowledge, thereby implicating this rule.

215. *See* FED. R. CIV. P. 26 advisory committee's note (1993 Amendment) ("[I]t is desirable that the parties' proposals regarding discovery be developed through a process where they meet in person, informally explore the nature and basis of the issues, and discuss how discovery can be conducted most efficiently and economically.").

216. The Sedona Conference, *The Sedona Conference Journal Volume 10 Supplement*, 10 SEDONA CONF. L. J. at 1 (2009).

217. *See The Sedona Conference Cooperation Proclamation*, *supra* note 143.

VI. CONCLUSION

Technology has a major impact on our lives today. If individuals use technology on a daily basis, counsel must learn how to work with electronic material and understand the cost of doing so. However, until we remove the fear and mystery of calculating costs, we cannot fully understand the price of e-discovery or the implications of such sanctions received by counsel who did not represent their clients competently.

Demystifying eDiscovery for Arbitrators

June 20, 2016

Presented By
Sherman Kahn

MKW
Mauriel Kapouytian Woods LLP

eDiscovery Need Not be Terrifying

- Adding a small "e" before the word discovery has acquired the power to strike fear into the heart of even the most intrepid litigators.
- A bit of perspective on the problem and some technical knowledge can do much to dispel that fear and enable arbitrators to help the parties keep costs down while getting the information they really need

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Perspective on the Problem

- eDiscovery is just discovery of documents created and stored in electronic form – its really not that different than old-fashioned paper-based discovery
- What is different is that parties are retaining much more material now which may have to be reviewed and produced
- Production and review of all this stuff can be far more expensive than the economics of the arbitration justify
- The problem is how to reduce the volume of material to a cost-effective level
- We will provide advice regarding how to manage the process to minimize costs and avert disputes

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Basic Terminology

- **Native Form** – Electronic documents in native form are documents in the form in which they are created (i.e. Microsoft Word or Lotus Notes)
- **Imaged Documents** – Imaged documents are documents converted from native form to an image of the content of the document (often accompanied by a file (called a load-file or text-file) containing the text of the imaged document so that it can be searched.
  - **TIFF Images** – TIFF (which means "Tagged Image File Format") is an imaging format that is compatible with many litigation support software products
  - **PDF Images** – PDF (Portable Document Format) is an imaging format proprietary to Adobe Systems. PDF has a number of advantages over TIFF imaging but PDF images are incompatible with a number of document management systems

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Basic Terminology

- **Metadata** – metadata is data included in an electronic document that is used by the computer to perform operations on the document. Most metadata is completely uninteresting to human readers. Some metadata can be helpful, of interest, or even critical to resolving certain issues
- For example an Outlook email can have more than 150 associated metadata fields. Only a few of those fields are usually useful (i.e., "from" "to" "cc" "bcc" and "subject" can help with searching and categorizing)
  - Word processing documents may store previous changes in metadata fields
  - Spreadsheets often store formulas in metadata fields
- More often than not, however, the pursuit of metadata is an expensive and useless diversion

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Basic Terminology

- **Custodian** – Custodian is a term that has developed in the e-discovery field to describe a person who (or in some cases a computer server or system that) may have relevant documents
  - Limiting the number of "custodians" searched is a key cost-control tool
- **Keywords or Search Terms** – Another way of reducing the volume of production of electronic documents is for the parties to review only those documents the text of which contains a specified set of keywords

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Basic Terminology

- **Forensic Preservation** – Electronic documents are easily modified and often are subject to automatic destruction (e.g. autodeletion of email over a certain age). In court litigation parties are obliged to preserve documents from change or destruction. This can be extremely expensive.
- **Backups** – Often companies keep backups of data on tape or in secondary servers. This data, which is kept for emergencies, can be very expensive to recover.

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Basic Terminology

- **Predictive Coding** – Predictive coding refers to technology using which a computer sifts through documents to find relevant materials without human intervention
  - Useful and potentially more cost effective when there are very large volumes of documents
  - Typically based on a review of a sample set of documents by an experienced lawyer
  - Can be more accurate than human review

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Form of Production

- One important consideration is whether the parties will produce documents in native or imaged format
- Advantages of Production in Native Format
  - Production can be faster, simpler and less expensive
- Disadvantages of Production in Native Format
  - Produced documents are difficult to manage for both the producing and receiving party and the receiving party may not have necessary software
  - Documents will change every time they are used and there is no easy way to control against improper modifications
  - Produced documents will contain all metadata and that metadata is likely to be altered by of the document during the arbitration
  - Documents produced in native format are difficult to authenticate
  - Documents produced in native format are not readily searched across a production database
  - Email produced in native format is difficult to use

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Form of Production

- Advantages of production in imaged form
  - Imaged documents can be easily used by commercial document management systems
  - Imaged documents cannot easily be modified and are readily authenticated
  - Imaged documents can be searched across an entire production database
  - Imaged documents can be produced with only necessary metadata attached
- Disadvantages of production in imaged form
  - Imaging may require a third party document vendor and can be very expensive
  - Imaging can deprive certain documents (especially spreadsheets) of necessary or useful data

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Managing eDiscovery

- Before the initial scheduling conference ask the parties to jointly prepare a discovery plan consistent with the parties arbitration agreement while keeping the following considerations in mind:
  - Arbitration is not litigation and scorched earth discovery will not be tolerated
  - The parties should discuss whether to produce documents in imaged or native form
  - The presumption will be, assuming the parties decide to produce documents in imaged format that metadata (other than basic email metadata) will not be produced unless a party makes a showing of need as to a particular document
  - Document custodians should be limited to those persons most likely to have relevant documents
  - Searches of custodians should be limited to files that are reasonably likely to contain relevant documents
  - The parties should consider whether it is appropriate to agree on a set of keywords to reduce the volume of documents
  - Data from backups need not be produced without a showing of a particularized need

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Managing eDiscovery

- If the parties are cooperative, consider suggesting an agreement that the parties use reasonable efforts to search for appropriate documents in good faith without formal rules
- Ask the parties to agree on reasonable measures for document preservation
- Determine whether spoliation risk is a problem and, if it is not, seek agreement from the parties to eliminate steps that are designed only to address that risk
- Active management is a service to the parties and prevents mischief

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E-Discovery Demystified for Arbitrators—Tips for How to Manage e-Discovery for Efficient Proceedings

By Sherman Kahn

The use of electronic media for the creation, storage and transmission of information has substantially increased the volume of available document discovery. It has also substantially increased the cost of the discovery process. The process of obtaining documentary evidence stored electronically has come to be referred to as "e-discovery."[1]

The prospect of e-discovery has caused great trepidation in the arbitration community. While there is some merit to that trepidation, particularly where increased costs are concerned, the nervousness associated with e-discovery can be substantially reduced with the realization that e-discovery is nothing more than discovery of documents created and stored in electronic form.

"[A]rbitrators should at least familiarize themselves generally with the technological issues that arise in connection with electronic data."

Indeed, e-discovery is really not that different from old-fashioned paper-based discovery. And dealing with it is a necessity. Parties do not retain documentary evidence in hard copy form the way they used to and reference to electronically stored documents may be the only way to reach evidence relevant to a transaction. For example, the revision history of the contract at issue in the arbitration may be obtainable only from electronic documents. Likewise all communications during the negotiation of the contract may have been by email.

What does make e-discovery different from old-fashioned document discovery is that parties are retaining much more material now that may have to be reviewed and produced. The proliferation of electronic media has enabled parties to store massive amounts of information that previously would not have been stored. In addition, the change from communication that would previously have occurred over the telephone or in person to communication by email has created a documentary record of even the most casual of conversations; and often that record is repeated multiple times in multiple places due to extensive lists of recipients and copies.

As a result, production and review of such material can be far more expensive than the economics of even a reasonably large arbitration justify. Costs are further increased if the parties need to go to "vendors" to process and prepare electronic data for production, not to mention attorney review of the material to be produced.

The problem is how to reduce the volume of material to a manageable level without increasing costs and the burden on the parties to unacceptable levels. This article makes some suggestions regarding how to manage the process to minimize costs and avoid disputes.[2]

To be able appropriately to address issues pertaining to the mechanics of e-discovery, arbitrators should at least familiarize themselves generally with the technological issues that arise in connection with electronic data. Such issues include the electronic format in which documents are produced, and the availability and need (or lack thereof) for production of "metadata." A basic understanding by the arbitrator of e-discovery technology and terminology can help the arbitrator reduce discovery costs for the parties.

A short glossary of some important e-discovery terms follows:

- **Native Form**—Electronic documents in native form are documents in the form in which they are created (*i.e.*, Microsoft Word or Lotus Notes).
- **Imaged Documents**—Imaged documents are documents converted from native form to an image of the content of the document (often accompanied by a file (called a load-file or text-file) containing the text of the imaged document so that it can be searched.
  - **TIFF Images**—TIFF (which means "Tagged Image File Format") is an imaging format that is compatible with many litigation support software products.
  - **PDF Images**—PDF (Portable Document Format) is an imaging format proprietary to Adobe Systems. PDF has a number of advantages over TIFF imaging but PDF images are incompatible with a number of document management systems.
- **Metadata**—metadata is data included in an electronic document that is used by the computer to perform operations on the document. Most meta-

data is completely uninteresting to human readers. Some metadata can be helpful, of interest, or even critical to resolving certain issues.

- For example, an Outlook email can have more than 150 associated metadata fields. Only a few of those fields are usually useful (*i.e.*, "from" "to" "cc" "bcc" and "subject" can help with searching and categorizing).
- Word processing documents may store previous changes in metadata fields.
- Spreadsheets often store formulas in metadata fields.
- More often than not, however, the pursuit of metadata is an expensive and useless diversion.

- **Custodian**—Custodian is a term that has developed in the e-discovery field to describe a person who (or in some cases a computer server or system that) may have relevant documents.
  - Limiting the number of "custodians" searched is a key cost-control tool.
- **Keywords or Search Terms**—Another way of reducing the volume of production of electronic documents is for the parties to review only those documents the text of which contains a specified set of keywords which can be agreed upon by the parties.
- **Forensic Preservation**—Electronic documents are easily modified and often are subject to automatic destruction (*e.g.*, autodeletion of email over a certain age). In court litigation parties are obliged to preserve documents from change or destruction. This can be extremely expensive.
- **Backups**—Often companies keep backups of data on tape or in secondary servers. This data, which is kept for emergencies, can be very expensive to recover.

Once an arbitrator understands the above terms, it becomes less of a burden to help the parties implement a manageable e-discovery program appropriate to the size and complexity of a given arbitration.

One important consideration is whether the parties will produce documents in native or imaged format. Production of electronic documents in native format can be faster, simpler and less expensive. However, there are significant disadvantages to production in native format. Documents produced in native format are difficult to manage both for the producing and for the receiving party and the receiving party may not have necessary software. Documents produced in native format will change every time they are used and there is no easy way to control against improper modifications. Documents produced in native format will contain all metadata and that metadata is likely to be unintentionally altered by the recipient of the document during the arbitration. Documents produced in native format are difficult to authenticate. Documents produced in native format are not readily searched across a production database. Email produced in native format is difficult to use.

Advantages of production in imaged form include that imaged documents can be easily used by commercial document management systems; imaged documents cannot easily be modified and are readily authenticated; imaged documents can be searched across an entire production database; and imaged documents can be produced with only necessary metadata attached. Disadvantages of production of electronic documents in imaged form include that imaging may require a third party document vendor and can be very expensive; and imaging can deprive certain documents (especially spreadsheets) of necessary or useful data.

Generally, parties will prefer to produce electronic documents in imaged form. Nonetheless and notwithstanding the long list of possible disadvantages of document production in native form, such production might be appropriate under the circumstances in a given arbitration, particularly with respect to reducing costs. Arbitrators should discuss with the parties, preferably at the initial scheduling conference, whether production in native form is advantageous under the circumstances.

Before the initial scheduling conference an arbitrator may wish to ask the parties to jointly prepare an e-discovery plan consistent with the parties' arbitration agreement while keeping the following considerations in mind:

- Arbitration is not litigation and scorched earth discovery should not be tolerated
- The parties should discuss whether to produce documents in imaged or native form
- The presumption will be, assuming the parties decide to produce documents in imaged format that metadata (other than basic email metadata) will not be produced unless a party makes a showing of need as to a particular document
- Document custodians should be limited to those persons most likely to have relevant documents
- Searches of custodians should be limited to files or folders that are reasonably likely to contain relevant documents
- The parties should consider whether it is appropriate to agree on a set of keywords to reduce the volume of documents

- Data from backups need not be produced without a showing of a particularized need

One advantage of arbitration is that the parties can easily agree to more flexible rules to avoid cost and burden. If the parties are cooperative, the arbitrator may wish to consider suggesting an agreement that the parties use reasonable efforts to search for appropriate documents in good faith without formal rules. Such an arrangement, under appropriate circumstances, can enable the parties to achieve their goals in arbitration at a considerably reduced cost.

One of the main drivers of increased e-discovery cost in litigation is fear by parties and their counsel that they will be accused of spoliation. Parties must begin litigation with elaborate, and often very expensive, measures to preserve massive amounts of electronic documentation. In arbitration, fears of spoliation accusations can be minimized through an agreement between the parties. The arbitrator can explore at the preliminary hearing whether the parties to agree on reasonable measures for document preservation that are not exceedingly expensive and that can be agreed to by both sides.[3]

Endnotes

1. This article discusses "e-discovery" in the context of United States domestic arbitration The same issues arise in international arbitration although, of course, the amount of document disclosure available in international arbitration is often significantly lower than the amount available in United States domestic arbitration Arbitrators must be careful to adjust their approach based on the context of the arbitration and the parties' expectations.
2. This article can only present certain practical advice for the arbitrator For a discussion of e-discovery far beyond the scope of this article, *see* "The Sedona Principles: Second Edition, Best Practice Recommendations & Principles for Addressing Electronic Document Production," Sedona Conference 2007.
3. For additional guidance, please see the New York State Bar Association's Guidelines For the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic, Commercial Arbitrations and Guidelines For the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations.

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The Federal Rules of Civil Procedure as They Relate to E-Discovery

Hon. Shira A. Scheindlin
U.S.D.J. Ret.

2006 Amendments Relating to E-Discovery

- **Rule 26(a)(1) (ii)** Initial Disclosures. A party must provide a copy of, or description by category and location of ESI in the Possession, Custody or Control of the party and that the party may use to supports its claims or defenses.

2006 Rule 26(f)

- Parties must meet and confer and develop a discovery plan which must state the parties' views and proposals concerning:
- "any issues relating to disclosure or discovery of ESI, including the form of forms in which it should be produced" AND" any issues relating to claims of privilege or protection as trial prep materials" (now covered under FRE 502)

2006 Rule 26(b)(2)(B)

- "Specific Limitation on ESI" "A party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible (NRA) because of undue burden or cost. If the producing party shows that the information is NRA the court may nonetheless order discovery from such sources if requesting party shows good cause (i.e. balances cost v. benefit). The court may specify conditions (i.e. cost shifting) for the discovery.

2006 Rule 33(d)

- Option to Produce Business Records. Where an answer to an interrogatory may be derived from a party's business records, **including ESI,** and the burden of extracting the information is the same for both parties, the producing party may specify the records from which the answer may be derived and permit the requesting party a reasonable opportunity to examine the records.

2015 Rule 26(b)(1)

Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

2015 Rule 37(e)

37(e) **FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION**. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

Reflections on Rule 37(e)

- Applies only to the loss of ESI, not to hard-copy or tangible things
- Defers to common law on the trigger and the scope of a party's preservation obligations
- Applies only if a party "failed to take reasonable steps to preserve" ESI
- Applies only when lost ESI "cannot be restored or replaced through additional discovery"

Reflections on Rule 37(e) (Cont'd)

- Does not use the words "sanction" or "spoliation"
- Requires a finding of prejudice unless there is an "intent to deprive another party of the information's use" in litigation
- Limits curative measures to those "no greater than necessary to cure the prejudice" (*e.g.*, additional discovery, fines, cost shifting, evidence preclusion, and allowing parties to present evidence or argument to jury regarding the loss)

Open Issues With Respect to Rule 37(e)

- Reasonable Steps. The phrase "lost because a party failed to take reasonable steps to preserve" is ambiguous. Different arbitrators may have different views on what steps are "reasonable"
- Burden of Proof. Under both subsections (1) and (2), the new rule is silent as to burden of proof. Does the party claiming prejudice have to establish its existence, or does the spoliating party have to prove lack of prejudice? Likewise, does intent to deprive need to be proven by the aggrieved party or disproven by the spoliating party?

What Factors Might an Arbitrator Consider in Deciding Whether to Impose Sanctions?

- Whether the party was on notice that litigation was likely and that the ESI would be discoverable
- Whether the party received a request to preserve, the clarity and reasonableness of the request, and whether the requestor and recipient engaged in good faith consultation regarding the scope of preservation
- Good faith adherence to neutral policies and procedures (*i.e.*, routine operation of an electronic information system
- The reasonableness of the party's efforts to preserve, including the implementation of a litigation hold and the scope of the preservation efforts
- The proportionality of the preservation efforts to any anticipated or ongoing litigation. ("A party may act reasonably by choosing the least costly form of information preservation. . . .")

What Factors Might an Arbitrator Consider in Deciding Whether to Impose Sanctions?

- Whether the information not retained reasonably appeared to be cumulative or duplicative
- The party's resources and sophistication, including whether the party "has a realistic ability to control or preserve some ESI"
- Factors outside the party's control (*e.g.*, "acts of God," cloud computing disasters)
- Adherence to best practices standards and guidelines (*e.g.*, *The Sedona Conference® Commentary on Legal Holds: The Trigger and the Process (2010)*

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TECHNOLOGY-ASSISTED DOCUMENT REVIEW: IS IT DEFENSIBLE?

By William W. Belt, Dennis R. Kiker and Daryl E. Shetterly*

Cite as: William W. Belt, Dennis R. Kiker & Daryl E. Shetterly, *Technology-Assisted Document Review: Is It Defensible?*, XVIII RICH. J. L. & TECH 10 (2012), http://jolt.richmond.edu/v18i3/article10.pdf.

I. INTRODUCTION

[1] Technology has changed the way we communicate and, in so doing, has changed the discovery phase of litigation. Parties must sift through ever-growing data volumes to find relevant material, significantly increasing time and cost requirements. Technology has also changed the way attorneys meet discovery demands. New technologies like "machine learning" and "predictive coding"[1] give lawyers important new tools to manage the growing volume of electronically stored information ("ESI").[2]

* William W. Belt is the leader of LeClairRyan's electronic discovery practice group. Dennis R. Kiker and Daryl E. Shetterly are partners in the electronic discovery practice group.

[1] *See* Jason. R. Baron, *Law in the Age of Exabytes: Some Further Thoughts on 'Information Inflation' and Current Issues in E-Discovery Search*, 17 RICH. J. L. & TECH. 9, at 25-26 (2011), http://jolt.richmond.edu/v17i3/article9.pdf (explaining terms like "machine learning" and "predictive coding" are just two of many terms used to refer to technology-assisted review). The technology and applications that we call "technology-assisted review," "predictive coding" and "machine learning" continue to change in important ways, and are therefore difficult to accurately define. In this article, "technology-assisted review" is a family of technologies and applications that receive input such as coding decisions from humans for a subset of documents, and use that input to help categorize, "predictively" code, or rank the remaining documents in the set. *Id.*

[2] *See id.*; *see also* FED. R. CIV. P. 26(b)(2)(B) (providing special rules for ESI).

At the same time, court decisions have sent "wake-up call[s]"[3] warning attorneys that deploying technology without appropriate safeguards may be foolishly rushing in "where angels fear to tread."[4]

[2] There was a time when clients sent their lawyers a file folder or box of paper containing the documents relevant to litigation. Thanks to the proliferation of email and other ESI,[5] documents now more commonly arrive on a hard drive, and that hard drive likely contains gigabytes or terabytes of data which, if printed, would fill the law firm's halls with boxes of paper.[6] At first, the shift from reviewing and analyzing data in paper format to electronic format did little to change the document review process.[7] Attorneys sat in front of computer screens and looked through email inboxes chronologically, similar to the way they previously would

[3] William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 134 (S.D.N.Y. 2009).

[4] United States v. O'Keefe, 537 F. Supp. 2d 14, 24 (D.D.C. 2008).

[5] John Gantz & David Reinsel, *Extracting Value from Chaos*, EMC CORP. (June 2011), http://www.emc.com/collateral/analyst-reports/idc-extracting-value-from-chaos-ar.pdf (pointing out that the world's information is "more than doubling every two years.") In 2011 the world will create a staggering 1.8 zettabytes of information. *Id.*

[6] The Sedona Conference, *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189, 192 n.2 (2007) [hereinafter *Sedona Search Commentary*] (noting that "[o]ne gigabyte of electronic information can generate approximately 70,000-80,000 of text pages, or 35 to 40 banker's boxes of documents (at 2,000 pages per box). Thus, a 100-gigabtye storage device (*e.g.*, a personal computer hard drive), theoretically, could hold as much as the equivalent of 3,500 to 4,000 banker's boxes of documents. By contrast, in 1990, a typical personal computer held just 200 megabytes of data - 1/500 the capacity of a typical hard drive today. Even if only 10% of a computer's available capacity today contains useful or "useable" information (as distinguished from application programs, operating systems, utilities, etc.), attorneys still would need to consider and potentially review 700,000 to 800,000 pages per each device.").

[7] *See id.* at 193.

have read through a box of paper.[8] e-Discovery technology has continually evolved to offer new tools and solutions. Now counsel has a myriad of tools available to assist in locating and reviewing relevant documents. With these technological advancements, the need has grown for technological expertise. Attorneys must understand the tools they deploy and how they fit in the discovery process. For most trial lawyers, the need to understand new technologies – both the technologies clients use to communicate and the technologies attorneys may use in discovery – can create daunting challenges.

[3] In response to evolving technology, the people and processes used to solve electronic discovery problems have continually changed since the earliest days of electronic discovery. In the few short years since electronic discovery emerged as an industry, litigants and attorneys have felt the "future shock" of accelerating change.[9] Technology-assisted review is yet another jolt to attorneys—a technology with the potential to change the methods we use to comply with our electronic discovery obligations.

[4] Attorneys have been hesitant to adopt each succeeding generation of document review technology, including technology-assisted review.[10] There are likely several reasons for this hesitancy.[11] One reason is the

[8] *See id.*

[9] *See* ALVIN TOFFLER, FUTURE SHOCK 4 (1970) (explaining that Toffler "coined the term 'future shock' to describe the shattering stress and disorientation that we induce in individuals by subjecting them to too much change in too short a time.").

[10] *See* Rachel K. Alexander, *E-Discovery Practice, Theory, and Precedent: Finding the Right Pond, Lure, and Lines Without Going on a Fishing Expedition*, 56 S.D. L. REV. 25, 27 (2011).

[11] We do not argue that technology-assisted review is the right tool for every case. Examples of document populations that may not be good candidates for technology-assisted review include; small document sets, document sets containing non-standard document types and document sets with a high percentage of paper documents or image files with text generated by optical character recognition software.

cautionary messages sent by court rulings like *O'Keefe* and *William Gross*.[12] Those two decisions relate to keyword searching, which has for some time been considered safe territory.[13] Moreover, technology-assisted review requires legal, technological and business process sophistication to effectively incorporate the technology into a large-scale discovery project.[14] In other words, attorneys must understand how to integrate technology-assisted review with the human component of document review.[15] Though the same is true for other methods for

[12] *See generally* United States v. O'Keefe, 537 F. Supp. 2d 14, 24 (D.D.C. 2008); William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 134 (S.D.N.Y. 2009).

[13] *See generally id.*

[14] *See* Patrick Oot, Anne Kershaw, & Herbert L. Roitblat, *Mandating Reasonableness in a Reasonable Inquiry*, 87 DENV. U. L. REV. 533, 534-35 (2010).

[15] *See, e.g.*, Ralph Losey, *Bottom Line Driven Proportional Review*, E-DISCOVERY TEAM (Jan. 15, 2012), http://e-discoveryteam.com/2012/01/15/bottom-line-driven-proportional-review/ ("[Y]ou cannot just dispense with final manual review [...] we are not going to turn that over to the Borg anytime soon. I've asked around and no law firms do that now. No experts advocate that approach either, even the most extreme advocates for automation (of which I'm one) [...] You use predictive coding to speed up the final manual review to be sure, but only a fool (or con artist trying to get at a producing parties [sic] secrets) trusts coding software today without human verification."); *see also* MAURA R. GROSSMAN, CONOR R. CROWLEY & JOE LOOBY, TREC, REFLECTIONS OF THE TOPIC AUTHORITIES (2008), *available at* http://trec-legal.umiacs.umd.edu/other/TAreflections2008.doc (explaining "how 'responsiveness' is defined is often dependent on numerous subjective determinations involving, among other things, the nature of the risk posed by production, the party requesting the information, the willingness of the producing party to face a challenge for underproduction, and the level of knowledge that the producing party has about the matter at a particular point in time. Lawyers can and do draw these lines differently for different types of opponents, on different matters, and at different times on the same matter. This makes it exceedingly difficult to establish a 'gold standard' against which to measure relevance/responsiveness and explains why document review cannot be completely automated."); Herbert L. Roitblat, Anne Kershaw & Patrick Oot, *Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review*, 61 J. AM. SOC'Y INFO. SCI. 1, 8 (2009), *available at* http://www.clearwellsystems.com/e-discovery-blog/wp-content/uploads/2010/12/man-v-comp-doc-review.pdf ("Discovery cannot be wholly automated, not for the reason that it

facilitating document review, such as keyword searching, the complexity of the technology and importance of the process are new territory for most lawyers.

[5] Most importantly, uncertainty remains as to whether the use of technology-assisted review tools is legally defensible.[16] Though intellectual debate challenges the efficacy of keyword searching, it is generally-accepted and widely used. Technology-assisted review is not as of yet. Judge Peck argues that counsel may be waiting for an opinion stating that technology-assisted review is, or is not, a reasonable means of identifying relevant information.[17] Anticipating that day, and in the interest of furthering the academic discussion around technology-assisted review, included herein is a legal brief that supports the use of technology-assisted review in a hypothetical case.

[6] In this hypothetical, the producing defendant faces a motion to compel after using technology-assisted review to exclude from review a subset of documents that technology has "predictively coded" as not likely to contain relevant information. During the meet and confer process, plaintiff objected to using the technology and insisted that the producing

involves so-called subjective judgment, but because ultimately attorneys and parties in the case have to know what the data are about. They have to formulate and respond to arguments and develop a strategy for winning the case. They have to understand the evidence that they have available and be able to refute contrary evidence. All of this takes knowledge of the case, the law, and much more.").

[16] *See, e.g.*, Andrew Peck, *Search, Forward*, LAW TECH. NEWS (Oct. 1, 2011), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202516530534. See also, *Da Silva Moore v. Publicis Groupe, et al.*, As of the date of this writing, no order is available, but a transcript of a hearing before Judge Peck addressing the technology is available at http://www.law.com/jsp/lawtechnologynews/PubArticleFriendlyLTN.jsp?id=1202542221714 &slreturn=1.

[17] *Id.* ("Perhaps they are looking for an opinion concluding that: 'It is the opinion of this court that the use of predictive coding is a proper and acceptable means of conducting searches under the Federal Rules of Civil Procedure, and furthermore that the software provided for this purpose by [insert name of your favorite vendor] is the software of choice in this court.' If so, it will be a long wait.").

party review all documents, including those predictively coded as not likely to be relevant. The defendant used the technology without obtaining plaintiff's consent, and plaintiff later obtained relevant documents from a third party that were excluded from production by the technology. Plaintiff filed a motion to compel defendant to review all of the documents that had been excluded through technology-assisted review, and defendant filed this brief in response. The brief in this hypothetical case is offered to provide a starting point from which to discuss the issues in the context of a court motion. The brief is written from the perspective of the technology proponent; however, in an actual case, corresponding briefs opposing the technology would precede and follow the response brief. There is not space here to include the opponent's arguments. In addition, the provided hypothetical brief does not address in detail the complex safeguards the courts require when counsel deploys technology in the discovery process. The sampling process, for example, may involve a statistical analysis better suited to a separate study. The arguments are based on federal law, though they should prove applicable in many state courts as well.[18]

[18] In addition to the 2006 amendments to the Federal Rules of Civil Procedure, many states have added language to their statutes or rules to accommodate electronic discovery. *See Current Listing of States that Have Enacted e-Discovery Rules*, ELECTRONIC DISCOVERY L., http://www.ediscoverylaw.com/promo/state-district-court-rules/ (last visited Feb. 1, 2012).

II. HYPOTHETICAL BRIEF

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MOUNTAIN STATE

Plaintiff, Inc., Plaintiff, vs.	Civil Action No. 000-00001
Defendant, Inc. Defendant.	

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL REVIEW AND PRODUCTION OF DOCUMENTS EXCLUDED FROM REVIEW BY TECHNOLOGY-ASSISTED REVIEW METHODOLOGY AND MOTION FOR PROTECTIVE ORDER[19]

Defendant, Defendant, Inc. ("Defendant") submits the following combined response to Plaintiff's Motion to Compel and Defendant's Motion for Protective Order. The Court should deny Plaintiff's motion because the technology-assisted review process used by Defendant in this case was reasonable and satisfies Defendant's discovery obligations under

[19] As this "brief" is presented solely for academic discussion, the format and style may not be appropriate for a brief filed with a court. *See* discussion *supra* p. 4.

the Federal Rules of Civil Procedure. Defendant combined the human review of 200,000 responsive and privileged documents with the technology-assisted review of 800,000 documents categorized by the technology[20] as "not relevant." Defendant's Response to Plaintiff's Motion to Compel at ¶¶ 8-10. Defendant respectfully submits that the process was reasonable and achieves the underlying goal of the Federal Rules of Civil Procedure to "secure the just, speedy, and inexpensive determination of every action and proceeding," by ensuring that the actions taken to identify and produce relevant information do not "outweigh[] its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed. R. Civ. P. 1, 26(b)(2)(C).

I. STATEMENT OF FACTS

1. Defendant and Plaintiff identified 20 custodians in Defendant's employ that were most likely to have information and

[20] Defendant's attorneys also reviewed and coded a statistical sample of randomly selected documents to allow the technology to categorize the entire set. *See infra* Part I, at 8.

documents relevant to the underlying matter. The parties also agreed upon a relevant date range for discovery. The details of the parties' agreement is contained in the ESI Protocol, attached as Exhibit A.[21]

2. Defendant collected documents in accordance with the ESI Protocol, which provides that Defendant would collect all e-mail and active files associated with the identified custodians. Defendant then engaged a third party provider, Vendor, Inc., to process and host the documents for review. After processing and de-duplication, 1 million unique documents were loaded into the review application for attorney review.

3. Recognizing the significant cost associated with reviewing each and every one of the million documents loaded into the review

[21] Since this is a brief in a hypothetical, there are no exhibits attached. Though the ESI protocol depends on the circumstances of each case, a number of resources may serve as a starting point for an ESI protocol. *See, e.g.*, *Suggested Protocol for Discovery of Electronically Stored Information ('ESI')*, U.S. DISTRICT CT. FOR THE DISTRICT OF MD., *available at* http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf (last visited Feb. 4, 2012); *An E-Discovery Model Order*, U.S. CT. APPEALS FOR THE FED. CIRCUIT, *available at* http://www.cafc.uscourts.gov /images/stories/announcements/Ediscovery_ Model_Order.pdf (last visited Feb. 4, 2012); *Default Standard for the Discovery of Electronically Stored Information ("E-Discovery")*, U.S. DISTRICT CT. FOR THE N. DISTRICT OF OHIO, *available at* http://www.ohnd.uscourts.gov/assets/Rules_and_ Orders/Local_Civil_Rules/CoverSheet.htm (follow "Appendices" tab; then follow "Appendix K" hyperlink) (last visited Feb. 4, 2012).

application, and the likelihood that many of those documents were not relevant to any matter at issue in this case, Defendant proposed to use a technology-assisted review tool[22] to divide the documents into two categories: (1) documents likely to be relevant; and (2) documents likely to be not relevant.[23] Defendant further proposed limiting human review to: (a) an initial set of randomly selected documents that would be reviewed by attorneys so that their coding decisions could be applied to the rest of the data set; (b) the data set that the tool identified as most likely to be relevant; and (c) a random, statistically significant sample of

[22] Technology-assisted review is also referred to as machine learning, predictive coding, software assisted review and suggestive coding. *See* Jim Eidelman & Ron Tienzo, *Predictive Coding & Non-Linear Review: Best Practices and Comparative Analysis*, CATALYST, *available at* http://www.catalystsecure.com/Webinars/pdfs/Partner _Pred ictive_Coding_and_Non-Linear%20Review_Webinar_Dec_15_2011.pdf. The term "technology-assisted review" is used throughout this brief to refer to these and other technologies that receive input, such as coding decisions, from humans for a subset of documents, and apply that input to help categorize, "predictively" code, or rank the remaining documents in the set.

[23] This refers to technology-assisted review in the context of filtering data that has been collected from its original environment and indexed for search. Technology-assisted review tools may also be used to filter data in its native environment, but that application is limited to instances where the technology is deployed behind the firewall. *Cf.* Gordon V. Cormack & Mona Mojdeh, *Machine Learning for Information Retrieval: TREC 2009 Web, Relevance Feedback and Legal Tracks*, *in* THE EIGHTEENTH TEXT RETRIEVAL CONFERENCE (TREC 2009) PROCEEDINGS at 3 (2009), *available at* http://trec.nist. gov/pubs/trec18/papers/uwaterloo-cormack.WEB.RF.LEGAL.pdf.

the documents the technology-assisted review technology identified as "not relevant."

4. Plaintiff refused to agree to Defendant's proposed technology-assisted review and sampling processes, and proposed instead that Defendant run several hundred search terms across the entire volume of data and review all documents that contained any of those search terms. The list of Plaintiff's proposed search terms is attached as Exhibit B.

5. Defendant ran the proposed search terms as requested and discovered that 967,453 of the documents (inclusive of family members)[24] contained one or more of the search terms, which included such common terms as "manufacture" and "quality control."

6. Under the Scheduling Order, Defendant had 30 days to complete the review and production. The deadline meant there was no

[24] The phrase "family member" in the e-Discovery context refers to an attachment. *See, e.g.*, Steve Green, *Document Family Circus*, DISCOVERY IN PRAC. (Apr. 11, 2011), http://hudsonlegalblog.com/e-discovery/the-document-family-circus.html (explaining an e-mail and its attachment are generally seen as two separate documents but are often considered part of the same "family" of documents for review and production purposes). While the number of documents that actually contain the search terms requested may be lower, it is often necessary to view a document in context with its attachments to determine privilege and responsiveness.

time to effectively negotiate further keyword limitations or to add Boolean connectors and complete the review on time.[25]

7. Because Defendant felt the search term protocol was ineffective in identifying only relevant documents, and in light of the time constraints and Plaintiff's refusal to agree, Defendant elected to use a technology-assisted review tool to identify the documents in the population most likely to be relevant. The technology-assisted review tool and process, described in detail below, utilized a subset of the search terms proposed by Plaintiff, attached as Exhibit C.

8. The technology-assisted review tool identified approximately 200,000 documents likely to have relevant information.

9. Defendant's attorneys reviewed all of these documents for privilege, confidentiality, and trade secrets, and subsequently produced 149,376 relevant, non-privileged documents.

[25] The timing and deadlines inherent in litigation are often overlooked in the discovery process. We include a deadline here to underscore the role timing plays in managing discovery projects. While computers can increase speed, data volumes can offset the advantage and make deadlines more difficult to meet. *See* Dean Gonsowski, *A Look into the Crystal Ball: E-Discovery Predictions and Trends*, ALANET.ORG (July/Aug. 2010), http://www.alanet. org/publications/issue/julaug10/LM-JulAug10-F1-EDiscovery.pdf.

10. Defendant then reviewed a random sample of the remaining 800,000 documents and, finding no additional relevant documents, determined with a 95% confidence level that less than 3% of the un-reviewed documents were relevant.[26]

11. Defendant produced 149,376 documents on time under the Scheduling Order.

12. Following production, Plaintiff identified and supplemented its production with a relevant e-mail, sent by one of the custodians during the relevant date range, that was produced pursuant to a third-party subpoena to Third Party Corp., but not included in Defendant's document production ("supplemented message"). Defendant was able to locate the supplemented message among the 800,000 documents that were excluded from review. The supplemented message was not in the random sample of documents reviewed as part of the quality control process.

[26] The exact number of documents that need to be reviewed to determine confidence level and confidence interval varies with the size of the document population. There are several resources available to identify the number of documents that need to be reviewed to determine the confidence level and confidence interval. *See, e.g.*, *Sample Size Calculator*, CREATIVE RES. SYS., http://www.surveysystem.com/sscalc.htm#one (last visited Feb. 1, 2012).

13. Following receipt of the supplemented message, Plaintiff renewed its demand that Defendant undertake a manual, linear review of the remaining 800,000 documents, and, when Defendant refused, filed its Motion to Compel.

II. Overview of the Technology-Assisted Document Review Process

A. Why Do We Need Technology-Assisted Review?

In the past decade, there has been an explosion in the volume of electronic information retained by organizations.[27] As a result, litigators must work with their clients to sift through larger and larger data sets to identify the relevant documents they are required to produce to comply with their obligations under the Federal Rules.[28]

There is generally no obligation for lawyers to look at every document within the organization to determine whether it is relevant to the

[27] Gantz, *supra* note 5.

[28] The Federal Rules of Civil Procedure require producing non-privileged documents responsive to requests "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

litigation.[29] Lawyers narrow the inquiry by interviewing employees to identify custodians – employees that have the relevant business records – and identifying data environments that contain relevant electronic and paper documents.[30] They work with information technology groups (hereinafter "IT") to collect those documents in preparation for production to the opposing party.[31]

[29] *Id; see also* The Sedona Conference, BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 38 (Jonathon M. Redgrave et al. eds., 2d ed., 2007) [hereinafter SEDONA PRINCIPLES], *available at* http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf (organizations should define the search for relevant documents by limiting their search to "electronically stored information from repositories used by key individuals rather than generally searching through the entire organization's electronic information systems.").

[30] *See* Bernd Honsel, Gerald G. Paul & Wolfgang A. Dase, *Representing Eurpean Companies in U.S. Litigation: Document handling—Document custodians*, in 1 Successful Partnering Between Inside and Outside Counsel § 23:19 ("Document custodians, including the company's information technology personnel, can be of great importance as litigation unfolds. In particular, if they are long-time employees of the company they may have a wealth of knowledge concerning documents under their supervision, including documents that may be vital to the company's position in the litigation."); *see generally* Daryl Shetterly, *Getting the Most from the Custodian Interview*, THE E-DISCOVERY MYTH (Dec. 19, 2011), http://e-discoverymyth.com/2011/12/19/getting-the-most-from-the-custodian-interview/.

[31] *See, e.g.*, Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D N.Y. 2004).

A decade ago, the documents copied in preparation for production were more likely to contain only the relevant, non-privileged documents.[32] Even if the data set contained other documents, a few lawyers or paralegals could sort through and categorize them efficiently with limited cost.[33] As data volumes grew, so too did the volume of irrelevant documents comingled with the documents collected from the client.[34] Given the large data volumes now collected in many cases, the document review phase (separating the relevant documents from the irrelevant documents, and identifying documents to be withheld or redacted and logged as privileged) of an electronic discovery project is often the most expensive part.[35]

Some of the common criteria or tools used to limit the volume of documents that need to be reviewed by humans include limiting document

[32] Craig Ball, *The Plaintiff's Practical Guide to E-Discovery, Part I*, CRAIG D. BALL P.C., 2 (2005), http://www.craigball.com/EDD-The%20Practical%20Plaintiffs%20Guide.pdf.

[33] *See id.*

[34] *See id.* at 16.

[35] Bennett Borden, Monica McCarroll, Mark Cordover & Sam Strickland, *Why Document Review is Broken*, WILLIAMS MULLEN (May 16, 2011), http://www.williamsmullen.com/resources/detail.aspx?pub=664.

review to specific custodians, limiting the data set by date range, and using search term filtering to separate the relevant documents from the rest of the data set.[36] Each of these criteria removes documents from the document set that humans will review. Of this list, search term filtering is probably the most complex because parties may have difficulty reaching an agreement on keywords during the meet and confer process.[37] Furthermore, the proper use of search term filtering is heavily dependent on technology and may require expertise in "statistics and linguistics."[38] Search terms are generally developed by interviews with custodians and negotiations with the opposing party.[39] Search terms can effectively identify relevant documents in some cases, but it is difficult to balance precision and recall.[40] While search terms will limit the size of the data

[36] *See* SEDONA PRINCIPLES, *supra* note 29, at 38.

[37] *See, e.g.*, United States v. O'Keefe, 537 F. Supp. 2d 14, 24 (D.D.C. 2008) (discussing how defendants "contended the search terms used by the government were insufficient").

[38] *Id.*

[39] *See* FED. R. CIV. P. 26(f); *see also* SEDONA PRINCIPLES, *supra* note 29, at 21 (listing among the topics for the 26(f) conference, the "use of search terms and other methods of reducing the volume of electronically stored information to be preserved or produced").

[40] *See* BRENT R. ROWE ET AL., ECONOMIC IMPACT ASSESSMENT OF NIST'S TEXT RETRIEVAL CONFERENCE (TREC) PROGRAM at § 2-4 (July 2010), *available at*

set, even after search term filtering, there is often a high percentage of irrelevant documents mixed in with the relevant documents that humans need to review.[41]

To reduce cost, litigators need the ability to analyze the collected data and identify the relevant documents that must be produced in order to check the documents for privilege, trade secrets, or categorize the documents in preparation for depositions or trial.[42] In addition, the producing party typically wants to know what they are producing before their opponent receives the production, since not all relevant documents have equal evidentiary value. There are many reasons a litigator may want humans to review the relevant documents before producing them to the opposing party. However, aside from confirming the absence of relevant documents, litigants gain little benefit from human review of

http://trec.nist.gov (explaining that precision refers to the percentage of relevant documents retrieved in a search while recall refers to the volume of irrelevant material that is also retrieved in the search).

[41] *Sedona Search Commentary*, *supra* note 6, at 199.

[42] *See id.* at 198.

irrelevant documents.[43] Historically, there has not been a reliable, industry-accepted technology or methodology to distinguish between relevant and irrelevant documents other than human review, meaning that humans necessarily needed to review a high percentage of documents that were not relevant.[44] In recent years, however, technology has improved.

B. The History of Technology-Assisted Review

Integrating technology with human review is not a new concept. Since the early days of reviewing electronic documents, attorneys commonly used technology to streamline and prioritize documents for human review and to assist in the quality control process.[45]

Early examples of integrating technology into human review include using a coding form to capture the reviewing attorney's work product, and using technology to create discreet batches of documents for humans to review.[46] Software providers developed indexing engines that

[43] *See id.* at 199.

[44] *Cf. id.* at 208.

[45] *Cf. id.* at 199.

[46] *See id.* at 209.

turned document text into searchable databases with metadata filters that empowered attorneys to organize documents by date range, custodian, and email thread or file type.[47] Attorneys could organize the documents in batches using date filters or search terms and prioritize batches for review.[48] Administrators gained the ability to set up workflows that allowed document reviewers to "check out" a batch, complete review, then "check in" the completed batch.[49]

Another type of technological advance used "checksum" or "hashing" algorithms to identify duplicate documents and remove the duplicate datasets ("de-dupe"), eliminating the need for attorneys to review identical documents, while retaining information about where those duplicate documents are located in the data set so these duplicates could be repopulated for production.[50] More recent technology identifies

[47] *See Sedona Search Commentary*, *supra* note 6, at 207-08.

[48] *See id.* at 200-01.

[49] *See, e.g.*, Press Release, kCura, kCura Releases Relativity Six (May 3, 2010), *available at* http://kcura.com/relativity/news/id/87/kcura-releases-e-discovery-review-platform-relativity-six.

[50] *See* Craig Ball, *Meeting the Challenge: E-Mail in Civil Discovery*, in 5TH ANNUAL ADVANCED E-DISCOVERY INSTITUTE: THE DISCOVERY OF ESI COMES OF AGE 2008, 2008

not just exact duplicates, but "near-duplicates" that vary by a few words or sentences.[51]

What these tools have in common is their ability to assist or augment the human review process – meaning these tools assist the human process rather than remove unique documents from the set of documents a human would review. More recent technologies can limit the number of documents reviewed by humans by categorizing document sets and, under the right circumstances, culling out documents not likely to be relevant.[52] This technology permits the human review team to focus on the documents that are most likely to be relevant by limiting the documents that need to be reviewed or by categorizing the relevant documents for priority review.

WL 6654666, *12 (Nov. 20, 2008); Ralph C. Losey, *Hash: The New Bates Stamp*, 12 J. TECH. L. & POL'Y 1, 12 (2007).

[51] *Sedona Search Commentary*, *supra* note 6, at 200.

[52] *See id*

C. Next Generation Technology-Assisted Review Tools

Earlier, we referenced some of the common criteria or tools used to limit the volume of documents that humans must review.[53] Technology allows us to filter data by custodian, date range and search terms.[54] While keyword searching (and for that matter, Boolean, fuzzy and concept searching) can prove effective, it has some limitations. For example, keyword searches are most effective when executed in iterations; however, the litigation process is not well suited to iterative keyword searching.[55] As a result the emergence of several newer technologies that do a better job at balancing precision and recall, and more reliably reduce the number of documents humans must review, is generating robust debate.[56]

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[53] *See supra* Part II.B.

[54] *See supra* text accompanying note 47.

[55] John W. Woods, Lisa J. Sotto & Meghan A. Podolny, *Internal Investigation and eDiscovery*, *in* EDISCOVERY FOR CORPORATE COUNSEL §7:19 (Carole Basri & Mary Mack eds., 2011).

[56] *See Sedona Search Commentary*, *supra* note 6, at 194; *see generally* Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, XVII Rich. J.L. & Tech. 11 (2011), http://jolt.richmond.edu/v17i3/article11.pdf.

Technology-assisted review tools generally work by using a human to train a computer on the categories of documents the computer should identify as relevant.[57] The computer then quickly goes out and reviews the entire data set and categorizes documents as either relevant or irrelevant based on the training it received.[58] Humans then review the documents the computer identifies as relevant as well as a statistically significant sample of the documents the computer identified as not relevant to confirm that they are, in fact, not relevant.[59] Using statistical

[57] Maura Grossman and Gordon Cormack defined these types of technology-assisted review tools as follows:

> A *technology-assisted review process* involves the interplay of humans and computers to identify the documents in a collection that are responsive to a production request, or to identify those documents that should be withheld on the basis of privilege. A human examines and codes only those documents the computer identifies – a tiny fraction of the entire collection. Using the results of this human review, the computer codes the remaining documents in the collection for responsiveness (or privilege). A technology-assisted review process may involve, in whole or in part, the use of one or more approaches including, but not limited to, keyword search, Boolean search, conceptual search, clustering, machine learning, relevance ranking, and sampling.

Grossman & Cormack, *supra* note 56.

[58] *Id.*

[59] The Sedona Conference, *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, 10 SEDONA CONF. J. 299, 312 (2009).

models that long predate the existence of electronic discovery, we can quantify our confidence level and say with a specific degree of certainty that we have identified at least a specific percentage of the relevant documents.[60]

However, there is much more to using this type of technology-assisted review than pushing a button. As technology-assisted review tools developed, processes and safeguards for defensibly implementing these tools developed as well.[61] With older technologies, the process was more about efficiency than reliability, since humans ultimately reviewed each document in the data set, and technology impacted only the order in which the humans reviewed documents.[62] While some commentators dispute whether humans work more accurately than machines, there are fewer challenges to processes involving humans than to processes

[60] *See* Grossman & Cormack, *supra* note 56, at 44-46; *Sedona Search Commentary*, *supra* note 6, at 192.

[61] *Sedona Search Commentary*, *supra* note 6, at 199.

[62] *See id.* at 198-99.

involving machines – perhaps because of the prevailing belief that human review serves as the gold standard.[63]

With newer technologies that reduce the need for humans to look at every document, the several types of tools available must be used properly in order to achieve a reliable result. Even the best technology in the wrong hands is a recipe for disaster. Technology is only reliable when it is used in conjunction with the right process. Indeed, in the context of litigation, the process is just as important, and perhaps more important,

[63] *Id.* at 199 ("[T]here appears to be a myth that manual review by humans of large amounts of information is as accurate and complete as possible – perhaps even perfect – and constitutes the gold standard by which all searches should be measured. Even assuming that the profession had the time and resources to continue to conduct manual review of massive sets of electronic data sets (which it does not), the relative efficacy of that approach versus utilizing newly developed automated methods of review remains very much open to debate."). *But see generally* William Webber, *Re-examining the Effectiveness of Manual Review*, http://www.umiacs.umd.edu/~oard/sire11/papers/webber.pdf (last visited July 28, 2011) (revisiting the analysis in two well known articles, "Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review" and "Technology-assisted review in E-Discovery Can be More Effective And More Efficient than Exhaustive Manual Review," which concluded, respectively, that manual review is at least as consistent as automated review and that manual review is superior to automated review). Webber argues that the previous studies, "while suggestive, are not conclusive" and calls for additional studies to answer the open question of whether an automated system can surpass or even achieve the reliability of a properly managed review team. *Id.* at 1.

than the technology. Some companies have taken these processes seriously enough to obtain patent protection for their technology.[64]

Historically, technology-assisted review augmented human review by allowing humans to review documents more efficiently.[65] The emerging generation of technology-assisted review tools is more analogous to search terms as it removes documents from the set of documents identified for human review.[66] However, using technology to limit the population of documents that will be reviewed by humans, either through the use of search terms or technology-assisted review, raises the question of reliability.

D. Is Technology-Assisted Review Reliable?

An attorney can assess the reliability of technology-assisted review tools the same way she assesses the reliability of search terms. Search terms are typically selected based on discussions with individual

[64] *See, e.g.*, Press Release, Recommind, Inc., Recommind Patents Predictive Coding (June 8, 2011), *available at* http://www.recommind.com/releases/20110608/recommind_patents_predictive_coding.

[65] *Cf. Sedona Search Commentary*, *supra* note 6, at 193 (explaining the changes technology has caused to the discovery process).

[66] *See id.* at 201.

custodians regarding the terms likely to identify relevant documents and negotiations with the opposing party.[67] However, the only way to determine the actual precision and recall of the search terms is to review a statistical sample of the documents identified as relevant and not relevant to confirm the level of precision and recall.[68] Technology-assisted review tools require a similar statistical review.[69]

Sampling allows the producing party to review a subset of the corpus of documents the technology-assisted review tool identifies as not relevant and say with a statistical degree of certainty that the tool has located a statistical percentage of the relevant documents (depending on how many documents were reviewed and how many errors were

[67] The discussion of search terms is generally seen as a required topic at the Rule 26(f) conference. The authors strongly suggest that counsel likewise discuss plans to use technology-assisted review tools in lieu of human document review. *See supra* text accompanying note 38.

[68] *See* Grossman & Cormack, *supra* note 56, at 8 (explaining the commonly-used terms "recall" and "precision" of an information retrieval process as the "completeness" and "accuracy" of the search, respectively).

[69] *See, e.g.*, *Application of Sampling to E-Discovery Search Result Evaluation*, E-DISCOVERY REFERENCE MODEL, app. 2, http://www.edrm.net/resources/guides/edrm-search-guide/appendix-2 (last visited Feb. 4, 2012).

identified).[70] Thus, whether the use of a technology-assisted review tool was defensible will come down to whether the party that used the technology can demonstrate that they followed the process and produced reliable results.

III. TECHNOLOGY-ASSISTED REVIEW IS DEFENSIBLE AND CONSISTENT WITH FUNDAMENTAL PURPOSES OF THE FEDERAL RULES OF CIVIL PROCEDURE

Evaluating the reasonableness of technology-assisted review in any given case requires the evaluation of two considerations: defensibility and proportionality.[71] The process employed must, in the first instance, be defensible, meaning that the proponent can "demonstrate to opposing parties, courts, and government agencies, that its chosen method and tool accurately captured a reasonably sufficient number of the relevant, nonprivileged ESI in existence, and that the remaining unreviewed and

[70] *See id.* ("The estimate of the proportion of responsive documents from a random sample can be stated to be within a specified number of standard deviations from the sample's proportion with a specific confidence level.").

[71] *See* Grossman & Cormack, *supra* note 56, at ¶ 5; *see also* The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 294 (2010).

unproduced ESI is irrelevant."[72] In addition, the proponent of technology-assisted review must demonstrate that its process satisfies the requirements of Rules 1 and 26 of the Federal Rules of Civil Procedure: that "the burden or expense of...discovery [does not] outweigh[] its likely benefit"[73] and helps to secure "the just, speedy, and inexpensive determination of [the] action[.]"[74]

A. Technology-Assisted Review is Defensible

To date, no court has addressed the defensibility of using technology-assisted review to exclude from review and production documents unlikely to contain relevant information.[75] Nevertheless,

[72] The Sedona Conference, *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process*, 10 SEDONA CONF J. 299, 320 (2009).

[73] FED. R. CIV. P. 1.

[74] FED. R. CIV. P. 26(b)(2)(C)(iii).

[75] *See, e.g.*, Peck, *supra* note 16 ("[N]o reported case (federal or state) has ruled on the use of computer-assisted coding. While anecdotally it appears that some lawyers are using predictive coding technology, it also appears that many lawyers (and their clients) are waiting for a judicial decision approving of computer-assisted review.") If faced with a challenge to the use of technology-assisted review, Judge Peck would first consider "what was done and why that produced defensible results," focusing on "whether [the process] produced responsive documents with reasonably high recall and high precision." *See id. See also,* Peck, *supra* note 16.

technology-assisted review is consistent with existing jurisprudence on the defensibility of using technology to facilitate the discovery of ESI.

In *Victor Stanley, Inc. v. Creative Pipe, Inc.*, Chief Magistrate Judge Paul Grimm analyzed a discovery dispute involving the inadvertent production of 165 purportedly privileged documents.[76] Judge Grimm ruled the attorneys had waived privilege and failed to prove they had undertaken a reasonable privilege review process.[77] In assessing the adequacy of the defendants' privilege review process, Judge Grimm noted that "it is universally acknowledged that keyword searches are useful tools for search and retrieval of ESI."[78] He further noted the danger of using "an unreliable or inadequate keyword search," and emphasized the importance of sampling to "test the reliability of the keyword search."[79]

[76] 250 F.R.D. 251, 253 (D. Md. 2008).

[77] *See id.* at 257-59, 262.

[78] *Id.* at 256.

[79] *See id.* at 257 ("The only prudent way to test the reliability of the keyword search is to perform some appropriate sampling of the documents determined to be privileged and those determined not to be in order to arrive at a comfort level that the categories are neither over-inclusive nor under-inclusive.").

In that case, the defendants failed to provide any evidence to support the reliability of their keyword search for privileged documents:

> Defendants, who bear the burden of proving that their conduct was reasonable for purposes of assessing whether they waived attorney-client privilege by producing the 165 documents to the Plaintiff, have failed to provide the court with information regarding: the keywords used; the rationale for their selection; the qualifications of [one of the defendants] and his attorneys to design an effective and reliable search and information retrieval method; whether the search was a simple keyword search, or a more sophisticated one, such as one employing Boolean proximity operators; or whether they analyzed the results of the search to assess its reliability, appropriateness for the task, and the quality of its implementation.[80]

Similarly, in *Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.*, a case involving alleged violations of the Americans with Disabilities Act, Magistrate Judge John Facciola was asked to resolve a dispute about whether the defendant should search backup tapes for information deleted from its computer systems during the course of the litigation.[81] The defendant objected on the basis that the process would be

[80] *Id.* at 259-60.

[81] 242 F.R.D. 139, 145-46 (D.D.C. 2007).

unduly burdensome and expensive.[82] Because potentially relevant information had been deleted after the duty to preserve had arisen and would only exist, if at all, on backup tapes, Judge Facciola ordered the defendant to search the tapes.[83] Further, he ordered the parties to confer on the process by which the backup tapes would be searched, noting that "recent scholarship...argues that concept searching, as opposed to keyword searching, is more efficient and more likely to produce the most comprehensive results."[84] Thus, courts have recognized that the proper use of technology to improve the quality and efficiency of document review is defensible so long as the proponent of the methodology can

[82] *Id.* at 147-48; *see also* FED. R. CIV. P. 26(b)(2)(B) ("A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.").

[83] *See Disability Rights Council*, 242 F.R.D. at 147-48.

[84] *See id.* at 148; *see also* A.N.S.W.E.R. Coal. v. Salazar, 258 F.R.D. 36, 38 (D.D.C. 2009) (ordering parties to confer on "a methodology for [keyword] searches [and] . . . a list of search directives that are likely to result in [relevant] documents"); Am. Family Mut. Ins. Co. v. Gustafson, No. 08-cv-02772-MSK-MJW, 2009 WL 641297, at *3 (D. Colo. Mar. 10, 2009) (ordering parties to "meet, confer, and agree upon the search terms that will be used" to search imaged hard drive).

explain "the [methodology] used; [and] the rationale for [its] selection . . . ."[85]

B. Technology-Assisted Review Furthers the Goal that the Burden and Expense of Discovery be Proportional to the Needs of the Case

Discovery "is defined in the first instance by relevance to the claims and defenses in a case."[86] Though "the bounds of permissible discovery in a civil action are generally regarded as expansive . . .they are not without limits."[87] In addition, a "party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."[88] Indeed, a court *must* limit discovery "if it determines that the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the

[85] *See* Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 259-60 (D. Md. 2008).

[86] Wood v. Capital One Serv., LLC., No. 5:09-CV-1445 (NPM/DEP), 2011 WL 2154279, at *5 (N.D.N.Y Apr. 15, 2011).

[87] *Id.* at *3; *see also* Averett v. Honda of Am. Mfg., Inc., No. 2:07-cv-1167, 2009 WL 799638, at *2 (S.D. Ohio Mar. 24, 2009) ("recent revisions [to the Federal Rules of Civil Procedure] communicate the message that discovery is not unlimited").

[88] FED R. CIV. P. 26(b)(2)(B).

importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."[89] Similarly, Rule 26(c) allows a court to protect a party against "undue burden or expense."[90]

The plaintiff in *Wood v. Capital One Services, LLC* claimed the defendants violated the Federal Debt Collection Practices Act.[91] Prior to filing the motions discussed in the opinion, "the parties engaged in a considerable amount of discovery," including numerous interrogatories and document requests directed to Capital One Services.[92] In response to the interrogatories, the defendant produced 1,500 pages of documents, and proffered a Rule 30(b)(6) witness for two days of deposition on several topics, including the methods the company had used to answer the

[89] FED. R. CIV. P. 26(b)(2)(C)(iii) (emphasis added); *see* Dilley v. Metro. Life Ins. Co., 256 F.R.D. 643, 644 (N.D. Cal. 2009) ("The court must limit discovery if it determines that 'the burden or expense of the proposed discovery outweighs its likely benefit,' considering certain factors including 'the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.'") (quoting FED. R. CIV. P. 26(b)(2)(C)(iii)); *Averett*, 2009 WL 799638, at *2 ("the court always has a duty to limit discovery under Rule 26(b)(2)(C)(i)-(iii)").

[90] *See* FED. R. CIV. P. 26(c).

[91] *See Wood*, 2011 WL 2154279, at *1.

[92] *See id* at *6.

plaintiff's discovery request.[93] In his motion to compel, the plaintiff chose specific search terms and asked that Capital One Services use the terms to search the e-mail accounts of forty-one employees.[94] Capital One Services established that "the likely volume to be generated by the requested searches, after elimination of duplicates, is as high as 1,753,537 documents, costing in excess of $5,000,000 to process, review, and produce."[95]

The court denied the plaintiff's motion and granted Capital One Services's motion for protective order, relying on Rule 26(b)(2)(C)(iii), which, the court stated, "serves to protect a party against having to produce voluminous documents of questionable relevance."[96] The court found that the plaintiff had failed to "shed significant light on the potential relevance of the documents sought," while the defendants had "clearly identified an inordinate burden associated with responding to the

[93] *See id.*

[94] *See id.* at *7.

[95] *See id.* at *8.

[96] *See* Wood v. Capital One Serv., LLC., No. 5:09-CV-1445 (NPM/DEP), 2011 WL 2154279, at *3 (N.D.N.Y Apr. 15, 2011).

request."[97] As a result, the "rule of proportionality" dictated that the plaintiff's motion be denied "without prejudice to his right to renew the motion to compel in the event he is willing to underwrite the expense associated with any such search."[98]

A similar result was obtained in *Daugherty v. Murphy*.[99] In that class action case alleging violations of due process and federal and state law in the handling of Medicaid claims, the parties brought before the court a dispute over the defendants' production of extracts from a certain computer system.[100] The defendants moved for a protective order and the plaintiffs filed a motion to compel, each asking the court to order production of the data extracts outlined in their competing proposals.[101] The court first outlined the law governing the opposing motions:

> While the scope of discovery is broad under Rule 26, that rule confers broad powers on the court to regulate or deny discovery even though the materials sought are otherwise

[97] *See id.* at *8-9.

[98] *See id.* at *7, *9.

[99] No. 1:06-cv-0878-SEB-DML, 2010 WL 4877720, at *1 (S.D. Ind. Nov. 23, 2010).

[100] *Id.* at *1-3.

[101] *Id.* at *3-4.

> within the scope of Rule 26(b)(1). Rule 26(b) provides that the scope of discovery may be 'limited by court order,' and Rule 26(b)(2)(C) requires the court to limit discovery if the court determines that the burden or expense of the discovery on one party outweighs its likely benefit to the other party, after considering 'the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.'[102]

According to the defendants, their proposed data extract would cost $36,000, of which the defendants had already spent $16,000.[103] In contrast, plaintiffs' proposed data extract would cost nearly $100,000.[104] Although the plaintiffs argued that the cost was exaggerated, the court disagreed:

> When the court compares the heavy time and expense to create the data extracts that the plaintiffs originally proposed (and assuming that their new proposal will request a similar number of extracts) with the benefits of that discovery and its importance to the issues to be resolved in this case, the plaintiffs come up short. The plaintiffs have not provided a clear explanation of how the data from [the defendants'] extracts is insufficient to allow the plaintiffs to present evidence of the proper scope of

[102] *Id.* at *4; FED. R. CIV. P. 26(b)(2)(C)(iii).

[103] Daugherty v. Murphy, No. 1:06-cv-0878-SEB-DML, 2010 WL 4877720, at *5 (S.D. Ind. Nov. 23, 2010).

[104] *Id.*

> Class 1 and/or the proper injunctive relief for Class 1. Simply asserting that their expert would like to have it is not enough.[105]

Further, the court denied the plaintiffs' request to allow their expert to design new data extracts because the plaintiffs failed to "convince the court that the burdens and benefits of data extracts should be measured dramatically differently."[106]

IV. DEFENDANT'S TECHNOLOGY-ASSISTED REVIEW WAS DEFENSIBLE AND PROPORTIONAL TO THE NEEDS OF THE LITIGATION

Defendant deployed technology-assisted review in a reasonable manner in this case because: Defendant described the process in sufficient detail; Defendant balanced privilege against pressing time deadlines and the requirement to cooperate; and Defendant has implemented sufficient safeguards and quality control mechanisms to meet the standards set forth in the Rules and the case law interpreting the Rules.[107] Defendant should

[105] *Id.* at *7.

[106] *Id.* at *8.

[107] As discussed at the start of this article, a detailed recitation of the necessary safeguards, Judge Peck's "careful thought, quality control, testing and cooperation" is beyond the scope of this article. William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 134 (S.D.N.Y. 2009); *see supra* Part I.

not be sanctioned for using technology-assisted review and avoiding the human review of documents, less than 3% of which may be relevant to this case.[108]

Technologies like de-duplication and keyword searching have become acceptable tools to limit the volume of documents reviewed by humans in the discovery process.[109] Technology-assisted review is yet another reasonable and defensible method of reducing the volume of documents designated for human review prior to production.[110]

Defendant's use of technology-assisted review in this case is reasonable because Defendant has balanced the technology's limitations with reasonable safeguards. Defendant reviewed a statistically significant sample of the 800,000 documents that the technology identified as non-responsive after it was trained by human reviewers. That sampling has yielded a 95% confidence level that less than 3% of the documents are

[108] *See supra* Part I.

[109] *See* John Markoff, *Armies of Expensive Lawyers Replaced by Cheaper Software*, N.Y. TIMES, Mar. 4, 2011, http://www.nytimes.com/2011/03/05/science/05legal.html?pagewanted=all.

[110] *See id.*

relevant.[111] The cost of paying attorneys to review 800,000 additional documents to find 24,000 potentially relevant documents is overly burdensome and disproportionate under the Rules.[112]

Plaintiff inaccurately describes technology-assisted review as a technology and a process that *replaces* contract attorneys and non-attorney review professionals who currently perform document review.[113] *Replacement* implies a "silver bullet" solution that over-simplifies the discovery process and ignores the role that attorney reviewers have played in this case.[114] Plaintiff ignores a critical fact: Defendant has not *replaced* human lawyers. Defendant has instead incorporated technology-assisted review into a process that has remained under the control of counsel. Human reviewers designed and executed a document review plan that leveraged technology to meet the requirements of defensibility and proportionality. Humans reviewed the documents that gave the

[111] *See supra* Part I.

[112] *See* FED. R. CIV. P. 26(b)(2)(C)(iii).

[113] *See* Markoff, *supra* note 109.

[114] *See Benefits and Risks of Predictive Coding*, EXECUTIVE COUNS. INST., http://www.executivecounselinstitute.com/e-discovery/benefits-and-risks-of-predictive-coding (last visited Feb. 2, 2012).

technology the input to predictively code the data set, the documents that the technology-assisted review tool identified as responsive or privileged, and a statistically significant sample of the documents identified as non-responsive as well. Finally, information from the documents, the information counsel is using to develop trial themes, has been of necessity transferred to the lawyers who are preparing to try the case. The better question is whether attorneys are using technology-assisted review in a defensible process, leveraging the right expertise and with appropriate safeguards to improve certain phases of the discovery process, not whether technology is *replacing* lawyers. The reasonableness of deploying technology in electronic discovery with appropriate safeguards has already been answered affirmatively for technologies like de-duplication and keyword searching.[115] As courts have ruled in prior cases like *Victor Stanley*, *O'Keefe*, and *In re Seroquel*, using technology to assist attorneys in the discovery process is defensible as long as it is implemented with sufficient safeguards and documentation.[116]

[115] *Id.*

[116] *See, e g.*, FED. R. EVID. 502 Committee Note ("Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening

Defendant has met its burden of establishing sufficient safeguards for using technology-assisted review and comparing such safeguards it to its use of technology in this case.

V. CONCLUSION OF HYPOTHETICAL BRIEF

The Court should deny Plaintiff's motion to compel, and grant Defendant's motion for protective order because the technology-assisted was reasonable, defensible, and the burden and expense of Plaintiff's requested relief would far outweigh the likely benefit.

III. ARTICLE CONCLUSION

[7] Lawyers do not eliminate risk; we manage risk. Increasingly, attorneys must develop a better understanding of the technology our clients use to generate potential evidence, and the technology available to sort through voluminous data to find necessary information. Trying cases still means developing trial themes and presenting evidence to support the elements of claims and defenses. That remains a human process. The process we use to identify, preserve, review and produce information in discovery is still evaluated based on a reasonableness standard. Reasonableness is still evaluated based on the "reasonable person" standard, not the "reasonable computer."

[8] We cannot say and do not attempt to forecast how any given judge would rule on this brief. What we can say is that given what we know

for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure."); United States v. O'Keefe, 537 F. Supp. 2d. 14, 18, 23-24 (D.D.C. 2008); Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 259 (D. Md. 2008); *In re* Seroquel, 244 F.R.D. 650, 663 (M.D. Fla. 2007).

about the current state of the federal rules and case law, taken in conjunction with statements by thought leaders and leading members of the judiciary, technology-assisted review, when implemented with the right expertise and sufficient safeguards, can be reliable when used in conjunction with the right process.

[9] We can say that the analysis depends on the facts of each case. Those facts flow directly from a new reality lawyers must accept: in addition to a thorough understanding of a developing body of case law, attorneys can no longer hide their heads in the sand and ignore technology. They must actively pursue an understanding of the technology their clients use to run their business, and the technology that preserves and re-formats data for use in court or staff their litigation team with lawyers that do understand it. Technology and electronic discovery will always present challenges, but lawyers must respond to the challenge by understanding, or finding someone who understands, how tools like technology-assisted review work. Heeding the "wake-up call" and developing expertise in litigation technologies and the processes to implement them will allow lawyers to change the way we think of electronic discovery – electronic discovery should be a solution, not a problem.

Applying Electronic Discovery in an Arbitrational Setting | Litigation News | ABA Section of LitigationAmerican Bar Association

Alternative Dispute Resolution»

By Michael Swarz

For most attorneys, embarking into the world of electronic discovery (e-discovery) and confronting the costs associated with it represent the single biggest challenge—and headache—in conducting litigation or alternative dispute resolution. The recent proliferation of federal and state laws dealing with electronically stored information (ESI) has exacerbated these hurdles. Against this backdrop of growing legislation and case law, counsel engaged in arbitration are tasked with making sense of how ESI will be approached and harnessed to its most effective use and presentation in an alternative dispute resolution setting without imposing all the courtroom expectations and sensibilities inherent in the traditional litigation setting.

Common Hurdles
For the past decade, ESI has surfaced as the foremost and most popular medium for data communication and storage. Although ESI is perhaps most recognizably represented by electronic mail messages, it may be found in a myriad of other formats and comprises enormous amounts of digital data. Some experts estimate that as many as 161 billion gigabytes of digital data were created solely in the year 2007.[1] A paper document containing an equivalent amount of information would stretch over 92 million miles!

To make matters even more complex, the sheer size of ESI is not the sole issue that must be confronted. After all, digital data can just as easily be duplicated and moved across an array of network systems with a few simple commands. As a result, it has become increasingly complicated to pinpoint the sources and locations of particular pieces of ESI. Indeed, the ESI sleuth will need to navigate through complicated servers, email systems, detachable media, voicemail, and even iPhones, to name a few. Each of these resources may contain information that is pertinent to legal discovery.

In contemplating and integrating ESI into an admissible form with a proper evidentiary foundation, counsel begin to confront an additional series of hurdles—namely, increased expenses and added risk. The combination of these two, and the fear of the unknown that they engender for the uninitiated, has led numerous cases to mistakenly settle prematurely. The arbitration attorney must therefore ensure that expense and risk are eliminated or minimized in tackling these evidentiary legal issues outside the courtroom setting.

Whither Arbitration?
At its inception, arbitration was articulated as a relatively relaxed alternative to complex litigation. The concept was thus born of the idea of giving both sides a straightforward, swift, and cost-effective arena to sort out their differences. Although the myriad rules of evidence generally did not apply, the arbitrator was granted authority to demand production of data, both electronic and not. Parties, however, did not believe that the arbitrator's mandate was robust enough to accomplish complete discovery. This understanding has transformed arbitration into an expensive and lengthy expedition in which each side is left with the often unsatisfactory results of, at best, a partial discovery process.

Nonetheless, arbitration may be favored by parties because, if nothing else, it is still viewed as being less costly than traditional litigation. This perception is based on the greater latitude granted by state and federal courts for expansive and expensive discovery requests in response to motions to compel discovery. In litigation, this outcome is particularly discouraging when strict deadlines

must be confronted and enormous amounts of ESI must be accounted for as part of the discovery process. Thus, arbitration, as flawed as it may be, is preferable from a cost-savings perspective because it allows for additional limitations as to the scope of ESI that will be admitted into evidence.

There are other benefits as well. Arbitration offers a secure, proven forum for airing and managing controversial pre-hearing dilemmas. In addition, the traditional rules of evidence do not fully govern in an arbitrational setting, and the perceived procedural shackles of litigation are therefore less restrictive in arbitration. These advantages dovetail quite well when supervising large-scale and specific ESI requisites in an arbitrational setting.

When Worlds Collide

Many have been baffled as to how e-discovery should be conducted in practical terms once ESI becomes pertinent to an arbitration. This is perhaps due to the enormous amount of possibly discoverable ESI and the expenses associated with producing it to the other side. In these and other arbitrational settings, the arbitrator should take the lead by setting up a case management conference to be attended by both parties. The conference should be of substance in terms of time and content and be attended, preferably, by the parties in person. In addition, it is recommended that the parties' information technology representatives be present as well to review, explain, and query the ESI in question.

During the case management conference, the arbitrator should mandate a litigation hold on all pieces of relevant ESI. If the parties have previously agreed to a litigation hold, the terms of the litigation hold should be scrutinized at the case management conference for all permutations of ESI along with any pertinent retention or deletion timetables to ensure that no ESI is manipulated. In addition to a methodical march through the many ESI options that may exist, including third-party and legacy systems, it is recommended that the parties review at this time the production formats and search terms to be employed thereafter.

In intricate cases, arbitrators have become accustomed to ordering sampling as a form of search term verification. Sampling can be imposed by an arbitrator when the parties may be dealing with an enormous number of ESI search terms. In doing so, the arbitrator crafts less invasive and more limited ESI searches to evaluate the helpfulness of repeating the partial sample searches more extensively. While this method may not yield consistent results, it is a practical substitute to sanctioning an indiscriminate search, which would be likely to increase the time and costs associated with interrogating the ESI.

Conclusion

E-discovery and arbitration need not be incompatible. Indeed, the fact that arbitration is the forum for resolving the parties' dispute can play a vital role in determining a party's ESI interests in a manner that is both swift and equitable. Consequently, arbitrators must be familiar with the workings of ESI to better manage the e-discovery likely to appear in their next case, so that the perceived advantages of arbitration are not lost in the process of handling ESI in the arbitrational setting.

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End Notes

1. Brian Bergstein, *So Much Data, Relatively Little Space*, ASSOCIATED PRESS, www.msnbc.msn.com/id/17472946/

POTENTIAL APPROACHES AND MATTERS TO CONSIDER IN ADDRESSING ISSUES AS TO ELECTRONIC DISCOVERY IN ARBITRATION

Charles J. Moxley, Jr.

Following are some potential approaches and matters for arbitrators to consider in addressing issues as to electronic discovery in arbitrations, subject to the needs of the particular case:[1]

- Where necessary, address issues as to appropriate "litigation holds" as to ESI;
- Generally require "meet and confers" concerning ESI, as well as discovery generally, when it appears there will be issues in this regard;
- Be cognizant of disparities as to technical sophistication between competing parties/counsel and consider how, if at all, to address same;
- Importance of generally fostering/requiring a spirit of cooperation among counsel concerning ESI, as well as concerning discovery generally;
- Requiring in appropriate cases that counsel be familiar at an early discovery conference with their client's information technology, sources of ESI, preservation practices, and the anticipated scope and form of ESI to be produced;
- Requiring in appropriate cases that requests for ESI identify with particularity the type of ESI sought, the underlying subject matter of the ESI requested, and the relevant time period for which ESI discovery is to be provided – and that objections to requests for ESI plainly identify the scope and limitation of any responsive production;
- Working with counsel, where appropriate, to determine and formulate appropriate search terms;
- Working with counsel, where appropriate, to determine the appropriate number of searches to be conducted;
- Working with counsel, where appropriate, to determine the appropriate time frames for electronic searches;
- Working with counsel, where appropriate, to figure out and determine the appropriate number of custodians and the appropriate files of designated custodians to be searched;
- Addressing issues as to the numbering or other identification of ESI to be produced;
- Addressing issues as to the form of identification and production of attachments to e-mails to be produced and the like;

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[1] There will be cases where one does not really need to do much as to ESI and will likely apply few, if any, of these approaches – and cases where, if counsel and/or the arbitrator(s) do not cause various of these approaches to be considered and applied, the parties may end up spending very substantial amounts of money on ESI. While in some cases, such a level of expense may be warranted, there will be many cases — and this is where these approaches can perhaps be most helpful — where the issues are complicated and the parties sophisticated, but the amounts of money involved do not justify the expense of full ESI discovery. In such cases, alert and savvy counsel and arbitrators need to be proactive to make sure reasonable parameters are in place.

- Evaluation of hit counts *vis-à-vis* proposed search terms, custodians, files, and the like;
- Provision for test searches based on proposed search terms, custodians, etc.;
- Overall objective of having the big ESI searches only have to be conducted once;
- The advantages and disadvantages of predictive coding;
- Format of production;
- metadata to be provided;
- Requiring in appropriate cases that production of electronic documents need only be from sources used in the ordinary course of business;
- Requiring in appropriate cases that there is no need to make production of electronic materials from back-up servers, tapes or other media, absent compelling need;
- Requiring in appropriate cases that, absent the showing of compelling need, the production of electronic materials need only be on the basis of generally available technology in a searchable format usable to the party receiving the e-documents and convenient and economical for the producing party;
- Requiring in appropriate cases that counsel agree on the form of production of ESI for all parties prior to producing ESI;
- Need for developing procedures for identifying privileged documents in collecting ESI and for clawbacks where appropriate;
- Requiring in appropriate cases that ESI to be produced first be "de-duped;"
- Considering cost-shifting when the costs and burdens of e-discovery are disproportionate to the nature and/or gravity of the dispute or to the relevance of the materials requested;
- Establishing, where appropriate, that there is no need to produce ESI that is already in the possession of the other side;
- Exploration of other and less expensive sources of the information contained in the ESI requested in the particular case;
- Requiring the requesting party to show the need for the ESI;
- Requiring that a party seeking metadata demonstrate that the relevance and materiality of the requested metadata outweighs the costs and burdens of producing same, unless the documents will otherwise be produced in a form that includes the requested metadata;
- Consideration of issues as to fairness and equality of treatment concerning ESI production, particularly where most or all the ESI is on one side;
- Requiring cost estimates from counsel with respect to alternate approaches to e-discovery in a particular case;
- Requiring, where potentially helpful, that each side have its ESI expert participate in discovery conference calls concerning e-discovery;
- The usefulness, by analogy, of certain parameters developed by various courts concerning the control of e-discovery;
- The overriding principle of proportionality and the need to consider it in defining the amount of e-discovery to be permitted/required;
- The compelling need to proactively engage with counsel as to the level, extent, and potential costs of various approaches to e-discovery in the particular case, in order to avoid the situation where counsel who are experienced in litigation but

not arbitration proceed with litigation-level e-discovery, without consideration of cost, efficiency, and proportionality;

- The potential for the tribunal to appoint its own ESI expert in an appropriate case;
- The usefulness of addressing ESI issues in the preliminary hearing and, in appropriate cases, establishing a schedule for counsel to meet and confer as to ESI and report to the arbitrator(s) as to same;
- The possibility, in appropriate cases, of parties making their respective electronic files available to the other for searching;
- The need not only to engage this issue early on, but to monitor it throughout the case;
- Alternatives to e-discovery in an appropriate case, including the use of such approaches as witness statements, particularizations, representations, and even depositions;
- Dealing with issues as to sanctions for spoliation or the intentional or negligent destruction or failure to preserve relevant ESI in light of the requirements of applicable law and of the applicable arbitration rules;
- Addressing issues of concern with respect to ESI requested of non-parties through subpoenas and the like;
- Trying to identify and address ESI issues before they become a problem and, most importantly, before they become the cause of substantial expense and delay; and
- Addressing any further issues counsel or the parties may have concerning ESI.

Useful Sources as to ESI

Following are some helpful sources that suggest best practices for addressing ESI issues, including some of the above approaches:

- New York State Bar Association (Dispute Resolution Section), (1) Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic Commercial Arbitrations and (2) Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Commercial Arbitrations, available at http://old.nysba.org/Content/NavigationMenu/Publications/GuidelinesforArbitration/DR_guidelines_booklet_proof_10-24-11.pdf
- New York State Bar Association (ComFed Section), Best Practices in E-Discovery in New York State and Federal Courts, available at http://www.nysba.org/workarea/DownloadAsset.aspx?id=523
- Chartered Institute of Arbitrators, Protocol for E-Disclosure in Arbitration, available at http://www.ciarb.org/information-and-resources/E-Discolusure%20in%20Arbitration.pdf

BNA, INC.

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REPORT

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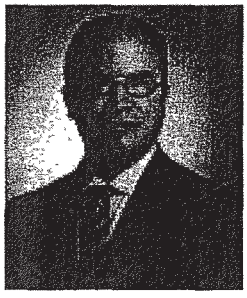
The rising tide of globalization has meant that, more frequently than ever before, multinational corporations must navigate between U.S. litigation discovery demands seeking the production of documents and information located in the European Union and EU data protection requirements. The authors examine the arguments available in U.S. litigation for resolving conflicting laws, and suggest an approach they say lawyers and business people can take to try to navigate through the rocky shoals of U.S. discovery obligations (the proverbial "rock") and EU data protection authorities (the proverbial "hard place"). Notwithstanding conflicting obligations, there are means today to navigate this legal morass, according to the authors, who suggest a way forward.

Mind the Gap: U.S. Discovery Demands versus EU Data Protection



BY KARIN RETZER AND MICHAEL MILLER

I. THE SOURCES OF THE CONFLICTING OBLIGATIONS

Complying with U.S. discovery demands can involve enormous effort and expense, even in the best of circumstances But the discovery process can become even more difficult when compliance with U.S. discovery demands raises potentially conflicting legal obligations in non-U S. jurisdictions. One way in which these conflicting demands might arise is when EU data protection laws prohibit the discovery of the requested information. On the one hand, U.S. courts can seek to compel litigants and third-party witnesses to produce documents and other information, and impose serious sanctions for failure to do so. On the other hand, data protection authorities in EU Member States[1] can view the production of those documents and other information, whether court ordered or not, as itself vio-

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lating EU data protection rules, and can impose penalties for taking the steps necessary to comply with those U.S. discovery orders. Below we discuss these conflicting demands, and suggest a constructive way to reconcile them. A useful place to start this discussion is at the roots of the conflicting demands imposed by the different legal regimes.

A. Different Approaches to Data Protection

One of the roots of the conflict that can arise in U.S.-EU cross-border discovery is the substantially different notions of "personal data" adopted under U.S. and EU law, and the different protections accorded such data. The EU takes an omnibus approach—protecting all personal information, while the United States operates on a harms-based approach—protecting only that information that is particularly sensitive or which, if inappropriately used or disclosed, can cause substantial harm to individuals. It is critical to understand these differences in any dialogue on cross-border discovery.

The EU Member States[2] generally embrace a broad view of "personal data." The 1995 Data Protection Directive[3] ("Directive"), as implemented by the Member States, protects individuals against the unauthorized processing of personal data, which is defined as any information relating to an identified or identifiable individual. This includes e-mails or documents created in the workplace such as work related e-mails, memoranda, and reports. The concept of "processing" is broadly defined as *"any operation or set of operations,"* whether manual or automated, including, but not limited to, *"collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction."*[4]

In the European Union, regulators view any processing of personal data with suspicion. Processing personal data is prohibited unless there is a specific statutory authorization, or consent from the individuals concerned. Individuals must also receive detailed notice regarding the personal data that are processed. Personal data may only be collected for a specific, explicit purpose, and may not be further processed in a manner incompatible with that original purpose. Surprisingly to many U.S. lawyers and business people, all of these rules apply equally to documents or information created in the context of employment. These rules were not created to block U.S. discovery or to influence U.S. policy decisions. Instead, they represent EU-based policy choices, and are of equally restrictive effect in the European Union itself.

The United States, by contrast, takes a more narrow, sector-by-sector approach. Unless there is applicable legislation that prevents such actions, an organization remains free to collect, use, transfer, and retain personal data as it deems necessary. Unlike the rules in the European Union, processing of personal information in the United States is permitted unless explicitly prohibited. The concepts of "personal data" and "processing" are also quite different. In the United States, the term "personal information" is generally restricted to specific types of information that are considered particularly sensitive, such as personal medical information, Social Security numbers, information relating to children, and financial information. The focus is on protecting only certain types of personal information. Other information (such as information created in the context of employment including e-mails and other documents) is not generally covered by U.S. data protection rules. Thus, courts in the United States—unless educated by the lawyers in the case—may have a hard time weighing discovery demands against EU notions of personal data privacy if for no other reason than that EU notions of personal data privacy are truly foreign to them.

B. Different Approaches to Gathering Evidence

The other major root of the conflict stems from the varied approaches to litigation discovery in the United States and European Union. EU jurisdictions (especially civil law jurisdictions such as those in Continental Europe, but also to some extent common law jurisdictions like the United Kingdom) generally limit disclosure of evidence to what is offered by the parties as evidence in support of the case, and impose limited affirmative disclosure obligations. In these jurisdictions, the ability of one party to a litigation to require the other party to produce broad categories of documents and information is very limited; the ability to require a *non-party* to disclose such documents and information even more so. Because EU authorities often, as a practical matter, can view U.S. discovery obligations as unnecessary and unreasonable, they have a hard time weighing them against EU privacy laws.

The U.S. Federal Rules of Civil Procedure ("FRCP"), by contrast, impose on litigating parties (and non-parties when subpoenaed) broad and substantial obligations to retain, search for, and produce documents and information requested by the other party.[5] U.S. discovery gives parties the right to seek discovery relating

[1] The 27 Member States of the European Union are: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom (collectively, the "Member States")

[2] The EEA member states Iceland, Liechtenstein, and Norway are bound to implement most EU legislation—including the 1995 Data Protection Directive—under Article 7 of the European Economic Area (EEA) Agreement.

[3] Directive 95/46/EC of October 24, 1995 on the protection of individuals with regard to processing of personal data and on free movement of such data [1995] OJ L 281/31. Article 2 of the Directive defines "personal data" as *"any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity"*

[4] Article 2(b) of the Directive.

[5] State procedural laws, which apply to cases brought in the courts of an individual U.S. state rather than in a federal court, are similar A comparable set of laws extends this obligation to preserve and produce evidence to U.S.-based administrative and regulatory proceedings. For example, the U.S. Securities and Exchange Commission ("SEC") holds the authority to investigate U.S. companies for compliance with federal securities laws, and the agency may invoke its broad subpoena power to compel the prompt production of records in accordance with its investigation Failure to preserve or produce in-

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to: (1) any matter, not privileged, that is *relevant* to the claim or defense of any party; and (2) all information "reasonably calculated to lead to the discovery of admissible evidence."[6] U.S. courts apply these standards liberally, and generally resolve any doubt in favor of permitting discovery. As one federal district court put it, in language that is typical of the mindset of U.S. judges (especially judges at the trial-court level), this broad construction "is consonant with American civil process which puts a premium on disclosure of facts to ascertain the truth as the means of resolving disputes."[7] This is why major U.S. litigation can involve the production of millions of pages of documents. It is also why an entity might find itself subject to a discovery demand that an EU data protection authority is likely to view as irrelevant to the underlying litigation (and thus, from the EU perspective, excessive and unnecessarily in breach of EU data protection laws).

Two particular aspects of U.S. discovery rules increase the potential conflict between U.S. discovery demands and EU data protection laws. The first is that the physical location of a document is not dispositive or even particularly relevant. Rule 34 of the Federal Rules of Civil Procedure provides that discovery may be had of documents that are in the "possession, custody or control" of a party. The notion of " '[c]ontrol' has been construed broadly by the courts as the legal right, authority, or practical ability to obtain the materials sought upon demand."[8] So, if an entity subject to U.S. jurisdiction has possession, custody, or control of documents or information physically located in the EU, those documents are just as much subject to U.S. discovery obligations as documents actually physically located in the United States.

The second aspect giving rise to potential conflict relates to the role of foreign parents, subsidiaries, or affiliates of U.S. entities. The test in these circumstances focuses on the U.S. entity's control of the foreign affiliate's documents. Where the U.S. entity is the parent corporation, "the determination of control turns upon whether the intracorporate relationship establishes some legal right, authority, or ability to obtain the requested documents on demand. Evidence considered by the courts include the degree of ownership and control exercised by the party over the subsidiary, a showing that the two entities operated as one, demonstrated access to documents in the ordinary course of business, and an agency relationship."[9] Even where the U.S. entity is not the parent corporation, U.S. courts can require the production of documents and information from parent companies or affiliates located abroad. Again, the test focuses on the concept of "control" over those foreign-based documents and information. The factors used to evaluate control in these situations "include (a) commonality of ownership, (b) exchange or intermingling of directors, officers or employees of the two corporations, (c) exchange of documents between the corporations in the ordinary course of business, (d) any benefit or involvement by the non-party corporation in the transaction, and (e) involvement of the non-party corporation in the litigation."[10]

The U.S. entity that is subject to the discovery request cannot simply ignore the request for "foreign" documents. Sanctions for failing to comply with discovery in United States litigation are severe, and include monetary sanctions, evidentiary sanctions such as an adverse inference, or termination of the proceedings in favor of the requesting party. There has been an increase in "adverse inference" sanctions imposed by the courts recently, which means that the courts informed the jury of the fact that the company lost or failed to produce certain relevant documents, and directed jurors to assume that whatever documents were lost contained evidence harmful to the company.

II. RESPONSES TO BROAD DISCOVERY—THE BACKGROUND TO THE CURRENT DEBATE

EU data protection laws are not the first instances of non-U.S. jurisdictions adopting laws that can affect the U.S. discovery process. Many of the prior examples of these sorts of laws began in significant part as a way to deal with what was perceived in non-U.S. jurisdictions as overwhelming U.S. discovery processes or interventionist U.S. antitrust and other litigation.[11] As we argue below, however, EU data protection laws are different, in that they were adopted to achieve EU public policy objectives separate and apart from any concern over U.S. discovery or the extraterritorial application of substantive U.S. law. U.S. courts' perception of the initial motivation for these kinds of statutes, however, continues to color the legal standard that courts will apply to conflicts between U.S. discovery obligations and EU data protection laws.

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formation may result in prosecution for criminal obstruction of justice.

[6] Fed R. Civ. P. 26(b)(1)

[7] *Uniden Am. Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 306 (M.D.N.C. 1998)

[8] *SEC v. Credit Bancorp*, 194 F.R.D. 469 (S.D.N.Y. 2000).

[9] *Camden Iron & Metal Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438, 442 (D.N.J. 1991); *see also In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1152 (N.D. Ill. 1979) (corporate parent held responsible for producing documents of wholly owned subsidiaries); *Am. Rock Salt Co. v. Norfolk S. Corp.*, 228 F.R.D. 426, 458-59 (W.D.N.Y. 2005) (defendants had "both legal and practical control" over the documents because: (1) defendants had access to the subsidiary's records in the ordinary course of business; (2) the defendant had a 58 percent ownership interest, and 50 percent stock interest, in the subsidiary; and (3) the subsidiary's website stated that the corporate entity "operates as an agent for its owners"); *Twentieth Century Fox Film Corp. v. Marvel Enters.*, 2002 U.S. Dist. LEXIS 14682, at *12 (S.D.N.Y. Aug. 8, 2002) (defendant had sufficient control over entity it "owns and operates" to compel production); *Dietrich v. Bauer*, 198 F.R.D. 397, 401 (S.D.N.Y. 2001) "[i]t is not always clear whether the decisions arising in the parent-subsidiary context are premised on a strict 'legal right' standard or . . . on a somewhat more flexible 'pragmatic approach.' ". *See generally*, C. Wright & A. Miller, 8 Federal Practice & Procedure 2d § 2210 (2006), *Strom v. Am. Honda Motor Co.*, 423 N.E.2d 1137, 1141-1145 (Mass. 1996) (reviewing the federal case law).

[10] *Uniden Am. Corp. v. Ericsson Inc.*, 181 F.R.D. at 306. In *Uniden*, the court concluded that the defendant had sufficient control over its sister corporation to compel overseas documents in the possession of the sister corporation.

[11] *See, e.g., Westinghouse Electric Corp. v. Rio Algom Ltd.*, 480 F. Supp. 1138 (N.D. Ill. 1979) (describing blocking statutes in Canada, Australia, and South Africa as having been enacted "for the express purpose of frustrating the jurisdiction of the United States courts over the activities of the alleged international uranium cartel").

A. The International Response: Blocking Statutes

One method that has been used to thwart the efforts of U.S. litigators and courts to obtain evidence under the FRCP is by enacting "blocking statutes" that penalize foreign citizens for complying with extraterritorial discovery requests.

For example, the French blocking statute, codified as Law No. 80538 of 16 July 1980, currently prohibits any French resident or national, as well as French legal entities and their employees, legal officers, or representatives, from disclosing, in any form, economic, commercial and technical documents and information to foreign legal entities and natural persons, except where the Hague Convention requires such disclosure.[12] This legislation also provides for potential criminal sanctions including imprisonment for compliance with discovery requests issued outside of the Hague Convention. A French witness in receipt of a discovery request issued pursuant to the FRCP (as opposed to the Convention) must inform French authorities and will usually contest its applicability on the ground that compliance will cause the witness to violate French law. The French witness will therefore ask the court to require the U.S litigants to utilize the Convention. U.S. courts have been very reluctant to accept such requests. The trend has been to refuse to order application of the Convention and instead permit U.S. litigants to seek to obtain foreign evidence using the FRCP, notwithstanding the consequences under the blocking statute if the French witness complies with the discovery request. In justifying their position, some U.S. courts have stated that the French blocking statute is "overly broad and vague and need not be given the same deference as a substantive rule of law." Other U.S. courts have ruled, more moderately, that the "protection of United States Citizens from harmful foreign products and compensation for injuries caused by such products [i.e., aircrafts]," was stronger than France's interest in protecting its citizens "from intrusive foreign discovery procedures." The bottom line is that U.S. litigators have perceived that U.S. courts will order discovery without regard to the French blocking statute, and this has led many litigants to ignore these blocking statutes altogether.[13]

The conflicts created by the coexistence of broad U.S. discovery and the more restrictive procedures in most EU countries contributed to the ratification of the Hague Evidence Convention. The Convention is a multilateral agreement that currently stands between over 40 nations; it seeks to facilitate a uniform procedure for obtaining evidence located abroad. The Convention generally provides two general methods for obtaining evidence:

- The U S. court issues letters of request, which are sent to the "Central Authority" of the jurisdiction where the discovery is located. The Central Authority is then responsible for transmitting the request to the appropriate judicial body in that jurisdiction for a response. A letter of request should typically be in the language of the Central Authority or accompanied by a translation. Execution of a letter of request is then subject to the local laws of the particular jurisdiction. Execution of a valid letter of request (i e , one that complies with the Convention) may only be refused in instances where the judiciary considers that its sovereignty or security would be prejudiced by execution of the letter

- Alternatively, where the parties consent, the Convention provides for evidence gathering abroad by U S. diplomatic officers or consular agents and appointed commissioners. These methods of gathering (oral) evidence are limited in three key respects: First, unlike letters of request, U.S diplomatic officers, consular agents, and appointed commissioners cannot compel the production of evidence. Second, these methods cannot be used to obtain documents located abroad and can be used only to take deposition testimony. Third, contracting states have the prerogative to declare that U.S diplomatic officers, consular agents, and appointed commissioners must first obtain permission from the foreign state prior to the deposition.

Many Convention signatory countries have rejected the prototypical "no holds barred," "no stone unturned" form of pre-trial discovery common in U.S. litigation. In particular, Article 23 of the Convention provides that contracting states are permitted "at the time of signature, ratification or accession" to declare that they will not execute letters of request issued in order to obtain pre-trial discovery of documents. So far, over 30 of the contracting nations to the Convention, including China, Mexico, France, and the United Kingdom, have filed limited reservations under Article 23 prohibiting some degree of pre-trial document discovery. Some nations, such as Argentina, Australia, Denmark, Germany, Italy, Luxembourg, Monaco, Poland, Portugal, South Africa, Spain, and Sweden, have filed reservations under Article 23 that essentially prohibit all pre-trial document discovery.

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[12] A translation of the French blocking statute reads as follows: *Article 1. Except when international treaties or agreements provide otherwise, no natural person of French nationality or habitually residing on French territory, nor any officer, representative, agent or employee of any legal entity having therein its principal office or establishment, may in writing, orally or in any other form, transmit, no matter where, to foreign public authorities documents or information of an economic, commercial, industrial, financial or technical nature, the communication of which would threaten the sovereignty, security, or essential economic interests of France or public order, as defined by government authorities to the extent deemed necessary*

Article 1bis. Except when international treaties or agreements and laws and regulations in force provide otherwise, no person may request, seek to obtain or transmit, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature, intended for the establishment of evidence in connection with pending or prospective foreign judicial or administrative proceedings.

[13] In fact, however, the statute cannot simply be ignored. In 2010 the French Supreme Court confirmed a Paris Court of Appeal Decision which ordered a French attorney to pay to a French witness €10,000 in damages for violation of Article 1bis of the blocking statute. The California Insurance Commissioner brought the suit against French insurance company MAAF regarding the takeover of U.S. insurance company Executive Life. The U.S. lawyer handling the case tried to obtain information from a former member of the MAAF board about how the board made decisions. The information was provided by a French attorney. The French court ruled, in rather broad terms, that the French attorney was liable under the blocking statute because the information sought and produced was of an economic nature and intended to establish evidence.

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B. Balancing Tests Applied in the U.S. Courts

U.S. courts have frequently confronted the conflict between discovery obligations and blocking statutes. However, there is no single test that is consistently used in all U.S. courts. The issue appears to be addressed largely on a case-by-case, court-by-court basis; this is most striking from an EU perspective.

Discovery disputes do reach the appellate or U.S. Supreme Court level, but such appellate cases represent only the tip the iceberg: individual judges deal with many work-a-day discovery cases, and issue decisions at the trial level that tend to be more sympathetic to parties seeking to take the discovery. Even when cases get to the Supreme Court or appellate levels, it is up to the lower courts to apply the often ambiguous standards that are created. We find generally that these trial-level courts are more likely to impose a broader application of their own discovery authority, due to their focus on day-to-day case management issues, as opposed to the wider theoretical issues of comity and international relations.[14]

No single standard governs foreign discovery in U S. courts. However, many U S. federal courts of appeal recognize a five-factor balancing test of the exercise of their enforcement jurisdiction, derived largely from the Restatement (Third) of Foreign Relations law of the United States. Under that test, courts consider the following five factors:

- The importance of the requested documents or other information to the litigation;
- The degree of specificity of the request;
- Whether the information originated in the U.S ;
- The availability of alternative means of securing the information; and
- The extent to which noncompliance with the request would undermine important interests of the state where the information is located.[15]

Some courts (including those in the U.S. Court of Appeals for the Second Circuit) add two additional factors:[16]

- The good faith of the party resisting discovery, and
- The hardship of compliance on the party from whom discovery is sought

U.S. courts applying these balancing tests have shown a propensity to prioritize discovery over foreign law. For example, in a case addressing potential violations of Malaysian law resulting from compliance with discovery demands, the court concluded:

> [T]he documents are vital to the litigation, the requests are direct and specific, the documents are not easily obtained through alternative means, the interest of the United States outweighs that of Malaysia under the circumstances, and the likelihood that [the New York branch] would face civil or criminal penalties is speculative Although [it] has acted in good faith, and the documents are located abroad, this is insufficient to overcome those factors weighing in favor of disclosure.[17]

U.S. courts tend to be less deferential to foreign authority in assessing potential hardship to the complying party because U S. courts come to the question assuming that international blocking statutes are motivated by an express desire to block U.S. discovery in order to protect non-U.S companies or to defeat substantive U.S. laws (for example, U.S. antitrust laws).[18] Litigants and U.S. courts point to the indisputable trade protection or bank secrecy rationales that characterize many blocking statutes, and openly doubt the *bona fides* of such laws.

There are, of course, cases that find in favor of the party opposing discovery.[19] Most recently, in *SEC v. Stanford International Bank Ltd.*, a Swiss non-party bank located in the United States was served with a subpoena seeking banking records located in Switzerland, the production of which, it argued, would "subject it and its employees to criminal, civil, and administrative penalties under Swiss law.[20] The non-party resisted the subpoena, arguing under *Aerospatiale* that the party seeking the discovery should first be required to proceed through the Hague Convention rather than requiring production by enforcing the U.S. subpoena. The district court agreed, after applying the seven-factor test described above. Although the court acknowledged that the requested documents were "vital" to the litigation, it found that three factors favored the non-party bank—the defense was not raised in bad faith, the documents were not located in the United States, and the non-party bank had a "potentially well-founded fear" that it could be prosecuted in Switzerland if it complied with the discovery request. Significantly, however, the district court declined to find that the U.S. interest in full discovery outweighed Switzerland's interest in its banking privacy laws, concluding that the very act of balancing was itself "political," and "especially inapposite in this case, where the legislative authorities of both nations essentially have spoken by adopting the Convention."[21] Refusing to read *Aerospatiale* as giving litigation parties a "green light to generally 'discard[] the treaty as an unnecessary hassle,' " it found that the "comity" factor required the requesting party to go

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[14] *Columbia Pictures Indus. v. Bunnell*, 2007 U S Dist LEXIS 46364, at *49-50 (C D Cal June 19, 2007) (*"[I]t is well-settled that foreign blocking statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce (let alone preserve) evidence even though the act of production may violate that statute "*) (Citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474 (9th Cir 1992), *Rich v KIS Cal., Inc.*, 121 F R D. 245, 257 (M.D N.C 1988) ("[i]n general, broad blocking statutes, including those which purport to impose criminal sanctions, which have such extraordinary extraterritorial effect, do not warrant much deference")

[15] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 442(1) (C) (1987).

[16] *See First Am. Corp. v. Price Waterhouse LLP*, 154 F 3d 16, 22 (2d Cir. 1998); *Minpeco, S A. v. ContiCommodity Servs Inc* , 116 F.R.D. 517, 523 (S.D N Y. 1987)

[17] *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ 8458, 2010 WL 808639 (S D N.Y. Mar. 8, 2010).

[18] Indeed, in *In re Societe Nationale Industrielle Aerospatiale v. U.S Dist. Ct.*, 482 U.S. 522 (1987), the U S. Supreme Court specifically stated that the lower courts must give greater deference to the substantive law of foreign nations than to procedural rules such as the French "blocking statute."

[19] Civil Action No 3 09-CV-0298-N, 2011 WL 1378470 (N.D-.Tex. Apr. 6, 2011)

[20] *Id.* at *2

[21] *Id* at *9.

through the Hague Convention *"at least in the first instance."*[22]

Cases like *Stanford* are rare, and are unlikely to stem the tide of more numerous cases that compel discovery even in the face of foreign prosecution. And, notably, the court in *Stanford* does not make at all clear what might happen if resort to the Hague Convention "in the first instance" does not lead to the necessary discovery from the Swiss Bank.

III. GUIDANCE FROM EU AUTHORITIES ON BALANCING EU DATA PROTECTION AND U.S. DISCOVERY OBLIGATIONS

The Article 29 Working Party ("Working Party"), the consortium of EU Member State data protection authorities, provides useful non-binding guidance on the challenges that arise from discovery obligations, in its 2009 Working Paper[23] on pre-trial discovery for cross-border civil litigation ("Paper"). Unfortunately, the Paper does not cover document production in U.S. criminal and regulatory investigations.

Although the Paper does not formally address document preservation in anticipation of proceedings before U.S. courts, or in response to requests known as "freezing" or "data retention order" it does stress that EU organizations have no permission to retain data *"at random for an unlimited period of time because of the possibility of litigation in the US."* The mere or unsubstantiated possibility of an action being brought before U.S. courts is not sufficient. Rather, data may only be retained if relevant and to be used in specific or imminent proceedings, where "reasonably anticipated."

Under the Directive, personal data may only be processed where authorized by law. The Paper covers three legal bases that can be used to authorize the processing (*i.e.*, disclosure or transfer) of personal data in cross-border discovery:

- *Consent*: The Working Party considers that *"it is unlikely that in most cases consent would provide a good basis for processing"*. The use of consent is not reliable, nor particularly workable. To legitimize data processing using this basis, organizations must obtain the "specific" and "informed" consent of all individuals who might potentially be concerned by, or relevant to the discovery. Individuals may subsequently withdraw their consent at any time, and consent is only deemed valid in cases where there is a "real opportunity" to withhold or withdraw consent without suffering any penalty. In earlier guidance, the Working Party has taken the position that a current employee cannot freely provide consent because of the prejudice that might arise should he/she refuse consent. This suggests that the use of employee consent to legitimize data processing exists only in theory. While obtaining the freely given consent of third parties, such as customers or suppliers, may be more realistic than for employees, the right to withdraw consent substantially lowers the utility of consent as a legal basis for complying with U.S discovery requirements, even in the case of non-employees

- *Legal Necessity*: An organization may establish the legitimacy of data processing where *"necessary for compliance with a legal obligation"* Regulators and courts interpret this quite narrowly to only cover situations where there is an EU statutory requirement: the Directive does not consider an extraterritorial legal dispute to be a legal obligation The Working Party has also opined that *"an obligation imposed by a foreign legal statute or regulation . . may not qualify as a legal obligation by virtue of which data processing in the EU would be made legitimate."*

- *Balance of Interest*: The balance of interest exception may cover discovery—or compliance with foreign requests. This is because organizations' interest in complying with U.S. statutory requirements (*i.e.*, U S. discovery requests) is usually legitimate. The Paper stresses that the proportionality and relevance of the data, and possible consequences for the individuals concerned must be taken into account. Adequate safeguards must be adopted to protect the rights of the individual The organization supplying the data should also "anonymize" or at least aggregate the data and, where possible, apply filtering techniques to exclude or cull irrelevant data These tasks should be assigned to a "trusted" third party within the European Union.

In addition to a legitimate legal basis, an adequacy mechanism must be in place where records are transferred to the United States (or to another country outside the EEA). Generally, the only acceptable mechanism is if the recipient country meets the Directive's "adequacy" requirements for data transfers. Adequacy is determined by a global assessment of safeguards and suitability to protect personal data, based on the various provisions of the Directive. Under this standard, the United States has not been deemed to have an adequate data protection scheme. For legal transfer of data to the United States, three mechanisms exist, and are described below. However, while these mechanisms can be useful to facilitate document review, none of them legitimizes the onward transfer of data from the requesting organization to other parties, witnesses, or the arbitrators. This limits their utility in U.S. discovery proceedings.

- *Safe Harbor Provisions*: The Safe Harbor program established by the European Commission and the U.S. government allows U.S.-based organizations to self-certify that they will abide by the Safe Harbor principles of notice, choice, onward transfer, security, data integrity, access, and enforcement Thus, Safe Harbor legitimizes transfers between an organization established in the EEA or Switzerland and a U.S. organization

- *Model Clauses*: Concluding a transfer agreement including the EU model contractual language furnishes organizations located in the United States (or another country not considered "adequate") with the necessary safeguards to engage in data transfers However, because model contracts must reflect the Directive's provisions, they do not address the aforementioned conflicts over data transfers for U.S.-based discovery efforts. Crucially, model clauses impose even stricter limitations for subsequent use in U S discovery proceedings. For example, it will not generally be permissible to share the information with other parties or U.S. courts In addition, U.S courts are very unlikely to execute transfer agreements in order to receive information.

[22] *Id.* at *3, 13 (emphasis added).

[23] Article 29 Working Party, *"Working Document 1/2009 on pre-trial discovery for cross-border civil litigation,"* WP 158, Adopted on 11 February, 2009. Available at http //ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp158_en.pdf.

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- *Binding Corporate Rules*: Multinational companies that wish to transfer data between international offices may look to binding corporate rules ("BCRs") as mechanisms by which data may be transferred outside of EU countries. BCRs are internal data protection rules and practices applied at a corporate-wide level. Due to this limitation, BCRs would not allow transfers to litigators or U.S. courts.

The Directive also provides for several derogations, or exceptions, from these three mechanisms. These occur, in relevant part, when the individual unambiguously consents to the transfer, or when the transfer is necessary for the exercise or defense of a legal claim:

- *Consent*: Here, consent follows the same standard as consent as a basis for processing personal data. Because of its limitations, consent remains an unreliable basis for cross-border data transfers.
- *Necessity for Legal Claim*: Article 26(1) (d) of the Directive creates an exception for international transfers that are "necessary or legally required on important public interest grounds, or for the establishment, exercise, or defense of legal claims." Derogating from earlier Member State interpretation, the Working Party's Paper appears to apply the legal claims exception to "single" international transfers of data in compliance with foreign discovery obligations unless a "significant" amount of data are involved. There is no further guidance on what a "single" transfer or a "significant" amount of data would mean. However, according to the Working Party, the exception is subject to "strict interpretation."[24] In addition, the Working Party has opined that the exception would not apply to a data transfer undertaken "on the grounds of the possibility that such legal proceedings might one day be brought."[25] The Working Party's examples may further imply that the exception is only relevant where the individual is a party to the litigation. This would severely limit the practical application of this concept. Moreover, Working Party's Papers and Opinions are non-binding and each Member State can vary its interpretation (which has happened in several other areas, such as whistleblowing).

With the appropriate mechanisms in place, the Working Party's Paper seems to permit international transfers of data in compliance with foreign discovery obligations under the balance of interest test and the legal claims derogation. However, these exceptions are narrowly cast, and the examples cited in the Paper may imply that they are only relevant where the litigation has already commenced, and may not support anticipatory or "preventive" discovery or document hold requests. Here, further guidance from the Working Party on what is meant by *"the mere or unsubstantiated possibility that an action may be brought before U.S. courts,"* would be very helpful. In particular, the Working Party should clarify that while a remote possibility for litigation may not suffice, disclosure should be permitted when necessary for prospective proceeding.

Importantly, where data *are* legitimately transferred, the Paper affirms that there is no waiver of data protection rights. Individuals may exercise their access and correction rights during the proceedings, as afforded to individuals under the Directive. Advance general notice of the possibility of data transfer should be provided to all individuals, *e.g.*, through a detailed technology use policy or data protection notice to all employees. When the data are actually collected and transferred, additional, more concrete notices should be given *"as soon as reasonably practicable,"* and should include information on the identity of any recipients, the purposes of the processing, and the categories of data concerned, as well as details on individuals' rights. All data must be protected through appropriate security standards and policies in order to keep the data confidential and secure. Where service providers are used, they should be bound by contract to ascertain compliance with purpose limitation obligations, retention policies, and security standards. To many litigators in the United States, where court records are public, these concepts often appear foreign and counterintuitive.

IV. THE BALANCING TEST AND DATA PROTECTION

Litigants or other recipients of a subpoena must be aware that U.S. courts may "overrule" or disregard data protection laws or other mechanisms designed to limit cross-border discovery. Indeed, the weight of the case law suggests that a party seeking to resist U.S. discovery obligations on this basis face an uphill battle. But the results of these cases are driven largely by the nature of the foreign laws that were before the court—blocking statutes designed to thwart U.S. policy objectives. EU data protection laws are different from these protective blocking statutes. They are motivated not by some generalized antipathy to U.S. discovery approaches or to substantive U.S. law (like antitrust, or the pursuit of financial crimes that requires interfering with bank secrecy), but rather by an affirmative view of the substantive privacy rights of EU citizens. In other words, they are good faith attempts to forward affirmative EU policy goals, not merely schemes to block U.S. policy goals.

In light of this background, parties facing conflicting legal obligations in the United States and the European Union need to advocate for application of a balancing test that recognizes both: (i) their own good faith in seeking to balance the conflicting legal obligations and (ii) the good faith of the EU regulatory regimes in seeking to advance the public policy interests reflected in data protection laws that have equal application to both. Existing balancing tests can work, but only so long as the U.S. courts can be persuaded to look closely at the EU data protection laws rather than simply equating them with traditional blocking statutes.

A recent report suggests that at least some U.S. courts may engage in the sort of balancing and compromise approach that would give due weight to both U.S. discovery demands and EU data protection laws. In a recently published report, the Bavarian data protection authority ("DPA") referred to a U.S. court decision from early 2011 that restricted a document production request to reconcile the competing demands of U.S. discovery and EU data protection.[26] In the case, the U.S.

[24] Working Document on a Common Interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995 adopted on 25 November 2005, page 13.

[25] Working Document on a Common Interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995 adopted on 25 November 2005, page 15.

[26] The Bavarian data protection authority's 102-page 2009-2010 Activity Report is available, in German, at http://www.regierung.mittelfranken.bayern.de/aufg_abt/abt1/.

plaintiff issued a broad document production request to the Bavaria-based German defendant. The defendant asked the DPA for guidance on the production of such data.

In its response, the DPA held that the plaintiff had a legitimate interest and need to defend the claim: the production of certain documents was permitted. However, the DPA opposed the production of other documents that were not directly related to the disclosure request or did not clarify the claim. Further, the DPA specified that any additional data must be filtered out, and any personal data irrelevant for the case had to be redacted.

The German defendant thus responded to the discovery request by providing only the documents the DPA permitted it to provide, and challenged the overall scope of the discovery request. In early 2011, the United States ruled in favor of the German defendant, stating that the denial of access to the requested documents would not damage the plaintiff's claim, where consistent with the Bavarian DPA's response.

This case may be helpful in guiding organizations in resolving conflicting obligations. Although the outcome may be due to the specifics of the case (the defendant was a German company and not, as is often the case, a U S. company with offices in Europe), by raising data protection concerns and cooperating with both EU authorities and U.S. courts, parties can come to an agreeable and compliant solution. Whether the case demonstrates the beginnings of a change in U.S. courts' approach—and a real willingness to account for EU data protection laws—remains to be seen.

V. RECOMMENDATIONS

We recognize that the above analysis is not going to completely reassure an entity facing conflicting discovery obligations and EU data protection obligations. What is perhaps even more troubling than the substance of the conflicting obligations is the dizzying array of often differing and uncertain legal standards that U.S. courts will use to judge a party's compliance with relevant law. These standards often seem to be applied to justify a particular result (and that result is usually to require disclosure), rather than to weigh the parties' conflicting legal obligations.

Organizations faced with potentially conflicting mandates from a U S. court and from EU data protection laws should consider the following measures in order to navigate the risks:

- **Plan Ahead to Avoid Issues in the First Place.** A U S. court is going to be far more persuaded by an entity's inability to produce discovery without violating foreign law if it can be persuaded that the entity did everything it could beforehand to mitigate its exposure. This might include the following:
  - ***Clear policies on record management:*** Data should only be retained if relevant and if there is a legal or business need to retain the information.
  - ***Technology use policy:*** All employees should be clearly informed about the possibility that data located on the organization's infrastructure may need to be retained and shared for discovery purposes.
  - ***Notice:*** Where appropriate, employees should be informed about the details of discovery requests, including possible recipients, third party service providers and the right to access and modify information. In some countries, works council or similar employee representatives or public authorities would also need to be informed Data protection officers should be consulted on a regular basis, and have their views taken into consideration.
- **Raise Potential Data Protection Law Restrictions Early in the Discovery Process.** If you wait until the document production date to raise potential data protection law issues, you are likely to face a very hostile audience when you go to court to seek protection
  - ***As soon as practicable, raise potential issues with your adversary:*** Alert the other side to the potential issues, and to the extent possible get them to take partial ownership of the issue. Express your willingness to cooperate with them to get the discovery, or to work around the discovery issue with them. Eventually, the judge is going to ask if you are acting in good faith, so act in good faith early and often. You want the court to conclude that you and your client have done your collective best to satisfy the discovery obligations.
  - ***Context is important:*** If you are a third party witness subpoenaed in U.S. litigation, you will have more scope to prioritize your EU discovery obligations. On the other hand, if you are a party to the litigation—and especially if you are a plaintiff—be prepared to find a way to respond to your adversary's discovery requests notwithstanding apparently conflicting EU data protection requirements.
  - ***Use Existing Balancing Tests, But Adapt Their Application to EU Data Protection Laws.*** Notwithstanding what appears to be a one-sided slate of results, there is nothing inherently wrong with the five- or seven-factor balancing tests currently being applied by U.S. courts. When applying those tests in this context, however, it is vital to emphasize to the court that the EU data protection laws in question protect "important interests of the state where the information is located," and are nothing like the historical blocking statutes viewed with such suspicion by the U.S. courts
- **Remember Your Data Protection Obligations During the Discovery Process.** If you do produce documents that are potentially subject to EU data privacy laws, protect the data.
  - ***Use protective orders carefully:*** Protective orders should be used to restrict information on a case-by-case basis for relevant data, rather than all data. Terms can be negotiated to restrict who may access the information sought and for what purposes. These terms could also impose sanctions for U S. parties' non-compliance with the terms of the order as an additional safeguard against breach of EU data protection requirements. The parties can agree that sensitive data should be withheld where appropriate, "anonymized," or redacted to preserve data protection interests. Personal data should be redacted if not directly related to the discovery request, or if irrelevant to the case.
  - ***Cooperate with EU data protection authorities:*** Official guidance from EU data protection authorities

baylda_daten/dsa_Taetigkeitsbericht_2010.pdf. The U.S. court and the parties were not identified due to a confidentiality agreement between the data protection authority and the defendant.

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may have greater weight and may help convincing U.S. courts of the need to account for EU data protection obligations. Be careful—you do not want the U.S court to conclude that you are "conspiring" with the EU data protection authority to defeat the discovery. Instead, you want all authorities and courts to conclude that you are looking to comply with all of your legal obligations in good faith, and that so long as you can do so you are essentially neutral on whether the discovery proceeds. In other words, you do not want anyone to conclude that you are (i) actively seeking to resist discovery, or (ii) actively seeking to violate your data protection obligations.

- o ***Apply appropriate security standards:*** Security standards should be applied to all relevant data, including contractual arrangements with service providers, to ensure uniform standards.

- **Try to work through issues creatively.** Try to determine if a mutually agreeable solution can be reached that complies with your obligations under both the U.S discovery rules and the EU data protection regulations Even if a complete solution cannot be reached, your willingness to work toward one will likely be viewed favorably by both the U S court and the relevant EU authorities.
  - o For example, as was discussed above, prior to disclosing any documents or information, it may be possible for the parties to negotiate terms that restrict who may access the data sought, as well as the purposes for which it may be used, in accordance with the security, transparency, and finality principles of the Directive.
  - o Also, upon review, any particularly sensitive aspect of the disclosure could be withheld, "anonymized," or redacted to preserve the European party's privacy interest, but not with substantial prejudice to the U.S party. A protective order could also provide for the redaction of information within a requested record that is not relevant or that is obtainable through other sources, in keeping with the Directive's objective of proportionality
  - o Finally, a protective order could impose sanctions for the U S party's non-compliance with the terms of the order as an additional safeguard against abuse of the European party's disclosures, as well as a further display of cooperation.
- **Seek to educate U.S. judges on the importance of EU Data Protection Regimes.** Judges in the United States are unlikely to be familiar with EU data protection regimes and blocking statutes, and are likely to view them with some suspicion From the U S perspective, this suspicion is somewhat natural given the historic lack of enforcement As the entity at the sharp end of the stick when it comes to the need to strike the right balance here, it is up to the target of the conflicting legal obligations to make sure the U.S. judge becomes familiar with these rules, and how they can be balanced with U.S. litigation needs.

There is one additional consideration each for the U.S. lawyer and the EU lawyer to keep mind in each and every case.

- **For the U.S. lawyer:** Do not underestimate the importance of complying with EU data protection laws and blocking statutes, or the seriousness with which EU regulators and EU courts view these laws even in the face of what appears to be a contradictory mandate from across the ocean. Failure to comply with EU laws can do significant damage

- **For the EU lawyer:** Do not underestimate the importance of complying with U.S. discovery obligations, or the seriousness with which U.S. courts view these obligations even in the face of what appears to be a contradictory mandate from across the ocean Failure to comply with these laws can do significant damage.

In the long term, both the U.S. and EU's legislative frameworks on international data transfers must adapt to accommodate each other's legal needs. Without a stronger, clearer, and streamlined compliance mechanism, the issue of whether to compel international document production will continue to occupy U.S. courts.[27] Amendments to both the U.S. and EU legislative frameworks will be a vital part of future efforts toward the harmonization of international discovery policies, and U.S. district courts will need to bring their hardship analysis in line with current attitudes towards enforcement. Judges and regulators on both sides of the ocean need to give more deference to the laws of the other jurisdiction

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[27] The issue of document production in cross-border discovery is not the only instance in which EU data protection laws have come into conflict with U.S laws. The U.S Sarbanes-Oxley Act requires U S public companies to establish codes of conduct for employee behaviors with respect to finance, accounting, and corporate governance These codes should be enforced through compliance hotlines ("whistle blowing" hotlines) that allow employees to report violations anonymously. When the Act came into force and multinational companies established hotlines for foreign branch offices or subsidiaries, EU authorities held that the hotlines ran afoul of EU privacy laws. Through direct negotiations, the United States, European Union, and various individual Member States issued guidelines for the operation of these hotlines that successfully reconciled the conflicting legal requirements.

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Global data privacy laws: 89 countries, and accelerating

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Global data privacy laws: 89 countries, and accelerating

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Introduction – 40 years on

How many countries now have data protection laws? The usual answer was somewhat vague: 'about sixty' or perhaps a well-informed respondent might have said 'more than sixty'. A reasonably accurate answer could not conveniently be found until 'Global data privacy laws: Accelerating after 40 years'[1] showed that at least 76 countries had enacted data privacy laws by mid-2011. Six months later, further investigation shows that was an under-estimate, and that there are at least 89 countries with such laws.

There are four reasons why has the number grown from 76 to 88 in six months. First, new laws have been passed or come into force in four countries from four different regions (Costa Rica, St Lucia, Gabon and Vietnam). Second, further research has resulted in the addition of pre-existing laws in 5 countries (Armenia; Paraguay; St Vincent & the Grenadines; the Seychelles; and Trinidad & Tobago). Third, two 'mini-jurisdictions' have been added (Qatar Financial Centre and Dubai International Finance Centre), after reconsideration. Finally, two jurisdictions have been added that only meet this article's criteria for a data privacy law in relation to their public sectors (Thailand and the USA) and do not do so in relation to the private sectors.

The following Table lists all countries (including otherwise independent legal jurisdictions) which have enacted data privacy laws, when they did so, the sectoral coverage of the law (only private sector; only public sector; or both sectors), and the international commitments of each country, or the international recognition their laws have received.

It is almost forty years since Sweden's *Data Act 1973* was the first comprehensive national data privacy law, and was the first to implement what we can now recognise as a basic set of data protection principles. This article surveys the forty years since then of global

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* This paper was completed and updated while the author was a Visiting Fellow at the Centre for Commercial Law Studies, Queen Mary, London, January 2012. Please contact the author on < graham@austlii edu au > in relation to any additions to or corrections of the Tables.

[1] Greenleaf, G 'Global data privacy laws: 40 years of acceleration' (2011) *Privacy Laws & Business International Report*, Issue 112, 11-17, September 2011

Electronic copy available at: http://ssrn com/abstract=2000034

development of data privacy laws to the start of 2012. The picture that emerges is that data privacy laws are spreading globally, and their number and geographical diversity accelerating since 2000. There are some surprising inclusions, and some illuminating trends in the expansion of these laws.

Criteria for inclusion

In this article, and the accompanying Table a country is considered to have a 'data privacy law' if it has a national law which provides a set of basic data privacy principles, to a standard at least approximating the minimum provided for by the OECD Guidelines or Council of Europe Convention 108, plus some methods of officially-backed enforcement (ie not only self-regulation). A general constitutional protection for privacy, or a civil action (tort) of infringement of privacy is not sufficient, and nor is a voluntary code of conduct.

In relation to the private sector, a law must cover most aspects of the operation of the private sector. This excludes countries which only have scattered sectoral privacy laws (eg credit reporting or medical records laws). The USA, which has numerous limited sectoral laws in the private sector is not included because of its private sector laws, but only because of its federal public sector law. Many countries have some exceptions in their private sector coverage, such as various forms of 'small business' exceptions (eg Japan and Australia), or exceptions for non-automated records, but this is not a basis for exclusion. A law with 'largely comprehensive private sector coverage' is therefore the principal basis for inclusion.

Most jurisdictions which have laws with near-comprehensive private sector coverage also have data privacy laws which cover their national public sectors. Such protection is sometimes by different legislation from that covering the private sector. Where there is a different law for the public sector it will often have principles and enforcement mechanisms which differ significantly from those applying to the private sector. There is however a growing group of countries, particularly in Asia, with laws which only cover the private sector but provide no protection in relation to the public sector: Malaysia, Vietnam, India, Qatar Financial Centre and Dubai International Finance Centre.

Some jurisdictions which now have private sector coverage initially only covered their public sectors, including the OECD members, Australia, Japan, Canada and South Korea, with private sector coverage only introduced up to 15 years later. It seems reasonable to include the two remaining jurisdictions which still provide basic data privacy protection in relation to their public sector only (the United States and Thailand), but do not do so for their private sector according to the criteria used here. As a unitary country, the Thai law covers the whole public sector. As a federation, the US *Privacy Act 1974* only covers the federal public sector, but some States have equivalent laws. Since 'private sector only' countries have been included in the Table, these 'public sector only' countries have now been included. The dates in the Table for the privacy laws of Australia, Japan, Canada and South Korea have also therefore been changed to the earlier dates on which their public sector laws were introduced. The Table does not include any countries which might have public sector privacy laws for some of their regional governments only (China might quality if it did), but not for most of its private sector or its federal public sector.

'**Countries**' is a slight exaggeration, and a more accurate term would be 'separate legal jurisdictions'. The Table originally included the two Special Administrative Regions (SARs) which have constitutionally different legal systems from the rest of China (Hong Kong and Macao, under the principle of 'One Country, Two Systems') and five British dependent territories which have their own legal systems (the Isle of Man, Jersey, Guernsey, Gibraltar and the Bahamas). By the same reasoning (and after some consideration), there has now been

added the Qatar Financial Centre (QFC) and the Dubai International Finance Centre (DIFC), because these areas, somewhat similar to 'special economic zones', have data privacy laws which are apply to all business carried out within the QFC and DIFC, and their own administrations, data protection authorities and courts to enforce such laws. Geographically, they may be like miniature versions of Hong Kong, but the size of a jurisdiction is little indication of how much personal data may be processed within it or transferred to or from it, so it seems best to include them for completeness.

However, sub-national jurisdictions which do not have their own separate legal systems, or are subject to the laws of a federation in relation to data privacy law, are not included. So States and Provinces in Germany, Canada and Australia are excluded even if they do provide some non-comprehensive coverage of the private sector. Certain provinces of the People's Republic of China which have enacted local laws are excluded for similar reasons. State or Provincial laws which only cover the local public sector are also excluded. Many of these sub-national laws are quite significant sources of data privacy legislation and case law, or were pioneers in data protection. Hesse in Germany, Quebec, Ontario and British Columbia in Canada, and Victoria and New South Wales in Australia are examples. It would be a valuable to include such jurisdictions in a separate Table, but this has not been done in this article. The result of this conservative approach is that no country is included twice in the Table, but nor has any country been unreasonably excluded.

The **year** stated in the Table under 'From' is the year from which the legislation was enacted which provided coverage of most of the private sector, or of the national public sector. So, for example, the year shown for Australia is 1988, even though the *Privacy Act 1988* operated for 13 years in relation to the public sector only, and for a lesser period in relation to the credit industry, before most of the private sector was added in 2001. Where the coming into force of a law was long-delayed after enactment (eg Russia, from 2007 to 2011) the date stated is the earlier date (enactment), but the Table notes it was not in force until the later date. A similar approach is taken where an Act has not yet come into force at all (eg Malaysia). In other cases the year stated is that of enactment, ignoring the year or so that it often takes for regulations to be made and preparations made for the law to be administered. The year of the most recent known amendment to the current law is given in the 'Latest' column. The purpose of these columns is to indicate trends in enactment and updating, not to give precise 'in force' dates (which would result in a far more complex Table).

Almost all jurisdictions provide in their legislation for a Data Protection Authority (DPA), a separate institution which has responsibility for the data privacy legislation. DPAs vary greatly in name (often called 'Privacy Commissioners'), functions and degree of independence from other government authorities. From the 87 jurisdictions, Chile, Colombia, the Kyrgyz Republic, India, Japan, Taiwan, Vietnam, Armenia and the USA are among the few remaining exceptions with no DPA, but this is not covered in the Table.

Growth by decade

The total number of new data privacy laws globally, viewed by decade, shows that their growth is accelerating, not merely expanding linearly: 8 (1970s), 13 (1980s), 21 (1990s), 35 (2000s) and 12 (2 years of the 2010s), giving the total of 89. In the 1970s data privacy laws were a western European phenomenon (Sweden, Germany, Austria, Denmark, France, Norway and Luxembourg), other than for the US public sector Act. The position was similar in the 1980s (UK, Ireland, Iceland, Finland, San Marino and the Netherlands, and three UK territories), with Israel as the first non-European state in 1981, and Australia, Japan and Canada providing 'public sector only' legislation. Acceleration commenced in the 1990s, as most remaining western European countries (EU and EEA) enacted laws (Portugal, Belgium,

Spain, Switzerland, Monaco, Italy and Greece). More significantly, with the collapse of the Soviet Union many former 'eastern bloc' countries enacted data privacy laws as part of their protection of civil liberties (Slovenia, Czech Republic, Hungary, Slovakia, Poland and Albania), and the first ex-Soviet-republics (Lithuania and Azerbaijan) did likewise. The spread outside Europe also started, with the first laws in Latin America (Chile) and the Asia-Pacific (New Zealand, Hong Kong and Taiwan, plus Thailand and South Korea's public sector laws).

In the 2000s the acceleration continued, with the expansion in the former eastern bloc and Soviet republic countries the most striking (Latvia, Bosnia & Herzegovina, Romania, Bulgaria, Croatia, Estonia, FYROM (Macedonia), Moldova, Serbia and Montenegro), plus the addition of the remaining European states (Cyprus, Malta, Andorra, Liechtenstein, Gibraltar). Outside Europe, expansion accelerated in the Asia-Pacific (Australia, South Korea, Japan, Macao SAR) and Latin America (Argentina, Colombia, Uruguay). In the Americas, the Bahamas added further new laws. Rapid development took place in Africa with new laws in Tunisia and Morocco (North African) and Mauritius, Cape Verde, Benin Senegal and Burkina Faso (Sub-Saharan Africa). The Kyrgyz Republic became the first country in Central Asia to legislate in 2008. In the first two years of this decade 11 new laws have been enacted (Faroe Islands, Malaysia, Mexico, India, Peru, Ukraine, Angola, Trinidad & Tobago, Vietnam, Costa Rica, Gabon and St Lucia) and the Russian law came into force, making this the most intensive period of data protection developments in the last 40 years.

Geographical expansion

Geographically, more than half (56%) of data privacy laws are still in European states (50/89), EU member states making up only slightly more than one third (27/89), even with the expansion of the EU into eastern Europe. There are data privacy laws in all 27 member states of the European Union (not yet counting Croatia), and a further 23 laws in other European countries or jurisdictions (including the EEA states). Only a few European states remain without such laws, (Georgia, Belarus and the Holy See/Vatican), so the potential for expansion in Europe is very limited. There are eight laws in Latin America, with Brazil set to become the ninth. In the Americas are also the laws in Canada and the USA, and four laws in the Caribbean. In Asia there are now nine data privacy laws, with Singapore promising a tenth, the other eight ASEAN states committed to improved privacy protection by 2015, and Bills before Parliaments in two others. Both Australia and New Zealand have data privacy laws, but none of the Pacific Islands do so (the only region with no such laws). In North Africa and the Middle East, there are five such laws, and eight in Sub-Saharan Africa. Further Acts are likely soon, with current Bills progressing in South Africa, Kenya and Ghana. The French-Speaking Association of Personal Data Protection Authorities (AFAPDP), and France's CNIL have both played key roles in developing expansion of data privacy in Africa. The Kyrgyz Republic law is the first in Central Asia, though Mongolia's laws also come close to qualifying.

The geographical distribution of the 89 laws by region is therefore: EU (27); Other European (23); Asia (9); Latin America (8); Africa (8); North Africa/Middle East (5); Caribbean (4); North America (2); Australasia (2); Central Asia (1); Pacific Islands (0). So there are 39 data privacy laws outside Europe, 44% of the total. Because there is little room for expansion within Europe, the majority of the world's data privacy laws will soon be from outside Europe, probably by the middle of this decade.

Bills for new Acts – Future expansions likely

The *Global Table of Data Privacy Bills* (following the Table of legislation) lists Bills for new Acts, but not for revisions of existing Acts unless they are Bills which expand a country's legislation to cover the private sector (eg Thailand) or the public sector. It first lists Bills

before the current session of a legislature (marked 'Current'); then Bills that are know to exist as current official government drafts but have not yet been introduced into the legislature; and finally Bills which were previously introduced to a legislature but have not progressed for some reason and are not current (marked 'Lapsed'). In all of these cases, it is quite possible that a Bill may rapidly enacted.

The Table shows that we can expect the pace of legislation to continue accelerating. There are Bills currently before legislatures in at least five countries (Georgia, Ghana, Philippines, Thailand and South Africa) although some have been withdrawn for redrafting. There are official draft Bills known in another five during the past year (Kenya, Cayman Islands, Nigel, Mali and Brazil). Antigua, British Virgin Islands, Jamaica, and Bermuda are known to be developing Bills (but with fewer details known), so there is considerable activity in the Caribbean. There are also older Bills which were introduced in Turkey, Lebanon and Barbados, and discussed in Madagascar, during the last decade. Not listed in the Bills Table, there are also those countries that have announced a definite intention to legislate, but have not yet developed a draft Bill. Singapore[2] and Qatar[3] (as distinct from the Qatar Financial Authority sub-region) are two countries in this category. There may be more Bills, or even more Acts, yet to be discovered. Research has not yet been done in relation to every separate jurisdiction in the world.

Measuring growth

For over two decades the rate of adoption of new data privacy laws per year has been steadily increasing, and the regions of the globe that have such laws has been steadily expanding. If the current rate of expansion is continued, 50 new laws would result in this decade, bringing the total to 127. Continued acceleration would make the total higher than that. Even on the conservative (and probably unrealistic) assumption that the 2010s will see no more data privacy laws than the 2000s, there would be 112 countries with data privacy laws by the decade's end, with the majority of the laws by then coming from outside Europe. In addition, many existing laws are being strengthened to keep up with rising expectations of privacy protection, international agreements, and the examples set by other countries (see the 'Latest' column in the Table).

There are other ways that expansion could be measured, say by the populations of the countries concerned, or by their GNP. These could show different trends, but reflection on the size and economic significance of the countries so far included makes it obvious that data privacy laws are more common in the world's larger and more economically significant countries. The recent inclusion of India accelerates this trend, as will the likely inclusion of Brazil in the near future. By any measure, data privacy laws are of increasing and accelerating global significance.

The most economically significant countries currently missing from the list are the USA (private sector), China and Brazil, now that India has adopted a data privacy law in 2011. The omission of Brazil is also expected to be remedied in 2012. China is currently enacting a profusion of sectoral laws, but a comprehensive law is still a possibility, and no-one knows what the outcome will be. The USA has many privacy laws and some effective enforcement, but no comprehensive privacy law in the private sector, nor it seems much prospect of one. Most other countries that do not yet have data privacy laws are of relatively low significance

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[3] Qatar has a draft Personal Information Privacy Protection Law under consideration: http://www.insideprivacy.com/international/qatar-seeks-views-on-draft-privacy-law/

in international trade, though some countries with large populations are among them, particularly in sub-Saharan Africa (eg Nigeria), and in Asia (eg Indonesia).

Finally, for the purposes of this brief overview, it is important to note that 'growth' or 'expansion' of data privacy laws cannot be equated with improvement in privacy protection. Some privacy laws are simply not enforced. Surveillance activities in both the private and public sectors can also grow at the same time as laws are enacted and operational, and quite often do when data privacy laws are a trade-off for, or a belated response to, more intensive surveillance. Assessing the effectiveness of data privacy laws is a far more complex task than is undertaken in this relatively simple exercise.

International commitments and recognition

International agreements concerning data protection have had a considerable influence on national and sub-national adoption of data privacy laws for thirty years since the drafting of both the OECD's privacy Guidelines and the Council of Europe Data Protection Convention at the outset of the 1980s. Since then, the European Union's data protection Directive of 1995 has been the most influential international instrument, and APEC's Privacy Framework has created regular opportunities for discussion of privacy issues among some Asia-Pacific jurisdictions.

All 27 Member States of the **European Union** are required to have data privacy laws which implement the EU privacy Directives, and all do so (see the Table). Five additional countries have applied to join the EU[4], and two of these (Montenegro and Turkey) do not yet have data privacy laws. The **European Economic Area** (EEA) includes the European Union member states plus Iceland, Norway and Liechtenstein, all of which have data privacy laws.

Countries or jurisdictions outside the EEA can obtain from the EU a decision that their laws provide an **'adequate'** level of protection of privacy, to enable free flow of personal data from EU member states to organisations in those countries. As yet, the EU has only made such decisions in relation to nine jurisdictions as a whole, a minority of which are of economic or political significance.[5] Uruguay and New Zealand should soon be added to this list, having receiving favourable Opinions from the Article 29 Working Party.

Forty-three of the forty-seven **Council of Europe** member States have ratified the Council of Europe Data Protection Convention of 1981 (Convention 108), and have data privacy laws. Armenia, Turkey and the Russian Federation have signed but not ratified the Convention. San Marino has done neither. However, Russia does now have a data privacy law (in force 2011). Armenia, Georgia and Turkey are the only Council of Europe Member State not to have enacted a data privacy law. Belarus is not a Council of Europe member because of human rights concerns, and the Vatican is not a member because it is not a democracy. The **Additional Protocol** (ETS 181) to the Convention also requires a commitment to data export restrictions and to an independent data protection authority, and brings the standards of the Convention up to approximately the same level as the Directive. Forty two Member States have signed the Additional Protocol, and 31 have subsequently ratified it. Twelve countries that have ratified the Convention (plus three territories on whose behalf the UK acceded to the Convention) have not ratified the Additional Protocol. Where a Council of Europe member has ratified both Convention 108 and the Additional Protocol, it is extremely unlikely as a matter of practice that data exports to that country would be prevented, so obtaining an

[4] Croatia; Former Yugoslav Republic of Macedonia (FYRIM); Iceland; Montenegro; Turkey

[5] Andorra, Argentina, Canada, Switzerland, Faroe Islands, Guernsey, Israel, Isle of Man, and Jersey

adequacy finding under the Directive becomes largely irrelevant in practice. This is noted in the Table.

Since 2008 the Council of Europe has made it clear that it wishes the Convention and Optional Protocol to become global agreements, and that it welcomes requests by states outside Europe with suitable data privacy laws to apply to accede to both. Uruguay is the first non-European state to be invited to do so, but has not yet formally acceded (there are Parliamentary processes requiring completion). An adequacy finding from the EU does not impose any reciprocal obligations on the recipient to allow free flow of personal data from it to EU countries. This obligation will however arise when countries outside the EU become members of the Council of Europe Convention 108.

Turkey is the only **OECD** (Organisation for Economic Cooperation and Development) member country, other than the USA in relation to the private sector, which does not have a data privacy law implementing the OECD's privacy Guidelines of 1981. The OECD's plans for enlargement[6] mean that more countries in future will be likely to be influenced by the OECD privacy Guidelines to adopt data privacy laws.

Two thirds (14) of the 21 **APEC** (Asia-Pacific Economic Cooperation) member 'economies' do have data privacy laws in at least one of the two sectors (see the Table), but 7 do not: Brunei; Indonesia; Philippines; Singapore; China; and Papua New Guinea. Thailand and the USA have public sector only laws, and Malaysia and Vietnam have private sector only laws. Singapore says it will introduce legislation in 2011; the Philippines and Thailand have bills for comprehensive laws before their legislatures. Whether APEC will expand beyond 21 members is still an open question. Numerous countries have been trying to join for some time[7]. In refusing India's application for membership, APEC decided not to admit more members until 2010. India is the only Asian country which is not an APEC member but does have a data privacy law (Macao SAR has such a law but is not a country). If APEC's membership is expanded, this will at least mean that more countries are involved in the six monthly discussions of APEC's privacy group.

The Economic Community of West African States (**ECOWAS**), a grouping of fifteen states under the Revised Treaty of the ECOWAS, agreed to adopt data privacy laws in 2008. A *Supplementary Act on Personal Data Protection within ECOWAS* (ECOWAS, 2010) to the ECOWAS Treaty, adopted by the ECOWAS member states, has established what the content of such data privacy laws should be, influenced very strongly by the EU Directive, and that each state is to establish a data protection authority. Four ECOWAS states have so enacted laws (Benin, Burkina Faso, Cape Verde, and Senegal), and a Bill is before Parliament in Ghana, leaving ten yet to take action.

Less advanced as yet, the East African Community (EAC), a regional group of five East African countries (Kenya, Tanzania, Uganda, Rwanda and Burundi) has taken various initiatives that encourage the member states to adopt data privacy legislation. Such initiatives include the current discussion of *A Draft Bill of Rights for the East African Community* which unlike the African Charter on Human and Peoples' Rights incorporates the right to privacy. Also, although not binding, the EAC has adopted *EAC Framework for Cyberlaws* Phases I and II in

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[6] "In May 2007, OECD countries agreed to invite Chile, Estonia, Israel, Russia and Slovenia to open discussions for membership of the Organisation and offered enhanced engagement to Brazil, China, India, Indonesia and South Africa" (OECD website). Chile, Solvenia, Israel and Estonia have since become members.

[7] "In addition to India, Mongolia, Pakistan, Laos, Bangladesh, Costa Rica, Colombia, Panama and Ecuador, are among a dozen countries seeking membership in APEC by 2008." – see <http://en.wikipedia.org/wiki/Asia-Pacific_Economic_Cooperation#Member_Economies>

2008 and 2011 respectively, addressing multiple cyber law issues including data protection. Yet as of now only Kenya is considering a draft bill on data protection.

Implications and further research

Now that we have this more accurate picture of the global development of data privacy laws, further research becomes possible. It has already made possible an assessment of the influence of European privacy standards on legislative developments outside Europe.[8] Further research is required on such questions as the implications of the increasingly interlocking data export restrictions in this legislation; on the effectiveness of the enforcement regimes in various countries; on the extent of judicial interpretation of these laws, and on other comparative aspects of data privacy laws. All of this requires an accurate account of the world's data privacy laws.

Updates, resources and acknowledgments

Details of new data privacy laws (and Bills for new laws) from countries which do not have them will be included in subsequent issues of *Privacy Laws & Business International Report*. This commentary and Table will be updated at least annually.

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Some of the resources which have been valuable in the research for this article are as follows: 'Data Protection Laws Around the World Map' at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1951416>; Council of Europe website, for ratifications of the Convention and the Protocol; EU website for legislation of member states <http://ec.europa.eu/justice/policies/privacy/law/implementation_en.htm>; EU website for adequacy decisions <http://ec.europa.eu/justice/policies/privacy/thridcountries/index_en.htm>; Privacy Laws & Business website <www.privacylaws.com>; Christopher Millard 'Privacy Laws & Business European Data Protection Laws Chart' *Privacy Laws & Business Newsletter*, May 1997; dataprotection.eu website <http://www.dataprotection.eu/>; Morrison & Foerster 'Privacy Library' <http://www.mofo.com/privacylibrary/>; Linklaters 'Data Protected' website for clients; BNA website. All errors and omissions remain my own.

[8] Greenleaf, G 'The Influence of European Data Privacy Standards Outside Europe: Implications for Globalisation of Convention 108' (accepted) *International Data Privacy Law*, Vol 2, Issue 2, 2012, available at <http://papers ssrn.com/abstract_id=1960299>

Global Table of Data Privacy Laws

This Table is sorted alphabetically by Jurisdiction, but can be sorted by any column (in Word).

Jurisdiction	Key Act	From[9]	Latest	Region[10]	Sec[11]	EU[12]	CoE[13]	Other Int.[14]
Albania	Act on the Protection of Personal Data	1999	1999	Europe (O)	Both	[I]	R, P	
Andorra	Law on the protection of personal data	2003	2003	Europe (O)	Both	A	R; P	
Angola	Lei da Protecção de Dados Pessoais	2011	2011	Africa	Both			
Argentina	Personal Data Protection Act	2000	2000	Latin Am	Both	A		
Armenia	Law on Personal Data	2002		Europe (O)	Both		NS; SP	
Australia	Privacy Act 1988	1988	2001	Australasia	Both			APEC, OECD
Austria	Datenschutzgesetz	1978	2009	Europe (EU)	Both	M	R; P	OECD
Azerbaijan	Law on data, data processing and data protection	1998	1998	Europe (O)	Both		R	
Bahamas	Data Protection Act	2003	2003	Caribbean	Both			
Belgium	Law on Privacy Protection in relation to the Processing of Personal Data	1992	1998	Europe (EU)	Both	M	R	OECD
Benin	Loi Portant Protection des données à Caractère Personnel	2009	2009	Africa	Both			ECOWAS
Bosnia & Herzegovina	Law on the protection of personal data	2001	2001	Europe (O)	Both	[I]	R, P	
Bulgaria	Law for Protection of Personal Data	2002	2007	Europe (EU)	Both	M	R; P	
Burkina Faso	Loi Portant Protection des Données à Caractère Personnel	2004	2004	Africa	Both			ECOWAS
Canada	Personal Information Protection and Electronic Documents Act	1983 (prior Act)	2002	North Am	Both	A		APEC; OECD
Cape Verde	Regime Juridico Geral de Protecção de Dados Pessoais a Pessoas Singulares Janeiro	2001	2001	Africa	Both			ECOWAS
Chile	Privacy Law	1999	1999	Latin Am	Both			APEC,

[9] **Date columns**: 'From' = date original law enacted; 'Latest' = year of last significant amendment known; 'NYIF' = not yet in force; 'NIFU' = not in force until date stated, where bringing into force is delayed over one year

[10] **Region column:** 'Europe (EU)' = current European member states; 'Europe (O)' = other European states (including EEA)

[11] **Sector column:** 'Pri' = covers private sector only; 'Pub' = covers public sector only; blank = covers both sectors

[12] **European Union column:** M = country is an EU member state; A = country's protection of personal data has been held 'adequate' by the EU; [A] = Favourable Article 29 Working Party opinion on adequacy, but no final decision announced; EEA = country is a member of the European Economic Area; [I] = Adequacy finding is in practice irrelevant due to country acceding to both Council of Europe Convention 108 and Additional Protocol

[13] **Council of Europe column:** ('Member' means Member State of the Council of Europe) R = Member and has ratified the Convention; R* = United Kingdom has ratified Convention on behalf of sub-jurisdiction; S = Member and has signed but not ratified Convention; P = has also ratified the optional protocol; NS = Member but has not signed Convention; [I] = not a Member but has been invited to accede to the Convention; A = not a Member but has acceded to the Convention

[14] **Other international commitments column:** APEC = 'economy' is a member of APEC (Asia Pacific Economic Cooperation); OECD = country is a member of OECD; ASEAN = county is a member of Association of South East Asian Nations; ECOWAS = country is a member of Economic Community of West African States; EAC = county is a member of the East African Community

								OECD
Colombia	Data Protection Law	2008	2008	Latin Am	Both			
Costa Rica	Protección de la Persona frente al tratamiento de sus datos personales	2011	2011	Latin Am	Both			
Croatia	Act on Personal Data Protection	2003	2003	Europe (O)	Both	[I]	R; P	
Cyprus	The Processing of Personal Data (Protection of the Individual) Law	2001	2003	Europe (EU)	Both	M	R, P	
Czech Republic	Personal Data Protection Act	1992	2000	Europe (EU)	Both	M	R, P	OECD
Denmark	Act on Processing of Personal Data	1978	2000	Europe (EU)	Both	M	R	OECD
Dubai IFC	Data Protection Law ('IFC' = International Financial Centre)	2007		N Af/M East	**Pri**			
Estonia	Data Protection Act	2003	2003	Europe (EU)	Both	M	R, P	OECD
Faroe Islands	Act on processing of personal data	2010	2010	Europe (O)	Both	A		
Finland	Personal Data Act	1987	1999	Europe (EU)	Both	M	R	OECD
France	Law relating to the protection of individuals against the processing of personal data	1978	2004	Europe (EU)	Both	M	R; P	OECD
FYROM (Macedonia)	Law on Personal Data Protection	2005	2005	Europe (O)	Both	[I]	R, P	
Gabon	Law related to personal data	2011	2011	Africa	Both			
Germany	Federal Data Protection Act	1977	2001	Europe (EU)	Both	M	R, P	OECD
Gibraltar	Data Protection Act	2004	2004	Europe (O)	Both			
Greece	Law on the Protection of individuals with regard to the processing of personal data	1997	1997	Europe (EU)	Both	M	R	OECD
Guernsey	Data Protection (Bailiwick of Guernsey) Law	1986	2001	Europe (O)	Both	A	R*	
Hong Kong SAR	Personal Data (Privacy) Ordinance	1995	1995	Asia	Both			APEC
Hungary	Law on the protection of personal data etc	1992	1992	Europe (EU)	Both	M	R, P	OECD
Iceland	Law on the Protection and Processing of Personal Data	1989	2000	Europe (O)	Both	EEA	R	OECD
India	Rules under s43A (2008 Amendt), Information Technology Act 2000	2011	2011	Asia	**Pri**			
Ireland	Data Protection Act	1988	2003	Europe (EU)	Both	M	R, P	OECD
Isle of Man	Data Protection Act	1986	2002	Europe (O)	Both	A	R*	
Israel	Privacy Protection Act 1981	1981	1981	N.Af/M East	Both	A		OECD
Italy	Consolidation Act regarding the Protection of Personal Data	1996	2003	Europe (EU)	Both	M	R	OECD
Japan	Act on the Protection of Personal Information	2003	2003	Asia	Both			APEC, OECD
Jersey	Data Protection (Jersey) Law	1987	2005	Europe (O)	Both	A	R*	
Kyrgyz Republic	Law on Personal Data	2008	2008	Central Asia	Both			
Latvia	Law on Protection of Personal Data of Natural Persons	2000	2002	Europe (EU)	Both	M	R; P	
Liechtenstein	Gesetz über die Abänderung des Datenschutzgesetzes (2002)	2002	2008	Europe (O)	Both	EEA	R, P	
Lithuania	Law on Legal Protection of Personal Data	1996	2003	Europe (EU)	Both	M	R, P	
Luxembourg	Data Protection Law	1979	2002	Europe (EU)	Both	M	R, P	OECD
Macao SAR	Personal Data Protection Act	2007	2007	Asia	Both			
Malaysia	Personal Data Protection Act	2010	NYIF	Asia	**Pri**			APEC,

								ASEAN
Malta	Data Protection Act	2001	2001	Europe (EU)	Both	M	R	
Mauritius	Data Protection Act	2004	2004	Africa	Both			
Mexico	Federal Law on the Protection of Personal Data Held by Private Parties	2010	2010	Latin Am	Both			APEC, OECD
Moldova	Law on Personal Data Protection	2007	2007	Europe (O)	Both	[I]	R; P	
Monaco	Act controlling personal data processing	1993	2001	Europe (O)	Both	[I]	R; P	
Montenegro	Law on Personal Data Protection	2008	2008	Europe (O)	Both			
Morocco	Loi relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel	2009	2009	N Af/M East	Both			
Netherlands	Personal Data Protection Act	1988	2000	Europe (EU)	Both	M	R, P	OECD
New Zealand	Privacy Act 1993	1993	2010	Australasia	Both	[A]		APEC, OECD
Norway	Personal Data Act	1978	2000	Europe (O)	Both	EEA	R	OECD
Paraguay	Law 1682 on Information of a Private Nature	2002		Latin Am	Both			
Peru	Law on Protection of Personal Data	2011	2011	Latin Am	Both			APEC, US FTA
Poland	Act on the Protection of Personal Data	1997	2004	Europe (EU)	Both	M	R, P	OECD
Portugal	Lei da protecçao de dados pessoais	1991	1998	Europe (EU)	Both	M	R; P	OECD
Qatar Financial Centre	Data Protection Regulations	2005	2005	N.Af/M.East	**Pri**			
Romania	Law on the protection of individuals with regard to the processing of personal data etc	2001	2005	Europe (EU)	Both	M	R, P	
Russia	Federal Law Regarding Personal Data	2006	NIFU 2011	Europe (O)	Both	S	S	APEC
San Marino	Law regulating the Computerized Collection of Personal Data	1983	1995	Europe (O)	Both		NS	
Senegal	Loi sur la Protection des données à Caractère Personnel	2008	2008	Africa	Both			ECOWAS
Serbia	Law on Personal Data Protection	2008	2008	Europe (O)	Both	[I]	R, P	
Seychelles	Data Protection Act	2003	2003	Africa	Both			
Slovakia	Act on the Protection of Personal Data	1992	2005	Europe (EU)	Both	M	R, P	OECD
Slovenia	Personal Data Protection Act	1999	2004	Europe (EU)	Both	M	R	OECD
South Korea	Data Protection Act	2001	2011	Asia	Both			APEC; OECD
Spain	Ley Orgánica de Protección de Datos de Carácter Personal	1992	1999	Europe (EU)	Both	M	R, P	OECD
St Lucia	Data Protection Act 2011	2011	NYIF	Caribbean	Both			
St Vincent & Grenadines	Privacy Act of 2003	2003		Caribbean	Both			
Sweden	Personal Data Act	1973	1998	Europe (EU)	Both	M	R; P	OECD
Switzerland	Data Protection Act	1992	1992	Europe (O)	Both	A	R, P	OECD
Taiwan	Personal Data Protection Act	1995	2010	Asia	Both			APEC
Thailand	Official Information Act 1997	1997	1997	Asia	**Pub**			APEC; ASEAN
Trinidad &	Data Protection Act	2011	2011	Caribbean	Both			

Tobago								
Tunisia	Loi portant sur la protection des données à caractère personnel	2004	2004	N Af/M.East	Both			
Ukraine	Law on Personal Data Protection	2011	2011	Europe (O)	Both	[I]	R, P	
United Kingdom	Data Protection Act 1998	1984	1998	Europe (EU)	Both	M	R	OECD
United States	Privacy Act of 1974	1974		North Am	**Pub**			OECD, APEC
Uruguay	Law on the Protection of Personal Data	2008	2008	Latin Am	Both	[A]	[I]	
Vietnam	Law on Protection of Consumers' Rights	2010	2010	Asia	**Pri**			APEC; ASEAN

Global Table of Data Privacy Bills

Table of Bills for new Acts (or new coverage of public/private sector), and official draft Bills

Jurisdiction	Title of Bill/Draft	From[15]	Current?[16]	Region	Sec	CoE	Other Int.
Georgia	Law on Personal Data Protection	2011	Current	Europe		R	
Philippines	Data Privacy Bill	2011	Current	Asia	Both		APEC; ASEAN
Ghana	Protection of Personal Data Bill	2010	Current, 2nd reading 10/ 2011	Africa	Both		ECOWAS
South Africa	Protection of Personal Information Bill	2009	Current, Before Committee; Being redrafted	Africa	Both		
Cayman Island	Data Protection Bill	2011	Draft	Caribbean	Both		
Madagascar	Data Protection Bill	2008	Draft	Africa	Both		
Mali	Data Protection Bill	2011	Draft	Africa	Both		ECOWAS
Niger	Data Protection Bill	2009	Draft	Africa	Both		
Brazil	Protection of Personal Data Bill	2011	Draft; in consultations	Latin Am.	Both		
Kenya	Data Protection Bill	2012	Draft; in consultations	Africa	Both		EAC
Barbados	Data Protection Bill	2005	Lapsed	Caribbean	Both		
Lebanon	Data Protection Bill	2005	Lapsed	N.Af/M.East	Both		
Thailand	Personal Data Protection Bill	2011	Lapsed	Asia	Both		APEC, ASEAN
Turkey	Law on the Protection of Personal Data	2003	Lapsed	Europe	Both	S	OECD

[15] 'From': Date of latest known Bill or official draft Bill

[16] 'Current?': 'Current' = before current session of legislature; 'Draft' = official draft known, but not yet introduced to legislature; 'Lapsed' = Bill was introduced in previous session of legislature but did not proceed

Arbitration Law

The Federal Arbitration ACT

The Federal Arbitration Act

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

Arbitration

Chapter 1. General Provisions

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

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

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

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

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

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

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

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

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

Section 5. Appointment of arbitrators or umpire

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

Section 6. Application heard as motion

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

Section 7. Witnesses before arbitrators; fees; compelling attendance

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

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

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

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

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

Section 10. Same; vacation; grounds; rehearing

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

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

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

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

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

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

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

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

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

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

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

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

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

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

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

Section 14. Contracts not affected

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

Section 15. Inapplicability of the Act of State doctrine

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

Section 16. Appeals

(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

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

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

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

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

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

Section 201. Enforcement of Convention

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

Section 202. Agreement or award falling under the Convention

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

Section 203. Jurisdiction; amount in controversy

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

Section 204. Venue

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

Section 205. Removal of cases from State courts

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

Section 206. Order to compel arbitration; appointment of arbitrators

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

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

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

Section 208. Chapter 1; residual application

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

C hapter 3. Inter-American Convention On International Commercial Arbitration

Section 301. Enforcement of Convention

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

Section 302. Incorporation by reference

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 307. Chapter 1; residual application

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

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

By William J.T. Brown

In 1920 New York was the leader, the first of the states to enact an arbitration statute directing courts to enforce the agreements of commercial parties to resolve their future disputes through arbitration. That1920 enactment remains at the core of New York's present arbitration law, C.P.L.R. Article 75. New York's 1920 enactment was also the model for the Federal Arbitration Act ("FAA"), which Congress adopted in 1925. The two acts co-existed for decades, with little suggestion of conflict. In general concept, the New York arbitration statute applied when parties brought an arbitration-related dispute into New York state court. The Federal act applied when such a dispute came before the federal court, which could only occur when there was an independent basis for federal jurisdiction, such as diversity of citizenship.

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

Federal Preemption

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

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

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

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

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

A Different Kind of Preemption –Voluntary Adoption of Federal Law

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

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

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

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

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

Every Arbitration Case a Constitutional Case

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

The Fate of Pro-Arbitration Provisions of New York Law

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

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

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

Conclusion

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

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

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

Arbitrators acting in New York State derive their powers from the parties' agreement to submit their dispute to arbitration and from the law that validates and implements that agreement: the New York State arbitration statute ("CPLR Article 75") and, if the dispute involves interstate or international commerce, the Federal Arbitration Act ("FAA"). These two statutes are quite similar in text and vintage. New York in 1920 was the first of the states to enact an arbitration statute and thus to reject the traditional view of arbitration as a competitive threat to the judiciary. The 1920 New York enactment was the model and inspiration when Congress in turn enacted the FAA in 1925. Interpretation of the two statutes underwent parallel and sometimes divergent development over most of the last century. Although the statutes confer power on arbitrators, an equally important function is their directive to courts as to how and when to intervene in the arbitral process. The arbitrator in performing his tasks may or may not be able to predict whether his work will be subject to supervision and review under state or federal law or by a state or federal court. Despite their similarities, the New York statute has historically been interpreted by New York State judges as withholding from the arbitrator certain powers that the FAA does grant to arbitrators. To cite three examples: the power to decide whether the claim in arbitration is barred by the statute of limitations[1], whether punitive damages should be awarded[2], and whether an award of attorneys' fees should be granted (permitted under New York arbitration law only if the parties have agreed to confer such a power)[3]. A further difference that may now be at issue in New York's appellate courts concerns the authority of the arbitrator to impose a monetary sanction for party obstruction causing injury or prejudice to the other party.

The Authority of the New York Arbitrator to Impose Sanctions.

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

[1] See In Re Smith Barney, Harris Upham & Co. v. Luckie, 85 N.Y. 193 (1995.)
[2] See Garrity v. Lyle Stuart, Inc., 40 N.Y. 2d 354 (1976).
[3] See CPLR 7513.
[4] 564 F.3d 81, 86 (2d Cir. 2009). The "broad" arbitration clause in that case gave the arbitrators authority to decide "any disputes or differences arising hereafter between the parties with reference to any transaction under or relating in any way to this Agreement...." Id., 564 F.3d at 84.

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

The New York State Court's Analysis.

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

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

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

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

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

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

A Critique of the Grynberg Decision.

We can respectfully question Justice Solomon's conclusion that the FAA did not apply to this arbitration due to the parties' omission of any reference to the FAA in the arbitration clause. Where an agreement to arbitrate is concluded in the context of interstate or international commerce, it appears that section 2 of the FAA operates of its own force to make that agreement valid and require its enforcement.[10] Certainly the arbitration clause defines the scope of the issues that are subject to the arbitrator's decision and must be interpreted under the state contract law that the parties have chosen[11], but the U.S. Supreme Court has held repeatedly that such a clause must also be interpreted under substantive federal law requiring that any ambiguity as to the scope of matters in arbitration be resolved in favor of subjecting the matter to arbitration.[12] Where the parties by their agreement have empowered the arbitrator to decide a body of issues but have specified that he is to act under rules that do not allow for decision of some of those issues, is that an ambiguity that must be resolved in favor of arbitration? The Second Circuit's recent decision in Bechtel do Brasil Construcoes would suggest that it is.[13]

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

[10] Indeed, as Grynberg involved an international arbitration, the New York Convention and FAA Chapter 2, section 207 would have applied to bring FAA section 2 into operation.
[11] See Credit Suisse First Boston Corp. v. Pitofsky, 4 N.Y. 3d 149, 154 n.2 (2005), citing federal precedents
[12] E.g., First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-45 (1995); Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).
[13] Bechtel do Brasil Construcoes v. AUG Araucaria Ltda., F.3d (2011), discussed below.
[14] Volt Info. Sciences v. Board of Trustees, 489 U.S. 468 (1989).
[15] Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).
[16] Id., 514 U.S. at 64-66.

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

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

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

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

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

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

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

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

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

Prima Paint established a contrary rule,[22] that the New York Court of Appeals in a unanimous opinion by Judge Wachtler found that it was unduly "bothersome" for the state courts to be enforcing a different rule than that which prevailed both in federal court and in maritime and securities cases in New York State court, and thus changed New York arbitration law to achieve uniformity on this issue.[23] Similarly, although New York courts had originally held that claims of human rights violation could not be subjected to arbitration, after the U.S Supreme Court held in Gilmer v. Interstate/Johnson Lane[24] that such claims were arbitrable, the New York Court of Appeals recognized the predominant federal role in this field and adhered to the federal rule.[25] In yet another initiative, New York Courts have been highly supportive of uniformity in requiring the application of the FAA by New York state courts in all disputes involving interstate commerce.[26] To be sure, consenting parties retain the right under FAA section 2 itself to decide in what manner they shall arbitrate; and that would permit them, within certain limits[27], to choose procedures of New York state law even if idiosyncratic or anomalous. But, as noted above, there is no public policy need to accentuate or cultivate the anomalous.

State and Federal Arbitration Statutes as Concurrent Grants of Authority.

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

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

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

[24] 500 U.S. 20 (1991).

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

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

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

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

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

upon to act in respect of the arbitration. The limitations that New York arbitration law places on the authority of arbitrators can no longer be considered as reflecting a public policy prohibiting exercise of arbitrator power in such areas, as the Court of Appeals has emphasized[30] that the choice of New York law to govern a commercial agreement will not be interpreted as importing those limitations into arbitration under that agreement. Explicit (or implicit) decision by the parties is required to make the New York arbitral limitations applicable in a given arbitration. Thus, while the New York arbitration statute may not give the arbitrator power to decide certain matters, it does not stand in the way of the arbitrator's exercise of those powers if he obtains them from concurrent grant of authority by the FAA (or party agreement validated and enforced by section 2 of the FAA).

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

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

Of course the parties may preclude imposition of sanctions in arbitration if they wish to do so. Under the authority of Volt[35] and Hall Street[36] they may also preclude application of all or at least most of the provisions of the FAA if they indeed wish to arbitrate under a different body of law, such as New York State law. But why should it be presumed that parties who have agreed to arbitrate under New York state arbitration law wish to preclude the application of the FAA where its terms may supplement but are not in conflict with the chosen state law procedures? The Second Circuit considered such an issue in the recent Bechtel do Brasil case, mentioned above.[37] There, as in Grynberg and Reliastar, the

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[30] In Sacharow, supra, note 17 and Diamond Waterproofing, supra, note 26.
[31] See Varley v. Tarrytown Assocs., Inc. 477 F.2d 208 (2d Cir. 1973)
[32] See CPLR § 7510.
[33] See The Home Ins. Co. v. RHA/Pennsylvania Nursing Homes, Inc., 113 F.Supp. 633 (S.D.N.Y. 2000). But see Franklin Hamilton LLC v. Creative Insurance Underwriters, Inc., 2008 U.S. Dist. LEXIS 92980 (S.D.N.Y.2008).
[34] See Coleman & Co. Securities, Inc. v. Giaquinto Family Trust, 2000 U.S. Dist. LEXIS 16215, a case which seems in conflict with the subsequent Second Circuit decision in Bechtel do Brasil, discussed below.
[35] Supra, note 14.
[36] Supra, note 27.
[37] Bechtel do Brasil Construcoes v. AUG Araucaria Ltda., .638 F.3d 150 (2d Cir. 2011).

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

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

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

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

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

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

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

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

[40] Imclone Sys. v. Waksal, 22 A.D. 3d 387 (1st Dep't 2005).
[41] Cited supra, note 11.

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

OVERVIEW OF ARBITRATION CHOICE OF LAW

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by

Charles J. Moxley, Jr.[1]

Scope

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

The issues arise in two overall contexts:

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

Presence of Choice of Law Issues in Every Case

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

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

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

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

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

Types of Law Applicable to Arbitrations

Areas of law potentially involved in any particular arbitration include:

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

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

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

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

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

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

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

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

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

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

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

The Law Applicable to an Arbitration May be State or Federal

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

Variables in Choice of Law Decisions in Arbitrations

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

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

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

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

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

New York Arbitration Law

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

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

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

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

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

Federal Arbitration Law

Federal arbitration law is generally set forth in the Federal Arbitration Act[5] (FAA) and case law. The FAA was enacted in 1925, five years after New York CPLR Article 75 (as originally enacted). The text of the FAA was largely based on Article 75.

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

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

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

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

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

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

[5] 9 USCS § 1 et seq.

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

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

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

Preliminary Overview of Federal Arbitration Law[8]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New York arbitration law, to be decided by the court[11] and under the FAA by the arbitrator.[12] In contrast, challenges to the validity of the arbitration clause itself are generally decided by the court under both New York arbitration law and the FAA.[13]

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

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

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

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

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

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

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

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

- **Punitive damages**: New York arbitration law generally prohibits arbitrators from awarding punitive damages, even if the parties agreed that the arbitrators would have such a power.[19] The Supreme Court in *Mastrobuono* found that the FAA permits arbitrators to award punitive damages.[20] The New York state courts have

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

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

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

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

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

been inconsistent after *Mastrobuono*, with some courts following the decision[21] and at least one not following it and sticking to the strong New York public policy against punitive damages.[22]

- **Attorneys' fees**: CPLR 7513 generally precludes arbitrators from awarding attorneys' fees, unless otherwise provided in the parties' agreement to arbitrate or implied by their choice of arbitration forum.[23] Federal law contains no such prohibition.[24]
- **Consolidation of arbitrations**: New York courts have held that they have the power to consolidate arbitrations based upon the same general bases applicable to the consolidation of actions[25] and have suggested that arbitrators have this same power to consolidate.[26] In contrast, federal courts have generally concluded that, given a broad arbitration clause, consolidation is for arbitrators not courts.[27] Although the Supreme Court's 2010 decision in *Stolt-Nielsen* seemed, by its treatment of class action arbitration, to imply that, absent an explicit delegation of the issue to the arbitrators, consolidation may be for the courts, several recent district court decisions in the Second Circuit have held that joinder and consolidation present different issues than class action arbitration and remain generally for arbitrators not courts to decide. [28]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[37] *See Id*

[38] *See Id.*

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

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

- Since FAA § 7 on its face provides only for enforcement in federal court, but disputes relating to arbitrations affecting interstate commerce may be litigated in state court, one might expect CPLR 7505 to apply to such disputes litigated in state court.
- Nonetheless, the First Department in at least one case has reflexively applied FAA § 7 to issues as to subpoenas in arbitrations to which the FAA is applicable.[41]

- **Application by New York state courts of the provisions of FAA §§ 9, 10, and 11 to issues as to the review of awards issued by arbitrators in cases involving interstate commerce:**
  - CPLR 7511 sets forth the standards for vacating or modifying arbitration awards.
  - FAA §§ 9, 10, and 11 set forth standards for confirming, vacating, and modifying arbitration awards. As noted above, § 10 refers specifically to vacating arbitration awards in federal district courts, without reference to state courts. Section 9 refers to confirming awards in federal court, although it also refers to the possibility of the parties' specifying the court in which judgment on an award shall be entered, without specifying what that court might be, or whether it might be a state court. Section 11 refers to modifying awards in federal district court.
  - Accordingly, one might expect that a New York state court hearing a motion to vacate an award in an arbitration to which the FAA is applicable would apply the standards set forth in CPLR 7511, except perhaps, as to confirming awards, if the parties' agreement provided otherwise.
  - Yet the New York courts, including the Court of Appeals, have often proceeded seemingly automatically and reflexively, from the determination that the FAA is applicable to the application of the standards of FAA §§ 10 and 11 for modifying and vacating awards.[42]

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

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

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

Scope of the FAA

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

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

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

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

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

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

Basic Substantive Rule of the FAA

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

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

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

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

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

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

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

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

Examples of State Laws Preempted by the FAA

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

Scope of Arbitrability: How Much of a Dispute is Arbitrable

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

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

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

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

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

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

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

Reversing the Presumption of Arbitrability for Gateway Issues of Substantive Arbitrablity

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

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

[55] *Howsam*, 537 U.S. at 84.

[56] *Howsam*, 537 U.S. at 83, stating:

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

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

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

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

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[57] *Id.* at 84-85.

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

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

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

Challenges to the Parties' Underlying Agreement and Arbitration Agreement

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

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

[59] *Howsam*, 537 U.S. at 85.

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

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

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

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

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

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

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

General Scope of Applicability of the FAA in New York Courts

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

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

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

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

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

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

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

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

parties, by their contract, had adopted California arbitration law, including a provision that permitted the staying of an arbitration pending related litigation.

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

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

[65] *Id.* at 477.

[66] *Id.*

[67] *Id.* at 479.

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

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

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

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

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

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

[70] *Id.*

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

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

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

the FAA and proceeded in their analysis and decisions to apply New York arbitration law. It would be interesting investigating whether counsel simply didn't raise the issue in such cases or the courts chose to ignore it.

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

- Whether New York's trend of over-preemption will continue will be interesting to watch. Numerous other states, including California, have tended to apply the FAA on a more limited basis in cases before them, generally applying their own arbitration law when it does not conflict with the central rule of the FAA that parties' arbitration agreements are enforceable as written.[73]

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

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

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

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

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[907 A.2d 550, 568]; *DeBaker v. Shah* (Ct.App. 1994) 187 Wis. 2d 252 [522 N.W.2d 268, 271], reversed on other grounds in *DeBaker v. Shah* (1995) 194 Wis. 2d 104 [533 N.W.2d 464]; *Flexible Mfg. Systems Pty v. Super Products* (E.D.Wis. 1994) 874 F.Supp. 247, 249; *M&L Power Services v. American Networks Intern.* (D.R.I. 1999) 44 F.Supp.2d 134, 139–142; *see also,* Howard S. Suskin and Stuart D. Polizzi, *A Cautionary Reminder About the Unique Application of the Federal Arbitration Act in State Court Proceedings*, 38 Securities Reg. L. & Rep. 2006 (Dec. 11, 2006), *citing, inter alia, Joseph v. Advest, Inc.*, 906 A.2d 1205 (Pa. Super. Ct. Aug. 8, 2006); *Atlantic Painting & Contracting, Inc. v. Nashville Bridge Co.*, 670 S.W.2d 841, 846 (KY 1984); *Manson v. Dain Bosworth Inc.*, 623 N.W.2d 610 (Minn. Ct. App. 1998), and Simmons Co. v. Deutsche Financial Services Corp., 532 S.E.2d 436, 439-40 (Ga. Ct. App. 200).

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

The Court in *Mastrobuono* stated:

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

514 U.S. at 62-64.

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

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

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

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NYSBA Commercial Arbitration Training Program:

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June 20, 2018

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New York State Bar Association – Dispute Resolution Section

Commercial Arbitration Training

VACATUR/CONFIRMATION – June 20, 2018

By Michael S. Oberman

I. Introduction

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

--Two closely watched cases in recent years—*Scandinavian Reinsurance Co.* v. *St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60 (2d Cir. 2012), and *Dealer Computer Servs., Inc.* v. *Michael Motor Co.*, 485 F. App'x 724 (5th Cir. 2012), *cert. denied*, 568 U.S. 1124 (2013)—saw the circuit court reverse district court vacaturs.

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

b. And yet, a second take-away: even if a challenge to an award is ultimately unsuccessful, the challenge takes time and expense – especially if pursued on appeal.

1. While there is a short period in which to commence a challenge to an award at the trial court level, there is no expedition for decision or appeal.

2. A recent study of 200 cases decided by the Southern District of New York since 2005 found that the average time from petition to district court judgment was 42 weeks and for international cases 35 weeks; most of the cases were employment disputes, with only 27 domestic commercial awards reviewed by the SDNY in that time period. *See* Tim McCarthy, David Hoffman and Ryham

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

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

II. Choice of Law

a. In the review of an award, there is the threshold issue of whether the case is governed by the FAA or by state law.

b. It is not the courthouse that determines whether the FAA or state law controls; it is the wording of the arbitration agreement along with the nature of the underlying dispute (i.e., interstate commerce).

c. *See Cusimano v. Schnurr*, 26 N.Y.3d 391, 399-400 (2015)(describing "undeniably broad" "interpretation" to be applied is assessing interstate commerce for purposes of the FAA); *Krantz & Berman LLP v. Dalal*, 472 F. App'x 76, 77 (2d Cir. 2012) ("But the record reflects that, pursuant to the retainer agreement, K&B (a New York law firm) provided services to Dalal (then a resident of Washington, D.C.) related to litigation involving a New Jersey corporation. We need go no further") (citing *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) as holding "involving commerce" in the FAA signifies the "broadest permissible exercise of Congress' Commerce clause power"), *cert. denied*, 133 S. Ct. 1584 (2013)).

d. *See also N.J.R. Assoc. v. Tausend,* 19 N.Y.3d 597, 601-02 (2012) ("We have explained that a contract specifying that 'New York law shall govern both "the agreement and *its* enforcement[]" adopts' the New York rule that the threshold statute of limitations issues are resolved by the courts and not arbitrators. . . ."; *County of Nassau v. Chase*, 402 F. App'x 540, 541 (2d Cir. 2010) (where contract specifies "that any appeal from an arbitration award is to be governed exclusively by New York state law, the designation must be honored by the courts unless the state law conflicts with federal law").

e. Scope of Review Under FAA or State Law

i. Law applied can matter—among other reasons—because of *SCOTUS* decision in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 576-77 (2008): held that the FAA grounds for review are exclusive (i.e., the parties cannot by contract provide that an award will be reviewed for mere error of law), but the Court specifically mentioned the possibility that broader review of awards may be had under state or common law.

ii. Three states have concluded that Sections 9-11 of the FAA do not preempt state law and that their state law provides for broader review (Alabama, California, and Texas); four have held otherwise (Maine, Georgia, Tennessee, and Massachusetts). *See* Michael S. Oberman, "The *Hall Street* Parade: State Courts Step Out and Consider Expanded Review of Arbitration Awards," 4 New York Dispute Resolution Lawyer, No. 3 at 23 (Fall 2011); *Katz, Nannis & Solomon, P.C. v. Levine*, 46 N.E.3d 541 (Mass. 2016).

iii. Going in the other direction, state and federal courts are exploring whether parties may, by agreement, narrow or even eliminate all—or certain—steps of judicial review.

1. See Michael S. Oberman, "The Other Shoe: Are Agreements *Narrowing* Judicial Review Enforceable," 31 Alternatives at 65 (May 2013).

III. Statute of Limitations

a. One of the ways the governing statute matters is in the applicable deadlines.

b. The time to seek confirmation is one year under either the FAA or the CPLR, but the rules are different for a petition to vacate.

1. Under the FAA, a petitioner has only three months to petition to vacate, and that period ends with the last day of the third month even if the other party subsequently moves to confirm within the year allowed.

2. Under the CPLR, a petitioner has 90 days to petition to vacate, but if the 90 days goes by and a petition to confirm is therefore timely made, the losing party may cross-move to vacate.

3. See *Martin v. Deutsche Bank Sec. Inc.*, 676 F. App'x 27 (2d Cir. 2017) (enforcing three month requirement); *Karo v. Nau Country Ins. Co.*, 901 N.W. 2d 689 (Neb. 2017) (three months rule under FAA is jurisdictional). *See also Thompson v. Lithia ND Acquisition Corp.*, 896 N.W.2d 230 (N.D. 2017) (noting split among federal circuits on whether one-year period is mandatory under FAA, holds later confirmation allowed under state statute).

IV. Mechanics: Proceedings

a. Even if review is under FAA, an independent basis is required for subject matter jurisdiction in federal court.

b. Most often, the proceeding consists of written submissions and oral argument; occasionally, there can be an evidentiary hearing and/or discovery.

c. It is not uncommon for a losing party to engage an investigator after an arbitration to seek out relationships of the arbitrator(s) that might give rise to a challenge for evident partiality.

d. Burden of Proof

i. Second Circuit has held that the showing required to avoid summary confirmation of an arbitration award under FAA is very high. *See Scandanavian Reinsurance,* 668 F.3d at 71-72.

ii. For CPLR cases, courts have applied a clear and convincing standard (*see, e.g., Allstate Ins. Co. v. Geico,* 100 A.D.3d 878, 879 (2d Dep't 2012)).

V. Substantive Grounds for Review: Manifest Disregard

a. There is conflict and confusion over the role of the doctrine of "manifest disregard of the law."

i. Again, *Hall Street* held that the FAA grounds are exclusive and cannot be expanded by private agreement.

ii. Had Justice Souter stopped there, an issue would have been resolved, and clarity would prevail.

iii. But he went a step further, observing how lower courts had extracted from the Supreme Court's own *Wilko v. Swan* opinion in 1953 language suggesting manifest disregard as a separate ground, and he appeared to suggest it is not a separate ground under the FAA.

iv. Following *Hall Street*, both the circuits and state highest courts have divided on whether the SCOTUS really meant to extinguish "manifest disregard" or merely to curtail its role (e.g., can be a gloss on statutory grounds); courts also split on whether violation of public policy is a cognizable non-statutory ground.

v. *See Bangor Gas Co., LLC v. H.Q. Energy Servs. (U.S.) Inc.,* 695 F.3d 181, 187 n.3 (1st Cir. 2012) (finding Second, Fourth, Sixth and Ninth applying manifest disregard; Fifth, Eighth and Eleventh not; First Circuit, in dicta, saying no).

vi. In 2010, the SCOTUS had an easy opportunity to erase the confusion it created when it decided *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010),

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

vii. Instead, Justice Alito in note 1 observed the growing conflict and stated the Court would reserve on the issue of whether *Hall Street* eradicated manifest disregard—and then appeared to lower the standard to the extent it survives.

viii. As recently as 2017, SCOTUS continues to deny cert. in cases re-presenting the "manifest disregard" issue.

ix. New York state courts apply manifest disregard in FAA cases. *See, e.g., Natixis N. Am. LLC v. Payner*, 101 A.D.3d 509 (1st Dep't 2012).

VI. FAA Statutory Grounds

a. Section 10 of the FAA has four sub-sections (see below) —two of which appear most frequently in recent cases of note.

i. Section 10(a)(2): "where there was evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2).

1. As applied by the circuits, nondisclosure by itself does not equal evident partiality.

a. SCOTUS last addressed evident partiality in 1968, a case called *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), and split 4-2-3, leaving circuits and state courts to debate the effect of the plurality decision and to find their own way.

b. *See generally*, Michael S. Oberman, "Clarifying the Standard for Determining Arbitrator Bias," New York Law Journal, Apr. 2, 2012.

c. Second Circuit standard: whether a reasonable person, considering all of the

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

i Most circuits are aligned with at least this level of review; two apply a lower standard of "reasonable impression of partiality."

ii *See generally,* Brief for Respondent-Respondent, *U.S. Electronics, Inc. v. Sirius Satellite Radio Inc.*, 2011 WL 6986868 (N.Y. 2011) (compiling case law) (Michael Oberman was lead counsel for Sirius in this case); *see also Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 252-53 (3d Cir. 2013) (adopting Second Circuit standard).

d. N.Y. Court of Appeals adopted Second Circuit standard in *U.S. Electronics Inc. v. Sirius Satellite Radio Inc.*, 17 N.Y.3d 912, 913 (2011).

e. *Scandanavian Reinsurance:* Really good opinion that explains evident partiality; the Court stated:

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

[I]in ascertaining whether a relationship is "material"... we think that a court must focus on the question of how strongly that relationship tends to indicate the possibility of bias in favor of or against one party, and

not on how closely that relationship appears to relate to the facts of the arbitration... *Id.* at 75.

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

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

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

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

i. DCS offers computer hardware and software for automobile dealerships; Michael Motor was one dealership which contracted with DCS.

ii. The dispute turned on an interpretation of a provision of DCS's standard contract.

iii. DCS appointed Carol Butner as its party-appointed neutral arbitrator.

iv. Butner disclosed: "I served on panel [sic] of three arbitrators that considered a dispute between Dealer

Computer Services, Inc. and another party." 485 F. App'x at 728. On her questionnaire, she answered "Yes" to question on parties and counsel appearing before her in the past, and put a question mark in response to question on whether she served as an arbitrator in which listed witnesses or individual parties gave testimony.

v. After panel ruled for DSC, Michael Motor learned that Butner had served on the panel in the arbitration between DSC and Venus Ford. That panel issued an 8 page award in favor of DSC, which required application of the very same contract provision.

vi. The same law firm represented DSC in both arbitrations; the same damages expert testified for DSC in both arbitrations (which the Venus Ford panel credited); and the Venus Ford panel heard two additional witnessed for DSC who did not testify in *Michael Motor*.

vii. The district court held that Butner's conduct created a "reasonable impression of bias" and rose to the level of evident partiality—a connection to DSC that significantly compromised her ability to act impartially, 485 F. App'x at 726.

viii. The briefs on appeal focused more on whether Michael Motor waived the challenge—and the Fifth Circuit accepted this argument in a summary order reversing district court:

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

ix. The fourth ground is "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made." 485 F. App'x at 727.

1. There is a chance that this ground might provide a way to challenge an error of law.

a. If a clause says that an arbitrator may only issue an award consistent with governing case law, and the arbitrator is seen as mis-applying that law, can a challenge be raised for exceeding power—recognizing that the parties could not provide for an award to be reviewed for errors of law? The Texas Supreme Court has said this can be done under the Texas statute and consistent with FAA in *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex.), *cert. denied*, 565 U.S. 963 (2011).

2. But many other courts have held that a questioning of the arbitrator's authority should not be an indirect way of getting judicial review of the merits of an award.

3. "The Second Circuit has 'consistently accorded the narrowest of reading to the FAA's authorization to vacate awards pursuant to § 10(a)(4) . . . focus[ing] on whether the arbitrators had the power based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue." *DigiTelCom*, 2012 WL 3065345, at * 2 (citations omitted).

4. *See Timegate Studios, Inc. v. Southpeak Interactive, L.L.C.*, 713 F.3d 797 (5th Cir. 2013) (holding that an arbitrator did not exceed his powers by amending the parties' agreement to

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

VII. CPLR Statutory Grounds

a. Quite similar to the federal grounds (the FAA was based on New York's arbitration statute at the time).

b. But CPLR 7511(b)(1) has the following set-up language: "if the court finds the rights of that party were prejudiced"; this is not expressed in the FAA.

i. First: "corruption, fraud or misconduct in procuring the award."

1. Leading case is *Goldfinger v. Lisker*, (68 N.Y.2d 225(1986)), where the arbitrator met with a party-litigant privately without the knowledge of the other party—seen as "misconduct" or "undue means."

2. The Court stated: "Precisely because arbitration awards are subject to such judicial deference, it is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded...Our general reluctance to disturb arbitration awards must yield in this case to the clear necessity of safeguarding the integrity of the arbitration process." 68 N.Y.2d at 231, 232-33.

ii. Second: "partiality of an arbitrator appointed as a neutral."

1. *See Weinrott v. Carp.*, 32 N.Y.2d 190, 201 (1973): "We believe it is incumbent upon an arbitrator to disclose any relationship which raises even a suggestion of possible bias. This case, however, involves no direct relationships between arbitrator and client....Thus, we have only a weak link of indirect relationships purporting to tie an arbitrator to a claimant through a third party who is known

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

2. A petitioner's subjective belief that the arbitrator's rulings favored respondent does not create an actual or perceived conflict of interest between the arbitrator and respondent that prejudiced petitioner's rights.

3. A failure to pursue a possible ground for challenge known *before* the award can result in a waiver *after* the award. *See Goldstein v. 12 Broadway Realty LLC*, 105 A.D.3d 506, 506-07 (1st Dep't 2013).

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

1. Exceeding power—at variance with a limitation in the arbitration clause (versus contract itself).

2. It is important to know that New York has recognized that an arbitrator "may do justice as he sees it, applying his own sense of the law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement." *Matter of Silverman*, 61 N.Y.2d 299, 308 (1984).

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

iv. Fourth: "failure to follow the procedure of this article"—like notice.

VIII. Enforcing Awards

a. Most post-award proceedings are brought to confirm or vacate an award, but occasionally a dispute over the meaning of an award leads to a court proceeding to interpret and enforce the award.

b. In *Pine Street Assocs., L.P. v. Southridge Partners, L.P.*, 107 A.D.3d 95, 100 (1st Dep't 2013), the court addressed its role when a dispute exists over the meaning of a confirmed award. "'[T]he Court's function [is] to determine and declare the meaning and intent of the arbitrator," adopting the "most reasonable meaning of the text by avoding any potential interpretations of the award that would render any part of its language superfluous or lead to an absurd result." In addition, the "award must be interpreted in the light most favorable to the prevailing party" (citing a U.S. Court of Appeals for the Sixth Circuit decision for this last principle).

c. In *Tricon Energy v. Vinmar Int'l. Ltd.*, 718 F.3d 448, 456, 460 (5th Cir. 2013), the court held: "If an arbitration panel has been granted authority by the parties to award a non-statutory rate of postjudgment interest, and if it wishes to do so, it must expressly award 'postjudgment interest.' This panel did not." The court found that the parties had authorized the panel to award post-judgment interest, but the award did not state that post-judgment interest was being award at a non-statutory rate. The award spoke of post-award interest: "the arbitrators in this

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

d. *See Herll v. Auto-Owners Ins. Co.,* 879 F.3d 293 (8th Cir. 2018) (applying Minnesota Arbitration Act, which expressly provides for a court to submit a claim that an award is ambiguous back to the arbitrators); *General Re Life Corp. v. Lincoln National Life Ins. Co.*, 273 F. Supp. 3d 307 (D. Conn. 2017), *appeal argued,* (2d Cir. 2018) (holding that, in certain circumstances, the doctrine of *functus officio* does not prevent a court from submitting to the arbitrator a claim that the award is ambiguous and may require clarification).

e. For international awards, *see generally CBF Industria DeGusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58 (2d Cir.) (discussing the procedure for confirmation/vacatur in contrast to enforcement) *cert. denied*, 133 S. Ct. 557 (2017).

FEDERAL ARBITRATION ACT

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

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

§ 10. Same; vacation; grounds; rehearing

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

1. [W]here the award was procured by corruption, fraud, or undue means;

2. [W]here there was evident partiality or corruption in the arbitrators, or either of them;

3. [W]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

4. [W]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and

definite award upon the subject matter submitted was not made.

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

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

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

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

a. Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

b. Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

c. Where the award is imperfect in matter of form not affecting the merits of the controversy.

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

CPLR 7511
Vacating or modifying award

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

(b) Grounds for vacating.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Selected and complied by Michael S. Oberman

Case	Description
Adviser Dealer Services, Inc. v. Icon Advisers, Inc., 557 F. App'x 714 (10th Cir. 2014)	Reversing vacatur of award, and directing confirmation of award that awarded attorney's fees in a FINRA arbitration, where the parties' submissions each requested attorney's fees which—under FINRA rules—constituted a request by all parties for an award of fees.
Aerotel, Ltd. v. IDT Corp., 568 F. App'x 51, 53 (2d Cir. 2014)	Affirmed a judgment denying a petition for vacatur on the grounds of manifest disregard and exceeding powers. This order does not discuss the substantive law at issue but rather observed how the district court had found that the arbitration panel had looked at the applicable law. The court added: "The District Court properly concluded that while another panel might have reached a different conclusion, the panel in this case, whether correctly or not, was unquestionably applying the governing law." The District Court also noted that "New York law gives arbitrators substantial power to fashion remedies"...and, accordingly, the decision to deny specific performance and instead grant lost profit damages was not in excess of its powers under the FAA. We agree." (citation omitted).
A&G Coal Corp. v. Integrity Coal Sales, Inc., 565 F. App'x 41, 43-44 (2d Cir.), *cert. denied*, 135 S. Ct. 368 (2014)	Affirmed a judgment rejecting a petition to vacate an award of $21,074,300.30 premised on manifest disregard of the law and of the parties' contract. In contrast to some Second Circuit summary orders that have had extended discussion of the legal principles cited in the challenge, the court here quickly disposed of the challenge to the ruling on the contract claim and almost as quickly disposed of the challenge to the amount of damages. Petitioner A&G—while conceding "that the arbitrator's fact-finding in calculating market price is essentially unreviewable"—nonetheless contended that (a) the award granted more than Integrity had sought in the arbitration and was therefore "punitive rather than compensatory" and (b) the arbitrator "disregarded New York law in calculating damages." The most interesting point in the order is the Second Circuit's statement that the fact that an arbitrator "reached a greater figure than the one calculated by [the claimant] does not transform a compensatory award into a punitive one." Here is that statement in its context: A&G's punitive damages argument fails in light of the record. In its brief to the arbitrator, Integrity explicitly abandoned its claim for cover damages,

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	instead urging the arbitrator to calculate market damages as provided by Uniform Commercial Code § 2-713. The arbitrator proceeded to follow this suggested methodology. The fact that he thereby reached a greater figure than the one calculated by Integrity does not transform a compensatory award into a punitive one. As for damages calculation, A&G fails to identify controlling authority restricting damages to goods actually ordered. Instead, it claims that Integrity was required to prove that it was ready, willing, and able to perform (i.e., to pay for and receive all of the coal under the purchase orders in question) to recover damages in the amount awarded. The arbitrator, in fact, found that Integrity was ready, willing, and able to perform in that its officers continued ordering coal from A&G throughout 2008—coal that A&G then failed to deliver even though Integrity had satisfied all payment obligations by February 11, 2008. Having so found, the arbitrator then relied on Uniform Commercial Code § 2-713 which provides that, subject to proof of market price, the non-breaching buyer can recover from the seller "the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages . . . but less expenses saved in consequence of the seller's breach." N.Y. U.C.C. § 2-713[.]
Agility Public Warehousing Co. K.S.C. v. Supreme Foodservice GMBH, 495 F. App'x 149, 150, 151, 153 (2d Cir. 2012)	Confirmed a $41 million award in favor of Agility. The court first held that the New York Convention plainly applies, since Supreme is a Swiss company. The court rejected Supreme's argument that the award was contrary to New York public policy, in that certain Agility witnesses refused to testify in the face of an indictment of Agility and yet Agility sought and obtained affirmative relief in the arbitration. The court held that the Convention's public policy ground pertains to "national" policies and not the policies of particular states within a country. The court declined to rule if any "basic, fundamental United States public policy" was implicated, because the "situation that

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	Supreme complains of was largely, if not entirely, of Supreme's own making"—specifically, it declined to adjourn the arbitration until after the criminal proceeding was concluded and it invited the arbitrators to draw adverse inferences from the refusal of the Agility executives to testify. "Under such circumstances, the arbitrators' decision to draw adverse inferences from the executives' absence" instead of dismissing Agility's claims "did not violate 'basic notions of morality and justice.'" Nor did the refusal to dismiss the claims of Agility violate due process. The court further rejected a challenge under §10(a)(3) since "misconduct" requires violation of "fundamental fairness," which was not shown. The court additionally rejected a challenge of exceeding power under § 10(a)(4), where Supreme argued the panel improperly awarded post-termination airlift fees; there was no issue about the arbitrators' authority to award such fees, only a contention of an erroneous legal ruling. The court finally rejected a manifest disregard challenge relating to the adverse inferences (rather than dismissal of the claim) in light of New York public policy; at most, there would be " a mere error in the application in the application of state law." Note: the court framed manifest disregard as a "gloss" on the statutory grounds, in contrast to some other recent cases which simply apply manifest disregard as if a separate ground.
Am. Postal Workers Union, AFLCIO v. U.S. Postal Serv., 754 F.3d 109, 113-14 (2d Cir. 2014)	Rejected an "exceeded powers" challenge. The court relied on the *Oxford Health* opinion from the Supreme Court for the proposition that "an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits." The Second Circuit also reaffirmed that "arbitrators possess authority to apply collateral estoppel based on prior judicial or administrative decisions" under "a broad arbitration agreement." Here is the court's summary of its opinion: Defendant United States Postal Service appeals from the May 16, 2013 judgment of the United States District Court for the Southern District of New York (Katherine B. Forrest, Judge) granting the motion of plaintiff American Postal Workers Union ("APWU") to vacate an arbitral award on the basis that the arbitrator exceeded his powers under the relevant agreement by applying the doctrine of

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	collateral estoppel against APWU. We hold that the arbitrator's decision to apply collateral estoppel—which was based on his interpretation of particular provisions of the arbitration agreement, and is within an arbitrator's authority to decide under a broad arbitration agreement—did not exceed his powers under the arbitration agreement as would be required to justify vacating the award.
Americo Life, Inc. v. Myer, 440 S.W.3d 18 (Tex. 2014)	Applying the FAA, the Texas Supreme Court vacated an award for exceeding authority where the parties' agreement allowed each party to appoint a party-appointed arbitrator, one party's designation of an arbitrator was challenged by the other side and the AAA upheld the challenge; the court held that the composition of the panel did not comply with the agreement and therefore that panel exceeded its power in rendering the award.
Bamberger Rosenheim, Ltd. v. OA Development, Inc., 862 F.3d 1284, 1288 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 654 (2018)	Declining to vacate an award under the New York Convention, where petitioner argued that the arbitrator had improperly interpreted the arbitral venue provision in the arbitration clause. The court did not separately analyze whether to vacate under the New York Convention and the FAA, finding that the scope of review was covered by the clause that "the arbitral procedure was not in accordance with the agreement of the parties," New York Convention, Art. V(1)(d), and the prong that "the arbitrator[] exceeded [his] powers" under § 10(a)(4) of the FAA. The court determined (even in an international dispute) that the issue of the proper venue under an arbitration clause is a procedural issue for the arbitrator to determine, where the parties agree that there is a valid arbitration clause in a binding agreement. And the court concluded that the arbitrator at least arguably interpreted the venue provision, ending the court's review. (The clause provided that any proceedings "shall take place in Tel Aviv, Israel, in the event the dispute is submitted by OAD, and in Atlanta, Georgia, in the event the dispute is submitted by Profimex." Profimex commenced arbitration in Atlanta; OAD submitted a counterclaim; Profimex argued OAD's counterclaim must be brought in Tel Aviv. The arbitrator found the counterclaim was part of the dispute initiated by

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

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	a different conclusion. "In determining whether the arbitrator exceeded her authority, district courts should consult the arbitrator's award itself. The award will often suggest on its face that the arbitrator was arguably interpreting the contract. Several pieces of relevant evidence can be gleaned from the award's text, including but not limited to: (1) whether the arbitrator identifies her task as interpreting the contract; (2) whether she cites and analyzes the text of the contract; and (3) whether her conclusions are framed in terms of the contract's meaning."
Burton v. Class Counsel & Party to Arbitration, 737 F.3d 1262 (9th Cir. 2013)	The Ninth Circuit, as a question of first impression, held that the FAA does not permit parties to contractually eliminate all judicial review of an arbitration award. Section 10 of the FAA reflects the intent of Congress "to preserve due process while still promoting the ultimate goal of speedy dispute resolution…If parties could contract around this section of the FAA, the balance Congress intended would be disrupted, and parties would be left without any safeguards against arbitral abuse." The clause in question provided for "binding, non-appealable arbitration." The court did not resolve the ambiguity of whether this language simply waived an appeal on the merits (but still permitted review under Section 10) or whether the language divested both the district court and the circuit court of jurisdiction to review the award at all; instead, the court found that the latter reading is unenforceable.
Campbell Harrison & Dagley, L.L.P. v. Hill, 782 F.3d 240, 245 (5th Cir. 2015) (internal quotes and citations omitted)	The court reversed a district court's vacatur of an arbitration award that awarded contingency fees to a law firm on public policy grounds. The court of appeals, applying Texas arbitration law, held: "Vacating an award on public-policy grounds requires an extraordinary case in which the award clearly violates carefully articulated, fundamental policy. For satisfying that standard, the policy must be well defined and dominant and not derived from general considerations of supposed interests."
CEEG (Shanghai) Solar Sciences & Tech. Co., Ltd. v. LUMOS, LLC, 829 F.3d 1201, 1206 (10th Cir. 2016)	Affirmed denial of motion to confirm an award under the New York Convention, where the notice of arbitration had been sent in Chinese whereas the parties' business dealings had been conducted in English. The court found that this met the Convention's provision allowing vacatur where "[t]he party against whom the award is invoked did not

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	receive proper notice…of the arbitration proceedings." In addition, the court found that "the composition of the arbitral authority . . .was not in accordance with the agreement of the parties," since LUMOS missed the opportunity to participate in the selection of the arbitrators due to late notice of the arbitration (i.e., when it finally became aware that the Chinese language document gave notice of an arbitration).
Certain Underwriting Members at Lloyds of London v. Insurance Co. of the Americas, 2017 WL 5508781, at *10 (S.D.N.Y. 2017)	Vacated an award for evident partiality on the part of a party-appointed arbitrator who did not disclose certain relationships with one of the parties. The court rejected the argument that, where the agreement stated as a qualification that the arbitrators be "disinterested," the test should only be that an arbitrator "lack a financial or other personal stake in the outcome" of the arbitration. It further rejected an argument that the standard for evident partiality should be more relaxed "in the case of party appointed arbitrators in tripartite industry arbitrations," especially when ex parte communications were permitted "through the discovery time period." The court ruled that the Second Circuit's *Scandinavian Reinsurance* opinion established that disclosure requirements applied to party-appointed arbitrators. The record in this action showed that the arbitrators made disclosures directly to the parties in an organizational session and then later in the hearings, and the parties' attorneys had a chance to ask questions on the disclosures that were made. This is the central finding: Here, I agree that the nondisclosure does not—taken alone—demonstrate evident impartiality, and therefore the citations to arbitration codes of ethics provided by Underwriters I are not dispositive. . . . However, those citations certainly support the notions that disclosures are routinely made in arbitrations and that the best practice for an arbitrator is to err on the side of disclosure. The question here is "whether the *facts* that were not disclosed suggest a material conflict of interest," such that "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Scandinavian Reinsurance Co.*, 668 F.3d at 77, 72. Here, those facts include clear, unrebutted evidence that a party appointed arbitrator failed to disclose material relationships

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	with principals of ICA, one of the parties before the arbitration panel, and his relationship with ICA itself. Of particular relevance is the undisclosed relationship with Ricardo Rios, the Treasurer, Secretary, and Director of ICA, who Campos hired just months prior to the Arbitration Hearing as his company's Chief Financial Officer. The undisclosed fact that Campos's company shares with ICA not only an address, but the same suite within that address, also suggests a material conflict of interest.
CBF Industria De Gusa S/A v. AMCI Holdings Inc., 850 F.3d 58, 72, 75 (2d Cir. 2017)	Reversed a district court decision that had refused to enforce a foreign arbitration award issued in an ICC arbitration seated in Paris that had not previously been confirmed. The Second Circuit held that, under the New York Convention, a district court should enforce a foreign award, even if not confirmed by a court in a primary or secondary jurisdiction, subject only to the limited New York Convention/FAA grounds for denying enforcement. The court observed that confusion has arisen because Section 207 of the FAA, intended to implement the New York Convention, uses the word "confirming" in providing that "[w]ithin three years after an arbitral award....is made..[any party may] apply to any court having jurisdiction under this chapter for an order confirming the award." The court further observed that Chapter 2 of the FAA also refers to confirmation of the award. The court reasoned that, since the FAA was intended to implement the New York Convention, the word "confirm" for these purposes is "the equivalent of 'recognition and enforcement' as used in the New York Convention for the purposes of foreign arbitral awards." The court also stated that this reading was consistent with the objective of having a single proceeding to enforce an award. In reaching this decision, the Court pointed to the amicus brief for the United States, which was entitled to great weight since the United States is a party to the New York Convention, a treaty. The court remanded this portion of the case for proceedings consistent with its opinion. The court in concluding its discussion of this issue of enforcement stated: "In order to avoid such confusion in the future, we encouragc litigants and district courts alike to take care to specify explicitly the type of arbitral award the district court is evaluating (domestic, nondomestic or foreign), whether the district court is sitting in primary or secondary

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	jurisdiction, and, accordingly, whether the action seeks confirmation of a domestic or nondomestic arbitral award under the district court's primary jurisdiction or enforcement of a foreign arbitral award under its secondary jurisdiction." When the district court denied enforcement for lack of a confirmed award, the award-creditor commenced a separate confirmation action. The district court dismissed the confirmation action, finding that the non-party sued as an alleged alter-ego of the award-debtor was immune from suit under Federal Rule of Civil Procedure 17(b)(lack of capacity to be sued), because the entity had been removed as a legal entity from the Swiss Commercial Register. The Second Circuit remanded with instructions for the district court to determine under "the law of the enforcing jurisdiction, here the Southern District of New York." The court next turned to the district court's dismissal of fraud claims, where the district court applied issue preclusion based on determinations in the arbitration. The Second Circuit found that allegations of fraud on the part of the award-creditor made application of the equitable doctrine of issue preclusion inappropriate without discovery on the allegations of fraud. Finally, the Second Circuit declined to affirm the dismissal of the enforcement action on the alternative ground of forum non conveniens, instead providing for the district court to revisit that issue on the remand. For further discussion of the terms "confirmation," "recognition" and "enforcement," *see Mobil Cerro Negro, Ltd. v. Bolivian Republic of Venezuela*, 863 F.3d 96, 119 n. 18, 121-22 (2d Cir. 2017) (holding that the Convention on the Settlement of Investment Disputes Act of 1966 does not confer subject matter over foreign sovereigns and that the ICSID requires a district court to "'enforce' ICSID awards and accord them 'the same full faith and credit as if [they] were [] final judgment[s] of a court of general jurisdiction of one of the several states.'") (citation omitted).
Citizen Potawatomi Nation v. Oklahoma, 881 F.3d 1226 (10th Cir 2018)	Vacating an award where the arbitration clause between the tribe and the state provided for de novo review of the arbitral award. The court found that such expanded review was precluded by Supreme Court precedent and that the specified standard of review was a material term of the

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	parties' agreement. The court accordingly ruled that the arbitration clause was unenforceable and should have been severed from the parties' compact, such that the award had to be vacated.
Corporacion Mexicana de Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploracion Y Produccion, 832 F.3d 92, 97 (2d Cir. 2016), *cert. dismissed,* 137 S. Ct. 1622 (2017)	Affirming district court's confirmation of an arbitral award rendered in Mexico, where (a) COMMISA initially sought confirmation in the Southern District of New York, which was granted; (b) PEP simultaneously appealed from that confirmation and also sought nullification in Mexican courts; (c) the Mexican court nullified the award on the ground that PEP was an entity deemed part of the Mexican government that could not be ordered to arbitrate; (d) the Second Circuit initially vacated the district court's judgment and remanded in light of the Mexican court order; (e) the district court adhered to its confirmation; and (f) the Second Circuit held that the district court properly exercised its discretion because giving effect to the subsequent nullification would "run counter to United States public policy and would…be 'repugnant to fundamental notions of what is decent and just in this country.'" In addition, the court stated that confirmation is mandatory when a convention ground for vacatur or modification has not been established.
Daesang Corp. v. Nutrasweet Co., 2017 WL 2126684, at *5-7 (Sup. Ct. N.Y. Cty. 2017), *appeal argued*, (1st Dep't 2018)	Reviewing an award that rejected NutraSweet's counterclaims and defenses to the breach of contract claims of Daesang, including a defense of fraudulent inducement seeking equitable rescission, Supreme Court found manifest disregard with respect to the ruling on two issues, stating in pertinent part: The Court determines that the Tribunal manifestly disregarded New York law in dismissing NutraSweet's claim for fraudulent inducement seeking the remedy of equitable rescission. Notwithstanding the presumption in favor of upholding arbitration awards, "deference to arbitrators is not without its limits" (Jock v. Sterling Jewelers, Inc., 143 FSupp3d 127, 133 [SDNY 2015]). Here, the Tribunal chose to disregard the well-established principle that a fraud claim can be based on a breach of contractual warranties where the misrepresentations are of present facts (in contrast

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	to future performance) and cause the actual losses claimed. . . . This legal principle clearly applies to NutraSweet's claim for fraudulent inducement seeking equitable rescission, and a review of the pre and post-hearing submissions demonstrate that NutraSweet repeatedly brought this governing legal principle to the attention of the Tribunal. . . . Nonetheless, the Tribunal ignored the applicable law, and mischaracterized NutraSweet's fraudulent inducement counterclaim and defense as one in which NutraSweet merely alleged that Daesang made an insincere promise of future performance. This conclusion is unsustainable. The fact that Daesang represented to NutraSweet in contract documents that it had "complied in all material respects with applicable laws ... in connection with the operation of the Business and the ownership and use of the Purchased Assets" (APA, § f), does not render NutraSweet's fraudulent inducement claim non-viable as redundant because NutraSweet demonstrated that Daesang misrepresented present facts which induced it to enter into the transaction.... The Court reaches the same conclusion with respect to the Tribunal's failure to even consider the merits of NutraSweet's breach of contract counterclaim which was based on Daesang's breach of multiple provisions of the APA and Processing Agreement. In addition to explicitly pleading a counterclaim for breach of contract in its terms of reference, NutraSweet submitted witness statements, live testimony, expert testimony, and cross-examined Daesang's witnesses, alleging $14 million in contract damages. . . . After the Partial Award was issued and NutraSweet pointed out the Tribunal's error that it was, in fact, seeking recovery for breach of contract, the Tribunal concluded that NutraSweet had waived its breach of contract counterclaim during closing argument, and cited to the transcript of that hearing, held on October 20, 2011. . . . However, a careful reading of the transcript utterly fails to demonstrate that there was a waiver by

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	Nutrasweet of its breach of contract counterclaim at the October 20, 2011 hearing.... The refusal to consider the merits of NutraSweet's breach of contract counterclaim and the baseless determination of waiver goes beyond a mere error in law or facts, and amounts to an egregious dereliction of duty on the part of the Tribunal.
Dealer Computer Servs., Inc. v. Michael Motor Co, 485 F. App'x 724, 726, 728 (5th Cir. 2012), *cert. denied,* 133 S. Ct. 945 (2013)	MMC asserted that arbitrator Butner failed to disclose that she was an arbitrator on the Venus Ford arbitration panel, which considered similar contract language and heard from the same damages experts as in the MMC proceeding. District Court found evident partiality holding, where arbitrator Butner had disclosed only that she had served on a previous arbitration involving one of the parties, that "Butner's prior exposure to the legal issues and witnesses involved in the Michael Motor arbitration creates a reasonable impression that she had prejudged at least some of the issues in the arbitration. It would be unreasonable to expect an arbitrator who had already signed an eight-page opinion ruling for a party as to how a contractual provision should be interpreted to change her mind in a subsequent arbitration and rule against that party on the exact same contractual provision. Likewise, it would be unreasonable to expect an arbitrator who had fully adopted the damages theories of an expert witness to then reject the damages theories of that same witness on similar issues in a subsequent arbitration. It is also reasonable to believe that Butner may have considered [witness] testimony from the Venus Ford Arbitration in evaluating evidence in the Michael Motor Arbitration. . . . Butner's participation in the Venus Ford Arbitration is 'a significant compromising connection' to DCS, and her failure to disclose that participation constitutes 'evident partiality.'" District Court found that the arbitrator's "minimal acknowledgement" was not sufficient to put Michael Motor on notice of a potential conflict such that it had waived its nondisclosure objections under either "actual knowledge" or "on notice" standard. 761 F.Supp. 459, 465, 468 (S.D. Tex. 2010). Fifth Circuit reversed on ground of waiver, where Butner had disclosed that she served on a panel that "considered a dispute between Dealer Computer Services, Inc. and another party." Court held: "Butner's disclosures were sufficient to put MMC on notice of a potential conflict. . . .

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	The information was available on the AAA online Webfile system, which was the agreed upon method of disclosure." Court does not reach issue of whether – absent waiver – there was evident partiality.
Dewan v. Walia, 544 F. App'x 240 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1788 (2014)	Vacated award for manifest disregard of law where the arbitrator ruled that a release signed by Walia was valid and enforceable but nonetheless arbitrated Walia's counterclaims.
Doscher v. Sea Port Group Securities, LLC, 832 F.3d 373, 388-89 (2d Cir. 2016)	In determining subject matter jurisdiction, a district court may look through a petition to vacate an award and determine jurisdiction based on the underlying disputes as defined by *Vaden v. Discover Bank,* 556 U.S. 49 (2009).
Eddystone Rail Co., LLC v. Jamex Transfer Services, LLC., 289 F. Supp. 3d 582, 588, 590 (S.D.N.Y. 2018)	This case addresses whether a non-party to an arbitration may intervene in the proceeding to confirm/vacate an award. Noting that § 10(a) of the FAA provides that "any party to the arbitration" may petition to vacate, the court finds that the statutory language on its face appears to preclude intervention. The court, however, further discussed a line of cases that have allowed intervention in limited circumstances, where a proposed intervenor could satisfy the threshold requirement of an "injury in fact" arising from the award, if confirmed, in order to participate in the proceeding; that requirement was not met in this case.
Finn v. Ballentine Partners, LLC, 143 A.3d 859 (N.H. 2016)	Held that Sections 9, 10 and 11 apply only to review of awards in federal district courts and do not pre-empt New Hampshire's statute for review of awards where, as here, a court finds that the parties' contract specified that New Hampshire law would control. The court then vacates the award under the state statute, which allows vacatur for "plain error" of fact or law.
Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 255-56 (3d Cir. 2013)	Reiterated its adoption of the Second Circuit's reasonable person standard for evident partiality, and affirmed the denial of a petition to vacate. Freeman, the losing party in the arbitration, first argued that the arbitrator was partial because the 40% owner of the prevailing party had contributed $4,500 to the arbitrator's unsuccessful campaign for a seat on the Pennsylvania Supreme Court—which the court saw as a small amount in relation to the $1.7 million raised for the campaign. The court sternly noted that the petition to vacate had failed to reveal that the

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	law firm representing Freeman had contributed $26,000 to the same campaign. The court, as an issue of first impression, held that this undisclosed campaign donation did not amount to evident partiality and "the reasons are many," including the facts that the donations were a matter of public record, the amount donated was small by comparison, the donating entity was only a minority owner of the party to the arbitration, and Freeman's law firm donated five times as much. A reasonable person could not conclude that the arbitrator was partial to Pittsburgh Glass. The court added that "campaign contributions are a way of life in many state judicial systems," and a mere nondisclosure of a relatively small donation does not, by itself, show evident partiality. The court also rejected a challenge based on the fact that the arbitrator had taught a seminar with a senior employment attorney at the entity owning 40% of the prevailing party: "a professional relationship with a party's minority owner is not 'powerfully suggestive of bias'"; the FAA requires "more than suppositions based on mutual familiarity."
General Re Life Corp. v. Lincoln National Life Ins. Co., 273 F. Supp. 3d 307 (D. Conn. 2017), *appeal argued*, (2d Cir. 2018)	This case addresses the authority of arbitrators to clarify an ambiguous award weighing the *functus officio* doctrine. The parties presented to arbitration a dispute over the right to "recapture" certain life insurance policies upon an increase in rates by the reinsurer. The court noted that, in the arbitration, the parties themselves had devoted little time to the terms of recapture, focusing instead on whether the record justified the rate increase. Two members of the panel (the umpire and one arbitrator) joined in a final award that found a rate increase was warranted and alluded to the right of recapture. However, the parties found the award unclear on the methodology for calculating the recapture payments. After some months of negotiation, the parties wrote to the arbitrators with their respective views on how the recapture should work. In response, two members of the panel (the umpire and the arbitrator who had not joined in the final award) issued a "Clarification," that analyzed the contract documents and provided an interpretation for the recapture issue. General Re filed a petition to confirm the original final award and Lincoln filed a petition to confirm the Clarification. The court reviewed existing case law, and found ample precedent for a court to return an ambiguous award to arbitrators for clarification, including Second Circuit precedent. However,

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	the court explored the extent to which the *functus officio* doctrine restricted the authority of an arbitrator to clarify an award. From the case law, the court found three commonly recognized exceptions to the doctrine: 1) to correct a mistake apparent on the face of an award; 2) where an award has not adjudicated a submitted issue, such that the arbitrator has not exhausted his function; and 3) where an ambiguity arises even though it appears that the arbitrator has completed the award. The court held that to clarify an award, a provision of an award "must be found to have been ambiguous"; and the clarification must do no more than clarify and not substantively change the final award. The court closely examined the case law evaluating when a clarification might appear to modify an award. In making these assessments, a court gives the usual deference to arbitral awards. Here, the court held that the Clarification explained what the arbitrators had intended in the final award and thus maintained the "spirit and basic effect" of the final award. The court gave weight to the fact that the parties had not discussed what recapture would look like in the hearing, allowing the conclusion that the final award did not unambiguously reflect the arbitrators' intent as to recapture methodology.
Gwathmey v. Rales, 518 F. App'x 20, 21 (2d Cir. 2013)	Held that an agreement incorporating the AAA rules constitutes an agreement to have the arbitrator, and not a court, determine arbitrability. Here the parties' agreement stated "[i]n no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitations." Gwathmey brought an action, and sought injunctive relief, to block an arbitration; the district court denied injunctive relief and dismissed the action. Gwathmey argued that the "in no event" language meant that a court would determine if the claims were time barred or, at least, created an ambiguity. The Second Circuit rejected this argument, finding no ambiguity as to the parties' intent to have the arbitrator determine arbitrability, citing (as noted) the incorporated AAA rules (which provide that the arbitrator has the power to rule on his or her own jurisdiction).
Harshad & Nasir Corp. v. Global Sign Systems, 14 Cal. App. 5th	Vacating an award for error of law, where parties had agreed to submit to arbitration under the California Code of

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523, 530-31(2d Dep't Div. 1 2017)	Civil Procedure and agreed that the arbitrator's "findings of fact and conclusions of law shall be reviewed on appeal to the trial court and thereafter to the appellate courts upon the same grounds and standards of review as if said decision and supporting findings of fact and conclusions of law were entered by a court with subject matter and present jurisdiction." On de novo review, the court found no substantial evidence to support a finding that an agreement to perform the work at issue was formed or a writing sufficient to satisfy the statute of frauds.
Hoskins v. Hoskins, 497 S.W.3d 490, 498 (Tex. 2016) (Willett, J. concurring)	Applying the Texas arbitration statute, the court held that the statutory grounds for vacatur are exclusive and that manifest disregard of the law is not a valid ground for vacatur.
Hyatt Franchising, L.L.C. v. Shen Zhen New World I, LLC, 876 F.3d 900, 902, 903 (7th Cir. 2017)	Affirming confirmation of an award, the court first held that the phrase "refusing to hear evidence" in § 10(a)(3) refers to the conduct of the hearing; nothing in the FAA requires an arbitrator to allow any discovery. The court further noted that the requested discovery was not relevant to the particular dispute. The court next found that the arbitrator's refusal to disqualify respondent's counsel did not constitute "misbehavior" under § 10(a)(3), because at most the ruling was an error and an error is not "misbehavior." (The court did not address whether an arbitrator has the power to disqualify counsel for a party.) The court also rejected a challenge under § 10(a)(4) (exceeding powers) for supposedly failing to comply with federal and state franchise laws; once more, the court said that legal error is not a ground for vacation of an award. "An arbitrator is not like a magistrate judge whose recommendations are subject to plenary judicial review." The court went on to say that an arbitrator "acts as the parties' joint agent and may do anything they parties themselves may do"; that is, if the parties may reach a compromise of a legal dispute without being accused of violating some law, "then the arbitrator may do so on their behalf." As one last ground, the court rejected an argument that the award violated public policy, because public policy is typically invoked to protect persons who have not agreed to arbitrate; where the outcome of the award is something the parties could agree to themselves under the law, public policy is not implicated. Finally, the court ruled that petitioner must bear the costs of the district court and appellate proceedings based on the contract and circuit

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	precedent; while the American rule requires each side ordinarily to bear its own costs and fess "in an initial round, but an entity that insists on multiplying the litigation must make the other side whole for rounds after the first."
In re Citigroup Global Markets, Inc. v. Fiorilla, 127 A.D.3d 491, 492 (1st Dep't 2015)	The court held: The motion court properly vacated the arbitration award based on a prior settlement agreement. The arbitrators manifestly disregarded the law by failing to enforce the settlement that respondent and petitioner Citigroup Global Markets, Inc. entered into on April 29, 2012. Notably, petitioners provided the relevant law regarding the enforcement of settlement agreements (*see Kowalchuk v Stroup*, 61 AD3d 118 , 873 N.Y.S.2d 43 [1st Dept 2009]) in their motions to enforce the agreement, but the arbitrators ignored the law and denied the motions without explanation (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471 , 481 , 846 N.E.2d 1201 , 813 N.Y.S.2d 691 [2006], *cert dismissed*548 U.S. 940 , 127 S. Ct. 34 , 165 L. Ed. 2d 1012 [2006]). "Although arbitrators have no obligation to explain their awards, when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account" (*Matter of Spear, Leeds & Kellogg v Bullseye Secs., Inc.*, 291 AD2d 255 , 256 , 738 N.Y.S.2d 27 [1st Dept 2002] [internal quotation marks omitted])
Int'l Brotherhood of Elec. Workers, Local Union 824 v. Verizon Fla., 803 F.3d 1241, 1248 (11th Cir. 2016)	Vacated award when the arbitrator, having ruled, was later persuaded he made an error and issued a superseding award; without determining the bounds of functus officio, the court held that the AAA rule specifying that an arbitrator "is not empowered to redetermine the merits of any claim already decided" controlled and defined the powers of the arbitrator.
IQ Products Co. v. WD-40 Co., 871 F.3d 344, 352 (5th Cir. 2017)	Rejecting challenge for "exceeding…powers" where "the parties clearly and unmistakably delegated the gateway issue of arbitrability to arbitration, and the assertion of arbitrability was not wholly groundless. Thus, the arbitrators acted within their authority in deciding that the dispute was arbitrable."
Katz, Nannis & Solomon, P.C. v. Levine, 46 N.E.3d 541, 546 (Mass.	The Supreme Judicial Court of Massachusetts, applying Massachusetts' arbitration statute, follows *Hall St. Assocs.,*

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2016)	*L.L.C. v. Mattel, Inc*, 552 U.S. 576 (2008), and holds that the parties may not alter the grounds of judicial review of an award because the statutory grounds control. The parties' agreement provided a standard for vacatur if there was a "material, gross and flagrant error" and the challenge to the award alleged that the arbitrator fundamentally misinterpreted a contract provision; the court ruled that this standard could not be applied by a court.
Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 729 F.3d 99 (2d Cir. 2013)	The Second Circuit addressed the "corruption" prong of 10(a)(2) of the FAA (the seldom invoked part of the clause that includes evident partiality). The opinion largely turns on the sufficiency of the evidence offered to prove corruption, in a case where there was no transcript of the proceedings (a fact the court repeated several times). The court ultimately found corruption was not established to the level required to vacate an award. This arbitration was conducted by a rabbinical arbitration panel, where each side (in a dispute over ownership of life insurance policies) appointed a rabbi, and those two selected the chair, Rabbi Kaufman. The principal contention was that Rabbi Kaufman acted in a corrupt manner, based on evidence that he told a non-party in advance of the award to "'[t]ell [the president of Kolel] that he has to give me another week and he will receive a [ruling] in his favor.'" It was further alleged that Rabbi Kaufman purposely excluded the arbitrator selected by the losing party from the arbitration and abruptly cut off the testimony of a witness called by that party in order to rush to a premature decision. The award was only signed by Rabbi Kaufman and the rabbi chosen by the prevailing party. The main point of law expressed in the opinion is the meaning of "corruption" in 10(a)(2) along with the high burden of proof. The court first recited its reasonable person standard for evident partiality, and said it was applicable to this case. However, the court at the same time quoted a case that held that "the award here must stand unless it is made abundantly clear that it was obtained through corruption, fraud or undue means." (citations omitted). This appears to refer to the 10(a)(1) ground for vacatur, which was also invoked by petitioner. The court

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	then stated: "Evidence of corruption must be abundantly clear in order to vacate an award under Sec. 10(a)(2)." The emphasis used by the court in deciding the case, is on that high level of proof—"abundantly clear." And the court held petitioner did not meet this standard. Notably, the court mentioned that Rabbi Kaufman "denies that the conversation took place" and "states he was in another part of the state" that day. In other words, in this proceeding there was testimony from the arbitrator. The Court then rejected the 10(a)(3) misconduct challenge, finding that petitioner has not shown a denial of "fundamental fairness," given the latitude arbitrators have to conduct a proceeding.
Leeward Construction Co., v. American University of Antigua. 826 F.3d 634, 640 (2d Cir. 2016)	The Court adopted the following standard for a reasoned award: We agree with our sister Circuits, and hold today that a reasoned award is something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel. A reasoned award sets forth the basic reasoning of the arbitral panel on the central issue or issues raised before it. It need not delve into every argument made by the parties. The award here satisfies that standard: while it does not provide a detailed rationale for each and every line of damages awarded, it does set forth the relevant facts, as well as the key factual findings supporting its conclusions. The summary nature of its analytical discussion reflects only that, as the district court found, '[t]he parties had ample opportunity to contest Leeward's entitlement to compensation for change order work, and the summary nature of the discussion in the decision shows that the panel simply accepted Leeward's arguments on this particular point.' *Leeward Constr.*, 2013 WL 1245549, at *3. No more is needed."
Martin v. Deutsche Bank Securities Litigation, 676 F. App'x 27 (2d Cir. 2017)	Reiterated that a petition to vacate an award must be served within three months after the award is filed or delivered (quoting and citing Sec. 12 of the FAA). In this case, Martin's counsel within the time period emailed counsel

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	for Deutsche Bank attaching a copy of the petition to vacate asking whether counsel would accept service on behalf of the bank. Deutsche Bank's counsel responded, offering to accept service if given 90 days to respond to the petition; Martin's counsel did not accept that offer. Martin's counsel then effected personal service beyond the three month period. The Second Circuit affirmed the district court's dismissal of the petition as untimely. Under Section 12 of the FAA, local law controlled effective service and Fed. R. Civ. P 5 makes email service effective only if the party to be served consents in writing. On this record, the courts found no written consent to accept email service, such that the emailing of the petition did not achieve service within the three month period and the three month period ran without effective service. This decision bears of course on petitions under the FAA, but the decision hinges as much on the application of the requirements of Fed. R. Civ. P. 5.
Matter of Andrews v. County of Rockland, 120 A.D.3d 1227, 1228-29 (2d Dep't 2014) (citations omitted)	Affirmed the vacatur of an award under this New York statutory ground: that the award was "so imperfectly executed…that a final and definite award upon the subject matter submitted was not made." CPLR 7511(b)(1)(iii). Here is the central part of the order: The parties agreed to arbitrate the issue of negligence and agreed to a "high-low" limit to the amount of damages, the sums of which were not disclosed to the arbitrator. The arbitrator was asked to decide the issue of liability, to wit, the negligence of each of the parties in connection with the incident, and, if established, to render a determination as to damages. After a hearing, the arbitrator determined that the petitioner was barred from any recovery irrespective of any negligence of the County because she was not wearing her seatbelt. Nonetheless, the arbitrator awarded the petitioner "the low" sum of damages in light of the parties' private agreement as to damages. . . . Although judicial review of arbitration awards is limited . . ., an award will be vacated when the arbitrator making the award "so imperfectly

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	executed it that a final and definite award upon the subject matter submitted was not made" (CPLR 7511[b][1][iii]. An award will be vacated as indefinite or nonfinal for purposes of CPLR 7511 if it does not "dispose of a particular issue raised by the parties" . . . "if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy'". . . . Here, the arbitrator's award was neither definite nor final, as it failed to resolve the controversy submitted, to wit, the negligence of each party and the amount of damages, if any. The arbitrator did not make any specific findings of fact or credibility or dispose of the issues raised by the parties. Instead, the arbitrator pointed to a fact not in dispute—that the petitioner was not wearing a seatbelt—and determined that he did not need to decide whether the County was negligent. In doing so, the arbitrator failed to dispose of the controversy with which he had been charged. Moreover, the arbitrator also failed to determine damages and instead referred to the parties' agreement, to which he was not privy, and awarded the petitioner "the low" sum of damages, despite finding that the petitioner was barred from recovering any damages. . . . In so doing, the arbitrator did not perform the job he was required to do pursuant to the parties' arbitration agreement.
Matter of New York City Tr. Auth. v. Phillips, 2018 WL 1719789, at *4 (1st Dep't 2018)	Reverses confirmation of award in a sexual harassment case, finding that the arbitrator's award was irrational and violated public policy by failing to find a dischargeable offense where the arbitrator's findings (similar to the EEO investigation) showed harassment; the "arbitrator's decision belies the realities of workplace sexual harassment."
Matter of Pinkesz v. Wertzberger, 139 A.D.3d 1071, 1072 (2d Dep't 2016)	A rabbinical arbitration court issued an award in 2011 and then, based on new information, issued a modified award in 2013. The court vacated the 2013 award, finding that the

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	"rabbinical court exceeded its authority in modifying the original award by rendering the new arbitration award."
McKool Smith, P.C. v. Curtis Int'l, Ltd., 650 F. App'x 208, 212 (5th Cir. 2016)	The court noted that it has already held that non-statutory grounds such as manifest disregard of the law and violation of public policy can no longer be a basis for vacating awards. However, the court declined to rule on whether such grounds are part of "exceeded [his] powers."
Move, Inc. v. Citigroup Global Markets, Inc., 840 F.3d 1152, 1157-59 (9th Cir. 2016)	Vacated an award where a FINRA arbitrator had lied on his Arbitrator Disclosure Report; most particularly, the arbitrator stated he was an experienced attorney when in fact he was not an attorney. The court vacated the award under § 10(a)(3), providing for vacatur upon finding that "the arbitrators were guilty of...any . . . misbehavior by which the rights of any party have been prejudiced." The court found that Move was prejudiced, because it had expressly sought an experienced attorney who could address sophisticated securities law issues. The court ruled that, although the award was unanimous, "there is simply no way to determine" if the other panel members were influenced by the challenged arbitrator. In any event, the court found that Move was deprived of a fundamentally fair hearing because it "received a hearing chaired by an imposter." The court, as an issue of first impression, also found that equitable tolling permitted this challenge to the award, where Move learned of the arbitrator's misconduct four years after the award when a legal newspaper revealed the arbitrator's falsification of his background. The court found that the three month deadline for seeking vacatur of an award could be overcome by equitable tolling, because the FAA's structure is not "incompatible with equitable tolling," "equitable tolling would not undermine the basic purpose of the FAA," and the FAA's time deadline is "neither unusually generous" nor "unusually emphatic" (the latter being factors considered when applying equitable tolling to a statutory limitations period).
NAPPA Constr. Mgm't, LLC v. Flynn, 152 A.3d 1128, 1134 (2017)	Under Rhode Island statute, the court vacated an award for exceeding power, where the arbitrator's interpretation of the contract "is in direct contravention of the contractual language."
Nat'l Football League Mgmt. Council v. Nat'l Football League	Reversed district court's vacatur of NFL Commissioner's award suspending Tom Brady, the Second Circuit (in a 2-1)

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Players Ass'n, 820 F.3d 527, 544, 548-49 (2d Cir. 2016) (citations omitted)	decision held, under the Labor Management Relations Act, that the Commissioner had not improperly rendered "his own brand of industrial justice" (the standard under the LMRA). Addressing a claim that the Commissioner had improperly excluded key evidence, the court stated that the test under Section 10(a)(3) of the FAA is whether "fundamental fairness is violated" and held that "the Commissioner's decision to exclude the testimony fit comfortably within his broad discretion to admit or exclude evidence and raises no questions of fundamental fairness." The court also rejected a claim of evident partiality, finding that "the parties contracted" in their collective bargaining agreement "to specifically allow the Commissioner to sit as arbitrator" and that—because arbitration is a matter of contract—the parties can ask for "no more impartiality than inheres in the method they have chosen."
Nat'l Indemnity Co. v. IRB Brasil Reseguros S.A., 675 F. App'x 89, 90-91 (2d Cir. 2017)	Addressed evident partiality in the context of a neutral chair who accepted appointment as a party-appointed arbitrator in two other cases supposedly for the party that won the arbitration awards that are the subject of this appeal. IRB sought vacatur of related awards in favor of NICO. The tribunal was composed of two party selected arbitrators and a neutral umpire-arbitrator (Daniel Schmidt). IRB based its challenge on evident partiality, arguing that Schmidt refused to withdraw from the case after IRB objected to his service as a party-appointed arbitrator on behalf of Equitas, which IRB alleged "is effectively identical to NICO." (Order at 2). The court noted that Schmidt accepted his first appointment as Equitas's party-arbitrator from NICO's counsel; he was appointed a second time as a party arbitrator by Equitas but that appointment did not involve NICO's counsel. IRB also argued it was improper for Schmidt to accept appointment in 2015 as Equitas's party-appointed arbitrator while the arbitrations between NICO and IRB were already in progress. The Second Circuit affirmed confirmation and denial of vacatur, reasoning as follows: > As the District Court explained in its March 10, 2016 Memorandum and Order, Schmidt's work as a party-arbitrator on behalf of Equitas does not amount to "evident partiality" under § 10(a)(2). Notwithstanding NICO's arguments to modify the

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	standard, our case law states that evident partiality is found when "a reasonable person, considering all the circumstances, would *have* to conclude that an arbitrator was partial to one side." *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 137 (2d Cir. 2007) (emphasis added) (internal quotation marks omitted). Here, even assuming that Equitas is an affiliate of NICO, the District Court correctly noted that IRB does not allege that Schmidt had any familial, business, or employment relationship with NICO or Equitas, or that he had any financial interest in the outcome of his arbitrations. Schmidt's relationships with NICO and Equitas, including his role as a party-arbitrator for Equitas, are professional. Furthermore, Schmidt ultimately voted against Equitas in his party-arbitrator role, and has accepted party-arbitrator appointments "against" other NICO-reinsured parties. Accordingly, considering all of these circumstances, a reasonable person would not have to conclude that Schmidt was partial to NICO. Note that the Second Circuit, in applying the "reasonable person" standard, pointed out that Schmidt voted against Equtias in his party-arbitrator role and has served as a party-arbitrator in other cases "against" NICO-reinsured parties. The court included these facts within "all of these circumstances," in concluding a reasonable person would not find evident partiality. The timeline of each of these facts is not clear from the Summary Order, but it appears that IRB might have raised its original challenge to Schmidt within the arbitration before Schmidt voted against Equitas in the other arbitration. The court rejected an additional challenge to the awards for misbehavior, because that ground was not asserted in the district court (and, for that reason, the Circuit did not provide the details of this ground). In addition, the court denied NICO's request for attorney's fees and costs because "IRB's arguments are not 'frivolous' under Rule 38."
Norfolk Southern Railway Co. v. Sprint Communications Co. L.P., 883 F.3d 417, 422-23 (4th Cir. 2018)	Vacates an award as non-final, where the agreement provided for each party to designate an appraiser and—if they did not reach agreement for a payment amount—the two would pick a third appraiser who was to seek a

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	compromise with the two other appraisers or at least one of them (and, failing that, to conduct his own appraiser). The third appraiser, Argianas, reached a compromise with one of the party appointed appraisers, with whom he issued a Majority Decision. Subsequently, a separate AAA case was brought to re-determine the payment owed; the AAA panel ruled that the Majority Decision was an enforceable final award subject to review under the FAA. The court ruled that the Majority Decision was not final, and therefore could not be confirmed, because Argianas (the third appraiser) '"reserve[d] his assent" to the award 'subject to' two 'extraordinarily appraisal assumptions,'" "without prejudice or time limitation' if either of these two 'assumptions' ever proved to be incorrect. That is, Argianas made clear that he might withdraw his assent—thus dissolving the compromise and the arbitration award itself—at some point in the future." In these circumstances, the court found that the award was not final.
N.Y.C. & Vicinity District Council v. Ass'n of Wall-Ceiling and Carpentry Indus. of N.Y., Inc., 826 F.3d 611, 619 (2d Cir. 2016)	Reversed a district court judgment vacating an arbitral award rendered under a collective bargaining agreement. The district court found that the award did not draw its essence from the CBA and that it conflicted with an earlier court order that had approved the CBA. At issue was whether employers had to staff two man jobs under the two-man job provision of the CBA or could elect instead to invoke the provision in a separate agreement that the employers had entered with the local union's international parent. The arbitrator ruled that the employers could invoke the international agreement. Here is the central part of the Second Circuit's ruling on whether the award drew is essence from the CBA; it is one more example of a circuit court reversing a district court vacatur of an award: We agree that, to the extent the district court's judgment rests on the basis that the award did not draw its essence from the CBA, it must be vacated. Rather than dispensing his "own brand of industrial justice," the arbitrator addressed the narrow question whether the CBA forecloses the invocation of the International Agreement's two-man job provision. Relying on the parties' history of allowing invocation of the International Agreement and on the CBA's negotiating history, he concluded that the CBA's silence on the issue indicated that

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	the parties did not intend to change that practice and thus supported WCC's position. That conclusion is at least arguably derived from an interpretation of the CBA itself and contradicts none of its "express and unambiguous" terms. Further, the arbitrator was careful to emphasize the limited scope of his decision, explaining that he was not ruling on the meaning of the International Agreement's two-man job provision or on when that provision could properly be invoked. Although it might have been equally reasonable for the arbitrator to have agreed with the District Council, a federal court is not authorized to decide whether the arbitrator's interpretation of a collective bargaining agreement was correct on the merits. NFL, 820 F.3d at 536. The arbitrator's decision here comfortably survives our tightly circumscribed scope of review.
NGC Network Asia, LLC v. PAC Pacific Group Int'l, Inc., 511 F. App'x 86, 88 (2d Cir. 2013), *aff'g*, 2012 WL 377995, at *5 (S.D.N.Y. Feb. 3, 2012), *cert. denied*, 134 S. Ct. 265 (2013)	Affirmed denial of a petition alleging evident partiality, where the arbitrator—a Los Angeles-based partner of Arent Fox—disclosed that the Washington, D.C. office of his firm had done work for the National Geographic Society, which was a parent company of National Geographic Television. The arbitrator thought National Geographic Television might be a witness, since it sold programming to NGC Network International, LLC, which in turn provided the programming to the NCG Network Asia, LLC (NGC), one of the two parties to the arbitration. The other party, PAC Pacific, challenged the arbitrator, which the AAA overruled. The arbitrator issued an award in favor of PAC Pacific and against NGC, and NGC moved to vacate. The district court had pointed to an evidentiary record before her that established that the National Geographic Society had no role in the arbitration and was an indirect, minority owner of the party, NGC. The district court stated: "Given the facts, there was no requirement that [the arbitrator] disclose the Society/Arent Fox relationship—it is tangential, at best, to the dispute underlying the arbitration. But he did." The Second Circuit held: "Because the arbitrator properly complied with his disclosure obligations, "[t]he concern . . . that nondisclosure might create an appearance of bias or even be evidence of bias is simply not present in this case." The circuit also found that the findings by the district court were not "clearly erroneous." The circuit further upheld the denial of vacatur

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	based on the AAA's rejection of the challenge to the arbitrator; it was not "undue means" for the AAA to apply its rules.
Odeon Capital Group LLC v. Ackerman, 864 F.3d 191, 196 (2d Cir. 2017)	Affirming denial of petition to vacate based on § 10(a)(1)("where the award was procured by corruption, fraud, or undue means").Odeon argued that Ackerman had committed perjury in the arbitration. The court stated: > A petitioner seeking to vacate an award on the ground of fraud must adequately plead that (1) respondent engaged in fraudulent activity; (2) even with the exercise of due diligence, petitioner could not have discovered the fraud prior to the award issuing; and (3) the fraud materially related to an issue in the arbitration. . . . > For fraud to be material within the meaning of Section 10(a)(1) of the FAA, petitioner must demonstrate a nexus between the alleged fraud and the decision made by the arbitrators, although petitioner need not demonstrate that the arbitrators would have reached a different result. Agreeing with the district court, the court of appeals noted that Ackerman had brought a number of claims, including a claim for unpaid wages. The perjured testimony related to the other claims, and therefore did not warrant a vacator. In addition, the court reversed the district court on denying fees to Odeon for prevailing in the district court proceedings, finding that a New York statute provided for attorneys' fees; the court of appeals read the word "proceedings" in the applicable New York statute to include a proceeding to confirm or vacate an arbitration award dealing with unpaid wages.
Oracle Corp. v. Wilson, 276 F. Supp. 3d 22 (S.D.N.Y. 2017)	Confirming award made on cross-motions without full evidentiary hearing, based on construction of contract language and what the arbitrator determined to be uncontroverted documentary evidence presented by Wilson. In its decision, the court at several points pointed out where the arbitrator had obtained the consent of both parties' to a particular procedure being followed, or the failure of petitioner Wilson to object to a certain procedure

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	during the arbitration and before the post-award challenge.
Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 (2013)	This case primarily dealt with the determination of whether there was an agreement on class arbitration, but it is now cited as the leading case on exceeding power. The Court stated: "[T]he sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong."(internal quotes and citations omitted). A petitioner must show that the arbitrator acted "outside the scope of his contractually delegated authority – issuing an award that simply reflects his own notions of economic justice rather than drawing its essence from the contract."
Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5th Cir. 2012)	"Here, the parties expressly incorporated into their arbitration agreement the AAA rules. These rules state that '[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.' We agree with most of our sister circuits that the express adoption of these rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."
PDV Sweeny, Inc. v. Conocophillips Co., 670 F. App'x 23, 24-25 (2d Cir. 2016)	Reviewed an international award under the Inter-American Convention on International Arbitration, which provides for refusal to recognize an award if the court finds "recognition or execution of the decision would be contrary to public policy." The court first stated the applicable standard: [A] court's task in reviewing an arbitral award for possible violations of public policy is limited to determining whether the award itself, as contrasted with the reasoning that underlies the award, 'creates an explicit conflict with other laws and legal precedents' and thus clearly violates an identifiable public policy." *International Bhd. Of Elec. Workers, Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704, 716 (2d Cir.1998) (alterations omitted) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987)). The public policy exception to enforcement of arbitral awards is "construed very narrowly,"

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	requiring a showing that "enforcement [of the challenged award] would violate our most basic notions of morality and justice." *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 411 (2d Cir. 2009) (internal quotation marks omitted).... The court then addressed petitioners' challenge that the award ran afoul of public policy against penalty provisions in contracts. The court noted that, although New York had such a policy, it was not clear that the policy was one embodied in "our most basic notions of morality and justice." The court found that it need not decide if this policy was applicable, because a court's role is only to "consider whether the award itself violates public policy." Here, the arbitrators considered and addressed the issue of public policy against contract penalties, but concluded that the amount to be paid fell under a termination provision and not a liquidated damages provision. The Second Circuit made clear that "we cannot revisit or question the fact-finding or legal reasoning that produced a challenged arbitration award." The court concluded: Here, petitioners point to no laws [or] legal precedents indicating that termination provisions setting the terms for ending a joint venture are contrary to 'well defined and dominant' public policy, *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983) (internal quotation marks omitted), much less are violative of our most basic notions of morality and justice. Thus, like the district court, we conclude that petitioners failed to show that public policy precluded confirmation of the arbitration award. *See generally Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90 (2d Cir. 2005)(stating that party opposing arbitral award bears 'heavy' burden to prove that exception applies)."
PoolRe Ins. Corp. v. Organizational Strategies, Inc., 783 3d 256 (5th Cir. 2015)	The court affirmed the vacatur of an award for exceeding powers, where related parties had entered into separate agreements, with one agreement providing for AAA arbitration and another agreement providing for ICC arbitration. The arbitrator appointed in the AAA case ruled

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	that he had the power to decide the disputes arising under the agreement with the ICC arbitration provision. The court reasoned that the ICC provision constituted a forum selection clause integral to the agreement in which it appeared. The arbitrator's actions were found to be contrary to an` express contractual provision—a provision providing for the forum and for an ICC arbitrator to resolve disputes under that agreement. In dicta, the court noted that a court may affirm in part and vacate in part on review of an arbitration award.
Rogers v. Ausdal Fin. Partners, Inc., 168 F. Supp. 3d 378, 389 (D. Mass. 2016)	In this FINRA case, the federal district court rejected vacatur based on the contention that the arbitrators failed to order third-party discovery that they themselves stated was relevant: Here, the panel may well have acted unfairly. It appears that the chair denied respondents the right to obtain the Verizon information, then concluded that the same information "seems to be important." Presumably, the panel could not and did not take that information into account, as it was not part of the record. However, the panel was acting within its legal authority when it reviewed and denied respondents' requests for subpoenas and this Court is without the power to vacate the award on that basis.
Roy v. Buffalo Philharmonic Orchestra, 682 F. App'x 42, 45-46 (2d Cir. 2017)	Denied a petition to vacate and granted a cross-motion to confirm an arbitration award rendered under the terms of a Collective Bargaining Agreement. Roy first argued that the arbitrator committed misconduct by excluding evidence of recordings and transcript that he made of certain meetings that factored into the dispute. The Court reiterated that the FAA does not control review of awards made under the Labor Management Relations Act, but the FAA grounds for vacatur provide guidance. The Court noted that, in an FAA case, "except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review." (Citation omitted). The Second Circuit has "never held that the requirement of 'fundamental fairness' applies to arbitrations under the LMRA," and the Court declined to resolve that issue in this case. Instead, the Court held that no action cited by Roy came close to violating the fundamental fairness of the arbitration,

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	because the arbitrator—based on the testimony of multiple witnesses—expressly found a pattern of behavior at odds with what Roy contended. Roy also argued that the arbitrator exceeded his powers by hearing testimony about complaints and concerns over Roy's musical performance and musical competence, where the CBA excluded from arbitration non-renewal based on musical incompetence. The Court ruled that because Roy was terminated for just cause and the arbitrator found Roy's conduct to be deliberate, "his behavior, if anything, was musical impertinence, and so the musical incompetence provision is not relevant here." In addition, Roy complained that the arbitrator considered witnesses for the Philharmonic while not crediting Roy's witnesses who corroborated his account. The Court pointed out that the arbitrator had acknowledged the difficulty of "tough credibility questions," and found that—"[g]iven the arbitrator's thorough and evenhanded treatment of the competing accounts"—"it cannot be said that the award was obtained through fraud, corruption, or undue means." Lastly, Roy claimed that the award is against public policy. The Court found: "While Roy's concern about his difficulty in finding new employment in a career where professional orchestra musician positions are extremely limited is understandable, this problem does not implicate a well-defined and dominant public policy concern, and so it is not a proper basis to vacate an arbitration award."
Salus Capital Partners, LLC v Moser, 2018 WL 566409, at * 10-11 (S.D.N.Y. 2018), *appeal filed*, (2d Cir. 2018)	Noting that § 12 of the FAA does not define "filed or delivered" in setting the three months deadline for petitioning to vacate an award, the court looked to the applicable rules the parties had agreed to for the conduct of the arbitration, which provided for mail, personal service or the filing of the award. Even though petitioner had received the final award by email ten days longer than the three month period, the court calculated the trigger date from when petitioner received by mail and personal service the petition to confirm the award—making the petition to vacate timely. The court confirmed the award, including an award of attorneys' fees as a sanction for Moser's actions in the arbitration; the court held that a broad arbitration clause confers discretion to award whatever remedies the

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	arbitrators deem appropriate (including the power to sanction a party for participate in the arbitration in bad faith). The court rejected a challenge to an award of "punitive damages," finding that such damages were for pre-award interest and disgorgement of compensation under the faithless servant doctrine—which, by law, are compensatory. The court finally awarded pre-judgment interest, on top of the pre-award interest in the award, at the 9% rate specified in the CPLR, which the court cited as the common practice within the Second Circuit.
Sanchez v. Elizondo, 876 F.3d 1216, 1221-22 (9th Cir. 2018)	The court first holds that it has appellate jurisdiction under § 16(a) of the FAA to review an award that both vacated an award and remanded for a new arbitration, thereby joining the First, Second, Third, Fifth and Seventh Circuits on this point. The court then reversed the district court and confirmed the underlying award, finding that the arbitrator had neither exceeded powers nor exhibited manifest disregard of the law in interpreting a FINRA rule as permitting arbitration of the dispute before a single arbitrator. For "exceeding powers," the court applied a standard that the award must be "completely irrational."
Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 748 F.3d 708 (6th Cir. 2014)	Reversed a district court injunction that had enjoined any further proceedings in a pending arbitration. The case reached the district court after the panel had issued a partial award on liability but had retained jurisdiction to complete the damage phase. Petitioner argued improper conduct on the part of a party appointed arbitrator. The district court—recognizing limits on judicial review before a final award—had recast the action as one for breach of contract concerning the rules under which the arbitration was to be conducted (in particular, the way party-appointed arbitrators were supposed to act). The Sixth Circuit rejected this approach, and instead applied the familiar principle that a court interacts with arbitration only at two stages—a proceeding to enforce an arbitration agreement and then the limited review of a final award. It is notable that the circuit panel chose to discuss a number of issues along the way. While finding no difference between Michigan arbitration law and the FAA, the court

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

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Servs., 633 F. App'x 548, 551 (2d Cir. 2015)	manifest disregard challenge. In particular, the court rejected challenges to the award of damages. The court stated in pertinent part: "[i]t is settled law in this circuit that arbitrators may render a lump sum award without disclosing their rationale for it, and that when they do, courts will not inquire into the basis of the award unless they believe that the arbitrators rendered it in 'manifest disregard' of the law or unless the facts of the case fail to support it." *Koch Oil, S.A. v. Transocean Gulf Oil Co.*, 751 F.2d 551, 554 (2d Cir. 1985).
Sotheby's Int'l Realty, Inc. v. Relocation Grp., LLC, 588 F. App'x 64, 65-66 (2d Cir. 2015)(internal quotations, punctuation and citations omitted)	Reversed a district court vacatur and rejects a manifest disregard of the law challenge. The court states that a "court reviewing an arbitral award cannot presume that the arbitrator is capable of understanding and applying legal principles with the sophistication of a highly skilled attorney....For this reason, and because of the 'great deference' that courts must grant an arbitration panel's decision, this Court has imposed the following three requirements in order to find that an award was issued in manifest disregard of the law. First, we must consider whether the law that was allegedly ignored was clear, as an arbitrator obviously cannot be said to disregard a law that is unclear or not clearly applicable. Second, we must find that the arbitrators did in fact err in their application of the law, and that the outcome reached was erroneous. Even where explanation for an award is non-existent, we can confirm it if a justifiable ground for the decision can be inferred from the facts of the case. Third, we must find that the arbitrators knew of the law's existence and its applicability to the problem before them."
Stone v. Bear, Stearns & Co., 872 F. Supp. 2d 435, 447-48, 451-52, 456 (E.D. Pa. 2012), *aff'd*, 538 F. App'x 169 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2292 (2014)	Confirmed award and denied petition to vacate, where Stone claimed that FINRA public arbitrator failed to disclose her husband's connection to the securities industry; in fact, the arbitrator had disclosed to FINRA in general terms her husband's connections to the securities industry, but that information was not included in the disclosure form sent by FINRA to the parties. The court does a full analysis of the law on evident partiality, and applies the Third Circuit standard requiring "proof of circumstances powerfully suggestive of bias." Emphasizing that nondisclosure or failure to follow FINRA disclosure rules by themselves would not constitute evident partiality,

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	the court found that the fact that the arbitrator made disclosure (even though not provided to Stone) meant that bias could not be inferred from the disclosure conduct of the arbitrator. The court also found that the arbitrator's husband's connections to the securities industry were too tenuous to infer bias (he taught a course years before for J.P. Morgan and gave a keynote speech at a J.P. Morgan conference). The court also rejected Stone's argument that the nondisclosure constituted misbehavior under § 10(a)(3); that ground has never been applied to a nondisclosure and Stone failed to show misconduct so severe that he was deprived of a fundamentally fair hearing. The court further rejected Stone's argument that the arbitrator exceeded her powers, where she was supposed to be the FINRA public arbitrator but where her husband's connections supposedly disqualified her for this role; while finding that the argument had some "logical appeal," the court found that Stone failed to show that the arbitrator did not make a good faith attempt to comply with her mandate. Finally, the court held Stone waived his challenged, because he "should have known" the basis of his challenge before the award; his investigation could have yielded the same information had it been done earlier
Strausser Enters., Inc. v. Segal & Morel, Inc., 2016 WL 4905677 (Pa. Super. Ct., 2016) (non-precedential), *appeal denied*, 169 A.3d 1020 (Pa. 2016)	Under the common law of arbitration conducted in Pennsylvania, ordinarily a unanimous decision by a panel of arbitrators is required for confirmation of an award; in this non-precedential decision (which the Pennsylvania Supreme Court declined to review), the court found that the parties by contract and conduct intended to be bound by a majority decision and therefore declined to vacate the 2-1 award
Szczepanek v. Dabek, 465 F. App'x 74, 75 (2d Cir. 2012)	Affirmed a district court order that found "manifest error" in the backup documentation for calculation of an award of attorney's fees imposed as a sanction and that reduced the fees to a "reasonable amount." The Second Circuit rejected an argument that the district court failed to give substantial deference to the award because the district court found "manifest error on the record before it." And the court rejected an argument that the district court acted without a statutory or judicial ground for departing from the award: "On the contrary, upon correcting the manifest error in the fee calculation, the district court enforced the terms of the arbitration award without any modification or vacatur."

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	The court also rejected the challenge to the district court's recalculation of the fee amount, finding "no clear error." In essence, the district court reviewed the record of the attorneys' billing and then applied the percentage of the fees (30%) that the arbitration award granted as a sanction. The petitioner had sought $944,604 based on allegedly incurred fees of $3,148,680, but the district court found that the proffered fees were overstated and allowed $283,381.21.
TCR Sports Broadcasting Holding, LLP v. WN Partner, LLC, 153 A.D.3d 140, 149, 152, 162 (1st Dep't 2017), *appeal dismissed*, 30 N.Y.3d 1005 (2017)	The First Department affirmed the vacatur of an arbitration award issued in an arbitration initiated before the Revenue Sharing Definitions Committee ("RSDC") of Major League Baseball (MLB") and further affirmed an order directing that the new arbitration be conducted by the RSDC; the vacatur was based on evident partiality. The dispute arose over the division of telecast rights fees among TCR Sports Broadcasting d/b/a The Mid-Atlantic Sports Network ("MASN"), the Baltimore Orioles and the Washington Nationals. In the arbitration, Proskauer represented the Nationals; the Orioles objected to Proskauer's participation on the basis that Proskauer had regularly represented MLB as well as at least one baseball team participating on the RSDC (where the clubs appointed to the RSDC effectively determined the dispute). The RSDC issued an award favoring the Nationals. "Although MLB cautioned all parties that they should not challenge the award," MASN on behalf of itself and the Orioles commenced the proceeding to vacate the award. In upholding the vacatur, the First Department wrote: > The evidence that the same lawyers in the same firm were representing interests of the arbitrators and MLB at the same time as they represented the Nationals in the arbitration is an objective fact inconsistent with impartiality. The arbitrators had a duty to, but did not, investigate or disclose their relationships with Proskauer, and MLB failed to exercise what power it had to ensure confidence in the fairness of the proceedings in light of MASN's stated concerns. Nonetheless, a majority of the Court held that the new arbitration should be conducted before the RSDC since that was the forum selected by the parties in their agreements,

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

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	without knowledge of the undisclosed facts. Today, we are asked to evaluate these standards in light of a partial disclosure. Here, the neutral arbitrator in question disclosed that the law firm representing one party to the arbitration had recommended him as an arbitrator in three other arbitrations. He also disclosed that he was a director of a litigation services company and attended a meeting at the law firm, but there was no indication the firm and company would ever do business. The trial court found the arbitrator failed to disclose that all of his contacts at the 700-lawyer firm were with the two lawyers that represented the party to the arbitration at issue; he owned stock in the litigation services company that was pursuing business opportunities with the firm; he served as the president of the company's United States subsidiary; he conducted significant marketing in the United States for the company; he had additional meetings or contacts with the two lawyers in question to solicit business from the firm for the company; and he allowed one of the two lawyers to edit his disclosures to minimize the contact. The trial court vacated the arbitration award, but the court of appeals reversed, concluding the party waived its evident partiality claim by failing to object or inquire further when the disclosures occurred. We hold the failure to disclose this additional information might yield a reasonable impression of the arbitrator's partiality to an objective observer. We further hold that because the party making the evident partiality challenge was unaware of the undisclosed information, it did not waive the claim. Accordingly, we reverse the court of appeals' judgment and reinstate the trial court's order vacating the award and requiring a new arbitration.
Thomas Kinkade Co. v. White, 711 F.3d 719, 720, 724 (6th Cir. 2013)	Upholding a judgment vacating an award in an arbitration took over five years; the circuit observed the "arbitration itself was a model of how not to conduct one." Well into the arbitration, the "neutral" arbitrator, Mark Kowalsky, announced to the parties that the respondent, White, and his party-appointed arbitrator on the panel, had entered into engagements with Kowalsky's firm. First, White (a party

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	to the arbitration) had hired one of the arbitrator's law firm partners to represent White in an unrelated arbitration. Second, White's party-appointed arbitrator hired a different one of the arbitrator's partners as a defense expert in a malpractice claim against that party-appointed arbitrator. On top of this, White's counsel was the one to advise Kowalsky that he had been "re-confirmed" as an arbitrator after the AAA denied Kinkade's challenge. The award gave White all the relief he requested. The Sixth Circuit held: "Here, Kinkade established a convergence of undisputed facts that considered together, show a motive for Kowalsky to favor the Whites and multiple, concrete actions in which he appeared actually to favor them." The court, noting that Kowalsky made disclosure of the engagements, added: "Five years into an arbitration, those disclosures were little better than no disclosures at all."
Tully Constr. Co, v. Canam Steel Corp., 684 F. App'x 24, 26 (2d Cir. 2017)	Affirmed the denial of a vacatur petition that was based on manifest disregard of the law. The court stated the standard for vacatur as follows: Under Section 10 of the FAA, an arbitration award may be vacated if, *inter alia*, it was procured by corruption or fraud, or the arbitrators "exceeded their powers." 9 U.S.C. § 10(a). The Second Circuit recognizes two additional bases for vacatur: if the award "was rendered 'in manifest disregard of the law,'" *Schwartz v. Merrill Lynch & Co., Inc.*, 665 F.3d 444, 451 (2d Cir. 2011) (quoting *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 340 (2d Cir. 2010)), or "the terms of the [parties' relevant] agreement[s]," id. at 452 (second alteration added) (quoting *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997)). However, only "a barely colorable justification for the outcome reached" by the arbitrator is necessary to confirm the award. *Landy Michaels Realty Corp. v. Local 32B-32J, Service Employees Int'l Union*, 954 F.2d 794, 797 (2d Cir. 1992) (quoting *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 704 (2d Cir. 1978)). The Court in this formulation said it "recognizes two additional bases for vacatur" beyond those it drew from Section 10 of the FAA, i.e., manifest

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	disregard of the law or of the terms of the parties' agreement. The Court agreed with the district court's rulings that the three alleged instances of manifest disregard urged by petitioners were without merit.
UBS Financial Services, Inc. v. Padussis, 842 F.3d 336 (4th Cir. 2016)	Denyed vacator where FINRA director applied FINRA's rules for appointing arbitrators even though one party did not submit its preferences. Court further declined to modify the award because modification would be contrary to the language and intent expressed in the award.
United Brotherhood of Carpenters and Joiners of America v. Tappan Zee Constructors, LLC., 804 F.3d 270, 276 (2d Cir. 2015)	A governing arbitration agreement empowered an arbitrator to issue an initial bottom line decision (stating who won) and then to reverse the outcome in the final award contemplated under the agreement. The opinion turns on language of the National Plan for the Settlement of Jurisdictional Disputes in the Construction Industry that sets out a process for unions to resolve jurisdictional issues—in this context, the allocation of work in a project. The arbitrator is given factors to apply and is directed to issue a short form decision within 5 days of the hearing stating the outcome, with a reasoned award to follow within 30 days of the hearing. In this case, the arbitrator's short form decision ruled in favor of the Dockworkers, but his reasoned award ruled in favor of the Carpenters, saying that his original analysis was incorrect and further saying that the arbitration provision gives the arbitrator continued power to resolve the dispute through issuance of the final award. The Court of Appeals ruled that a court must defer to the arbitrator's interpretation of the language of the agreement concerning the sequence of awards. The court found that its holding was consistent with previous opinions deferring to an arbitrator's interpretation of contract language (whether the court agreed with the interpretation or not). The court observed: "While the ultimate result was perhaps a bit unusual, it was not a declaration of the arbitrator's 'own brand of justice in contradiction of the clearly expressed language of the contract'" (citation omitted). The court rejected appellant's argument that the parties had not submitted the issue of what an arbitrator was permitted to do in the short form award and final award, and also rejected the argument that the issue of the scope of the awards was a gateway issue for a court to decide. Rather, the court held that the dispute

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	over allocation of work was submitted to arbitration and that the arbitrator's construction of what he could do in the two awards was a matter of contract interpretation as part of his resolution of the dispute. And the court found that the arbitrator did not lose power under the doctrine of functus officio because until the final award he had not fully exercised his authority to determine the submitted issues.
U.S. Elec., Inc. v. Sirius Satellite Radio Inc., 17 N.Y.3d 912, 915 (2011) (Argued by Michael S. Oberman)	Held that New York courts applying the FAA will follow the Second Circuit's standard for evident partiality. Court affirms lower court's determination that there was no evident partiality where the son of panel chairman William Sessions was a member of Congress, who publicly supported the then-pending merger between Sirius and XM Satellite Radio Inc. and was a political ally of Rep. Darrell Issa, a director and major shareholder of U.S. Electronics' competitor in the distribution of Sirius radios (DEI). "This would be a far different case if USE could allude to a personal or business relationship between Chairman Sessions and Congressman Issa; or if his son had a prominent role at Sirius or DEI."
U.S. Soccer Federation, Inc. v. U.S. National Soccer Team Players Association, 838 F.3d 826, 835, 837 (7th Cir. 2016)	Vacated an arbitration award, where the arbitrator had found the contract language to be ambiguous; the court agreed with the district court that the arbitrator invoked the terms "silence" and "ambiguity" "far too cavalierly." Construing the agreement, the court found that the language was clear and express on the point in issue. The court held that the arbitrator had exceeded his authority by not applying the clear and unambiguous contract language. In so holding, the court found that the award ran "contrary to this court's well-established holding that 'the arbitrator cannot dress his policy desires up in contract interpretation clothing." (citation omitted). The court concluded that the goal of arbitration of providing "swift, inexpensive and final decisions" "does not vitiate judicial review of an arbitrator's decision." (citation omitted). The court found its ruling consistent with the parties' agreement since the arbitral award was a decision that "stray[ed] beyond [the arbitrator's] delegated authority" and "is barred by the negotiated contract."
VRG Linhas Aereas S.A. v.	Reversed a district court judgment denying confirmation of

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Matinpatterson Global Opportunities Partners II LP, 717 F.3d 322, 323 (2d Cir. 2013)	an award on the ground that the ICC panel lacked jurisdiction over the dispute. The Circuit remanded the case for the district court to determine whether the parties had agreed that questions of arbitrability were for the arbitrator or a court. Here is the Court's summary: After receiving an arbitral award against Respondents-Appellees MatlinPatterson Global Opportunities Partners II L.P. and MatlinPatterson Global Opportunities Partners (Cayman) II L.P. (collectively "MatlinPatterson"), Petitioner-Appellant VRG Linhas Aereas S.A. ("VRG") filed a petition in the Southern District of New York seeking confirmation of the award in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). 9 U.S.C. §§ 201-08. MatlinPatterson argued in response, as it had in arbitration and court proceedings in Brazil, that the Arbitral Tribunal administered by the International Court of Arbitration of the International Chamber of Commerce ("ICC") lacked jurisdiction over its dispute with VRG. The district court (Cedarbaum, J.) issued an oral ruling agreeing with MatlinPatterson and thereafter denied VRG's petition by handwritten endorsement. On appeal, VRG argues that the district court usurped the Arbitral Tribunal's role when it decided that the scope of the parties' arbitration agreement—assuming there was one—did not extend to the dispute at hand. The question of who is to decide whether a dispute is arbitrable is one that must necessarily precede the question of whether a dispute is arbitrable. We therefore vacate the district court's judgment and remand so that it may decide, in the first instance and on the particular facts of this case, who—the court or the Arbitral Tribunal—has the power to determine the scope of the alleged arbitration agreement between VRG and MatlinPatterson. As we describe more fully below, this power—to determine the scope of any agreement to arbitrate—is to remain with the district court unless the parties agreed to an arbitration clause that clearly and unmistakably

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Zurich Am. Ins. Co. v. Team Tankers A.S., 811 F.3d 584, 589, 591 (2d Cir. 2016)	Affirmed the confirmation of an award, finding no manifest disregard of the law; the court stated: "It is arguable that the shipper's evidence could have supported a contrary conclusion, but that does not show that the panel majority manifestly disregarded the law." The court further found no "corruption" or "misbehavior" where the panel chairman did not disclose that he had a brain tumor with which he had been diagnosed during the arbitration; the petitioner contended that the parties' shipping rules required disclosure of such an illness. The court treated the argument as an attempt to expand the FAA grounds for vacatur, and held that the parties' rules could not alter the statutory grounds. The Second Circuit additionally held that the district court erred in awarding attorneys' fees and costs incurred in the proceeding to confirm or vacate the award. The court found that the parties' agreement (relied on by the district court) only allowed fees and costs for breach of contract, and in this case no breach was shown. The court reasoned that seeking confirmation or vacatur was part of the contract, not a breach of it. And the court ruled that, if the contract did require a shipper to forbear from resisting confirmation, that would be unenforceable under the FAA, stating: "We have held that '[p]arties seeking to enforce arbitration awards through federal-court

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	confirmation judgments may not divest the courts of their statutory and common-law authority to review both the substance of the awards and the arbitral process for compliance with § 10(a) and the manifest disregard standard." Lastly, the court found that the record did not warrant fees for bad faith conduct. (citation omitted).

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

By Michael S. Oberman

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

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

Texas

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

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

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

Maine

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

Georgia

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

Tennessee

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

Alabama

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

California

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

New York

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

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

Practice Point

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

Endnotes

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

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ISTOCK

Clarifying the Standard For Determining **Arbitrator Bias**

New decisions take on 'evident partiality.'

BY MICHAEL S. OBERMAN

IN AN ARTICLE entitled "'Gotcha Game,'" The National Law Journal reported last year on a "rising tide of challenges to arbitration awards [that] threatens to undermine the system."[1] The article focused on challenges alleging "evident partiality" on the part of an arbitrator, and observed that a "wide jurisdictional disparity regarding what constitutes partiality" was compounding the added time and expense inherent in any judicial challenge to an award.[2] But the last year has brought new clarity to the standard for evident partiality applied by the U.S. Court of Appeals for the Second Circuit and now by state courts in New York. This article traces the evolution of that standard, concluding with two recent cases that clarify the law—the Second Circuit's *Scandinavian Reinsurance Co v. St. Paul Fire & Marine Ins. Co.* opinion[3] and the N.Y. Court of Appeals' decision in *U.S. Electronics Inc. v. Sirius Satellite Radio Inc.*[4]

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More Issues Raised Than Resolved

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

1968[7]—prompted 40 years of debate on whether the plurality opinion of Justice Hugo Black or the concurring opinion of Justice Byron White should be followed, with most courts concluding that the plurality opinion does not control.[8]

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

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

Reasonable Person Standard

In 1984, the Second Circuit adopted a reasonable person standard for evident partiality in *Morelite Constr. Corp v NYC Dist Council Carpenters Benefit Funds*,[14] the court's seminal opinion that has been applied in dozens of cases.[15] Judge Irving Kaufman treated "much of Justice Black's opinion...as dicta," allowing the court to "delineate standards of impartiality on a relatively clean slate."[16] "Mindful of the trade-off between expertise [in the relevant industry] and impartiality, and cognizant of the voluntary nature of submitting to arbitration," the court read "Section 10(b) as requiring a showing of something more than the mere 'appearance of bias' to vacate an arbitration award."[17] But the court could not "countenance the promulgation of a standard of partiality as insurmountable as 'proof of actual bias'—as the literal words of Section 10 might suggest."[18] The court concluded:

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

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

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

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

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

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

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

The court stated that

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

Applied Industrial also addressed whether an arbitrator has a duty to investigate, holding that

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

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

Second Circuit's Latest Guidance

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

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

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

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

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

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

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

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

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

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

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

Court of Appeals Concurs

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

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

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

1. Leigh Jones, "'Gotcha Game,'" National Law Journal, Feb 14, 2011 at 1
2. Id at 5
3. __F3d__, No 10-0910-cv, 2012 WL 335772 (2d Cir. Feb 3, 2012).
4. 958 N E 2d 891 (N Y 2011). Sirius' brief included a nationwide survey of the case law on evident partiality, contending there was more concurrence than disagreement among the federal circuits on the standard for evident partiality. 2011 WL 6986868, at *23-52
5. 9 U.S.C §10(a)(2)
6. *Diamond Waterproofing Sys. Inc v 55 Liberty Owners Corp*, 826 N E 2d 802, 803 (N Y 2005)
7. 393 U S 145 (1968)
8. See *Positive Software Solutions Inc v New Century Mortg Corp*, 476 F3d 278, 281-82 (5th Cir 2007) (en banc) (collecting cases)
9. 393 U.S at 146
10. Id at 149-50
11. Id at 150-52.
12. Id at 151-52
13. Id at 152, 154
14. 748 F 2d 79 (2d Cir 1984)
15. See, e g, *Transportes Coal Sea de Venezuela CA v. SMT Shipmanagement & Transp Ltd*, No 05-CV-9029 (KMK), 2007 WL 62715 (S D N Y. Jan 9, 2007) (collecting cases)
16. *Morelite*, 748 F 2d at 83
17. Id. at 83-84.
18. Id at 84
19. Id
20. Id at 85
21. 878 F 2d 38 (2d Cir. 1989) (per curiam)
22. Id at 40.
23. Id
24. 379 F 3d 24 (2d Cir 2004)
25. Id at 28 (citations omitted)
26. 492 F 3d 132, 137 (2d Cir 2007) (citations and internal quotation marks omitted)
27. Id at 137.
28. Id at 138
29. Id. at 139
30. 732 F Supp 2d 293 (S D N.Y. 2010) (Scheindlin, J.)
31. 2012 WL 335772, at *9.
32. Id at *11
33. Id at *12.
34. Id at *12 n 22
35. Id at *13 (citing Justice White)
36. Id at *10 (quoting *Three S Del Inc. v Dataquick Info Sys Inc*, 492 F 3d 520, 530 (4th Cir 2007))
37. Id at *13
38. Id at *9 (quoting *Lagstein v Certain Underwriters at Lloyd's, London*, 607 F 3d 634, 646 (9th Cir. 2010)).
39. Id at *8 (quoting *Three S Del*, 492 F.3d at 530)
40. Id. at *1; see also *STMicroelectronics, N V. v Credit Suisse Securities (USA) LLC*, 648 F.3d 68, 74 (2d Cir 2011), which addressed whether an arbitrator's experience as an expert witness would cause him to have a "predisposition" against financial institutions in disputes over account management; the court rejected a challenge to the award under §10(a)(3) of the FAA ("other misbehavior by which the rights of any party have been prejudiced").
41. 958 N.E 2d at 893
42. Id at 892
43. Id at 893.
44. Id at 893-94.

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Court Decisions

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

BY MICHAEL S. OBERMAN

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

Some companies are concerned about having a significant matter resolved in arbitration, where there is no review by a court on the merits (e.g., for errors of law). In contrast, some companies seeking finality expeditiously and inexpensively are discouraged by the sometimes drawn-out process of subjecting an award to the limited review permitted by the Federal Arbitration Act or state arbitration statute at the trial and appellate court levels.

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

Some courts reasoned that arbitration is a creature of contract, and courts should honor the scope of review the parties agreed upon. Other courts found that parties could not by contract alter a statutory scheme for judicial review, and that the statutory grounds were the exclusive bases for judicial review. See, generally, Petition for a Writ of Certiorari, *MACTAC Inc. v. Gorelick*, 2006 WL 189805 (Jan. 23, 2006) (collecting cases and law review articles).

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

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

In contrast, the Maine, Georgia and Tennessee top courts held that their state statutes do not permit expanded review. See Michael S. Oberman, "The *Hall Street* Parade: State Courts Step Out and Consider Expanded Review of Arbitration Awards," 4:3 *N. Y. Dispute Resolution Lawyer* 23 (Fall 2011).

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

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

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

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

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

FIRST IN NINTH

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

The Ninth Circuit was clear that the issue remains unresolved in that circuit in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 999 n.16 (9th Cir 2003) (en banc). This case is likely best remembered for its holding that parties could not expand the scope of judicial review, but the court also observed that "the decision to contract for a *narrower* standard of review than the courts generally apply in the absence of a statutory command is a decision that may be less troublesome than the attempt for a *broader* standard of review than that authorized by Congress, although we need not resolve that question here." (Emphasis in the opinion.) *Kyocera* is the latest expression from the Ninth Circuit. See *Swenson v. Bushman Investment Properties, Ltd.*, 870 F. Supp. 2d 1049, 1055-56 (D. Idaho 2012)(available at http://bit.ly/YgKv3g)(tracing case law and holding in the case before it that the parties' agreement did not clearly waive judicial review).

2 In *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 931 (10th Cir 2001), the Tenth Circuit noted in dicta that "parties to an arbitration agreement may eliminate judicial review by contract," while holding that parties could not expand judicial review.

Court Clash

The subject: Another visit to *Hall Street*

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

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

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

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

The circuit stated: "Arbitration awards are not self-enforcing, a fact that the Hoefts, who petitioned the District Court to confirm the award, cannot deny. Thus, while we have spoken in broad terms of deference to private agreements to arbitrate, we have always done so with an awareness of the confirmation-and-vacatur-safety net that hangs below." Id. The court added:

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

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

4. In *MACTEC Inc. v Gorelick*, 427 F3d 821 (10th Cir. 2005), the Tenth Circuit—five years after *Bowen*—returned to the question of narrowed review and granted a motion to dismiss an appeal from a district court judgment confirming an award, where the arbitration agreement provided: "Judgment upon the award rendered by the arbitrator shall be final and nonappealable and may be entered in any court having jurisdiction thereof" *Id.* at 827.

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

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

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

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

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

LIMITED 'APPEALABILITY'

6. In *Uhl v. Komatsu Forklift Co.*, 512 F3d 294, 300-01 (6th Cir. 2008), the Sixth Circuit construed a provision that "[t]he award shall be exclusive, final, and binding to all issues and claims" and held that this formulation did not waive appealability of a judgment confirming an award (citation and quotation marks omitted).

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

Yet the statutory limited grounds for review are intended to accord relief when there is a denial of a fundamentally fair process, and a party that waives this limited review in advance could be surprised by circumstances surrounding an award that might warrant vacatur even under the limited statutory grounds.

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

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Kramer Levin's Oberman on 5th Cir's Timegate case: The Arbitrator's Award Limits (April 22).

Exceeding Powers – May an Arbitrator Amend a Contract As Part of an Award?

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Every now and again, a case comes along that guides what arbitrators may, or may not, do in resolving a dispute. *Timegate Studios Inc v. Southpeak Interactive LLC*, 2013 WL 1437710 (5th Cir. Apr. 9, 2013)(available here), is such a case.

Reversing a vacatur of an arbitration award by the federal Southern District of Texas, the Fifth U.S. Circuit Court of Appeals held that the arbitrator had not exceeded his powers by amending the parties' agreement to grant a perpetual license to the prevailing party in the losing party's intellectual property.

Timegate and Gamecock (owned by Southpeak Interactive LLC) had entered into a development agreement for a video game called "Section 8." Timegate was to design the game, and Gamecock was to fund the development—and then distribute—the game. The agreement gave Gamecock only a limited distribution license, and expressly reserved in Timegate the exclusive ownership of the game intellectual property.

Additionally, the agreement specifically prohibited Gamecock from preparing derivative works and from exploiting any of the game's subject matter except as provided for in the agreement.

Section 8 was released two years after the agreement was made, but the game did not meet expectations. The parties soon filed claims against each other in arbitration. The arbitrator—after an eight-day evidentiary hearing—unequivocally found that Timegate materially breached the agreement.

The arbitrator also found that Timegate had engaged in fraud--e.g., by failing to invest the amount of money it represented it was spending in game development, by diverting part of the money funded by Gamecock, and by releasing a version of the game for another game system contrary to the terms of the agreement.

The arbitrator awarded more than $7 million in damages to Gamecock, but he concluded that the monetary award was insufficient to fully compensate Gamecock for the injuries it would suffer due to Timegate's failure to deliver what was required for other distribution channels and for sequels of the game.

The arbitrator therefore provided in the award that the agreement "is hereby amended as a matter of law" to give Gamecock a perpetual license in Timegate's intellectual property in the game and to authorize Gamecock to create sequels to the game without any need to account to Timegate. "The effect of the license-modifying portion of the Award was to realign major elements of the parties' future relationship as established by their original agreement." Id. at *3.

Gamecock filed a motion in the federal district court to confirm the award, and Timegate moved to vacate the award. The district court "found that although a finding of fraud permits an arbitrator to fashion an award which conflicts with contractual provisions," any such award must still be "'rationally inferable from the parties' central purpose in drafting the agreement.'" Id.

The district court held that "the arbitrator's creation of the perpetual license was not a remedy rationally rooted in the contract. Id. Finding that it could "'not modify the award while still preserving its intent, and acting consistently with the essence of the parties' contract,'" the district court vacated the award on the ground that the arbitrator had exceeded his power. Id. (Citation omitted). See 9 U.S.C. § 10(a)(4).

A unanimous three-judge Fifth Circuit panel reversed. In an opinion by Circuit Judge W. Eugene Davis, it first stated the standard of review of an award: that a court "must sustain an arbitration award even if [the

court] disagree[s] with the arbitrator's interpretation of the underlying contract as long as the arbitrator's decision 'draws its essence' from the contract"—or , put another way, "if it is rationally inferable from the letter or the purpose of the underlying agreement." *Timegate*, 2013 WL1437710, at *4 (citations omitted).

Addressing Section 10(a)(4) of the FAA, the court observed that "[w]hether an arbitrator has exceeded his powers is tied closely to the applicable standard of review. . . . [t]he question is whether the arbitrator's award was so unfounded in reason and fact, so unconnected with the wording and purpose of the [contract] as to manifest an infidelity to the obligation of an arbitrator." Id. (Citations and internal quotation marks omitted).

Simply put, the appellate court wrote that "the substantive question of whether an arbitrator has exceeded his arbitration power is a function of our highly deferential standard of review in such cases: an arbitrator has not exceeded his powers unless he has utterly contorted the evident purpose and intent of the parties —the 'essence' of the contract." Id.

The court added that "the arbitrator's selection of a particular remedy is given even more deference than his reading of the underlying contract"; "[t]he remedy lies beyond the arbitrator's jurisdiction only if there is no rational way to explain the remedy handed down by the arbitrator as a logical means of furthering the aims of the contract." Id. (Citation and internal quotation marks omitted)

Having framed the standard as turning on the "essence" of the underlying agreement, the court proceeded to determine the essence of the particular agreement in the case. The court did so by reviewing the agreement itself, as opposed to taking findings from the award or from the district court's decision.

The court found that "virtually every foreseeable aspect of the parties' business relationship is contemplated and addressed by the Agreement, representing a sensitive, interdependent balance in which each party was assured of a specific set of rights and benefits in exchange for their promise to accept a specific set of duties and responsibilities." Id

The court added that the "entire Agreement can accurately be summed up as the creation of a mutually beneficial business relationship between two parties with distinct expertise· a video game developer and a video game publisher." Id.
Against this review of the agreement, the court held that the "perpetual license furthers these general aims of the Agreement." Id. at *5.

Because it was conceded that the record proved an inability of the parties to further work with each other, the "only way to give Gamecock the opportunity to benefit from the future development variations of Section 8 was to cut Gamecock loose from Timegate and allow it to independently pursue game marketing efforts " Id.

The court observed that "the arbitrator could have reasonably found that only by severing the parties' obligations to work with each other to develop, publish, and sell Section 8 could each party achieve the object of the Agreement: access to the financial benefits of their agreed-upon contributions " Id.

Timegate argued that vacatur was warranted because the perpetual license was contrary to express provisions of the agreement. The court rejected the argument, finding first that the agreement ran 35 pages so that any award "which attempts to compensate and restore one contractual party for multiple, irreversible breaches committed by the other party will inevitably realign some of the original contract's provisions." Id at *6.

The court also noted that Texas law provides a basis for voiding provisions of a contract upon a finding of fraudulent inducement

The court next distinguished its prior cases that found an arbitrator had exceeded his powers by saying that, in those cases, the arbitrator had "intruded on an issue that was reserved for an alternative decisionmaker or was removed from anyone's discretion under the contract." Id. (Citation omitted).

Pulling these threads together, the Fifth Circuit concluded: "Although this court has not considered a factually similar application of the essence test, our caselaw suggests that the perpetual license is within the broad scope of the arbitrator's authority " Id

In particular, the court quoted from a prior case that an award must be upheld "[p]rovided that [the arbitrator's] choice is not precluded by *the arbitration provision under which he is acting*, is adequately grounded in the contract, and is not arbitrary or capricious." Id. at *7 (citation omitted; emphasis added by the Fifth Circuit).

The court noted that it had located only one case on point—a decision by the California Supreme Court—and the Fifth Circuit found that case (which also upheld an award) to be persuasive authority Id (citing *Advanced Micro Devices Inc. v. Intel Corp.*, 885 P 2d 994 (Cal 1994))

The court completed its opinion by reiterating the elements that drove the decision:

> Timegate committed an extraordinary breach of the Agreement, and an equally extraordinary realignment of the parties' original rights is necessary to preserve the essence of the Agreement. Because the Agreement bestowed broad remedial powers upon the arbitrator and because it was fraudulently induced and irreversibly violated by Timegate, the perpetual license is a rational and permissible attempt to compensate Gamecock and maintain the Agreement's essence.

The court did not detail how the arbitration provision in this agreement was broad, it merely stated that "the arbitration clause is quite broad and contains no limits relevant to the instant dispute: '*any* dispute . . shall be submitted to binding arbitration '" Id at *4 (Emphasis is the Fifth Circuit opinion's.)

Nor in its analysis did the court address whether a district court—if presented with the same set of facts in a lawsuit—could provide the same remedy as the perpetual license upheld by this opinion (although the *Advanced Micro Devices* decision, cited with approval in *Timegate*, recognizes that an arbitrator may award a remedy that would not be available in a court proceeding and further recognizes that parties in their arbitration provision can limit an arbitrator's power to do so).

So, what guidance does this case provide? First, it must be noted that there were unchallenged findings of misconduct by Timegate—not a mere breach of contract, but conduct sounding in fraud

Second, the nature of the agreement—which envisioned future joint exploitation of the video game—meant that monetary damages accrued to date would not provide a complete remedy, and probably damages for unrealized future profits could be seen as too speculative to calculate

Third, the arbitration provision did not limit the remedies that could be awarded In this set of circumstances, the Fifth Circuit found that the arbitrator did not exceed his powers by amending the agreement to provide Gamecock with a perpetual license.

Given the deferential standard of review under Section 10(a)(4) and the several qualifications just noted, it cannot be said that the court was in any way suggesting that amending a contract should be considered a "best practice" for arbitrators or that arbitrators are being encouraged to be creative in fashioning remedies. But the case does teach that in the right circumstances and with the right contract provisions, an award amending a contract in order to afford complete relief to the injured party can fit within the powers of an arbitrator.

[END]
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Matter of Flintlock Constr. Servs., LLC v Weiss
2014 NY Slip Op 05818
Decided on August 14, 2014
Appellate Division, First Department
Manzanet-daniels, J., J.
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Decided on August 14, 2014 SUPREME COURT, APPELLATE DIVISION First Judicial Department

Rolando T. Acosta,J.P.

Dianne T. Renwick

Richard T. Andrias

David B. Saxe

Sallie Manzanet-Daniels, JJ.

156278/12

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

v

Gretchen Weiss, Respondent-Respondent.

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

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

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

MANZANET-DANIELS, J.

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

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

The Flintlock and Basque operating agreements contain identical arbitration provisions, which provide, in relevant part, that "[a]ny controversy or claim arising out of or relating to this Agreement or the breach or alleged breach of this Agreement, shall be resolved by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association which are then in effect." Although the letter agreement does not itself contain an arbitration clause, it was executed contemporaneously with the operating agreements and describes respondent's role as a member of Flintlock and Basque. Although petitioners did not object to the punitive damages claim in the original demand for arbitration, they challenged respondent's right to amend the demand to assert claims for fraud and intentional misrepresentation, and moved before the arbitration panel to dismiss several of the claims, including the request for punitive damages. Petitioners asserted, inter alia, that punitive damages were not available/arbitrable. The motion to dismiss the request for punitive damages was denied, on or about July 5, 2012, without prejudice to renewal at the hearing, based on a more complete record as to whether the claim affected interstate commerce, and thus, mandated application of the Federal Arbitration Act (FAA), 9 USC § 1 *et seq*. A hearing before the arbitration panel was scheduled to commence on November 5, 2012.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RENWICK, J. (dissenting)

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

Factual and Procedural Background

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

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

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

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

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 14, 2014

CLERK

Footnotes

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

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

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

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

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

MACROBUTTON DoFieldClick [Return to Decision List]

Binding Third Parties

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

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

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

§ 4.02 BINDING THIRD PARTIES

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

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

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

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

- ALTIMARI, CIRCUIT JUDGE.

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

BACKGROUND

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

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

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

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

DISCUSSION

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

A. *Traditional Bases for Binding Nonsignatories.*

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

1. Incorporation by Reference.

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

2. Assumption.

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

3. Agency.

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

4. Veil Piercing/Alter Ego.

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

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

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

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

5. Estoppel.

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

* * * *

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

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

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

* * * *

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

CONCLUSION

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

NOTE:

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

Shaffer v. Stratton Oakmont, Inc.
United States District Court, N.D. Ill., 1991.
765 F. Supp. 365.

- NORGLE, DISTRICT JUDGE.

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

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

FACTS

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

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

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

Neither defendant's name appears anywhere in the agreement.

* * * *

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

DISCUSSION

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

* * * *

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

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

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

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* * * *

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IT IS SO ORDERED.

Arbitrability

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

A. Type of Controversy

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

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

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

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

B. Scope of Agreement to Arbitrate

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

C. The Legal Enforceability of the Agreement to Arbitrate

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

D. "Procedural" Obstacles

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

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

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

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

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

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

Chapter 6

THE ALLOCATION OF POWERS BETWEEN COURTS AND ARBITRATORS

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

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

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

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

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

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

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

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

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

§6.01 DETERMINING WHETHER THE ARBITRAL PROVISION COVERS A PARTICULAR DISPUTE

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

- **BREYER, J.**

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

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

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

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

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

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

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

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

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

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

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

NOTE:

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

Karen Howsam, Individually and as Trustee for the E. Richard Howsam, Jr. v. Dean Witter Reynolds, Inc.
Supreme Court of the United States
123 S.Ct. 588 (2002)

▪ **BREYER, J.**

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

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

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

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

The Courts of Appeals have reached different conclusions about whether a

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

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

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

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

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

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

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

NOTES:

1. Does it make sense to equate "procedural" status with a presumed party intent to have the arbitrator decide the matter at issue? Do parties, particularly lay ones, really consider whether court or arbitrator will decide statute of limitations and related timeliness issues? What has the Supreme Court said about any idea that parties can be determined to have specifically contemplated an involvement of interstate commerce? *See Allied Bruce* case, *supra* at page 131. How is use of a "party contemplation" test any different here?

2. The Court here says issues of waiver of the right to arbitrate are also "procedural" and hence for the arbitrator. The fact is that, in the context of motions to compel arbitration, courts pass on the issue of waiver all the time. There are numerous such cases decided post-*Howsam.*

3. As stated, the *Howsam* approach is applied by the federal courts with respect to statutes of limitations in general, but the New York rule is that a statute of limitations defense may be asserted before the court on resisting arbitration. *See* CPLR 7502(b).

4. Should the New York approach permitting statute of limitations to be raised as a threshold matter with the court be preempted in an FAA case, at least absent party provision that the New York law of arbitration shall govern the arbitration? Yes, at least when a case is in federal court. Goldman, Sachs & Co. v. Griffin, appearing *supra* at 172.

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

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

Rent-A-Center, West, Inc., v. Jackson
Supreme Court of the United States, 2010.
130 S. Ct. 2772 (2010).

- SCALIA, J.

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

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

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

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

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

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

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

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

9 U.S.C. § 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * * *

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

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

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

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

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

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

* * * *

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

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

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

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

* * * *

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

* * * *

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

* * * *

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

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

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

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

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

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

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

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

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

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

Chapter 3

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

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Introduction

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

The Personal Jurisdiction Requirement

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

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

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

In order to comply with the Due Process Clause, it has long been established that a defendant must have "certain minimum contacts" with the forum "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'".[4] In 2014, in its landmark decision in *Daimler AG v. Bauman*,[5] the U.S. Supreme Court provided guidance on how this standard must be applied to determine whether the Due Process Clause has been satisfied for corporate entities.

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

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

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

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

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

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

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

Implications for Enforcement of International Arbitral Awards

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

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

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

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

Application of the *Forum Non Conveniens* Doctrine

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

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

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

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

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

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actions to enforce international arbitral awards. The D.C. Circuit has both granted and refused dismissal when presented with this issue. In *TMR Energy Ltd. v. State Property Fund of Ukraine*, it affirmed a judgment enforcing a Swedish award against an entity which the court held was an "agent" of the State of Ukraine.[37] The court rejected the argument that the enforcement action should be dismissed on the ground that the debtor had no property in the United States, concluding that "[e]ven if the [debtor] currently has no attachable property in the United States, however, it may own property here in the future, and [creditors] having a judgment in hand will expedite the process of attachment".[38]

The D.C. Circuit then affirmed dismissal of an enforcement action in *TermoRio S.A. E.S.P. v. Electranta S.P.*[39] In that case, the appellate court upheld the district court's refusal to enforce an award that had been set aside at the seat (Colombia), but it did not decide whether the action "might have been dismissed on the ground of *forum non conveniens*, the alternative basis announced by the District Court".[40] The district court had indeed granted dismissal on that ground, noting that "[t]his matter is a peculiarly Colombian affair, and should properly be adjudicated in that country".[41]

In *Venture Global Engineering LLC v. Satyam Computer Services, Ltd.*,[42] the Sixth Circuit affirmed enforcement of an award rendered in England and refused to dismiss on the basis of *forum non conveniens*. Specifically, the Sixth Circuit appeared to endorse the district court's reasoning that no public interest of India (the purported adequate alternative forum) outweighed the interest in having the case resolved in Michigan: the debtor was a Michigan company, the award involved the transfer of the assets of a Michigan company, and the agreements at issue were governed by Michigan law.[43]

On the other hand, a majority of a Ninth Circuit panel affirmed dismissal of an enforcement action in *Melton v. Oy Nautor Ab*.[44] Because the defendant had not challenged the application of *forum non conveniens* in the district court, the majority found that the argument had been waived, and it issued its decision assuming that the doctrine was applicable, noting that "[o]ur decision is limited to the application of the doctrine of *forum non conveniens* to the specific facts of this case. We express no opinion as to interpretation of the [New York Convention]".[45] Upholding dismissal, the judges noted that an alternative forum existed (Finland, the seat of arbitration) and held that the district court did not abuse its discretion in concluding that the private and public interest factors weighed in favour of dismissal.[46]

The dissent, however, disagreed with the majority's refusal to consider the applicability of the doctrine. The dissenting judge then expressed his view that "[i]t seems unwise to apply *forum non conveniens* to an action to enforce a foreign arbitration award under the Convention, in the absence of any law that *forum non conveniens* applies to cases arising under the Convention".[47] He concluded that dismissal based on *forum non conveniens* was not appropriate, recognising that in a "summary proceeding to confirm an arbitration award . . . the proof and logistics factors attendant to trial are non-existent".[48]

The application of *forum non conveniens* in this context has been widely criticised by bar associations and commentators.[49] And even if the doctrine is applied, it does not necessarily result in dismissal even within the circuits in which the Courts of Appeals have found it applicable. For example, in *Thai-Lao Lignite (Thailand) Co. v. Government of the Lao People's Democratic Republic*,[50] a district court in the Southern District of New York acknowledged that the creditor's choice of forum was "entitled to a presumption of validity"; that despite the existence of an adequate alternative forum, the private and public interests weighed against dismissal because enforcement "is typically a summary proceeding"; and the case was "connected to the forum" (the parties had travelled to preliminary conferences in New York, retained New York counsel and did not identify any foreign law to be applied to decide the case).[51] As another example, in *Higgins v. SPX Corporation*, the U.S. District Court for the Western District of Michigan stayed an action pending *vacatur* proceedings in Brazil, but refused to dismiss on the basis of *forum non conveniens*.[52] That court acknowledged that "there will remain a second aspect of this suit, enforcement of the arbitration award, which will nevertheless be proper following the presumed confirmation of the arbitration award. In other words, Michigan, because of the location of [debtor's] assets, may be a proper and convenient forum for Plaintiff to enforce the arbitration award upon successful completion of the nullification suit".[53]

Conclusion: Other Avenues for Enforcement

While a lack of personal jurisdiction or the *forum non conveniens* doctrine may present hurdles for enforcement of certain international arbitral awards in the United States, they are not insurmountable. First, with some foresight, parties may dispose of these potential obstacles by specifically providing in their arbitration agreements for consent to the jurisdiction of the U.S. courts for purposes of recognition and enforcement of any arbitral award, and for a waiver of any defence of *forum non conveniens* in connection with any enforcement proceedings. The U.S. courts are likely to respect such an agreement between the parties. At the time of enforcement, the parties may also explore whether the potential defendant has taken some other action, or engaged in activities, that make it susceptible to general or specific jurisdiction in a particular U.S. forum.

Secondly, parties seeking to enforce an award may attempt to determine what assets a debtor may have in the jurisdiction and, assuming that there are some assets, whether the particular U.S. jurisdiction will consider the presence of those assets sufficient to satisfy the jurisdictional requirement.

Finally, a party seeking recognition might be able to circumvent these hurdles by converting its award to a judgment in a foreign jurisdiction and then seeking recognition of that foreign judgment in the United States. This may be possible because of an anomaly of U.S. law in certain jurisdictions in which a lack of personal jurisdiction and *forum non conveniens* may be invoked to prevent enforcement of foreign arbitral awards in the federal courts, but they are not applicable defences to the enforcement of foreign *judgments* in a state court.[54]

Endnotes

1. *See* New York Convention art. V, *opened for signature* June 10, 1958, 330 U.N.T.S. 3; Panama Convention art. 5, 1438 U.N.T.S. 249 (entered into force June 16, 1976).
2. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1121 (9th Cir. 2002).
3. *See Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009); *Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 177-79 (3d Cir. 2006), *cert. denied*, 549 U.S. 1206 (2007); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 213 (4th Cir. 2002), *cert. denied*, 537 U.S. 822 (2002); *First Inv. Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 748-52 (5th Cir.

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2012); *GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 817 (D.C. Cir. 2012). *See also S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1303-05 (11th Cir. 2000) (assuming without discussion that personal jurisdiction is required).

4. *Frontera*, 582 F.3d at 396 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).
5. 134 S. Ct. 746 (2014).
6. *Id*. at 750-51.
7. *Id*. at 751.
8. *Id*.
9. *Id*.
10. *Id*. at 752.
11. As the Supreme Court discussed in *Daimler*, U.S. courts may exercise either "specific" jurisdiction or "general" jurisdiction over a party. *See id*. at 753-58. Specific jurisdiction may be exercised where the lawsuit arises out of or relates to the defendant's contacts with the forum; general jurisdiction may be exercised when a foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities". *Id*. at 754 (quoting *Int'l Shoe*, 326 U.S. at 318) (alteration in original).
12. *Id*. at 751.
13. *Id*. at 761.
14. *Id*.
15. *Id*. at 761 n.19.
16. *Id*. at 762-63.
17. Such cases have become known as "F-cubed" cases. In 2010, the Supreme Court limited the extraterritorial reach of the Exchange Act in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), to preclude F-cubed actions in the securities law context. In its 2012 decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), it dismissed on subject matter jurisdiction grounds a series of Alien Tort Act claims against Royal Dutch/Shell arising out of alleged human rights abuses in Nigeria. The Court then addressed the F-cubed issue again a year later in *Daimler*, but because it decided the case based on the constitutional limitations of personal jurisdiction, *Daimler* has far broader implications than the earlier cases that involved setting limitations on the reach of particular federal statutes.
18. 750 F.3d 221 (2d Cir. 2014), *cert. denied*, 134 S. Ct. 2888 (2014).
19. *Id*. at 223.
20. *Id*.
21. *Id*. at 223-24.
22. *Id*. at 223.
23. *Id*. at 225 (quoting *Daimler*, 134 S. Ct. at 760).
24. *Id*. at 226.
25. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429-30 (2007) (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994)).
26. 311 F.3d 488, 496 (2d Cir. 2002) (quoting New York Convention art. III) (alteration added). The Second Circuit stated that "the items listed in Article V as the exclusive defenses . . . pertain to substantive matters rather than procedure". *Id*.
27. *Id*. at 495, 496 (quoting *Am. Dredging*, 510 U.S. at 453).
28. *Id*. 498-501. The court noted, *inter alia*, that a trial might be required on the issue of the State of Ukraine's potential liability as a non-signatory and that "[t]he case before us simply has no connection with the United States other than the fact than the United States is a Convention signatory". *Id*.
29. 665 F.3d 384, 386 (2d Cir. 2011).
30. *Id*. at 386-87.
31. *Id*. at 387.
32. *Id*. at 389.
33. *Id*. at 392.
34. *Id*. at 397 (Lynch, J., dissenting).
35. *Id*. at 397-98.
36. *Id*. at 402.
37. 411 F.3d 296, 300-03 (D.C. Cir. 2005), *reh'g en banc denied* Aug. 29, 2005.
38. *Id*. at 303; *accord Belize Social Development Ltd. v. Gov't of Belize*, 5 F. Supp. 3d 25, 34 (D.D.C. 2013), *appeal filed* Jan. 14, 2014.
39. 487 F.3d 928 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1038 (2007).
40. *Id*. at 932.
41. *TermoRio S.A. E.S.P. v. Electranta del Atlantico S.A. E.S.P.*, 421 F. Supp. 2d 87, 103 (D.D.C. 2006), *aff'd*, 487 F.3d 928 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1038 (2007).
42. 233 F. App'x 517 (6th Cir. 2007).
43. *Id*. at 521.
44. 161 F.3d 13 (9th Cir. 1998) (unpublished).
45. *Id*. at *1.
46. *Id*.
47. *Id*. at *2.
48. *Id*. (also quoted in *Figueiredo*, 665 F.3d at 402 (Lynch, J., dissenting)).
49. *See, e.g.*, ABA Resolution 107C (adopted by the House of Delegates Aug. 12-13, 2013) (affirming that the "U.S. common law doctrine of *forum non conveniens* is not an appropriate basis for refusing to confirm or enforce arbitral awards that are subject to the provisions of the [New York Convention] or the [Panama Convention] and that refusal on that basis is not consistent with U.S. treaty obligations under these Conventions and U.S. supporting implementing legislation"); Report of the International Commercial Disputes Committee of the Association of the Bar of the City of New York, *Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards* (April 2005) (expressing the view that *forum non conveniens* should not be a ground for dismissal of an action to confirm or enforce an arbitral award because a convenient forum is not a requirement for constitutional due process); GARY B. BORN, 3 INTERNATIONAL COMMERCIAL ARBITRATION 2985 & n.508 (2d ed. 2014) (agreeing with *Figueiredo* dissent, and stating, *inter alia*, that it is "both inconsistent with the [New York] Convention and unjust to more broadly rely on the *forum non conveniens* doctrine to deny recognition of foreign awards where there are assets of an award-debtor within the recognition forum or reasonable grounds for believing that assets might be transferred to or through the recognition forum in the future"). *See also* RESTATEMENT OF THE LAW OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-29(a) (Tentative Draft No. 3 Apr. 16, 2013) ("An action to confirm a U.S. Convention award or enforce a foreign Convention award is not subject to a stay or dismissal in favour of a foreign court on forum non conveniens grounds".).
50. No. 10 Civ. 5256 (KMW), 2011 WL 3516154 (S.D.N.Y. Aug. 3, 2011), *aff'd*, 492 F. App'x 150 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1473 (2013).

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51. *Id*. at 9-12 (internal quotation marks and citation omitted). *See also Constellation Energy Commodities Grp. Inc. v. Transfield ER Cape Ltd.*, 801 F. Supp. 2d 211, 218-21 (S.D.N.Y. 2011) (refusing to dismiss under *forum non conveniens* where award creditor was incorporated in the United States and adequate alternative fora were available in the United Kingdom and Hong Kong).
52. No. 1:05-CV-846, 2006 WL 1008677, at *4 (W.D. Mich. Apr. 18, 2006).
53. *Id*.
54. *See, e.g., Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Fin. Servs. Co.*, 117 A.D.3d 609, 611 (1st Dep't 2014) (affirming an order for the recognition and enforcement of a $40 million English judgment and holding that under New York law, a judgment creditor need not establish a basis of personal jurisdiction over the judgment debtor and rejecting application of *forum non conveniens* doctrine); *Lenchyshyn v. Pelko Elec., Inc.*, 281 A.D.2d 42, 50-51 (4th Dep't 2001) (holding that a party seeking recognition of a foreign money judgment need not establish a basis for personal jurisdiction over the debtor).

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VACATING AN INTERNATIONAL ARBITRATION AWARD RENDERED IN THE UNITED STATES: DOES THE NEW YORK CONVENTION, THE FEDERAL ARBITRATION ACT OR STATE LAW APPLY?

By
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I. INTRODUCTION

When an international arbitration award is issued in the United States, and one party wants to have the award confirmed, enforced or vacated, three different bodies of law are potentially implicated: (1) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"),[1] (2) the Federal Arbitration Act ("FAA"),[2] and (3) state law. A recent decision by the United States Court of Appeals for the Third Circuit in *Ario v. Underwriting Members of Syndicate 53 at Lloyds*[3] highlights the complex interaction of these laws in the context of an attempt to vacate an international award. The case demonstrates both why the parties' selection of the seat of an arbitration is critical and why parties must take care in drafting arbitration clauses.

This article begins by examining the relevant provisions of the Convention, the FAA, and the role of state law. For an illustration of the interplay of these provisions, it then discusses the Third Circuit's decision in *Ario*, where the Third Circuit held that the grounds for vacatur of an international arbitration award issued in the United States are the same grounds as those applied to a domestic arbitration award. By this decision, the Third Circuit joined other circuits that have

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

[2] 9 U.S.C. §§ 1-16, 201-08, 301-07 (2011).

[3] Ario v. Underwriting Members of Syndicate 53 at Lloyds, 618 F.3d 277 (3d Cir. 2010).

held that the grounds for vacatur set forth in the FAA applicable to domestic arbitration awards also apply to international arbitration awards rendered within the United States. However, a few courts have held that a motion to vacate an international award rendered in the United States should be decided only under the New York Convention's more limited grounds for review. The result of this split in the case law is that parties and practitioners must be aware of the jurisdiction within the United States where a motion to vacate an award is likely to be brought. As discussed below, whether the New York Convention or the FAA governs also has important implications with respect to certain procedural rules that apply to the application to vacate.

II. THE THREE BODIES OF LAW IMPLICATED BY A MOTION TO VACATE

A. The New York Convention

The New York Convention, which has been in force in the United States for almost 40 years and has been ratified or acceded to by more than 140 countries, provides a relatively straightforward and effective mechanism for the enforcement of arbitral awards throughout the world. The goal of the New York Convention is "to encourage the recognition and enforcement of *international* arbitration awards and agreements";[4] its "'underlying theme . . . as a whole is clearly the autonomy of international arbitration.'"[5]

The New York Convention applies to (a) arbitral awards that are made in a country which is a party to the Convention other than the country where enforcement is sought, or (b) awards that are "not considered as domestic awards

[4] Jacada (Europe) Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 705 (6th Cir. 2005).
[5] Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp., 512 F.3d 742, 746 (5th Cir. 2008) (quoting PHILIPPE FOUCHARD, EMMANUEL GAILLARD & BERTHOLD GOLDMAN, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION para. 250 (Emmanuel Gaillard & John Savage eds., 1999)).

in the [country] where their recognition and enforcement is sought."[6] Thus, whether an award is considered international or domestic is determined by the law of the country where recognition or enforcement is sought, rather than the Convention.

B. The FAA

In the United States, the New York Convention is implemented through the FAA. As the Supreme Court has explained, "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts."[7] The FAA consists of three chapters. Chapter 1[8] contains "a set of default rules 'designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate"'";[9] Chapter 2 implements the New York Convention and governs international or non-domestic awards; [10] and Chapter 3 provides for the enforcement of the Inter-American Convention on International Commercial Arbitration, also known as the Panama Convention,[11] and sets forth the interplay between the New York Convention and the Panama Convention. [12]

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[6] New York Convention, *supra* note 1, art. I, 21 U.S.T. at 2519. This approach was adopted to accommodate a divergence of opinion between civil law countries, which considered "'the nationality of an award [to be] determined by the law governing the procedure,'" *Jacada (Europe)*, 401 F.3d at 705 (quoting Bergesen v. Joseph Muller Corp., 710 F.2d 928, 931 (2d Cir. 1983)), and common law countries, which "favored a simple rule under which an award was domestic in the country it was entered and foreign elsewhere." *Id.*

[7] Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581 (2008) (alterations in original) (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)).

[8] 9 U.S.C. §§ 1-16.

[9] Ario v. Underwriting Members of Syndicate 53 at Lloyds, 618 F.3d 277, 288 (3d Cir. 2010) (quoting Volt Info. Scis., Inc. v. Bd. of Trs.. of Leland Stanford Jr. Univ., 489 U.S. 468, 474 (1989)).

[10] 9 U.S.C. §§ 201-208.

[11] Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, S. Treaty Doc. No. 97-12, O.A.S.T.S. No. 42, 14 I.L.M. 336 [hereinafter Panama Convention]. The following states have ratified the Panama Convention: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, United States, Uruguay and Venezuela. The only OAS

Chapter 2 defines what awards constitute international or non-domestic arbitration awards and are thus covered by the New York Convention:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial . . . falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.[13]

Application of Chapter 2 of the FAA is not limited to awards rendered outside the United States. Rather, under the FAA, an arbitration award issued in New York, in a commercial dispute governed by New York law, in favor of a New York citizen, would nevertheless be considered an international award if another party to the arbitration was not a U.S. citizen, or alternatively, if it involved a dispute relating to property or performance outside of the United States.[14]

The FAA also provides, however, that "Chapter 1 [of the FAA, governing domestic disputes,] applies to actions and proceedings brought under [Chapter 2] to the extent that chapter is not in conflict with [Chapter 2] or the Convention as

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member states that have not ratified the Convention are the Dominican Republic and Nicaragua.

[12] 9 U.S.C. §§ 301-307.

[13] 9 U.S.C. § 202.

[14] *See, e.g.*, Lander Co. v. MMP Invs., Inc., 107 F.3d 476-78, 481-82 (7th Cir. 1997) (award issued in New York in dispute between two U.S. firms for distribution of U.S.-manufactured products in Poland found to be non-domestic under 9 U.S.C. § 202). *See also* Zeiler v. Deitsch, 500 F.3d 157, 164 (2d Cir. 2007) (arbitration was non-domestic, even though it took place in New York, where assets were located in Israel, some parties resided in Israel and governing law was based on a foreign system).

ratified by the United States."[15] Thus, the federal law governing domestic arbitrations may also be implicated in connection with the judicial review of an international award. Then, as a result, state law may also come into play because, as discussed below, the FAA also permits parties to agree that state arbitration law will apply to certain aspects of their arbitration.

C. Recognition or Enforcement of an Award Under the New York Convention

As discussed above, the New York Convention may apply to arbitration awards issued in the United States because some of these awards will be considered to be international or non-domestic under the FAA.[16]

While the New York Convention sets forth the grounds on which a court may refuse to recognize or enforce an international award, it does not explicitly deal with the grounds that are available on a motion to vacate or set aside an arbitral award. The New York Convention provides that a court "shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon"[17] unless the party against whom the award is invoked provides "proof" that one of seven limited grounds for non-recognition exists.[18] One of the seven grounds set forth in Article V(1)(e) is

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[15] 9 U.S.C. § 208.

[16] *See* 9 U.S.C. § 202; New York Convention, *supra* note 1, art. I(1), 21 U.S.T. at 2519.

[17] New York Convention, *supra* note 1, art. III, 21 U.S.T. at 2519.

[18] *See id.*, art. V, 21 U.S.T. at 2520. Article V provides:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the

that the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."[19]

Article V(1)(e) appears to draw a distinction between courts of the country "in which, or under the law of which, that award was made,"[20] and courts of countries where enforcement of the award is sought. This divide has been recognized as creating a distinction between courts with "primary" jurisdiction (i.e., jurisdiction to set aside or vacate an arbitral award), and "secondary" jurisdiction (i.e., without jurisdiction to set aside or vacate an award, but with jurisdiction to deny enforcement of an award). As the Fifth Circuit has recognized,

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> arbitration proceedings or was otherwise unable to present his case; or
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> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Id. The grounds to refuse recognition of a foreign award under the New York Convention are identical to the grounds contained in the Panama Convention. *See* Panama Convention, *supra* note 12, art. 5.

[19] New York Convention, *supra* note 1, art. V(1)(e), 21 U.S.T. at 2520; *see also* 9 U.S.C. § 207.

[20] New York Convention, *supra* note 1, art. V(1)(e), 21 U.S.T. at 2520.

"[o]nly a court in a country with primary jurisdiction over an arbitral award may annul that award."[21]

The Convention contains no description of or limitation on the capacity of the jurisdiction where the award was rendered to apply its own law vacating the award.[22] This means that the parties' choice of the seat of arbitration can have significant consequences for any judicial review of the award. According to one scholar, the Convention "entrusts the place of arbitration with significant power to enhance, or to impair, the international effectiveness of an award rendered within its territory. The ways courts at the arbitral seat exercise, or fail to exercise, their power to set an award aside generally will determine the award's international currency."[23]

D. Vacating an Arbitral Award in the United States

For the reasons discussed above, in order for a party to invoke Article V(1)(e) of the New York Convention as a ground for denying enforcement of the award, an international award made in the United States would need to be vacated by a U.S. court under U.S. law.[24] Under U.S. law, a threshold question arises as to whether a motion to vacate an award is governed by the FAA standards for vacatur or by the arbitration law of the state in which the award was made, or of the state whose law governs the parties' contract. Although the Supreme Court held in a

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[21] Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 287 (5th Cir. 2004); *See also* M & C Corp. v. Erwin Behr GmbH & Co., 87 F.3d 844, 849 (6th Cir. 1996) ("We hold . . . that such a motion to vacate may be heard only in the courts of the country where the arbitration occurred or in the courts of any country whose *procedural* law was specifically invoked in the contract calling for arbitration of contractual disputes.").

[22] *See* William W. Park, *The International Currency of Arbitral Awards*, *in* INTERNATIONAL ARBITRATION 2007 309, 333 (PLI Litig. & Admin. Practice, Course Handbook Series No. 756, 2007); *see also* George A. Bermann, *Jurisdiction: Courts vs. Arbitrators*, *in* INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 135, 169 (James H. Carter & John Fellas eds., 2010).

[23] WILLIAM W. PARK, INTERNATIONAL FORUM SELECTION 127 (1995).

[24] *See* Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 21-23 (2d Cir. 1997).

case involving a domestic arbitration that, as a general matter, the FAA does not preempt state law,[25] in this specific context, the FAA standards for vacatur are widely recognized to preempt state grounds for vacatur unless the parties clearly provide otherwise in their agreement.[26]

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*,[27] the Supreme Court expressly left open the possibility that parties may select state law to govern enforcement or vacatur of an arbitral award, stating:

> The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11 [of the FAA], deciding nothing about other possible avenues for judicial enforcement of arbitration awards.[28]

Several Courts of Appeals have also contemplated that parties may displace the federal standard for vacatur with a state law standard, but only if they do so explicitly in their agreements.[29]

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[25] *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 477 (1989) ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration").

[26] *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2565 (2009) ("It is well-settled that federal standards for vacatur under the FAA are preemptive under U.S. law, superseding more expansive grounds for vacatur under state law."); Ario v. Underwriting Members of Syndicate 53 at Lloyds, 618 F.3d 277, 292 (3d Cir. 2010) ("'[T]he FAA standards control "in the absence of contractual intent to the contrary."'" (alteration in original) (quoting Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 296 (3d Cir. 2001) (quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 59 (1995)))).

[27] Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).

[28] *Id.* at 590.

[29] *See, e.g.*, Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account, 618 F.3d 277, 292-93 (3d Cir. 2010); Jacada (Europe) Ltd. v. Int'l Mktg.

Assuming that the parties have not explicitly chosen a state law regime for vacatur, parties may move to vacate arbitral awards made in the United States under Section 10 of the FAA,[30] which provides the exclusive grounds for vacatur of awards under the FAA.[31] Under Section 10, a court may vacate an award for the following reasons:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[32]

These grounds to vacate under the FAA overlap to a large extent with the grounds to deny enforcement contained in Article V of the Convention, but are also

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Strategies, Inc., 401 F.3d 701, 711-12 (6th Cir. 2005) (generic choice of law clause was not sufficient evidence to demonstrate that the parties intended to displace the federal standard for vacatur); Action Indus., Inc. v. U.S. Fid. & Guar. Co., 358 F.3d 337, 342-43 (5th Cir. 2004) (holding that agreement at issue's "choice-of-law provision [did] not express the parties' clear intent to depart from the FAA's vacatur standard").

[30] 9 U.S.C. § 10.

[31] *See Hall St. Assocs.*, 552 U.S. at 583-84. In *Hall Street Associates*, the Court held that parties could not expand the scope of judicial review under the FAA by contract. *See id.* at 583-84 & n.5, 586-87.

[32] 9 U.S.C. § 10(a).

somewhat broader.[33] For example, the FAA authorizes vacatur of an award for an arbitrator's refusal to postpone a hearing or refusal to hear pertinent evidence.[34] By contrast, the New York Convention permits a court to deny recognition only where "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."[35] The inability to present one's case is a somewhat narrower ground than the ground for vacatur enunciated in the FAA.[36] Additionally, while there is currently a debate about whether "manifest disregard for the law" remains a viable ground for vacatur under the FAA after the Supreme Court's decision in *Hall Street Associates*,[37] it is undoubtedly not a ground on which to deny enforcement under the Convention.[38]

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[33] *See Ario*, 618 F.3d at 290 n.9.

[34] 9 U.S.C. § 10(a)(3).

[35] New York Convention, *supra* note 1, art. V(1)(b), 21 U.S.T. at 2520.

[36] On the other hand, because the grounds for vacating an arbitral award under the FAA and denying the recognition and enforcement of an award under the New York Convention are similar in some respects, whether the FAA or the New York Convention govern a motion to vacate may not have significant practical consequences in certain cases. *See* John V.H. Pierce & David N. Cinotti, *Challenging and Enforcing International Arbitral Awards in New York Courts*, *in* INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 357, 396 (James H. Carter & John Fellas eds., 2010).

[37] Some courts have taken the view that "manifest disregard" is a non-statutory ground for review which is inconsistent with *Hall Street Associates*. *See, e.g.*, Coffee Beanery, Ltd. v. WW, L.L.C., 300 F. App'x 415, 418-19 (6th Cir. 2008). Others have concluded that "manifest disregard" refers collectively to the grounds for review in the FAA, and is therefore a "judicial gloss" on the statutory grounds for review which is no longer viable after *Hall Street Associates*. *See, e.g.*, Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 94-95 (2d Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1758 (2010).

[38] *See, e.g.*, M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844, 850-51 (6th Cir. 1996); Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech., No. 09-791 (RBW), 2011 WL 192517, at *8-13 (D.D.C. Jan. 21, 2011). As the United States District Court for the District of Columbia has recently observed:

> It should be no surprise, then, that [respondent] DynCorp has failed to cite any case law where the "manifest disregard for the law" standard has been considered an express or implied basis for *denying recognition* of an arbitral award under the New York Convention. Instead, the cases that DynCorp cites . . . all involve arbitral awards that have been rendered in the United States, thereby allowing the non-prevailing parties in those cases to seek *vacatur* of the award under Article V(1)(e) of the Convention.

In addition, Section 12 of the FAA contains other rules governing a notice of a motion to vacate an award. Importantly, Section 12 requires that notice of a motion to vacate an award "must be served upon the adverse party or his attorney within three months after the award is filed or delivered."[39]

III. INTERPLAY BETWEEN THE NEW YORK CONVENTION AND U.S. DOMESTIC LAW

A. The Third Circuit's Decision in Ario

The Third Circuit's recent decision in *Ario v. Underwriting Members of Syndicate 53 at Lloyds*[40] illustrates the interplay between the principles discussed above as well as the importance of carefully drafting arbitration agreements.[41] The case involved four reinsurance contracts, or "treaties," between two Pennsylvania insurance companies (the "Insurers") and the Underwriting Members of Syndicate 53 at Lloyd's for the 1998 Year of Account (the "Reinsurers"), who were mostly British.[42] At the time of the lawsuit, the Insurers were in liquidation and represented by Joel Ario, the Insurance Commissioner of the Commonwealth of Pennsylvania as statutory liquidator.[43]

The arbitration clause provided that "[a]rbitration hereunder shall take place in Philadelphia, Pennsylvania unless both parties otherwise agree. Except as hereinabove provided, the arbitration shall be in accordance with the rules and procedures established by the Uniform Arbitration Act as enacted in Pennsylvania."[44] The arbitrators issued an "unreasoned award" rescinding three of the four reinsurance treaties, which did not provide a rationale or identify the

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Int'l Trading & Indus. Inv. Co., 2011 WL 192517, at *11.
[39] 9 U.S.C. § 12.
[40] 618 F.3d 277 (3d Cir. 2010).
[41] *See id.* at 288-96.
[42] *Id.* at 283 & n.2.
[43] *Id.* at 283.
[44] *Id.* at 284.

evidence on which it was based.[45] The Insurers then filed a motion to confirm in part and vacate in part the award in Pennsylvania state court. The Reinsurers removed the case to federal district court and filed a motion to confirm the award.[46] The parties agreed that the award was subject to the New York Convention, but they disagreed about the applicability of the FAA and Pennsylvania state law.[47]

Ario argued that the parties had opted out of the FAA entirely by their choice of the rules and procedures established by the Pennsylvania Uniform Arbitration Act ("PUAA")[48] to govern the arbitration, and that the federal court thus lacked subject matter jurisdiction.[49] The district court held that it had jurisdiction over the case because the case related to an arbitration award falling under the Convention.[50] After the district court denied his motion to remand, Ario argued that his motion to vacate was governed by the standards in PUAA rather than the more stringent vacatur standards in the FAA. The district court concluded that its review was governed by the FAA rather than PUAA, denied the motion to vacate, and confirmed the award.[51]

The Third Circuit affirmed, with one dissent, the judgment confirming the award,[52] holding that (1) parties may not "opt out" of the FAA, but the FAA permits the parties to waive the right of removal as long as they do so in "clear and unambiguous language" (although the court concluded the parties did not do so in this case);[53] and (2) that the FAA, rather than the Convention or PUAA, provided the standards for vacatur.[54]

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[45] *Ario*, 618 F.3d at 286.
[46] *Id.*
[47] *Id.*
[48] 42 PA. CONS. STAT. ANN. §§ 7301-7320 (West 2007).
[49] *Ario*, 618 F.3d at 286.
[50] *Id.*
[51] *Id.* at 287.
[52] It reversed, however, the district court's award of sanctions under Federal Rule of Civil Procedure 11 against Ario and his counsel. *Id.* at 283.
[53] *Id.* at 288-90.
[54] *Ario*, 618 F.3d at 290-95.

On the first point, the Third Circuit quoted the Supreme Court's statement that "when 'parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA.'"[55] Thus, it held:

> An agreement by parties to apply the rules and procedures of state law operates neither as an "opt out" of the domestic FAA nor as an "opt out" of the Convention's implementing legislation. It is federal law that allows the parties to make and enforce agreements that fall under the FAA or the Convention.[56]

It held that "although *Volt* [and a later Supreme Court decision] addressed only the domestic FAA, the principles undergirding those decisions apply to the Convention's implementing legislation."[57] However, because of the "'strong and clear preference for a federal forum,'" the Third Circuit applied a "strict standard," requiring "'clear and unambiguous language'" evidencing a waiver of the right to remove.[58]

After concluding that the parties in the case before it did not "clearly and unambiguously" agree to waive the right of removal, the Third Circuit considered whether the FAA "domestic" vacatur standards applied to a "Convention award rendered and enforced in the United States."[59] It recognized that "if vacatur is limited to the grounds listed in the Convention, Ario would have little chance of success."[60]

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[55] *Id.* at 288 (quoting Volt Info. Scia., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 479 (1989)).
[56] *Id.* at 289.
[57] *Id.*
[58] *Id.* (quoting Suter v. Munich Reinsurance Co., 223 F.3d 150, 158 (3d Cir. 2000)).
[59] *Ario*, 618 F.3d at 290-92.
[60] *Id.* at 291.

The Third Circuit adopted the reasoning and holding of the Second Circuit in *Yusuf Ahmed Alghanim & Sons Co., W.L.L. v. Toys "R" Us, Inc.*,[61] the seminal case on the issue of the law applicable to a motion to vacate a non-domestic arbitration award rendered in the United States. *Toys "R" Us* has been widely cited for the proposition that a motion to vacate an international or non-domestic arbitral award rendered in the United States is governed by Chapter 1 of the FAA.[62]

In *Toys "R" Us*, the Second Circuit reasoned: "We read Article V(1)(e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award."[63] The Second Circuit summarized the framework of the New York Convention by concluding that the Convention:

> mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.[64]

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[61] Yusuf Ahmed Alghanim & Sons Co., W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15 (2d Cir. 1997) [hereinafter *Toys "R" Us*].

[62] The *Toys "R" Us* case arose out of a contract between Toys "R" Us and a Kuwaiti company, Yusuf Ahmed Alghanim & Sons Co., W.L.L. ("Alghanim"), to open Toys "R" Us stores around the Middle East. When a dispute arose after Toys "R" Us attempted to terminate the agreement, the parties initiated arbitration under the auspices of the American Arbitration Association. The arbitrator rendered an award in favor of Alghanim. Alghanim petitioned the district court to confirm the award under the New York Convention, and Toys "R" Us cross-moved to vacate or modify the award. *Id.* at 17-18.

[63] *Id.* at 21.

[64] *Id.* at 23.

It drew support from scholarly literature interpreting Article V(1)(e), noting that "[t]here appears to be no dispute among these authorities that an action to set aside an international arbitral award, as contemplated by Article V(1)(e), is controlled by the domestic law of the rendering state."[65] The court also reasoned from the history of the New York Convention that it was not meant "to deprive the rendering state of its supervisory authority over an arbitral award, including its authority to set aside that award under domestic law."[66]

In *Ario*, the Third Circuit agreed with the Second Circuit that Article V of the Convention specifically contemplates that the country in which the award is made is free to vacate or set aside an arbitral award in accordance with its domestic

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[65] *Id.* at 21; *see also id.* at 22 ("'[T]he Convention is not applicable in the action for setting aside the award.'" (quoting ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 20 (1981))); *id.* ("'[T]he fact is that setting aside awards under the New York Convention can take place only in the country in which the award was made.'" (quoting Jan Paulsson, *The Role of Swedish Courts in Transnational Commercial Arbitration*, 21 VA. J. INT'L L. 211, 242 (1981))); *id.* at 22-23:

> [Article V(1)(e)] fails to specify the grounds upon which the rendering State may set aside or suspend the award. While it would have provided greater reliability to the enforcement of awards under the Convention had the available grounds been defined in some way, such action would have constituted meddling with national procedure for handling domestic awards, a subject beyond the competence of the Conference.

quoting Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1070 (1961).

[66] *Toys "R" Us, Inc.*,126 F.3d at 22. The Second Circuit reaffirmed its holding *Zeiler v. Deitsch*, 500 F.3d 157 (2d Cir. 2007). In *Zeiler*, the court reviewed a district court decision vacating certain arbitration awards and confirming other awards made by the same tribunal. The lower court appeared to have considered only Article V in its decision. On review, the Second Circuit commented on the "double role" of the reviewing court where the court was asked to confirm a non-domestic arbitration award falling under the Convention, as well as serving as an authority under Article V(1)(e) "authorized under Chapter 1 of the FAA to vacate arbitration awards entered in the United States." *Id.* at 165 n.6. The Second Circuit explained that the district court should not have vacated the awards on the basis of Article V(1)(d) because neither the Convention nor Chapter 2 of the FAA grant the power to vacate non-domestic awards. *Id.* Rather, the lower court should have analyzed the vacatur motion under Section 10 of the FAA. *Id.*

arbitration law.[67] Because Article V(1)(e) incorporates the domestic FAA with respect to motions to set aside awards, the court concluded that there is no conflict between the Convention and the FAA.[68]

The Third Circuit then turned to the question of whether, under the FAA, the parties could displace the federal vacatur standards with the state law standards in the PUAA. As the dissent recognized, the answer to this question was significant. The dissent explained: The FAA standards still rigorously limit judicial intervention, requiring challengers to show the award was "completely irrational," a near prohibitive burden. Under the PUAA by contrast, a court may modify or correct an award that is "contrary to the law." [69]

The Third Circuit ruled that parties could do so: [T]he domestic FAA allows parties to agree to apply state law enforcement mechanisms in lieu of the FAA default rules. Of course, "[t]he FAA is not the only way into court for parties wanting review of arbitration awards," and parties "may contemplate enforcement under state statutory or common law." [70] It held, however, that in order to displace the "'FAA standards [which] control in the absence of contractual intent to contrary[,]'"[71] it would "require the parties to express a 'clear intent' to apply state law vacatur standards instead of those of the FAA."[72]

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[67] *Ario*, 618 F.3d at 292.
[68] *Id.* at 292.
[69] *Id.* at 298 (Aldisert, J., dissenting in part) (citations omitted) (citing Mut. Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co., 868 F.2d 52, 56 (3d Cir.1989); 42 Pa. Cons.Stat. Ann. §§ 7301(d)(2) & 7314(a)). The Third Circuit recognized that in Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 590 (2008), the "Supreme Court addressed only the narrow question of whether the parties could agree to modify the FAA's confirmation, vacatur and modification standards [set forth in 9 U.S.C. §§ 9, 10 and 11], concluding that they 'provide exclusive regimes for the review provided by statute,' and thus could not be altered by the parties." *Id.* at 292 n.11 (majority opinion) (quoting *Hall St. Assocs.*, 522 U.S. at 590). The court in *Ario* held, however, that "*Hall Street* says nothing about using the alternate avenue of 9 U.S.C. § 205 for judicial enforcement of an arbitration award falling under the Convention, and does not support Ario's arguments that the FAA is entirely displaced." *Id.*
[70] *Id.* at 292 (second alteration in original) (quoting *Hall St. Assocs.*, 522 U.S. at 590).
[71] *Id*. (quoting Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 296 (3d Cir. 2001)).
[72] *Ario*, 618 F.3d at 293 (citing *Roadway Package Sys.*, 257 F.3d at 288, 293, 295).

The majority of the court then determined that the arbitration agreement in issue did not evince a "clear intent" to apply the vacatur standards in the PUAA to the exclusion of the FAA.[73] It concluded that while "there is a plausible argument that the parties may have agreed to apply PUAA standards, it falls short of the 'clear intent' we demand."[74] It interpreted the arbitration provisions, which stated that the arbitration "shall be in accordance with the rules and procedures established by the Uniform Arbitration Act as enacted in Pennsylvania,"[75] "[to be] concerned with only the conduct of the arbitration itself, not judicial enforcement of a resulting award."[76] The dissent agreed with the majority's recitation of the law, but disagreed with the majority's interpretation of the arbitration agreement, reasoning that the PUAA's "rules and procedures" included rules of judicial vacatur.[77]

B. Ario Reflects the Majority View

The holding of the Third Circuit in *Ario* and the Second Circuit in *Toys "R" Us* that a motion to vacate an international award rendered in the United States is governed by the domestic standards for vacatur set forth in Chapter 1 of the FAA reflects the majority view.

The Sixth Circuit likewise decided in *Jacada (Europe) Ltd. v. International Marketing Strategies, Inc. (Europe)*[78] that the FAA grounds for domestic vacatur development company from the United Kingdom and a marketing firm from Michigan. After arbitration in Michigan under the auspices of the American Arbitration Association, the tribunal issued an award in which it expressly disregarded a limitation on liability provision in the contract and issued

[73] *Id.*
[74] *Id.*
[75] *Id.* at 284.
[76] *Id.* at 294.
[77] *Ario*, 618 F.3d at 299 (Aldisert, J., dissenting in part).
[78] 401 F.3d 701 (6th Cir. 2005).

an award in favor of IMS.[79] Jacada filed a petition to vacate the award in state court, and a few hours later IMS filed a petition to confirm the award in federal court.[80] The federal case was stayed, and the state case was transferred and then removed to federal district court.[81]

The federal district court ruled that the Convention was applicable to the dispute and therefore that the action was properly removed, a decision upheld by the Sixth Circuit.[82] The court then addressed Jacada's petition to vacate the award. It began its analysis with the language of Article V(1)(e) and held that "[b]ecause this award was made in the United States, we can apply domestic law, found in the FAA, to vacate the award."[83]

The Sixth Circuit distinguished its prior holding in *M & C Corp. v. Erwin Behr GmbH & Co., KG*,[84] which "held that a party seeking to vacate an arbitral award was limited to raising the exclusive grounds found in Article V of the Convention because the FAA does not apply to cases under the Convention if the FAA is 'in conflict' with the Convention or its implementing legislation."[85] The court distinguished this holding on the grounds that *M & C* dealt with an award that had been rendered in the United Kingdom. In *Jacada*, the award was rendered in the United States and Article V(1)(e) therefore authorized the application of domestic law.[86]

Other circuits have stated in dicta that motions to vacate international arbitral awards are reviewed under the FAA vacatur standards, rather than under the grounds in Article V of the New York Convention for denying enforcement of

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[79] *Id.* at 703-04.
[80] *Id.* at 704.
[81] *Id.*
[82] *Id.* at 704-09.
[83] *Id.* at 709.
[84] 87 F.3d 844 (6th Cir. 1996).
[85] 401 F.3d at 709 n.8.
[86] *Id.* The court also addressed whether the parties had agreed to "opt out" of the FAA in favor of Michigan's law, which provided a "more thorough standard of review," and concluded that the "generic choice-of-law provision" in the contract was insufficient to opt out of the federal vacatur standard of review. *Id.* at 710.

an award. For example, the Seventh Circuit noted in passing in *Lander Co. v. MMP Investments, Inc.* that the New York Convention "contemplates the possibility of the award's being set aside in a proceeding under local law."[87]

The Fifth Circuit Court addressed the interaction of the New York Convention and the FAA in greater detail in the *Gulf Petro Trading Co.* case.[88] That case involved a dispute over a joint venture between Nigerian National Petroleum Corporation (NNPC), owned by the government of Nigeria, and Petrec, a division of a U.S. company.[89] The arbitral tribunal rendered two decisions: a "Partial Award" finding that Petrec had standing to submit its claims and that NNPC had not fulfilled its obligation under the joint venture agreement, and a "Final Award," finding that Petrec in fact did not have standing to sustain its claims against NNPC.[90] Petrec made an application before the Swiss Federal Court to set aside the Final Award, but the Swiss court confirmed the award.[91] Petrec then filed a claim in the Northern District of Texas to enforce the Partial Award and set aside or modify the Final Award. The district court determined that by seeking to enforce the Partial Award, Petrec was really seeking to annul the Final Award, because the findings of the Partial Award had been essentially vacated by the arbitral tribunal in the Final Award. Because the New York Convention does not authorize secondary jurisdictions – i.e., jurisdictions other than the jurisdiction where the award was made – to vacate or annul awards, the district court held that it was precluded from granting the relief sought by Petrec.[92] The district court held that "United States federal courts cannot set aside or modify an arbitral award

[87] 107 F.3d 476, 478 (7th Cir. 1997).
[88] Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp., 512 F.3d 742 (5th Cir. 2008); Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp., 288 F. Supp. 2d 783 (N.D. Tex. 2003), *aff'd*, 115 F. App'x 201 (5th Cir. 2004).
[89] *Gulf Petro Trading Co.*, 512 F.3d at 744.
[90] *Id.*
[91] *Id*.
[92] *Gulf Petro Trading Co.*, 288 F. Supp. 2d at 792.

made in another nation," and therefore do not have subject matter jurisdiction over such claims.[93]

After the Fifth Circuit upheld the district court's determination that it could not set aside or modify the Final Award because it had only secondary jurisdiction, Petrec filed suit in the Eastern District of Texas, claiming that the arbitral award was the result of bribery and fraud,[94] and asserting statutory claims under the U.S. Racketeer Influenced and Corrupt Organizations Act (RICO) and the Texas Deceptive Trade Practices Consumer Protection Act, and common law claims for fraud and civil conspiracy.[95] The district court determined, and the Fifth Circuit agreed, that all of Gulf Petro's claims in this second lawsuit constituted a collateral attack on the Final Award, because the harm that Gulf Petro suffered was a result of the arbitral award against it, not the alleged bribery itself.[96] Because a "court sitting in secondary jurisdiction lacks subject matter jurisdiction over claims seeking to vacate, set aside, or modify a foreign arbitral award," the Fifth Circuit dismissed all of Gulf Petro's claims.[97]

Finally, the D.C. Circuit held in *TermoRio S.A. E.S.P. v. Electranta S.P.* that "[u]nder the [New York] Convention, the power and authority of the local courts of the rendering state remain of paramount importance.'"[98] It noted that the New York Convention did not ""provide any international mechanism to insure the validity of the award where rendered. This was left to the provisions of local law. The Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration.""[99]

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[93] *Id*.
[94] *Gulf Petro Trading Co.*, 512 F.3d at 745.
[95] *Id*. at 749.
[96] *Id*. at 750.
[97] *Id*. at 747.
[98] TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 939 (D.C. Cir. 2007) (quoting *Alghanim*, 126 F.3d at 22).
[99] *Id.* (quoting *Alghanim*, 126 F.3d at 22).

C. The Eleventh Circuit's Contrary View

The Eleventh Circuit has taken a different approach than the cases discussed above. In *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*,[100] it considered an appeal from a denial of a motion to vacate the arbitral award made in the United States that it concluded was a non-domestic award governed by the Convention because one of the parties was a non-U.S. party.[101]

The court then addressed the appellant's three theories for why the award should be vacated, and used the terminology for *vacating* an award and *denying enforcement* of an award interchangeably. Although the appeal was of the denial of a motion to *vacate* an award, the court began its analysis by stating: "The Tampa panel's arbitral award *must be confirmed* unless appellants can successfully assert one of the seven defenses against enforcement of the award enumerated in Article V of the New York Convention."[102]

The Eleventh Circuit declined to vacate the arbitral award because the ground advanced by the party seeking vacatur was not contained in Article V of the Convention.[103] The court analyzed the distinction between the regime governing vacatur of domestic arbitration awards and non-domestic awards. It concluded that the reasons for vacatur of domestic awards included the four grounds enumerated in the FAA and two non-statutory defenses against enforcement, namely that an award is "arbitrary and capricious" or enforcement would be against public policy.[104] The court contrasted this regime for vacatur with the defenses against enforcement of an award contained in the Convention, and quoted the Second Circuit's opinion in *Toys "R" Us* for the proposition that the grounds to deny enforcement of an award "'enumerated in Article V of the

[100] Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434 (11th Cir. 1998).
[101] *Id.* at 1441.
[102] *Id.* (emphasis added).
[103] *Id.* at 1445.
[104] *Id.* at 1445-46.

Convention are the only grounds available for setting aside an arbitral award.'"[105] It held that "the Convention's enumeration of defenses is exclusive," and that Chapter 1 of the FAA was inapplicable to a motion to vacate an arbitral award that falls under the New York Convention.[106]

A district court within the Eleventh Circuit has noted that *Industrial Risk Insurers* and *Toys "R" Us* appear to be at odds with each other.[107] The court noted that *Toys "R" Us* recognized "that grounds other than those set forth in the New York Convention may apply to a motion to set aside or vacate a foreign arbitral award rendered in the United States," but declined to rely on *Toys "R" Us* because it was "not binding law . . . and appears to be contrary to [*Industrial Risk Insurers*]."[108]

Another federal district court sitting in Virginia similarly held, in *RZS Holdings AVV v. PDVSA Petroleos S.A.*, [109] that Chapter 1 of the FAA does not apply to international awards rendered in the United States. The court was presented with a petition to vacate an award on the basis that one or both parties had received a draft of the award prior to its publication, one of the arbitrators attended a conference with an attorney from the prevailing party, and the prevailing party paid the entire cost of the arbitration.[110] The court denied the petition because none of the grounds presented in support of the petition were contained in Article V of the Panama Convention, which is nearly identical to Article V of the New York Convention.[111] It held that there was a conflict between Chapter 1 and Chapter 3 of the FAA, which implements the Panama Convention, based upon its "reading of the language of 9 U.S.C. § 207 that indicates that the

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[105] *Id.* at 1446 (quoting *Toys "R" Us*, 126 F.3d at 20).
[106] *Id.*
[107] *See* Nicor Int'l Corp. v. El Paso Corp., 318 F. Supp. 2d 1160, 1168 n.7 (S.D. Fla. 2004).
[108] *Id.*
[109] RZS Holdings AVV v. PDVSA Petroleos S.A., 598 F. Supp. 2d 762 (E.D. Va. 2009), *aff'd*, 383 F. App'x 281 (4th Cir. 2010).
[110] *Id.* at 768.
[111] *Id.* at 767.

reasons enumerated in Article V of the [Panama] Convention provide the exclusive list of grounds to vacate international arbitration awards."[112]

D. Practical Considerations in Seeking To Vacate an Award: The Timing Trap

The FAA contains a strict three-month deadline for parties to move to vacate arbitral awards: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."[113] If Chapter 1 of the FAA applies to awards covered by the New York Convention, then this limitations period likewise applies.[114] Many state statutes also have very short deadlines for seeking vacatur.[115] This is in contrast to the three years permitted under the Convention for a party to seek confirmation of an award.[116]

If a party does not move to vacate an award within the three-month time frame, it cannot seek to do so later when faced with a motion to confirm the award.[117] Accordingly, a party who intends to seek to vacate an international award rendered in the United States must move quickly and may not wait until the prevailing party seeks confirmation of the award.

If a party chooses not to vacate or misses the deadline, then its only option is to wait for the opposing party to attempt to confirm or enforce that award under the New York Convention, and attempt to resist confirmation or enforcement. As discussed above, however, under the New York Convention, a court must confirm

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[112] *Id.* at 766-67.
[113] 9 U.S.C. § 12.
[114] *See* Republic of Arg. v. BG Group PLC, 715 F. Supp. 2d 108, 120 n.10 (D.D.C. 2010).
[115] *See, e.g.*, 42 PA. CONS. STAT. ANN. § 7314(b) (2007) (30 days); FLA. STAT. § 682.13(2) (2003) (90 days); N.Y. C.P.L.R. § 7511(a) (McKinney Supp. 2011) (90 days).
[116] 9 U.S.C. § 207 ("Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration.").
[117] *See* Lander Co. v. MMP Invs., Inc., 107 F.3d 476, 478 (7th Cir. 1997); *see also* Taylor v. Nelson, 788 F.2d 220, 225 (4th Cir. 1986); Florasynth v. Pickholz, 750 F.2d 171, 174-77 (2d Cir. 1984).

the award unless the party opposing confirmation proves "one of the grounds for refusal or denial of recognition or enforcement of the award specified" in the New York Convention exists.[118] If a party does not move to vacate an award within the three-month time limit, then it would only have available the Article V grounds to resist enforcement of the award, not the Chapter 1 grounds under the FAA to vacate the award.

Moreover, it is not necessary for a party to confirm the award in the United States before seeking to enforce the award elsewhere. [119] As the Second Circuit has explained: "While the distinction between vacation of an arbitration award and refusal to confirm an award may be of negligible significance within the United States, it can affect the remaining force of an unconfirmed award outside this country, if a party seeks to confirm and enforce the award under the Convention abroad."[120]

IV. CONCLUSION

Parties choosing the United States as the place of their international commercial arbitrations need to understand the interplay between the Convention, the FAA and state law and to consider the issues discussed above both at the time they draft their arbitration agreements and after an award is entered. Parties who are not aware of these issues may lose their opportunity to have an award entered against them vacated based on grounds in the FAA, or on more lenient state law grounds, which may not be available under the New York Convention.

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[118] *See* 9 U.S.C. § 207.

[119] *See, e.g.*, Oriental Commercial & Shipping Co., (U.K.), Ltd. v. Rosseel, N.V., 769 F. Supp. 514, 516-17 (S.D.N.Y. 1991). In *Oriental Commercial*, the court noted that parties obtaining an international arbitral award in the United States have two options. They can seek to have the award confirmed by a U.S. court and enforce it elsewhere as a foreign judgment. Alternatively, they can go directly to a court outside of the United States and seek enforcement of the award under the New York Convention. *Id.*

[120] Zeiler v. Deitsch, 500 F.3d 157, 165 n.6 (2d Cir. 2007).

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Interim, Provisional and Conservatory Measures in U.S. Arbitration

By Steven Skulnik

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U.S. Legal Framework for Arbitration

Arbitration in the U.S. is governed by both federal and state law. The main source of U.S. arbitration law is the Federal Arbitration Act ("FAA"),[1] which applies in the state and federal courts of all U.S. jurisdictions. The FAA applies to all arbitrations arising from maritime transactions or to any other contract "involving commerce," which is defined broadly. This effectively means that the FAA applies to all international arbitrations and most domestic arbitrations seated in the U.S.

Seeking Interim Relief Before Courts and Arbitrators

Arbitration governed by institutional rules such as the American Arbitration Association ("AAA") Commercial Arbitration Rules (as amended on September 9, 2013, for arbitrations that commence on or after October 1, 2013) ("AAA Rules") and the International Centre for Dispute Resolution ("ICDR") International Arbitration Rules as amended and effective June 1, 2014 ("ICDR Rules") specify that the arbitrators have the power to grant interim, provisional and conservatory measures and specify procedures for obtaining relief even before the tribunal is constituted.[2]

Provisional relief is often necessary before arbitration when:

- A party has evidence that is relevant to the dispute but this evidence is likely to be destroyed, damaged or lost absent an interim order protecting it.
- A dispute is concerned with the ownership of perishable goods that may deteriorate before the dispute can be determined. An interim order requiring the sale of the goods (with the sale proceeds to be held pending the final award), or requiring the goods to be sampled, tested or photographed before the sale is often granted in this case.

Who May Provide Relief

Interim, provisional and conservatory relief in aid of arbitration may be provided by:

- The arbitral tribunal;
- An "emergency arbitrator" appointed by an administering body;
- A federal or state court.

The precise scope of the powers of each of these to act depends on:

- The arbitration agreement;
- Applicable arbitration rules;
- Applicable federal and state law.

Court-imposed Limits

Under the FAA, a court may grant interim relief pending arbitration.[3] The question of whether a federal court should grant preliminary injunction is generally one of federal law even in diversity actions, but state law issues are sometimes considered.[4]

Court-issued interim orders generally last only until the arbitrators have the opportunity to consider the request for emergency or injunctive relief.[5] In effect, restraints issued by courts often serve the same function as temporary restraining orders.

While some U.S. courts have held that they lack power to grant interim relief where the underlying dispute is subject to an arbitration agreement governed by the New York Convention[6] other courts have rejected this approach.[7] In *Sojitz Corp. v. Prithvi Info. Solutions Ltd.*, 921 N.Y.S.2d 14, 17 (1st Dep't 2011), for example, the court held that a creditor can attach assets, for security purposes, in anticipation of an award that will be rendered in an arbitration seated in a foreign country, even where there is no connection between the arbitral dispute and the state, as long as there is a debt owed by a person or entity in the state to the party against whom the arbitral award is sought.

Where admiralty jurisdiction is invoked, federal law governs attachments of ships and other assets.[8] In proceedings begun by libel and seizure of vessels or other properties in admiralty proceedings, Section 8 of the FAA provides the federal courts with jurisdiction to direct the parties to proceed with arbitration and to enter a decree on the award.

Procedure under State Law

Outside of admiralty, state law governs the availability of the provisional remedy of attachment in federal court.[9] Most state laws authorize provisional remedies in aid of arbitration.[10] Some state statutes that have adopted the UNCITRAL Model Law expressly allow for applications for interim measures of protection in aid of an arbitration.[11]

Whether to Apply to the Arbitral Tribunal or the Court

Parties generally can apply either to a court or to arbitrators for interim relief. Parties should consider applying to the court when:

- The arbitral tribunal has not yet been constituted and therefore cannot yet act. In these cases, unless the applicable arbitral rules contain emergency arbitrator provisions, an application to the court is necessary.
- The party seeking interim relief needs judicial compulsion. Although arbitrators can impose negative consequences on parties (for example, drawing adverse inferences if a party does not produce evidence), they have no ability to make a party carry out their orders and no power that can be applied to non-parties.
- The party needs *ex parte* relief. Under most institutional rules, a party seeking emergency measures of protection must notify the other parties.[12] Notice of the application gives the party an opportunity to dissipate the evidence or assets that are the subject of the application. By the time the tribunal makes an order, it can be too late. By contrast, federal courts and most state courts (*e.g.*, California and New York) permit an applicant to proceed without notice in urgent cases.
- The matter is urgent and the arbitrator does not act timely or does not provide an adequate remedy.[13]Absent a showing of urgency, under the RUAA parties may seek relief only from the arbitrator after the arbitrator is appointed and is authorized and able to act.
- The arbitrator may not have the power to grant the relief sought. For example, arbitrators may not have the authority to appoint a receiver.[14]

Parties should consider applying to the arbitral tribunal for interim relief when:

- The tribunal has been constituted and is available on short notice;
- The applicant is satisfied that the other party will respect orders issued by the tribunal;
- The federal or state courts at the place of arbitration are reluctant to grant provisional remedies in aid of arbitration;
- The parties' agreement or the applicable institutional rules empower the arbitral tribunal to grant broader interim relief than would be available in court.[15]

Interim Relief from the Arbitral Tribunal

Institutional Rules

Interim relief is available under, *inter alia*, the:

- AAA Rules;
- ICDR Rules;
- JAMS Arbitration Rules (effective July 1, 2014);
- The International Institute for Conflict Prevention & Resolution (CPR) Administered Arbitration Rules (effective July 1, 2013).

This section summarizes the interim relief available under the AAA and ICDR Rules. A review of the other institutions is included in the online version of this practice note at *http://us.practicallaw.com/0-587-9225.*

AAA Rules

Under the AAA Rules:

- The tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
- Interim measures may take the form of an interim award and the tribunal may require security for the costs of the interim measures.[16]

AAA Rule 38 provides that where a party requires emergency relief before the tribunal has been formed, the AAA appoints an "emergency arbitrator." The emergency arbitrator has the power to order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order, giving reasons in either case.[17] The authority of the emergency arbitrator ceases once the panel has been constituted.[18]

The rules also provide for parties to seek temporary relief in court, stating that:

> A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate.[19]

ICDR Rules

Under the ICDR Rules:

- At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.
- Interim measures may take the form of an interim award and the tribunal may require security for the costs of the interim measures.[20]

Furthermore, the rules expressly permit the tribunal to apportion the costs of the application in any interim award or in the final award.[21] In many cases it is prefer-

able for costs to be dealt with globally at the end of the arbitration, rather than at the application itself.

The rules further provide that where a party requires emergency relief before the tribunal has been formed, the ICDR appoints an "emergency arbitrator."[22] The emergency arbitrator has the power to order interim measures for the protection or conservation of property and may grant interim measures in the form of an award or an order, giving reasons in either case.[23] The authority of the emergency arbitrator ceases once the tribunal has been constituted.[24]

The rules also provide for parties to seek temporary relief in court, stating that:

> A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.[25]

When to Apply

As a general principle, applications for interim and conservatory relief should be made as early as possible. This is because:

- Failure to apply early may prejudice the application for practical reasons. Evidence or assets may be disposed of or property may deteriorate.
- Delay in applying may be taken into account by the tribunal. If the matter is not urgent enough to cause a party to seek relief promptly, a tribunal may decide that the relief is not necessary.

How to Apply

The procedure for applying to the tribunal depends in the first instance on the arbitration agreement or any applicable rules. However, the following points are generally applicable to arbitration under any institution's rules:

- **Apply in writing.** In the absence of any particular procedural requirements, most applications to the tribunal for interim measures should be made in writing.
- **Submit evidence.** The applicant should provide evidence in support of its position. For example, if a party is seeking conservatory orders in relation to property, it should identify the property and its whereabouts, and provide evidence that establishes why the relief sought is necessary. If the applicant is seeking to enforce an employee non-compete agreement, provide affidavits establishing the employer's business interest in enforcing the non-compete and the potential harm to the employer if the tribunal does not issue an order preserving the *status quo*. The applicant should also brief the applicable law regarding its entitlement to the relief sought.
- **Specify relief sought.** State the precise order sought clearly in the application. Do not apply for an order that is too broad in scope. Provide a carefully formulated draft order so that the tribunal can easily see what is being requested and why.

Ex Parte Applications to Arbitrators

The rules of the major arbitral institutions prohibit applications for interim relief being made without notice. In any event, proceeding before an arbitrator on an *ex parte* basis would be ill-advised because:

- Most arbitral tribunals are extremely reticent about proceeding without giving both parties an opportunity to address them.
- Any steps taken without notice may affect the enforceability of the ultimate award. *Ex parte* evidence submitted to an arbitration panel that disadvantages any of the parties in their rights to submit and rebut evidence violates the parties' rights and is grounds for vacatur of an arbitration award.[26]

No Power to Bind Fully Constituted Arbitral Tribunal

Under the institutional rules considered here, the emergency arbitrator does not have the power to bind the full arbitral tribunal. The fully constituted tribunal has the power to vacate, amend or modify any order, award or decision by the emergency arbitrator.

The usual default position is that the emergency arbitrator cannot become a member of the full arbitral tribunal unless the parties agree otherwise.

Enforcing Preliminary Relief Awarded by Arbitrators in Court

Courts have held that they do not have the power to review an interlocutory ruling by an arbitration panel,[27] but have relaxed this rule when parties seek confirmation of provisional remedies awarded by arbitrators.[28]

In *Yahoo! Inc. v. Microsoft Corp.*, the court confirmed an award issued by an emergency arbitrator appointed under the AAA rules to grant emergency relief "until the matter can be fully and fairly decided by a three arbitrator panel of industry experts following discovery."[29] The *Yahoo!* case shows how quickly interim relief can be obtained in arbitration. The emergency arbitrator held two days of evidentiary hearings starting 11 days after Microsoft commenced arbitration and issued a decision six days after conclusion of those hearings. The next day, Yahoo! moved in court to vacate the award and Microsoft cross-moved to confirm. The court ruled for Microsoft less than a week later. In going from commencement to judicial confirmation in merely 25 days, the *Yahoo!* case demonstrates that even where the tribunal is not constituted, the use of emergency procedures provided by arbitral institutions can provide expeditious and effective relief. Moreover, the court respected the parties' agreement to keep proceedings confidential. The motion

papers were filed under seal and the only part of the proceeding that was made public was the judge's decision.

More recently, in *Companion Property & Casualty Insurance Co. v. Allied Provident Insurance, Inc.*, the arbitrators issued an interim award requiring the respondent to post security.[30] When the respondent ignored the interim award, the claimant made a motion in court to confirm it. The court reviewed the case law that supports the court's power to confirm interim awards of security and noted that "[w]ithout the ability to confirm such interim awards, parties would be free to disregard them, thus frustrating the effective and efficient resolution of disputes that is the hallmark of arbitration." Having concluded that it had the power to confirm the interim award, the court noted that it should confirm as long as there is a "barely colorable justification." On that standard, the court confirmed the award because the agreement between the parties required that the respondent provide collateral for its obligations.[31]

Where, on the other hand, a court is asked to vacate an interim award issued by arbitrators, the same considerations may not apply. In *Chinmax Med. Sys. Inc. v. Alere San Diego, Inc.*, the court refused a request to vacate an emergency arbitrator's interim order for certain conservatory measures under the ICDR Rules.[32] In *Chinmax*, the court in addressing a challenge to the interim order found that it did not have jurisdiction to vacate the order because it was not final and binding for the purposes of the New York Convention. The order itself stated that it would be subject to the consideration of the full arbitration tribunal, and on this basis the court refused to grant the motion to vacate.

Courts will only enforce that part of the interim relief that requires judicial intervention at that stage of proceedings. To determine whether to enter grant relief, a court must consider:

- The likelihood that the harm alleged by the party will ever come to pass.
- The hardship to the parties if judicial relief is denied at this stage in the proceedings.
- Whether the factual record is sufficiently developed to produce a fair adjudication of the merits.[33]

Resisting Interim Relief

In response to a request for interim relief, a party should marshal its legal arguments and supporting evidence to convince the tribunal or a court not to grant the requested relief. The opposition should address whether the tribunal or court has the power to grant the request and should give reasons why the application should be denied as a matter of discretion.

In addition to its main argument, the respondent should consider arguing in the alternative that if the relief sought by the applicant is granted, it should be conditioned on the applicant providing adequate security. Most institutional rules provide for security as a condition of interim relief granted by arbitrators.

Before an Emergency Arbitrator

The respondent should check how long it has under the rules to object to the appointment of the arbitrator and make the relevant objections in the permitted time frame. There may be grounds to resist the granting of emergency relief if the respondent has not been given proper notice of the application, or if the application fails to establish that the award to which the applicant may be entitled may be rendered ineffectual without interim relief.

In its response to the application, the respondent may consider whether it can object to the:

- Jurisdiction of the emergency arbitrator;
- Application on these grounds, among others:
  - the emergency arbitrator provision of the relevant rules do not apply;
  - the applicant is unlikely to succeed on the merits;
  - there is no urgent need for the interim relief to be granted;
  - irreparable harm would be suffered by the respondent if the emergency relief were granted; or
  - greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

Before the Arbitral Tribunal

The respondent should check the applicable rules regarding the power of the tribunal and the procedures for interim relief. In its response to the application, the respondent may consider whether it can object to the application on these, among other grounds:

- The applicant is unlikely to succeed on the merits;
- There is no urgent need for the interim relief to be granted;
- Irreparable harm would be suffered by the respondent if the emergency relief were granted;
- Greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

Before a Court

The respondent should consider:

- Whether federal or state courts in the state where the arbitration is seated have held that they lack power to grant the relief requested.[34]
- The application can be opposed on the ground that courts should intervene only until the arbitrators

have the opportunity to consider the request for emergency or injunctive relief.[35] Where the arbitral tribunal is authorized to grant the equivalent of preliminary injunctive relief, it has been inappropriate for the district court to do so.[36]

- The applicant is unlikely to succeed on the merits;
- There is no urgent need for the interim relief to be granted;
- Greater harm would be suffered by the respondent if the interim measure is granted than would be suffered by the applicant if it were not.

Endnotes

1. 9 U.S.C. §§ 1-16, 201-208, 301-07.
2. See AAA Rules 37 and 38 and Articles 6 and 24, ICDR Rules.
3. *See Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 376 (4th Cir. 2012), *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano*, 999 F.2d 211, 214-15 (7th Cir. 1993) and *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1051-54 (2d Cir. 1990).
4. *See AIM Int'l Trading LLC v. Valcucine SpA.*, 188 F. Supp. 2d 384, 387 (S.D.N.Y. 2002).
5. *See Fairfield Cnty. Med. Ass'n v. United Healthcare of New England, Inc.*, 557 F. App'x 53, 56 (2d Cir. 2014) and *Next Step Med. Co. v. Johnson & Johnson Int'l*, 619 F.3d 67, 70 (1st Cir. 2010).
6. *See, e.g., McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1037-38 (3d Cir. 1974) and *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75 (4th Cir. 1981).
7. *See Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990); *Aggarao*, 675 F.3d at 376; *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 365 (5th Cir. 2003); *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazoni v. Lauro*, 712 F.2d 50, 54-55 (3d Cir. 1983).
8. *See Result Shipping Co. v. Ferruzzi Trading USA Inc.*, 56 F.3d 394, 399 (2d Cir. 1995).
9. Federal Rules of Civil Procedure (FRCP) 64 states: "[a]t the commencement of and throughout an action [for attachment in federal district court], every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment."
10. Section 7502(c) of the New York Civil Practice Law and Rules ("CPLR"), for example, provides that to obtain provisional relief, the movant must demonstrate that "the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." CPLR 7502(c) provides that a showing of an ineffectual award is the "sole ground for the granting of the remedy" (compare *JetBlue Airways v. Stephenson*, 932 N.Y.S.2d 761 (Sup. Ct. N.Y. Co. 2010), *aff'd*, 931 N.Y.S.2d 284 (1st Dep't 2011) (denying motion for injunctive relief under CPLR 7502(c) because, although the movant presented arguments regarding the CPLR Article 63 criteria, it ignored the "ineffectual award" requirement) with *Winter v. Brown*, 853 N.Y.S.2d 361 (2d Dep't 2008) (lower court erred when it granted preliminary injunction in favor of seller in breach of contract action where seller failed to satisfy the traditional equitable criteria for preliminary injunctive relief)). CPLR 7502(c) also provides that if an arbitration is not commenced within 30 days of the granting of provisional relief, the order granting relief expires and costs, including reasonable attorneys' fees, are awardable to the respondent.
11. *See, e.g., Bahr Telecomms. Co. v. DiscoveryTel, Inc.*, 476 F. Supp. 2d 176, 184 (D. Conn. 2007) (federal court applying state law of attachment) and *Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, 647 S.E.2d 102, 105 (N.C. App. 2007) (granting preliminary injunction under the Revised Uniform Arbitration Act (RUAA)). States that have adopted this rule include Colorado, Florida, Minnesota and Washington.
12. *See* AAA Rule 38(b) and Article 6, ICDR Rules.
13. *See* section 8 of the RUAA.
14. *Compare Stone v. Theatrical Inv. Corp.*, No. 14 CIV. 6494 PAE, 2014 WL 6790262, at *12 (S.D.N.Y. Dec. 2, 2014), *reconsideration denied*, No. 14 CIV. 6494 PAE, 2015 WL 195848 (S.D.N.Y. Jan. 14, 2015) (arbitrator has the power to appoint receiver as part of a final award) with *Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. v. Lowenstein Sandler, P.C.*, 839 A.2d 52, 57-58 (N.J. Super. Ct. App. Div. 2003) and *Pursuit Capital Management, LLC v. Claridge Associates, LLC*, No. 654301/12 (Sup. Ct. N.Y. Co. Mar. 21, 2013) (unpublished) (arbitrators may not appoint a receiver as a provisional remedy).
15. *See, e.g., CE Int'l Res. Holdings LLC v. S.A. Minerals Ltd. Pship*, No. 12 CIV. 8087 CM, 2012 WL 6178236, at *3-*5 (S.D.N.Y. Dec. 10, 2012).
16. AAA Rule 37.
17. AAA Rule 38(e).
18. AAA Rule 38(f).
19. AAA Rule 38(h).
20. Article 24, ICDR Rules.
21. Article 24.4, ICDR Rules.
22. Article 6(2), ICDR Rules.
23. Article 6(4), ICDR Rules.
24. Article 6(5), ICDR Rules.
25. Article 24(3), ICDR Rules.
26. *See Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1025 (9th Cir. 1991).
27. *See Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980).
28. *See Sperry Int'l Trade v. Gov't of Isr.*, 532 F. Supp. 901, 909 (S.D.N.Y. 1982), aff'd, 689 F.2d 301 (2d Cir. 1982) (confirming an arbitrator's order to place a disputed $15 million letter of credit in escrow pending a decision on the merits, finding that the award would be rendered a meaningless exercise of the arbitrator's power if the order were not enforced); *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1059 (6th Cir. 1984) (upheld the confirmation of the award that preserved the status quo, reasoning that the injunction issued by the arbitral tribunal would be meaningless absent judicial confirmation of it) and *S. Seas Navigation Ltd. v. Petroleos Mexicanos*, 606 F. Supp. 692, 694 (S.D.N.Y. 1985) (holding that if "an arbitral award of equitable relief based upon a finding of irreparable harm is to have any meaning at all, the parties must be capable of enforcing or vacating it at the time it is made").
29. 983 F. Supp. 2d 310 (S.D.N.Y. 2013).
30. No. 13-CV-7865, 2014 WL 4804466, at *3 (S.D.N.Y. Sept. 26, 2014).
31. *Zurich Am. Ins. Co. v. Trendsetter HR, LLC*, 2016 WL 4453694 (N.D. Ill. Aug. 24, 2016) (confirming interim award requiring insured to post security for insurance carrier's claims) and *see also Ecopetrol S.A. v. Offshore Exploration & Prod.* LLC, 46 F. Supp. 3d 327, 337 (S.D.N.Y. 2014) (enforcing interim awards requiring seller to tender certain amounts to purchaser with funds not derived from amounts in escrow).
32. No. 10CV2467 WQH NLS, 2011 WL 2135350 (S.D. Cal. May 27, 2011).
33. *See Draeger Safety Diagnostics, Inc. v. New Horizon Interlock, Inc.*, No. MC 11-50160, 2011 WL 653651, at *4 (E.D. Mich. Feb. 14, 2011).
34. *See, e.g., McCreary Tire*, 501 F.2d at 1037-38, *see also Bowers v. N. Two Cayes Co. Ltd.*, 2016 WL 3647339, at *3 (W.D.N.C. July 7, 2016) (confirming arbitrator's grant of injunctive relief ordering a percentage of the sale of certain real estate to be placed in an escrow account pending the outcome of the arbitration but denying confirmation of arbitrator's ruling that that the arbitration is binding on the parties).
35. *See, e.g., Next Step Med.*, 619 F.3d 67 at 70.
36. *See, e.g., Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999).

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Neutrals

The Arbitration from Hell and How the New York Courts Got It Wrong

BY NORMAN SOLOVAY

This article follows-up on the author's reporting, which explained why the New York state's Appellate Division, First Department, was wrong in 2012 when it unanimously upheld a New York lower court's vacatur of an arbitrator's sanctions award against Jack J. Grynberg in *Matter of Jack J. Grynberg et al., Respondents, v. BP Exploration Operating Co. Ltd. et al., Appellants*, 92 A.D.3d 547, 938 N.Y.S.2d 439 (2012) (available at http://bit.ly/2x7FXpj).

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The earlier work, a *New York Law Journal* article by this author, titled "Step Back in Time: Curtailing Arbitrators' Authority to Award Sanctions," *N.Y.L.J.* 7 (Aug. 6, 2012)(available with a subscription at http://bit.ly/2v4U7Wn), examined the vacatur of the arbitrator's award of sanctions against Grynberg, which is referred to in this article as the "Sanctions Issue."

This article will explain why the First Department was wrong again in 2015 when it unanimously affirmed a lower court's decision in the same case, but on a different issue, referred to in this article as the "Signature Bonus Issue". *Matter of Grynberg v. BP Exploration Operating Co. Ltd.*, 127 A.D.3d 553, 7 N.Y.S.2d 125 (2015).

The Sanctions Issue and the Signature Bonus Issue were only two of the 13 issues that were resolved in arbitrations that Grynberg commenced in 2002 against a subsidiary of BP Plc and Statoil ASA pursuant to the terms of two identical settlement agreements that Grynberg entered into with each of those companies in 1999.

Until recently, the court records in the 2015 New York case were not publicly available because they were filed under seal by the New York courts. But as a result of a Sept. 8, 2016, decision of the U.S. District Court for the District of Columbia (referred to above and throughout the article as the "DC Case"), all of the relevant documents that were filed under seal are now publicly available on Pacer as Exhibits in the DC Case (DC Court Index No. 1:08-cv-00301), fully captioned *Jack J. Grynberg, et al. v. BP P.L.C., et al.*, Civil Action No. 08-301 (JDB), 205 F.Supp.3d 1 (2016).

Thus, the whole story of this case, which Grynberg characterized in his Declaration in the DC Case as "The 13-Year Arbitration from Hell," can now be told.

The key player in this marathon arbitration was, and still is, Jack J. Grynberg, a Denver-based geologist and professional engineer who amassed a multimillion dollar fortune in the oil and gas business. Grynberg, who speaks Russian fluently, developed a relationship with Kazakh President Nursultan Nazarbayev when he hosted him on a U.S. tour.

Grynberg then brokered an agreement

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The author, a Columbia Law School graduate, where he was an editor of the Law Review, and thereafter a law secretary to New York State Court of Appeals Chief Judge Charles D. Breitel when Breitel sat in the Appellate Division, describes himself as a "reformed litigator." Now the principal shareholder of the Solovay Practice in New York, he is the author of books and articles advocating increasing and improved use of alternative dispute resolution practices to replace and avoid the long drawn-out trials in which he used to be involved.

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between the Republic of Kazakhstan and a consortium of seven international oil and gas companies, one of which was BP. Under the agreement, the consortium obtained valuable rights to develop oil and gas reserves in the Kashagan Field in the Caspian Sea area of Kazakhstan.

Pursuant to the agreement with the Kazakh government, BP, as well as the other consortium members, was required to make payments to the Kazakhstan government in the nature of an up-front license fee, referred to as "Signature bonuses," in connection with obtaining those development rights.

In 1993, Grynberg filed suit against BP in New York's Southern District federal court claiming that BP breached a 1990 agreement to pay him a carried interest in the profits it would earn as a consortium member.

That suit was settled in 1996 in a mediation in which Stephen A. Hochman, a well-known and highly regarded New York-based arbitrator/mediator, served as the court-appointed mediator.

The settlement's substantive terms were set forth in a two-page handwritten preliminary settlement agreement, the "PSA." The PSA provided that the parties would embody those substantive terms in a definitive settlement agreement that was to be based on a similar settlement agreement that Grynberg previously entered into with another member of the consortium.

At the request of both parties, Hochman agreed to serve as the sole arbitrator to resolve any and all disputes that may arise under the PSA or the definitive Settlement Agreement pursuant to the following provision in the PSA:

> Any dispute hereunder or as to the terms

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of the definitive settlement agreement shall be resolved in accordance with N.Y. law by binding arbitration in NYC before Stephen A. Hochman in accordance with the commercial arbitration rules of the American Arbitration Association. [2013 New Award, p. 4 [see citation below]; DC Case, Exhibit 7.]

In January 1999, after lengthy negotiations, the parties reached agreement on the terms of a definitive settlement agreement. Because Statoil was the beneficial owner of one-third of BP's one-seventh interest in the consortium—i.e., 14.28%—there were two identical settlement agreements involving Grynberg: one with BP relating to its two-thirds share of its total one-seventh interest in the consortium, and the other with Statoil relating to its one-third interest. Thus, BP owned a 9.52% interest in the consortium, and Statoil owned a 4.76% interest.

The Signature Bonus Issue arose because the settlement agreements provided that Grynberg was entitled to a 15% carried interest in the net profits that each of BP and Statoil earned from being consortium members.

The settlement agreements also provided that BP's and Statoil's net profits were to be determined by an independent auditor. The independent auditor confirmed that the Signature Bonuses were paid via a wire transfer from BP's bank account and thus treated them as an expense in the computation of BP's net profits.

Grynberg, however, argued to the auditor that the Signature Bonus payments should not be treated as costs in calculating his 15% share of BP's net profits—even if those payments represented actual costs that reduced BP's profits—because the wire transfer payments were made to an intermediary and then remitted to Kazakh government officials instead of the Kazakhstan government, thus constituting bribes that violated the U.S. Foreign Corrupt Practices Act.

After the auditor rejected Grynberg's claim, he made the same argument to Arbitrator Hochman, who also rejected it, stating in what was denominated his Final Decision and Award (the "2010 Original Award") that:

> If it were not for those Signature Bonus payments (whether they were legal or illegal), BP, as well as Statoil and the other members of the Consortium, may not have had the opportunity to earn the profits they derived from their participation in the Consortium. Because 15% of BP's profits, as well as 15% of Statoil's profits, inured to the benefit of Claimants (a total of over $40,000,000), Claimants would not have suffered any damages even if the Signature Bonus payments could be proven to have been illegal bribes.
>
> Simply put, Claimants' request for an evidentiary hearing on the bribery issue was denied because the issue of whether the Signature Bonuses were or were not bribes is not a relevant issue. The relevant issue is whether the independent auditor was wrong to deduct them in his calculation of BP's Net Sales Proceeds. The auditor cannot decide the issue of whether the Signature Bonus payments violated the U. S. Foreign Corrupt Practices Act, but he can decide whether the payments should be deducted in computing BP's Net Sales Proceeds, and he did decide that issue. [2010 Original Award, p. 19, DC Case, Exhibit 4.]

No End in Sight

The case: A 1993 suit. A 1996 mediation settlement that included arbitration. An arbitration starting in 1999. Into the courts in 2010.

The result: There is none. The arbitrator defied a court determination, a move that this article strongly backs. Then the arbitration award was overturned. The appealing party took the case to another federal circuit to avoid arbitration and have a court decide the issue.

The future: Will the players live long enough to see an outcome? At press time, no ADR proceedings were scheduled.

TRIAL COURT VACATES

New York state Supreme Court Justice Jane S. Solomon vacated Hochman's sanctions award against Grynberg in her 2010 decision. *Grynberg v. BP Exploration*, N.Y. Sup. Ct. slip opinion 116840-04 (Dec. 8, 2010); DC Case, Exhibit 5.

The ground for vacating the award by the Supreme Court, which is the New York trial-level court and the state's first judicial stop for confirming an arbitration award, was that arbitrators have no power to award sanctions under New York law—which, as indicated in the above-referenced *N.Y. Law Journal* article, ignored the applicable and controlling Federal Arbitration Act.

Justice Solomon, however, confirmed Hochman's award on the Signature Bonus Issue, stating:

> Based on his determination that the sole relevant issue was whether BP paid the signature bonuses, he confirmed the auditor's findings without pursuing the avenue of inquiry that the petitioners wanted. This determination does not violate any public policy concerns. Similarly Hochman's denial of the evidentiary hearing and his discussion of the proper standard for burden of proof are irrelevant to his reliance on the fact that the payments were made. [Citation omitted.]

On Feb. 21, 2012, the New York Appellate Division's First Department overturned Solomon's confirmation of Hochman's award on the Signature Bonus Issue, stating:

> The arbitrator's failure to determine the nature of the disputed payment warrants the vacatur. ... Petitioners claim that this payment constituted a bribe. Respondents assert it was a bona fide cost of doing business. We remand for the arbitrator to determine the nature of the payment. Contrary to the arbitrator's finding, deducting a payment intended to be a bribe to a public official is unenforceable as violative of public policy (see *Matter of New York State*

Correctional Officers & Police Benevolent Assn v. State of New York, 94 N.Y.2d 321, 326 (1999); *Matter of Crosstown Operating Corp. [8910 5th Ave. Rest.]*, 191 AD2d 384 (1993); Penal Law art 200).

In the Matter of Jack J. Grynberg, et al., Appellants-Respondents, v. BP Exploration Operating Co. Ltd., et al., Respondents-Appellants, 92 A.D.3d 547, 938, N.Y.S.2d 439 (2012); DC Case, Exhibit 6.

ARBITRATOR'S DILEMMA

The Appellate Division's remand of the Signature Bonus Issue to Arbitrator Hochman, ordering him to decide whether BP's Signature Bonus payment was a bribe, faced him with a dilemma because he believed—correctly—that the decision was wrong.

What some would consider the easy and safe choice for him would have been to follow the instructions of the First Department and hold evidentiary hearings on the bribery issue, even though he and the independent auditor previously determined it to be irrelevant in the context of computing BP's net profits.

But as the arbitrator noted in what was denominated his "Decision and Award after Remand" (the "2013 New Award"), that safe choice would have been inconsistent with his ethical duties as set forth in Canon I.A of the Code of Ethics for Arbitrators in Commercial Disputes (available at http://bit.ly/2vaYXBr), which states:

> An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved.

Before issuing his 2013 New Award, Arbitrator Hochman sent the parties a draft in which he explained why he believed holding the hearings ordered by the First Department would be inconsistent with his ethical duties.

He noted in that New Award that he had received a list of the numerous non-parties whom Grynberg stated he would subpoena to testify and a list of the extensive documents that he would subpoena from those parties in his attempt to prove his claim that the Signature Bonus payments were bribes.

'In furtherance of my ethical responsibility to the process of arbitration, I must respectfully refuse to comply with the [New York state Appellate Division] First Department's Remand Order to determine the nature of the Signature Bonus payments.'

Hochman also explained that holding such extensive hearings on the bribery issue would result in interminable delay and substantial cost and expense to the parties inconsistent with the goal of arbitration, which is for the arbitrator to decide all issues in accordance with applicable law but in a quicker, less costly, and more efficient process than litigation. Id.

After the parties received Hochman's draft of the 2013 New Award, BP and Statoil proposed a solution to his dilemma that would not be inconsistent with his ethical duties: namely, to summarily dismiss the Signature Bonus bribery claim because it was not plausible under the federal pleading standard announced by the U.S. Supreme Court in *Iqbal v. Ashcroft*, 556 U.S. 662 (2009). D.C. Case, Exhibit 10, p. 5.

They argued that the bribery claim was implausible because the FCPA criminal indictment of the intermediary who allegedly transmitted the Signature Bonus payments to the Kazakh government officials was dismissed.

But Hochman rejected that proposal since an award based on such a summary dismissal could risk being vacated because it would deprive Grynberg of the opportunity to prove his bribery claim, and thus might constitute a refusal to hear evidence pertinent and material to the controversy—a statutory ground for vacatur under Federal Arbitration Act Section 10.

Hochman could have resolved the arbitrator's dilemma by taking the easy way out by complying with the First Department's remand order. He would have been paid his hourly rate to hold extensive evidentiary hearings on the bribery issue, even though it is unlikely that Grynberg would be able to meet his burden of proof that the wire transfers from BP's bank account ultimately went to Kazakh government officials instead of the Kazakhstan government.

But Hochman, in rejecting that easy way out, explained in his 2013 New Award that:

> In furtherance of my ethical responsibility to the process of arbitration, I must respectfully refuse to comply with the First Department's Remand Order to determine the nature of the Signature Bonus payments. That is because the remand was based on the Court's erroneous holding in reliance on one of New York's two non-statutory grounds for vacating an arbitral award rather than on the only non-statutory ground for vacating an arbitral award under the FAA, which is manifest disregard of the law, a much stricter standard than either of the New York standards.

GRYNBERG'S BELATED BIAS CLAIM

When the New York Appellate Division First Department overturned Justice Solomon's lower court opinion confirming Hochman's decision on the Signature Bonus Issue, Grynberg went back to the lower court and claimed, for the first time, that Hochman should be removed for bias.

Specifically, on March 12, 2012, soon after the appellate court issued its Feb. 21, 2012, decision ordering Hochman to hold evidentiary hearings on the bribery issue that he previously ruled in 2010 was irrelevant, Grynberg made a motion to the lower court to remove Hochman for bias.

Undoubtedly, Grynberg made this belated bias claim because he knew perfectly well that Hochman would, as a matter of principle, rule the same way on the Signature Bonus Issue after the First Department remanded that issue to him in 2012 as he did in his 2010 Original Award.

After his first belated attempt to remove Hochman for bias was denied, the ever-persistent Grynberg made many additional attempts, all of which also were unsuccessful.

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Neutrals

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His fifth failed attempt was in a Dec. 11, 2012, appeal to the First Department. That court, however, held that "by failing to make any argument as to the arbitrator's alleged partiality during the confirmation proceeding [in 2010 before Justice Solomon], petitioners waived that challenge."

The First Department appeals court also noted that it found "petitioners' contention that the arbitrator exhibited either actual bias or the appearance of bias [to be] without merit."

Because Arbitrator Stephen Hochman made the same ruling on the Signature Bonus Issue in his 2013 New Award as he did in his 2010 Original Award, Grynberg went back to the lower court, this time before then-Supreme Court Justice Cynthia S. Kern with motions to vacate the 2013 New Award and remove Hochman as the arbitrator because he refused to follow the First Department's remand order to hold hearings on the bribery issue.

Grynberg's application included a motion that Hochman be replaced by a three-person AAA arbitration panel because the Settlement Agreements provided an AAA panel be substituted for Hochman if he is "unable or unwilling to serve." DC Case, Exhibits 2 and 3, §10.04 of both Settlement Agreements.

KERN ON THE SIGNATURE BONUS

On April 2, 2014, Justice Kern—who in June was appointed to the appellate bench by New York Gov. Andrew Cuomo—granted Grynberg's motions to vacate the 2013 New Award, remove Hochman as the decider of the Signature Bonus Issue and substitute a new three-person AAA arbitration panel to decide that issue. *Jack J. Grynberg, et al., v. BP Exploration Operating Co. Ltd. and Statoil, ASA*, N.Y. Sup. Ct. slip opinion 116840-04 (April 2, 2014); D.C. Case, Exhibit 8.

That April 2014 decision related only to the Signature Bonus Issue in the arbitration that was the subject of the 2010 Original Award (referred to below as the "First Arbitration"), which related to the audit that determined BP's net profits.

Because the audit by the independent auditor to determine Statoil's net profits had not been completed when the 2010 Original Award was issued, the parties had agreed that any claims or issues that may arise relating to the Statoil audit would be resolved in a separate arbitration (the "Statoil Arbitration").

Although the Statoil audit involved the same Signature Bonus Issue that the arbitrator decided in the First Arbitration, it also involved several other important issues relating to the computation of Statoil's net profits.

Justice Kern explained that her decision to remove Hochman in the First Arbitration was not based on bias but rather on her conclusion that he exceeded his powers. The Kern opinion stated that "the arbitrator exceeded a specifically enumerated limitation on his powers when he issued the New Award … [and] explicitly failed to follow the unambiguous directive of the First Department that he make a determination as to whether the signature bonus payment was a bribe."

Although noting that it is "within a court's discretion whether to remit an arbitration matter to the same or a different arbitrator," Justice Kern based her decision to remit the Signature Bonus Issue to the AAA panel on the fact that Hochman made it clear in his 2013 New Award that, if she remitted the matter to him, he would comply with his ethical obligation to avoid the unnecessary costs, expenses and delay that would ensue if he were to follow the First Department's direction to hold hearings on the bribery issue that he previously ruled was irrelevant.

ARBITRATOR REJECTS RECUSAL REQUEST

Soon after Justice Kern issued her April 2014 decision removing Hochman as the decider of the Signature Bonus Issue in the First Arbitration, Grynberg requested that Hochman recuse himself as the arbitrator in the Statoil Arbitration, although it was well under way and close to a decision. In an April 21, 2014 email response to that request, Hochman gave the following reasons for refusing:

> Although I have not finally ruled on any of the claims asserted in the Statoil Arbitration, I have devoted a substantial amount of time in considering the extensive briefs submitted by the parties and in drafting and sending the parties a tentative award on several of those claims. In your 9-page letter dated July 2, 2013, you summarized the voluminous exchanges of emails, letters and other documents and communications relating to the issues in the Statoil Arbitration, including some new issues that you had properly raised. That letter also pointed out that you had brought to my attention and convinced me that Statoil's $60,253 breach of contract claim was time barred under CPLR § 215, thus requiring Statoil to resort to an equitable estoppel argument in its attempt to collect its claim for arbitration fees against Claimants relating to the First Arbitration. It would be unfair to both parties if I were to shirk my responsibilities by requiring them to start over with a new panel of three arbitrators, especially after so much time and money has already been invested in this Statoil Arbitration. [D.C. Case, Exhibit 9, p. 1-2.]

THE ARBITRATOR FURTHER EXPLAINS . . .

Then, four days later on April 25, 2014, Arbitrator Hochman sent a six-page email memorandum to all parties that, in addition to supplementing the reasons he believed Justice Kern's April 2014 decision was wrong and that his 2013 New Award should be reinstated, explained why it would also be wrong for her to remove him in the Statoil Arbitration. D.C. Case, Exhibit 10.

After reminding the parties that he was not charging arbitration fees for the time he spent in researching and writing the "legal briefs" in his 2013 New Award and his subsequent emails to the parties, Hochman explained what he viewed as his ethical duties to the arbitration process:

'I believe my ethical duty to the arbitration process includes doing whatever I can to enhance the reputation of the New York courts for expertise in commercial matters and for making legally correct decisions on arbitration issues.'

I believe my ethical duty to the arbitration process includes doing whatever I can to enhance the reputation of the New York courts for expertise in commercial matters and for making legally correct decisions on arbitration issues. The email that I sent to all counsel on September 27, 2012 referring to the Solovay Article [*New York Law Journal*, supra] was motivated solely by my duty to the arbitration process and desire to increase the likelihood that the Court of Appeals will correct what I believe was the First Department's erroneous decision relating to the Sanctions Award.

My primary duty as an arbitrator is to correctly decide all claims presented to me, based on the applicable law (which includes the FAA to the extent applicable), and to do so as impartially and objectively as would an ideal judge who always made the right decision. As the Original Award made clear, I decided all of the 13 arbitration claims based solely on the applicable law even though the Arbitration Agreement incorporated the AAA's Rules that empowered me to grant remedies that exceeded the remedies that a court could grant. Because the Settlement Agreements did not provide for attorneys' fees to a prevailing party, I denied Respondents' motions for attorneys' fees (which aggregated approximately $14 million) even though I had the authority to award them pursuant to the AAA Rules.

Although I did not award Respondents $14 million in attorneys' fees, I awarded them a total of $3 million in sanctions against Grynberg individually, who represented himself in the arbitration pro se, because it approximated the attorneys' fees incurred by Respondents in defending against Grynberg's claims that I found were not made in good faith. The fact that my decision on the legal fee issue was helpful to Claimants is as irrelevant as the fact that my advising the parties of the Solovay Article might be helpful to Respondents. As Justice Solomon noted, "Hochman had the discretionary power to award costs and attorneys' fees (Award, 24). He affirmatively elected to not use that power. ..."

The holdings should be reviewed by New York's top court. They signal that New York courts are hostile to arbitration and unwilling to enforce arbitration agreements in accordance with their terms.

Notwithstanding the fact that the AAA Rules incorporated in the Arbitration Agreement gave me the power to grant any remedy or relief that I deemed just and equitable, even if it exceeded the power that the law gives to judges, I did not exercise that power because I believe that most parties who agree to arbitration, including the parties to this arbitration, do not want arbitrators to disregard the law and decide issues based on their own subjective notions of justice and equity rather than on the objective and thus predictable standards of the applicable law that courts are required to follow. When the parties agreed to name me as their sole arbitrator of any and all future disputes, they evidenced their intention to have me make a final and binding decision based on the applicable law—i.e., their intent was to choose arbitration **instead** of litigation, not arbitration **and** litigation.

To increase the likelihood that I will decide all legal issues correctly, my practice is, and has been in this arbitration, to let the parties know which way I am leaning on an issue in order to give the party that I am leaning against an opportunity to convince me that my tentative position is not correct. Thus, before issuing a final award, I send the parties a draft of my proposed award to give them an opportunity to suggest corrections or argue against my tentative decision on any issue. Not only does that minimize the risk that I may make an incorrect ruling, it also saves the parties time and expense by focusing them on the issues that I consider relevant to my goal to make a legally correct decision. Also, in the interest of complying with the intentions and needs of the parties for an efficient arbitral process as well as legally correct decisions, I refuse to permit evidentiary hearings on irrelevant issues or depositions to hear testimony that could more efficiently be heard at a hearing.

In support of his duty to keep the arbitral process efficient, Hochman also explained his reluctance to order depositions in arbitrations after Grynberg, representing himself pro se, made numerous requests to take the depositions of various witnesses. In an email response to one of Grynberg's requests, copied to all parties, Hochman stated that:

> depositions are not appropriate in arbitration except in unusual circumstances (e.g., where a witness may die before a hearing can be scheduled)..., [and] the proper forum to present evidence in arbitration is in an evidentiary hearing at which the arbitrator can keep the questioning focused on the relevant issues in an attempt to keep the arbitration process efficient. Depositions are not only duplicative of the evidence that can be obtained at a hearing, they can lead to costly discovery disputes and lengthy unfocused questioning (and sometimes even witness harassment) that is inconsistent with the goal that arbitration should be more efficient than litigation. [D.C. Case Exhibit 29.]

It is ironic that, but for Hochman's view of his ethical duties to the arbitration process, Grynberg could have been required to pay BP and Statoil a total of $14 million in legal fees instead of only $3 million in sanctions.

Thus, Hochman's decisions, which led to his removal as the arbitrator in that case, might well come under the heading of "No Good Deed Shall Go Unpunished."

STATOIL DECISION

After Hochman refused to recuse himself from the pending Statoil Arbitration, Grynberg moved to (1) reopen Justice Kern's April 2014 proceeding; (2) disqualify Hochman from any further Statoil Arbitration participation; (3) consolidate the Statoil Arbitration with the First Arbitration, and (4) discharge Hochman from participation as an arbitrator in any of the

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parties existing *or future* disputes.

On July 17, 2014, Justice Kern, in the trial court, granted Grynberg's motion to consolidate the pending Statoil Arbitration with the First Arbitration so that the same AAA arbitration panel that would decide the Signature Bonus Issue in that completed arbitration would also decide the same issue in the pending Statoil Arbitration.

Although the Signature Bonus Issue was only one of the many issues in the Statoil Arbitration, Justice Kern noted that it was the most significant dollar issue in that arbitration and that the Settlement Agreements did not contemplate "two separate arbitrations to be conducted before different arbitrators." Thus, there was no provision "which would allow Mr. Hochman to be the arbitrator on some issues but not on others." *Jack J. Grynberg, et al. v. BP Exploration Operating Co. Ltd. and Statoil, ASA*, N.Y. Sup. Ct. slip opinion 116840-04 (July 17, 2014); D.C. Case, Exhibit 11, p.7.

Despite the fact that Grynberg's motion was to remove Hochman as the arbitrator in all *future* as well as existing disputes, Kern granted this motion to discharge Hochman only from participation in the parties' *existing* disputes.

She refused to make any ruling "with respect to any future disputes between the parties which do not yet exist as such a ruling would constitute an advisory opinion which this court is not willing to render." Id.

KERN AFFIRMED

On April 16, 2015, the First Department unanimously affirmed Justice Kern's April 2014 and July 2014 decisions, because the arbitrator failed to follow the "clear directive" of the Court's 2012 order to determine whether the Signature Bonus payments were bribes.

Notwithstanding the fact that the Statoil Arbitration involved several significant issues in addition to the Signature Bonus Issue and was almost completed, the First Department confirmed Justice Kern's consolidation of the Statoil Arbitration with the First Arbitration. The appeals court noted that "Statoil did not meet its burden to show that consolidation would prejudice its substantial rights."

FIRST DEPARTMENT: WRONG AGAIN

Despite the fact that (1) arbitration is a creature of contract; (2) arbitrators have an ethical duty to the process of arbitration as well as to the parties, and (3) the Federal Arbitration Act preempts state arbitration law that permits an arbitrator's award to be vacated on a non-statutory ground other than manifest disregard of the law, the First Department's unanimous confirmation of Justice Kern's decisions on the Signature Bonus Issue assumed that the First Department had the power to do the following:

a) Override the parties' arbitration agreement by limiting the broad powers that the parties gave their chosen arbitrator, including the power to exclude evidence on a factual issue that he determined was irrelevant to the issue in dispute, by ordering him to hold hearings on that irrelevant issue that would have resulted in additional and unnecessary delay and costs to the parties;
b) Vacate the award of the arbitrator based on a non-statutory ground for vacatur that is available only where the dispute has no effect on interstate commerce (such as disputes under a collective bargaining agreement between a New York employer and a New York union); and
c) Remove the parties' chosen arbitrator because he followed the parties' order to decide the dispute in accordance with applicable law instead of following the First Department's order which was based on New York arbitration law, which is inconsistent with and hostile to the FAA's pro-arbitration policy.

BP & STATOIL'S MOVE FOR LEAVE TO APPEAL

On Sept. 1, 2015, the Court of Appeals dismissed—but did not deny—the motions of BP and Statoil for leave to appeal the First Department's unanimous 2015 decision because, under the New York Constitution, the Court of Appeals—the state's highest court—does not have jurisdiction to grant leave to appeal until *all* issues between the parties have been finally decided.

Although it had been finally decided that an AAA panel will be substituted for Hochman as the decider of all existing disputes, the Signature Bonus Issue—whether Grynberg is entitled to additional profit payments from BP and Statoil—will not be decided until the AAA panel decides that issue.

Irrespective of how the AAA panel decides the Signature Bonus Issue, once that issue is finally decided, then, and only then, will the Court of Appeals have jurisdiction to grant a motion by BP and/or Statoil for leave to appeal the First Department's decisions on both the Sanctions Issue and the Signature Bonus Issue, the only clearly existing issues between the parties.

But there are significant dollar amounts at stake in those two issues. As noted above, the arbitrator's award of sanctions against Grynberg in favor of BP and Statoil totaling $3 million was reversed. Also, $4,166,667 is at stake depending on the outcome of the Signature Bonus Issue (which is 15% of the $27,777,778 in Signature Bonus payments made by BP on behalf of itself and Statoil), two-thirds of which ($2,777,778) were treated as expenses of BP, and one-third of which ($1,388,889) as expenses of Statoil.

GRYNBERG'S D.C. FOLLY

In Grynberg's Dec. 29, 2015, motion to the U.S. District Court for the District of Columbia, he argued in his declaration that the D.C. court should decide the Signature Bonus Issue instead of an AAA panel.

Grynberg asserted that the court should decide the case since he is the key fact witness who can prove that the Signature Bonus payments were bribes and, because he was then 84 years old, he might not live long enough to prove his bribery claim in the AAA arbitration.

On Sept. 8, 2016, the D.C. court issued a 22-page decision dismissing Grynberg's motion to reopen that Court's 2008 decision that the Signature Bonus Issue should be decided by the arbitrator. Although Grynberg moved to appeal the D.C. District Court's decision to the D.C. Circuit Court of Appeals, that appeal was dismissed on Jan. 30, 2017, based on a stipulation of all parties.

* * *

When and how will this story end?

It is now more than two years after Gryn-

berg made his motion to the D.C. court. Still, it is not yet known when the proceedings before the AAA arbitration panel will begin or what the outcome will be, assuming it follows Justice Kern's unanimously confirmed order that the AAA panel should decide all existing issues—presently the Sanctions Issue and the Signature Bonus Issue.

We can only guess how long that arbitration will take. And it would not be surprising if the losing party on those significant dollar issues moves to vacate the AAA panel's award in favor of the winner, in which case it may be a long time before both of those issues are finally decided—a condition that must be met before the Court of Appeals will have jurisdiction to grant or deny leave to appeal the unanimous and erroneous 2012 and 2015 decisions of the First Department, Appellate Division.

There is also the possibility that the parties may decide to settle their existing disputes, either prior to or during the AAA arbitration proceeding—in which case the New York Court of Appeals will never get an opportunity to correct the First Department's errors.

Those holdings should be reviewed by New York's top court. They signal that New York courts are hostile to arbitration and unwilling to enforce arbitration agreements in accordance with their terms.

This may be a wakeup call to amend the New York State Constitution to give the Court of Appeals jurisdiction to grant leave to appeal a final decision on any issue that has been finally decided by the appellate court even if there remains issues that have not yet been finally decided.

It is ironic that if the First Department had, in its 2012 decision, unanimously confirmed—instead of having unanimously overturned Justice Solomon's 2010 decision confirming Hochman's decision on the Signature Bonus Issue in his 2010 Original Award that held the bribery issue was irrelevant—the Court of Appeals would have had jurisdiction to grant leave to appeal the First Department's erroneous 2012 unanimous decision confirming Justice Solomon's vacatur of Hochman's sanctions award. (See the author's *New York Law Journal* article cited in this article's second paragraph for a fuller explanation of why the First Department was wrong in 2012 when it unanimously upheld Justice Solomon's lower court vacatur of Hochman's sanctions award against Grynberg.)

Hopefully, Grynberg and all others having an interest in the outcome of this case will live long enough to see how this story ends.

AWARDS OF INTEREST IN INTERNATIONAL COMMERCIAL ARBITRATION: NEW YORK LAW AND PRACTICE

COMMITTEE ON INTERNATIONAL COMMERCIAL DISPUTES

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Interest on damages awarded by an arbitral tribunal can be a significant component of a prevailing party's total recovery in international commercial arbitration. Uncertainty exists, however, with respect to the criteria that international arbitrators should apply in determining pre-award and post-award interest. One question that arises in domestic and international arbitrations governed by New York substantive law and seated in New York is whether the prejudgment interest provisions contained in Sections 5001, 5002 and 5004 of the New York Civil Practice Law and Rules ("N.Y.C.P.L.R." or "C.P.L.R.") apply to the determination of pre-award or post-award interest. The answer to the question whether arbitrators are obligated to (or should) apply New York's nine percent statutory prejudgment interest rate can have a substantial economic impact on the parties in an arbitration.

Part I of this report sets forth an executive summary.

Part II provides a discussion of the standards applicable to interest determinations in international commercial arbitrations, with a focus on arbitrations that are both governed by New York substantive law and seated in New York.[1]

Appendix A sets forth summaries of pre-award and post-award interest determinations of arbitral tribunals in approximately 45 international commercial arbitrations governed by New York substantive law.

Appendix B sets forth summaries of New York federal and state court decisions reviewing arbitral awards of interest in post-award proceedings brought under Chapter 1 of the Federal Arbitration Act, 9 U.S.C. §§ 1–16; the United Nations Convention on the Recognition

[1] This report proposes a step-by-step approach that international arbitrators may apply to the determination of interest in international commercial arbitrations generally, and not merely in international commercial arbitrations governed by New York substantive law and seated in New York. This report does not address, however, the choice of law issues that may arise when the arbitral law of the seat of arbitration may conflict on the question of interest with the substantive law governing the dispute because no such conflict exists between New York arbitral law and New York substantive law. The report addresses the law of the seat of arbitration principally as a factor that arbitrators may wish to consider as one indication of party intent.

and Enforcement of Foreign Arbitral Awards, enacted as Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201–208 (the "New York Convention"); or New York State's arbitration statute, C.P.L.R. Article 75.

I. Executive Summary

International arbitrators have discretion to apply or not to apply New York's statutory prejudgment interest provisions to the determination of pre-award and post-award interest in an international commercial arbitration governed by New York substantive law and seated in New York, in the Committee's view, for several reasons. First, the text of C.P.L.R. Sections 5001 and 5002 contains numerous terms (including references to "the court's discretion," "the cause of action," "the jury," and "the clerk of the court") indicating that these sections are intended to apply only to court proceedings, not arbitration. Second, the legislative history of C.P.L.R. Section 5004, which sets the prejudgment interest rate applicable under Sections 5001 and 5002, indicates that the New York State Legislature (the "NY Legislature") adopted a fixed rate of nine percent in part in consideration of factors that are not directly related to the compensatory purpose of an award of interest and that arbitrators may or may not deem relevant to the award of interest in international arbitration. In particular, the NY Legislature's adoption of a fixed rate in 1972 reflected its desire to simplify the calculation of interest by the courts; in 1981, after market rates of interest had risen into the high teens, the NY Legislature increased the fixed rate from six to nine percent in part to discourage defendants from using delay tactics in court proceedings. Third, although New York's highest court has not had occasion to address squarely the applicability, or not, of New York's prejudgment interest provisions to international or domestic arbitration, the State's Appellate Divisions have held that these provisions do not necessarily

apply to arbitrations and that an arbitral tribunal's decision on this question is not subject to review by the courts.[2]

New York courts acknowledge that, in the absence of express party agreement on the interest rate to be applied, arbitrators have discretion to determine interest based on a broad range of considerations. It may be appropriate for an arbitral tribunal to determine pre-award and post-award interest in accordance with New York's prejudgment interest provisions if, by way of example only: evidence exists that the parties intended for the statutory prejudgment interest rate to apply, or no case is made in favor of applying a different rate, or the choice of interest rate would not have a significant economic impact one way or another. Arbitrators also have discretion to take into consideration that, as already noted, the NY Legislature adopted a fixed rate in part for the administrative convenience of the courts. Moreover, arbitrators may choose to consider to what extent New York's nine percent rate differs from market rates prevailing during the pre-award period and/or economic factors specific to the parties such as their cost of funds. However arbitrators may choose to exercise their discretion to determine interest, in order to facilitate international enforcement the Committee recommends that the tribunal set forth clearly in its award the basis for its interest determination.

In the Committee's view, thoughtful consideration of two guiding principles common to New York law and to international arbitration – the freedom of contracting parties to agree on the terms of their relationship, and the compensatory purpose of interest – should guide arbitrators in prioritizing the many factors that they may consider in awarding interest in a particular case. Generally, the more clearly a factor reflects the intent of the parties, the higher the priority an arbitral tribunal should give to that factor. A focus on party intent generally leads

[2] *See, e.g., Penco Fabrics, Inc. v. Bogopulsky, Inc.*, 146 N.Y.S.2d 514, 515 (1st Dep't 1955); *Dermigny v. Harper*, 6 N.Y.S.3d 561, 562 (2d Dep't 2015); *Rothermel v. Fidelity & Guarantee Ins. Underwriters, Inc.*, 721 N.Y.S.2d 565, 566 (3d Dep't 2001).

to an examination of key factors in the following order: (a) contractual stipulations on interest rates to be applied to one or more aspects of the contract; (b) guidance that may be found in the arbitration rules chosen by the parties regarding the award of interest; (c) the substantive law governing the merits of the case; and (d) the arbitration law of the seat of the arbitration. An arbitral tribunal should consider these indicators of party intent in light of the underlying compensatory purpose of interest awards subject to narrow exceptions based on public policy.

An arbitral tribunal engaged in the reasonable exercise of its discretion may seek guidance in appellate court decisions that set forth guidelines for trial courts to follow in exercising their discretion to award prejudgment interest in federal question and admiralty cases. For example, the guidelines set forth by the federal Court of Appeals for the Seventh Circuit call upon the district courts to award prejudgment interest at the market rate, which may be either (a) the actual rate that the losing party must pay to borrow money or (b) the U.S. prime rate, which is a market-based estimate.[3] Counsel may wish to alert arbitrators to this case law and/or to the various approaches that economists employ in calculating the amount of prejudgment (or pre-award) interest necessary to compensate the prevailing party for the loss of use of its money.

Summaries of arbitral awards set forth in Appendix A to this report suggest that uncertainty exists with respect to the criteria that international arbitrators should apply in determining pre-award and post-award interest. International arbitrators generally give effect to contractual stipulations on interest; however, arbitral practice varies with respect to the determination of interest in the absence of such stipulations. Arbitrators in a significant minority of the surveyed awards expressly determined that New York's nine percent prejudgment interest

[3] *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331-35 (7th Cir. 1992).

provisions do not apply to the determination of interest in international arbitration.[4] A majority of the awards surveyed awarded interest, typically with little or no analysis, in accordance with New York's prejudgment interest provisions.[5] The Committee hopes that this report will serve to enhance consistency and predictability in the analysis underpinning the award of interest in international arbitrations governed by New York substantive law.

II. Standards Governing the Award of Interest by International Arbitrators

Generally, interest on amounts awarded in arbitration may accrue during three periods: (a) the period from the date the prevailing party's claim arose to the date of the award (pre-award interest); (b) the period from the date of the award to the date of entry of judgment enforcing the award (post-award, prejudgment interest); and (c) the period from the date of entry of judgment to the date of payment (post-judgment interest).

The confidentiality of the arbitral process presents an obstacle to the collection of reliable statistics. The summaries of awards set forth in Appendix A indicate, however, that commercial arbitrators grant pre-award interest to the prevailing party as a matter of course and sometimes grant post-award, prejudgment interest.

A. Pre-Award Interest

Recent commentaries on the award of interest in international arbitration illustrate the complexity of the subject and prompt this Committee to propose that, in international commercial arbitration governed by New York substantive law, arbitrators apply a step-by-step approach to their determination of pre-award interest.[6]

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4 *See* Appendix A, rows 1 to 8.

5 *See id.*, rows 17 to 42.

6 *See, e.g.*, GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3105 (2014) ("The interplay between differing national laws dealing with interest, as well as national characterizations of interest rules and national choice-of-law rules, can be metaphysical in their theoretical complexity."); Thierry J. Senechal & John Y. Gotanda, *Interest as Damages*, 47 COLUMBIA J. TRANSNAT'L L. 491 (2009); Andrea Giardina, *Issues of Applicable*

The standards that govern the pre-award interest determination in any given arbitration will depend on factors including (a) the terms of the parties' contract, (b) the applicable arbitration rules, (c) the law governing the merits, and/or (d) the applicable arbitration law. The Committee proposes that arbitrators prioritize these factors according to how clearly and directly each factor reflects the intent of the parties as to the principles that should govern in the event of an arbitrated dispute between them. The recommended order of priority acknowledges and gives effect to (a) the contracting parties' broad autonomy, under the law of international commercial arbitration applicable in New York, to agree on the law and procedures that apply to their dispute, and (b) the emphasis in the New York law of contract interpretation on construing agreements in accordance with the parties' intent as expressed in the language of their agreement.[7]

Each step in the Committee's suggested methodology is explained *seriatim* below. The last subsection (subsection II.A.5) provides general guidelines that arbitrators may decide to follow in exercising the discretion that they will often possess with respect to the determination of pre-award interest in arbitrations governed by New York substantive law.

Law and Uniform Law on Interest: Basic Distinctions in National and International Practice, in INTEREST, AUXILIARY AND ALTERNATIVE REMEDIES IN INTERNATIONAL ARBITRATION 129 (Filip de Ly & Laurent Lévy eds., 2008); Matthew Secomb, *A Uniform, Three-step Approach to Interest Rates in International Arbitration*, in INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION 431 (Stefan M. Kröll et al. eds., 2011). *See also* J. Martin Hunter & Volker Triebel, *Awarding Interest in International Arbitration: Some Observations Based on a Comparative Study of the Laws of England and Germany*, 6(1) J. INT'L ARB. 7 (1989); David J. Branson & Richard E. Wallace, *Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach*, 28 VA. J. INT'L L. 919 (1988); J. Gillis Wetter, *Interest as an element of damages in the arbitral process*, 5 INT'L FIN. L. REV. 20 (1986).

[7] *See, e.g.*, BORN, *supra* note 6 at 102 (noting the New York Convention's "emphatic recognition of the predominant role of party autonomy in the arbitral process"); *Sec. Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 325 (2d Cir. 2004) (Federal Arbitration Act "requires arbitration proceed *in the manner provided for in the parties' agreement*") (internal quotation marks, alteration and citation omitted; emphasis in original); *Greenfield v. Phillies Records, Inc.*, 98 N.Y.2d 562, 569 (2002) ("The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent.") (citation omitted); *Slatt v. Slatt*, 64 N.Y.2d 966, 967 (1985) ("In adjudicating the rights of parties to a contract, courts . . . are required to discern the intent of the parties[.]").

1. Contractual Stipulations on Interest

The first step in the Committee's suggested methodology is for arbitrators to determine whether the parties' contract establishes how interest is to be assessed in the arbitration. Subject to limited exceptions discussed below, contractual stipulations governing the assessment of interest on the damages awarded by a court or tribunal are valid and enforceable under the laws of most jurisdictions (including New York).[8]

Contracts occasionally include a clause that specifically sets the rate of interest on damages or on a particular category of damages.[9] If the contract contains such a clause, and if the clause applies to the damages awarded, it is appropriate for arbitrators to determine pre-award interest in accordance with it, subject to the considerations discussed below. More often, the parties' contract will contain a "late payment" clause or other similar type of clause stipulating how interest is to be assessed on amounts past due under the contract.[10] Such a clause typically addresses such matters as when interest begins to accrue on an amount due, the rate at which it accrues, whether the interest is simple or compound, and, if it is compound, the compounding period.

In the Committee's view, generally it is appropriate for arbitrators to apply a late payment or other similar clause if the losing party's breach consists of a failure to make or delay

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[8] *See, e.g., NML Capital v. Republic of Argentina*, 17 N.Y.3d 250, 258 (2011) (*NML I*) ("When a claim is predicated on a breach of contract, the applicable rate of prejudgment interest varies depending on the nature and terms of the contract."); 10 JACK B. WEINSTEIN, HAROLD L. KORN & ARTHUR R. MILLER, NEW YORK CIVIL PRACTICE ¶ 5004.01a, at 50-79 (2016) ("The parties may establish, by contract, the rate of interest to be paid until entry of judgment[.]"); English Arbitration Act 1996, § 49(1) ("The parties are free to agree on the powers of the tribunal as regards the award of interest.").

[9] Following is an example of a clause addressing the assessment of interest on a particular category of damages: "[Any amount of unpaid Seller Damages] that is ultimately determined to have been due on any Damages Due Date shall bear interest at the Default Rate . . . from such Damages Due Date until the date of payment."

[10] Following is an example of a late payment clause: "Unless otherwise specified, all sums due under the Contract shall be paid within forty five (45) days from the date on which the obligation to pay was incurred. All sums due by one Party to the other under the Contract shall, for each day such sums are overdue, bear interest compounded daily at the applicable LIBOR plus two (2) percentage points."

in making a required payment under the contract. Arbitrators should exercise caution, however, in deciding whether to grant pre-award interest in accordance with a late payment clause on damages awarded for breaches of contract not involving non-payment or late payment.[11] If an arbitral tribunal decides that an interest rate in a late payment clause is not relevant to the determination of pre-award interest on damages awarded for other kinds of breaches, the arbitrators should proceed to the next step in the methodology suggested herein.

In certain limited circumstances, arbitrators may decline to award interest in accordance with a contractual stipulation. For example, if a contractual stipulation on interest is invalid under the usury law of the jurisdiction whose law governs the parties' contract, arbitrators should decline to enforce the stipulation and consider other methods of calculating interest.[12] Usury laws may be subject, however, to exceptions rendering them inapplicable to pre-award and post-award interest. For example, New York's civil usury law, which prohibits charging more than sixteen percent interest per year, does not preclude applying a contractually stipulated rate to pre-award and post-award interest in a commercial dispute because the usury law does not apply to interest on defaulted obligations.[13]

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[11] *See, e.g., Allenby, LLC v. Credit Suisse AG*, 25 N.Y.S.3d 1, 6 (1st Dep't 2015) (contractual stipulation on interest applied only to delayed settlement, not damages awarded by court for breach of contract); *Ross v. Ross Metals Corp.*, 976 N.Y.S.2d 485, 487-88 (2d Dep't 2013) (contractual stipulation on interest was basis for calculating monthly payments due under contract, but did not apply to damages awarded by court for defendant's breach of its obligation to make such payments); *NML I*, 17 N.Y.3d at 261-62 (clause in bond documents providing that interest would accrue at specified rate "until the principal is paid" applied to damages awarded by court for Argentina's breach of its obligation to make bi-annual interest payments to bondholders). In drafting a late payment or other similar clause, contract drafters may wish to make clear whether the clause is intended to apply to the determination of interest on the damages awarded for a contractual breach not consisting of a failure to make a required payment or of a delay in making a required payment.

[12] The validity of a contractual stipulation on interest is generally determined by the law governing the parties' contract. *See* Restatement (Second) Conflict of Laws § 207 cmt. e (1971) ("[The law governing the parties' contract] determines the validity of an express contractual provision for the payment of a stipulated rate of interest."); DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS (15th ed.) § 7-089 ("[W]hether an express undertaking to pay interest is lawful or whether it is made invalid wholly or partly by legislation referring to usury or money-lending depends on whether that legislation forms part of the law applicable to the contract.").

[13] *See, e.g., Bloom v. Trepmal Constr. Corp.*, 289 N.Y.S.2d 447, 448 (2d Dep't 1968), *aff'd*, 23 N.Y.2d 730 (1968) (provision in note fixing interest due after default at rate in excess of statutory maximum was valid and

In addition, the public policy of some countries may prohibit the charging of any interest or the charging of interest at a high rate.[14] If an arbitration is seated in such a country, or if enforcement is likely to be sought in such a country, the tribunal may decline to give effect to an otherwise valid contractual stipulation on interest in order to minimize the risk that its award will be vacated (annulled) by a court of the seat or denied enforcement in other courts on public policy grounds.[15] Alternatively, arbitrators may issue a partial award granting the principal amount of damages and a separate partial award granting interest as a possible device to insulate the former award from vacatur at the seat or a refusal to enforce on public policy grounds.[16]

2. Arbitration Rules

The second step in the Committee's suggested methodology, to be followed if the parties' contract does not contain a provision governing the assessment of interest on damages awarded,

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enforceable); *Manfra, Tordella & Brookes, Inc. v. Bunge*, 794 F.2d 61, 63 n.3 (2d Cir. 1986) ("the [New York] usury laws do not apply to defaulted obligations"). New York's civil usury law also does not apply if the principal amount involved is greater than $250,000, and it cannot be interposed as a defense by corporations or other business entities. *See* N.Y. Gen. Oblig. Law §§ 5-501(1), (2), (6)(a), 5-521 (McKinney 2016); N.Y. Banking Law § 14a-(1) (McKinney 2016). New York's criminal usury law (which prohibits charging more than 25% interest per year) does not apply to defaulted obligations or if the principal amount involved is greater than $2.5 million. *See* N.Y. Penal Law §§ 190.40, 190.42; N.Y. Gen. Oblig. Law § 5-501(6)(b); *Bristol Inv. Fund, Inc. v. Carnegie Int'l Corp.*, 310 F. Supp. 2d 556, 563-64 (S.D.N.Y. 2003).

[14] For example, the public policy of some countries prohibits the charging of any interest on the ground that it violates Islamic law. *See* ABDUL HAMID EL-AHDAB & JALAL EL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES 632 (2011) ("contracts relating to interest . . . are considered to be against [Saudi Arabian] public policy"). New York's public policy against usury is coterminous with its usury laws. Accordingly, the charging of interest at a high rate does not violate New York public policy unless it runs afoul of New York's usury laws. *See NML Capital v. Republic of Argentina*, 621 F.3d 230, 238-39 (2d Cir. 2010) (*NML II*) (enforcement of 101% annual interest rate on notes issued by Argentina in principal amount of $102 million did not violate New York public policy because New York's civil and criminal usury laws do not apply where the principal amount involved exceeds $250,000 and $2.5 million, respectively).

[15] Article 50(2) of Saudi Arabia's Arbitration Law (promulgated on April 16, 2012) provides that "[t]he competent court shall, on its own initiative, annul an arbitral award if it includes anything contrary to the rules of Islamic law and the laws of the Kingdom." *See also, e.g.*, UNCITRAL Model Law on International Commercial Arbitration, Art. 34(2)(b)(ii) (court at seat of arbitration may set aside award if it finds that "the award is in conflict with the public policy of [the seat]"); New York Convention, Art. V(1)(e) (court in country where recognition and enforcement is sought may refuse recognition and enforcement if award "has been set aside . . . by a competent authority of the country in which . . . that award was made").

[16] Article V(2)(b) of the New York Convention provides that a court may refuse to recognize or enforce a foreign award if "recognition or enforcement of the award would be contrary to the public policy of [the] country [where recognition and enforcement is sought]."

is for arbitrators to look to the arbitration rules chosen by the parties for any provisions regarding the award of interest. The rules of several leading international arbitral institutions grant arbitrators discretion to award such interest as they consider appropriate.[17] For example, Article 31(4) of the International Arbitration Rules (the "Rules") of the American Arbitration Association's International Centre for Dispute Resolution (the "ICDR") ("ICDR Article 31(4)") provides as follows: "[T]he tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law(s)." By contrast, the UNCITRAL Arbitration Rules and the rules of several other leading institutions, including the ICC, Hong Kong International Arbitration Centre (the "HKIAC") and Swiss Chambers, are silent with respect to the award of interest.

In view of the frequent use of the ICDR Rules in international commercial arbitrations governed by New York substantive law, the requirement under ICDR Article 31(4) that the tribunal "tak[e] into consideration the contract and applicable law(s)" in exercising its discretion to award interest raises three noteworthy issues.[18] First, arbitrators might well ponder the meaning of "taking into consideration the [parties'] contract." In the Committee's view, if the contract contains a clause that specifically addresses the assessment of interest on the amounts

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[17] *See* ICDR International Arbitration Rules, Art. 31(4) (quoted in text); LCIA Arbitration Rules, Art. 26.4 ("Unless the parties have agreed otherwise, the Arbitral Tribunal may order that simple or compound interest shall be paid by any party on any sum awarded at such rates as the Arbitral Tribunal decides to be appropriate (without being bound by rates of interest practised by any state court or other legal authority) in respect of any period which the Arbitral Tribunal decides to be appropriate ending not later than the date upon which the award is complied with."); SIAC Arbitration Rules, Rule 32.9 ("The Tribunal may award simple or compound interest on any sum which is the subject of the arbitration at such rates as the parties may have agreed or, in the absence of such agreement, as the Tribunal determines to be appropriate, in respect of any period which the Tribunal determines to be appropriate."); WIPO Arbitration Rules, Art. 62(b) ("The Tribunal may award simple or compound interest to be paid by a party on any sum awarded against that party. It shall be free to determine the interest at such rates as it considers to be appropriate, without being bound by legal rates of interest, and shall be free to determine the period for which the interest shall be paid."); JAMS International Arbitration Rules, Art. 35.7 (same as Article 31(4) of ICDR Rules); DIFC-LCIA Arbitration Rules, Art. 26.4 (same as Article 26.4 of LCIA Rules).

[18] This language is repeated in the September 2016 revisions to the JAMS International Arbitration Rules. *See* JAMS International Arbitration Rules, Art. 35.7.

awarded, respect for party autonomy typically would suggest that arbitrators determine interest in accordance with that clause rather than exercise their discretion under ICDR Article 31(4), at least in part because "specific terms [of a contract] . . . are given greater weight than general language."[19] The reference to "taking into consideration" the parties' contract in ICDR Article 31(4) appears to acknowledge that an arbitral tribunal has discretion to consider whether to determine interest in accordance with a contractual stipulation on interest, such as a late payment clause, that does not strictly apply, by its terms, to damages awarded for reasons other than late payment.[20]

Second, arbitrators may wish to consider what laws are included within the term "applicable law(s)" in ICDR Article 31(4). In the Committee's view, the term includes the substantive law(s) governing the parties' contract.[21] The Committee considers that the term "applicable laws(s)" may be understood also to include the arbitration law of the arbitral seat when it addresses an arbitral tribunal's remedial powers.[22] In addition, arbitrators exercising discretion under ICDR Article 31(4) may take into consideration the public policies of the arbitral seat and of any jurisdiction where the award is likely to be enforced, even though such

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[19] RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (1981). *See generally County of Suffolk v. Long Island Lighting Co.*, 266 F.3d 131, 139 (2d Cir. 2001) ("It is axiomatic that courts construing contracts must give specific terms and exact terms greater weight than general language.") (internal quotation marks, ellipsis and citations omitted).

[20] *See, e.g.*, ICC Award No. 7622, ICC International Court of Arbitration Bulletin 15(1) (2004), at 79 (applying contract rate even though it did not apply to damages awarded); ICC Award No. 6219, ICC International Court of Arbitration Bulletin 3(1) (1992), at 22 (same). *See also* Secomb, *supra* note 6, at 432.

[21] Paragraph (1) of Article 31 provides in pertinent part that "[t]he arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute." Prior to the 2014 revisions to the ICDR Rules, the predecessor article to ICDR Article 31(4) required that the tribunal take into consideration the contract and "applicable law" (singular). *See* ICDR International Arbitration Rules (as amended and effective June 1, 2009), Art. 28(4). No commentary on the 2014 revisions to the Rules addresses the change from the singular to the optional plural in the interest provision.

[22] *See* subsection II.A.4 below.

public policies might not be viewed as falling within the ordinary meaning of "applicable law(s)."

Third, when "taking into consideration the . . . applicable law(s)" in accordance with ICDR Article 31(4), arbitrators may wish to consider what effect they should give to the law governing the parties' contract.[23] As discussed in subsection II.A.3 below, many jurisdictions have enacted statutory provisions specifying how interest shall be assessed on the damages component of court judgments. Arbitrators exercising their discretion under ICDR Article 31(4) may deliberate on the meaning of "taking into consideration" such statutory provisions. The question takes on practical significance when the statutory provisions call for the application to court judgments of a rate of interest that materially overcompensates or undercompensates the prevailing party in light of prevailing market rates of interest or the prevailing party's actual cost of funds.[24]

In the Committee's view, ICDR Article 31(4) allows an arbitral tribunal, in the exercise of its discretion, to determine pre-award and post-award interest wholly or partially in accordance with the statutory prejudgment interest provisions applicable to court judgments

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[23] The same question could be asked with respect to the arbitration law of the seat. As discussed in subsection II.A.4 below, however, all of the arbitration laws surveyed that address the awarding of interest either (a) grant the tribunal discretion to award such interest as it considers appropriate or (b) provide that the tribunal may award interest, without addressing the standard that the tribunal should apply in making such an award. Accordingly, no conflict generally will arise between the standard for awarding interest under Article 31(4) of the ICDR Rules and the standard for awarding interest under the arbitration law of the seat.

[24] New York's statutory prejudgment interest rate of nine percent, enacted by the NY Legislature when market rates were even higher, exceeds market rates of interest generally prevailing in the United States at the time of this report. By contrast, the statutory interest rates of some other jurisdictions may be set below commercially available rates. For example, the French Civil Code allows for the award of simple interest at the "legal rate," which is fixed by the French Minister of Economy every six months based on the European Central Bank's benchmark rate and commercial lending rates in France. *See* CODE CIVIL [C. CIV.] art. 1231-7 (Fr.); Decree No. 2014-947 of August 20, 2014 Relating to the Legal Rate of Interest (amending Article L. 313-2 of the Monetary and Financial Code). As of June 2017, the French legal rate was only 0.90% per year. Some jurisdictions have adopted a statutory prejudgment interest rate that continuously floats by reference to a benchmark rate. For example, the Delaware Code provides for a "legal rate" of five percent over the Federal Reserve discount rate. See DEL. CODE ANN. tit. 6, § 2301(a). The Delaware courts generally award prejudgment interest at the legal rate defined by Section 2301(a). *See, e.g.*, *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 226 (Del. 2005) ("the legal rate [defined by Section 2301(a)] has historically been considered as the 'benchmark' for prejudgment interest").

under the law governing the parties' contract. For example, if interest only begins to accrue under that law from the date of a formal demand for payment, arbitrators would have discretion to award interest from that date; at the same time, they could determine the interest rate based on commercial considerations and without regard for any statutory prejudgment interest rate under the applicable law.

An arbitral tribunal would also have discretion, in the Committee's view, to award interest under ICDR Article 31(4) based exclusively on commercial considerations and without any regard for statutory interest provisions applicable to court judgments under the law governing the parties' contract.[25] In the Committee's view, an award of interest based exclusively on commercial considerations would be in accord with party expectations that reasonably arise (subject to specific evidence to the contrary) from ICDR Article 31(4)'s grant of discretion to the tribunal to award such interest "as it considers appropriate."

3. Law Governing the Merits

Courts have held that the purpose of pre-award interest is to compensate the prevailing party for the loss of use of money that the prevailing party was entitled to receive from the date its claim arose until the date of the award.[26] Because pre-award interest is an element of

[25] Subsection II.A.5 below sets forth general guidelines that a tribunal may choose to follow in determining an appropriate interest rate, whether interest is simple or compound, and, if compound, the compounding period.

[26] *See, e.g.*, *NML I*, 17 N.Y.3d at 266 ("[T]he function of prejudgment interest is to compensate the creditor for the loss of use of money the creditor was owed during a particular period of time.") (internal citations omitted); *Kassis v. Teachers' Ins. & Annuity Ass'n*, 786 N.Y.S.2d 473, 474 (1st Dep't 2004) ("The purpose of prejudgment interest is to compensate parties for the loss of the use of money they were entitled to receive, taking into account the time value of money.") (internal quotation marks and citation omitted).

complete compensation for the claim,[27] the Committee's view is that it should generally be determined in accordance with the same law that governs liability and damages.[28]

This choice-of-law approach accords with New York's choice-of-law rules.[29] It also accords with Comment (e) to Section 207 of the Restatement (Second) of Conflict of Laws, which provides that the law governing the parties' contract "determines whether plaintiff can

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[27] *See, e.g., West Virginia v. United States*, 479 U.S. 305, 310 (1987) ("Prejudgment interest is an element of complete compensation."). In the international context, *see* 2010 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS ("UNIDROIT PRINCIPLES") Art. 7.4.2(1) ("The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance.").

[28] Most international arbitration rules grant arbitrators discretion to apply the law or rules of law they determine to be appropriate, in the absence of party agreement as to the applicable law. *See, e.g.*, ICDR Arbitration Rules, Art. 31(1) ("Failing such an agreement by the parties [on the substantive law(s) or rules of law applicable to the dispute], the tribunal shall apply such law(s) or rules of law as it determines to be appropriate."); ICC Arbitration Rules, Art. 21(1) ("In the absence of any such agreement [on the rules of law applicable to the merits of the dispute], the arbitral tribunal shall apply the rules of law which it determines to be appropriate."). International arbitrators reasonably may conclude that a generic choice-of-law clause specifying the law governing the parties' contract does not encompass an agreement that that law shall govern the determination of pre-award interest, given that interest is generally considered as incidental to the damages awarded on the main claim. *Cf. Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58-64 (1995) (interpreting generic choice-of-law clause referring to "the laws of the State of New York" as encompassing New York's substantive rights and obligations, but not its prohibition on the award of punitive damages by arbitrators). Nonetheless, as explained in this subsection, it would generally be appropriate for international arbitrators to determine pre-award interest in accordance with the law governing the parties' contract, because interest is an element of complete compensation for the main claim.

Gary Born distinguishes, for choice-of-law purposes, between an arbitral tribunal's authority to award interest and the standards governing the exercise of that authority. BORN, *supra* note 6 at 3103-06. According to Professor Born, "the better view appears to be that, absent contrary agreement, questions concerning the arbitrators' authority to award interest are better regarded as subject to the law of the arbitral seat" because "[i]t is that law which is generally regarded as having the closest connection to questions concerning the tribunal's powers." *Id.* at 3104. As discussed in subsection II.A.4.a below, both federal and New York arbitral law grant arbitrators broad remedial powers that include the power to award interest, absent party agreement to the contrary. Professor Born further suggests that international arbitrators should "apply the law of the currency in which any award is made to determine the substantive standards, including the applicable interest rates, for any award of interest," although he recognizes that "arbitrators have in practice generally looked to the substantive law governing the parties' underlying claims for standards regarding interest." *Id.* at 3105-06.

[29] *See, e.g., Schwimmer v. Allstate Ins. Co.*, 176 F.3d 648, 650 (2d Cir. 1999) ("Under New York choice of law rules, the law of the jurisdiction that determines liability governs the award of pre-judgment interest."); *Davenport v. Webb*, 11 N.Y.2d 392, 394-95 (1962) (prejudgment interest is substantive issue controlled by law governing merits); *Sirie v. Godfrey*, 196 A.D. 529, 539 (1st Dep't 1921) (entitlement to prejudgment interest was governed by French law, which was law governing parties' contract). The choice-of-law rules of some other jurisdictions may treat prejudgment interest as a procedural matter governed by the law of the forum. *See* BORN, *supra* note 6, at 3105.

recover interest, and, if so, the rate, upon damages awarded him for the period between the breach of contract and the rendition of judgment."[30]

a. New York Substantive Law Relating to the Award of Interest by International Arbitrators

If New York substantive law governs the merits of the parties' dispute, international arbitrators should consider what standards, if any, that law imposes on the award of interest in international arbitration. One question that frequently arises in practice is whether New York's prejudgment interest provisions contained in C.P.L.R. Sections 5001, 5002 and 5004 apply to the determination of interest in arbitration. For the reasons set forth in this subsection, it is the Committee's view that international arbitrators (a) are not bound to apply these provisions and (b) have discretion under New York's substantive common law to award such interest as they consider appropriate.

i. Inapplicability of New York's Prejudgment Interest Provisions to International Arbitration

C.P.L.R. Sections 5001, 5002 and 5004 provide for mandatory prejudgment interest, at an annual rate of nine percent and on a simple-interest basis, upon any sum awarded by a New York State court for breach of contract.[31] Although these provisions are found in the Civil Practice Law and Rules, state and federal courts have found them to be substantive for choice-of-law and *Erie* purposes.[32] Whether these statutory prejudgment interest provisions apply in arbitration

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[30] RESTATEMENT (SECOND) CONFLICT OF LAWS § 207 cmt. e (1971). *See also id.* § 171 cmt. c (law governing tort liability and damages "determines whether the plaintiff can recover interest and, if so, at what rate for a period prior to the rendition of judgment as part of the damages for a tort").

[31] N.Y.C.P.L.R. §§ 5001(a), 5002, 5004 (McKinney 2016); *Long Playing Sessions, Inc. v. Deluxe Labs., Inc.*, 514 N.Y.S.2d 737, 738 (1st Dep't 1987) (court may award only simple interest under C.P.L.R. §§ 5001 and 5004).

[32] *See, e.g.*, *Davenport*, 11 N.Y.2d at 394-95 (prejudgment interest is substantive issue controlled by law governing merits); *Paine Webber Jackson & Curtis, Inc. v. Winters*, 579 A.2d 545, 551-53 (Conn. App. Ct. 1990) (N.Y.C.P.L.R. § 5001 is rule of substantive law to be applied by Connecticut courts if New York law governs merits); *Schwimmer*, 176 F.3d at 650 (prejudgment interest is substantive issue for *Erie* purposes). *See also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 207 cmt. e (1971); *id.* § 171 cmt. c. Under the *Erie* doctrine, a U.S. federal court hearing a claim brought under state law must apply state rules that the court considers "substantive"

does not turn, however, on whether they are characterized as substantive or procedural for purposes of determining their applicability in state or federal court.[33] Rather, the Committee considers the key question to be whether the provisions are directed to the determination of interest not only by a court, but also by arbitrators. As shown by the summaries of awards in Appendix A of this report, arbitrators have not always considered this question or answered it in a consistent manner.

In the Committee's view, based upon the statutory language and New York case law, New York's statutory prejudgment interest provisions are binding only in court proceedings and not in arbitration. Several sections of the C.P.L.R. support this conclusion. First, C.P.L.R. Section 101 provides that the Civil Practice Law and Rules "shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges."[34] The inclusion of New York's prejudgment interest provisions in a statute that governs civil proceedings in the courts of the state and before "all judges" indicates that the NY Legislature intended for the interest provisions to be applicable in court proceedings, not in arbitration. The C.P.L.R. does address certain limited aspects of arbitration in its Article 75, generally considered to be the first

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under federal law, while applying federal rules that it considers "procedural" under federal law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). It is beyond the scope of this report to address whether courts outside the United States apply New York's prejudgment interest provisions if New York substantive law governs the merits of the parties' dispute.

[33] One reason courts have characterized statutory prejudgment interest provisions as substantive for choice-of-law and *Erie* purposes is to discourage forum shopping by plaintiffs, who otherwise might choose to sue in a particular court to take advantage of that forum's statutory prejudgment interest rate. *See, e.g.*, *Jarvis v. Johnson*, 668 F.2d 740, 745 (3d Cir. 1982) ("[I]f [Pennsylvania's prejudgment interest statute] is not applied in the federal courts, an incentive for forum shopping in diversity actions may well result. We can readily foresee that many plaintiffs would sue in Pennsylvania state court to take advantage of [Pennsylvania's prejudgment interest statute] and thus to recover considerable additional damages."). This anti-forum-shopping rationale does not support the application of statutory prejudgment interest provisions in arbitration, however, because the parties to an arbitration agreement cannot shop for a forum after the agreement to arbitrate has been signed. And unlike the rules that govern court jurisdiction, the parties' choice of a seat of arbitration in international arbitration frequently reflects a determination that the seat has *no* connection with the parties or the dispute. There is, therefore, little reason for an arbitral tribunal to reach the same result that a court at the seat would reach.

[34] N.Y.C.P.L.R. Section 105(d) defines "civil judicial proceeding" as "a prosecution, other than a criminal action, of an independent application to a court for relief."

arbitration statute in the United States and a model used in the drafting of the Federal Arbitration Act.[35] Article 75 makes no reference, by cross-reference or otherwise, to the issue of interest awards in arbitration.

Second, New York's prejudgment interest provisions are part of C.P.L.R. Article 50, entitled "Judgments Generally." N.Y.C.P.L.R. Section 5011 defines "judgment" as "the determination of the rights of the parties in an action or special proceeding and may be either interlocutory or final." Arbitration does not qualify as an "action" or as a "special proceeding" under the N.Y.C.P.L.R.[36] The inclusion of the prejudgment interest provisions in an article relating to "judgments" is a further indication that the NY Legislature intended for the interest provisions to apply only to civil proceedings in New York State's courts.

Third, N.Y.C.P.L.R. Sections 5001 and 5002 contain numerous terms indicating that they are intended to apply only in court proceedings. Subdivision (a) of Section 5001 provides, in full, as follows:

> **Actions in which recoverable.** Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

Subdivision (a) thus refers to "action[s]" both in its title and in its text. As already noted, arbitration does not qualify as an "action" under the C.P.L.R. The reference to the "court's discretion" to award interest in equitable actions further suggests that the NY Legislature, in its enactment of Section 5001, considered only court proceedings. So, too, do the references in subdivisions (b) and (c) of Section 5001 and in Section 5002 to "the cause of action," "the jury," "the court," "motion," "the clerk of the court" and "any action."

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35 *See Southland Corp. v. Keating*, 465 U.S. 1, 34 (1984).

36 *See, e.g.*, N.Y.C.P.L.R. §§ 103(b), 105(b), 304, 7502(a).

The legislative history of C.P.L.R. Section 5004, which fixes the prejudgment interest rate applicable under Sections 5001 and 5002 at nine percent, further supports the conclusion that these sections are intended to apply only in court proceedings, not in arbitration. The NY Legislature adopted the fixed nine percent rate in part for reasons not directly related to the compensatory purpose of an interest award and not necessarily relevant to the award of interest in international arbitration.

The highest court of the State of New York, the New York Court of Appeals ("NY Court of Appeals") explained as follows:

> Prior to 1972, CPLR 5004 provided that "[i]nterest shall be at the legal rate, except where otherwise prescribed by statute." The "legal rate" was then based upon the variable rate of interest on the loan or forbearance of money as set by the Banking Board, or, if no rate had been prescribed by the Banking Board, the rate of 6% per annum (see, 1972 Report of NY Law Rev Commn, 1972 NY Legis Doc No. 65 [C], reprinted in 1972 McKinney's Session Laws of NY, at 3226). However, in its review of the provision, the Law Revision Commission recommended that the rate be fixed at 6% based upon the following reasons: (1) 6% was the historical rate from 1879; (2) the interest rate for a loan or forbearance was not logically or necessarily related to the rate for judgments; (3) a fixed rate would facilitate the administrative act of entering judgments with interest "without possible controversy over different rates for different periods;" and (4) the power of the Banking Board to set such rates was due to expire later that year. Accordingly, in 1972, CPLR 5004 was amended to set a fixed interest rate on judgments at "six per centum per annum" (L 1972, ch 358).
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> However, in the years that followed, interest rates soared in an inflationary market. The 1981 Report of the Advisory Committee on Civil Practice noted reports where defendants had exploited the system by investing and accruing interest on funds which would otherwise have been used to pay judgment creditors (1981 McKinney's Session Laws of NY, at 2658). Increased returns were facilitated through such delaying tactics as "the prosecution of unmeritorious appeals and eschewing reasonable settlements" (Mem of Assemblyman Goldstein, 1981 NY Legis Ann, at 148). Although arguments had been made "to reinstate the market rate under CPLR 5004" (1981 McKinney's Session Laws of NY, at 2658; see also, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 5004), the Advisory Committee then recommended increasing the fixed rate payable on judgments from 6 to 9%. The recommendation was enacted in 1981 (see, L 1981, ch 258) and the rate has remained unchanged since.

Rodriguez v. New York City Housing Authority, 91 N.Y.2d 76, 78-79 (1997). The NY Legislature thus appears to have adopted a fixed rate of six percent in 1972 based upon a complex set of public policy goals not all of which were directly related to determining an appropriate level of compensation in a particular case.[37] In 1981, after market rates had risen into the high teens, the NY Legislature increased the fixed rate from six percent to nine percent, in part, to discourage defendants from using delay tactics in court proceedings.[38]

The NY Court of Appeals has not had occasion to address squarely the applicability, or not, of New York State's prejudgment interest provisions to international or domestic arbitration. It can reasonably be surmised that this is due, at least in part, to the very limited grounds available to challenge an arbitral award or to resist its enforcement. New York's courts have consistently rejected, however, applications to modify an award or to grant pre-award interest in circumstances where the award allegedly did not comply with New York's prejudgment interest provisions.

The leading case in this area is *Penco Fabrics, Inc. v. Bogopulsky, Inc.*, 146 N.Y.S.2d 514 (1st Dep't 1955), in which the Appellate Division, First Department, held that "[t]he right to interest involves questions of fact and law that are within the purview of the arbitrators." *Id.* at 515. The arbitral tribunal had awarded damages for breach of contract, but it had not granted any pre-award interest, even though Section 480 of the then Civil Practice Act, the predecessor to C.P.L.R. Section 5001, provided for mandatory prejudgment interest in breach of contract

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[37] The six percent rate adopted in 1972 was close to the market rates in effect at the time. During 1972, the U.S. prime rate ranged from 4.50% to 6.00%. *See* http://www.fedprimerate.com/wall_street_journal_prime_rate_history.htm.

[38] During 1981, the U.S. prime rate ranged from 15.75% to 21.50%. *See id.*

actions.[39] The Appellate Division denied the award-creditor's request for pre-award interest, reasoning as follows:

> The mere fact that the award was silent on the question did not mean that the arbitrators did not consider the question and did not operate to enable the court to allow such interest. Provisions of law applicable to judicial actions and proceedings do not necessarily apply to arbitrations. Parties who submit their controversies to arbitration forego those provisions and leave all questions of law and fact to the arbitrators.

Id. The Appellate Division characterized the grant of pre-award interest as a mixed question of law and fact for the tribunal to decide and held that a tribunal's decision on that question is not subject to review by the courts.[40]

Three Appellate Division cases holding that a domestic arbitral tribunal's power to grant pre-award interest stems from its broad remedial powers under New York arbitral law (without any mention of C.P.L.R. Section 5001) support the conclusion that New York State's prejudgment interest provisions do not apply in arbitration.[41] *Levin & Glasser, P.C. v. Kenmore Property, LLC*, 896 N.Y.S.2d 311 (1st Dep't 2010), is typical of these three cases. The award-creditor in *Levin & Glasser* requested that the court grant pre-award interest on the damages

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[39] Section 480 of the then Civil Practice Act provided as follows:

> In every action wherein any sum of money shall be awarded by verdict, report, or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum, whether theretofore liquidated or unliquidated, and shall be added to and be a part of the total sum awarded.

N.Y. Civil Practice Act § 480 (as amended in 1927).

[40] In subsequent cases, the Appellate Division has reaffirmed that "in a contract dispute brought before an arbitrator[,] the question of whether interest from the date of the breach of the contract should be allowed in an arbitration award is a mixed question of law and fact for the arbitrator to determine." *Levin & Glasser, P.C. v. Kenmore Property, LLC*, 896 N.Y.S.2d 311, 312 (1st Dep't 2010) (internal quotation marks, alteration and citation omitted). *See also, e.g.*, *Dermigny v. Harper*, 6 N.Y.S.3d 561, 562 (2d Dep't 2015) ("[B]ecause the arbitration award did not include a provision awarding the defendant [pre-award] interest, the court was without power to award [such] interest."); *Rothermel v. Fidelity & Guarantee Ins. Underwriters, Inc.*, 721 N.Y.S.2d 565, 566 (3d Dep't 2001) ("the question as to whether pre-award interest is to be allowed is for the arbitrator to determine"); *Gruberg v. Cortell Group, Inc.*, 531 N.Y.S.2d 557, 558 (1st Dep't 1988).

[41] *See Levin & Glasser, P.C. v. Kenmore Property, LLC*, 896 N.Y.S.2d 311 (1st Dep't 2010); *West Side Lofts, Ltd. v. Sentry Contracting, Inc.*, 751 N.Y.S.2d 475, 476 (1st Dep't 2002); *Rosenblum v. Aetna Cas. & Sur. Co.*, 439 N.Y.S.2d 482, 483 (3d Dep't 1981).

awarded by the tribunal, contending that the tribunal had lacked the authority to award interest under the arbitration rules of New York's Fee Dispute Resolution Program, which are silent on this issue. *Id.* at 312-13. The Appellate Division rejected this contention on the ground, *inter alia*, that a tribunal's "broad authority to resolve disputes" under New York arbitral law includes the power to award interest. *Id.* The fact that the court rested its decision on a tribunal's broad remedial powers under New York arbitral law rather than on C.P.L.R. Section 5001 suggests that the court did not consider Section 5001 in the context of arbitration.[42]

Three New York federal district courts appear to have assumed, notwithstanding several reported Appellate Division decisions, that New York State's prejudgment interest provisions apply in domestic arbitration.[43] In each case, the award-creditor claimed that the tribunal had "manifestly disregarded" the law by failing to grant pre-award interest in accordance with C.P.L.R. Section 5001. The district courts rejected this argument in each of the three cases on grounds other than the non-applicability of C.P.L.R. Section 5001 in arbitration (a point that does not appear to have been argued).[44] In view of (a) the principle that, in order to establish manifest

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[42] *See also West Side Lofts*, 751 N.Y.S.2d at 476 (arbitrator did not exceed his powers by awarding interest; court did not refer to C.P.L.R. § 5001 but instead cited *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 308 (1984), which held that arbitrator "may do justice as he sees it"); *Rosenblum*, 439 N.Y.S.2d at 483 (arbitrators had power to rule on pre-award interest based on their broad power to fashion awards to achieve just results).

[43] *See Sayigh v. Pier 59 Studios, L.P.*, No. 11-CV-1453, 2015 U.S. Dist. LEXIS 27139, at *33-*36 (S.D.N.Y. Mar. 5, 2015); *Shamah v. Schweiger*, 21 F. Supp. 2d 208, 217 (E.D.N.Y. 1998); *Nicoletti v. E.F. Hutton & Co.*, 761 F. Supp. 312, 315 (S.D.N.Y. 1991).

[44] In *Sayigh*, the district court held that the tribunal had not manifestly disregarded the law because (1) the petitioner's claim arose under a human rights statute and (2) C.P.L.R. Section 5001(a) requires the award of interest only on sums awarded for breach of contract or interference with property. *Sayigh*, 2015 U.S. Dist. LEXIS 27139, at *35. In *Shamah*, the district court concluded that both arbitral tribunals and federal district courts exercising diversity jurisdiction have discretion to award interest at a rate lower than the applicable state statutory prejudgment interest rate, although it erroneously based that conclusion on a Second Circuit decision which held only that in the narrow circumstances of that particular case, the district court had not abused its discretion by using a rate lower than the applicable Vermont statutory prejudgment interest rate. *See Shamah*, 21 F. Supp. 2d at 217 (citing *Chandler v. Bombardier Capital, Inc.*, 44 F.3d 80, 84 (2d Cir. 1994)). In *Nicoletti*, the district court reasoned that "[a]lthough petitioner's claim sounded in contract, the arbitrators may have concluded that [his] entitlement was equitable rather than contractual, and that therefore interest was discretionary [under C.P.L.R. Section 5001(a)]." *Nicoletti*, 761 F. Supp. at 315.

disregard of the law, "[t]he governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable";[45] (b) the text of the C.P.L.R.; and (c) the Appellate Division's observation in *Penco Fabrics* that New York's prejudgment interest provisions "do not necessarily apply to arbitrations," 146 N.Y.S.2d at 515, counsel for the award-debtor in each of the three cases had available, in opposition to the manifest disregard challenge, a further argument that C.P.L.R. Section 5001 is not "clearly applicable."[46]

ii. Pre-Award Interest Under New York's Substantive Common Law

In the Committee's view, New York's substantive common law allows an arbitral tribunal to award interest as an element of damages on the main claim(s).[47] After the enactment of New York's first prejudgment interest statute in 1920, New York courts have held that they may award prejudgment interest only on the basis of specific statutory authority.[48] Prior to the

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45 *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 934 (2d Cir. 1986).

46 In *Moran v. Arcano*, No. 89 Civ 6717, 1990 U.S. Dist. LEXIS 9349 (S.D.N.Y. July 27, 1990), Judge Haight of the District Court for the Southern District of New York stated in *dictum* and without referring to C.P.L.R. Section 5001 that "[w]hether interest is taxed on a claim prior to the entry of an arbitration award is within the discretion of the arbitrators." *Id.* at *6. Judge Haight thus appears to have concluded, *sub silentio*, that C.P.L.R. Section 5001 does not apply in arbitration. However, neither of the two cases that he cited in support of this statement so held. *See Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 63 (3d Cir. 1986) (holding that district court should have granted post-award, prejudgment interest because, while arbitrators had included pre-award interest in their award, they "lacked authority to decide the entirely separate question of prejudgment interest on the amount confirmed by the district court judgment"); *Brandeis Intsel Ltd. v. Calabrian Chemicals Corp.*, 656 F. Supp. 160, 170 (S.D.N.Y. 1987) (confirming award that included pre-award interest granted by arbitrators under English law; arbitration seated in London and parties' contract governed by English law).

A Massachusetts appellate court has held squarely that, under Massachusetts law, "[a]n arbitrator's award of interest, when made as a component of an award, is an integral part of the total remedy that he fashions and, as such, is not subject to the statutory provisions which apply to court-awarded interest on contract claims." *Blue Hills Reg'l Dist. Sch. Comm. v. Flight*, 409 N.E.2d 226, 235 (Mass. App. Ct. 1980). The Massachusetts statutory prejudgment interest provisions are worded similarly to the New York provisions. *See* MASS. GEN. LAWS ch. 231, § 6C (2016) ("In all actions based on contractual obligations, upon a verdict, finding or order for judgment for pecuniary damages, interest shall be added by the clerk of the court to the amount of damages, at the contract rate, if established, or at the rate of twelve percent per annum from the date of the breach or demand.").

47 Some commentators argue that, as a general matter, "[c]laimants would be more accurately compensated for the loss of use of their money if they received interest as damages, as opposed to interest on damages." SENECHAL & GOTANDA, *supra* note 6 at 514. *See also* SECOMB, *supra* note 6, at 443-44.

48 *See, e.g.*, *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 851 (2d Cir. 1992) ("The right to interest [under New York law] is purely statutory and in derogation of the common law and it cannot be extended beyond

enactment of that statute, New York common law allowed courts to award prejudgment interest in breach of contract actions with interest running from the date on which the defendant could have ascertained the damages with reasonable certainty.[49] The Committee believes that, because New York's prejudgment interest provisions do not apply in arbitration, the proscription on non-statutory interest under New York law also does not apply in arbitration. Moreover, the availability of pre-award interest under New York's substantive common law accords both with (a) the historical allowance of prejudgment interest under the common law and (b) the compensatory purpose of such interest.[50]

In addition, as discussed in subsection II.A.4.a below, federal and New York arbitral law both grant arbitrators broad remedial powers that include the discretionary power to award interest on damages. In the Committee's view, an arbitral tribunal may consider the law regarding its remedial powers, including its discretionary power to award interest, to be substantive law for purposes of choice-of-law analysis, particularly if the tribunal is seated in a jurisdiction that treats arbitrators' remedial powers as a question of substantive law.[51]

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the statutory regulations or limitations.") (internal quotation marks and citation omitted); *Two Clinton Square Corp. v. Computerized Recovery Sys., Inc.*, 446 N.Y.S.2d 663, 664 (4th Dep't 1981) ("interest should not be awarded without specific legislative authority"); *United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868, 878 (2d Cir. 1976) ("This Court has repeatedly held that since CPLR § 5001 is obviously phrased in mandatory terms, New York law does not permit the trial court to exercise any discretion with regard to prejudgment interest determinations.").

[49] *See, e.g., Faber v. City of New York*, 222 N.Y. 255, 262 (1918) ("[I]f a claim for damages [on account of breach of contract] represents a pecuniary loss, which may be ascertained with reasonable certainty as of a fixed day, then interest is allowed from that day.").

[50] In 1927, the New York State Legislature amended the State's prejudgment interest statute to allow the courts to award prejudgment interest on the principal amount of damages "whether theretofore liquidated or unliquidated." Shortly thereafter, the NY Court of Appeals held that retrospective application of the amendment to contracts entered into before its enactment did not violate the non-impairment clause of the U.S. Constitution because the amendment "prevents an escape . . . from the real obligation to make full compensation for breach of contract" and "vindicates a preexisting right to compensation for breach of contract." *J.B. Preston Co. v. Funkhouser*, 261 N.Y. 140, 145 (1933).

[51] *See* BORN, *supra* note 6, at 3068 ("[I]n many jurisdictions, the arbitrators' remedial powers are treated as an aspect of the substantive dispute between the parties.").

One question that may arise is whether an international arbitral tribunal, in exercising discretion to award interest under New York law, should apply New York's prejudgment interest provisions even though they are not directed to the determination of interest by arbitrators. Given that C.P.L.R. Section 5001 has been characterized as substantive for choice-of-law and *Erie* purposes, one might argue that an award of interest under this section ordinarily would accord with the parties' reasonable expectations if they have chosen New York law as the law governing their relationship. Moreover, the Appellate Division recently stated that New York's "statutory nine percent rate [is] presumptively fair and reasonable, irrespective of the lower interest rate in the current market," although it made this statement in an equitable action in which it upheld the trial court's awarding of six percent interest.[52]

Arbitrators have discretion to determine interest based primarily on commercial considerations and to consider New York's statutory prejudgment interest provisions in the light of commercial realities, for three main reasons.

First, as discussed above, the NY Legislature adopted a fixed nine percent prejudgment interest rate in part for reasons not directly related to the compensatory purpose of an interest award and not necessarily relevant to the award of interest in international arbitration.

Second, the award of nine percent simple interest in accordance with New York's statutory prejudgment interest provisions may materially overcompensate or undercompensate the prevailing party for the loss of use of its funds.[53]

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[52] *Gourary v. Gourary*, 943 N.Y.S.2d 80, 82 (1st Dep't 2012).

[53] In some cases, even in the current low rate environment, the award of nine percent interest in accordance with New York's statutory prejudgment interest provisions may *undercompensate* the prevailing party for the loss of use of its funds. As noted above, a court may award only simple interest under C.P.L.R. Sections 5001 and 5004. In the commercial world, however, interest on a debt is almost always compounded; for this reason, an arbitral tribunal exercising its discretionary power to award interest under New York's substantive common law may choose to award interest on a compound basis. Depending on various factors such as the compounding interval and the length of the pre-award period, compound interest calculated at today's low market rates may exceed simple interest

Third, given the broad remedial powers of arbitrators under both federal and New York arbitral law and the many uncertainties at the time of contract regarding possible future disputes, commercial parties and their counsel may reasonably expect an arbitral tribunal to exercise discretion to award such interest as it considers appropriate. Of course, if for any reason the parties express a different expectation, for example by fixing the pre-award interest rate in advance, they are free to do so in their contract or in a stipulation entered during arbitration.[54]

During a period when New York's statutory prejudgment interest rate is substantially higher or lower than market rates, factors that may weigh in favor of application of the statutory rate in a specific case may include, in the judgment of the tribunal, a showing of party intent that the statutory prejudgment interest rate be applied; the absence of any case made in favor of applying a different rate; or a lack of significant economic impact on the interest calculation in a particular case. Moreover, if both parties argue that New York's statutory prejudgment interest provisions govern their respective claims for pre-award interest, a tribunal could reasonably infer agreement between the parties that the statutory prejudgment interest rate applies in their arbitration.[55]

On the other hand, arbitrators have discretion to consider factors that may weigh against application of New York's statutory prejudgment interest rate in a time of low market interest rates, including the NY Legislature's desire to set the prejudgment interest rate at a level close to or below the market rates at the time the statutory rate was chosen; the NY Legislature's concern

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calculated at New York's nine percent statutory prejudgment rate. In the Committee's view, this possibility confirms that it may be appropriate for arbitrators to award interest based on commercial considerations.

[54] *See* subsection II.A.1 *supra*.

[55] Arbitrators may also exercise their discretion to apply New York's statutory prejudgment interest provisions if they take the view that it would be desirable, as a general matter, that the relief granted coincide precisely with the relief that a court hearing the same claim would grant. In the Committee's view, a tribunal may consider how a court would decide the same question but retains discretion, under well-settled federal and New York State arbitral law, to consider other factors in shaping the tribunal's remedy. *See* subsection II.A.4.a below.

for easing administrative burdens on the courts; and the extent to which current market rates of interest may adequately discourage the use of delay tactics in arbitration.[56]

iii. Inapplicability of Section 5-501(1) of New York's General Obligations Law to Pre-Award Interest

An arbitral tribunal may also wish to consider whether it would be appropriate to award interest at New York's statutory default rate of interest for loan obligations, as established by Section 5-501(1) of the State's General Obligations Law ("G.O.L."). G.O.L. Section 5-501(1) provides that "[t]he rate of interest, as computed pursuant to this title, upon the loan or forbearance of any money, goods, or things in action . . . shall be six per centum per annum unless a different rate is prescribed in section fourteen-a of the banking law."

In *Sedlis v. Gertler*, 554 N.Y.S.2d 614 (1st Dep't 1990), the Appellate Division held that an arbitrator should have granted pre-award interest at the six percent rate set by G.O.L. Section 5-501(1) because the parties' contract provided that late payments would bear interest at New York's "legal rate." *Id.* at 616. Relying on C.P.L.R. Section 7511(c)(1), which provides that the court shall modify an award if "there was a miscalculation of figures . . . in the award," the Appellate Division modified the arbitrator's award (which granted twelve percent pre-award interest) to provide for interest at the six percent rate. *Id.* The Appellate Division's modification

[56] New York's maintenance of the nine percent statutory prejudgment interest rate in the current low rate environment may also be intended to encourage defendants to settle claims brought against them. *See Oden v. Schwartz*, 71 A.3d 438, 457 (R.I. 2013) (upholding constitutionality of Rhode Island's statutory prejudgment interest rate of twelve percent in medical malpractice actions on ground that this rate is "rationally related to a legitimate state interest of promoting settlement as well as compensating an injured plaintiff for the loss of the use of money to which he or she is legally entitled"). However, any possible state interest in promoting settlement of claims appears to be related to the efficient administration of justice by the courts and does not reflect a substantive policy favoring plaintiffs over defendants. *See Paine Webber*, 579 A.2d at 551 (court held that Connecticut's "offer of judgment" rule, which "provides an economic incentive for parties to settle disputes before trial," was "procedural rule, punitive in nature, and enacted to promote fair and reasonable pretrial compromises of litigation," and that it therefore applied to action in Connecticut state court even though New York law governed substantive issues in dispute). In view of the many and varied social policies underlying statutory prejudgment interest rates, arbitrators reasonably may conclude that a statutory prejudgment interest rate binding on courts may or may not be appropriate in a particular case but should not dictate the determination of interest in arbitration.

of the award appears anomalous in the sense that it involved the reversal of a substantive ruling, not the correction of a mere computational error.[57] The court's interpretation of G.O.L. Section 5-501(1) as establishing a legal rate of interest of six percent under New York law would appear to support the application of this rate to pre-award interest in arbitration irrespective of whether or not the parties specifically so agreed in their contract.

Three factors militate against the application of the six percent rate established by G.O.L. Section 5-501(1) to pre-award interest in arbitration, absent party agreement that this rate will apply. First, G.O.L. Section 5-501(1) provides that the rate set by that section applies to a "loan or forbearance," a phrase that does not encompass damages owed by a breaching party.[58] Accordingly, the text of the statute provides no basis for arbitrators to award interest at the six percent rate, absent party agreement to the contrary.

Second, the majority of courts to have addressed the issue have concluded that the six percent rate set forth in G.O.L. Section 5-501(1) is "superseded" by New York's maximum interest rate of sixteen percent set by Section 14-a of the Banking Law.[59] The latter is a usury rate and does not reflect the NY Legislature's calculation of what rate would make an injured party whole. Accordingly, it would not be appropriate, in the Committee's view, for arbitrators to award interest at the sixteen percent rate set by Section 14-a, absent clear evidence of party intent that it apply in the circumstances.

Third, to the extent that the six percent rate mentioned in G.O.L. Section 5-501(1) retains any validity, the Committee is not aware of any precedent or other authority supporting the

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[57] *See, e.g., Madison Realty Capital, L.P. v. Scarborough-St. James Corp.*, 25 N.Y.S.3d 83, 85 (1st Dep't 2016) ("CPLR 7511(c)(1) only authorizes modification of computational errors . . ., not reversal of substantive rulings").

[58] *See, e.g., Manfra, Tordella & Brookes*, 794 F.2d at 63.

[59] *See, e.g., La Barbera v. A.F.C. Enters.*, 401 F. Supp. 474, 479-80 (S.D.N.Y. 2005) (collecting cases); *Rachlin & Co. v. Tra-Mar, Inc.*, 308 N.Y.S.2d 153, 158 (1st Dep't 1970).

award of interest in accordance with G.O.L. Section 5-501(1) in arbitration, absent party agreement that New York's "legal rate" is applicable. Arbitrators therefore should not presume, solely on the basis of the parties' choice of New York law as the law governing their contract, that parties intended for the six percent rate to apply to the award of interest.

b. International Arbitrators Should Align the Rate of Interest With the Currency of the Award

As already noted, many jurisdictions (including New York, in the case of a court judgment) have enacted statutory provisions specifying how interest shall be assessed on damages, including the rate at which it shall accrue.[60] For reasons set forth above, the Committee takes the view that neither the New York prejudgment interest provisions (C.P.L.R. §§ 5001, 5002 and 5004) nor G.O.L. Section 5-501(1) are binding in international arbitration. For purposes of this discussion, the Committee assumes that, under some circumstances, the statutory interest provisions of other jurisdictions may be deemed applicable, as a question of local law or public policy, in a particular international arbitration.

In accordance with the choice-of-law analysis discussed above, the law governing the parties' contract generally should determine whether the prevailing party may recover interest on damages and, if so, how much.[61] An award of interest in accordance with these provisions may not be appropriate, however, if (a) the governing law specifies a legal rate of interest and (b) the arbitral tribunal assesses damages and issues its award in the currency of another jurisdiction. For example, a contract may provide for arbitration in New York, French governing law, and payment in U.S. dollars. If, as would be expected, the arbitral tribunal assesses damages and

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60 *See, e.g.*, C. CIV. art. 1231-7 (Fr.) (interest on damages accrues at "legal rate"); Decree No. 2014-947 of August 20, 2014 Relating to the Legal Rate of Interest (amending Article L. 313-2 of the Monetary and Financial Code) (legal rate fixed by French Minister of Economy every six months).

61 *See supra* notes 26-30 and accompanying text.

issues its award in U.S. dollars, the grant of pre-award interest at the French legal rate may not make commercial sense because that rate reflects, *inter alia*, material changes in the value of the Euro over time.[62] In fairly foreseeable circumstances, therefore, application of the French legal rate to an arbitral award in U.S. dollars could significantly undercompensate or overcompensate the prevailing party for the loss of use of its money.[63]

Arbitral tribunals may wish to consider at least two factors as they seek to avoid anomalies in the interest rate used to calculate pre-award interest. First, arbitrators may consider whether, as a matter of statutory construction, the legal rate under the governing law does not apply to damages assessed in a foreign currency. As explained by Professor Pierre Mayer:

> The arbitrator's sense of equity can suggest to him that the rule expressed in the applicable law only deals with domestic situations, which allows him to formulate himself the rule that is supposed to apply to international situations. This last device has been used to set aside provisions, which can be found in many national laws, which fix the rate of interest at a certain percentage, regardless of the place of payment and of the currency in which the debt was expressed; indeed, such provisions lead to absurd results when applied to international contracts.[64]

In the event an arbitral tribunal should determine that the legal rate of interest under the governing law does not apply, the arbitrators may consider assessing interest at a rate appropriate to the currency of the award through the exercise of any discretion that they possess in determining damages under the governing substantive law or the arbitral law of the seat.

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62 In the international context, particularly in the absence of an express provision in the parties' contract, an arbitral tribunal may have discretion in determining the currency in which the award is rendered. *See* UNIDROIT PRINCIPLES Art. 7.4.12 ("Damages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate.").

63 The 2012 U.S. Model Bilateral Investment Treaty recognizes the importance of matching the interest rate to the currency of the award. Article 6(3) of the Model Treaty provides that if the fair market value of an expropriated investment is denominated in a freely usable currency, the arbitral tribunal shall grant pre-award and post-award interest "at a commercially reasonable rate for that currency[.]" *See also* 2012 U.S. Model Bilateral Investment Treaty, Art. 6(4) (specifying compensation payable if fair market value of expropriated investment is denominated in currency that is not freely usable).

64 Pierre Mayer, *Reflections on the International Arbitrator's Duty to Apply the Law*, 17(3) ARB. INT'L 235, 244 (2001). *See also* Secomb, *supra* note 6, at 440.

Alternatively, international arbitrators reasonably may conclude that the choice-of-law approach, holding that interest should be determined in accordance with the same law that governs liability and damages, is subject to an exception in an international case if the value of the currency of the governing law changes at a materially different rate from the value of the currency of the award.[65] In such circumstances, the Committee believes that it would be appropriate for a tribunal to determine the entitlement to interest and the period during which interest accrues in accordance with the law governing the contract, while determining the interest rate, whether the interest is simple or compound, and (if it is compound) the compounding period in accordance with general principles of law.[66] Such general principles include the prevailing party's right to full compensation for the loss of use of money it was entitled to receive from the date when interest begins to accrue under the governing law until the date of the award.[67] An international arbitration tribunal possesses discretion under general principles of law to assess

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[65] Section 10 of the Restatement (Second) Conflict of Laws expressly recognizes that "[t]here may . . . be factors in a particular international case which call for a result different from that which would be reached in an interstate case." The Reporters Notes to Section 10 of the Restatement observe that "[s]ome questions can arise only in international conflicts, [such] as questions involving . . . the conversion of one currency into another."

[66] This recommended choice-of-law rule is similar to the approach followed by the English courts, which determine liability to pay prejudgment interest in accordance with the law governing the merits, while determining the rate of interest in accordance with English law. *See* DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS (15th ed.) § 7R-082, Rule 20(2). English law authorizes the High Court to award prejudgment interest on a simple-interest basis "at such rate as the court thinks fit[.]" Senior Courts Act, 1981, § 35A(1). In the exercise of its discretion under English law, the High Court "will, *prima facie*, award the rate applicable to the currency in which the debt is expressed." DICEY, MORRIS & COLLINS, *supra*, § 7R-082, Rule 20(3) (footnotes omitted). *See also, e.g.*, *Miliangos v. George Frank (Textiles) Ltd.*, [1977] Q.B. 489, 497 ("while you look to the proper law of the contract to see whether there is a right to recover interest by way of damages, you look to the *lex fori* to decide how much"; court awarded damages in Swiss francs and held that claimant was entitled to prejudgment interest on a simple-interest basis "at a rate at which someone could reasonably have borrowed Swiss francs in Switzerland at simple interest").

[67] *See* UNIDROIT PRINCIPLES Art. 7.4.10 ("Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues from the time of non-performance.").

pre-award interest at a market rate appropriate to the currency of the award and on a compound basis.[68]

Comment (e) to Section 823 of the Restatement (Third) of the Foreign Relations Law of the United States addresses the awarding of prejudgment interest by U.S. state and federal courts in international cases as follows:

> The date for commencement of interest on an obligation or a judgment is determined by the law of the forum, including its rules on choice of law. When a statutory rate of interest is applicable in the forum, that rate must be applied, even if the judgment is given in foreign currency. If no statutory rate of interest is applicable, the court may, in appropriate cases, order interest to be based on the interest rate applicable at the principal financial center of the state issuing the currency in which the judgment is payable.[69]

In accordance with the first sentence of this comment, read together with Comment (e) to Section 207 of the Restatement (Second) of Conflicts of Law, the law governing the merits of the parties' dispute should determine the date for commencement of prejudgment interest. The second sentence appears to provide that a U.S. court must apply the forum's statutory prejudgment interest rate, if any, in assessing prejudgment interest in an international case, "even if the judgment is given in foreign currency." This approach to the applicable interest rate can

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[68] *See, e.g.*, UNIDROIT PRINCIPLES Art. 7.4.9(2) (providing that interest on late payments shall be payable at "the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment"); ICC Award No. 8769, ICC International Court of Arbitration Bulletin 10(2) (1999), at 75 (awarding interest at "commercially reasonable interest rate" in accordance with Article 7.4.9(2) of UNIDROIT Principles). International investment tribunals, applying international law, often assess pre-award interest at a market rate appropriate to the currency of the award and on a compound basis. A recent survey of pre-award interest determinations in 63 investment awards rendered between January 2000 and March 2016 found that 18 of the 63 awards surveyed (approximately 30%) assessed pre-award interest at a rate based on LIBOR, most often with an uplift of two percentage points. *See* Tiago Duarte-Silva & Jorge Mattamouros, *Prejudgment interest – a mere afterthought?*, 11(5) GLOBAL ARB. REV. 30, 31 (2016). LIBOR is a benchmark rate that the leading banks in London charge each other for short-term loans. Sixteen of the awards surveyed (25%) assessed interest at a rate not linked to any benchmark, most often from four to six percent, while nine of the awards (14%) assessed interest at a rate based on U.S. Treasury yields. *Id.* at 31-32. In the majority of recent awards, international investment tribunals have assessed interest on a compound basis. *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 298 (2012).

[69] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 823 cmt. e (1987).

give rise to anomalies for at least two reasons.[70] First, if a statutory prejudgment interest rate is to be applied, the presumptively applicable interest rate in an international case generally is not the forum's statutory rate, but the statutory rate under the governing substantive law.[71] Second, a court or arbitral tribunal should consider the impact, if any, of the currency in which damages are to be awarded. If the value of the currency of the governing substantive law changes at a materially different rate than the value of the currency of the award, it may be inappropriate, as a general matter, for a court or arbitral tribunal to grant one of the parties a windfall by applying a statutory prejudgment interest rate that has no relevance to the loss incurred as a result of delay in recovery of compensation.[72]

4. Law of the Arbitral Seat

The next step in the Committee's suggested approach is for arbitrators to look to the law of the arbitral seat governing the arbitral process.[73]

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[70] To the Committee's knowledge, no U.S. court has ever cited or applied the second sentence of Comment (e) to Section 823 of the Restatement (Third) of the Foreign Relations Law of the United States. *See, e.g.*, *Amoco Cadiz*, 954 F.2d at 1333 ("Rules for prejudgment interest . . . usually come from the law defining the elements of damages. . . . One would think, therefore, that prejudgment interest on the French plaintiffs' claims depends on French law[.]").

[71] *See* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 207 cmt. e (1971).

[72] In an article published in 1985, Professor Ronald Brand proposed that Section 823 of the draft Restatement (Third) of the Foreign Relations Law of the United States then under consideration be revised to include the following provision:

> In giving judgment on a foreign currency obligation, a court may award both pre-judgment and post-judgment interest at such rate or rates as may be appropriate, taking into consideration the statutory rate of interest, if any, otherwise applicable and the rate of interest generally available in the market on investments made in terms of the currency in which judgment is made.

Ronald A. Brand, *Restructuring the U.S. Approach to Judgments on Foreign Currency Liabilities: Building on the English Experience*, 11(1) YALE J. INT'L L. 139, 184 (1985). As Professor Brand explained, this provision was "directed at the problem of matching the interest rate to the currency of judgment. Without such a rule, it is possible that a court would render judgment in one currency and apply the interest rate relevant to another currency[.]" *Id.* at 189. Professor Brand's proposal was not adopted.

[73] The choice of a seat almost invariably leads to the application of its arbitration law, and so parties should expect that their selection of a seat will affect numerous aspects of the arbitral process, potentially including the standards applicable to the awarding of interest. *See, e.g.*, BORN, *supra* note 6, at 2052 ("[T]he law of the arbitral seat can directly govern a number of distinct legal issues affecting any international arbitration, many of which can be highly important."). An arbitral tribunal, in considering an award of interest, may decide, in the face of evidence

As discussed in subsection (a) below, the law of the arbitral seat, when the seat is New York, accords with New York substantive law relating to the award of interest by international arbitrators. If, in a particular case, the law of the arbitral seat conflicts with the applicable substantive law relating to the award of interest by international arbitrators, the tribunal will need to determine how to reconcile the conflict. No such conflict exists when New York is the arbitral seat and New York substantive law governs the dispute. This Committee does not express a view as to how such conflicts might be addressed in arbitrations seated in other jurisdictions.

a. International Arbitrators' Broad Remedial Powers Under Federal Arbitral Law

The Federal Arbitration Act and C.P.L.R. Article 75, New York's arbitration statute, are silent with respect to the award of interest. It is well-settled, however, as a matter of federal and New York arbitral law that, "[w]here an arbitration clause is broad . . . arbitrators have the discretion to order remedies they determine appropriate, so long as they do not exceed the power granted to them by the contract itself."[74]

In the Committee's view, the broad remedial powers of international arbitrators under federal arbitral law include at least the same discretionary power to award interest that the New

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in a specific case that the contracting parties carefully considered the arbitration law of the seat, that the arbitration law of the seat be given greater weight in that case than the law governing the merits. However, contracting parties frequently select the seat of arbitration primarily or exclusively for reasons of logistical convenience and without regard to its arbitration law. Under the latter, more typical scenario in commercial cases, principles of party autonomy and respect for the intent of the parties arguably weigh in favor of giving the arbitration law of the seat lower priority than the law governing the merits of the parties' dispute. Following the same logic, when parties neglect to designate the seat and, as a consequence, the seat is designated for the parties, arbitrators reasonably may decide not to give weight to the law of the seat as reflective in any way of party intent as to interest awards.

[74] *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 262 (2d Cir. 2003) (federal law). *See also, e.g.*, *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 902 (2d Cir. 2015) ("Like federal law, New York law gives arbitrators substantial power to fashion remedies that they believe will do justice between the parties and under New York law, arbitrators have power to fashion relief that a court might not properly grant.") (internal quotation marks, ellipsis and citation omitted); *Bd. of Educ. of Norwood-Norfolk Cent. Sch. Dist. v. Hess*, 49 N.Y.2d 145, 152 (1979) ("[T]o achieve what the arbitration tribunal believes to be a just result, it may shape its remedies with a flexibility at least as unrestrained as that employed by a chancellor in equity."); *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 308 (1984) (arbitrator "may do justice as he sees it"); *Benedict P. Morelli & Assocs., P.C. v. Shainwald*, 854 N.Y.S2d 133, 134 (1st Dep't 2008) ("Arbitrators are free to shape a remedy with unrestrained flexibility in order to achieve a just result.").

York courts possess in equitable actions. In equitable actions, the New York courts enjoy discretion under C.P.L.R. Section 5001(a) to determine whether to award any interest and, if so, how much.[75] As explained by the Appellate Division in *Rosenblum v. Aetna Casualty & Surety Co.*, 439 N.Y.S.2d 482 (3d Dep't 1981),

> [I]t is . . . well settled that the inclusion of interest in recoveries in actions of an equitable nature is left to the sound discretion of the court (see CPLR 5001, subd [a]) and that arbitrators are empowered to fashion awards to achieve just results and may shape remedies with a flexibility at least as unrestrained as that employed by a chancellor in equity.

Id. at 483 (internal quotation marks, ellipsis and citation omitted). Although the underlying claim in *Rosenblum* was equitable, the Appellate Division's conclusion that a tribunal's broad remedial powers under New York law include the discretionary power to award interest applies equally regardless of whether the claim in the arbitration is characterized as legal or equitable.[76] An international arbitral tribunal seated in New York has discretion, therefore, to award such interest as it considers appropriate.

b. International Arbitrators' Power to Award Interest Under Other National Arbitration Laws

The arbitration statutes of England and several predominantly British Commonwealth jurisdictions expressly grant to arbitral tribunals discretion to award such interest as they

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[75] N.Y.C.P.L.R. § 5001(a) (". . . in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion"). By contrast, in actions of a legal nature, courts generally have no discretion under New York law with regard to prejudgment interest determinations. *See, e.g.*, *United Bank*, 542 F.2d at 878 ("This Court has repeatedly held that since CPLR § 5001 is obviously phrased in mandatory terms, New York law does not permit the trial court to exercise any discretion with regard to prejudgment interest determinations.").

[76] *See Levin & Glasser*, 896 N.Y.S.2d at 312 (tribunal's "broad authority to resolve disputes" includes power to award interest; nature of underlying claim in arbitration not specified); *West Side Lofts*, 751 N.Y.S.2d at 476 (arbitrator did not exceed his powers by granting pre-award interest; nature of underlying claim in arbitration not specified); *Grobman v. Chernoff*, No. 024250/98, 2008 N.Y. Misc. LEXIS 10792, at *3 (Sup. Ct. Nassau County 2008) ("an arbitrator's power includes pre-award interest as part of a decision"; sole issue in arbitration was amount of damages owed for personal injuries).

consider appropriate.[77] For example, Section 49(3) of the English Arbitration Act 1996 provides that "[t]he tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case . . . on the whole or part of any amount awarded by the tribunal[.]"

The House of Lords' well-known decision in *Lesotho Highlands Development Authority v. Impregilo SpA*, [2005] UKHL 43, establishes that a tribunal seated in England has discretion to award interest under Section 49(3) of the English Arbitration Act even if the law governing the merits specifies how interest shall be calculated on damages. The dispute in that case arose under a contract governed by the law of Lesotho and providing for arbitration in London. The law of Lesotho included statutory interest provisions, but the tribunal disregarded those provisions in exercising its discretion to award interest under Section 49(3) of the Arbitration Act. The Court of Appeal held that the tribunal had exceeded its powers, reasoning that "there is no room for any discretionary procedural power" under Section 49(3) where the law governing the merits confers a substantive right to interest.[78] The House of Lords reversed on the ground, *inter alia*, that Section 49 of the Arbitration Act allows an arbitral tribunal to award interest either by exercising its discretionary power under Section 49(3) or by applying the law governing the merits pursuant to Section 49(6).[79]

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77 *See, e.g.*, ENGLISH ARBITRATION ACT 1996 § 49; SINGAPORE INTERNATIONAL ARBITRATION ACT 2012 §§ 12(5)(b), 20; HONG KONG ARBITRATION ORDINANCE, Art. 34D; BERMUDA INTERNATIONAL CONCILIATION AND ARBITRATION ACT 1993 § 31; BRITISH COLUMBIA INTERNATIONAL COMMERCIAL ARBITRATION ACT § 31(7); AUSTRALIAN INTERNATIONAL ARBITRATION ACT 1974 §§ 25-26; INDIAN ARBITRATION AND CONCILIATION ACT 1996 § 31(7)(a); IRISH ARBITRATION ACT 2010 § 18. Several U.S. states that enacted arbitration statutes based on the UNCITRAL Model Law on International Commercial Arbitration added a section providing that unless otherwise agreed by the parties, the arbitral tribunal "may award interest." *See* CALIFORNIA CIV. PROC. CODE § 1297.317 (2017); 710 ILLINOIS COMP. STAT. 30/25-20(g) (2017); OREGON REV. STAT. § 36.514(6) (2017); TEXAS CIV. PRAC. & REM. CODE § 172.144 (2017). These U.S. state statutes do not address the standard that the tribunal should apply in awarding interest.

78 *Lesotho Highlands Development Authority v SPA*, [2003] EWCA Civ 1159, at [48]-[49].

79 *Lesotho Highlands Development Authority v. Impregilo SpA*, [2005] UKHL 43, at [38]-[39].

5. General Guidelines for the Exercise of Discretion in Awarding Interest

Federal case law with respect to the awarding of prejudgment interest by the federal district courts in federal question and admiralty cases may provide useful guidance for international arbitrators in the exercise of any discretion they possess with respect to the awarding of pre-award interest in arbitration, whether by virtue of the applicable arbitration rules, the applicable substantive law (or rules of law), or the applicable arbitration law. The federal district courts have broad discretion as to the awarding of prejudgment interest in such cases.[80] Each Circuit has developed somewhat different guidelines for the exercise of this discretion. The Seventh Circuit Court of Appeals has set forth perhaps the clearest and most comprehensive set of guidelines. *See In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331-35 (7th Cir. 1992). In a *per curiam* opinion, Chief Judge Bauer and Judges Easterbrook and Fairchild set forth the following guidelines:

- A district court should award prejudgment interest at the market rate, because interest at this rate "puts both parties in the position they would have occupied had compensation been paid promptly." *Id.* at 1331.

- The market rate is "the minimum appropriate rate for prejudgment interest, because the involuntary creditor [*i.e.*, the prevailing party] might have charged more to make a loan." *Id.*

- "Any market rate reflects three things: the social return on investment (that is, the amount necessary to bid money away from other productive uses), the expected change in the value of money during the term of the loan (i.e., anticipated inflation), and the risk of nonpayment. The best estimate of these three variables is the amount the defendant must pay for money, which reflects variables specific to that entity." *Id.* at 1332.

- A district court need not try to determine the actual rate that the defendant must pay to borrow money. *Id.* If the court chooses not to engage in such "refined rate-setting," it should award prejudgment interest at the U.S. prime rate, which is "the rate banks charge for short-term unsecured loans to credit-worthy

[80] *See, e.g.*, *Wickham Contracting Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, AFL-CIO*, 955 F.2d 831, 833-34 (2d Cir. 1992) (federal question case); *Indep. Bulk Transp., Inc. v. Vessel "Morania Abaco"*, 676 F.2d 23, 25 (2d Cir. 1982) (admiralty case).

customers." *Id.*[81] While the prime rate "may miss the mark for any particular party, . . . it is a market-based estimate." *Id.*

- The relevant market rate is the rate in effect during the prejudgment period, "not the going rate at the end of the case." *Id.* If the market rate fluctuated during the prejudgment period, the district court should calculate interest at the different rates in effect during this period. *Id.* at 1333. Alternatively, it may use an average rate during the period. *Id.* at 1335.

- The "norm" in federal litigation is to award prejudgment interest on a compound basis because (1) the defendant would have had to pay interest on unpaid interest if it had borrowed the amount of the damages and (2) the plaintiff could have earned interest on interest if it had invested or loaned that amount. *Id.* at 1331-32.

The Seventh Circuit's guidelines are broadly similar to those developed by the other federal courts of appeals. For example, the Second Circuit held, in *Mentor Insurance Company (U.K.) Ltd. v. Norges Brannkasse*, 996 F.2d 506 (2d Cir. 1993), that the district court may award prejudgment interest at a rate that "reflects the cost of borrowing money, if measured for example by the average prime rate or adjusted prime rate[.]" *Id.* at 520.[82] Judge Jacobs, writing for the panel, concluded that "[t]he award of compound interest . . . was within the district court's broad discretion." *Id.* Unlike the Seventh Circuit in *Amoco Cadiz*, the Second Circuit in *Mentor Insurance* held that (a) the district court may award interest at a short-term, risk-free rate, rather than the market rate, and (b) "a prevailing party is not entitled to a calculation of prejudgment interest at the interest rates at which it actually borrowed money during the period in question since consideration of the precise credit circumstances of the victim would inject a needless variable into these cases." *Id.* (internal quotation marks and citation omitted).

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[81] As of the date of this report (June 2017), the U.S. prime rate is 4.25%. If the tribunal assesses damages and issues its award in a currency other than the U.S. dollar, the Committee considers that it would generally be appropriate for it to use a market rate appropriate to the currency of the award. *See* subsection II.A.3.b *supra*.

[82] *See also, e.g.*, *Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nigeria*, 603 Fed. Appx. 1, 5 (D.C. Cir. 2015) ("This court has repeatedly concluded that the use of the prime rate in the award of prejudgment interest reflects an appropriate exercise of the district court's discretion.").

An arbitral tribunal may find guidance in judicial opinions that set forth guidelines intended to ensure that the prevailing party is fully compensated for its loss. Arbitral tribunals generally differ from most trial courts in being able to bring to bear whatever resources the parties consider appropriate in order to take into account the particular circumstances of the parties including, in appropriate cases, engaging in a "refined rate-setting" exercise. *See Amoco Cadiz*, 954 F.2d at 1332. In other cases they may choose to award interest at an appropriate market rate or at a risk-free rate. *See Mentor Ins.*, 996 F.2d at 520.

Economists differ as to how pre-award (or prejudgment) interest should be calculated in order to compensate the prevailing party for the loss of use of money it was entitled to receive from the date its claim arose until the date of the award.[83] For example, some economists espouse the "coerced loan" theory, which holds that pre-award interest should be calculated at the rate that the losing party would have paid a voluntary creditor because the losing party, by not immediately compensating the prevailing party for its harm, in effect forced the prevailing party to make a loan to the losing party equal in value to the prevailing party's harm.[84] Other economists argue that pre-award interest should be calculated at a rate equal to the prevailing party's opportunity cost of capital.[85] Several other approaches for determining the pre-award

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[83] *See* Aaron Dolgoff & Tiago Duarte-Silva, *Prejudgment Interest: An Economic Review of Alternative Approaches*, 33(1) J. INT'L ARB. 99 (2016).

[84] *See, e.g.*, Michael S. Knoll & Jeffrey M. Colon, *The Calculation of Prejudgment Interest* (2005), in PENN LAW: LEGAL SCHOLARSHIP REPOSITORY.

[85] *See, e.g.*, Manuel A. Abdala et al., *Invalid Round Trips in Setting Pre-Judgment Interest in International Arbitration*, 5(1) WORLD ARB. & MEDIATION REV. 1 (2011). In a number of industries and economic sectors, commercial enterprises have an opportunity cost of capital equal to or in excess of nine percent per annum. In those circumstances, at least, adoption of an "opportunity cost of capital" approach to calculating pre-award interest would tend to support the award of interest at New York's nine percent statutory prejudgment interest rate as an appropriate estimate of the prevailing party's opportunity cost of capital. On the other hand, a number of economists criticize the opportunity cost of capital approach to calculating pre-award interest on the ground, *inter alia*, that the prevailing party does not actually put any investment at risk; rather, the only risk that the prevailing party assumes is the risk that the losing party will not satisfy the award, and this risk may be compensated by requiring the losing party to pay interest at the rate that it would have paid a voluntary creditor. *See, e.g.*, Dolgoff & Duarte-Silva, *supra* note 83 at 101 ("[T]here is an inconsistency introduced by applying *ex ante* cost of capital rates

interest rate also exist.[86] It will generally be up to the parties in the arbitration to argue to the arbitral tribunal what rate is appropriate in the particular circumstances of their dispute.

The Seventh Circuit awarded the plaintiffs in the *Amoco Cadiz* case prejudgment interest at the average U.S. prime rate compounded annually, although it did not address the appropriate compounding period in its decision.[87] It would not be inappropriate for arbitrators, in exercising their discretion, to award compound interest and to base the compounding period on factors specific to the parties and their industry.

Finally, the Committee believes that it is generally appropriate for pre-award interest to begin to accrue from the date of the non-performing party's breach, except that interest upon damages incurred thereafter should generally begin to accrue from the date the damages were incurred. Subject to any countervailing equitable considerations, the awarding of interest until the date of the award generally appears to be necessary to provide full compensation to the prevailing party for the loss of use of its money.[88]

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to an *ex post* calculation of compensation. The opportunity cost of capital is also inappropriate because the claimant has not actually put any investments at risk to earn such a return."); Don Harris et al., *A Subject of Interest: Pre-award Interest Rates in International Arbitration* (2015), at http://www.brattle.com ("Pre-award interest at the claimant's cost of capital would compensate the claimants for a favourable outcome to the alternative investment, while ignoring the chances that they could have lost. Moreover, if the alternative project was really so fantastic, then the claimant should have been able to find sources of funding for it other than the amounts owed by respondent."); Knoll & Colon, *supra* note 84 at 9 ("Given th[e] assumption [that the plaintiff had access to the capital markets], the defendant's actions cannot plausibly be said to have prevented the plaintiff from foregoing any attractive investment opportunities and thus to have missed out on the resulting return.").

[86] *See* Dolgoff & Duarte-Silva, *supra* note 83.

[87] *See Amoco Cadiz*, 954 F.2d at 1331-32; *Cement Div., Nat'l Gypsum Co. v. City of Milwaukee*, 950 F. Supp. 904, 910-11 (E.D. Wis. 1996).

[88] This pre-award period coincides with the periods specified in C.P.L.R. Section 5001(b) and UNIDROIT Principles Article 7.4.10. *See* N.Y.C.P.L.R. § 5001(b) ("Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date."); UNIDROIT PRINCIPLES Art. 7.4.10 ("Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues from the time of non-performance.").

B. Post-Award, Prejudgment Interest

Parties sometimes request not only that arbitrators include pre-award interest as part of the total compensation due under the award, but also that the arbitral tribunal order the losing party to pay interest on the total amount of the award from the date the award is issued until the date it is paid. The Committee is also aware that there have been instances in which the ICC International Court of Arbitration, following its review of a tribunal's draft award under Article 33 of the ICC Rules, has asked the tribunal to modify its award to address the granting of post-award interest, even if the prevailing party did not request such interest in its pleadings.

Increasingly, the practice is for arbitral tribunals to order the award-debtor to pay post-award interest if it does not satisfy the award within a specified time period. In U.S. courts, post-award interest ordered by an arbitral tribunal generally accrues from the date of the award (or the date on which payment is due under the award) until the date of a U.S. federal or state court judgment enforcing the award, even if the award provides that such interest shall accrue until the date the award is paid. Under the so-called merger doctrine, when an award is enforced through a U.S. federal or state court judgment, the debt created by the award merges with the judgment, such that the award debt is extinguished and, in the jurisdiction that rendered the judgment, only the judgment debt survives.[89] Accordingly, "post-award" interest ordered by an arbitral tribunal comprises only post-award, prejudgment interest; post-judgment interest is separately determined in accordance with the law of the enforcement forum. In cases potentially involving enforcement proceedings in a forum that has not adopted a merger doctrine analogous to the

[89] *See, e.g.*, *Marine Mgmt, Inc. v. Seco Mgmt., Inc.*, 574 N.Y.S.2d 207, 208 (2d Dep't 1991), *aff'd*, 80 N.Y.2d 886 (1992); *Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 102 (2d Cir. 2004); *Tricon Energy Ltd. v. Vinmar Int'l, Ltd.*, 718 F.3d 448, 457 (5th Cir. 2013); *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 387 F.3d 1021, 1024 (9th Cir. 2004); *Newmont U.S.A. Ltd. v. Ins. Co. of N. Am.*, 615 F.3d 1268, 1275-77 (10th Cir. 2010); *Parsons & Whittemore Ala. Mach. & Servs. Corp. v. Yeargin Constr. Co.*, 744 F.2d 1482, 1484 (11th Cir. 1984); *Bayer CropScience AG v. Dow Agrosciences LLC*, No. 2016-1530, 2017 U.S. App. LEXIS, at *30 (Fed. Cir. Mar. 1, 2017).

doctrine prevailing in the United States, there may be good practical reasons for the arbitral tribunal to award interest until the date the award is paid.

In the Committee's view, it is generally appropriate for an arbitral tribunal to follow the same step-by-step methodology to identify the standards governing the award of post-award, prejudgment interest that an arbitral tribunal follows to determine the standards for pre-award interest. The fundamental guiding principles remain the same: respect for the intent of the parties and the compensatory purpose of interest. Not surprisingly, all of the arbitration rules that address the awarding of interest grant the arbitral tribunal discretion to award such pre-award and post-award interest as it considers appropriate.[90]

Accordingly, an arbitral tribunal, in exercising discretion with respect to post-award, prejudgment interest, may follow the guidelines set forth in subsection II.A.5 above for pre-award interest. Notwithstanding the arguably secondary purpose to encourage an award-debtor to satisfy an award promptly, the awarding of post-award, prejudgment interest at a rate higher than the rate of pre-award interest may be deemed an unenforceable penalty in some jurisdictions.[91]

C. Post-Judgment Interest

As noted above, "post-award" interest ordered by an arbitral tribunal only accrues until the date of a U.S. federal or state court judgment enforcing the award, because the debt created

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[90] *See, e.g.*, ICDR International Arbitration Rules, Art. 31(4); LCIA Arbitration Rules, Art. 26.4; SIAC Arbitration Rules, Rule 32.9. One circumstance in which the governing standards for pre-award interest and post-award, prejudgment interest would differ is where the parties' contract contains a clause specifically addressing the assessment of interest on any damages "until the date of award," rather than "until the date of payment."

[91] *See Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063, 1068-69 (N.D. Ga. 1980) (declining to enforce that portion of award assessing post-award interest at rates higher than rate of pre-award interest on ground that post-award rates were penal rather than compensatory). The Indian Arbitration and Conciliation Act (as amended in 2015) provides that, unless otherwise ordered by the arbitral tribunal, post-award interest shall accrue at a rate two percent higher than the Indian legal rate in effect on the date of the award. *See* INDIAN ARBITRATION AND CONCILIATION ACT 1996 § 31(7)(b).

by the award is deemed to merge into the judgment under the merger doctrine prevailing in the United States.[92] Interest on the judgment, or "post-judgment interest," is separately determined in accordance with the law of the enforcement forum. For U.S. federal court judgments, 28 U.S.C. Section 1961 specifies that interest shall be calculated from the date of entry of the judgment, "at a rate equal to the weekly average 1-year constant maturity Treasury yield . . . for the calendar week preceding the date of the judgment," and that it shall be compounded annually.[93]

It may be possible, under some circumstances, for parties to override the general merger rule and to specify a post-judgment interest rate, if the parties use "clear, unambiguous, and unequivocal" language indicating their intent that interest will accrue at this rate after the entry of a judgment.[94] Contractual language stating that interest will accrue at a particular rate "until the principal is paid," or other similar language, has been held not to meet this high standard.[95]

Where the parties have agreed to a broad arbitration clause, the question whether they have sufficiently contracted for their own post-judgment rate is a determination reserved for the arbitral tribunal.[96] Nevertheless, an award ordering that interest shall accrue at a particular rate "until the award is paid," or other similar language, does not override the general rule on merger.[97] Rather, the arbitral tribunal must use words that make crystal clear its intent to award

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92 *See, e.g.*, *Marine Mgmt.*, 574 N.Y.S.2d at 208; *Westinghouse*, 371 F.3d at 102; *Tricon*, 718 F.3d at 457; *Fid. Fed. Bank*, 387 F.3d at 1024.

93 *See* 28 U.S.C. § 1961(a), (b). *See also* N.Y.C.P.L.R. §§ 5003, 5004 (providing for 9% interest upon New York State court judgments).

94 *Marine Mgmt.*, 574 N.Y.S.2d at 209; *Westinghouse*, 371 F.3d at 102; *Tricon*, 718 F.3d at 457; *Fid. Fed. Bank*, 387 F.3d at 1024.

95 *Marine Mgmt.*, 574 N.Y.S.2d at 208-09; *Tricon*, 718 F.3d at 459.

96 *Tricon*, 718 F.3d at 457; *Newmont*, 615 F.3d at 1276-77.

97 *Tricon*, 718 F.3d at 459-60; *Fid. Fed. Bank*, 387 F.3d at 1022, 1024.

post-judgment interest.[98] The Committee is aware of only one case in which an arbitral tribunal's award was interpreted as awarding post-judgment interest.[99]

International Commercial Disputes Committee
Richard L. Mattiaccio, Chair

June 2017

[98] *Tricon*, 718 F.3d at 459-60.

[99] *See Newmont*, 615 F.3d at 1273, 1276-77 (tribunal's award "provided for pre- and post-judgment interest at rate of 1.5% per month").

APPENDIX A

Arbitrators' Pre-Award and Post-Award Interest Determinations in International Commercial Arbitrations Governed by New York Substantive Law

Key: Arbitral Institutions and Relevant Rules	
Arbitral Institution	**Relevant Rules on Interest**
ICC: (International Chamber of Commerce)	The ICC Arbitration Rules are silent with regard to interest.
ICDR: International Centre for Dispute Resolution	The ICDR International Arbitration Rules provide, at Article 31(4), that a tribunal "may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law(s)."
IUSCT: Iran- U.S. Claims Tribunal	The IUSCT Arbitration Rules, which are adapted from the 1976 UNCITRAL Arbitration Rules, are silent regarding interest.
LCIA: London Court of International Arbitration	The LCIA Rules provide, at Article 26.4, that "the arbitral tribunal may order that simple or compound interest shall be paid by any party on any sum awarded at such rates as the arbitral tribunal decides to be appropriate (without being bound by rates of interest practised by any state court or other legal authority)."

No.	Case	Case Details	Rate Applied	Approach to Interest
Awards Granting Interest at a Market Rate Some arbitral tribunals granted pre-award interest and/or post-award interest at a market rate, rather than at New York's statutory prejudgment interest rate. The law governing the merits in all of these arbitrations was New York law. Some of the arbitrations were seated in jurisdictions other than New York. Awards declining to apply the New York statutory prejudgment interest rate tend to contain the most thorough and searching analysis with respect to the awarding of interest.				
1	*Veolia Propreté v. Valores Ecologicos S.A. de C.V.*, ¶¶ 259–60, 279(a)-(c)	- Institution: ICC - Seat: New York	5%	The tribunal considered that a grant of pre-award interest was appropriate, and acknowledged that the CPLR rate was 9%. Nonetheless, the tribunal granted simple pre-award interest at a

No.	Case	Case Details	Rate Applied	Approach to Interest
	(available via Westlaw Arbitration Materials)	- Law: New York - Year: 2007		rate of 5%, describing this rate as "market based." The tribunal undertook a comparatively lengthy analysis of the applicability of the CPLR to pre-award interest. It concluded that while there was no doubt that New York law governed the contract at issue, "[t]his agreement by the parties does not extend to their joint agreement as to the applicability of Section 5004 of the Civil Practice Law and Rules (CPLR) of the State of New York." The tribunal found that the CPLR was meant to govern "the civil procedure in the courts of New York" and *not* arbitration proceedings taking place in New York, other than as provided for under CPLR Article 75. Accordingly, the tribunal did not feel "compelled to apply the CPLR interest rate of 9%". The tribunal considered that since the 9% interest rate under the CPLR had been fixed by statute over 20 years prior, it is a rate that "inevitably bears no relation to existing market rates." For post-award interest, the tribunal granted interest at a 5% rate, *or* the applicable rate in the jurisdiction where enforcement of the award was sought.
2	*Grove Skanska v. Lockheed International A.G.*, ICC Case No. 3903 (excerpted in David J. Branson & Richard E. Wallance, *Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach*, 28 Va. J. Int'l L. 919 (1987)	- Institution: ICC - Seat: Geneva - Law: New York - Year: 1981	Unspecified "realistic rate"	The contract at issue in this case provided that a party's failure to make payments on time would carry the penalty of interest, but did not specify any particular interest rate. The contract had an unusual governing law clause which explicitly provided that "the law of the State of New York, U.S.A. (procedural and substantive) shall govern the interpretation of the Agreement." The prevailing party contended that interest should be computed at market rates (LIBOR +1%). LIBOR had been as high as 20% during the pre-award period. The losing party argued that interest should be set at the New York statutory prejudgment rate, which at that time was 6%. The tribunal first noted that, under New York case law, the question of interest is deemed substantive. However, the tribunal declined to apply the CPLR interest provisions on the ground that

No.	Case	Case Details	Rate Applied	Approach to Interest
				they only pertained to court actions and not to international arbitrations. The tribunal noted the "truly international flavor" of the dispute and stated that "in international commercial arbitrations it is generally accepted that arbitrators are entitled and indeed expected to award a realistic rate of interest." The tribunal performed its own analysis of the CPLR, noting that the separate section dealing with arbitration (Article 75) does not cross-reference the CPLR prejudgment interest provisions, whereas it does explicitly refer to other portions of the CPLR such as the prescription rules found in Article 2. The tribunal stated that "[w]e approach §§ 5001 and 5004 on the footing that the rate of interest laid down may have the characteristic of a rule of practice to be applied in certain circumstances but not necessarily of universal application to all tribunals charged with the duty of deciding issues in accordance with the law of the State of New York." The arbitrators conceded that if there was some indication that New York law was intended to limit interest rates in all contexts, it would control. Absent some clear indicia of such an intent, however, the tribunal did not believe that New York law had such a broad application. Ultimately, the tribunal granted interest at what it called a "realistic rate," but did not give an indication of what it considered this to be. Instead, the tribunal expressed the hope and expectation that the parties would be able to agree on a mutually-acceptable, appropriate rate.
3	*Daum Global Holdings Corp. v. Ybrant Digital Ltd.*, ¶¶ 56–61 (available via Westlaw Arbitration Materials)	- Institution: ICC - Seat: Singapore - Law: New York - Year: 2013	Unspecified	In this case, the tribunal found that although New York law governed the merits of the parties' dispute, interest was governed by Singapore law, as the *lex arbitri*. Section 20(1) of the Singapore Arbitration Act 2012 expressly grants to arbitral tribunals the authority to "award simple or compound interest from such date, at such rate and with such rest as the arbitral tribunal considers appropriate. . ." The tribunal further explained that CPLR Article 50 is "concerned

No.	Case	Case Details	Rate Applied	Approach to Interest
				with New York court proceedings." The tribunal noted that it had wide discretion as to the awarding of interest, but it held that it had insufficient information to make a suitable award of interest at the time. Instead, it reserved the question for a later award.
4	*NTT Docomo, Inc. v. Ultra D.O.O*, ¶ 85 (available via Westlaw Arbitration Materials)	- Institution: ICC - Seat: New York - Law: New York - Year: 2010	U.S. Prime (3.25% - 4.25%)	The tribunal first noted that Docomo was entitled to pre-award and post-award interest at the New York statutory prejudgment interest rate pursuant to CPLR § 5001. However, it chose not to grant interest at this rate. Rather, the tribunal applied the U.S. Prime rate for pre-award interest, to run as of three separate dates for separate breaches. Similarly, the tribunal granted simple post-award interest at the Prime rate, to run until the award was paid or reduced to judgment. The tribunal did not provide a detailed explanation as to why it chose to apply the Prime rate over the New York statutory prejudgment interest rate. However, one factor that was likely relevant is that Docomo only claimed interest at the Prime rate, and Ultra made no submission in response.
5	ICC Case No. 10888 (excerpt available via ICC Dispute Resolution Library)	- Institution: ICC - Seat: Paris - Law: New York - Year: 2002	U.S. Risk-Free	The tribunal had previously granted pre-award interest at a risk-free interest rate computed by an expert. Said interest was to run from the date of breach to the date of the award. Claimant applied for correction of the award, asserting that the tribunal should have awarded interest at the 9% New York statutory prejudgment interest rate. The tribunal rejected the application, noting that an international arbitral tribunal acting under the ICC Rules and seated in Paris was not bound to apply a rule on interest that was intended for the courts of New York State. The tribunal expressed concern that employing the New York rate would hinder the enforceability of its award, and instead chose the

No.	Case	Case Details	Rate Applied	Approach to Interest
				"U.S. risk-free prejudgment interest rate," which it viewed as more reflective of the economic reality.
6	*Al Maya Trading Establishment v. Global Export Marketing Co., Ltd.*, ¶ 88 (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York - Year: 2016	U.S. Prime (3.25%)	The tribunal acknowledged that New York law prescribes 9%. However, it found that "in an international arbitration such as this, where the parties have not specifically agreed to any particular interest rate and no evidence was presented as to actual borrowing costs, we believe that the better course is to apply a commercial rate in the relevant currency." Notably, the tribunal cited to the *Grove Skanska* case in support of its proposition that "CPLR Article 50 . . . concerns court judgments." The tribunal thus granted pre-award interest at the U.S. Prime Rate.
7	*Butzel Long v. Valtech, S.A.*, ¶¶ 7.1–7.7 (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: London - *Lex Arbitri*: England - Law: France, New York - Year: 2010	5%	The sole arbitrator concluded that interest was governed by the English Arbitration Act as the *lex arbitri*. Under Section 49 of that Act, an arbitral tribunal has broad discretion to fix the rate of interest. The sole arbitrator granted pre-award interest at 5%, in accordance with English court practice. While "this rate may be in excess of the interest rate at which Valtech could borrow from a bank," it was "designed to encourage Valtech to resist the temptation to delay payment to Chesapeake of the sums due it, in effect using Chesapeake as its de facto banker." For post-award interest, the Arbitrator similarly applied a rate of 5% both for damages and costs, with a three-week grace period for the latter. This interest was to be compounded quarterly.
8	*PepsiCo, Inc. v. Iran* (available at Yearbook of Commercial Arbitration, Vol. XII, Page 253 (1987))	- Institution: IUSCT - Seat: The Hague - Law: New York - Year: 1986	10%	In this case, the tribunal applied LIBOR +3% for damages relating to most of the contractual breaches found. For one breach, the tribunal applied a 10% rate, deeming this "reasonable." Notably, neither party argued for the application of the New York statutory prejudgment interest rate, even though New York law

No.	Case	Case Details	Rate Applied	Approach to Interest
				governed the underlying contract.
Awards Granting Interest at the Contractual Rate Usually, contractual interest rates apply, by their terms, only to the late payment of money owed under the contract. However, tribunals have often applied such contractual rates to the award of damages.				
9	*Sullivan & Cromwell, LLP v. Justice*, ¶¶ 128–32 (available via Westlaw Arbitration Materials)	- Institution: AAA - Seat: New York - Law: New York - Year: 2016	8%	The parties' contract (an attorney-client fee agreement) provided that the client could elect to make certain payments due under the contract over a period of 10 calendar quarters at an annual interest rate of 8%. The tribunal held that this provision was not directly applicable to the amount due by the client and considered the contract ambiguous as to whether the parties intended the 8% contractual rate or the 9% statutory rate to apply to this amount. The tribunal rejected the law firm's request for 9% pre-award interest, noting that "[u]nder New York law, where a contract provides that interest will be paid at a specific rate until the principal has been paid, the contract rate governs, not the statutory rate, and interest is due until payment of the principal is made or until the contract is merged into a judgment." The tribunal further noted that "[a]mbiguous provisions in attorney-client fee agreements are to be construed in a manner most favorable to the client."
10	*PDV Sweeny, Inc. v. ConocoPhillips Co.*, ICC Case No. 16982, Final Award of 18 August 2014, ¶¶ 31–32 (available via Westlaw Arbitration Materials)	- Institution: ICC - Seat: New York - Law: New York, Venezuela - Year: 2014	Default Rate (4.875%)	The relevant contract in this case was unusual, in that it provided for an interest rate that was specifically to be applied to damages. It read, in relevant part: "[Seller Damages] shall bear interest at the Default Rate pursuant to Section 4.2 from such Damages Due Date until the date of payment." The tribunal had previously rendered a Partial Award in which it awarded respondent Seller Damages under the contract. The parties had agreed that pre-award interest should be granted at the Default Rate (4.875%), and that it should run from the date when Seller Damages became due until the date of the Partial Award. Respondents sought the 9% statutory prejudgment interest rate for

No.	Case	Case Details	Rate Applied	Approach to Interest
				post-award interest, arguing that the contract did not specify a rate for post-award interest. The tribunal held that this provision was tantamount to a post-award interest provision, given that it specified that interest was to run "until the date of payment." The tribunal thus awarded post-award interest at the Default Rate of 4.875%, reasoning that applying the New York statutory prejudgment interest rate would be contrary to the parties' agreement.
11	*Travis Coal Restructured Holdings v. Essar Global Fund, Ltd.*, ¶¶ 711–23 (available via Westlaw Arbitration Materials)	- Institution: ICC - Seat: New York - Law: New York - Year: 2014	10%	The contract in this case provided for a "pre-default" interest rate of 8% on the principal balance due, and a 10% "default" rate once the claimant had made a demand for payment. The contract further provided that any amount to be paid by respondent "shall bear interest at the Default Rate or the maximum rate permitted by applicable Requirements of Law, whichever is less . . . ." This contract was more in line with the norm, in that it provided that the contractual rates applied to late payments and not to damages. The tribunal construed the term "Requirements of Law" as addressing only those laws that set upper limits on interest, such as usury statutes. To hold otherwise, the tribunal reasoned, would be to needlessly abridge the parties' freedom to contractually agree on an interest rate of their choice. The tribunal further concluded that the interest rates specified under the contract were not prohibited by New York's anti-usury laws. As such, the tribunal granted simple pre-award interest at 8% up until the "default date," and 10% interest thereafter. The tribunal also granted simple post-award interest at 10%.
12	*CIMC Raffles Offshore Ltd. v. Schahin Holdings, S.A.*, ¶ 81(1)(a)-(c) (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York (?) - Year: 2012	LIBOR +2%	The contract included an interest rate of LIBOR +2%. The tribunal granted pre-award interest at the contractual rate. However, the tribunal granted post-award interest at the statutory 9% rate, which was to run beginning 30 days after the rendering of the award. The tribunal did not explain why it decided to apply different rates

No.	Case	Case Details	Rate Applied	Approach to Interest
				to pre-award and post-award interest.
13	*Thales Alenia Space France v. Globalstar, Inc.*, ¶¶ 124, 126. (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York - Year: 2012	EURIBOR + 400 basis points	The contract stipulated an interest rate of EURIBOR + 400 basis points for late payments. The tribunal granted pre-award interest at the contractual EURIBOR rate. For post-award interest, the tribunal awarded 5% simple interest to run on unpaid amounts beginning 30 days from the issuance of the award until payment in full. The tribunal noted that this 5% rate corresponded closely to the rate that the parties agreed to in the contract (EURIBOR +400 basis points).
14	*Amaprop Ltd. v. Indiabulls Financial Services Ltd.*, ¶¶ 155–56 (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York, India - Year: 2011	12%	The agreement between the parties provided that the respondent would pay 12% interest per annum on all amounts borrowed. The tribunal, invoking the contract as well as equitable considerations and arbitral practice, awarded pre-award and post-award interest at the 12% contractual rate.
15	*Agrera Investments, Ltd. v. Palant*, ¶ 68 (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York - Year: 2011	12%	The contract provided for a 12% interest rate on payments for purchase of shares, pursuant to a contractual stock purchase option. The tribunal applied the contractual rate, in light of the fact that claimant sought damages for breach of the very contractual provision that provided for the 12% interest rate.
16	*Westminster Securities Corp. v. Petrocom Energy Ltd.* (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York - Year: 2010	12%	The tribunal granted pre-award interest on damages as well as on the fees and costs awarded. The tribunal did not specify the interest rate it was applying, although claimant had requested interest at the contractual rate applicable to late payments (12%).
17	*KWV Int'l (Pty) Ltd. v. Peter Andrew LLC*, pp. 12–13	- Institution: ICDR	7%	One of the contracts at issue provided for an interest rate of 7% on overdue payments; the other was silent on interest.

No.	Case	Case Details	Rate Applied	Approach to Interest
	(available via Westlaw Arbitration Materials)	- Seat: New York - Law: New York - Year: 2008		Despite the fact that "[b]oth parties have requested pre and post award interest at the New York statutory rate of 9% per annum," the sole arbitrator concluded that the contractual interest provision reflected what the parties had deemed an appropriate rate of interest for their business arrangement and accordingly awarded interest at the 7% contractual interest rate, to run from the date of breach until the date of payment.

No.	Case	Case Details	Approach to Interest
Awards Granting Interest at the New York Statutory Prejudgment Interest Rate (Reasoned Decisions) In arbitrations where the contract between the parties was silent on the issue of interest, arbitral tribunals have often granted pre-award and/or post-award interest at the 9% New York statutory prejudgment interest rate. Those tribunals that have issued (often perfunctory) reasoned decisions on this issue have generally relied on the parties' choice of New York law as the law governing the contract.			
18	*Organizacion Ideal, S. de R.L. de C.V. v. FHR Mexico Management Company, S.A. de C.V.*, ¶¶ 484–500 (available via Westlaw Arbitration Materials	- Institution: AAA - Seat: New York - Law: New York - Year: 2017	The sole arbitrator granted pre-award interest at the 9% statutory rate. In this case, the parties apparently agreed that CPLR §§ 5001 and 5004 governed the grant of interest. The dispute related solely to whether the grant of pre-award interest on an award of lost profits would constitute double recovery and a windfall for the award creditor. The sole arbitrator considered that New York law did not bar the grant of prejudgment interest on lost profits.
19	*Digitelcom Ltd. v. Tele2 Sverige AB*, ¶ 457 (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York - Year: 2011	The tribunal granted post-award interest on costs, to run beginning 15 days from the rendering of the award. It applied the New York 9% statutory prejudgment interest rate, holding that it was appropriate given that New York law governed the contract and New York was the seat of arbitration.
20	*Kailuan Int'l Co., Ltd v. Sino East Minerals* Ltd. ¶¶ 136–37 (available via Westlaw Arbitration	- Institution: ICC - Seat: New York	The tribunal, citing the CPLR, granted pre-award interest at the statutory 9% rate, stating that "[w]e find this rate appropriate" because New York law governed the contract. The tribunal further granted post-award interest at 9%, to run beginning 30

No.	Case	Case Details	Approach to Interest
	Materials)	- Law: New York - Year: 2016	days after the rendering of the award.
21	*Logic, S.P.A. v. L-3 Communications Corp.*, ¶ 111 (available via Westlaw Arbitration Materials	- Institution: ICC - Seat: New York - Law: New York - Year: 2015	This decision is notable in that the tribunal explicitly found that it was not bound to apply the New York statutory prejudgment interest rate. However, citing to CPLR §§ 5001 and 5004, it found the 9% rate "appropriate" because it was the rate applied to New York court judgments and therefore "may be used by arbitral tribunals for guidance." The tribunal granted simple pre-award interest at 9%, running from the date of breach. It also granted 9% post-award interest until the date the award was paid.
22	*Sexton v. Karam et al.*, ¶¶ 218–222 (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York - Year: 2014	The tribunal did not grant pre-award interest, as it had rejected the claimant's claims and there were no counterclaims. However, it did grant post-award interest on its award of costs and fees. The tribunal noted that Article 28(4) of the ICDR Rules allowed it to "award such . . . post-award interest . . . as it considers appropriate, taking into consideration the contract and applicable law." The tribunal further indicated that the "New York CPLR does not set forth a post-award interest rate for international arbitrations seated in New York and does not mandate the application of its post-judgment interest rate to such arbitrations. Further, it is generally accepted in international arbitration that neither the statutory post-judgment interest rate at the seat of arbitration nor the statutory post-judgment interest rate of the law governing the contract mandatorily applies. Instead, arbitrators generally have wide discretion to determine the applicable interest rate, and the ICDR Rules reflect this principle. In exercise of its discretion, the tribunal nonetheless chose to apply the 9% CPLR rate "that would apply to a judgment rendered by a New York state court as of the date of this Final Award."
23	*Barracuda and Caratinga Leasing Co., B.V. v. Kellogg Brown & Root, LLC*, at Part K(A) (available via Westlaw Arbitration	- Institution: LCIA (UNCITRAL Rules) - Seat: New York	This arbitration, while administered by the LCIA, was conducted pursuant to the 1976 UNCITRAL Arbitration Rules, which are silent as to the award of interest. The tribunal declined to grant any pre-award interest, noting that the claimant did not request such interest and that the claimant had not incurred additional replacement

No.	Case	Case Details	Approach to Interest
	Materials)	- Law: New York - Year: 2011	costs that would warrant the grant of pre-award interest. With respect to post-award interest, the tribunal granted the New York statutory prejudgment interest rate because New York law was the "law applicable to the arbitration" and the contract. This post-award interest was applied both to damages and to the costs awarded by the tribunal.
24	*Aconcagua Investing Ltd. v. Ingaseosas International Co.*, ¶¶ 165–66 (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: Miami - Law: New York - Year: 2008	The sole arbitrator granted pre- and post-award interest at the 9% statutory prejudgment interest rate, reasoning that "no interest rate was stipulated" in the contract. The sole arbitrator determined that pre-award statutory interest would run from the date of breach as determined by the arbitrator. Post-award interest would begin accruing if payment of the amount awarded was not made within 30 days.
Awards Granting Interest at the New York Statutory Prejudgment Interest Rate (Unreasoned Decisions) Many awards that have granted interest at the 9% statutory prejudgment interest rate have done so without any analysis.			
25	*Life Insurance Fund Elite Trust v. Avon Capital, LLC* (available via Westlaw Arbitration Materials	- Institution: AAA - Seat: New York - Law: New York - Year: 2016	The sole arbitrator granted 9% pre-award interest pursuant to CPLR §§ 5001 and 5004. The sole arbitrator did not provide any reason for this award other than that the claimant was "entitled" to statutory interest.
26	*Moses & Singer LLP v. Cleveland Heart, Inc.*, ¶¶ 1–7 (available via Westlaw Arbitration Materials)	- Institution: AAA - Seat: New York - Law: New York - Year: 2015	The sole arbitrator granted 9% interest pursuant to CPLR § 5004 to each of seven sums due under seven separate invoices.
27	*Travelers v. Idas Celik Enerji Tersane ve Ulasim Sanayi A.S.* (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York	For pre-award interest, the tribunal simply awarded a lump sum amount. For post-award interest, the tribunal granted interest at the New York statutory prejudgment interest rate to run on any amounts unpaid within 30 days of issuance of the arbitral award.

No.	Case	Case Details	Approach to Interest
		- Year: 2015	
28	*Hard Way, LLC v. Roc Fashions, LLC*, p. 2 (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York - Year: 2014	The tribunal granted a fixed figure for pre-award interest ($68,219.18 interest through June 18, 2014 plus $4.28 per day through date of award). For post-award interest, the tribunal granted 9% statutory interest, to run beginning 30 days after the rendering of the award.
29	*Caldera Resources, Inc. v. Global Gold Mining, LLC*, ICDR Case No. 50 2010 00674, p. 40 (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York (?) - Year: 2014	The tribunal neither granted nor discussed pre-award interest. It granted post-award interest at New York's statutory prejudgment interest rate of 9% on most categories of damages awarded, running from the date of award.
30	*Garcia v. Ridge C.C.*, ¶¶ 66, 82 (available via Westlaw Arbitration Materials)	- Institution: ICC - Seat: New York - Law: New York - Year: 2014	The tribunal granted 9% simple pre-award and post-award interest. The pre-award interest was to run from the date of breach. The tribunal opted to grant simple interest despite a contractual provision that allowed it discretion to grand compound interest.
31	*Schulte, Roth & Zabel, LLP v. China North Docl East Petroleum Holdings Ltd.*, p. 8 (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York (?) - Year: 2014	The sole arbitrator granted pre-award interest at the 9% statutory prejudgment interest rate, to run from date of breach. There was no discussion of post-award interest.
32	*GlobeOp Financial Svcs. LLC v. Titan Capital Group*, p. 51 (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York - Year: 2014	The sole arbitrator referenced the contractual choice of New York law and noted that "under New York law, interest is normally allowed and awarded as a matter of course." He granted pre-award interest at 9%. He also granted post-award interest at the statutory prejudgment interest rate.

No.	Case	Case Details	Approach to Interest
33	*CE Int'l Resources Hldgs, LLC v. S.A. Minerals Ltd. Partnership*, ¶ 75 (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York - Year: 2013	The sole arbitrator granted 9% statutory interest, to run from the approximate date of breach. This interest was to run until award-debtor received payment in full.
34	*Toshiba Corp. v. Nat'l Film Laboratories, Inc.* (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York - Year: 2012	The sole arbitrator granted post-award interest at the statutory prejudgment interest rate on attorney's fees and costs, to begin running immediately after the rendering of the award. There was no mention of pre-award interest.
35	*Colt Int'l Ltd. v. Altpower, Inc.* (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York - Year: 2012	The sole arbitrator granted pre-award interest at the statutory prejudgment interest rate, to run from a date fixed after the commencement of the arbitration. There was no mention of post-award interest.
36	*Oakley Fertilizer, Inc. v. Hagrpota For Trading & Distribution, Ltd.*, ¶ 136 (available via Westlaw Arbitration Materials)	- Institution: ICC - Seat: New York - Law: New York - Year: 2011	The tribunal granted simple 9% statutory interest, running from the date of breach. It made no express finding with respect to post-award interest.
37	*Amri Rensselaer, Inc. v. Borregaard Industries Ltd.*, ¶ 3 (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York - Year: 2010	The sole arbitrator cited to the CPLR, and granted pre-award interest at the statutory prejudgment interest rate. The interest was to run from the date on which claimant received notice of the termination of the contract at issue. The sole arbitrator also granted post-award statutory interest at 9%, to run until date of payment.
38	*A.G.k. SARL v. A.M. Todd Co.*, ¶ 17 (available via Westlaw Arbitration	- Institution: ICDR	The tribunal granted pre-award interest at the 9% statutory prejudgment interest rate. The interest was to run from the date the arbitration commenced, given the extreme

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	Materials)	- Seat: New York - Law: New York - Year: 2010	longevity of the dispute. The tribunal also granted post-award interest at the 9% statutory prejudgment interest rate, to run until payment in full.
39	*Lizton Trading, Ltd. v. ATM Lenders, LLC*, ¶¶ 190–91, 194 (available via Westlaw Arbitration Materials)	- Institution: LCIA - Seat: London - Law: New York - Year: 2008	With respect to pre-award interest, the tribunal stated that it would exercise "its discretion to apply the New York rate of interest of 9% to the principal sums awarded." This was to be a simple interest rate, running from the date of breach. Similarly, for post-award interest, the tribunal granted simple interest at New York's statutory prejudgment interest rate. This was uncontested. The tribunal awarded interest at a rate of LIBOR +2% on the costs of the arbitration if not paid within 14 days.
40	*Navneet Publications India Ltd. v. American Scholar, Inc.*, ¶¶ 5.2-5.3 (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: Unclear - Year: 2008	The sole arbitrator granted the claimant 9% pre-award interest running from the date of breach, and 9% post-award interest on any unpaid amounts to begin running 30 days from the date the award was rendered.
41	*Colonial Oil Industries, Inc. v. Masefield America, Inc.*, ¶ 5.3 (available via Westlaw Arbitration Materials)	- Institution: ICC - Seat: New York - Law: New York - Year: 2007	The tribunal granted both pre-award and post-award interest at the 9% statutory prejudgment interest rate.
42	*Lubiam Modo per l'Uomo SPA v. Chesa Int'l Ltd.*, ¶ 19 (available via Westlaw Arbitration Materials)	- Institution: ICDR - Seat: New York - Law: New York - Year: 2007	The tribunal granted pre-award interest "at the legal rate of interest permitted under the law of New York ." The interest was to run until the date of payment.
43	*Esso Exploration and Prod. Chad Inc. v.*	- Institution: ICC	In this case, the applicability of the 9% statutory prejudgment interest rate was uncontested. The sole arbitrator granted pre-award interest, to run from "an

No.	Case	Case Details	Approach to Interest
	Taylors Int'l Svcs. Ltd., ¶¶ 58, 60 (available via Westlaw Arbitration Materials)	- Seat: New York - Law: New York - Year: 2006	appropriate midpoint of the various dates on which Esso Chad incurred the losses suffered by it." Post-award interest at the 9% rate was granted on both damages and the costs and fees awarded by the tribunal. It was to run starting 1 month and 1 week after the rendering of the award.
44	*Capital India Power Mauritius I v. Maharashtra Power Dev't Corp. Ltd.,* ICC Award No. 12913/MS, pp. 34–36 (available via italaw.com)	- Institution: ICC - Seat: New York - Law: New York - Year: 2005	The tribunal granted 9% simple pre-award interest, to run from the date of the destruction of claimant's equity in an investment project in breach of a Shareholders Agreement. The tribunal invoked its discretion to decline to grant pre-award interest on arbitration costs. The tribunal also granted 9% simple post-award interest.
45	*Chemical Overseas Hldgs, Inc. v. Uruguay*, ¶¶ 64–65, 68(a) and 68(h) (available via Westlaw Arbitration Materials)	- Institution: ICC - Seat: New York - Law: New York - Year: 2004	Invoking the CPLR, the tribunal held that claimants were entitled to simple 9% interest "from the earliest ascertainable date the cause of action existed." The tribunal also granted simple post-award interest at the statutory 9% rate.
46	*ICC Case No. 9839*, ¶ 63 (excerpt available in 2004 Y.B. Com. Arb. 66)	- Institution: ICC - Seat: Unclear - Law: New York - Year: 1999	The tribunal held that, under CPLR § 5001, the petitioner was owed 9% interest from the earliest possible date its cause of action existed. This 9% interest was to run until petitioner received full payment of the sum awarded.
47	*White Westinghouse Int'l Co. v. Bank Sepah*, IUSCT Case No. 14 (7-14-3), (summarized in 1983 Y.B. Com. Arb. 320)	- Institution: IUSCT - Seat: The Hague - Law: Unclear - Year: 1982	In this case, a check issued by the respondent to claimant remained unpaid due to a presidential order of 14 November 1979, freezing respondent's U.S. assets. A consent judgment was filed in the New York Count Clerk's office on 28 February 1980. Before the Iran-U.S. Claims Tribunal, the claimant sought the principal amount of this judgment plus interest running from 14 November 1979. For its part, the respondent claimed that no interest should be payable on the principal amount because its funds in the U.S. were frozen. The tribunal noted evidence that respondent's U.S. funds had yielded interest during the period in question, and therefore respondent could not be exempted from paying New York statutory interest.

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			The tribunal applied §§ 5003 and 5004 of the CPLR in its analysis. The application of § 5003, which deals with post-judgment interest, was a product of the unusual circumstances of this case, *i.e.* that the tribunal was dealing with an award that followed a New York state court judgment. The tribunal granted pre-award interest at 6% up to and including 24 June 1981. After that date, pre-award interest was raised to 9% to match the increase in the CPLR rate. This interest was to run from the date of the consent judgment. No post-award interest was granted.

APPENDIX B

New York Federal and State Court Decisions Reviewing Arbitrators' Awards of Interest

No.	Case Citation	Approach to Interest
	Federal Court Decisions Reviewing Arbitrators' Interest Awards	
	Federal courts have consistently held that the question of whether to grant pre-award interest is for the arbitrators to determine and that courts are powerless to award such interest if the arbitrators have not done so. By contrast, federal courts have discretion to grant post-award, prejudgment interest if the arbitral tribunal has not granted such interest in its award. Where arbitral tribunals have granted post-award interest, federal courts will confirm the award of interest for the post-award, prejudgment period. There appears to be no difference between the federal courts' approach to domestic and international arbitral awards.	
1	*Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150 (2d Cir. 1984)	In this New York Convention case, the lower court had confirmed the tribunal's award without granting post-award, prejudgment interest, stating that it did not have jurisdiction to "go beyond confirmation" of the award. On appeal, the Second Circuit held that whether to grant post-award, prejudgment interest in cases arising under federal law has, in absence of statutory directive, been placed in the "sound discretion" of the district courts. The court noted that there is a presumption in favor of the award of prejudgment interest, and that the facts did not indicate that award of prejudgment interest would be inappropriate in this case. The case was thus remanded to the district court for computation of post-award, prejudgment interest at a "appropriate rate."
2	*Manios v. Zachariou*, No. 14CV4331-LTS-DCF, 2015 U.S. Dist. LEXIS 42537 (S.D.N.Y. 2015)	In this proceeding to vacate an international arbitral award under Chapter 2 of the Federal Arbitration Act ("FAA"), the award-creditor argued that the arbitrators had manifestly disregarded the law by granting pre-award interest on a distribution of assets in an estate settlement case. The award-creditor contended that the terms of CPLR § 5001 only allow for interest upon "a sum awarded." The court rejected the award-creditor's "manifest disregard" claim, holding that where parties agree to submit a dispute to AAA arbitration (such as in the instant case), the AAA Commercial Rules are incorporated into the underlying agreement. Because the AAA Rules grant arbitrators the authority to award interest at such rate and from such date as they may deem appropriate, the tribunal did not manifestly exceed its authority by granting pre-award interest in this case. Accordingly, the award-debtor was not entitled to vacatur of the arbitral tribunal's award under the FAA.
3	*Sayigh v. Pier 59 Studios*, No. 11-CV-1453-RA, 2015 U.S. Dist. LEXIS 27139, at *37 (S.D.N.Y.	In this proceeding to modify or vacate an arbitral award, the award-creditor argued that the arbitrator manifestly disregarded New York law by not granting her pre-award interest.

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	Mar. 5, 2015)	The court rejected this argument, first noting that CPLR § 5001 (providing that interest shall be recovered on a sum awarded for breach of contract) was inapplicable, as the underlying dispute concerned an alleged act of employment discrimination. The court further held that, "where an arbitrator could have awarded pre-award prejudgment interest but did not, the court may not do so when entering judgment on an arbitration award." The court, applying CPLR § 5002, granted "post-award prejudgment interest at an annual rate of 9%" as well as post-judgment interest at the rate provided for in 28 U.S.C. § 1961(a).
4	*Local Union No. 1 of the United Assn. of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. v. Bass Plumbing & Heating Corp.*, 2014 U.S. Dist. LEXIS 183085 (E.D.N.Y. Oct. 28, 2014)	In this proceeding to confirm a domestic arbitral award, the arbitral tribunal had not granted post-award, prejudgment interest. Petitioner sought, along with confirmation of its award, to obtain interest from the date of the award. Magistrate judge Viktor Pohorelsky found that where an award is silent as to prejudgment interest, a court is not entitled to award such interest. He therefore recommended that Petitioner's request for interest be denied. This recommendation was adopted, and a judgment was entered in *Local Union No. 1 of the United Assn. of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. v. Bass Plumbing & Heating Corp.*, 2015 U.S. Dist. LEXIS 37932 (E.D.N.Y. Mar. 25, 2015). This judgment is at odds with the weight of New York federal case law, which provides that courts have discretion to grant post-award, prejudgment interest where the arbitral award is silent as to such interest. The outcome of this case appears to have resulted from the Magistrate Judge's misreading of certain precedents (*see Shamah v. Schweiger* and *Moran v. Arcano*, below) which had referred to pre-award interest as "prejudgment" interest.
5	*PremiereTrade Forex, LLC v. FXDirectDealer, LLC*, No. 12 CIV. 7006 PAC, 2013 WL 2111286 (S.D.N.Y. May 16, 2013)	In this proceeding to confirm a domestic arbitral award, the tribunal in the underlying arbitration had granted post-award interest at the New York statutory prejudgment interest rate of 9%, to begin running 30 days after the award. During the confirmation proceeding, the award-creditor sought a separate, additional award of prejudgment interest at 9% per annum, on top of the arbitrators' award of post-award interest. The court denied the award-creditor's request for duplicative post-award, prejudgment interest, noting that "confirmation of the award will include post-award interest at a rate of 9% specified in the arbitrators' opinion". The court further noted that, to the extent the award-creditor's request for prejudgment interest referred to pre-award interest, "the Court will not grant interest that the arbitrators in this action explicitly denied."

No.	Case Citation	Approach to Interest
6	*Ganfer & Shore, LLP v. Witham*, 2011 U.S. Dist. LEXIS 2622 (S.D.N.Y. 2011)	In this proceeding to confirm a domestic arbitral award, the court held that where an arbitral tribunal does not grant pre-award interest, a court cannot award such interest on a motion to confirm the arbitration award. By contrast, the court held that it was required to grant post-award, prejudgment interest "absent circumstances warranting the contrary" and that post-judgment interest was similarly "mandatory."
7	*Finger Lakes Bottling Co. v. Coors Brewing Co.*, 748 F.Supp.2d 286, 292-93 (S.D.N.Y. 2010)	In this proceeding to confirm a domestic arbitral award, the court first noted that, where arbitrators have authority to grant pre-award interest, courts cannot grant such interest in post-award proceedings. However, in this case the issue of interest was beyond the scope of the parties' narrowly-worded and limited arbitration agreement. New York law governed the granting of pre-award interest, because this was a diversity case and New York law governed the arbitration agreement. The award-creditor was not entitled to interest at the 9% statutory prejudgment interest rate because it did not assert a claim for breach of contract. Rather, because the proceeding was one of an equitable nature, the court had discretion to grant pre-award interest under CPLR § 5001. The court ultimately granted interest at the treasury bill rate, reasoning that the New York statutory prejudgment interest rate was not in line with actual market conditions.
8	*Petrie v. Clark Moving & Storage, Inc.*, No. 09-CV-06495, 2010 U.S. Dist. LEXIS 48460 (W.D.N.Y. 2010)	In this proceeding to confirm a domestic arbitral award, the award-creditor requested that the court grant pre-award interest at the 9% rate specified in CPLR § 5004. The court rejected the award-creditor's claim, noting that arbitrators may provide for pre-award interest as part of their award, but if the award is silent on pre-award interest courts may not grant it. Because the "court is not entitled to award an amount relating to such prejudgment interest . . . the parties must determine the applicable interest rate and calculate the amount due."
9	*Coastal Caisson Corp. v. E.E. Cruz/NAB/Frontier-Kemper*, 2007 U.S. Dist. LEXIS 58114 (S.D.N.Y. Aug. 10, 2007)	In this proceeding to confirm a domestic arbitral award, the award-creditor moved to modify the award to add prejudgment interest. The award-creditor sought 9% prejudgment interest pursuant to the CPLR, from the date the contract balance was due. The arbitral tribunal had held that "[a]lthough prejudgment interest may be required by the CPLR, we find that we have discretion under the applicable rules of the American Arbitration Association not to award pre-award interest . . . . Given the vast uncertainties concerning the amounts due and the reasons for those uncertainties . . . we think it is highly inappropriate to award interest and we decline to do so." In denying the award-creditor's motion to modify the award, the court noted that "the arbitrators did not

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		disregard law in exercising their discretion to deny [award-creditor] prejudgment interest." The court noted that the parties had selected the American Arbitration Association Construction Industry Rules and New York law to govern their dispute. The former, at Rule 44(d), grant arbitrators discretion to award such interest as they may deem appropriate. The latter, at CPLR § 5001, provides that "interest may be required by law." Ultimately, the court concluded that "[g]iven the tension between Rule 44(d) and Section 5001, it is appropriate to refrain from vacating an arbitral award and to defer to the arbitrators' judgment. This case was partially reversed on unrelated grounds in *E.E. Cruz v. Coastal Caisson Corp.*, 346 Fed. Appx. 717 (2d Cir. 2009).
10	*P.M.I. Trading Ltd. v. Farstad Oil, Inc.*, 2001 U.S. Dist. LEXIS 227 (S.D.N.Y. 2001)	In this New York Convention case, the court, citing *Waterside Ocean Nav.*, held that, absent persuasive evidence to the contrary, post-award, prejudgment interest is available for judgments rendered under the New York Convention and is presumed to be appropriate. The court held that "[t]he mere fact that arbitrators chose not to award post-award, prejudgment interest does not control this analysis." It granted post-award, prejudgment interest, as well as post-judgment interest, at the federal post-judgment rate specified by 28 U.S.C. § 1961(a).
11	*Shamah v. Schweiger*, 21 F.Supp.2d 208 (E.D.N.Y. 1998)	In this proceeding to confirm a domestic arbitral award, the award-creditor moved to modify the amount of the award to include pre-award interest at the New York statutory prejudgment interest rate of 9%. It asserted that the tribunal's grant of 6% interest was a "material miscalculation" that necessitated modification. The court denied the motion, noting that courts "have rejected motions to vacate or modify arbitration awards which have failed to provide prejudgment interest." The court also cited *Moran v. Arcano* for the proposition that arbitrators may grant pre-award interest, but when their award is silent with regard to such interest, courts may not grant it in the arbitrators' stead. The court considered that, in awarding 6% interest, the tribunal could have been using the federal post-judgment interest rate. Accordingly, there was no evidence that the pre-award interest component of the arbitral award was miscalculated. The court denied the award-creditor's request for modification.
12	*Nicoletti v. E.F. Hutton & Co.*, 761 F.Supp. 312 (S.D.N.Y. 1991)	The award-creditor moved to modify a domestic arbitral award on the ground that the tribunal had manifestly disregarded the law in failing to grant him pre-award interest under CPLR § 5001. The court denied the motion, noting that the award-creditor had cited to no case in which an arbitration

No.	Case Citation	Approach to Interest
		award was vacated or modified for failure to award prejudgment interest. Although the award-creditor's claim sounded in contract, the arbitrators may have determined that his entitlement was equitable rather than contractual, and that interest was therefore discretionary under CPLR § 5001(a).
13	*Jamaica Commodity Trading Co. v. Connell Rice & Sugar Co.*, No. 87 CIV. 6369 (JMC), 1991 WL 123962 (S.D.N.Y. July 3, 1991)	In this New York Convention enforcement proceeding, the arbitral tribunal had granted post-award, prejudgment interest "in the amount of 10% per year from the date of the award until the award is fully paid or reduced to judgment." In addition to confirming the principal amount of the award, the court expressly noted that it was confirming the arbitrators' award of prejudgment interest pursuant to *Waterside Ocean Nav.*
14	*Moran v. Arcano*, 1990 U.S. Dist. LEXIS 9349 (S.D.N.Y. 1990)	In this proceeding to confirm a domestic arbitral award, the award-creditor claimed pre-award and post-award, prejudgment interest. The court held that whether interest is taxed on a claim prior to the entry of an arbitration award (*i.e.*, pre-award interest) is within the discretion of the arbitrators (although neither of the two cases that it cited in support of this proposition so held). The court held that if the award is silent as to pre-award interest, a court is not entitled to grant it. By contrast, it held that "the award of post-award prejudgment interest is a matter left with the district court."
15	*Brandeis Intsel, Ltd. v. Calabrian Chemicals Corp.*, 656 F.Supp. 160 (S.D.N.Y. 1987)	In this proceeding to confirm an international arbitral award under the New York Convention, the award-debtor cross-moved for vacatur, *inter alia* on the ground that the tribunal's award of 11.5% pre-award interest was penal and therefore contrary to U.S public policy. The court denied the cross-motion, holding that the award-debtor had not shown that the arbitrators' chosen rate of 11.25% per annum was penal as a matter of English law, which governed the parties' contract. Moreover, the award-debtor had not pointed to any other expression of accepted public policy which would weigh against confirming the arbitrators' award of interest. 28 U.S.C. § 1961(a), which refers to post-judgment interest, was inapposite.
16	*UCO Terminals, Inc. v. Apex Oil Co.*, 583 F. Supp. 1213 (S.D.N.Y. 1984)	In this proceeding to confirm a domestic arbitral award, the award-debtor cross-moved to vacate the award, in part on the ground that the tribunal's calculation of post-award interest was incorrect and unauthorized. The tribunal had granted post-award interest at a rate of 12%, to run beginning 30 days after the award was rendered. The court rejected the award-debtor's argument that this grant of interest was unauthorized, noting that "[p]ost-award interest is an entirely rational arrangement established by the arbitrators to compensate [award creditor] for its loss. . . . Absent some express limitation on such an award, the Court can discern

No.	Case Citation	Approach to Interest
		no disregard of applicable law or of the [underlying contract] here." The court further rejected the award-debtor's argument that the annual rate of 12% established in the arbitral award should be set aside, as there was no indication that the tribunal disregarded the law in granting such a rate of interest.
17	*A/S Siljestad v. Hideca Trading, Inc.*, 541 F. Supp. 58 (S.D.N.Y. 1981)	In this confirmation proceeding, the award-debtor moved to vacate the arbitral tribunal's grant of pre-award interest at 14%, as said interest was omitted from the arbitral award itself and was only later added as an "Appendix B." The award-debtor argued that this amounted to an impermissible reconsideration of the tribunal's ruling. The court rejected the award-debtor's claim, holding that the tribunal had not considered the issue of interest in its initial award, and therefore retained discretion to subsequently add pre-award interest in the form of Appendix B. The grant of interest was thus confirmed. The court, applying federal maritime law, granted post-award, prejudgment interest, also at 14%.
18	*United States use of Groisser & Schlager Iron Works, Inc. v. Walsh*, 240 F. Supp. 1019 (N.D.N.Y. 1965)	In this case, the award-debtor moved to vacate a prior judgment confirming an arbitral award. The prior judgment had granted pre-award interest to the award-creditor notwithstanding that (a) the tribunal had not granted pre-award interest, and (b) the issue of interest had not been placed before the arbitral tribunal. The court held that, under CPLR §§ 5001, 5002 and 5003, the award-creditor was entitled to interest as a matter of right. The court noted that while the issue of interest was not submitted to the tribunal in the demand for arbitration, the parties specifically agreed in their arbitration agreement to arbitrate their dispute "as to balance due, together with appropriate interest." Further, the award-creditor had demanded interest in the complaint it submitted to the district court. Thus, even though the arbitral tribunal had not granted pre-award interest, the court rejected the award-debtor's argument that the court's grant of pre-award interest was improper and merited vacatur or modification of the prior judgment. N.B. This case appears at odds with the weight of subsequent case law, which unambiguously holds that courts may not grant pre-award interest if the arbitrators have not done so.
New York State Court Decisions Reviewing Arbitrators' Interest Awards New York state case law mirrors federal case law with regard to the review of arbitrators' awards of interest.		

No.	Case Citation	Approach to Interest
19	*Dermigny v. Harper*, 6 N.Y.S.3d 561 (2d Dep't 2015)	In this appeal, the award-creditor sought to reinstate a vacated lower court judgment that had confirmed an arbitral award and granted pre-award interest. The lower court had vacated its own judgment on the ground that the award-creditor had misrepresented to the clerk of the court that he was entitled to pre-award interest. The Appellate Division noted that, because the arbitration award did not include a provision granting pre-award interest to the award-creditor, the court was without power to grant such pre-award interest. Post-award, prejudgment interest and post-judgment interest were granted pursuant to CPLR 5002 and 5003, respectively.
20	*Esrey v. Ernst & Young, LLP*, 133 A.D.3d 539 (1st Dep't 2015)	In this case, the award-creditors appealed from a lower court ruling denying a motion to vacate an arbitral award on the ground that the tribunal had manifestly disregarded the law by granting prejudgment interest at a rate lower than the CPLR rate. The First Department affirmed the trial court's ruling, noting that (a) the parties' agreement limited the prevailing party's damages to the actual damages suffered and (b) the tribunal had found that the award-creditors were "fully compensated" by reduced prejudgment interest.
21	*Peters v. Collazo Florentino & Keil LLP*, 117 A.D.3d 432 (1st Dep't 2014)	In this case involving a domestic arbitral award, the award-creditor appealed from a decision confirming an arbitral award which granted prejudgment interest at a rate of 2% per annum. The First Department, reviewing the award under CPLR Article 75, denied the appeal and held that (a) the award-creditor failed to timely move to modify the award to raise the prejudgment interest rate to 9%, and (b) in any event, the arbitrator properly set the prejudgment interest rate at 2%. It is not entirely clear why the court felt that the 2% rate was proper. The court cited to CPLR § 5001(a), suggesting that it may have viewed the dispute as one of an equitable nature rather than for breach of contract. CPLR § 5001(a) provides that "in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be *in the court's discretion*."
22	*Kingdon Capital Mgt., LLC v. Kaufman*, 110 A.D.3d 648 (1st Dep't 2013)	In this case involving a domestic arbitral award, the award-debtor appealed from the lower court's judgment granting the award-creditor the sum and prejudgment interest rate set by the award. The First Department unanimously affirmed the lower court judgment, noting that there was no basis for modifying the rate of prejudgment interest awarded.
23	*Levin & Glasser, P.C. v. Kenmore Property, LLC*,	In this case involving a domestic arbitral award, the award-debtor appealed from the lower court's

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	896 N.Y.S.2d 311 (1st Dep't 2010)	judgment granting the award-creditor pre-award interest pursuant to CPLR § 5001. The Appellate Division vacated the lower court's judgment, holding that the lower court had erred in granting pre-award interest. It reasoned that, in contract disputes before an arbitral tribunal, the question of whether interest from the date of breach of contract should be allowed in the arbitral award is a mixed question of law and fact that is for the arbitrator to determine. Because the award-creditor could have sought pre-award interest from the arbitral tribunal, it was now barred from seeking such interest from the court.
24	*Grobman v. Chernoff*, 881 N.Y.S.2d 458 (2d Dep't 2009)	The award-creditor appealed from a lower court order that disallowed pre-award interest. The circumstances of this case were unusual, in that the arbitration was focused solely on the issue of damages after the award-debtor's liability had been determined in a prior jury trial. The Appellate Division observed that in a personal injury action in which the trial is bifurcated, interest on damages runs from the date liability is determined. Therefore, the court held that the award-creditor was entitled to "pre-award" interest, *i.e.* interest running from the date of the jury verdict that preceded the arbitration. Thus, the Appellate Division granted the award-creditor interest on her personal injury award from the date the award-debtor's liability was determined, notwithstanding the tribunal's silence with regard to pre-award interest. This decision was affirmed by the Court of Appeals in *Grobman v Chernoff*, 15 N.Y.3d 525 (2010).
25	*West Side Lofts, Ltd. v. Sentry Contr., Inc.*, 300 A.D.2d 130 (1st Dep't 2002)	In this case involving a domestic arbitral award, the award-debtor appealed from a lower court ruling confirming an arbitral award, including pre-award interest. The First Department affirmed the lower court's judgment. It held that, [g]iven a broad arbitration clause and the absence of a contractual provision specifically prohibiting preaward interest, the award of preaward interest cannot be successfully challenged as beyond the arbitrator's power simply because the parties' contract contains no provision therefor and petitioner made no such demand in the arbitration."
26	*Rothermel v. Fidelity & Guarantee Ins. Underwriters Inc.*, 721 N.Y.S.2d 565 (3d Dep't 2001)	In this case involving a domestic arbitral award, the award-creditor appealed from a lower court ruling denying his request for pre-award interest. The arbitral tribunal had also refused to grant pre-award interest. The Appellate Division affirmed the lower court's ruling, holding that the question as to whether pre-award interest is to be awarded is for the arbitrator to determine and, if the arbitrator does not award any pre-award interest, the court is powerless to do so.

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		The court added that even if the arbitrator had committed an error of fact or law in denying the award-creditor pre-award interest, the lower court would have lacked the authority to correct such an error.
27	*Excelsior 57th Corp. v. Kern*, 283 A.D.2d 209 (1st Dep't 2001)	The award-creditor appealed from a lower court judgment vacating so much of an arbitration award as granted pre-award interest. The Appellate Division affirmed the lower court, holding that the arbitrators exceeded their authority in awarding pre-award interest on the back rent they found due, because (a) the parties' narrow arbitration clause only covered specifically-mentioned issues of fact and (b) the parties did not agree to submit the issue of interest to the arbitrators. The court also declined to use "judicial discretion" to award interest under CPLR 5001, criticizing the award-debtor's conduct in the underlying arbitration.
28	*State Farm Mut. Auto. Ins. Co. v. Cordes*, 662 N.Y.S.2d 140 (2d Dep't 1997)	In this appeal, the Second Department reversed a lower court order that granted pre-award interest, in spite of the arbitral tribunal's failure to do so. The Second Department noted simply that "[t]he court lacked the power to award pre-arbitration award interest."
29	*Aetna Casualty and Surety Co. v. Rosen*, 650 N.Y.S.2d 29 (2d Dep't 1996)	In this appeal from a lower court judgment confirming an arbitral award, the Appellate Division modified the lower court's ruling so as to omit the court's award of pre-award interest. The Appellate Division explained that the lower court was powerless to grant pre-award interest (as presumably the tribunal had not provided for such interest). Rather, upon confirmation of an arbitrator's award, interest should be calculated from the date of the award.
30	*Sedlis v. Gertler*, 554 N.Y.S.2d 615 (1st Dep't 1990)	In this appeal from a lower court judgment confirming a domestic arbitral award, the tribunal had granted pre-award interest and post-award interest at a rate of 12%. The award-creditor requested that the court vacate the award or modify the interest the interest portion of the award. The parties' contract provided that late payments would bear interest at the rate specified or at the "legal rate" at the award-creditor's place of business, which was New York. The First Department held that, as no interest rate was specified in the parties' contract, prejudgment interest should be calculated at the rate of 6% per annum set by General Obligations Law § 5-501(1). In modifying the award, the First Department relied on CPLR § 7511(c)(1), which provides that the court shall modify an arbitral award if "there was a miscalculation of figures . . . in the award." This appears to have been in error, given that CPLR § 7511(c)(1) only authorizes modification of computational errors and not reversal of substantive rulings. The arbitrators' award of interest involved a decision on a substantive

No.	Case Citation	Approach to Interest
		issue, and not a mere miscalculation.
31	*Gruberg v. Cortrell Group, Inc.*, 143 A.D.2d 39 (1st Dep't 1988)	In this case involving a domestic arbitral award, the award-creditor appealed from a lower court judgment that had denied pre-award interest. The Appellate Division upheld the lower court's decision to deny pre-award interest, but modified the date from which post-award interest was to run to correct a computational error by the arbitrator. The Appellate Division noted that in a contract dispute brought before an arbitrator, the question of whether interest from the date of breach of contract should be allowed is a mixed question of law and fact for the arbitrator to determine. Further, in a motion under CPLR § 7510 to confirm an arbitral award, the arbitrator's award is deemed conclusive as to all matters of law and fact, unless some ground for modification or vacatur exists under CPLR § 7511. In this case, since the tribunal's award was silent as to pre-award interest, the lower court did not have the authority to grant such interest.
32	*Rosenblum v. Aetna Casualty & Surety Co.*, 439 N.Y.S.2d 482 (3d Dep't 1981)	The award-creditor appealed from a lower court judgment confirming an arbitral award that omitted pre-award interest. The award-creditor had moved under CPLR § 7511 to modify the award to include pre-award interest, but this motion was denied. The Appellate Division considered it "well settled" that arbitrators are empowered to fashion awards to achieve just results and "may shape remedies with a flexibility at least as unrestrained as that employed by a chancellor in equity." Accordingly, the award should not be disturbed.
33	*Penco Fabrics, Inc. v. Bogopulsky, Inc.*, 146 N.Y.S.2d 514 (1st Dep't 1955)	In this proceeding involving a domestic arbitral award, the Appellate Division held that the question of whether interest is to be allowed from the date of breach was for the arbitrators to determine. The court was powerless to award interest from the date of breach. The mere fact that the award was silent on interest did not mean that the arbitrators did not consider this question. Additionally, the court noted that provisions of law applicable to judicial actions and proceedings do not necessarily apply to arbitrations. Parties who submit their disputes to arbitration forego these provisions and leave all questions of law and fact to the arbitrators. The right to interest involves questions of law and fact that were within the arbitrators' purview.
34	*Taborsky v. Bayes*, No. 09-9562, 2016 N.Y. Misc. LEXIS 592 (Sup. Ct. Suffolk Co. Feb. 23, 2016)	In this proceeding to confirm an arbitral award pursuant to CPLR Article 75, the award-creditor moved to modify the award to add pre-award interest, pursuant to CPLR § 5001. Citing *Dermigny* and *Rothermel*, the court noted that the arbitration award "did not include a provision

No.	Case Citation	Approach to Interest
		granting the [award-creditor] pre-arbitration award interest; consequently, the court is without power to award such interest."
35	*Chamois v. Countrywide Home Loans, Inc*., 863 N.Y.S.2d 897 (Sup. Ct., Orange Co., 2008)	In this proceeding to confirm a domestic arbitral award in a labor dispute, the award-creditors claimed that they were entitled to pre-award interest on their back pay award as a matter of law, despite the fact that the tribunal had not granted such interest. The court, applying the review standards contained within CPLR Article 75 and the Federal Arbitration Act, concluded that "judicial review of arbitration awards is extremely limited." In particular, the court noted that arbitrators may provide for pre-award interest as part of their award, and that courts have rejected motions to vacate or modify arbitration awards which have failed to provide pre-award interest. It also noted that where an award is silent on pre-award interest, a court may not grant it. Thus, because pre-award interest was not mentioned in the arbitral award, the award-creditors' request was denied.
36	*DeMartini v. Bertram Garden Apartments*, 138 N.Y.S.2d 659 (Sup. Ct. Queens Co. 1955)	In this case involving a domestic arbitration, the arbitral tribunal had rendered an award, a judgment had been entered thereon, and the award-debtor had made payment in full. Nevertheless, the award-creditor contended that he was still entitled to continue a proceeding to enforce a mechanic's lien for pre-award interest on the arbitral award. The arbitrator's award had not provided for pre-award interest. The court noted that "interest was an incident of the award and arose out of the contract between the parties" because all matters arising out of that contract were within the scope of the parties' arbitration agreement. It followed that the arbitral award and the judgment entered thereon stood as a bar to enforcement of the mechanic's lien. The court thus granted summary judgment dismissing the award-creditor's attempt to enforce the mechanic's lien.

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A Call To Cyberarms: The International Arbitrator's Duty To Avoid Digital Intrusion

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A CALL TO CYBERARMS: THE INTERNATIONAL ARBITRATOR'S DUTY TO AVOID DIGITAL INTRUSION

Stephanie Cohen[*] *& Mark Morril*[**]

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I. INTRODUCTION

International commercial arbitration rests on certain fundamental attributes that cut across the different rule sets and cultural and legal systems in which it operates. There is common ground that any international commercial arbitration regime must encompass integrity and fairness, uphold the legitimate expectations of commercial parties, and respect essential elements of due process such as equal treatment of the parties, a fair opportunity for each party to present its case and neutral adjudicatory proceedings, untainted by illegal conduct.[1]

The system and its integrity depend substantially on the role of the arbitrator. As Professor Rogers has stated: [T]he authoritative nature of adjudicatory outcomes, as well as their existence within a larger system, imposes on adjudicators an obligation to preserve the integrity and legitimacy of the adjudicatory system in which they operate.[2] Cyberbreaches of the arbitral process, including intrusion

1. *See e.g.*, UNCITRAL MODEL LAW ON INT'L COM. ARB., art. 18 (1985) [hereinafter UNCITRAL Model Law], ("The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(b) (1958) (party inability to present case is grounds to refuse recognition and enforcement of an award); ENGLISH ARBITRATION ACT 1, § 33 (1996) (general duty of tribunal); LONDON CT. OF INT'L ARB., LCIA ARBITRATION RULES (2014) [hereinafter LCIA RULES] art. 14.4 (conduct of proceedings); William Park, *Arbitrators and Accuracy*, 1 J. OF INT'L DISP. SETTLEMENT 43, note 89 (2010) (arbitrators rejecting complicity with money laundering, fake arbitrations, and other illicit schemes.); LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 485 (Lawrence W. Newman & Richard D. Hill eds., 3d ed., 2014); Klaus Peter Berger & J. Ole Jensen, *Due Process Paranoia and the Procedural Judgment Rule: a Safe Harbour for Procedural Management Decisions by International Arbitrators*, 32 (3) ARB. INT'L 415 (2016).

2. CATHERINE ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 283 (2014).

into arbitration-related data and transmissions, pose a direct and serious threat to the integrity and legitimacy of the process.[3] This article posits that the arbitrator, as the presiding actor, has an important, front-line duty to avoid intrusion into the process.

The focus here on cyberintrusion into the arbitral process does not imply that international arbitration is uniquely vulnerable to data breaches, but only that international arbitration proceedings are not immune to increasingly pervasive cyberattacks against corporations, law firms, government agencies and officials and other custodians of large electronic data sets of sensitive information.[4] Similarly, our focus on the role and responsibilities of the arbitrator should not obscure that cybersecurity is a shared responsibility and that other actors have independent obligations.[5] Arbitrators are not uniquely vulnerable to data breaches and are not guarantors of cybersecurity.[6] In the highly interdependent landscape of international commercial arbitration, data associated with any arbitration matter will only be as secure as the weakest link. Since data security ultimately depends on the responsible conduct and vigilance of individuals, any individual

3. Though we focus primarily on the threat of data breaches, the analysis here is generally applicable to other forms of unauthorized digital intrusion in proceedings, such as surreptitious surveillance of a hearing or of arbitration counsel in their offices, or the inadvertent recording and disclosure of an otherwise private conversation between members of the tribunal.

4. *See infra* Part II.

5. Most notably, counsel have ethical duties to protect client confidentiality and to keep abreast of the risks and benefits of technology related to their practice. Further, all actors in the process may have contractual or regulatory obligations to protect sensitive personal or commercial information. *See* infra Sections III.A and III.C.

6. High profile examples of arbitration-related cyberattacks or data breaches have involved arbitral institutions, counsel, and parties as targets. *See* Zachary Zagger, *Hackers Target Anti-Doping, Appeals Bodies Amid Olympics*, LAW360.COM, (Aug. 12, 2016), https://www.law360.com/articles/827962/hackers-target-anti-doping-appeals-bodies-amid-olympics (reporting that hackers attempted to infiltrate the website of the Court of Arbitration for Sport during the Rio Olympic Games); Alison Ross, *Tribunal Rules on Admissibility of Hacked Kazakh Emails*, GLOBAL ARBITRATION REV., (Sept. 22, 2015), http://globalarbitrationreview.com/article/1034787/tribunal-rules-on-admissibility-of-hacked-kazakh-emails (reporting that privileged e-mails between a government and its arbitration counsel were disclosed by hackers of the government's internal network); Alison Ross, *Cybersecurity and Confidentiality Shocks for PCA*, GLOBAL ARBITRATION REV., (July 23, 2015), http://globalarbitrationreview.com/article/1034637/cybersecurity-and-confidentiality-shocks-for-the-pca (reporting that the Permanent Court of Arbitration website was hacked during a hearing of China-Philippines arbitration and counsel in a Russia-related arbitration received "Trojan downloaders" that, if opened, would have enabled hackers to listen in on conversations).

actor can be that weak link, whatever their practice setting, whatever the infrastructure they rely upon, and whatever role they play in an arbitration.[7]

We explore in Part II the threat that cybersecurity breaches pose to international commercial arbitrations, using some examples of high-profile breaches that already have occurred.[8] We analyze in Part III the obligations that underpin the arbitrator's duty to avoid intrusion. That duty, in our view, need not be created anew. Rather, it rests securely on well-established duties of arbitrators to safeguard both the confidentiality and the legitimacy and integrity of proceedings, as well as to be competent to handle each individual matter.[9] In an era of significant cyberthreats to the international commercial arbitration process, the duty to avoid intrusion is an inherent duty that follows as a matter of necessity from these earlier identified duties.

We then discuss, in Part IV, the nature and scope of the arbitrator's duty to avoid intrusion, which is bounded and fulfilled by taking reasonable measures to prevent unauthorized digital access to arbitration-related information. There is no bright line list of measures that will fulfill the duty. Rather, assessment of the cybersecurity necessary in international commercial arbitration is an ongoing, risk-

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7. The impact of individual conduct on cybersecurity has been highlighted in recent high profile security breaches. *See, e.g.*, Gregory Krieg & Tal Kopan, *Is This the Email That Hacked John Podesta's Account?*, CNN (Oct. 28, 2016), http://www.cnn.com/2016/10/28/politics/phishing-email-hack-john-podesta-hillary-clinton-wikileaks/index.html; Eric Lipton, et al., *The Perfect Weapon: How Russian Cyberpower Invaded the United States*, N.Y. TIMES (Dec. 13, 2016), http://www.nytimes.com/2016/12/13/us/politics/russia-hack-election-dnc.html?smprod=nytcore-ipad&smid=nytcore-ipad-share; Tom Vanden Brook & Michael Winter, *Hackers Penetrated Pentagon E-mail*, USA TODAY (Aug. 7, 2015), http://www.usatoday.com/story/news/nation/2015/08/06/russia-reportedly-hacks-pentagon-email-system/31228625; Tom Fox-Brewster, *Sony Needed to Have Basic Digital Protection. It Failed*, THE GUARDIAN (Dec. 20, 2014), https://www.theguardian.com/commentisfree/2014/dec/21/sony-hacking-north-korea-cyber-security.

8. Although the focus of this article is on international commercial arbitration, many of the considerations discussed here will apply as well in investor-state and public international arbitration. Notably, some of the high profile data security breaches discussed in this article occurred in those contexts. *See supra* note 6. At the same time, however, there may be important differences between the scope of the arbitrator's duty to avoid intrusion in the two regimes owing to the public interest in investor-state arbitration and initiatives to increase transparency in the settlement of investor-state disputes. *See, e.g.*, UN Convention on Transparency in Treaty-Based Investor-State Arbitration (2015).

9. *See* William Park, *The Four Musketeers of Arbitral Duty: Neither One-For-All No All-For-One*, 8 ICC DOSSIERS 24 (2011).

based process that requires all participating individuals to understand data security threats in context. As threats evolve, participants must know their own digital architecture and security vulnerabilities (including those that arise from their personal day-to-day work habits) in order to implement protective measures responsive to the threats that apply to their data landscape and individual matters.

The specific protective measures required to satisfy the duty will depend on an analysis of the security risks and on the measures that are practically available, as both will undoubtedly evolve from time to time. They will also depend upon considerations of convenience, cost and efficiency, as the arbitrator may need to balance the duty to avoid intrusion against other duties, including the duty to conduct proceedings in an expeditious and cost-effective manner[10] and, in the absence of overriding considerations, consistent with the parties' choices.[11]

Finally, in Part V, we address some practical considerations for arbitrators as they determine what measures to implement to avoid intrusion and, in Part VI, suggest for future dialogue some ways in which all participants in the international commercial arbitration system may collaborate to address the ongoing threats. The fundamentals of effective cybersecurity management are accessible and not unduly burdensome. The arbitrator who keeps abreast of risks and benefits of technology in the arbitration process, is conscious of his or her digital assets and infrastructure, and who implements

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10 . *See* INT'L CHAMBER OF COMMERCE [ICC], RULES OF ARBITRATION (2017) [hereinafter ICC RULES], art. 22(1) (tribunal shall make every effort to conduct the arbitration in an expeditious and cost-effective manner); INT'L CTR. FOR DISP. RES., INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION INTERNATIONAL ARBITRATION RULES (2014) [hereinafter ICDR RULES], art. 20(2) ("The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute"); LCIA RULES, *supra* note 1, at art. 14.4(ii) (tribunal's general duty to adopt suitable procedures, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute).

11. *See, e.g.*, UNCITRAL Model Law, *supra* note 1, at art. 34(2)(a)(iv) (award may be set aside if "the arbitral procedure was not in accordance with the parties' agreement, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate"); LCIA RULES, *supra* note 1, at art. 14.2 ("The parties may agree on joint proposals for the conduct of their arbitration for consideration by the Arbitral Tribunal. They are encouraged to do so in consultation with the Arbitral Tribunal and consistent with the Arbitral Tribunal's general duties . . ."); ICDR RULES, *supra* note 10, at 1 (rules apply "subject to modifications that the parties may adopt in writing" except that "where any rule[] is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail").

reasonable protective measures, will readily meet the obligation to avoid intrusion.

II. DATA SECURITY THREATS IN INTERNATIONAL ARBITRATION

Cyberintrusion, or hacking as it is more commonly known, is often in the news in respect to geo-politics[12] and major corporate and government records data breaches.[13] Law firms, too, are increasingly

12. See, e.g., U.S. Federal Bureau of Investigation and U.S. Department of Homeland Security, Joint Analysis Report, *GRIZZLY STEPPE-Russian Malicious Cyber Activity*, JAR-16-20296A (2016), https://www.us-cert.gov/sites/default/files/publications/JAR_16-2029 6A_ GRIZZLY%20STEPPE-2016-1229.pdf (providing technical details regarding the tools and infrastructure used by the Russian civilian and military intelligence services to compromise and exploit networks and endpoints associated with the US election); David E. Sanger & Mark Mazzetti, *U.S. Had Cyberattack Plan if Nuclear Dispute Led to Conflict*, N.Y. TIMES (Feb. 16, 2016), https://www.nytimes.com/2016/02/17/world/middleeast/us-had-cyberattack-planned-if-iran-nuclear-negotiations-failed.html;

13. See, e.g., Vindu Goel and Nicole Perlroth, *Yahoo Says 1 Billion Accounts Were Hacked*, N.Y. TIMES (Dec. 14, 2016), https://www.nytimes.com/2016/12/14/ technology/ yahoo-hack.html?_r=0 (stating that following a September 2016 disclosure that sensitive personal information associated with 500 million users was stolen in late 2014 in an apparently state-sponsored attack, Yahoo disclosed that a separate 2013 attack compromised more than one billion users.); Kevin McCoy, *Cyber Hack Got Access to Over 700,000 IRS Accounts*, USA TODAY (Feb. 26, 2016), http://www.usatoday.com/story/money/2016/02/26/ cyber-hack-gained-access-more-than-700000-irs-accounts/80992822/; James Billington, *Hackers Carry Out $55M Cyber Heist From Boeing Aerospace Parts Manufacturer*, INT'L BUS. TIMES (Jan. 27, 2016), http://www.ibtimes.co.uk/hackers-carry-out-55m-cyber-heist-boeing-aerospace-parts-manufacturer-1540455; Ahiza Garcia, *Target Settles for $39 Million Over Data Breaches*, CNN (Dec. 2, 2015), http://money.cnn.com/2015/12/02/news/companies/target-data-breach-settlement/ (noting that the 2013 hack of Target database compromised roughly forty million customers); Julie Hirschfield Davis, *Hacking of Government Computers Exposed 21.5 Million People*, N.Y. TIMES (July 9, 2015), https://www.nytimes.com/2015/07/10/us/ office-of-personnel-management-hackers-got-data-of-millions.html; Anna Wilde Mathews, *Anthem: Hacked Database Included 78.8 Million People*, WALL ST. J. (Feb. 24, 2015), http://www.wsj.com/articles/anthem-hacked-database-included-78-8-million-people-1424807364. *See generally* Verizon, 2016 Data Breach Investigations Report [hereinafter Verizon Report], http://www.verizonenterprise.com/verizon-insights-lab/dbir/2016/ (last visited Jan. 22, 2017) (analyzing a dataset provided by security service providers, law enforcement, and government agencies of more than 100,000 security incidents in 2015, revealing 3,141 confirmed data breaches in eighty-two countries); PricewaterhouseCoopers, Key Findings from the Global State of Information Security Survey (2017), http://www.pwc.com/gx/en/issues/cyber-security/information-security-survey/assets/ gsiss-report-cybersecurity-privacy-possibilities.pdf [hereinafter PWC Report]; Sarah Kuranda, *New Federal Budget Proposal Raises Government Security Spending* (Feb. 9, 2016), http://www.crn.com/print/news/security/300079648/new-federal-budget-proposal-raises-government-security-spending-ups-opportunity-for-vars.htm (referencing hacks of United

reported as having fallen victim to cyberattacks.[14] As awareness increases that corporations and players in the legal sector are attractive targets for cybercriminals, the multiple players involved in international private commercial arbitrations should realize that they too are vulnerable to cybercriminals.[15] International commercial arbitrations routinely involve sensitive commercial and personal information, including information that is not publicly available and that has a potential to move markets or impact competition. Conveniently for hackers, this information is culled together in large data sets, ranging from pleadings and documents produced in disclosure, documentary evidence, witness statements, expert reports, memorials, transcripts, attorney work product, tribunal deliberation materials, and case management data. As the multiple players involved often live in different countries, the information is frequently exchanged and stored in electronic form, making it vulnerable to malevolent outside actors.

Data custodians, who hold sensitive data to varying degrees, include arbitral institutions, counsel, the parties and members of the arbitral tribunal (along with their respective support staff), as well as experts and vendors, including court reporters, translation services, couriers, and information technology ("IT") professionals, among others. Hackers may attack individual actors directly[16] or the digital

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States Office of Personnel Management records and email accounts of the Director of the CIA and the Secretary of Homeland Security).

14. *See, e.g.*, Nate Raymond, *U.S. Accuses Chinese Citizens of Hacking Law Firms*, INSIDER TRADING (Dec. 28, 2016), http://www.reuters.com/article/us-cyber-insidertrading-idUSKBN14G1D5; Michael Schmidt and Steven Lee Myers, *Panama Law Firm's Leaked Files Detail Offshore Accounts Tied to World Leaders*, N.Y. TIMES (Apr. 3, 2016), https://www.nytimes.com/2016/04/04/us/politics/leaked-documents-offshore-accounts-putin.html (reporting that 11.5 million documents leaked from Panama law firm exposed the offshore accounts of 140 politicians and public officials). *See also* New York State Bar Ass'n Ethics Opinion 1019 (Aug. 2014) ("Cyber-security issues have continued to be a major concern for lawyers, as cyber-criminals have begun to target lawyers to access client information, including trade secrets, business plans and personal data. Lawyers can no longer assume that their document systems are of no interest to cyber-crooks.").

15. For an overview of the major cyber risks in the practice of international arbitration and the tradecraft of the principal threat actors (hacktivists, state actors, and criminals), see James Pastore, *Practical Approaches to Cybersecurity in Arbitration*, 40 FORDHAM INT'L L.J. 1023 (2017). *See also* Verizon Report, *supra* note 13.

16. A prevalent method of attack that capitalizes on human error is ransomware, a form of malware frequently distributed through spear phishing e-mails sent to targeted individuals. The FBI explains:

infrastructure of their organizations.[17] Moreover, each smartphone, tablet, laptop, thumb drive, other digital device, and cloud service used for the transmission or hosting of arbitration-related data offers a potential portal for unauthorized outsiders to gain access.

The participants in international commercial arbitrations are, to a large degree, digitally interdependent, in that the process typically involves the transmission and hosting of data and collaborative elements such as communications relating to the arbitration. Consequently, any break in the custody of sensitive data has the potential to affect all participants. Indeed, since participants will frequently play host not only to their own sensitive data, but also to the sensitive data of others, intrusion into data held by one participant may injure another more than the one whose data security was compromised.

Unauthorized access of sensitive data may result in the disclosure, or even acceptance into evidence of, illegally obtained, confidential, or privileged matter in ways that undermine fundamental elements of the adjudicatory process and its baseline due process elements.[18] Disclosure of commercially sensitive information, trade

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> [V]ictims—upon seeing an e-mail addressed to them—will open it and may click on an attachment that appears legitimate, like an invoice or an electronic fax, but which actually contains the malicious ransomware code. Or the e-mail might contain a legitimate-looking URL, but when a victim clicks on it, they are directed to a website that infects their computer with malicious software. Once the infection is present, the malware begins encrypting files and folders on local drives, any attached drives, backup drives, and potentially other computers on the same network that the victim computer is attached to. Users and organizations are generally not aware they have been infected until they can no longer access their data or until they begin to see computer messages advising them of the attack and demands for a ransom payment in exchange for a decryption key.
>
> FBI, *Cyber Crime*, https://www.fbi.gov/investigate/cyber (last visited Jan. 16, 2017).

17. In a July 2015 "watering hole" attack, for example, hackers implanted a malicious Adobe Flash file on the Permanent Court of Arbitration's website that allowed them to infect the computer systems of website visitors who had not patched a known Adobe Flash security flaw. Luke Eric Peterson, *Permanent Court of Arbitration Website Goes Offline, with Cyber-Security Firm Contending that Security Flaw was Exploited in Concert with China-Philippines Arbitration*, IA REP. (July 23, 2015), http://www.iareporter.com/articles/permanent-court-of-arbitration-goes-offline-with-cyber-security-firm-contending-that-security-flaw-was-exploited-in-lead-up-to-china-philippines-arbitration.

18. *See* Alison Ross, *Tribunal Rules on Admissibility of Hacked Kazakh Emails*, GAR (Sept. 22, 2015) (reporting on unpublished order in Caratube International Oil Co. LLP and Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, admitting into evidence certain documents obtained from the public disclosure of documents hacked

secrets, or personal information may violate laws or contractual commitments in business-to-business or customer agreements, cause serious reputational and economic harm to individuals or businesses,[19] trigger regulatory sanctions[20] or negligence claims,[21] and impact the integrity of public securities markets.[22] Further, since the parties, counsel and arbitrators frequently reside in different countries and may be subject to differing data security law, privacy regimes and ethical standards, the legal effect of a data breach may be uncertain and complex.[23] Last, and not least, data security breaches, particularly those resulting from a failure to implement reasonable security protocols, threaten to undermine public confidence in the very institution of international private commercial arbitration. We explore the latter consequence further below.

III. SOURCES OF THE ARBITRATOR'S DUTY TO AVOID INTRUSION

The arbitration rules, ethical codes, practice guidelines, and national laws that govern international commercial arbitration do not, by and large, establish an express duty for arbitrators or any other participant in the arbitral process to implement cybersecurity

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from Kazakhstan's government computer network, yet excluding other documents on the basis of privilege).

19. *See, e.g.*, Michael Cieply and Brooks Barnes, *Sony Hacking Fallout Includes Unraveling of Relationships in Hollywood*, N.Y. TIMES (Dec. 18, 2014), https://www.nytimes.com/2014/12/19/business/media/sony-attack-is-unraveling-relationships-in-hollywood.html.

20. *See, e.g., FINRA Fines Lincoln Financial Sub $650,000 for Cybersecurity Shortcomings*, NAT'L L. REV. (Nov. 24, 2016), http://www.natlawreview.com/article/finra-fines-lincoln-financial-sub-650000-cybersecurity-shortcomings.

21. *See, e.g.*, Robert Burnson, *Yahoo's Massive Data Breach Draws Negligence Suits by Users*, BLOOMBERG TECH. (Sept. 23, 2016), https://www.bloomberg.com/news/articles/2016-09-23/yahoo-s-massive-data-breach-draws-negligence-lawsuit-by-user; *See also Shore et al. v. Johnson & Bell, Ltd.*, No. 1:16-cv-04363 (Verified Complaint) (N.D. Ill. Apr. 15, 2016) (class action alleging a Chicago law firm was negligent and engaged in malpractice by using security practices that left client information vulnerable to hacking, including, for example, a ten year-old time-entry system that had not been updated with security patches).

22. Nate Raymond, *U.S. Accuses Chinese Citizens of Hacking Law Firms*, INSIDER TRADING (Dec. 28, 2016), http://www.reuters.com/article/us-cyber-insidertrading-idUSKBN14G1D5 (reporting criminal charges for trading on confidential corporate information obtained by hacking into networks and servers of law firms working on mergers).

23. *See Cybersecurity and Arbitration: Protecting Your Documents and Ensuring Confidentiality*, NYSBA INSIDE (2016).

measures.[24] Why, then, does the arbitrator bear responsibility to avoid cybersecurity breaches? In our view, the arbitrator's duty to avoid intrusion rests on well-established arbitral duties: (i) the duty to protect the confidentiality and privacy of the proceedings, which will vary in different arbitrations, but exists to some degree in all proceedings; (ii) a fundamental duty to preserve and protect the integrity and legitimacy of the arbitral process; and (iii) a duty to be competent. In addition to these general duties, some arbitrators may have express or implied cybersecurity obligations by virtue of attorney codes of conduct, national data protection laws or regulations, or agreement with the parties.

A. Duty of Confidentiality

It is by now well-established that although parties generally have a right to keep international commercial arbitrations private (i.e., to exclude third parties from hearings),[25] it cannot be assumed that they have a general duty or right to keep arbitration-related information confidential (i.e., to refrain from disclosing, and to keep others from disclosing, such information to third parties).[26] Arbitrators are on slightly different footing. Although applicable law,[27] governing

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24. *See* Section III.C for a discussion of the ethical obligations of lawyers under the ABA Model Rules of Professional Conduct, which regulate attorney conduct.

25. *See* Simon Crookenden, *Who Should Decide Arbitration Confidentiality Issues?* 25 ARB. INT'L 603, 603 (2009) ("The privacy of arbitration proceedings is generally recognised internationally."); *see also, e.g.*, ICC RULES, *supra* note 10, at art. 26(3): (" . . . Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted."); ICDR RULES, *supra* note 10, at art. 23(6) ("Hearings are private unless the parties agree otherwise or the law provides to the contrary."); LCIA RULES, *supra* note 1, at art. 19.4: ("All hearings shall be held in private, unless the parties agree otherwise in writing."); SINGAPORE INT'L ARB. CTR., ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE (2016) [hereinafter SIAC RULES], art. 24.4 ("Unless otherwise agreed by the parties, all meetings and hearings shall be in private, and any recordings, transcripts, or documents used in relation to the arbitral proceedings shall remain confidential.").

26. UNCITRAL Notes on Organizing Arbitral Proceedings, ¶ 50 (2016) [hereinafter UNCITRAL Notes], ("there is no uniform approach in domestic laws or arbitration rules regarding the extent to which participants in an arbitration are under a duty to observe the confidentiality of information relating to the arbitral proceedings"); L. Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 ARB. INT'L 131 (1999); Leon Trakman, *Confidentiality in International Commercial Arbitration*, 18 ARB. INT'L 1 (2002).

27. More often than not, whether an arbitrator has a duty of confidentiality is not addressed by national legislation. *See* BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2003 (Wolters Kluwer, 2d ed. 2014); *see also* Joshua Karton, *A Conflict of Interests: Seeking a*

arbitration rules,[28] and party agreement may vary in the extent to which they obligate an arbitrator to keep *all* aspects of an arbitration proceeding confidential, it is uncontroversial that the arbitrator has a fundamental duty to keep at least *certain aspects* of a proceeding confidential. Gary Born takes a broad view of the confidentiality obligation, stemming from the arbitrator's adjudicatory role:

> Even where confidentiality obligations are not imposed upon the parties by either their agreement or applicable national law, the arbitrators are subject to separate confidentiality obligations by virtue of their adjudicative function. One element of the arbitrator's role is the duty to maintain the confidentiality of the parties' written and oral submissions, evidence and other materials submitted in the arbitration. It is generally inconsistent with the arbitrator's mandate to disclose materials from the arbitration to third parties.[29]

The *AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes* is consistent with this view. Canon VI provides that "[a]n

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Way Forward on Publication of International Arbitral Awards, 28 ARB. INT'L 447, 450 (2012).

28. Although they differ in scope, most institutional international arbitration rules, with the notable exception of the ICC Rules, impose an express obligation of confidentiality on arbitrators. *See, e.g.*, ICDR RULES, *supra* note 10, at art. 37(1) ("Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator . . . . [T]he members of the arbitral tribunal . . . shall keep confidential all matters relating to the arbitration or the award."); LCIA RULES, *supra* note 1, at art. 30.2 ("The deliberations of the Arbitral Tribunal shall remain confidential to its members . . . ."); SIAC RULES, *supra* note 25, at art. 39.1 ("Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator . . . shall at all times treat all matters relating to the proceedings and the Award as confidential. The discussions and deliberations of the Tribunal shall be confidential."), art. 39. 3 (". . . matters relating to the proceedings" includes the existence of the proceedings, and the pleadings, evidence and other materials in the arbitral proceedings and all other documents produced by another party in the proceedings or the Award arising from the proceedings, but excludes any matter that is otherwise in the public domain"); JAMS FOUNDATION, JAMS INTERNATIONAL ARBITRATION RULES (2016), art. 17.1 (**"**Unless otherwise required by law, or unless the parties expressly agree, the Tribunal, the Administrator and JAMS International will maintain the confidentiality of the arbitration."), art. 17.2 ("Unless otherwise required by law, an award will remain confidential, unless all of the parties consent to its publication."); INT'L INST. FOR CONFLICT PREVENTION & RES., CPR 2014 RULES FOR ADMINISTERED ARBITRATION OF INTERNATIONAL DISPUTES (2014) [hereinafter CPR RULES], art. 20 ("Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related disclosure and the decisions of the Tribunal, as confidential . . . ."). *But see* ICC RULES, *supra* note 10, at app. I, art. 6 ("The work of the [ICC] Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity.").

29. BORN, *supra* note 27, at 2004.

arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office."[30] In particular, the arbitrator has a duty to "keep confidential all matters relating to the arbitration proceedings and decision" and "[i]n a proceeding in which there is more than one arbitrator, . . . [not to] inform anyone about the substance of the deliberations of the arbitrators." [31] Less comprehensively, the *IBA Rules of Ethics for Arbitrators* specify that the "deliberations of the arbitral tribunal and the contents of the award itself, remain confidential in perpetuity unless the parties release the arbitrators from this obligation."[32] At the same time, however, they encapsulate a general duty of confidentiality by stating that arbitrators should be "discreet."[33]

In contrast to arbitrators, who are thus bound by a duty of confidentiality,[34] the parties themselves may not have a *duty* to keep

30. Similarly, the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members (Oct. 2009) provides: "A member shall abide by the relationship of trust which exists between those involved in the dispute and (unless otherwise agreed by all the parties, or permitted or required by applicable law), both during and after completion of the dispute resolution process, shall not disclose or use any confidential information acquired in the course of or for the purposes of the process." CHARTERED INST. OF ARBITRATORS, THE CHARTERED INSTITUTE OF ARBITRATORS CODE OF PROFESSIONAL AND ETHICAL CONDUCT FOR MEMBERS (Oct. 2009) [hereinafter CIArb ETHICS CODE], Rule 8.

31. AAA/ABA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon VI (B), (C). *See also* Canon I (I) ("An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.").

32. INT'L BAR ASSOC., IBA RULES OF ETHICS FOR ARBITRATORS, article 9. The IBA Rules of Ethics are not binding, but are deemed to reflect internationally acceptable guidelines developed by practicing lawyers from all continents. *Id*. at Introductory Note.

33. *Id.*

34. We note that while many arbitrators are lawyers and will have professional ethical obligations to preserve client confidentiality, by their terms, such obligations apply only when a lawyer is acting in a representative capacity for a client and not when serving as an arbitrator, who does not represent any party but has equal duties to all. BORN, *supra* note 27 at 1970; CPR-Georgetown Commission on Ethics and Standards in ADR, Proposed New Model Rule of Professional Conduct Rule 4.5: The Lawyer as Third-Party Neutral (2002), Rule 4.5.2, comments [1], [3]. Nonetheless, to the extent that lawyers' duties of confidentiality have been updated to take account of cyberthreats, analysis of those duties may inform how the international arbitrator should view the nature and scope of his or her duty to avoid intrusion. *See, e.g.*, U.K. Information Commission Office, Monetary Penalty Notice under the Data Protection Act 1998, Supervisory Powers of the Information Commissioner (Mar. 10, 2017), https://ico.org.uk/media/action-weve-taken/mpns/2013678/mpn-data-breach-barrister-20170316.pdf (fining UK family law barrister for failing to take "appropriate technical

arbitration proceedings or certain aspects of them confidential. Nonetheless, there is a common *expectation* among users of international commercial arbitration[35] that the overall process will be confidential.[36] More specifically, parties and institutions expect that the arbitrator will maintain the confidentiality of the arbitration.[37]

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measures against the unauthorised or unlawful processing of personal data" in relation to confidential client files where the barrister failed to encrypt such files on her home computer and her husband inadvertently made the files accessible on an online directory while attempting to update software, noting that the Bar Council and barrister's chambers had issued guidance to barristers that a computer used by family members or others may require encryption of files to prevent unauthorized access to confidential material by shared users).

35. Notably, expectations of privacy and confidentiality may differ in investor-state arbitration. As explained in the UNCITRAL Notes on Organizing Arbitral Proceedings:

> [t]he specific characteristics of investor-State arbitration arising under an investment treaty have prompted the development of transparency regimes for such arbitrations. The investment treaty under which the investor-State arbitration arises may include specific provisions on publication of documents, open hearings, and confidential or protected information. In addition, the applicable arbitration rules referred to in those investment treaties may contain specific provisions on transparency. Further, parties to a treaty-based arbitration may agree to apply certain transparency provisions.

UNCITRAL Notes, *supra* note 26, at ¶ 55.

36. Paul D. Friedland, Arbitration Clauses for International Contracts 21 (Juris, 2d ed. 2007) ("Notwithstanding the usual absence of prohibitions on party disclosure, there is an expectation and tradition of confidentiality in arbitration, which a party violates at its own peril vis-à-vis the arbitrators."); Queen Mary Univ. of London Sch. of Int'l Arb., 2010 International Arbitration Survey: Choices in International Arbitration, at 29, http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf , 29 (Fifty percent of corporations indicated that they "consider that arbitration is confidential even where there is no specific clause to that effect in the arbitration rules … .or agreement"); Int'l Inst. for Conflict Prevention & Res., General Commentary for CPR Rules for Administered Arbitration of International Disputes, *available at* https://www.cpradr.org/resource-center/rules/international-other/arbitration/international-administered-arbitration-rules ("Parties that choose arbitration over litigation of an international dispute do so primarily to avoid the unfamiliarity and uncertainty of litigation in a foreign court; also out of a need or desire for a proceeding that is confidential and relatively speedy."); ICC International Court of Arbitration, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, ¶ 27 (July 13, 2016) ("The [ICC] Court endeavors to make the arbitration process more transparent in ways that do not compromise expectations of confidentiality that may be important to parties.")

37 . UNCITRAL Notes, *supra* note 26, at ¶ 53 ("Whereas the obligation of confidentiality imposed on the parties and their counsel may vary with the circumstances of the case as well as the applicable arbitration law and arbitration rules, arbitrators are generally expected to keep the arbitral proceedings, including any information related to or obtained during those proceedings, confidential.") (emphasis added); LCIA Notes for Arbitrators, ¶ 6 (June 29, 2015) ("Parties to arbitrations are entitled to expect of the process a just, well-reasoned and enforceable award. To that end, they are entitled to expect arbitrators: . . . to maintain the confidentiality of the arbitration. . . .") (emphasis added).

Moreover, in the adversarial and adjudicatory context, each actor in arbitration has legitimate expectations of privacy as to the data that defines or supports its role in the process. Irrespective of the extent to which the proceeding as a whole is entirely confidential or in some respects public, counsel and clients expect that they alone will have access to their communications and case strategy, for example, while arbitrators expect that no one else will have access to their deliberations or draft adjudicative documents and other work product. Those who intrude on these boundaries by hacking or other unauthorized access may break the law[38]; at a minimum, they will threaten legitimate expectations as to privacy in any adjudicatory process and the integrity of the process as a whole. In sum, since cyberintrusion undermines or negates the legitimate expectations of confidentiality that exist in international commercial arbitration as well as the legitimate expectations of privacy that exist to some degree in all adjudicatory proceedings, it follows that the arbitrator's special duty to protect confidentiality extends to an obligation to avoid intrusion by non-participants who are determined to defeat those expectations.[39]

B. Duty to Preserve and Protect the Integrity and Legitimacy of the Arbitral Process

The arbitrator's duty to avoid intrusion also rests on a duty to protect the integrity and legitimacy of the arbitral process. Unauthorized intrusion by hackers or other malevolent actors threatens more than confidentiality: it is a direct threat to the fair, neutral, and orderly process that underlies all arbitrations and to public trust in the arbitral process. If we accept that hacking threatens the integrity of the process, it follows that the arbitrator's obligation to protect the integrity of the process encompasses some form of duty to avoid such intrusion.

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38. In the United States, for example, certain federal laws criminalize hacking and most states have computer crime laws that address unauthorized access. *See* Computer Fraud and Abuse Act, 18 U.S.C. § 1030; National Conference of State Legislatures, Computer Crime Statutes (Dec. 5, 2016), http://www.ncsl.org/research/telecommunications-and-information-technology/computer-hacking-and-unauthorized-access-laws.aspx.

39. *See* UNCITRAL Notes, *supra* note 26, at ¶ 58(b).

Our premise that the arbitrator has a duty to avoid intrusion does not require resolution of the ongoing debate as to whether a commercial arbitrator is a mere independent service provider to the parties or if the arbitrator has a broader, adjudicative role with responsibilities also to society and the rule of law.[40] Recognizing the deference to party autonomy that characterizes international commercial arbitration, it is well-established that arbitrators also have important and independent responsibilities to maintain their own reputations and probity, to support the interests of society and to uphold the legitimacy and integrity of the arbitral process.[41] Even the most articulate and well-respected proponents of the arbitrator as service provider model recognize that there are limits to party autonomy and to arbitrators' fidelity to the parties' instructions.[42]

There is little doubt that the use in an arbitration of data illegally obtained by or on behalf of a party would irreparably taint

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40. *See* ROGERS, *supra* note 2; Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 392 (1978) (common features of the power to adjudicate delegated by the state to judges and by consent of the parties to arbitrators); Panel Discussion, *Arbitrator Ethics Through the Lens of Arbitrator Role: Are Arbitrators Adjudicators or Service Providers?*, 10 WORLD ARB. & MED. REV. 3, 309 (2016); Margaret Moses, *The Role of the Arbitrator: Adjudicator or Service Provider?*, 10 WORLD ARB. & MED. REV. 3, 367 (2016)

41. *See e.g.*, Julie Bédard, Timothy Nelson and Amanda Kalantirsky, *Arbitrating in Good Faith and Protecting the Integrity of the Arbitral Process*, 3 PARIS J. INT'L ARB. 737, 749 (2010); ABA/AAA CODE OF ETHICS FOR ARBITRATORS IN COM. DISPUTES, Canon 1 ("An arbitrator should uphold the integrity and fairness of the arbitration process . . . . An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved."); ICC RULES, *supra* note 10, at art. 5 ("[T]he emergency arbitrator shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case"); JAMS FOUNDATION, JAMS ARBITRATOR ETHICS GUIDELINES, 1 ("[A]n arbitrator should uphold the dignity and the integrity of the office of the arbitration process"); CIARB ETHICS CODE, *supra* note 30, at Part 2, Rule 2 ("A member shall maintain the integrity and fairness of the dispute resolution process.").

42. *See* Luca G. Radicati di Brozolo, *Party Autonomy and the Rules Governing the Merits of the Dispute in Commercial Arbitration*, *in* LIMITS TO PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION, 339 (Juris, 2016); *see also* Teresa Cheng, *panelist*, *The Theory and Reality of the Arbitrator: What is an International Arbitrator?* 7 WORLD ARB. & MED. REV. 4, 639 (2013) (commenting at the 25th Annual Workshop of the Institute for Transnational Arbitration that although arbitrators are independent service providers, there is also a duty to oneself as well as a duty to the arbitral process); ROGERS, *supra* note 2; ILA REPORT, *infra* note 47, at 17; Park, *Arbitrators and Accuracy*, *supra* note 1, at n.59 (stating faithfulness to the agreement would not justify violation of international public policy.)

proceedings.[43] Different issues arise when external actors compromise the data security of arbitration-related information. Here, the participants are victims of the intrusion and the matter presumably may proceed, with such corrective or ongoing protective steps as the tribunal may deem appropriate.[44] Nonetheless, such an incident, particularly if it follows from a failure to adequately secure data, inevitably will erode the confidence and trust of participants, and potentially the public, in the international private commercial arbitration process.[45] The arbitrator, along with the parties, counsel, and other actors in the process, is in a position to take reasonable protective measures to avoid that risk.

While much attention has been focused on the implied *powers* of arbitrators to fill in gaps in institutional rules or the parties' agreement where necessary to protect due process and the legitimacy of the process, less attention has been paid to the scope of the arbitrator's *duties*.[46] The ILA Arbitration Committee's *Final Report*

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43. ILA REPORT, *infra* note 47, at 18; Bernard Hanotiau, *Misdeeds, Wrongful Conduct and Illegality in Arbitral Proceedings*, *in* INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS, 285 (Kluwer Law International, 2003); REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 5.76 (5th ed., 2009).

44. *See Caratube*, *supra* note 18 (considering the admissibility of illegally obtained evidence, accepting some and excluding some).

45. *See* Jan Paulsson, *Metaphors, Maxims and Other Mischief, The Freshfields Arbitration Lecture 2013*, 30 ARB. INT'L 4, 630 (2014) ("[P]ublic confidence is perforce at stake in the arbitral context as well [as in the judicial process], because arbitration cannot thrive without the support of the general legal system."); Charles Brower, *Keynote Address: The Ethics of Arbitration: Perspectives from a Practicing International Arbitrator*, 5 BERKELEY J. OF INT'L L. PUBLICIST, 1 (2010) ("[A]rbitrators and arbitral institutions also have an interest in maintaining legitimacy, both for the mutual acceptance of their awards by the parties before them and for broad public acceptance of the entire law-based system of which they are a part.").

46. Two widely cited cases involving the appearance of new counsel after an ICSID tribunal was constituted focused on the arbitrator's role in preserving the integrity of the arbitration proceedings. Although the tribunals reached differing results on applications to disqualify counsel and had differing views on the nature and extent of an arbitrator's inherent powers, both stated that the arbitrators had some inherent power, and presumably some obligation, to protect the essential integrity of the proceeding. *See Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, 15, (2008) (Tribunal's Ruling Regarding the Participation of David Mildon QC in further Stages of the Proceeding); *Rompetrol Group NV v. Romania*, ICSID Case No. ARB/06/03, 5-6 (2008) (Decision of the Tribunal on the Participation of a Counsel); *see also* Bédard, et al., *supra* note 41 at n.69. Similarly, in *Caratube*, although the tribunal found that the claimants failed to prove the respondent had engaged in any threatening or intimidating action that could cause an irreparable harm to the claimants' rights in the arbitration, including a right to the "integrity and the legitimacy of the arbitration," the tribunal implicitly recognized its authority to take

on The Inherent Powers of Arbitrator in International Commercial Arbitration noted that the implied powers necessary to protect the core functions of arbitration amount to affirmative arbitral duties:

> It is in such situations that a third and final category of non-enumerated powers becomes relevant, encompassing that authority which can be said to be truly inherent, namely those powers necessary to safeguard a tribunal's jurisdiction and the integrity of its proceedings. Stated differently, these powers are those required to decide a legal dispute fairly and in a manner consistent with at least the minimal requisites of due process and public policy. They trace their roots most clearly to the original notion of inherent powers as protecting jurisdiction and curtailing procedural abuses, and their exercise may justify overriding party preferences. . . . Such powers are so core to the function of arbitration that they might be more properly termed arbitral duties, the fulfillment of which is a necessary function of serving as a competent arbitrator.[47]

We conclude, then, that the arbitrator's duty to uphold the legitimacy and integrity of the arbitral process, and to ensure confidence and trust in arbitration, further supports the premise that the arbitrator has a duty to avoid intrusion.

C. Duty of Competence

It is commonly accepted that an arbitrator has a duty of competence.[48] Various arbitrator ethics codes expressly require arbitrators to be "competent." Canon 1 of the *ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes*, which requires an arbitrator to uphold the integrity and fairness of the arbitration process, provides that an arbitrator should accept appointment in a

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measures to preserve the integrity of the arbitration insofar as it stressed the "[p]arties' general duty, arising from the principle of good faith, not to take any action that may aggravate the present dispute, affect the integrity of the arbitration and the equality of the Parties . . . ." *Caratube supra* note 18, at ¶¶ 111, 154.

47. INTERNATIONAL LAW ASSOCIATION, REPORT FOR THE BIENNIAL CONFERENCE IN WASHINGTON, D.C., April 2014 (final report 2016) [hereinafter ILA REPORT], at 17, http://www.ila-hq.org/download.cfm/docid/04ED7050-5C2A-4A56-92FCF1857A094C8B (last visited Jan. 22, 2017).

48. *See* Henry Gabriel and Anjanette H. Raymond, *Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards*, 5 WYO. L. REV 453 (2005); ILA REPORT, *supra* note 47 (stating the duty to protect integrity of the proceeding is core to necessary function of serving as a competent arbitrator).

particular matter only if fully satisfied that he or she is "competent to serve." The *IBA Rules of Ethics for International Arbitrators* provide a more general requirement that "international arbitrators should be . . . competent" in addition to a specific requirement that the arbitrator be competent to determine the issues in dispute in a particular matter.[49]

While the arbitrator ethics codes do not define competence, important context and definition of the meaning of the term may be drawn from the evolution of lawyer ethics codes in recent years. Recognizing the need to provide some definition of competence and to update ethical codes to reflect the rise of globalization and technology, governing bar associations and disciplinary authorities have amended lawyer ethical codes to provide explicit linkage between general competence requirements and the need to keep abreast of technology.[50] For example, the American Bar Association ("ABA") *Model Rules of Professional Conduc*t, first introduced by the ABA in 1983, and adopted over time in various forms by most states in the United States,[51] provide the following lawyer competence requirement:

> Rule 1.1 Competence
>
> > A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge,

49. *See* Introductory Note and Rule 2.2; *see also* CIARB ETHICS CODE, *supra* note 30, at Part 2, Rule 4 "Competence" ("A member shall accept an appointment or act only if appropriately qualified or experienced.").

50. Lawyer ethics rules obviously do not bind non-lawyer arbitrators. Indeed, some of the rules are limited to the context of client representation and thus do not expressly apply even to lawyers who, when serving as arbitrators, are not representing clients. For example, ABA Model Rule 1.1, standing alone in the form quoted in the accompanying text, does not apply directly to arbitrators, even if they are lawyers practicing in a jurisdiction where this version of the Model Rules applies. In France, the Règlement Intérieur National, the French code of ethics for lawyers, contains a general competency requirement in respect to client work in Article 1.3 ("L'avocat . . . fait preuve, à l'égard de ses clients, de competence . . . ."), http://codedeonto.avocatparis.org/acces-article; *see also* UK SOLICITORS REGULATORY AUTHORITY, SRA CODE OF CONDUCT 2011 (Version 18, 2016) [hereinafter UK SRA CODE OF CONDUCT] at 0-1.5 ("[t]he service you provide to clients is competent . . . . "), http://www.sra.org.uk/solicitors/handbook/code/content.page.

51. A notable exception is California, which maintains its own Rules of Professional Conduct. California Rule 3-110 (A) provides a general competence requirement ("A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.").

> skill, thoroughness and preparation reasonably necessary for the representation.

Notably, ABA Model Rule 1.1 is limited by its terms to the lawyer serving in a representational function. However, the Preamble to the Model Rules notes that a lawyer may serve in other roles, including "as a third party neutral, a non-representational role helping the parties to resolve a dispute or other matter," and goes on to state that, "[i]n all professional functions a lawyer should be competent, prompt and diligent."[52]

New York State did not adopt the Model Rules until 2009 and did not adopt the Preamble quoted above. However, Model Rule 1.1 as adopted in New York added a more general competency requirement, in addition to the client-oriented rule: "A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle . . . ." [53] Thus, at least as to lawyers working as arbitrators in jurisdictions that have adopted the ABA Preamble or who have adopted a rule similar to Rule 1.1(b) as in effect in New York State, there is a direct ethical obligation of competence.[54]From 2009 to 2013, the ABA Commission

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52. AM. BAR. ASSOC., PREAMBLE: A LAWYER'S RESPONSIBILITIES, ¶4. By referring to "professional functions," the Preamble is broad enough to avoid the debate over whether participants are engaged in the practice of law. *See* Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 17 Cal.4th 119 (Cal. 1998), *cert den.,* 525 U.S. 920 (1998); Schiff Hardin LLP, *Arbitration and the Unauthorized Practice of Law*, 13 ARIAS QUARTERLY U.S. 1, 16-19 (2006), http://www.schiffhardin.com/Templates/Media/files/archive/binary/spector-arbitration. pdf.

53. NY Judiciary Law (Appendix: Code of Prof. Resp. §1200, Rule 1.1 (b)); The New York State Bar Association Committee on Standards of Professional Conduct ("COSAC") 2007 Report recommending the adoption of the Model Rules noted that the new rules were beneficial in describing competent representation as requiring the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," in contrast to the previous Lawyer's Code of Professional Responsibility that "did not define or describe competent representation." New York State Bar Association Proposed Rules of Professional Conduct 11 (2007), *available at* http://www.nysba.org/workarea/DownloadAsset.aspx?id =26635; New York City Bar Association Professional Responsibility Committee Report on COSAC Proposals Rules 1.1-1.4, 3.1, 3.2, 3.5-3.9, and 8.1-8.4 (2006) *available at* http://www.nycbar.org/pdf/report/Prof_Resp_COSAC_506.pdf (proposed Rule 1.1 "helpfully fleshes out the definition of 'competent representation'"). Notably also, in adopting Model Rule 1.1 (b), New York State intended to preserve the concept in prior Disciplinary Rule 6-101 (competent representation) and its accompanying Ethical Consideration 6-2 that a lawyer should attain and maintain competence by keeping abreast of current legal literature and developments. *Id.*

54. Also useful by analogy is *The Code of Conduct for Lawyers in the EU*, issued by the Council of Bars and Law Societies of the European Union, which bridges the gap from the

on Ethics 20/20 recommended proposed amendments to the Model Rules to account for, among other things, rapid changes in technology affecting the practice of law. In 2012, the ABA House of Delegates adopted a revised Comment 8 to Model Rule 1.1, to provide in respect to competency, that "to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with technology." In amending Comment 8, the ABA took the position that the revised language did not impose any new obligations on lawyers, but, rather, simply reminded lawyers that in the current environment, an awareness of technology, including the benefits and risks associated with it, is part of the lawyer's general ethical duty to remain competent.[55] The same may be said in respect to an arbitrator's competence obligation.

In its 2014 report recommending that New York adopt the revised comment 8 to Model Rule 1.1, the New York State Bar Association Committee on Standards of Professional Conduct noted that:

> . . . to keep abreast of changes in law practice, a lawyer needs to understand the risks and benefits of technology relevant to the lawyer's particular practice. For example, if a lawyer's clients are communicating with the lawyer by web-based document-sharing technology or by social media, the lawyer should have some understanding of how to ensure that confidential communications remain confidential. The proposed amendment impresses upon lawyers the key role that technology plays in law practice and creates the expectation that lawyers will keep abreast of the

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regulation of lawyers working in a representational capacity in the judicial system to those working in arbitration by providing that "[t]he rules governing a lawyer's relations with the courts apply also to his relations with arbitrators." CCBE, CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN UNION (2002) at art. 4.5, *available at* http://www.idhae.org/pdf/code2002_en.pdf.

55. *See* Karin Jenson, Coleman Watson, & James Sherer, *Ethics, Technology, and Attorney Competence*, *available at* http://www.law.georgetown.edu/cle/materials/eDiscovery/2014/frimorndocs/EthicsIneDiscoveryBakerHostetler.pdf (last visited Jan. 14, 2017); *see also* The State Bar Of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion Interim No. 11-0004 (2014) ("An attorney's obligations under the ethical duty of competence evolve as new technologies develop and become integrated with the practice of law."); INT'L BAR ASSOC., IBA INTERNATIONAL PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION (2011), http://www.ibanet.org/barassociations/BIC_resources.aspx ("Competence . . . includes competent and effective client, file and practice-management strategies.").

> benefits and risks associated with the technology relevant to their own legal practice.[56]

Whether or not adopted in the form encompassing the more general obligation provided in the New York version of the rules, the Model Rules, and particularly Comment 8 to Model Rule 1.1 as it now reads, are relevant to inform and define the meaning of competence as applied to arbitrators, as well as in their direct regulation of lawyer conduct.[57]

Achieving digital literacy, including an understanding of the measures reasonably necessary to avoid cyberintrusion in an arbitration, is also closely related to the attention institutions, users, and counsel have paid in recent years to the role of the arbitrator in

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56. Report of The New York State Bar Association Committee On Standards Of Attorney Conduct ("COSAC") Proposed Amendments to the New York Rules of Professional Conduct and Related Comments 10 (2014), http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=54063.

57. *See, e.g.*, In re: Amendments to Rules Regulating the Florida Bar 4-1.1 and 6-10.3, No. SC16-574 (Sept. 29, 2016), at http://www.floridasupremecourt.org/decisions/2016/sc16-574.pdf (amending the comment to rule on competence to address technology); Law Society of Upper Canada, Technology Practice Management Guideline, Guideline 5.5 ("Competent Use of Information Technologies. Lawyers should have a reasonable understanding of the technologies used in their practice or should have access to someone who has such understanding") & 5.10 ("Security Measures. Lawyers should be familiar with the security risks inherent in any of the information technologies used in their practices including unauthorized copying of electronic data, computer viruses which may destroy electronic information and hardware, hackers gaining access to lawyers' electronic files, power failures and electronic storms resulting in damage to hardware or electronic information, theft of vast amounts of electronic information stored in stolen hardware. Lawyers should adopt adequate measures to protect against security threats and, if necessary, to replace hardware and reconstruct electronic information."), *available at* http://www.lsuc.on.ca/with.aspx?id=2147491197 (last visited Jan. 22, 2017); Canadian Bar Association, *Legal Ethics in a Digital World* (Sept. 2, 2015), https://www.cba.org/getattachment/Sections/Ethics-and-Professional-Responsibility-Committee/Resources/Resources/2015/Legal-Ethics-in-a-Digital-World/guidelines-eng.pdf; Philipe Doyle Gray, *The Pillars of Digital Security*, BAR NEWS: J. OF THE NEW SOUTH WALES BAR ASSOCIATION (Summer 2014), http://www.philippedoylegray.com/content/view/56/45/ (although the Law Society of New South Wales has not adopted professional conduct rules addressing technology, it has published guidelines for lawyers about the use of technology such as cloud computing and social media); E-Law Committee of the Law Society of South Africa, LSSA Guidelines on the Use of Internet-Based Technologies in Legal Practice (2014), www.lssa.org/za/index.php?; *see also* UK SRA CODE OF CONDUCT, *supra* note 50, at O-4.5 ("You have effective systems and controls in place to enable you to identify risks to client confidentiality . . . ."); O-7.5 ("You comply with . . . data protection legislation."); IB-7.5 ("Identifying and monitoring . . . IT failures and abuses.").

case management.[58] In the highly digitized and interdependent world of international arbitration, management of technology and baseline data security competence manifestly have become critical components of an arbitrator's competence to organize and conduct arbitration proceedings.[59]

D. Global Data Protection Laws and Regulations

In any given arbitration matter, data held by an arbitrator may be subject to specific cybersecurity obligations arising from international or national data protection laws and regulations that govern how certain information can be collected, stored, and transferred.[60] While there is no universal international approach to data protection, nearly 110 countries[61] have enacted laws aimed at protecting personal information by regulating categories of data or industry sectors, such as the financial and health care industries.[62] As the key players in

58. *See, e.g.*, ICC RULES, *supra* note 10, at app. IV (case management techniques); LCIA RULES, *supra* note 1, at art. 14 (conduct of the proceedings); ICDR RULES, *supra* note 10, at art. 20.2 (conduct of the proceedings) ("In establishing procedures for the case, the tribunal and the parties may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings."); College of Commercial Arbitrators, Protocols for Expeditious, Cost-Effective Commercial Arbitration (2010) 69 (arbitrators should take control of the arbitration and actively manage it from start to finish); ICC Commission Report, Controlling Time and Costs in Arbitration (2d. ed. 2012); Christopher Newmark, *Controlling Time and Costs in Arbitration*, *in* LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION *supra* note 1.

59. The UNCITRAL Notes on Organizing Arbitral Proceedings (2016) urge that arbitrators consider issues relating to the means of communication to be used during the proceedings at the outset, noting that the parties and the tribunal "may need to consider issues of compatibility, storage, access, data security as well as related costs when selecting electronic means of communication." UNCITRAL Notes, *supra* note 26, at ¶¶ 56, 58.

60. *See* UNCTAD, Data Protection Regulations and International Data Flows: Implications for Trade and Development, UNCTAD/WEB/DTL/STICT/2016/1/iPub, http://unctad.org/en/PublicationsLibrary/dtlstict2016d1_en.pdf (last visited Jan. 9, 2017) (overview of international and national laws and regulations) ("UNCTAD on Data Protection"); *see also* European Union Data Protection Directive (95/46/EC) (implemented in each of the twenty-eight EU Member States through national data protection law).

61. *See* UNCTAD on Data Protection at 42 (108 countries have either comprehensive data protection laws or partial data protection laws).

62. In the United States, for example, there is no omnibus privacy or data protection legislation, but a patchwork of federal privacy laws that generally regulate security breach notification statutes by sector and state. *See, e.g.*, Health Insurance Portability and Accountability Act, 42 U.S.C. § 1301 *passim* [hereinafter HIPPA] (health information); Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (consumer protection); Gramm-Leach-

international arbitrations frequently reside in different countries, resulting in continuous cross-border exchanges of information, it follows that the same data may be subject to multiple, and potentially inconsistent, laws. For example, the legal concept of "personal information" or "personally identifiable information" subject to reasonable protection from unauthorized access is defined more broadly under EU law than it is under US law.[63]

While it is beyond the scope of this article to address the complex conflict-of-law issues that may arise in these situations,[64] the global proliferation of data protection laws indicates that: (i) participants in international arbitrations who share the sensitive information of others may have legal obligations to ensure that arbitrators, acting in the capacity of service providers, safeguard that information by complying with certain security standards[65]; and (ii) increasingly, both participants and non-participants in an arbitration may have legally enforceable interests (or rights)[66] in the way that arbitrators secure and handle e-mail correspondence, witness statements, [67] and other electronically-exchanged documents that routinely disclose personally identifiable information. Moreover,

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Bliley Act, 15 U.S.C. §§ 6801-6827 (financial information); National Conference of State Legislators, Security Breach Notification Laws (Jan. 4, 2016), http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx (forty-seven states have enacted legislation entitling individuals to notice of breaches of information of personally identifiable information).

63. *See* Practical Law, Expert Q&A on Data Security in Arbitration (Dec. 1, 2016) (stemming from the concept in EU countries that privacy is a fundamental human right, a person's name and place of employment can be considered protected information).

64. Although not the focus of this article, we note that the potential for the application of disparate data protection laws strongly favors early discussions between opposing counsel about how arbitration-related data will be handled as well as discussion of data security with the tribunal by at least the first case management conference.

65. For example, an individual or organization that must comply with health information privacy rules under HIPPA is required to have any "business associate" it engages to help carry out its functions agree to comply with those rules as well. HIPPA, *supra* note 62. *See also* EU Directive 2016/1148 (July 6, 2016).

66. *See, e.g.*, Charter of Fundamental Rights of the European Union (2012/C 326/02), art. 7 ("Everyone has the right to respect for his or her private and family life, home and communications") & 8(1) ("Everyone has the right to the protection of personal data concerning him or her.").

67 . *See* INT'L BAR ASSOC., IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2010), art. 4(5) (specifying personal information to be included in fact witness statements).

when security incidents occur, a web of breach notification obligations may be triggered.[68]

Although it is not evident that the obligations or legal interests that may arise under the current global data protection regime create a bright-line duty, independent of any specific case, for arbitrators to avoid cyberintrusion, their prevalence at least supports the notion that to maintain user confidence in international arbitration process, arbitrators must not only be prepared and competent to handle sensitive information securely, but also appear to the public to be so prepared. Global data protection laws thus behoove arbitrators to be proactive (and not merely reactive, on a case-by-case basis) in dealing with cybersecurity.

IV. NATURE AND SCOPE OF THE ARBITRATOR'S DUTY TO AVOID INTRUSION

This article posits that the arbitrator's duty in relation to cybersecurity is one of avoiding intrusion, which we define as the duty to take reasonable measures to prevent unauthorized digital access to arbitration-related information. In the following sections, we first explore the nature and scope of the duty and then discuss some practical measures that will assist the arbitrator in fulfilling the duty.

A. An Umbrella Obligation

As we have shown above, the arbitrator's duty in relation to cybersecurity is not a new, independent obligation, but rather a natural extension in the digital age of an arbitrator's existing duties to keep arbitration-related information confidential, to preserve and protect the integrity and legitimacy of the arbitral process, and to be competent. By grouping the implied cybersecurity responsibilities arising under each of these duties under the new umbrella of the "duty to avoid intrusion," we recognize the unique challenges that cyberthreats pose to the practice of international arbitration in the digital age.

This is a matter of substance, not just terminology. Recognition of the threat and each actor's acceptance of responsibility to take part in addressing it are key building blocks to effective cybersecurity in

68. Practical Law, *supra* note 63.

the international commercial arbitration regime. In this article, which focuses on the arbitrator's role, we emphasize that the fulfillment of existing arbitrator duties in the digital age encompasses a duty to be proactive and vigilant in guarding against cyberintrusion.

B. An Interdependent Landscape with Independent Duties

Since the data arbitrators are entrusted to keep confidential generally originates in the arbitration from the parties and their counsel, it may be tempting for arbitrators to view cybersecurity as an issue for the parties, and particularly counsel, to address on a case-by-case basis. Parties and their counsel indisputably do have legal and ethical responsibilities to safeguard the data that they import into an arbitration.[69] In many instances, they will be uniquely positioned to secure that data and to advise the arbitrator regarding specific security precautions necessary in the case or required by law. Any view that purports to isolate any one particular participant in the arbitration process as having sole responsibility for cybersecurity, however, or to relieve the arbitrator from any responsibility for cybersecurity outside of the bounds of individual cases, ignores the interdependent digital landscape discussed above and is shortsighted. Since any break in the custody of sensitive data may affect all participants in the arbitral process, cybersecurity is an inherently shared responsibility.

While interdependent with other actors, the arbitrator's cybersecurity duty also stands alone. The arbitrator who takes the view that others are primarily responsible abjures the arbitrator's special role as adjudicator as well as the arbitrator's underlying duties to safeguard the integrity and legitimacy of the process and the confidentiality of arbitration-related information. The obligations of other players in the arbitral process (including the parties, counsel, arbitral institutions and third party service providers among others) may be governed by differing standards and other legal regimes, only some of which overlap with those governing arbitrators.

Moreover, the arbitrator's day-to-day data security architecture and practices pre-exist individual matters and persist after the matter is concluded. Thus, the strength of the arbitrator's routine cybersecurity practices will impact the overall security of arbitration-

69. *See supra* Section III.D (discussing national data protection laws and regulations); Section III.C (discussing cybersecurity obligations arising from attorney ethical codes).

related data from the first moment the arbitrator becomes involved with a case, before counsel or the parties have an opportunity to address security protocols that may be appropriate for the specific data involved in the matter, and will continue after the matter ends as the arbitrator maintains at least some data for conflicts or other record-keeping purposes.

C. Personal Accountability

As arbitrators are appointed for their personal qualifications and reputational standing,[70] it is broadly accepted in international arbitration that the arbitrator's mandate is personal and cannot be delegated.[71] While this notion is raised most often in discussions about impermissible delegation of decision-making responsibilities to arbitral secretaries, the personal nature of the arbitrator's mandate has implications for cybersecurity as well. In particular, it is important for arbitrators to recognize that even if the security of their digital infrastructure is established and monitored by IT personnel, or they work in a large law firm setting where they have little to no influence over firm-wide security policies, they cannot assume that their responsibilities in relation to cybersecurity have been met.

First, effective security depends on individual choices and conduct.[72] Hackers' most valuable currency is human carelessness.[73]

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70. BORN, *supra* note 27, at 2013. ("Arbitrators are almost always selected because of their personal standing and reputation . . .").

71. *See* Eric Schwartz, The Rights and Duties of ICC Arbitrators, in ICC International Court of Arbitration Bulletin, Special Supplement, The Status of the Arbitrator (1995) at 86; *see also* BORN, *supra* note 27, at 1999. ("An arbitrator's obligations include the duty not to delegate his or her responsibilities or tasks to third parties. … Most fundamentally, an arbitrator cannot delegate the duty of deciding a case, attending hearings or deliberations, or evaluating the parties' submissions and evidence to others: these are the essence of the arbitrator's adjudicative function and they are personal, non-delegable duties.").

72. To highlight the fundamental role played by individuals in protecting confidential information, whether reliance is placed on notepads, mobile telephones, or the cloud, Philipe Doyle Gray shares this anecdote:

> I regularly walk from the Supreme Court of New South Wales down King Street to stop at the intersection with Elizabeth Street. So too do other lawyers. When it's raining we huddle under the awning of the Sydney University Law School, but in fine weather we gather around the traffic lights waiting for the signal that it's safe for pedestrians to cross. Usually, I see paper files or lever-arch folders neatly stating the names of the clients concerned, and sometimes the nature of their confidential affairs. Often, I can't help but overhear a colleague talking about his matter. A few

Even if an arbitrator operates in an environment with the digital architecture of Fort Knox, important security actions will always remain in the arbitrator's personal control. Law firm or IT policy may dictate to an arbitrator, for example, that strong, complex passwords be used on all laptops and other devices and that passwords be changed regularly. However, an arbitrator risks completely undermining that security protocol by conveniently storing a reminder of the password du jour on a post-it note stuck to the cover of a laptop,[74] and then working away on the laptop in an airport lounge or other public environment, or, worse, forgetting the laptop in the security line or the airplane seat pocket after a long international flight.[75] Similarly, although IT policy may dictate that no USB drive can be used in a networked computer before it is manually scanned for viruses by the IT department, an arbitrator sitting in a hearing in Vienna may decide before the flight home to take the USB drive handed out at a recent arbitration conference and use it to transfer

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> times, sensitive material was inadvertently broadcast to passers-by that happened to include me. Once, I even overheard a colleague—speaking on his mobile phone—discuss settlement negotiations during a mediation that had adjourned over lunch: he openly discussed not only the parties' respective offers, but his own client's bottom line. The real security problems lie not in CLOUD COMPUTING, but in ourselves.

Gray, *supra* note 57. *See also Harleysville Ins. Co. v. Holding Funeral Home*, Case No. 1:15cv00057 (W.D. Va., Feb. 9, 2017), http://bit.ly/2mSkyuu (court held that insurer's attorney-client privilege was waived where entire claims file was loaded onto a cloud service and made accessible to anyone via hyperlink without password protection, stating this was the "cyber world equivalent of leaving its claims file on a bench in the public square").

73. In December 2015, The Wall Street Journal reported that "[w]eeks after J.P. Morgan Chase & Co. was hit with a massive data breach that exposed information from 76 million households, the country's biggest bank by assets sent a fake phishing email as a test to its more than 250,000 employees. Roughly 20% of them clicked on it, according to people familiar with the email." Robin Sidel, *Banks Battle Staffers' Vulnerability to Hacks*, WALL ST. J., (Dec. 21, 2015), https://www.wsj.com/articles/the-weakest-link-in-banks-fight-against-hackers-1450607401. *See* Int'l Chamber of Commerce [ICC], *Cyber Security Guide for Business*, at 8, ICC Doc. 450/1081-5 (2015) ("35% of security incidents are a result of human error rather than deliberate attacks. More than half of the remaining security incidents were the result of a deliberate attack that could have been avoided if people had handled information in a more secure manner.").

74. According to Verizon's 2016 Data Breach Investigations Report, "63% of confirmed data breaches involved weak, default or stolen passwords." Verizon Report, *supra* note 13, at 20. *See also* Fox-Brewster, *supra* note 7 (Sony hack revealed chief executive's password was "guessable to any semi-skilled hacker" and that passwords to internal accounts were stored in a file marked "passwords").

75. Laptops and other devices are reportedly lost over 100 times more frequently than they are stolen. Verizon Report, *supra* note 13, at 44.

notes from deliberations stored on her laptop to a public computer in the hotel business center for printing.

Second, there is danger in complacency. Arbitrators understandably want to spend time on the practice of arbitration, not on routine practice management. However, an arbitrator who dismisses cybersecurity as an "IT issue" and who assumes that "others are taking care of it" fails to appreciate how a failure to heed cybersecurity may undermine his or her ability to keep arbitration-related information confidential as well as user trust and confidence in the integrity of the international arbitration regime. Notwithstanding the steady flow of news reports about cyberbreaches, it appears that "many [attorneys and law firms] are not using security measures that are viewed as basic by security professionals and are used more frequently in other businesses and professions."[76] Arbitrators who rely on IT personnel to support their practice should thus bear in mind that their existing data security framework and digital architecture may well require an upgrade or adaptation to the unique aspects of international arbitration. Indeed, just as an arbitrator should not entrust (but may be aided by) the conflicts department in his or her law firm to determine whether he or she is bound to make any disclosures in an arbitration,[77] an arbitrator may be assisted by, but should not entrust, an IT department to fulfill the duty to avoid intrusion.[78]

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76. David G. Ries, *Security*, ABA TECHREPORT 2016, 1-2, http://www.americanbar.org/content/dam/aba/publications/techreport/2016/security/security.authcheckdam.pdf (reporting on 2016 survey of attorneys and law firms about security incidents and safeguards). *See also* Matthew Goldstein, *Citigroup Report Chides Law Firms for Silence on Hackings*, N.Y. TIMES (Mar. 26, 2015), https://nyti.ms/1NkjfKo (In March 2015, Citigroup's internal cyberintelligence team advised bank employees to be "mindful that digital security at many law firms, despite improvements, generally remains below the standards for other industries.").

77. *See, e.g.*, Ometto v. ASA Bioenergy Holding A.G. et al., 12 Civ. 1328(JSR), 2013 WL 174259 (S.D.N.Y. Jan. 7, 2013).

78. The importance of "executive-level" attention to effective cyberrisk management is frequently emphasized by cybersecurity experts. *See, e.g.*, ICC, *Cyber Security Guide for Business*, *supra* note 73, at 4 (2015); Tucker Bailey et al., *Why Senior Leaders Are the Front Line Against Cyberattacks*, MCKINSEY & CO. (June 2014), http://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/why-senior-leaders-are-the-front-line-against-cyberattacks.

D. Continuous and Evolving

The duty to avoid intrusion is a continuous obligation, which is not limited in time. In part, this follows from the nature of the arbitrator's duty of confidentiality. Since arbitrators may maintain digital information from their cases beyond the lifetime of an individual matter, ranging from case administration data (including as part of conflicts or billing systems), correspondence, procedural decisions, awards, and parties' evidentiary submissions, parties and other participants have a reasonable expectation that arbitrators will continue to safeguard the confidentiality of such information once a case ends.[79] Furthermore, as we have discussed above, because arbitrators accept appointments in new matters with a digital architecture and certain security practices already in place, parties and other participants have a reasonable expectation that arbitrators will heed cybersecurity from the time of appointment (and necessarily before).

The ongoing nature of the arbitrator's duty to avoid intrusion also flows from the underlying duty to be competent. Because cyberthreats are constantly evolving alongside advancing technology, an arbitrator cannot take effective steps to avoid intrusion unless he or she keeps abreast of the changing nature and scope of cyberrisks. Otherwise, the arbitrator will not be in any position to analyze risks and weigh appropriate responses, including, for example, with respect to whether new or additional security measures may be warranted, what work-arounds might be acceptable when complying with an established security protocol proves to be impossible or impractical, or whether a new product or service is adequately secure.

E. Bounded by Reasonableness

Cybersecurity professionals routinely advise that in today's environment of ever-escalating data breaches, there is no longer any question of *if* one's digital infrastructure and data will be hacked, but

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79. Int'l Law Ass'n, *Draft Report of the Committee on International Commercial Arbitration for the 2010 Hague Conference, Confidentiality in International Arbitration*, at 18 (2010), http://www.ila-hq.org/en/committees/index.cfm/cid/19 (although there is uncertainty regarding the duration of duties of confidentiality in arbitration, the "fact that the duty of confidentiality usually covers the award seems to point to an expectation that the regime of confidentiality should outlive the arbitral proceedings and that the obligations will not cease after the end of the arbitration.").

only *when*.[80] As a practical reality, it follows that the arbitrator cannot guarantee that arbitration-related information will remain safe from hackers, [81] but can only take steps to mitigate the risks of cyberintrusion. In *LabMD, Inc. v. Federal Trade Commission*, the U.S. Federal Trade Commission ("FTC") explained why "reasonableness," assessed "in light of the sensitivity and volume of consumer information [a company] holds, the size and complexity of its business, and the cost of available tools to improve security and reduce vulnerabilities," is an appropriate touchstone for determining whether a company has implemented appropriate data security measures:

> [The FTC] has made clear that it does not require perfect security; reasonable and appropriate security is a continuous process of assessing and addressing risks; there is no one-size-fits-all data security program; and the mere fact that a breach occurred does not mean that a company has violated the law.[82]

Notably, reasonableness, not perfection, also bounds the lawyer's confidentiality duty under the ABA Model Rules to protect information relating to the representation of a client from unauthorized access.[83]

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80. U.S. Attorney Preet Bharara recently made such a pronouncement in announcing criminal indictments of hackers who traded on confidential law firm information, saying, "This case of cyber meets securities fraud should serve as a wake-up call for law firms around the world: you are and will be targets of cyber hacking, because you have information valuable to would-be criminals." Nate Raymond, *U.S. Accuses Chinese Citizens of Hacking Law Firms, Insider Trading*, REUTERS, (Dec. 28, 2016), http://www.reuters.com/article/us-cyber-insidertrading-idUSKBN14G1D5. *See also, e.g.*, Verizon Report, *supra* note 13, at 3 ("No locale, industry or organization is bulletproof when it comes to the compromise of data."); ICC, *Cyber Security Guide for Business*, *supra* note 73, at 10 ("Even the best protected enterprise will at some point experience an information security breach. We live in an environment where this is a question of when, not if.").

81. ICC, *Cyber Security Guide for Business*, *supra* note 73, at 4 (2015) ("[A]ll business managers including executives and directors must recognize that cyber risk management is an on-going process where no absolute security is, or will be, available.").

82 . *LabMD, Inc*., F.T.C. No. 9357, 2016 WL 4128215 (F.T.C. July 28, 2016). California's Attorney General notes in her Breach Report 2016 that "reasonable security" is the general standard for information security adopted not only in California but also the major United States federal data security laws and regulations. *See infra*, note 111.

83. Model Rule 1.6(c) provides "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." MODEL RULES OF PROF'L CONDUCT, r. 1.6(c) (AM. BAR ASS'N, 1983). (emphasis added)

A risk-based approach, bounded by reasonableness, is similarly appropriate as we examine the scope and boundaries of the arbitrator's duty to avoid the ever-evolving threats of cyberintrusion in international commercial arbitration. It follows from the conclusion there is no one-size-fits-all data security program for consumer-facing corporations that there is no one-size fits-all data security program for international commercial arbitrators; any such program would risk obsolescence and fail to account for significant contextual differences. Furthermore, as Pastore argues, a de-contextualized approach to data security may be counterproductive "in that it over-designates [sensitive] information (desensitizing practitioners to the truly critical information) and results in overly cumbersome processes for information that, in reality, needs little to no additional protections."[84]

In addition, a standard of reasonableness under the circumstances is familiar in the law, particularly in areas where the facts and circumstances vary widely and evolve over time. The reasonableness approach enables consideration of the trade-offs that will sometimes exist between increased security measures and other interests.[85] To the extent the arbitrator's duty to avoid intrusion is in tension with other important values such as conducting the proceedings expeditiously and cost-effectively and in accordance with the parties' preferences,[86] arbitrators should be entitled to weigh all of the relevant circumstances to determine the correct balance. [87] Arbitrators, institutions, users, and counsel should be able to understand and embrace such a standard for cybersecurity.

Accordingly, it is appropriate to limit the arbitrator's duty to an obligation to take such measures to protect digital security as he or she deems reasonable in light of the relevant facts and circumstances, including developments in technology and evolving security risks, the arbitrator's individual practice setting and digital architecture, the sensitivity of the data to be protected, and any party preferences or

84. Pastore, *supra* note 15.

85. *See generally* Pastore, *supra* note 15.

86. *See supra* note 10.

87. The UNCITRAL Notes on Organizing Arbitral Proceedings (2016) note that data security is but one factor to be considered when deciding whether to use electronic means of communication for proceedings.. Other factors to be considered may include compatibility, storage, access and related costs. *See* UNCITRAL Notes, *supra* note 26.

other case-specific factors present in the matters over which the arbitrator presides.

V. IMPLEMENTING THE DUTY TO AVOID INTRUSION

In the absence of a detailed roadmap for data security, the challenge for international arbitrators is to determine what specific measures they should implement to avoid intrusion, in their own infrastructure and in arbitrations over which they preside, given that what constitutes "reasonable" measures will vary based on a risk assessment of the arbitrator's individual digital architecture and data assets, the prevalent data security threats, available protective measures and, in relation to individual matters, case-specific factors.[88] Although it is by no means comprehensive, in this Part, we aim to highlight certain practical measures and general principles that are likely to be relevant for all international arbitrators, regardless of practice setting and individual risk profile.[89] In doing so, we further aim to show that the fundamentals of effective cyberrisk management need not be overwhelming or unduly burdensome. In addition, since cyberintrusion in the arbitral process can potentially arise from both intentional, targeted attacks on arbitral participants[90] and from the

88. Security framework standards are generally directed at organizations rather than business professionals. *See generally* NAT'L INST. OF STANDARDS AND TECH., SPECIAL PUBLICATION 800-53 REVISION 4, SECURITY AND PRIVACY CONTROLS FOR FEDERAL INFORMATION SYSTEMS AND ORGANIZATIONS (2013); FRAMEWORK FOR IMPROVING CRITICAL INFRASTRUCTURE CYBERSECURITY (2014), *available at* www.nist.gov; INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, ISO/IEC 27002:2013 *Information Technology, Security Techniques, Code of Practice for Information Security Controls*, *available at* www.iso.org (last visited Jan. 22, 2017); Center for Internet Security, *Critical Security Controls for Effective Cyber Defense*, Version 6 (Oct. 15, 2015), www.cisecurity.org/.

89. A recent working paper from the Washington Legal Foundation suggests eight data security best practices based on an analysis of FTC enforcement actions:

- Limit the collection, retention, and use of sensitive data;
- Restrict access to sensitive data;
- Implement robust authentication procedures;
- Store and transmit sensitive information securely;
- Implement procedures to identify and address vulnerabilities;
- Develop and test new products and services with privacy and security in mind;
- Require service providers to implement appropriate security measures;
- Properly secure documents, media, and devices.

Kurt Wimmer, Ashden Fein, Catlin M. Meade & Andrew Vaden, *Data Security Best Practices Derived From Ftc § 5 Enforcement Actions*, at 6 (Washington Legal Foundation Paper No. 199, 2017).

90. *See supra* notes 13-14.

inadvertent [91] disclosure or compromise of arbitration-related information (e.g., by way of a weak password, lost mobile device, or other human error),[92] we discuss below potential responses to external threats and safeguards to prevent or mitigate damage if data security is compromised.

A. Keeping Abreast of Developments in Relevant Technology and Understanding Associated Benefits and Risks

There are readily accessible resources for arbitrators to educate themselves as to the evolving nature and scope of major data security threats, with a view to understanding the significance and effectiveness of specific security protocols, such as standards for passwords. These resources have been developed by bar associations, law firms, and others.[93] For example, the ABA has taken the lead internationally in developing guidance for legal practitioners in responding to the challenges of the digital world and regularly posts short, digestible articles online on topics such as ransomware and encryption, in addition to offering educational webinars and seminars.[94] Such resources frequently highlight ethical opinions from state bar associations on the responsible use of technology in the legal

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91. Even a single misdirected e-mail—within an arbitration proceeding—can have serious consequences for the perceived integrity and legitimacy of proceedings. In Horndom Ltd. v. White Sail Shipping, Optima Shipping and Integral Petroleum (SCC Arbitration V094/2011), the respondents challenged their own appointee to the tribunal after he accidentally copied one of the parties' lawyers on an e-mail complaining that counsel were getting "above their station" and that he was "rather sick of these parties." While the arbitrator admitted that disagreement over the hearing date resulted in his "frustration with procedural matters" and "intemperate expression," according to the respondents, the inadvertent disclosure of this otherwise private exchange among tribunal members revealed the arbitrator's "personal animosity" toward counsel and raised justifiable doubts about his impartiality. *See also* Alison Ross, *Accidental cc Triggers Double Arbitrator Challenge in Stockholm*, GLOB. ARB. REV. (Oct. 17, 2016), http://globalarbitrationreview.com/article/1069329/accidental-cc-triggers-double-arbitrator-challenge-in-stockholm.

92. An episode of the popular CBS TV show *The Good Wife* was based on the disclosure of confidential information resulting from an open feed when a video camera was mistakenly left on after a teleconferenced deposition. THE GOOD WIFE, (CBS, 2014), http://www.cbs.com/shows/the_good_wife/episodes/213197/.

93. *See, e.g.*, *supra* note 88 and accompanying text.

94. *Law Technology Resource Center*, AMERICAN BAR ASSOCIATION http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources.html (last visited Jan. 20, 2017).

profession. One particularly noteworthy resource, available only to ABA members, are e-mail alerts from the FBI about evolving cyberrisks and threats targeting law firms.

Other bar associations worldwide, such as the Law Society of Upper Canada, also have developed helpful online resources.[95] For the most part, such resources are available for free online (i.e., to members and non-members alike) and can assist arbitrators in finding quick, practical answers to technical questions written for legal professionals (such as what are the risks of public wifi and what alternatives are available for mobile wifi access). Meanwhile, to keep a handle on evolving data protection obligations internationally, now that most major law firms have a dedicated data privacy or cybersecurity practice group, arbitrators may also find it helpful to sign up for e-mail alerts from several law firms based in different jurisdictions.

B. Implementing Baseline Security

Cybersecurity experts agree that good cyber "hygiene"—basic everyday habits relating to technological use—is essential to a strong, baseline defense.[96] Significantly, these are habits that every arbitrator, regardless of practice setting, can readily implement, with minimal cost and without the need for IT support. Basic cyber hygiene best practices include:

- creating access controls, including strong, complex passwords[97] and two-factor authentication when available[98];

95. *See Technology Practice Tips*, LAW SOCIETY OF UPPER CANADA http://www.lsuc.on.ca/technology-practice-tips-podcasts-list/ (podcasts on "everything you ever wanted to know about technology, but were afraid to ask" including "[p]ractical and important information about passwords, encryption, social media, smartphone security, websites and much more . . . in an accessible, conversational manner.").

96. *See, e.g.*, FED. TRADE COMM'N, START WITH SECURITY: A GUIDE FOR BUSINESS, LESSONS LEARNED FROM FTC CASES (June 2015), https://www.ftc.gov/system/files/documents/plain-language/pdf0205-startwithsecurity.pdf; Wimmer et. al., *supra* note 89.

97. On some devices, including many phones and tablets, biometric authentication technologies such as fingerprint scanners now are available to perform the authentication and access control function. *See* PWC Report, *supra* note 13, at 9-12.

98. Many services and sites that store sensitive information, including cloud storage and e-mail providers, offer two-factor authentication whereby access requires a password plus something else that you have; typically, a security code that is either sent by text message or e-mail to a separate device or generated via an app that works offline such as Google Authenticator, or a biometric like a fingerprint. *See Two-Factor Authentication for AppleID*,

- guarding digital "perimeters" with firewalls, antivirus and antispyware software, operating system updates and other software patches[99];
- adopting secure protocols such as encryption for the storage and transmission of sensitive data[100];
- being mindful of public internet use in hotel lobbies, airports, coffee shops, and elsewhere and considering making use of personal cellular hotspots and virtual private networks[101]; and
- being mindful of what one downloads.[102]

C. Taking a Thoughtful Approach to Assets and Architecture

As Pastore explains, determining what cybersecurity should be implemented turns on knowledge of one's "assets" and "architecture."[103] That is, what sensitive information do you have (e.g., customer lists of a client, sensitive trade secrets developed through substantial R&D expenditures, or potentially market-moving information about future business plans), and where do you store it (e.g., with a third-party cloud provider, on portable (and easily lost) external media like thumb drives, or on networks accessible by other practitioners in the firm without regard to whether the need access to such data).[104] This exercise will be relevant in respect to the arbitrator's own practice-related data, such as conflicts and billing records, closed case records, as well as the data received in matters where the arbitrator is presiding. If the arbitrator works in an organizational setting, it will also be relevant in respect to the arbitrator's use of personal devices, which are often not subject to

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APPLE, https://support.apple.com/en-us/HT204915 (last visited Jan. 22, 2017); *Google Two-Step Verification*, GOOGLE, https://www.google.com/landing/2step/ (last visited Jan. 22, 2017); Seth Rosenblatt & Jason Cipriani, *Two-Factor Authentication (What You Need to Know)*, CNET, (June 15, 2015), https://www.cnet.com/news/two-factor-authentication-what-you-need-to-know-faq/.

99. *See Protections, How to Protect Your Computer*, FBI, https://www.fbi.gov/investigate/cyber (last visited Jan. 20, 2017).

100. *See e.g.*, Alex Castle, *How to Encrypt Almost Anything*, PC WORLD, (Jan, 18, 2013), http://www.pcworld.com/article/2025462/how-to-encrypt-almost-anything.html.

101. Pastore, *supra* note 15.

102. *See supra* note 99.

103. In this article, we frequently refer synonymously to one's digital "infrastructure."

104. Pastore, *supra* note 15.

established security protocols.[105]

Once the arbitrator knows and classifies the sensitivity of the different data he or she holds and knows where it is located, the arbitrator will be in a position to assess what protocols may be appropriate for storage and transfer of the information.[106] In addition, the arbitrator will be in a position to consider what steps can be taken to reduce the risk that sensitive data will be compromised in a cyberattack or following human error. For example:

- Though the arbitrator may own both a tablet and laptop, do arbitration-related documents need to be accessible on both devices, or is it sufficient that they are loaded on one? (Here, an important consideration is whether the data really needs to be loaded onto a portable device and subjected to the enhanced risks of travel.)
- Can the arbitrator enable notifications for e-mail[107] or cloud services[108] when unauthorized data access may have occurred and remotely revoke that access or wipe data?
- When working at home, does the arbitrator use a separate device in lieu of a shared family computer? If not, are there other steps the arbitrator can take to segregate business data (e.g., by using separate computer logins)?

By the same token, at the conclusion of a case, the arbitrator should seek to avoid holding onto case-related data longer than is

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105. According to the ABA TechReport 2016, most lawyers (74%) use a personal rather than firm-issued phone for their legal work and a majority (51%) use a tablet for legal work, the vast majority of which (81%) are personal devices. Nonetheless, "only 43% of lawyers reported having a mobile technology policy for their firm, meaning the majority of law firms don't even have a policy for how mobile devices should be used and how client data should be stored and transmitted on them." Aaron Street, *Mobile Technology*, ABA TECHREPORT (2016), http://www.americanbar.org/publications/techreport/2016/mobile.html.

106. Pastore discusses this analysis in greater detail. *See* Pastore *supra* note 15.

107. Such measures are generally not available for free consumer e-mail services. Thus it is generally preferable to use paid professional versions of these services, which have more robust security protocols.

108. Numerous lawyer ethics opinions have considered whether the use of cloud services is compatible with an attorney's obligation to maintain confidentiality. The decisions generally have concluded that lawyers may use the services, provided that they take reasonable steps to select a reliable vendor, implement available security and address the potential risks. *See* Cloud Ethics Opinions Around the U.S., AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html

necessary.[109] With a view to developing an individualized document retention policy, the arbitrator should give thought to what information will be kept, why, for how long, where case information resides now (across which devices and in what applications/programs), and where the materials will be stored. At a minimum, the arbitrator will want to retain basic case administration data for the purposes of future conflicts checks. Otherwise, the arbitrator may wish to consider questions such as:

- During the life of a case, can the arbitrator use file-naming conventions to facilitate identifying and segregating types of documents, such as pleadings and exhibits, that the arbitrator is unlikely to have any interest in retaining after a case ends?
- Does applicable law preclude the arbitrator from retaining certain data or mandate that it be stored or disposed of in any particular fashion?
- To the extent that it is desirable and appropriate to retain arbitrator work product, such as procedural orders and awards, for personal future reference, would it be workable to retain anonymized Word documents in lieu of final PDF copies?
- If the arbitrator practices in an organizational setting that has a document retention policy, are documents kept longer than necessary to comply with rules applicable to the attorney-client relationship, which do not apply to service as an arbitrator?

D. Planning for a Data Breach

Separate from considering data breach protocols for individual cases, there are a number of useful reasons for the arbitrator to consider more generally how he or she would respond to a data breach if and when one arises. First, by thinking through what steps should be taken in the event of various scenarios, the arbitrator may be able to identify and remediate security vulnerabilities that he or she had not considered. Second, the arbitrator will be in a better position to react quickly to control or limit the damage that flows from a security incident, and possibly avoid triggering duties to notify data owners, regulators, insurers, law enforcement, or others that a security

109. Pastore, *supra* note 15.

incident occurred.[110] This exercise is particularly important for international arbitrators for whom international travel is a fact of life, as travel creates special risks of inadvertent data loss and vulnerability to unlawful intrusion.

The prospect of a lost laptop, for example, may prompt an arbitrator to consider:

- Is the laptop protected by a strong password?
- Is full disk encryption enabled?[111]
- Can the arbitrator make use of location tracking and/or remote data wiping to minimize potential disclosure of sensitive information?[112]
- Can the arbitrator provide the police with the serial number for the laptop?
- Can the arbitrator avoid lost productivity by restoring information on the laptop from a back-up?
- Is there sensitive data on the laptop that could trigger breach notification duties? If so, could that data be handled differently (e.g., securely destroyed or encrypted)?

E. Case Management Considerations

In our view, the arbitrator must be attuned to data security issues in the organizing phase of the arbitration. Taking into account such

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110. *See, e.g.*, U.S. Department of Health & Human Services, *Guidance Regarding Methods for De-identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA)*, https://www.hhs.gov/hipaa/for-professionals/privacy/special-topics/de-identification/#_edn1 (last accessed Jan. 21, 2017) (explaining that there is often a safe harbor for data breach notification if sensitive information has been encrypted or otherwise de-sensitized); Kamala D. Harris, Attorney General California, Department of Justice, Breach Report 2016, *available at* https://oag.ca.gov/breachreport2016 (last accessed Jan. 21, 2017) (explaining major differences between state notification statutes); *See* Cal. Civil Code § 1798.82 (demonstrating that in 2016, California amended its data breach notification law effective January 1, 2017 to trigger notification obligations not only if unencrypted data is compromised, but also if encrypted data is breached along with any encryption key that could render the data readable or useable).

111. *See Turn On Full Disk Encryption (Windows 10)*, MICROSOFT, https://support.microsoft.com/en-us/instantanswers/e7d75dd2-29c2-16ac-f03d-20cfdf54202f/turn-on-device-encryption; *see also Use FileVault to Encrypt the Start-Up Disk on Your MAC*, APPLE, https://support.apple.com/en-us/HT204837.

112. These measures are available for Apple devices including laptops, for example, but only if the "find my iPhone" feature has been activated first.

factors as the size and complexity of the case, the likelihood that confidential or sensitive data will be stored or transmitted, the parties' resources, sophistication, and preferences, as well as potential legal obligations arising under applicable law or rules in relation to data privacy or confidentiality, the arbitrator should consider whether to raise the topic of data security at the initial case management or procedural conference.[113] Thereafter, the continuing scope of the arbitrator's duty will depend on factors such as the extent to which the parties or their counsel assume responsibility for data security and the arbitrator's own assessment of the ongoing risks and the measures he or she can reasonably implement in addition to or in lieu of measures other actors are undertaking.

The arbitrator may also seek the cooperation of the parties and counsel in avoiding the unnecessary transmission of sensitive data to the tribunal. For example, at the outset of an arbitration, the arbitrator may consider telling counsel that, apart from reliance documents submitted with the parties' memorials, the arbitrator is not to be copied on, or provided with, any pre-hearing disclosure that the parties may otherwise exchange. Likewise, if the arbitrator can anticipate that sensitive personal information (such as tax returns) or commercial information (such as pricing information or trade secrets) will be exchanged, consideration may be given to having irrelevant information redacted (e.g., to show only the last four digits of a social security number). Alternatively, it may be possible to aggregate or anonymize data before it is provided to the arbitrator without diminishing either party's ability to fairly present its case.

VI. LOOKING TO THE FUTURE

We conclude this article with the well-worn maxim that "it takes a village." We hope that the challenge we present to arbitrators will stimulate discussion in the international commercial arbitration community and prompt other participants to focus on their own responsibilities and how their individual security architecture and practices may undermine or support the security measures taken by

113. *See* UNCITRAL Notes, *supra* note 26. Consistent with the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings, we do not intend to suggest a binding requirement for the tribunal or parties to act in any particular manner.

others. As awareness of cybersecurity risks in arbitration increases, we hope to see dialogue around questions such as the following:

- Should arbitral institutions amend their rules to flag data security for consideration in the initial organizing phase of an arbitration, as their rules now do with respect to other important topics,[114] and/or should they expressly establish duties for the parties, counsel, institution and arbitrators to implement reasonable measures to avoid intrusion?
- Should counsel be charged with developing a data security plan in individual arbitration matters[115] and/or providing a secure platform for the transmission and storage of data in each matter?
- How should tribunals resolve party conflicts about appropriate security measures, breach notification obligations, and related costs?
- Should arbitrators routinely disclose their data security practices to parties and counsel (e.g., in relation to cloud computing or post-award document retention) and should those practices be subject to the parties' comments and consent?
- Should arbitral institutions or other participants develop shared secured platforms for data storage and transmission that would be available to parties as a non-exclusive choice?
- What kinds of training and education programs should be developed for parties, counsel, arbitrators, and other participants to provide baseline knowledge, as well as updated information on evolving data security threats and updates on available protective measures?

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114. *See e.g.*, ICC RULES, *supra* note 10, at art. 22, (effective case management) and Appendix IV (case management techniques); ICDR RULES, *supra* note 10, at art. 20(2) (noting that the tribunal and the parties may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings) and art. 20(7) (establishing the parties' duty to avoid unnecessary delay and expense and the tribunal's power to "allocate costs, draw adverse inferences, and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration"); LCIA RULES, *supra* note 1, at art. 14 (avoiding unnecessary delay and expense) and art. 30 (confidentiality).

115. *See* David J. Kessler, et al., *Protective Orders in the Age of Hacking*, NYLJ, (Mar. 16, 2015), reprint at 1 ("In the age of cyber attacks, hacking, and digital corporate espionage… [p]rotective orders should be upgraded to require reasonable levels of security to protect an opponents' data and more stringent notification requirements if unauthorized access does occur . . .").

- Should institutions that maintain rosters of arbitrators require their arbitrators to complete mandatory cybersecurity training?
- Should arbitrator ethical codes be updated to define competence to include an obligation to keep abreast of new developments in arbitration and its practice, and to consider the benefits and risks associated with technology?
- Should professional organizations like the International Bar Association or the Chartered Institute of Arbitrators develop cybersecurity checklists or guidance notes for arbitrators, counsel, or other participants?

There will no right answer to these and other relevant questions, but we are confident that dialogue will be constructive. What will constitute a reasonable data security program and what reasonable measures individual participants in the process should take will continue to evolve. Our hope is that increased awareness will ensure that a process will emerge in every arbitration to identify data security risks and develop a response, having regard to the nature and scope of the risks, the desires and resources of the parties, and other relevant factors.

DRAFT CYBERSECURITY PROTOCOL FOR INTERNATIONAL ARBITRATION

CONSULTATION DRAFT

Announcement of Cybersecurity Protocol Consultation

International arbitration in the digital landscape warrants consideration of what constitutes reasonable cybersecurity measures to protect the information exchanged during the process.

Recognizing this need, the International Council for Commercial Arbitration (ICCA), the International Institute for Conflict Prevention and Resolution (CPR) and the New York City Bar Association have established a Working Group on Cybersecurity in Arbitration (the "Working Group"). The Working Group has promulgated a Draft Cybersecurity Protocol for International Arbitration (the "Protocol") and is now pleased to proffer this draft Protocol for public consultation. The draft Protocol is attached hereto.

The consultative period will last until 31 December 2018. All interested parties are encouraged to provide detailed thoughts and comments on the draft protocol, or to provide general feedback. The Working Group will hold a number of public workshops in different parts of the world to solicit and discuss the views of interested parties. In addition, the Working Group welcomes written comments from interested parties which should be submitted no later than 30 September 2018, through the Working Group's page on ICCA's website at <http://www.arbitration-icca.org/projects/Cybersecurity-in-International-Arbitration>.

In anticipation of the public consultation, which the Working Group anticipates will include input from a variety of sources with differing views, the draft Protocol refrains in Schedule A from offering specific cybersecurity measures for possible inclusion in arbitration agreements or procedural orders. Instead the Protocol suggests a procedural framework for developing specific cybersecurity measures within the context of individual cases, recognizing that what constitutes reasonable cybersecurity measures will vary from case-to-case based on a multitude of factors. Depending on the feedback received, the final Protocol may or may not include such proposed measures in Schedule A.

Following the consultation period, the Protocol will be revised, refined, and finalized in accordance with the input and comments received. After that time, the Working Group anticipates that there will be an ongoing review and revision process, as cybersecurity issues will evolve with changing technology, new cyberthreats, changing laws and regulatory schemes, and emerging consensus as to best practices.

The Working Group is chaired by Brandon Malone (Chairman of the Scottish Arbitration Centre and the principal of Brandon Malone & Company). Its members include Olivier André (CPR), Paul Cohen (4-5 Gray's Inn Square Chambers), Stephanie Cohen (independent arbitrator), Hagit Elul (Hughes Hubbard & Reed), Lea Haber Kuck (Skadden, Arps, Slate, Meagher & Flom LLP), Micaela McMurrough (Covington & Burling), Mark Morril (independent arbitrator), Kathleen Paisley (Ambos Law) and Eva Y. Chan (Skadden, Arps, Slate, Meagher & Flom LLP) as Secretary to the Working Group.

Draft Cybersecurity Protocol for International Arbitration*

I. Introduction: Importance of Cybersecurity in Arbitration

A. Most exchanges of information[1] today are digital, including in international arbitration and other forms of dispute resolution.

B. Parties expect that the providers of dispute resolution services and other participants in the dispute resolution process will take reasonable measures to protect non-public exchanges of information, including reasonable cybersecurity measures, to safeguard digital information from unauthorized access and disclosure.

C. Cybersecurity may be legally mandated when the information at issue is personal or industry-regulated data, or if the information is relevant to national security or other matters of public interest.

D. In an increasingly digital landscape, the credibility of any dispute resolution system, including arbitration, depends on maintaining a reasonable degree of protection of the digital information exchanged during the process, except where the parties intend for the information to become public. Arbitration proceedings are not immune to increasingly pervasive cyberattacks against businesses, law firms, governmental actors, educational institutions and other custodians of large electronic information repositories. This means that attention to cybersecurity is required in international arbitration as it is in other sectors.

E. Arbitration has the benefit over other dispute resolution processes of enabling parties to maintain the confidentiality of the dispute resolution process itself where they want to, and the information exchanged within it. Reasonable cybersecurity measures are essential to ensure that international arbitration maintains this advantage.

F. Even where an arbitration has not been made confidential by agreement of the parties or by application of arbitration rules or law, maintaining the legitimacy of the process may require that certain aspects of the arbitral process remain confidential. For example, interactions between an administering institution and the parties, tribunal deliberations, and draft awards are generally intended to remain private and secure.

G. Although a reasonable degree of cybersecurity is critical for international arbitration in the digital world, what is reasonable in any given circumstance depends on various factors discussed herein.

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* Proposed by the Working Group on Cybersecurity in Arbitration established by the International Council for Commercial Arbitration (ICCA), the International Institute for Conflict Prevention and Resolution (CPR) and the New York City Bar Association. Pending a period of public consultation, the Protocol is being issued as a draft for debate and comment. The Working Group anticipates that a final version of the Protocol will be released in 2019.

1. This Protocol uses the broad term "information" to include all types of electronic and non-electronic information of any type and in any form, including both commercial and personal information. When referring to personal information specifically, we use the term "personal data" employed in many data protection laws and regulations. This is also a very broad term and typically includes all information of any nature whatsoever that individually or collectively could be used to identify an individual (including for example, work-related emails, lab notebooks, agreements, handwritten notes, etc.).

H. Cybersecurity is a shared responsibility of all Participants[2] in the international arbitration process. Security of information ultimately depends on the responsible conduct and vigilance of individuals. Many breaches arise from individual conduct; any individual actor can be the "weak link", no matter how robust the security of its infrastructure.

I. The Participants in international arbitrations are, to a large degree, digitally interdependent, because the process typically involves the transmission and hosting of information and collaborative elements such as communications relating to the arbitration. Consequently, any break in the custody of arbitral information has the potential to affect all Participants. Indeed, since Participants will frequently host not only their own arbitral information, but also the information of others, intrusion into the information held by one Participant may injure another more than the one whose information security was compromised.

J. All Participants should take into consideration their own, regular cybersecurity practices and digital infrastructure as a threshold matter, because Participants' day-to-day security practices and infrastructure pre-exist individual arbitrations, and therefore have an immediate and continuing impact on the security of arbitration-related information. Schedule C hereto highlights general cybersecurity practices that all Participants in an international arbitration should take into consideration.

II. Cybersecurity Risks in International Arbitration

A. Cybersecurity refers to the means employed to protect digitally stored information from intrusion by threat actors not authorized to have access to that information.

B. As a matter of good practice, reasonable cybersecurity measures should be employed whenever large amounts of digital information are processed. This includes international arbitration.

C. While not unique, the need for reasonable cybersecurity measures in international arbitrations is highlighted by:

1. the litigious backdrop, which can lead to targeting of information;

2. the high-value, high-stakes nature of disputes, which increases the risk of breaches and the likelihood that those breaches will cause significant loss;

3. the exchange of information that is often sensitive or high-value confidential commercial information and/or regulated personal or other data; and

4. the cross-border nature of the process, which creates heightened challenges in complying with applicable legal requirements and makes the consequences of a breach more substantial.

2. The term "Arbitral Participants" or "Participant" refers to anyone who receives information that s/he would not otherwise have as a result of the arbitral process. Hence, it includes the parties, counsel, arbitrators, arbitral institutions, experts, and Vendors. Capitalized terms not otherwise defined herein are defined in the Glossary attached as Schedule D, which also includes a general glossary of terms relevant to cybersecurity that are not used in this Protocol.

D. The specific consequences that may result include:

1. economic loss to parties, arbitrators, institutions, witnesses or other persons/entities whose commercial information or personal data is compromised;

2. reputational damage to arbitral institutions, arbitrators and counsel, as well as to the system of arbitration overall; and

3. potential liability under applicable laws and other regulatory frameworks.

E. With respect to the legal and regulatory framework, the vast amounts of digital information available today have led to increasing regulation of the security and use of information, particularly personal data. These data protection regimes require, among other things, reasonable cybersecurity measures whenever personal data is exchanged. This legal infrastructure has the potential to apply to, and shape how, information is managed in international arbitrations.

F. Applicable law may vary from jurisdiction to jurisdiction, and non-compliance with applicable law may result in substantial penalties and/or litigation risk. Furthermore, data protection enforcement and other legislative risk may be inconsistent in different jurisdictions and create obstacles to trans-border information exchanges and indirectly international arbitration.

G. However, the determination of what law(s) apply(ies) in a particular arbitration may be a complex issue and it may be difficult to reconcile requirements of different jurisdictions.

H. Given the substantial risk of non-compliance, we can expect that parties will increasingly drive data protection compliance in all fields, including international dispute resolution, with the starting point being that reasonable cybersecurity may be required as a matter of law, whenever personal or other regulated data is exchanged, and good practice, whenever important information is exchanged during an arbitration. The baseline reasonableness standard will ensure consideration of the facts and circumstances of individual cases, including the parties' preferences and resources.

III. Purpose of the Cybersecurity Protocol

A. The Draft Cybersecurity Protocol for International Arbitration set forth in Section IV (the "Cybersecurity Protocol" or the "Protocol") is intended to encourage Participants in international arbitration to become more aware of cybersecurity risks in arbitration and to provide guidance that will facilitate collaboration in individual matters about the cybersecurity measures that should reasonably be taken, in light of those risks and the individualized circumstances of the case to protect information exchanged in the arbitral process.

B. The Protocol is intended to provide a framework that parties and arbitrators can consult in order to determine reasonable cybersecurity measures for their individual matters. The Protocol will not apply in any given case unless it is adopted by agreement of the parties or an arbitral tribunal determines that it will apply.

C. Although following the Protocol may assist in identifying applicable legal requirements, it does not supersede applicable laws or regulations which may require that specific cybersecurity measures be implemented. Furthermore, it is solely addressed at cybersecurity and does not attempt to address any other potentially applicable data protection or other measures that may be required.

D. The Protocol therefore purposefully does not adopt a one-size-fits-all approach, but rather guides parties and arbitrators in undertaking a risk-based approach to determine reasonable cybersecurity measures for a particular matter.

E. Rather than obligating the parties to follow a specific and immutable set of cybersecurity measures, the Protocol provides flexibility to accommodate party preferences and risk tolerance in light of the individual circumstances of each case.

F. It is expected that the Protocol will necessarily evolve over time in light of:

1. Changing technology;

2. New and prevalent cyberthreats;

3. New laws/regulations;

4. Any consensus that might emerge as to reasonable measures/arbitration best practices; and

5. New cybersecurity initiatives by institutions or others.

G. Although the Protocol is drafted with international commercial arbitrations in mind, Arbitral Participants may find it a useful starting point for domestic arbitration matters and/or investor-state arbitrations.

IV. Cybersecurity Protocol for International Arbitration

A. The Cybersecurity Protocol is structured as follows:

1. Articles 1-3 address general issues;

2. Articles 4-6 address the tribunal's authority to order cybersecurity measures and the potential scope of such measures;

3. Articles 7-12 address the factors to be considered when determining what cybersecurity measures to adopt;

4. Articles 13-17 suggest a procedural framework for adopting cybersecurity measures during an arbitration;

5. Article 18 addresses cybersecurity breaches; and

6. Article 19 clarifies what is not covered.

General Provisions

1. This Cybersecurity Protocol governs issues of information security in an arbitration where the parties have agreed to follow it, or the arbitral tribunal has determined to employ it.

Commentary to Article 1

(a) Article 1 recognizes the importance of party autonomy in the conduct of international arbitrations, as well as the important role played by the tribunal in determining what cybersecurity measures are reasonable in any given case. Among other things, the arbitral tribunal may have to interpret any agreements reached by the parties, resolve any conflicts with applicable arbitration rules or mandatory provisions of law, consider the interests of other Participants such as third parties or administering arbitral institutions, and fulfill its own responsibility to maintain the integrity and legitimacy of the adjudicatory process.

(b) Subsequent Articles more fully address the role played by Arbitral Participants. In particular, Article 4 addresses the tribunal's authority over issues of cybersecurity in the arbitration, and Article 13 addresses when and how parties are recommended to enter into an agreement addressing cybersecurity.

(c) The Protocol has been prepared as a unified set of guidelines and is not intended or recommended to be applied in a piecemeal fashion.

2. The Protocol does not supersede applicable law, regulations, professional or ethical obligations.

Commentary to Article 2

(a) The Protocol is not intended to ensure compliance with any applicable law or regulation and adherence to the Protocol does not provide any liability shield or presumptions.

(b) Article 11 reminds Participants that, in determining what cybersecurity measures are reasonable for their individual matter, applicable law and regulations should be taken into account.

(c) There are multiple sources of mandatory cybersecurity regimes including those contained in many of the more than 100 national data protection laws, regulations, and industry norms applicable across the globe to certain types of personal data and data of public importance, including, for example, the European Union General Data Protection Regulation ("GDPR") and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") in the United States.

(d) The GDPR, for example, includes a broad-reaching set of mandatory legal requirements applicable to the collection and processing of individuals' personal data. There is no exception for arbitrations and the penalties for breach may be substantial.

(e) The Protocol is limited to cybersecurity, and purposefully does not address the broader subject of how the application of data protection rules to any personal or other data exchanged in an arbitration will impact the process. However, while the security required differs among jurisdictions, to the extent personal data is exchanged during an arbitration, under the GDPR and virtually all extant data protection regimes, keeping that information secure, including implementing reasonable and proportionate cybersecurity adequate to such purpose, is mandatory.

(f) Legal requirements may apply to all who either process or control the information, including personal data, which may include all Arbitral Participants.

(g) It is therefore important in each case for all the Arbitral Participants to understand their obligations under the law(s) that may be applied to the processing of the information, including personal data. Counsel's obligations in some instances may extend to informing other relevant actors of applicable legal requirements and how they will be addressed.

(h) It is also important for counsel and arbitrators to be aware of any ethical and professional obligations of their own that have implications for cybersecurity.

3. The Protocol does not establish any liability standard for any purpose, including, but not limited to, liability in contract, for professional malpractice, or negligence.

Commentary to Article 3

(a) Article 3 makes clear that the Protocol is not intended to establish any liability standard.

(b) The Protocol proposes a mechanism for the adoption of reasonable case-specific cybersecurity measures, rather than providing what those measures should be.

(c) Article 3 is not intended to limit the rights of the parties to make agreements with respect to cybersecurity as set forth in Article 13 or the right of the arbitral tribunal to issue directives regarding cybersecurity as set forth in Article 4.

Authority to Order Cybersecurity Measures and their Potential Application

4. The arbitral tribunal has the authority to determine what security measures, if any, are reasonable in the circumstances of the case, taking into account the views of the parties (and the other Arbitral Participants, to the extent the tribunal considers to be appropriate) and to order the implementation of such measures.

Commentary to Article 4

(a) Article 4 recognizes the tribunal's express authority to determine the cybersecurity measures, if any, that are reasonable in the case. This authority is implied in the tribunal's general powers, but is expressly recognized in Article 4.

(b) In making any determination on cybersecurity, the tribunal shall take the parties' views into account.

(c) As further set forth in Article 13, in cases of party agreement, the tribunal should respect the parties' agreement on the cybersecurity measures to be employed, unless other significant countervailing factors exist that in the tribunal's view outweigh the significant weight to be given to party autonomy.

(d) Article 4 also recognizes that in some cases, third parties as well as Arbitral Participants other than the parties, also may have an interest in the cybersecurity measures to be employed, and recognizes the tribunal's right to take such views into account where appropriate.

5. In administered arbitrations, counsel and the arbitral tribunal should consider whether the application of certain cybersecurity measures may depend upon the consent of the arbitral institution or may need to be adapted to respond to the institutional rules, practices or capabilities.

Commentary to Article 5

(a) If an arbitration is administered by an institution, it may be necessary for the parties and the arbitral tribunal to consult and coordinate with that institution prior to adopting cybersecurity measures, in order to ensure that the measures are consistent with, and can be implemented pursuant to, the institution's rules, practices and technical capabilities.

(b) Depending on the degree of confidentiality of the information involved, it may be necessary to coordinate with the institution when the arbitration is being commenced (e.g., to determine whether the secure notification of a request for arbitration or request for emergency relief can be made or if a more limited filing is appropriate initially; or, to request institutional attention to the secure handling of confidential information by potential arbitrators.)

(c) As cybersecurity receives increasing attention, some arbitral institutions may adopt their own rules or practices relating to information security. For example, an institution might adopt or endorse a hosting platform for some or all of the information related to arbitrations they administer, such as a secure hosting platform for the transmission of communications and documents between the parties, the tribunal and the institution.

(d) The institution's rules and practices may or may not be deemed mandatory by the institution.

6. In determining what information security measures will be adopted in the arbitration, consideration may be given to establishing procedures for the following:

i. the transmission of communications, pleadings, disclosure materials and evidence by the parties;

ii. communications among arbitrators and between the arbitrators and any administering institution;

iii. storage of arbitration-related information;

iv. sharing arbitration-related information with authorized third parties such as experts, interpreters, stenographers, and tribunal secretaries;

v. vulnerability monitoring and breach detection;

vi. security breach notification and risk mitigation; and

vii. post-arbitration document retention and destruction.

Commentary to Article 6

(a) With respect to the transmission of communications, pleadings, disclosure materials and evidence, the following measures, among others, may be considered:

(i) limiting all exchanges and transfers of confidential commercial information and personal data in relation to the arbitration;

(ii) without prejudice to disclosure obligations, limiting the disclosure of confidential commercial information and personal data (i.e., in addition to the narrow standard generally applied to document exchange in international arbitration, the parties may consider protective measures such as redaction, pseudonymization, or anonymization of information before it is exchanged);

(iii) restricting access to arbitration-related information on a least privilege and need-to-know basis, or limiting certain information to attorneys' eyes only (e.g., under ordinary circumstances, disclosure material need not be shared with the arbitral tribunal or the institution, except in respect to disclosure disputes, in which event the material shared should be limited to what is relevant to the tribunal's resolution of the dispute); and

(iv) the method of transmission (e.g., e-mail, third-party platform or virtual data room, USB drive or other portable storage device) and corresponding protective measures (e.g., encryption; procedure for transmitting the password for a portable storage drive separately from the drive itself).

(b) If a third-party data storage platform is being considered, counsel should seek to agree on the party or other individual or entity that will host it, who will have access to the platform, and for how long.

(c) In considering which data storage platform to use, if any, counsel should consider the nature and amount of information, the amount of time it will need to be stored, whether it includes personal or other regulated data or confidential commercial information, and other issues related to the data being stored.

(d) Security breaches are addressed in Article 18 and accompanying Commentary.

(e) Issues to be considered with respect to post-arbitration document retention and destruction may include:

(i) whether to require that arbitration-related information be returned or safely disposed of (or certified as having been safely disposed of); and

(ii) the timing of any such requirement, with due consideration for applicable legal or ethical obligations, award recognition/enforcement proceedings, and legitimate interests in retaining work product.

Factors to be Considered in Developing Cybersecurity Measures

7. The cybersecurity measures to be adopted for the arbitration shall be those that are reasonable, taking into consideration: the nature of the information at issue; the potential security threats and consequences of a potential information breach; the available security capabilities of Arbitral Participants; applicable rules and legal obligations; the Purpose of the Protocol as set forth in Section III supra, and other relevant circumstances of the case.

Commentary to Article 7

(a) Article 7 sets out the elements of a risk-based approach to determining what cybersecurity measures are reasonable in individual arbitration matters. Articles 8-12 provide more detailed guidance as to each aspect of the risk analysis.

(b) By assessing risk according to the individual circumstances of a case and adopting a standard of reasonableness, Article 7 recognizes that there is no one-size-fits-all approach to cybersecurity in arbitration matters.

(c) The reasonableness standard adopted by the Protocol is consistent with an emerging global trend in favor of requiring "reasonable", "reasonable and proportionate", or "appropriate" cybersecurity measures when attention to cybersecurity is legally or ethically required.

(d) This approach provides flexibility to accommodate changes in technology, best practices and threats current at the time of an actual dispute, rather than obligating the parties to follow a specific and immutable set of steps.

(e) This individualized approach recognizes that implementation of cybersecurity measures entails balancing potentially competing considerations (such as cost and convenience) and that similarly situated parties may make different but equally legitimate choices based on their own preferences, including considerations of cost and proportionality, risk tolerance and technical capabilities, among others.

(f) Article 7 recognizes that there will exist categories of cases where enhanced data security protection will be necessary in light of the sensitivity of information, legal considerations, special risks or other factors. Provided it is legally permissible, there may also be cases in which parties consider that information security protection somewhat below a baseline standard is sufficient and appropriate (e.g., due to the parties' lack of resources or infrastructure or the low-value nature of the case).

8. With respect to the nature of the information in the arbitration, the following factors, among others, may be considered:

i. what information is likely to be relevant and material in the arbitration;

ii. whether confidential commercial information will be exchanged;

iii. whether personal data will be exchanged;

iv. how much confidential commercial information and personal data is likely to be exchanged in the arbitration;

v. who has or should have access to the information exchanged during the arbitration;

vi. who "owns" the information;

vii. where the information is stored; and

viii. whether the confidential commercial information and/or personal data is subject to express confidentiality agreements or other relevant obligations, such as legal/regulatory restrictions relating to data protection/privacy, cross-border data transfer, breach notification, and/or privilege.

Commentary to Article 8

(a) Article 8 seeks to identify what information might be vulnerable to cyberthreats or increased legal risk in an arbitration.

(b) Consideration of what information is likely to be relevant and material in the arbitration can be useful in identifying types of data that are likely to be exchanged by the parties in the case.

(c) Examples of types of confidential commercial information and/or personal data that may require special care include:

(i) intellectual property;

(ii) trade secrets or other commercially sensitive information;

(iii) health or medical information;

(iv) payment card information;

(v) non-payment card financial information;

(vi) personal data, which is also referred to as personally identifying information ("PII");

(vii) information subject to professional legal privilege;

(viii) information related to or belonging to a government or governmental body (including classified data and politically sensitive information); and

(ix) information that is subject to express confidentiality agreements or other relevant obligations, such as legal/regulatory restrictions relating to data privacy, cross-border data transfer, breach notification, and/or privilege.

9. With respect to the potential cybersecurity threats and consequences of a potential breach, the following factors, among others, may be considered:

i. further to the analysis conducted under Article 8, the nature of the information likely to be involved in the arbitration;

ii. the identity of the parties, key witnesses, and other Arbitral Participants;

iii. the industry/subject matter of the dispute;

iv. the size and value of the dispute;

v. the prevalence of cyberthreats;

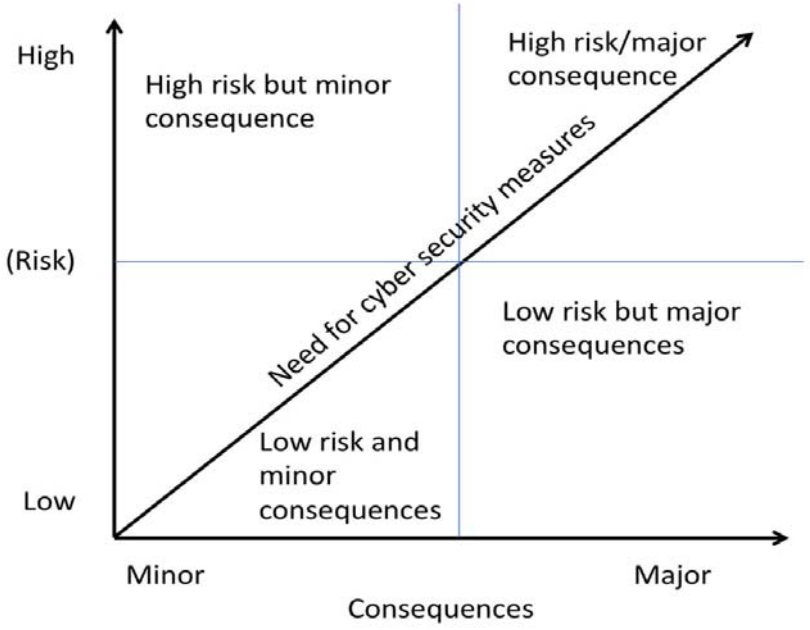
vi. the nature and frequency of international travel likely to be required for the arbitration; and

vii. the severity of potential consequences if there is a breach of information security.

Commentary to Article 9

(a) Article 9 sets out some factors that may be relevant in analyzing information security risk in the arbitration. The risk is a function of the likelihood of a cybersecurity breach and the consequences of that breach. Typically, parties and/or the tribunal will wish to determine whether the risk of a cyberattack or other information security breach in the particular circumstances of the arbitration is high or low, and whether the consequences of a breach are likely to be minor, moderate, or severe.

(b) The threat of a cyberattack and consequent desirability of cybersecurity measures can be plotted on a chart as follows:



(c) A case with a large counsel team, for example, will have more points of vulnerability and may necessitate stricter cybersecurity measures.

(d) Some issues to consider in analyzing the information security risk that may attach to the identity of the parties, key witnesses, and other Arbitral Participants (including the arbitral institution, experts, and counsel) include:

(i) Whether the matter involves a party or other Arbitral Participant with a history of being targeted for cyberattacks;

(ii) Whether the matter involves parties that handle large amounts of high-value confidential commercial information and/or personal data;

(iii) Whether the matter involves a public figure, high-ranking official or executive, or a celebrity; and

(iv) Whether the matter touches upon any government, government information, or government figure.

(e) Travel tends to increase information security risk. Consideration should be given to how often and to where Participants are likely to travel with arbitration-related information and whether there are particular risks associated with a particular destination. Some jurisdictions may assert the right to access information on portable devices as a condition of entry, for example. Consideration should also be given to how arbitration-related information is likely to be transported (e.g., whether it will be downloaded on portable devices or accessed via a secure server).

(f) Some questions to consider in analyzing the consequences and severity of a potential breach of information security may include:

(i) The value of the information to the parties;

(ii) The value of the information to third parties;

(iii) The nature, type, and amount of personal data being processed and whether it is legally regulated;

(iv) Potential embarrassment or damage caused by public disclosure of the information;

(v) Whether and how the information could be (mis)used by a third party (e.g., politically, for extortion purposes, for insider trading purposes, or to obtain a competitive advantage).

(g) In addition to considering the potential impact of a breach on the Arbitral Participants, consideration should be given to the potential impact on persons outside of the arbitration process, including but not limited to the persons to whom personal data relates. An information breach suffered by one Arbitral Participant may cause injury to other Participants or third parties.

10. With respect to the available security capabilities, the existing digital infrastructure of Arbitral Participants and any potential technical impediments to implementing cybersecurity measures should be considered.

Commentary to Article 10

(a) Once parties and the tribunal have assessed the seriousness of the cybersecurity threat in the circumstances of the particular arbitration and the desirability of cybersecurity measures, it is then necessary to weigh the degree of cybersecurity measures suggested by the threat against practical considerations, including what measures are proportionate to the size and value of the dispute.

(b) Article 10 recognizes that the Arbitral Participants, including the parties, counsel, the arbitrators, and administering institutions, may have differing technical resources and constraints on their technical capacity that will influence what may be reasonable in a particular case.

(c) General cyber awareness by the Participants, including their day-to-day security practices and digital infrastructure, may also determine what security measures may be warranted in any given arbitration matter. For example, when all Participants already employ a high level of cybersecurity, additional measures may not be needed. Schedule C highlights general cybersecurity practices that all Arbitral Participants should take into consideration.

(d) While the limitations of a party's resources are an important factor, consideration also should be given to the security needs of the case, the accessibility and affordability of security resources, and measures that may be taken without significant expenditure.

11. Applicable rules and legal obligations may dictate that certain types of cybersecurity measures be adopted regardless of the threat inherent in the individual circumstances of the arbitration. Among the factors that may be considered are the following:

    i. contractual obligations such as confidentiality agreements;

    ii. relevant arbitration rules;

    iii. ethical and professional obligations; and

    iv. regulatory obligations including those that are industry-related (e.g., HIPAA) and those that are information-related, including those applicable to personal data (e.g., GDPR and other data protection laws and other privacy rights).

Commentary to Article 11

    (a) As discussed in the Commentary to Article 2, the Protocol is not intended to assure compliance with, and does not supersede, applicable law, regulations, professional or ethical obligations.

    (b) Arbitrators and parties may also be faced with differing or conflicting mandatory obligations. The arbitral tribunal will have to determine how to harmonize such obligations, taking into consideration the consequences of non-compliance as well as due process considerations for all concerned.

12. Other relevant considerations in determining what measures are reasonable may include, but are not limited to:

    i. workflow needs and preferences;

    ii. cost;

    iii. proportionality;

    iv. burden/relative resources; and

    v. efficiency.

Commentary to Article 12

    (a) Article 12 recognizes that if proposed cybersecurity measures would be so onerous as to prevent the arbitration from proceeding in an orderly fashion, then the balance of “reasonableness” may weigh against their adoption.

    (b) In particular, cybersecurity measures that are too strict or difficult: (i) risk being ignored or evaded; and (ii) may have a negative impact on the ability of Participants to accomplish necessary tasks.

Procedural Considerations When Adopting Cybersecurity Measures

13. In the first instance, the parties should attempt to agree on reasonable cybersecurity measures, if any. Any agreement is subject to approval by the arbitral tribunal.

Commentary to Article 13

(a) Article 13 recognizes the importance of party autonomy. Normally, counsel should be responsible in the first instance to meet and confer on the information security protection measures to be implemented in a particular arbitration, taking into account existing cybersecurity measures already employed by the Arbitral Participants.

(b) Issues that counsel should consider discussing with their clients and opposing counsel may overlap with issues ordinarily considered in the context of disclosure and document preservation.

(c) In principle, where possible, the parties should agree on the cybersecurity measures to be employed, which should be reasonable taking into account the factors discussed above in Articles 7-12.

(d) Notwithstanding the principle of party autonomy, the parties cannot bind the arbitral tribunal. Nor can the parties bind the institution administering the arbitration. Any preliminary agreement should be formalized only after consultation with the tribunal and, where appropriate or required, the arbitral institution.

14. The tribunal should consider issues of cybersecurity, including any agreement that may have been reached by the parties, as early as practicable, which ordinarily will not be later than the first case management conference.

Commentary to Article 14

(a) The expectation generally is for issues of cybersecurity to be discussed with the parties in preparation for, and during, the initial case management conference or procedural hearing, and then to be incorporated in a procedural order.

(b) However, in certain cases, the initial hearing or conference may either be too late or too early; hence, any party may raise cybersecurity measures for consideration at any time.

(c) At the initial conference, the arbitral tribunal should be prepared to:

(i) discuss the ability and willingness of its members to adopt specific security measures;

(ii) engage counsel in a discussion about reasonable cybersecurity measures;

(iii) resolve any disputes about reasonable cybersecurity measures;

(iv) express its own interests in preserving the integrity of the arbitration process, taking into account the parties' concerns and preferences, the capabilities of any administering institution and other factors discussed in this Protocol; and

(v) render an appropriate order or include cybersecurity provisions in an early procedural order.

(d) Cybersecurity measures may also be set forth in a stipulation of the parties approved by the tribunal.

(e) Ordinarily the tribunal should defer to the parties' agreement, but there may be circumstances for departure. Such circumstances may include but are not limited to:

(i) measures to protect third-party interests, including other Arbitral Participants or third-party witnesses;

(ii) applicability of mandatory legal and regulatory requirements and other rules;

(iii) capabilities of the arbitrators and administering institution;

(iv) the tribunal's own interest in protecting the integrity of the process, including the security of its own communications and deliberations.

(f) The procedures adopted at the outset of the arbitration should allow for modification as necessary throughout the course of the proceeding, including updates as to: (i) what qualifies as the nature of the information being processed; (ii) required procedures based on the specific circumstances of the case as it develops; and (iii) changed circumstances, such as changes in applicable law, risks in the proceeding, institutional rules/requirements, or technological developments. Such updates should be made after consultation with the parties and any administering arbitral institution.

(g) The tribunal may modify the measures previously agreed to by the parties or determined by the tribunal at the reasoned request of any party, or on its own initiative in light of the evolving circumstances of the case.

15. Arbitral Participants and fact witnesses should be informed of the cybersecurity measures in place and shall agree in writing to comply with such measures before receiving any arbitration-related information, provided that where an essential third-party expert, fact witness or Vendor is unable or unwilling to comply with the agreed standards, the matter shall be referred to the tribunal for consideration, and, if necessary, direction.

16. The technical capability of Vendors should be no less than the minimum requirements designated by the parties.

Commentary to Articles 15-16

(a) Third parties present a difficult area for the protection of confidential information in general and electronically stored information in particular. They are not under the control of the tribunal and may not suffer directly from the consequences of a cybersecurity breach. Nevertheless, there is little point in agreeing to stringent cybersecurity measures for the parties, counsel, the tribunal and institution if the same information is to be sent to third parties without adequate safeguards. Further, to the extent that legal requirements apply, these may require third parties to agree to adequate safeguards before the information is shared.

(b) Where possible, counsel should obtain the written agreements of third parties to abide by cybersecurity measures that have been agreed or ordered by the tribunal.

(c) Where third parties either cannot or will not agree to comply, the tribunal shall be informed and direction given where appropriate.

17. Cybersecurity is the shared responsibility of all Arbitral Participants involved in an arbitration. Arbitral Participants are responsible for ensuring that all personnel directly or indirectly involved in an arbitration are aware of, and follow, cybersecurity measures being adopted in a proceeding as well as the potential impact of a cybersecurity breach.

Commentary to Article 17

(a) The security of information in an arbitral proceeding ultimately depends on the decisions and actions of all individuals involved, and any individual actor can be the cause of a cybersecurity breach. Many security breaches result from individual conduct rather than a breach of systems or infrastructure.

(b) In a case with multiple parties and large counsel teams, for example, it is necessary for Arbitral Participants to make persons directly or indirectly involved aware of any cybersecurity measures, and of their agreement to be bound by them, whether by express agreement or as part of their employment conditions or consulting agreement.

(c) The Arbitral Participant providing access to arbitral information covered by cybersecurity measures is responsible for ensuring that the persons with whom it is shared are aware of those measures and agree to follow them.

(d) This may involve a large number of people, each of whom could prove to be the weak link.

(e) Arbitral Participants should identify the various team members who support them and have access to digital information. For example, counsel appearing on behalf of a party in an arbitration may be supported in the background by additional lawyers who are not known to the other party or tribunal, administrative staff, and legal assistants or law clerks.

(f) Similarly, within an arbitral institution, case administration may involve a team of case management personnel, administrative support staff, and members of the institution's standing court of arbitration practitioners. To mitigate the risk of data breaches, cybersecurity awareness must permeate organizational structures and extend beyond the core Participants in the arbitral process to such team members and support personnel.

Cybersecurity Breaches

18. The cybersecurity measures adopted for the arbitration may address material issues related to possible information security breaches, including, among other things:

i. what constitutes a security breach;

ii. who shall be notified of a breach;

iii. timing of the notification; and

iv. specific steps to be taken to mitigate any information breach.

Commentary to Article 18

(a) Steps that may be taken to mitigate any information security breach may include, depending on the circumstances:

(i) implementing measures to identify the specific source of the breach;

(ii) taking steps to correct any weaknesses in security systems in order to mitigate the impact of a breach and/or prevent further breaches;

(iii) informing all affected parties that a breach occurred, consistent with any applicable legal obligations, in a timely manner and in a manner best preserving the confidentiality of the arbitration;

(iv) if appropriate, taking systems and applications offline to prevent further loss of information;

(v) taking steps to retrieve lost information and to ensure that unauthorized recipients delete or return information;

(vi) if appropriate, enlisting Vendors to manage effects of breach; and

(vii) if appropriate, involving law enforcement.

(b) Applicable laws may dictate the required procedures for addressing cybersecurity breaches. The GDPR, for example, includes strict mandatory 72-hour breach notification requirements. Some U.S. states have also adopted harm triggers; for example, if a lost laptop has full-disk-encryption-enabled, no notification would be required.

(c) There may also be a need to assess the nature of the breach, whether there has been unauthorized access to information, and whether there is an urgent need to take corrective action to prevent further breaches.

(d) Until a breach occurs, it may not be possible to determine what breach notification obligations exist as a matter of law even if compliance may require swift action.

Matters Not Covered by the Protocol

19. The following matters are beyond the scope of this Protocol:

i. the allocation of costs arising from the implementation of the Protocol and/or from any data breach or alleged failure to implement information security measures as directed by the arbitral tribunal; and

ii. the nature and scope of any authority of the arbitral tribunal to impose sanctions in the event of a data breach or alleged failure to implement information security measures as directed by the arbitral tribunal.

Commentary to Article 19

(a) The Protocol purposefully does not address either the allocation of costs or the tribunal's authority to order sanctions arising from data breaches or an alleged failure to implement information security measures as directed by the arbitral tribunal.

(b) However, while the Protocol does not expressly address such issues, it is not intended to negate authority otherwise available to the tribunal to allocate costs or impose sanctions.

Schedule A
Arbitration Agreement

It is not recommended that parties specify particular cybersecurity measures in their arbitration agreement because technology may change materially by the time the dispute arises, and the circumstances of the subsequent dispute may inform the cybersecurity measures that the parties choose to adopt. However, the parties may want to provide generally in their arbitration agreement that the arbitration shall be conducted in a secure manner in line with the Cybersecurity Protocol for International Arbitration. The following language would be appropriate for inclusion in the arbitration agreement:

> The parties agree that the arbitration shall be conducted in a secure manner as determined by the arbitral tribunal, taking into consideration the views of the parties and the Cybersecurity Protocol for International Arbitration.

Schedule B
Model Language for Specific Cybersecurity Measures*

Article 13 of the Protocol provides that parties should in principle agree on the cybersecurity measures to be employed, but that these measures should not be adopted without the approval of the tribunal. Further, Article 14 provides that the tribunal should typically adopt such language into a procedural order or by stipulation of the parties after the first case management conference, to be updated as the case proceeds.

The language set forth below providing for specific cybersecurity measures and related issues may be considered for inclusion in party agreements and/or tribunal orders. The adoption of case-specific cybersecurity measures whether by agreement of the parties, which will typically require tribunal approval, or by tribunal order, may include the language set forth below or some variation thereof depending on the circumstances.

1. [Model Language Re: Baseline Cybersecurity Measures]

2. [Model Language Re: Enhanced Cybersecurity Measures]

3. [Model Language Re: No Additional Cybersecurity Measures]

4. [Model Language Re: Notification of Data Breach and/or Breach of the Cybersecurity Measures]

5. [Model Language Re: Cybersecurity Dispute Resolution]

6. [Model Language Re: Use of Special Expert on Cybersecurity Issues]

7. [Model Language Re: Damages for Breach of Cybersecurity Measures]

8. [Model Language for inclusion in Vendor Agreements]

9. [Model Language Re: Agreement to Share Expenses of Cost of Enhanced Cybersecurity Measures]

10. [Possible Model Procedural Order (standard provisions subject to adaptation in individual cases)]

* Inclusion of Model Language to be considered based on feedback from the Consultation Process.

Schedule C
General Cybersecurity Practices

1. Because the Participants in international arbitration are, to a large degree, digitally interdependent, all Participants (including counsel, witnesses, experts, arbitrators, Vendors and arbitral institutions) involved in the arbitration should be conscious of good general cybersecurity practices for storing and processing information obtained during the arbitral process.

2. All Participants should be conscious of their own, regular cybersecurity practices and digital infrastructure as a threshold matter, because Participants' day-to-day security practices and infrastructure pre-date individual arbitrations, and therefore have an immediate and continuing impact on the security of arbitration-related information.

3. Depending on the circumstances, examples of good general cybersecurity practices may include:

    (a) Creating access controls, such as strong, complex passwords and multi-factor authentication when appropriate and secure password storage and controls.

        (i) Access controls, including user account management, passwords, and multi-factor authentication, determine who has authority to access information and what privileges s/he has to use it.

        (ii) In June 2017, the National Institute of Science and Technology ("NIST") substantially revised longstanding password guidance (see NIST Special Publication 800-63B). Key recommendations include that passwords should be based on unique passphrases, at least 8 characters long, and easily remembered ("memorized secrets"). In addition, common dictionary words, past passwords, repetitive or sequential characters, and context-specific words (such as derivatives of the service being used) should be avoided, and mixtures of different character types are unnecessary. The NIST further recognizes that in many cases, password managers increase the likelihood that users will choose stronger memorized secrets.

        (iii) Multi-factor authentication allows a user to safeguard a digital account (such as an e-mail account) from unauthorized access by requiring that the user provide additional proof of identity beyond a password. Given the frequency with which Participants in international arbitrations travel, to the extent they consider it is warranted to use multi-factor authentication, they may wish to ensure that any method they use is available offline.

    (b) Guarding digital "perimeters" using measures such as firewalls, antivirus and antispyware software, operating system updates and other software patches.

    (c) Adopting secure protocols, such as encryption for the storage and transmission of arbitral information, that are reasonable, taking into account the nature of the data and its required use within the arbitral process.

        (i) Arbitral information should generally be protected during transmission using industry-standard encryption technology, which prevents communications from being intercepted and read as they travel from end-to-end. It may also be appropriate under certain circumstances and depending on the nature of the data to encrypt individual file attachments.

(ii) To guard against unauthorized access of digital information due to loss or theft of a laptop or other mobile devices, it may be reasonable to enable full disk encryption (which is often built into device operating systems) to protect all data stored on the device while it is at rest.

(iii) If information is stored in the cloud, depending on the nature of the information, it may sometimes be appropriate to encrypt the information before it is uploaded and to keep control of the encryption key out of the hands of the cloud provider.

(d) Being mindful of public internet use in hotels, airports, coffee shops and elsewhere and considering protective measures such as personal cellular hotspots or virtual private networks (VPNs) where warranted in light of encryption and other measures being employed. Public Wi-Fi may provide hackers with access to unsecured devices on the same network, allow them to intercept password credentials, or to distribute malware. As an alternative to public Wi-Fi, Arbitral Participants may wish to use a mobile hotspot to establish an internet connection. Where appropriate, other protective measures could include using a VPN to encrypt communications traveling on the unsecured network connection and/or avoid connecting to any websites that fail to use HTTPS security.

(e) Being mindful to download programs and digital content only from legitimate sources and not to open attachments from unknown email senders.

(f) Keeping mobile devices close and making use of available protective measures in case of loss or theft, possibly including full disk encryption and remote tracking and wiping.

(g) Making routine secure and redundant data back-ups. Redundant data back-ups allow users to recover information in the event data is lost or corrupted due to human error, hardware failure, ransomware attack, or otherwise. One possible approach is to follow the so-called 3-2-1 rule, which means there should be 3 copies of the data, 2 should be stored locally on different storage media, and 1 copy should be stored offsite.

(h) Knowing one's data security infrastructure, including professional and personal networks, computers and portable devices, cloud services, software program and apps, remote access tools and back-up services.

(i) Implementing document and data preservation policies to minimize storage of data no longer required.

(j) Making reasonable on-going efforts to be educated about evolving cybersecurity risks and best practices.

4. All Arbitral Participants should have an understanding (if not a written inventory) of where data resides in, and flows through, their digital infrastructure, in order that appropriate controls and safeguards may be implemented. An arbitrator who regularly uses a personal tablet to review pleadings and exhibits, for example, should know whether the documents will be stored locally on the tablet by default, on servers for the application(s) used to review the documents, and/or personal cloud storage.

5. Once Arbitral Participants are cognizant of their own digital architecture, they can take steps to mitigate the risk of data breaches from basic security vulnerabilities. More often than not, data breaches arise from malicious actors who look for and find security vulnerabilities to exploit rather than from targeted attacks. Many of these security vulnerabilities arise from a failure to implement and/or maintain basic, well-established security practices that do not require any significant financial resources, technological support, or infrastructure investment.

Schedule D
Glossary

(Please note that not all of the terms defined below appear in the draft document.)

Access Control – The process of granting or denying specific requests to: (i) obtain and use information and related information processing services; and (ii) enter specific physical facilities.

Antispyware Software – A program that specializes in detecting both malware and non-malware forms of spyware.

Antivirus Software – A program specifically designed to detect many forms of malware and prevent them from infecting computers, as well as cleaning computers that have already been infected.

Attribution – The process of tracking, identifying and laying blame on the perpetrator of a cyberattack or other hacking exploit.

Authentication [includes multi-factor authentication and dual-factor authentication] – Verifying the identity of a user, process, or device, often as a prerequisite to allowing access to resources in an information system.

Backing Up – The act of making a copy of files and programs to facilitate recovery, if necessary. (See also *Data Backup.*)

Breach Notification – Notification of the unauthorized movement or disclosure of sensitive information to a party, usually outside the organization, that is not authorized to have or see the information.

Business Continuity Management – The documentation of a predetermined set of instructions or procedures that describe how an organization's mission/business processes will be sustained during and after a significant disruption.

Chief Information Security Officer (CISO) – The individual responsible for overseeing and implementing an entity's cybersecurity program and enforcing its cybersecurity policies.

Cloud – A model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.

Computer Forensics – The application of computer science and investigative procedures involving the examination of digital evidence – following proper search authority, chain of custody, validation with mathematics, use of validated tools, repeatability, reporting, and possibly expert testimony.

Cyberattack – An attack, via cyberspace, targeting an enterprise's use of cyberspace for the purpose of disrupting, disabling, destroying, or maliciously controlling a computing environment/infrastructure; or destroying the integrity of the data or stealing controlled information.

Cybersecurity – The ability to protect or defend the use of cyberspace from cyberattacks.

Cyber Exercise – A simulation of an emergency designed to validate the viability of one or more aspects of an IT plan. (See also *Information Technology (IT).*)

Cyber Incident – Actions taken through the use of an information system or network that result in an actual or potentially adverse effect on an information system, network, and/or the information residing therein.

Cyber Incident Response Plan – The documentation of a predetermined set of instructions or procedures to detect, respond to, and limit consequences of a cyber incident involving an organization's information system(s).

Cyber Risk – The potential of loss or harm related to technical infrastructure or the use of technology within an organization.

Data Backup – A copy of files and programs made to facilitate recovery, if necessary.

Data Breach – The unauthorized movement or disclosure of sensitive information to a party, usually outside the organization, that is not authorized to have or see the information.

Data Integrity – The property that data has not been altered in an unauthorized manner. Data integrity covers data in storage, during processing, and while in transit.

Data Loss – The exposure of proprietary, sensitive, or classified information through either data theft or data leakage.

Data Privacy – Assurance that the confidentiality of, and access to, certain information about an entity or individual is protected.

Data Recovery – The process of restoring data that has been lost, accidentally deleted, corrupted or made inaccessible.

Data Storage – Retrievable retention of data. Electronic, electrostatic, or electrical hardware or other elements (media) into which data may be entered, and from which data may be retrieved.

Data Transfer – The act of electronically sending information from one location to one or more other locations.

Data Wiping – Overwriting media or portions of media with random or constant values to hinder the collection of data.

Decryption – The process of transforming ciphertext into plaintext using a cryptographic algorithm and key.

Denial of Service – Actions that prevent a system from functioning in accordance with its intended purpose. A piece of equipment or entity may be rendered inoperable or forced to operate in a degraded state; operations that depend on timeliness may be delayed.

Digital Perimeter – A physical or logical boundary that is defined for a system, domain, or enclave, within which a particular security policy or security architecture is applied.

Document Destruction – Destroying, overwriting, deleting, or otherwise rendering digital, electronic, or physical documents unusable.

Document Retention – The identification, storage, retrieval, and maintaining of digital, electronic, or physical documents, files, or records pursuant to legal, specific contract, or other obligations.

Encryption – Any procedure used in cryptography to convert plaintext into ciphertext to prevent anyone but the intended recipient from reading that data.

Endpoint Monitoring – Automated tools, software, and procedures that track and ensure the security of network devices and systems.

Firewall – A gateway that limits access between networks in accordance with local security policy.

Full Disk Encryption – The process of encrypting all the data on the hard drive used to boot a computer, including the computer's operating system, and permitting access to the data only after successful authentication with the full disk encryption product.

General Disruption – An unplanned event that causes an information system to be inoperable for a length of time (e.g., minor or extended power outage, extended unavailable network, or equipment or facility damage or destruction).

Hacker – Unauthorized user who attempts to or gains access to an information system.

Hacking – The act of gaining unauthorized access to a digital device, network, system, account or other electronic repository. (See also *Hacker*.)

Identity Theft – Wrongfully obtaining and using another person's personal data in some way that involves fraud or deception, typically for economic gain.

Incident Response – The documentation of a predetermined set of instructions or procedures to detect, respond to, and limit consequences of a cyber incident involving an organization's information systems(s). (See also *Cyber Incident Response Plan.*)

Information Technology (IT) – Any equipment or interconnected system or subsystem of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by an entity or individual. The term information technology includes computers, ancillary equipment, software, firmware, and similar procedures, services (including support services), and related resources.

Intrusion Detection System (IDS) – A security service that monitors and analyzes network or system events for the purpose of finding, and providing real-time or near real-time warning of, attempts to access system resources in an unauthorized manner.

Intrusion Prevention System (IPS) – A system that can detect an intrusive activity and can also attempt to stop the activity, ideally before it reaches its targets.

Keyboard Logger (also "Keylogger") – A program designed to record which keys are pressed on a computer keyboard, often used to obtain passwords or encryption keys and thus bypass other security measures.

Malware – A computer program that is covertly placed onto a computer with the intent to compromise the privacy, accuracy, or reliability of the computer's data, applications, or operating system. Common types of malware threats include viruses, worms, malicious mobile code, Trojan horses, rootkits, and spyware.

Managed Services – A service provider that remotely manages a customer's IT infrastructure and/or end-user systems, typically on a proactive basis and under a subscription model.

Multi-Factor Authentication (MFA) Proxy Server – Authentication using a server that services the requests of its clients by forwarding those requests to other servers and uses two or more different factors to achieve

authentication. Factors include: (i) something you know (e.g., password/PIN); (ii) something you have (e.g., cryptographic identification device, token); or (iii) something you are (e.g., biometric).

Password – A string of characters (letters, numbers, and other symbols) used to authenticate an identity or to verify access authorization.

Payment Card Industry (PCI) – Commonly refers to the Payment Card Industry Data Security Standard (PCI DSS), which is a set of policies and procedures developed to protect credit, debit, and cash card transactions and prevent the misuse of cardholders' personal information. PCI DSS compliance is required by all card brands.

PCI Forensic Investigator (PFI) – Companies, organizations or other legal entities charged with investigating cyber incidents related to Payment Card Industry information; organizations in compliance with all PFI Company requirements (as defined by the Payment Card Industry Security Standards Council (PCI SSC)) and have been qualified as PFI Companies by PCI SSC for purposes of performing PFI Investigations.

Personal Cellular Hotspot – A mobile hotspot is an *ad hoc* wireless access point created by a dedicated hardware device or a smartphone feature that shares the cellular data.

Personally Identifying Information (PII) – Information which can be used to distinguish or trace the identity of an individual (e.g., name, social security number, biometric records, etc.) alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual (e.g., date and place of birth, mother's maiden name, etc.).

Phishing – Tricking individuals into disclosing sensitive personal information by claiming to be a trustworthy entity in an electronic communication.

Ransomware – A type of malware that is a form of extortion. The malware works by encrypting a victim's hard drive, thus denying the victim access to encrypted files. The victim must then pay a ransom to obtain a key to decrypt the files and gain access to them again.

Remote Desktop Protocol (RDP) – Provides remote display and input capabilities over network connections for Windows-based applications running on a server. RDP is designed to support different types of network topologies and multiple Local Area Network (LAN) protocols.

Remote Tracking – A tool designed to help remotely and proactively monitor mobile devices, laptops, or other systems.

Server Message Block (SMB) – A network protocol used by Windows-based computers that allows systems within the same network to share files. It allows computers connected to the same network or domain to access files from other local computers as easily as if they were on the computer's local hard drive.

Software Patch – A software component that, when installed, directly modifies files or device settings related to a different software component without changing the version number or release details for the related software component.

Spoofing – Faking the sending address of a transmission to gain illegal entry into a secure system.

Spyware – Software that is secretly or surreptitiously installed into an information system to gather information on individuals or organizations without their knowledge; a type of malicious code.

Trojan Horse – A computer program that appears to have a useful function, but also has a hidden and potentially malicious function that evades security mechanisms, sometimes by exploiting legitimate authorizations of a system entity that invokes the program.

Virtual Private Network (VPN) – A restricted-use, logical (i.e., artificial or simulated) computer network that is constructed from the system resources of a relatively public, physical (i.e., real) network (such as the internet), often by using encryption (located at hosts or gateways), and often by tunneling links of the virtual network across the real network.

Vulnerability – Weakness in an information system, system security procedures, internal controls, or implementation that could be exploited by a threat source.

Worm – A computer program that can run independently, can propagate a complete working version of itself onto other hosts on a network, and may consume sources destructively.

THE BRAINS BEHIND MEDIATION: REFLECTIONS ON NEUROSCIENCE, CONFLICT RESOLUTION AND DECISION MAKING

*Daniel Weitz**

INTRODUCTION

On September 13, 1848, an explosives charge sent a three-foot tamping iron about an inch in diameter through the head of Phineas Gage.[1] Although Gage survived, the tamping iron, which entered just under the left eye and exited through the frontal portion of his head, destroyed his prefrontal cortex.[2] Prior to the accident, Gage was a popular foreman of a railroad construction crew.[3] After the accident, he was a tactless, profane, and impulsive man with a dramatically altered personality.[4]

It is through extreme examples of severe deficits in the brain that scientists were able to develop our earliest descriptions of how the brain affects behavior. Today, advances in neuroscience have given us unprecedented insights into the workings of the human brain.[5] A great deal has been discovered in disciplines ranging from cognitive-behavioral psychology and neuropsychology to molecular biology. To what extent these discoveries impact other fields, including the dispute resolution profession, is now a hotly-pursued topic. While a quick survey of recent studies of the brain produces a flood of connections to the practice of mediation, even neuroscientists caution against the certainty of their findings.[6] There is still more research to be done and many of these studies provide evidence of correlation but not necessarily causation. Perhaps we should resist the temptation to champion a long sought-after scientific basis for all that we do as mediators. However, there is no denying the fascination with what we are learning about the human brain, how it guides our behaviors, and how it impacts the way we make decisions. At a minimum, it is cause for great reflection.

I. OUR NEGATIVE VIEW OF CONFLICT

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[1] *See The Phineas Gage Information Page Maintained By Malcolm Macmillan*, www.deakin.edu.au/hbs/GAGEPAGE (last visited Feb. 14, 2010).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] For a great explanation of functional magnetic resonance imaging (fMRI), see MARCO IACOBONI, MIRRORING PEOPLE, THE SCIENCE OF EMPATHY AND HOW WE CONNECT WITH OTHERS 59 (2009). For a description of transcranial magnetic stimulation (TMS), *see id.* at 90.

[6] *See* Edward Gandolf, *Cautions About Applying Neuroscience to Batter Intervention* 3 (citing NEUROSCIENCE AND THE LAW: BRAIN, MIND, AND THE SCALES OF JUSTICE (Brent Garland & Mark Frankel, eds. 2004)), *available at* http://www.nationalcenterdvtraumamh.org/lib/File/Neuroscience%20and%20batterer%20programs-FINAL.pdf (last visited Mar. 6, 2011); *see also* Nigel Eastman & Colin Campbell, *Neuroscience and Legal Determination of Criminal Responsibility*, 7 NATURE REV. NEUROSCIENCE 311 (Apr. 2006), *available at* http://www.nature.com/nrn/journal/v7/n4/full/nrn1887.html.

Mediation training programs often begin with a conflict word association exercise to explore the nature of conflict. Trainees typically produce a list of similarly negative words including argue, fight and disagreement. This list propels a lively discussion of why we tend to view conflict as something that is always negative. We point to television, our past experiences and even our parents. After encouraging reflection, sometimes through small group exercises, mediation trainers ask whether anything positive ever comes from conflict. Trainees list a number of positives including clarity, recognition, understanding, and improved relationships. The trainer then hopes the group will come to appreciate that conflict is not inherently good or bad but that the nature of conflict often depends on how it is handled.

Recent discoveries in the field of neuroscience shed even greater light on our predominantly negative view of conflict. In *Nurture Shock*, Po Bronson and Ashley Merryman discuss the work of Dr. E. Mark Cummings at the University of Notre Dame.[7] Cummings studied the impact that everyday parental conflict may have on children. Cummings found that the typical married couple had about eight disputes each day and that spouses were roughly three times more likely to express anger to each other as they were to show affection.[8] Children are witnesses to these conflicts forty-five percent of the time.[9] Cummings staged experiments to see what impact this type of conflict had on children. Ultimately, what he found was that witnessing the conflict itself did not result in any negative change in the child's behavior, provided the child was allowed to see the resolution of the argument.[10] It was only when the argument was stopped in the middle before resolution that it had a negative effect on the child's behavior.[11] Cummings has even shown that being exposed to marital conflict can be good for children provided it is constructive and resolved with affection.[12]

Think for a moment about our own childhood experiences with conflict. Did our parents fight? If so, was it constructive conflict? And as to a more subtle point, as Bronson and Merryman highlight, did our parents ironically make matters worse by taking the fight upstairs or into the other room, thus sparing us the exposure? If so, did they remember to tell us that they worked it all out?

Bronson and Merryman also point to a body of research on the nature of conflict among siblings.[13] Dr. Hildy Ross of the University of Waterloo found only about one in every eight conflicts between siblings ends in compromise or reconciliation.[14] In the other seven conflicts, the siblings withdraw usually after the older child bullied or intimidated the younger child.[15] Scottish researcher Dr. Samantha Punch concluded "Sibship is a relationship in which the boundaries of social interaction can be pushed to the limit. Rage and irritation need not be suppressed, whilst politeness and toleration can be neglected."[16] Children made seven times as

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[7] PO BRONSON & ASHLEY MERRYMAN, NURTURE SHOCK 184 (2009).
[8] *Id.*
[9] *Id.*
[10] *Id*
[11] *Id.*
[12] *Id.*
[13] BRONSON & MERRYMAN, *supra* note 7, at 120.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 121.

many more negative and controlling statements to their siblings as they did to their friends, according to Dr. Ganie DeHart of SUNY Geneseo in New York.[17]

Bronson and Merryman wonder what siblings learn from the thousands and thousands of interactions that they have with each other when, no matter how the conflict is handled, they will still be together the next day. They suggest perhaps that children learn poor social skills from those interactions, just as often as they learn good ones. They learn of conflict, but not necessarily constructive conflict.[18]

Bronson and Merryman also provide support for those who claim that we get our negative view of conflict, and perhaps our poor conflict resolution skills, from children's television. Citing studies involving comparisons of educational television with more violent children's shows, we now know that while children may be less violently aggressive after watching educational television, they are far more relationally aggressive.[19] Bronson and Merryman explain that while physical aggression can include pushing or hitting, and verbal aggression often involves name calling, relational aggression involves ignoring or telling lies about another child. The more children watched educational television, the more controlling, manipulative and bossier they became. Bronson and Merryman point out that one possible explanation for this phenomenon may be that educational television spends most of its time establishing conflict between characters and very little time resolving it. Preschoolers, for example, are said to be less able to connect the information from the end of the show to what happened earlier. They tend to learn from the individual behaviors shown rather than the overall lesson.[20]

Bronson and Merryman not only provide us with insights into our views on conflict, but they also provide us with food for thought on why we behave the way we do in conflict.[21] For example, significant research has been done on the importance of sleep, which supports the position that we consolidate learning and store memory during sleep.[22] Bronson and Merryman report that according to these studies, negative memories are stored in the amygdala (an area of the brain associated with strong emotions such as fear) while neutral and positive memories are stored in the hippocampus (an area of the brain associated with storage of memory and conversion of short term to long term memory).[23] Furthermore, lack of sleep is harder on the hippocampus than it is on the amygdala, so we may remember negative feelings and events more so than neutral or positive ones. Could this explain why we so often seem to judge people in conflict by their most negative potential? Other studies have shown that stress can cause a similar effect on the hippocampus.[24] During situations of stress, hormones called glucocorticoids are released in the brain.[25] Glucocorticoids are known to cause damage to the hippocampus. In fact, under extreme conditions, glucocorticoids can kill brain cells in the hippocampus.[26] This suggests that stress, and the brain chemistry connected with it, is not only related to our negative

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[17] *Id.* at 120–21.
[18] *Id* at 119.
[19] BRONSON & MERRYMAN, *supra* note 7, at 180.
[20] *Id.*
[21] *Id.* at 35.
[22] *Id.* at 33–35.
[23] *Id* at 35.
[24] JOHN MEDINA, BRAIN RULES 178 (2009).
[25] *Id.* at 179.
[26] *Id. See also* NORMAN DOIDGE, THE BRAIN THAT CHANGES ITSELF 248 (2007).

view of conflict but perhaps our negative view of those with whom we have conflict and how we interact with them.

What can we learn from the field of neuroscience and these studies of the brain, conflict and even educational television? The above research suggests that our predominantly negative view of conflict is shaped by our experience dating back to early childhood. This further suggests that our negative view of conflict is perhaps a conditioned response. Did any of us have positive role models for dealing constructively with conflict when we were children? And even if we did, were those lessons as frequent or as powerful as the negative ones?[27] Did our parents let us watch educational television thinking we were learning something good about conflict resolution? The jury may still be out on exactly what it was we were learning, but it appears evident in the way in which so many of us behave in conflict situations that we developed more destructive than constructive skills. Furthermore, our negative view of conflict undoubtedly impacts how we approach it and increases the likelihood that we will adopt a competitive style when a collaborative style would be optimal. The perception that conflict is inherently negative quite possibly precludes many disputing parties from even trying mediation when it would otherwise be helpful to them. However, if our negative view of conflict is indeed largely a conditioned response, perhaps we can change it. If our destructive behavior in conflict is further influenced by the unconscious effects of stress or lack of sleep, perhaps we can mitigate these effects by simply becoming aware that they exist. Therefore, the integration of mediation and neuroscience not only provides help with resolving the conflict at hand, it provides an opportunity to develop constructive conflict resolution approaches and skills that can be used well into the future.

II. NEUROPLASTICITY AND REASON FOR HOPE

During much of the twentieth century, the prevailing theory was that our brains, at least for the most part, were almost completely formed and unchanging after childhood.[28] However, recent discoveries have provided evidence of neuroplasticity, which challenges the assumption that our brains are done developing once we reach adulthood.[29] For example, studies have shown that exercise can improve cognitive function and even brain physiology.[30] Exercise also appears to stimulate a protein known as Brain Derived Neurotrophic Factor ("BDNF"), which aids in the development of healthy tissue.[31] In *Brain Rules,* molecular biologist John Medina refers to BDNF as having a powerful fertilizer-like growth effect on certain neurons in the brain.[32] According to Medina, BDNF not only keeps neurons young and healthy, rendering them much more willing to connect with one another, but it also encourages the formation of new cells in the brain.[33]

Another revolutionary scientific discovery is the neural insulator known as myelin. In *The Talent Code*, Daniel Coyle describes how myelin wraps itself around the nerve fibers in our

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[27] For an interesting discussion of the psychological phenomenon of "negativity bias," which means that the human mind is wired to magnify the negative, see JONAH LEHRER, HOW WE DECIDE 81 (2009).

[28] DOIDGE, *supra* note 26, at i.

[29] DOIDGE, *supra* note 26, at xix.

[30] *See* MEDINA, *supra* note 24, at 7–27. *See also* DOIDGE, *supra* note 26.

[31] *See* MEDINA, *supra* note 24, at 22.

[32] *Id.*

[33] *Id.*

brain that serve as the basis of skill, making them stronger and faster.[34] The thicker it gets, the better it insulates and the faster and more accurate our movements and thoughts become. Coyle tell us that we continue to grow myelin well into our fifties and beyond, after which we still make myelin even though we start to lose more than we make.[35]

These are amazing discoveries. No matter how prior experience may have shaped our perception of conflict, if we can always acquire new skills and improve our brain function, it is not a far stretch to believe we can improve the way in which we perceive and deal with conflict. As Coyle puts it, maybe you *can* teach an old dog new tricks; it just takes "deep practice."[36]

III. MEDIATOR SKILLS AND DECISION MAKING

In my journey through numerous books and studies dealing with neuroscience, a number of associations with conflict resolution and mediation emerged. Studies of the brain have produced major insights into how we make decisions. When viewing these insights from the perspective of a conflict resolution professional, it does not take much to connect aspects of mediation and mediator skills to neuroscience and what we have been learning about the brain.

Fundamental mediator skills include the delivery of an opening statement, framing negotiable issues, and generating movement between parties who are stuck in their positions.[37] The utility of these skills can be connected to a number of findings including the psychological phenomenon of "priming," "the framing effect," the role of mirror neurons, and the functions of the left and right hemispheres of the brain as they impact cooperation, empathy, and problem solving.[38] Additional studies in behavioral economics and cognitive-behavioral psychology provide explanations for how our adult views of conflict are shaped, discussed *supra*, and reasons why mediator skills and reflective practice are so helpful to people in conflict.

Malcolm Gladwell wrote in *Outliers* that, "[p]lane crashes are much more likely to be the result of an accumulation of minor difficulties and seemingly trivial malfunctions."[39] The same is true for any discussion of the impact of specific mediator skills. Focus on the use of any one skill or nuance of process will not by itself typically change the nature of the dialogue between the parties in mediation. The true difference between whether or not the parties' conflict lands safely or crashes to the ground is the accumulation of skills and nuances of process that may seem trivial when viewed in isolation.

IV. THE PSYCHOLOGICAL PHENOMENON OF PRIMING AND MEDIATOR OPENING STATEMENTS

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[34] *See generally* DANIEL COYLE, THE TALENT CODE (2009).

[35] *Id.* at 6.

[36] *Id.* at 47–53. "Deep practice" as used by Coyle is comparable to the term "deliberate practice" used by psychologist Anders Ericsson, who described deliberate practice as "working on technique, seeking constant critical feedback, and focusing ruthlessly on shoring up weaknesses." *Id.* at 51. Ericsson is known in part for his groundbreaking work, which included the central tenet that "every expert in every field is the result of around ten thousand hours of committed practice." *Id. See also* MALCOLM GLADWELL, OUTLIERS 40 (2008).

[37] *See Mediation Training Curriculum Guidelines*, New York State Unified Court System, http://www.nycourts.gov/ip/adr/Part146_Curriculum.pdf (last visited Mar. 6, 2011) [hereinafter Mediation Training Guidelines].

[38] *See infra* Part IV.

[39] GLADWELL, OUTLIERS, *supra* note 36, at 183.

Most mediators begin the initial meeting with an opening statement. This is particularly true of mediators who deal with interpersonal conflict including divorce, community, or workplace mediation.[40] The goals of an opening statement include educating the parties about the process, developing rapport and trust, and setting the tone for a collaborative negotiation. Despite the apparent benefits of providing an opening statement, some mediators question its utility.[41] Critics of a mediator opening statement say it takes too long and much of it is a waste of time as the parties are too distracted to absorb the content. However, the research of John Bargh on the "priming effect" may provide new insights.

John Bargh, a psychology professor at Yale University, has published many books and papers on the "priming effect," in which prior presentation of a word or concept can influence behavior.[42] One of the most well known priming studies involves two groups of undergraduate students at New York University who were asked to read a long list of words.[43] Everyone was given a list of five-word sets and asked to make a grammatically correct four-word sentence out of each set. These are called scrambled sentence tests. For example, students are presented with the following: "feels weather the hot patience." This five-word set could be unscrambled to read "the weather feels hot." However, students in this experiment were actually given one of two different lists containing words meant to "prime" them to behave in a specific way. Mixed into one list were words associated with being polite; mixed into the other list were words associated with being rude. When the students were soon placed in an experimental situation to measure the degree to which they would act polite or rude, their behavior correlated with the words with which they were primed.

After completing twenty variations of the scrambled sentences, the students were instructed to take the completed lists down the hall to the professor's office where they were to be collected and scored. When the students arrived at the professor's office, there was another student standing in the doorway asking the professor a series of questions. The real test was to see how quickly the students would interrupt or how long the students would wait before interrupting to hand in the completed test. The students who were primed with polite words waited longer on average than the students who were primed to be rude. In fact, the overwhelming majority of the students primed to be polite never interrupted at all.[44] Simply priming them with words associated with being polite made them wait longer than those students who were primed with words associated with being rude.

There is an enormous body of research demonstrating the ability to prime subjects with subtle words to act in an almost limitless variety of ways.[45] Research has even shown that priming can make us slow or fast, or even good or bad at math. But before we explore math, I will conclude the discussion of opening statements.

Think about the words mediators emphasize in their opening statements. Most give meaningful emphasis to words such as "listen," "understand," "comfortable," "confidential," "freely," and "informal." Mediation trainers and teachers often discuss the benefits of a good opening statement in order to set the tone for mediation because we want to establish an

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[40] *See* Mediation Training Guidelines, *supra* note 37.

[41] This is based on my own experience working with mediators.

[42] *See* MALCOLM GLADWELL, BLINK 53 (2007).

[43] *See id.* at 55 (describing a study conducted by John Bargh, Mark Chen and Lara Burrows at New York University).

[44] *Id.*

[45] *See* IAIN MCGILCHRIST, THE MASTER AND HIS EMISSARY 167 (2009).

atmosphere of cooperation and open dialogue and in doing so, distinguish mediation from its adversarial alternatives. While most mediators have always appreciated the power of a good opening statement, we now have reason to believe there is a scientific explanation for its effectiveness as well. According to the "priming effect," "the way we think and act...are a lot more susceptible to outside influences than we realize."[46]

When we deliver opening statements, we have the potential to prime the parties to act in a manner consistent with the words we use. Furthermore, given our tendency to associate conflict with that which is negative, parties are likely primed to behave poorly in conflict. At a minimum, they are primed to adopt a competitive and adversarial approach to conflict. Therefore, a mediator's opening statement is not only an important aspect of establishing a collaborative atmosphere, but perhaps also plays a role in neutralizing the way in which parties are negatively primed as they enter the process.[47]

V. THE FRAMING EFFECT AND THE UTILITY OF FRAMING NEGOTIABLE ISSUES

The research showing that we can be made to perform better or worse on mathematical problems ties the "priming effect" with another psychological phenomenon known as the "framing effect."[48] In a study conducted by Sian L. Beilock from the University of Chicago, a group of female undergraduates were given a series of relatively simple math problems known as "modular arithmetic."[49] Students were given horizontal math problems, represented by a left to right linear equation as well as vertical math problems represented by numbers above and below one another forming the equation. Then, half of the female students were reminded of a negative stereotype, for example that women do not do as well as men on math.[50] This form of priming is called the "stereotype threat" condition in which simply reminding people of a stereotype can create anxiety, which in turn decreases performance.[51] This allowed Beilock and her colleagues to explore how a high-stress situation creates worries that compete for the working memory normally available for performance. After all, if we are stressed out and anxious, there is going to be less working memory available to deal with solving the math problems.

Jonah Lehrer, a frequent writer in the field of neuroscience, described the results of Beilock's study in his blog, *The Frontal Cortex.*[52] As it turned out, the activation of the stereotype led to decreased performance, but only on the horizontal problems.[53] The reason for these results has to do with the local processing differences of the brain.[54] The horizontal problems depended more on the same area of the brain (the left prefrontal cortex) associated with anxiety, which would likely be preoccupied worrying about our math performance. In contrast,

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[46] GLADWELL, BLINK, *supra* note 42, at 58.

[47] For a related discussion on the power of "anchoring," a commonly used negotiation technique, see LEHRER, *supra* note 27, at 156–58.

[48] *See id.* at 106.

[49] *See* Sian Beilock, *Math Performance in Stressful Situations*, 17 CURRENT DIRECTIONS IN PSYCHOL. SCI. 3395 (2008).

[50] *Id.* at 339.

[51] *Id.*

[52] Jonah Lehrer, *The Frontal Cortex* (Apr. 13, 2010), http://scienceblogs.com/cortex/2010/04/dont_choke.php.

[53] *Id*

[54] *Id.*

performance on vertical problems was unaffected.[55] The vertical math problems are perceived primarily as visual spatial problems, which are associated with a different area of the brain (the right prefrontal cortex), which is not distracted by our anxieties or threatened by stereotypes.[56] In other words, according to Lehrer, "merely changing the presentation of the problem can dramatically alter how the brain processes the information."[57]

Beilock's study should also remind mediators of a classic skill we call "framing negotiable issues."[58] Mediators are trained to frame issues in neutral language to invite interest-based discussion rather than adversarial positional bargaining. This is done in order to avoid adopting the position of either party and to create an inviting agenda that encourages meaningful dialogue. We frame issues neutrally to take the sting out of the topic. Thanks to Sian Beilock, we now know that neutral framing also changes the way in which the brain actually processes the information and may even mitigate the anxiety produced by conflict.

VI. PRISONERS OF OUR PRECONCEPTIONS[59]

> "Tell me what you know. . .Then tell me what you don't know, and only then can you tell me what you think. Always keep those three separated."
>
> Colin Powell[60]

Robert Burton's fascinating work, *On Being Certain, Believing You Are Right Even When You're Not*, discusses an impressive line of studies, which show that emotional habits and patterns and expectations of rewards are difficult to break.[61] Burton also makes a compelling case for how this same argument applies to thoughts: "Once firmly established, a neural network that links a thought to a feeling of correctness is not easily undone. An idea known to be wrong continues to feel correct."[62]

In *How We Decide*, Jonah Lehrer points to studies that show people with strong affiliations, for example, partisan voters, when confronted with inconsistent information, recruit the prefrontal cortex to filter the information to fit what it already believes and to ignore inconsistencies.[63] Once this is done, they get a positive emotional response (through the release of dopamine) and are rewarded—to Lehrer, this is the definition of rationalizing.[64]

Marco Iacoboni and colleagues conducted research that revealed how political sophisticates, in answering political questions, rely on memory and a "default state network" or

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[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *See* Lela P. Love, *Deconstructing Dialogue and Constructing Understanding, Agendas, and Agreements*, 38 FAM. & CONCILIATION CTS. REV. 27, 30 (2000).
[59] This phrase is borrowed from University of California at Berkley psychologist Philip Tetlock referring to political pundits who, according to Tetlock, are particularly prone to dismissing dissonant or contradictory possibilities. Or as Jonah Lehrer puts it, they "[p]erform elaborate mental gymnastics to avoid admitting error." *See* LEHRER, *supra* note 27, at 209.
[60] *Id.* at 248.
[61] *See generally* ROBERT A. BURTON, ON BEING CERTAIN, BELIEVING YOU ARE RIGHT EVEN WHEN YOU'RE NOT (2008).
[62] *Id.* at 97–98.
[63] LEHRER, *supra* note 27, at 205. For another example of cognitive dissonance, see BURTON, *supra* note 61, at 13.
[64] LEHRER, *supra* note 27, at 205.

the region that is most active when we are resting.[65] In order to better understand the default state network, Iacoboni refers to the state you are in when you are daydreaming.[66] You were certainly conscious but not necessarily engaged in any form of conscious deliberation. Sophisticates think about politics all the time so they do not need to employ conscious deliberation to the political statements—they just rely on memory. Political novices show activity in the regions of the prefrontal cortex associated with cognitive attention and in doing so shut down the default state network.[67]

Think about parties in conflict who have invested a lot of time, energy and thought to their positions. How much of their behavior in conflict is driven by their default state network and retrieval of memory? The research on political sophisticates suggests that perhaps a great deal of conflict is driven by processes other than conscious deliberation.[68] Colin Powell's approach to thinking, for instance, is a possible way to avoid becoming prisoners of our preconceptions.

VII. MIRROR NEURONS

Conflict escalation is a universal experience. We have all been involved in conflicts and we have all experienced firsthand how conflict has a tendency to escalate. One person speaks and the receiver raises an eyebrow. The speaker continues and suddenly an insult is hurled. Mediators allow venting as a means to let off steam. Mediators also frequently and repeatedly summarize the concerns raised by the parties as way to de-escalate conflict and encourage discussion of interests instead of positions.[69] But what really is at the core of the escalation? Is it just poor word choice or tone? What did that raised eyebrow really mean and were there other expressions communicated that we perhaps failed to consciously appreciate?

According to Marco Iacoboni, Italian scientists were among the first to discover mirror neurons while researching the macaque monkey in a laboratory in Parma, Italy.[70] Macaque monkeys were given grasping tasks, for example, picking up a raisin or a peanut.[71] Meanwhile, the researchers tracked the firing of neurons in the motor areas of the monkey's brain through implanted electrodes.[72] One day, researcher Leo Fogassi casually picked up a peanut and discovered that the monkey's brain reacted as if the monkey had grasped the peanut himself.[73] The area of the brain that reacted was the same area that reacts when the monkey performs the grasping action.[74] Only this time it happened based solely on observing Fogassi as he performed the task.[75] Soon enough, researchers discovered these same mirror neurons in human beings.[76]

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[65] *See* IACOBONI, *supra* note 5, at 252–53.
[66] *Id.* at 253.
[67] *Id.* at 252.
[68] For a related discussion on the phenomenon of "confabulation," in which the mind "makes up" information to resolve ambiguities, see MCGILCHRIST *supra* note 45, at 81.
[69] Love, *supra* note 58, at 28.
[70] *See* IACOBONI, *supra* note 5, at 10 (According to Iacoboni, there are several recorded observations of mirror neurons claiming to be the first but none are confirmed as such. However, through many subsequent controlled experiments over a period of twenty years, the existence of mirror neurons was indeed confirmed).
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*

Anyone who has ever spent time with a baby knows how easily they can imitate and how this simple action can easily bring a smile to your face. But what researchers are beginning to conclude is that babies do not only learn to imitate, they imitate to learn.[77] In one study, a baby imitated facial expressions as early as forty-one minutes after birth.[78]

According to Iacoboni, this ability to imitate is the result of special neurons known as mirror neurons. These mirror neurons are not just about copying, but are also a means of understanding another's intentions.[79] In fact, the mirroring of other people's speech is necessary for us to perceive it.[80] Mirror neurons send signals to the limbic system, which allows us to feel the emotions associated with the observed facial expressions. Only after we feel these emotions internally are we able to explicitly recognize them.[81] Mirror neurons also learn to predict the actions of other people and to code them for intention, which suggests that mirror neurons are shaped by our experience.[82] Mirror neurons help us reenact in our brains the intentions of other people, giving us a profound understanding of their mental states.[83]

The discovery of mirror neurons has had widespread implications for many disciplines. For example, Iacoboni and others have begun to connect deficits in mirror neuron function to conditions such as autism.[84] Is there a connection between our unconscious imitation or mirroring of others and the way in which conflicts escalate? How much of our anger or frustration, or dismissive tone is derived from the other as opposed to our own free will or autonomy?

Iacoboni also discusses the interdependence of self and other when he says, "the more we learn about mirror neurons, the more we realize that we are not rational, free acting agents... Mirror neurons in our brains produce automatic imitative influences of which we are often unaware and that limit our autonomy by means of powerful social influences."[85] He even points out that "imitation and 'liking' tend to go together as well."[86] Is that why we hate it when people make faces at us or roll their eyes when we speak? Are we unconsciously looking for mirroring and instead receiving explicit rejection? How much of our response to conflict begins as an unconscious mirroring of the other? And if mirroring plays a role in the escalation of conflict, can it play a similar role in the de-escalation of conflict? According to Iacoboni, "mirroring is a pervasive form of communication and social interaction among humans."[87]

We now know that parties in conflict have to deal with brains that may be wired to amplify the negative in conflict and are subject to the unyielding power of our preconceptions and the escalating potential of mirror neurons. At the same time, mediators can use opening statements and summarizing skills to encourage the parties toward a more collaborative conflict approach, de-escalate conflict, and perhaps discuss their interests instead of just their positions.

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[76] IACOBONI, *supra* note 5, at 10.
[77] *Id.* at 48.
[78] *Id.*
[79] *Id.* at 58.
[80] *Id* at 105.
[81] *Id.* at 112.
[82] *Id.* at 162.
[83] *Id.*
[84] IACOBONI, *supra* note 5, at 172.
[85] *Id.* at 209.
[86] *Id.* at 114.
[87] *Id.* at 245.

The reflections on the neuroscience surrounding conflict and decision-making are endless. But for now, I have only one more observation.

VIII. MEDIATING ON THE RIGHT SIDE OF THE BRAIN

In 1979, Betty Edwards published the bestselling book *Drawing on the Right Side of the Brain*, in which she illustrated how suppressing the left side of the brain and enabling the right side of the brain can bring out the true artist in anyone.[88] She believed that the left hemisphere is too narrowly focused on details to see the big picture. However, by using techniques to suppress the left hemisphere, she allows the right hemisphere to see the whole picture and put the pieces together.[89]

A common theme in the neuroscience literature surveyed for this article involves the differences between the left and right hemispheres of the brain. While the left hemisphere of the brain is critical to decisionmaking, particularly for its ability to engage in sequential logic, it is the right hemisphere upon which we rely for matters of cooperation, empathy, and the types of problem solving associated with a shift toward collaboration.[90]

If we are to accept some of the differences between the left and right hemispheres as accurate, then mediators should find ways to activate the right hemispheres of the parties in mediation. By doing so, we maximize the parties' ability to engage in collaborative dialogue. According to the research reported by Iain McGilchrist and others, there are quite a few commonly accepted differences between the left and right hemispheres of the brain. For example: "the left hemisphere delivers what we know, rather than what we actually experience"[91]; or the right hemisphere is concerned with the whole context while the left hemisphere is concerned with the parts and naming.[92] According to McGilchrist, "we must learn to use a different kind of seeing, to be vigilant not to allow the right hemisphere's options to be too quickly foreclosed by the narrower focusing of the left hemisphere."[93]

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[88] *See generally* BETTY EDWARDS, DRAWING ON THE RIGHT SIDE OF THE BRAIN (1979).

[89] *Id.* For an interesting interpretation of the applicability of Edwards' book, see DANIEL H. PINK, A WHOLE NEW MIND: WHY RIGHT-BRAINERS WILL RULE THE FUTURE 15 (2006).

[90] *See generally* MCGILCHRIST, *supra* note 45. Additional differences between the left and right hemispheres cited by McGilchrist include: "When we put ourselves in others' shoes, we are using the right inferior parietal lobe and the right lateral prefrontal cortex, which is involved in inhibiting the automatic tendency to espouse one's own point of view." *Id.* at 57; "In circumstances of right hemisphere activation, subjects are more favourably disposed towards others and more readily convinced by arguments in favour of positions that they have not previously supported." *Id.*; "The right hemisphere plays an important role in 'theory of the mind,' a capacity to put oneself in another's position and see what is going on in that person's mind." *Id.*; "Ultimately, there is clear evidence that when it comes to recognising emotion...whether it is expressed in language or through facial expression, it is the right hemisphere on which we principally rely." *Id.* at 59; "The one exception to the right hemisphere's superiority for the expression of emotion is anger." *Id.* at 61; the right hemisphere is partial to emotions that deal with bonding and empathy while the left hemisphere is partial to competition, rivalry and self belief. *See id.* at 62–63; an extensive body of research now indicates that insight, whether mathematical or verbal, is associated with activation in the right hemisphere." *See id.* at 65; "Denial is a left hemisphere specialty." *See id.* at 85; "Our sense of justice is underwritten by the right hemisphere, particularly by the right dorsolateral prefrontal cortex." *Id.* at 86.

[91] *See id* at 164.

[92] *See id.* at 70.

[93] *Id.* at 164.

Most mediators likely recall the Prisoner's Dilemma model in game theory, which has served as a basis for training mediators in the benefits of collaboration over competition.[94] According to McGilchrist, scientists have studied the brains of humans as they played this Prisoner's Dilemma game.[95] In Prisoner's Dilemma, subjects that achieve mutual cooperation with another human being show activity in the pleasure centers of the brain, including the dopamine system, striatum, and orbitofrontal cortex.[96] They do not, however, show activity when cooperation is with a computer.[97] When playing with a human being, the majority of regions showing cooperation are right-sided whereas when playing with the computer the regions are mainly left-sided.[98] McGilchrist goes on to say that "[i]t is mutuality, not reciprocity, fellow-feeling, not calculation, which is both the motive and reward for successful co-operation."[99]

The research on the Prisoner's Dilemma scenario provides support for the theory that relationship building and direct communication between the parties is a critical component of establishing a cooperative negotiation environment. This research also has implications for the use of caucus in mediation. Mediators are frequently taught to caucus less if the parties have an ongoing relationship; the parties need to learn to work things out themselves.[100] The research on Prisoner's Dilemma supports the theory that the parties, particularly those with the potential for an ongoing relationship, may do better together in joint session than apart in caucus. At a minimum, caucus should be used sparingly in order to give the parties the greatest opportunity to develop the mutuality and fellow feeling necessary for cooperation.

IX. OLD LADY YOUNG LADY[101]

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[94] For a detailed description of Prisoner's Dilemma, see MCGILCHRIST, *supra* note 45, at 147.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] CARRIE MENKEL MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 355 (2nd. ed.. 2005).
[101] This picture known as "My Wife and My Mother-in-Law" was originally published in 1915 by the cartoonist W.E. Hill.

The above image has been used extensively by mediation trainers. Through elicitive dialogue trainers might ask the trainees to look at the image and describe what they see. Some trainees would say they see an old lady. Others would say they see a young lady. And some would say they see both. The trainer might then ask those who see the young lady to help those who do not and vice versa. Trainees draw attention to the mouth of the old lady and encourage the viewer to see the mouth as a choker on the neck of the young lady. They point out that the young lady is looking off to her right revealing a profile of her left jawbone. The jawbone is also the nose of the old lady. Eventually, everybody will see both images. The lessons learned may include the fact that two people can look at the same thing and see it in dramatically different ways. One might say the image reflects the importance of being open to looking at a situation from another point of view. However, if anyone doubted that the other was telling the truth about what they see, they might only be willing to look at the image from their own point of view. What neuroscience now tells us about this exercise takes these lessons one step further.

McGilchrist argues that the right hemisphere will not prematurely resolve ambiguities such as the "old lady young lady image" because studies of the brain involving images like this one reveal that such ambiguities can be seen in one way or another, but not simultaneously.[102] This means you cannot hold onto your own point of view and simultaneously see the other. You have to suspend your point of view or toggle points of view for a brief moment in order to see the other perspective. This is easier said than done. With images such as the old lady young lady, "[w]e remind ourselves that this is pure biology on display, and move on to other thoughts. But with unstable mental images that are personally meaningful, this is far more difficult."[103] The key to this challenge may reside in the abilities of the right hemisphere. "So the left hemisphere needs certainty and needs to be right. The right hemisphere makes it possible to hold several ambiguous possibilities in suspension together without premature closure on one outcome."[104]

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[102] *See* MCGILCHRIST, *supra* note 45, at 82.
[103] *See* BURTON, *supra* note 61, at 199.
[104] *See* MCGILCHRIST, *supra* note 45, at 82.

CONCLUSION

"It is the rule of thumb among cognitive scientists that unconscious thought is 95 percent of all thought—and that may be a serious underestimate. Moreover, the 95 percent below the surface of conscious awareness shapes and structures all conscious thought."[105]

Phineas Gage and his horrible accident provided us with some of our earliest insights into the connection between our brain and the way in which we behave. Advances in technology now enable us to observe the brain in unprecedented ways. This has led to a wide array of discoveries in neuroscience with potentially broad application to the dispute resolution profession. Researchers who have studied the role of conflict in the lives of children have taught us that we learn as many if not more ineffective conflict management skills growing up as effective skills. From glucocorticoids to cognitive dissonance and the discovery of mirror neurons, we have reason to believe our perceptions of conflict and those with whom we have conflict may be influenced as much, if not more, by our unconscious thoughts than our own free will. We have explored how the "priming effect" and the "framing effect" can be correlated with the utility of certain mediator skills, including the delivery of opening statements and the framing of negotiable issues. We have learned there are many differences between the tendencies of the left and right hemispheres of the brain. These differences may provide new clues in how to best use mediation to foster collaborative dialogue. Yet we have only seen the tip of the iceberg when it comes to the application of neuroscience to the world of dispute resolution and mediation. More discoveries are surely on the horizon.

[105] GEORGE LACKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH 13 (1999).

This Is Your Brain on Mediation: What Neuroscience Can Add to the Practice of Mediation

By Daniel Weitz

Introduction

A group of undergraduate students at New York University were chosen for the experiment.[1] Everyone was given a list of five word sets and asked to make a grammatically correct four word sentence out of each set. These are called scrambled sentence tests. For example, students are presented with the following: "feels weather the hot patience." This five word set could be unscrambled to read "the weather feels hot." However, students in this experiment were actually given one of two different lists containing words meant to "prime" them to behave in a specific way. Mixed into one list were words associated with being polite; mixed through the other list were words associated with being rude. When the students were soon placed in an experimental situation to measure the degree to which they would act polite or rude, their behavior correlated with the words with which they were primed.

After completing twenty variations of the scrambled sentences the students were instructed to take the completed lists down the hall to the Professor's office where they were to be collected and scored. When the students arrived at the Professor's office, there was another student standing in the doorway asking the Professor a series of questions. The real test was to see how quickly the students would interrupt or how long the students would wait before interrupting to hand in the completed test. The students who were primed with polite words waited longer on average than the students who were primed to be rude. In fact, the overwhelming majority of the students primed to be polite never interrupted at all.[2] Simply priming them with words associated with being polite made them wait longer than those students who were primed with words associated with being rude.

Advances in neuroscience have given us an unprecedented look at the human brain and human behavior. Discoveries have followed in disciplines ranging from cognitive-behavioral psychology to molecular biology. To what extent these discoveries impact other fields, including the dispute resolution profession, is now a hotly pursued topic. While a quick survey of recent studies of the brain opens a flood of connections to the practice of mediation, even neuroscientists caution against the certainty of their findings. There is still more research to be done and many of these studies provide evidence of correlation but not necessarily causation. Perhaps we too should resist the temptation to champion a long sought after scientific basis for all that we do. However, there is no denying the fascination with what we are learning about the human brain and how it guides our behaviors and impacts the way we make decisions. At a minimum, it is cause for great reflection.

Our Negative View of Conflict

Mediation training programs often begin with a conflict word association exercise to explore the nature of conflict. Trainees typically produce a list of similarly negative words including argue, fight and disagreement. This list propels a lively discussion of why we tend to view conflict as something negative. We point to television, our past experiences and even our parents. After encouraging reflection, sometimes through small group exercises, mediation trainers ask if anything positive ever comes from conflict. Trainees list a number of positives including clarity, recognition, understanding and improved relationships. The trainer then hopes the group will come to appreciate that conflict is not inherently good or bad but that the nature of conflict is instead a function of how it is handled.

Recent discoveries in neuroscience shed even greater light on our negative associations with conflict. For example, significant research has been done on the importance of sleep.[3] This research supports the position that we consolidate learning and store memory during sleep. In *Nurture Shock*, Po Bronson and Ashley Merryman report that negative memories are stored in the Amygdala (an area of the brain associated with strong emotions such as fear) while neutral and positive memories are stored in the Hippocampus (an area of the brain not only associated with storage of memory but conversion of short-term to long-term memory as well). Furthermore, lack of sleep is harder on the Hippocampus than it is on the Amygdala. So, when sleep deprived, we have a harder time remembering neutral or positive feelings and events since our Hippocampus is adversely affected by the lack of sleep. Meanwhile, the less-affected Amygdala has little trouble helping us to recall negative feelings and events. Therefore, since people often lose sleep during periods of conflict or crisis, could this explain why we so often judge people with whom we are in conflict by their most negative potential? How often have you heard people in conflict say "I can't think of one good thing to say about him!" Other studies have shown that stress can cause a similar effect on the Hippocampus. During situations of stress, hormones called glucocorticoids are released in the brain.[4] Glucocorticoids are known to cause damage to the Hippocampus. In fact, under extreme conditions, glucocorticoids can kill brain cells in the Hippocampus. This

suggests that stress, and the brain chemistry connected with it, is not only related to our negative view of conflict but perhaps our negative view of those with whom we have conflict. Furthermore, it is not a far stretch to connect our negative view of conflict with our propensity toward competitive approaches to conflict. Is it possible that our negative view of conflict not only impacts how we approach it but also increases the likelihood that we will adopt a competitive style when a collaborative style would be optimal? The perception that conflict is inherently negative quite possibly precludes many disputing parties from even trying mediation when it would otherwise be helpful to them.

We Can Change

During much of the twentieth century, the prevailing theory was that our brains were pretty much completely formed and unchanging after childhood. However, recent discoveries have provided evidence of neuroplasticity, which challenges the assumption that our brains are done developing once we reach adulthood.[5] For example, studies have shown that physical exercise can improve cognitive function and even brain physiology.[6] Exercise also appears to stimulate a protein known as BDNF or Brain Derived Neurotrophic Factor, which aids in the development of healthy tissue. In *Brain Rules*, molecular biologist John Medina refers to BDNF as having a powerful fertilizer-like growth effect on certain neurons in the brain. According to Medina, BDNF not only keeps neurons young and healthy, which enables them to better connect with one another but it also encourages the formation of new cells in the brain.

If our negative view of conflict is indeed largely a conditioned response, perhaps we can change it. Mediation not only provides help with resolving the conflict at hand, it provides an opportunity to develop constructive conflict resolution skills that can be used well into the future.

Application of Neuroscience to Mediator Skills

Discoveries in neuroscience can be associated with a variety of mediator skills including the delivery of an opening statement and framing negotiable issues. The application of these skills relate to a number of discoveries including the psychological phenomenon of "priming" and the "framing effect."

The Psychological Phenomena of Priming and the Utility of Mediator Opening Statements

Most mediators begin the initial meeting with an opening statement. This is particularly true of mediators who deal with interpersonal conflict including divorce or community or workplace mediation. The goals of an opening statement include educating the parties about the process, developing rapport and trust, and setting the tone for a collaborative negotiation. Despite the apparent benefits of providing an opening statement, some mediators question its utility. Critics of a mediator opening statement say it takes too long and much of it is a waste of time as the parties are too distracted to absorb the content. While some openings may go on longer than necessary, the phenomenon of priming lends support for the use of mediator opening statements.

Recall the priming experiment, discussed above, conducted by Professor John Bargh and colleagues at New York University. There is an enormous body of research demonstrating the ability to prime subjects with subtle words to act in a seemingly limitless variety of ways. Research has shown that priming can make us slow or fast or even good or bad at math.[7] But before I tell you about math, let us finish the discussion of opening statements.

Think about the words mediators emphasize in their opening statements. Most give meaningful emphasis to words such as listen, understand, comfortable, confidential, freely, and informal. Mediation trainers and teachers often discuss the benefits of a good opening statement in order to set the tone for mediation. We want to establish an atmosphere of cooperation and open dialogue and in doing so distinguish mediation from its adversarial alternatives. While most mediators have always appreciated the power of a good opening statement, we now have reason to believe there is a scientific explanation for its effectiveness as well. According to the phenomenon of priming, we are a lot more susceptible to outside influences and our unconscious than we realize.[8] When we deliver opening statements, we have the potential to prime the parties to act in a manner consistent with the words we use. Furthermore, given our tendency to associate conflict with that which is negative, parties are likely primed to behave poorly in conflict. At a minimum, they are primed to adopt a competitive and adversarial approach to conflict. Therefore, a mediator's opening statement is not only an important aspect of establishing a collaborative atmosphere but perhaps it plays a role in neutralizing the way in which parties are negatively primed as they enter the process.

The Framing Effect and the Utility of Framing Negotiable Issues

The research that shows we can be made to perform better or worse in math ties the priming phenomenon with another psychological phenomenon known as the Framing Effect. In a study conducted by Sian L. Beilock from the University of Chicago,[9] a group of female undergraduates were given a series of relatively simple math problems known as modular arithmetic. Students were given horizontal math problems, represented by a left-to-

right linear equation as well as vertical math problems represented by numbers above and below one another forming the equation. Then, half of the female students were reminded of a negative stereotype, for example, that "women do not do as well as men on math." This form of priming is called the "stereotype threat condition" in which simply reminding people of a stereotype can induce anxiety which in turn decreases performance. This allowed Beilock and her colleagues to explore how a high-stress situation creates worries that compete for the working memory normally available for performance. After all, if we are stressed out and anxious, there is going to be less working memory available to deal with solving the math problems.

Jonah Lehrer, a frequent writer in the field of Neuroscience, described the results of Beilock's study on his blog *The Frontal Cortex*. As it turned out, the activation of the stereotype led to decreased performance, but only on the horizontal problems. The reason has to do with the local processing differences of the brain. The horizontal problems depended more on the same area of the brain (the left prefrontal cortex) associated with anxiety and would likely be preoccupied worrying about our math performance. In contrast, performance on vertical problems was unaffected. The vertical math problems are perceived primarily as visual spatial problems which are associated with a different area of the brain (the right prefrontal cortex) which is not distracted by our anxieties or threatened by stereotypes. In other words, according to Lehrer, "merely changing the presentation of the problem can dramatically alter how the brain processes the information."[10]

Beilock's study should also remind mediators of a classic skill we call framing negotiable issues. Mediators are trained to frame issues in neutral language to invite interest-based discussion rather than adversarial positional bargaining. This is done in order to avoid adopting the position of one side or the other and to create an inviting agenda that encourages meaningful dialogue. We frame issues neutrally to take the sting out of the topic. Thanks to Sian Beilock, we now know it also changes the way in which the brain actually processes the information. Perhaps it even mitigates the anxiety produced by conflict.

Conclusion

> It is the rule of thumb among cognitive scientists that unconscious thought is 95% of all thought.... Moreover, the 95% below the surface of conscious awareness shapes and structures all conscious thought.
>
> George Lackoff[11]

We have only seen the tip of the iceberg when it comes to the application of Neuroscience to the world of dispute resolution. We have seen how the psychological phenomenon of "priming" and the "framing" effect can be correlated with mediator skills including the delivery of opening statements and framing negotiable issues. However, there is much more to learn. But unlike 95% of our unconscious thoughts, advances in neuroscience make it possible for us to consciously appreciate that which we continue to learn about the brain and to think and reflect about how it applies to the field of mediation.

Prolific author Malcolm Gladwell wrote in *Outliers* that "Plane crashes are much more likely to be the result of an accumulation of minor difficulties and seemingly trivial malfunctions." This serves as a useful metaphor for any discussion of mediator skills. Focus on or use of any one skill will not by itself change the nature of the dialogue between the parties in mediation. In order to help the parties land their conflict safely, we need to use an accumulation of skills that may seem trivial when viewed in isolation. When explored in the context of Neuroscience, we can begin to see how these individual skills, utilized in conjunction with many others, can have a dramatic impact on conflict resolution and human behavior.

Endnotes

1. See Malcolm Gladwell, *Blink*, Paperback ed. (New York: Back Bay Books/ Little, Brown and Company, 2007), 55 (describing a study conducted by John Bargh, Mark Chen and Lara Burrows at New York University).
2. *Id.*
3. Po Bronson and Ashley Merryman, *Nurture Shock* (New York, Boston· Hatchett Book Group, First Edition 2009), 35
4. John Medina, *Brain Rules* (Seattle· Pear Press, 2009), 179
5. See Norman Doidge, Md., *The Brain that Changes Itself* (London: Penguin, 2007).
6. John Medina, *Brain Rules* (Seattle: Pear Press, 2009), 14
7. See Iain McGilchrist, *The Master and His Emissary* (New Haven, London: Yale University Press 2009)
8. Malcolm Gladwell, *Blink*, Paperback ed (New York: Back Bay Books/ Little, Brown and Company, 2007), 58.
9. Sian Beilock, *Math Performance in Stressful Situations*, Current Directions in Psychological Science, Volume 17-Number 5 (Association for Psychological Science)
10. Jonah Lehrer—The Frontal Cortex http://scienceblogs.com/cortex/2010/04/dont_choke php (posted April 13, 2010).
11. G. Lackoff and M. Johnson, Philosophy in the Flesh (New York: Basic Books, 1999), 13

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Mastering the Unconscious

Arbitrators and Decision Making: Can We Improve?

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NYSBA Arbitration Training

June 2017

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This year's hot subject

- IBA Arbitration Day - February 21, 2013- Making the award: need we rethink the process? Deliberations: an opaque and disorganised process?
- Swiss Arbitration Association- February 1, 2013- Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions
- Brunel University London- May 22-24, 2013- The Roles of Psychology in International Arbitration

Mental Contamination

- ***"Mental contamination is the process whereby a person has an unwanted judgment emotion or behavior because of mental processing that is unconscious or uncontrollable."*** Timothy and Brekker, psychologists

- ***[We] should take steps to limit the impact of 'blinking on the bench'"*** Guthrie, Rachlinski, and Wistrich, law professors and magistrate

Justice Cardozo

- “Deep below consciousness are other forces. The likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man whether he be litigant or judge.”

The Nature of the Judicial Process 167 (1921)

Judge Frank

- "The conscientious judge will, as far as possible, make himself aware of his biases..."

Judge Frank in *In re J.P. Linahan*, 138 F. 2d 650 (2d Cir. 1943)

569

Justice Scalia

- *While computers function solely on logic, human beings do not. All sorts of extraneous factors-emotions, biases, preferences-can intervene, most of which you can do absolutely nothing about* ***(except play upon them, if you happen to know what they are.)"***

Justice Scalia, *Making Your Case: The Art of Persuading Judges* (2008)

The Brain

- **Plato (**424-348 BC)
  - **two horses (rational/moral and irrational/passionate)**
- **Kahneman** (2011):
  - **System 1 and System 2**

Blinders

- Informational- "unringing the bell"
- Attitudinal – personal predilections
- Cognitive – heuristics- mental short cuts

Judge experiments

- 265 state and federal judges
- Average 9 years on the bench
- Anonymous questionnaire

1. Informational Blinder- Inadmissible Evidence

- Privileged Communication very damaging to plaintiff
- Half the judges saw it
- 75 % of those judges ruled that the communication was privileged

- Judges who did not see the document- 55% found for plaintiff
- Judges who saw it and ruled privileged - 29 % found for plaintiff

Informational Blinder- Subsequent remedial measure

- Gasoline flare up from a gasoline can
- Company said almost never happened
- Warning and recall letter sent later
- Held inadmissible as a subsequent remedial measure

- Judges who saw the evidence- - 75% said not liable
- Judges who did not see the evidence- 100% said not liable

Application to arbitrators?

- Hearsay
- Expert witnesses
- Privileged document review
- Med – arb
- Should we be less generous in admitting inadmissible evidence? Risk of vacatur real?
- Should counsel highlight inadmissibility and unreliability of evidence more without unduly disrupting the proceeding?

2. Attitudinal Blinders
Personal predilections

- Democratic judges studies show are 1.4 times as likely to render a liberal decision
- Our backgrounds; personal experiences and how they influence us
- Other forms of bias? Manner of presentation across cultures, deep pocket, plaintiff versus defendant, corporation vs. individual, race, culture, fill it in for yourself

3. Cognitive Blinder- Hindsight Bias Heuristic

- Was failure to take precautions against flooding negligent?
- Half the judges were told that a flood costing $1 million occurred subsequently
- Not told about the flood, 24% found negligence
- Told about the flood, 57% found negligence

Cognitive Blinder
Confirmation Bias Heuristic

- Study of what you already believe
- Study of supporters of Bush and Kerry in the 2004 elections- statements by candidates- only the parts of the brain that control emotions were triggered; reasoning part completely inactive

Cognitive Blinder
Anchoring Heuristic

- Pedestrian hit by truck
- Half the judges heard a motion to dismiss for lack of $75,000 jurisdictional minimum - they denied it
- Other judges did not hear the motion
- Judges who did not hear the motion awarded a mean of $1,200,000 million
- Judges who heard the motion awarded a mean of $880,000- 30% spread

Cognitive Blinder
Anchoring

- Auto accident- arm amputated- facts presented
- Some Judges heard demand of 10 million dollars in settlement conference
- Other judges heard demand for “a lot of money”

- Judges who heard $10,000,000 awarded mean of $2,210,000
- Judges who only heard large number awarded mean of 808,000

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Cognitive Blinder Framing

- Alan- intelligent-industrious-impulsive-critical-stubborn-envious
- Ben- envious-stubborn-critical-impulsive-industrious-intelligent
- Who did you view more favorable?

- **Film: asked how fast between 30-40 MPH car was going**
- **Smashed 40 MPH**
- **Collided 39 MPH**
- **Bumped 38 MPH**
- **Hit 34 MPH**
- **Contacted 31 MPH**

Application to Us?

- **Hindsight bias**– our job is often to reconstruct what must have been then – Actual outcome makes it seem more predictable than it was. Careful…
- **Confirmation bias-** our job is to listen and assess with an open mind; An early view of the case or our personal feelings about a subject may cause us to only hear and process what confirms that view. Careful…
- **Anchoring Bias-** Assessing damages- number anchors can impact thinking. Careful…

Application to counsel?

- Careful selection of arbitrators
- More expansive arbitrator interviews unrelated to merits to flush out biases
- Mock arbitrations
- Presentation tailored to suit particular arbitrators
- Play to cultural norms

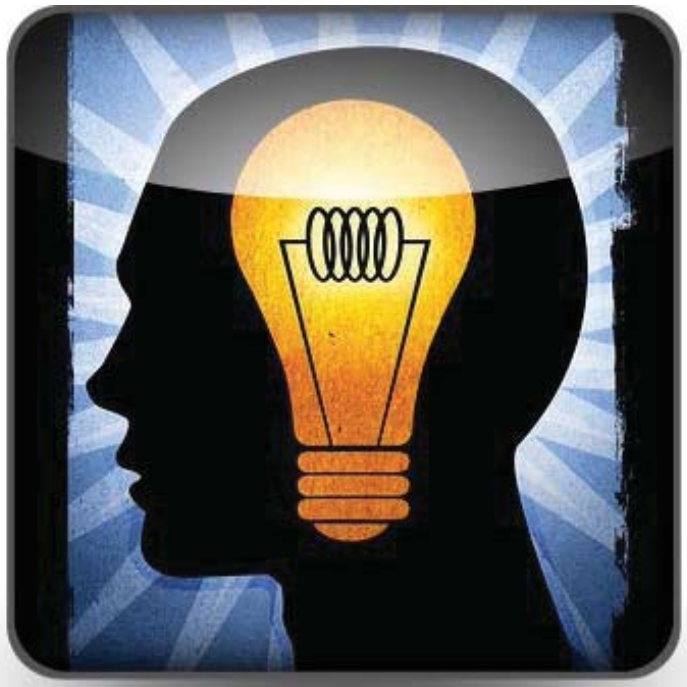
The Coherence Bias: On Being Certain

- "People hate being in a state of doubt and will do whatever is necessary to improve from doubt to belief." **Judge Richard Posner**, THE JURISPRUDENCE OF SKEPTICISM, 86 Mich. L. Rev. 827 (1988)
- Coherence bias
- The feeling of pleasure/reward - Triggered by the feeling of being certain
- Brain's mesolimbic dopamine system
- Same biology as sex, drugs and alcohol. Robert Burton, *On Being Certain*, 2008
- **Does feeling certain assure you are right?**

The Hunch

I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, **wait for the feeling, the hunch**—that **intuitive flash of understanding** which makes the jump-spark connection between question and decision, and . . . sheds its light along the way."

5th Circuit Judge Joseph C. Hutcheson, Jr., "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decisions" (1929)



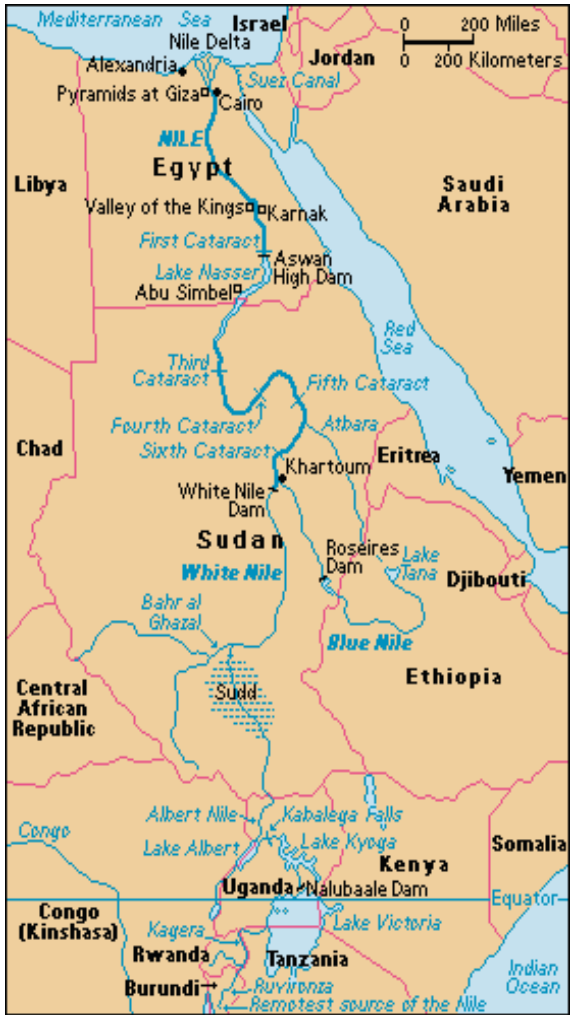
Similar statements by Judge Friendly and Judge Hand

Overcoming Unconscious Bias

- Awareness of the mental contaminant
- Motivation to correct it
- Awareness of the direction and magnitude of the bias
- Control over resolve to correct it
- People, even if they believe they are biased, do not believe their bias has infected their judgment – the “bias blind spot"
- **Awareness, knowledge and motivation do not work; not enough; control does not follow**

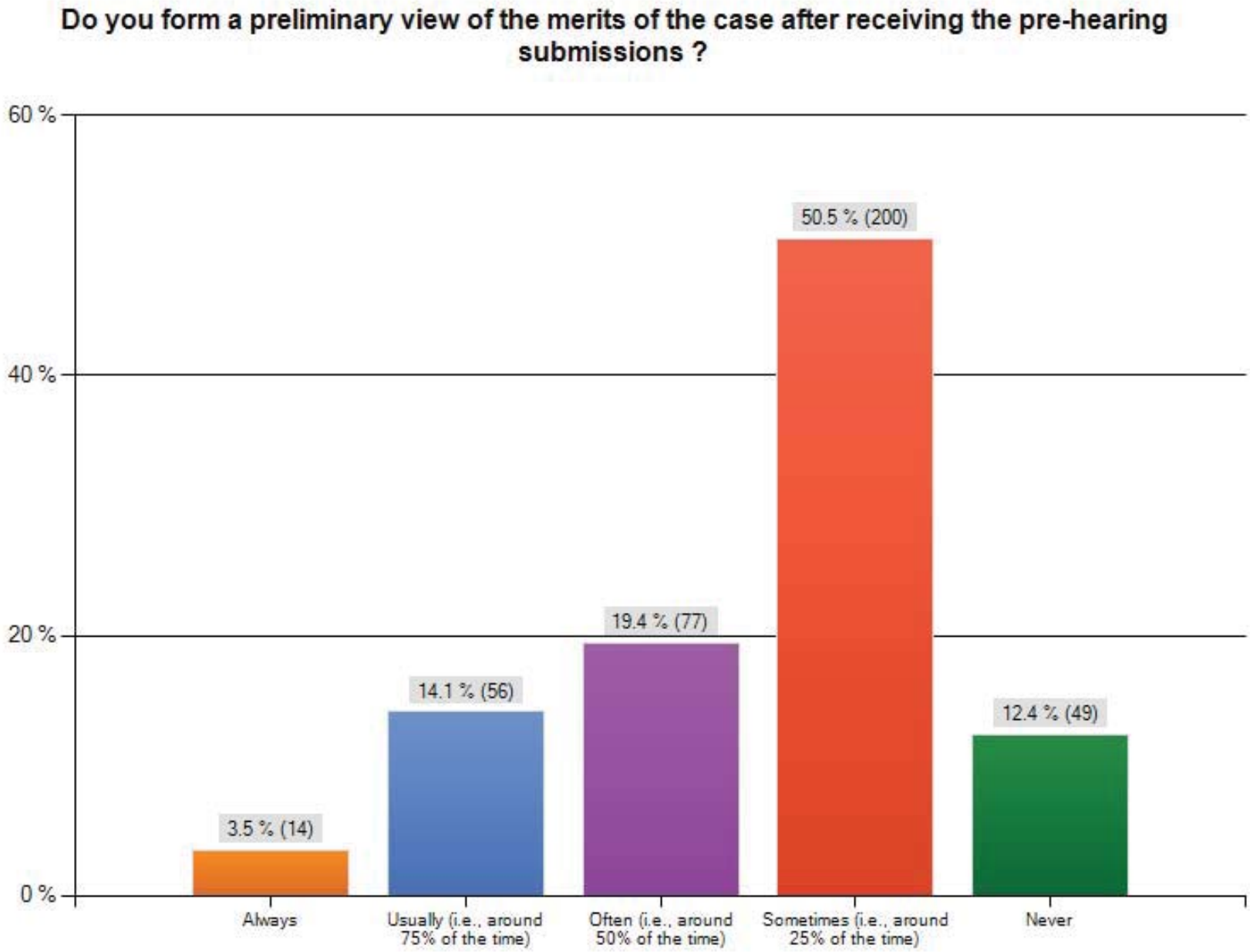
Denial

- DeNile
- The Illusion of objectivity



Decision framework

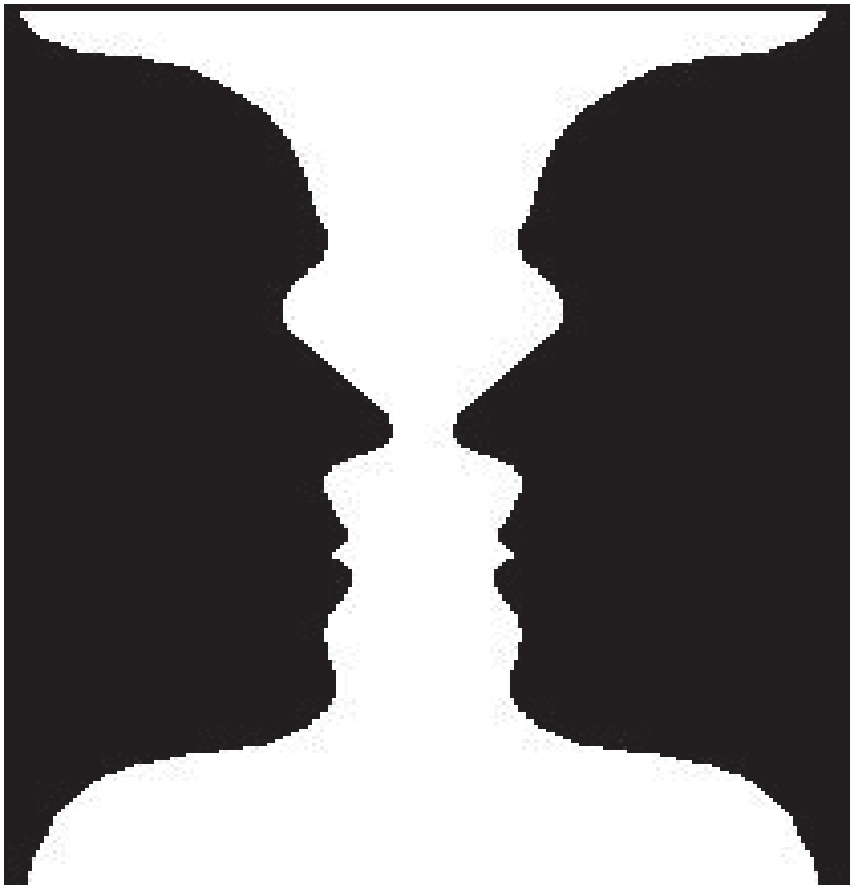
- "A typical arbitrator concludes the initial phase with a single dominant story in mind… Sizeable percentage of arbitrators have established a clear leaning by the end of the opening statement."
- Richard C. Waites and James E Lawrence, *Psychological Dynamics in International Arbitration Advocacy,* In The Art of Advocacy in International Arbitration 109 (2010).
- **If we form a view early does it lead to biased assimilation of new evidence? Confirmation bias?**


Do you form a preliminary view of the merits of the case after receiving the pre-hearing submissions ?
60 %
40 %
20 %
0 %
3.5 % (14)
14.1 % (56)
19.4 % (77)
50.5 % (200)
12.4 % (49)
Always
Usually (i.e., around 75% of the time)
Often (i.e., around 50% of the time)
Sometimes (i.e., around 25% of the time)
Never

Debiasing:
Overcoming your "bias blind spots"

- Play both stories throughout the proceeding - Consider the Opposite
- Marshal and constantly weigh positive as well as negative evidence for both sides
- Makes sure you ask questions that elicit the full story- not just confirming preliminary view
- Identify why you may be wrong
- Reduce reliance on memory
- Replay how you reached your conclusions- what did you reject
- Write down your reasoning
- Estimate odds of your being wrong
- Were you influenced by any biases /heuristics /inadmissible evidence
- Consult your co-arbitrators
- Leave enough time - Delay decision making - Sleep on it
- What did you need to have presented to go the other way
- What would the losing party feel you overlooked
- If someone were writing it the other way- where and how would they differ

Two faces, an urn or both???



Young girl or old hag? Harder to see both? Have to really try?

Gestalt theory – law of closure

Woody Allen's Story

- When I was kidnapped, my parents snapped into action...
- (By now you have probably constructed your own story of what happened next)

- … They rented my room out.

- Thank you

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Arbitrators, Mediators, and Heuristics --- The Search for Antidotes to Potential Distortions in Our Thinking

Charles J. Moxley, Jr.[1]

I. Introduction

In recent years, it has become increasingly clear from the scientific and technical literature that the physical and psychological make-up of our brains can have important and sometimes distorting effects upon our judgment and decision-making.

Specifically, the construction of our minds, including the chemistry of the functioning of our minds, potentially affects our judgment and decision-making, as humans – and, by extension, as arbitrators, mediators, judges and lawyers in arbitrations, mediations and court cases – in significant ways. The same thing is true of the internal processing of our minds, where it appears that much more activity occurs on an unconscious, or perhaps a "preconscious," basis than we are aware.

Numerous leading commentators, including, most notably, Daniel Kahnemann of Princeton University, in his recent bestseller "Thinking Fast and Thinking Slow" have suggested that our minds have essentially two systems, System 1 and System 2.[2]

System 1, as described by Kahnemann and others, is essentially our automatic, largely unconscious, mental apparatus that makes snap judgments, quick judgments, early decisions, and instinctual resolutions of matters that come to our attention.[3] This part of our brain is often very

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[1] I acknowledge the considerable assistance of Michael Krenicky in preparing this review of the heuristics literature and suggested solutions to the problems presented.
[2] Daniel Kahneman, Thinking Fast and Slow 20-21 (2011).
[3] *Id.*

accurate and very reliable. Indeed, it is our primary survival mode, which includes the flight or fight phenomena and the like. In short, our System 1 instinctual mental processes serve us very well.

System 2, in turn, is the deliberative part of our minds, the part of our minds that processes information and reasons from point to point.[4] This part of our minds enables us to override our System 1 and potential distortions it can introduce by imposing judgments on our instinctive responses to stimuli. Just as our System 1 is generally quite reliable and generally works quite well, System 2 is quite a fine piece of equipment, including the aspect of it that involves overriding System 1. This ability to impose judgments is often invaluable and is seen as distinguishing us from creatures that possess only instinct.

Nonetheless, scholars have concluded, based on what appear to be quite reliable objective psychological tests – that that our System 1 is prone to certain identifiable errors that our System 2 typically tends to overlook or ignore, absent intervention (such as this article might make possible).

Specifically, experts in this field have shown that our System 1 is prone to numerous types of misjudgment that can put us as arbitrators, mediators and judges at risk of making erroneous judgments and decisions grounded in fallacy or mistake.

The importance of the impact of System 1 on our decision-making processes is not lost on the legal world or the world at large, as several popular books have been written on this topic, including "Blink" by Malcolm Gladwell and, as mentioned, the recent comprehensive tome by Daniel Kahnemann, "Thinking Fast and Thinking Slow," supported by an impressive array of high level psychological research. Professor Jeffrey Rachlinski of Cornell Law School and

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[4] *Id.*

others have reviewed this subject in the context of judicial decisions, conducting extensive studies concerning the impact of systematic errors that are prevalent in System 1 on judges and their decisions.

However, other than a few articles[5], the impact of System 1 on arbitrators has largely been ignored by the academic world. This is despite the fact that arbitrators are presumably at least as prone to such errors of judgment and indeed, in some respects, may be more so, since arbitrators, by definition, function in a regime that is more flexible and less "rules-bound" than judges. For instance, arbitrators, unlike judges, are generally not bound by detailed Federal Rules of Civil Procedure or New York Civil Practice Law and Rules or the like.[6] The Federal Arbitration Act, the New York Arbitration Law, and leading arbitration rules, such as the Rules of the American Arbitration Association, JAMS, and the ICC, tend to be less specific than comparable court rules and processes, leaving far greater discretion to arbitrators.

Additionally, arbitration takes place behind closed doors, in private. Thus, the awards of arbitrators are not subject to the same level of scrutiny as the decisions of judges (although there is some overview of arbitrators' findings by the marketplace and, of course, by the courts, to a limited extent).

Therefore, for us as arbitrators and counsel in arbitrations, it is important to identify the main patterns of misjudgment and erroneous decision-making that are prevalent in our System 1, so we can identify steps we can take to correct for such potential errors.

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[5] *See, e.g.*, Christopher R. Drahozal, *Mandatory Arbitration: A Behavioral Analysis of Private Judging,* 67 Law and Contemp. Prob. 105 (2004).
[6] *See, generally*, FED. R. Civ. P.; N.Y. C.P.L.R.

II. ANALYSIS of HEURISTIC BIASES

A. Overview

This article focuses on seven key heuristics that appear to have the potential to affect the thinking of arbitrators, and goes on to propose potential solutions for mitigating the effects of such heuristics. While this article gives individual proposed solutions for each heuristic, it is important to note that there is also a common thread through each of the solutions offered. Several of the possible solutions for mitigating the effects of System 1 biases discussed in this article involve expanding the decision-making process in arbitration to broaden the arbitrator's perspective as to and understanding of the matters at issue.

B. Heuristics

1. Representative Heuristic

a. Overview

A representative heuristic is when an individual makes judgments about the probability that a person or event falls into a particular category based on the fact that that person or event has similar characteristics to people or events in that category as a whole. The most well-known study done on representative heuristics is Daniel Kahneman's study involving "Tom W."[7] In this study, individuals were asked to guess the major of a fictional student, "Tom," after hearing a description of his personality traits.[8] "Tom" lacked creativity and had little sympathy for or interest in interacting with others.[9] Despite being told that humanities and education were the most common majors at his school and computer science was the least common major, the

[7] Kahneman, *supra* n. 2 at 146-48.
[8] *Id.*
[9] *Id.*

majority of people guessed that "Tom" was a computer science major.[10] Most of the survey subjects based their decision on the personality traits that were given to them.[11] This study showed that individuals often choose less probable outcomes rather than a more probable outcome because of assumptions made about certain people or events.

b. Solutions

There are a number of solutions that arbitrators and mediators can use to limit the negative effect of the representative heuristic during their decision-making or other processes. One such solution that applies to arbitrators was explained in Chris Guthrie, Jeffrey Rachlinski, and Andrew J. Wistrich's article about the mental processes of judges titled *Inside the Judicial Mind.*[12] The authors suggested that while the representative heuristic can be helpful for making efficient decisions, it can also lead judges in the wrong direction.[13] For example, "… Judges should regard a litigant's efforts to prove that a highly unlikely event occurred with great suspicion. A rare event … is more likely to be the extraordinary product of a common cause (non-negligence) than the ordinary product of an extraordinary cause (negligence). Rare events should not be attributed to extraordinary causes without powerful evidence."[14] Like judges, arbitrators should look closely at a party's explanations that include extraordinary causes of events. Parties may attempt to exaggerate their position or sensationalize an event to draw sympathy from the arbitrator. It is important for the arbitrator to think rationally, based on the evidence, about the probabilities of various events in a case without being affected by language of the parties.

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[10] *Id.*
[11] *Id.*
[12] 86 Cornell L. Rev. 777, 823-24 (2001).
[13] *Id.*
[14] *Id.*

2. The Law of Small Numbers

a. Overview

The Law of Small Numbers is a type of representative heuristic that can also affect arbitrators. The Law of Small Numbers is a logical fallacy that occurs when someone assumes that a small sample is representative of a much larger population.[15] This assumption can cause problems for arbitrators and mediators when attempting to assess the facts of a case. Dave Finch gives a relevant example for arbitrators and mediators in his article *Heuristics, Fallacies, and Biases,* "A plaintiff who suffered a whiplash though given a prognosis of complete recovery in a few months, based upon the large numbers of accident victims who recover at that rate, but whose friend had a similar injury two years before and continues to suffer, is likely to resist the prognosis, even despite obvious differences between her age and anatomy and that of her friend."[16] Therefore, a party that is involved in a personal injury arbitration may overlook the much larger sample size of all accidents because of a past experience with a similar accident.

b. *Solutions*

Like parties to arbitration or mediation, arbitrators and mediators can also be affected by the Law of Small Numbers. Arbitrators must avoid relying solely on their past experiences in similar arbitrations to determine what an appropriate result should be for a particular arbitration because often one's personal experiences (even for an experienced arbitrator) may not be based on a large enough sample size to evaluate the particular situation at hand.

Finally, it is important for arbitrators and mediators to be aware of irrelevant things that might come up in a case, and how they might seem to affect relevant and significant matters in

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[15] Kahneman, *supra* n. 2 at 112-13.
[16] Dave Finch, *Heuristics Fallacies, and Biases,* Dave Finch Mediation Services 5 (2008) available at http://mediationserv.com/?page_id=28

the case. As Dave Finch says in his article, "The mediator aware of this small numbers fallacy will diplomatically inquire of the party relying on limited data whether she believes it is sufficient in quantity to match the data on the opposing side, not by way of coercing her to accede to the opposition proposal, but by way of inviting her to reassess a position that may be based on inadequate data. In most cases there is a region in which no one can say with certainty that a particular number is too high or too low; above or below a probable verdict; unrealistic or spot on. But, the mediator can guide both parties toward that zone of possibilities where both sides are likely to take refuge in settlement."[17] Again, the role of the mediator is to act as an unbiased decision-maker. By forcing parties to assess their own personal biases, it helps to get all sides, including the arbitrator, on the same page as to what an appropriate settlement might be for a particular case.

3. The Availability Heuristic

a. Overview

The availability heuristic is when one readily remembers something or some event and the individual believes the event must be important because they remember the event. This availability heuristic often overinflates the importance or relevance of a particular fact or event in a case in the mind of an individual.

For example, an individual is likely to exaggerate the frequency of both Hollywood divorces and political sex scandals because they attract extensive news coverage and easily come to mind.[18] Other examples of this type of bias include situations where personal experiences are more "available" than incidents that happened to others or statistics that one has heard second-

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[17] *Id.*
[18] Kahneman, *supra* n. 2, at 130.

hand. For example, a judicial error that affects a person directly may undermine her faith in the justice system more than a similar incident that she reads about in a newspaper.[19]

b. Solutions

As arbitrators, it is very important that we look outside our personal experiences when coming to a decision in a particular arbitration. When making decisions, it is important not to assume the current proceeding requires the same outcome as a previous proceeding with similar facts that we remember. In addition, as arbitrators we should consider pausing and thinking about why we are making a particular decision. It is important for us as arbitrators to avoid making decisions based solely on personal anecdotes that easily come to mind. In addition to avoiding personal biases, it is important that we as arbitrators and mediators be aware of potential biases of the parties. As Robert Adler discussed, "One should be particularly alert to the availability heuristic as a confound in negotiation. An opponent who refuses to consider a truly generous offer may do so because he or she has had a bad memory triggered that creates unreasonably negative feelings towards the offer. Things as trivial as using a particular facial expression or phrasing words in a particular way might remind an opponent of a previous bad experience in such a way that he or she refuses to bargain further to reach a deal."[20] Awareness of these potential biases can help a mediator bridge the gap between the parties to create a palatable settlement for both parties and can help make the arbitrator aware of any personal biases that he or she might have.

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[19] *Id.*

[20] *See* Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 Ohio St. J. on Disp. Resol. 683, 702 (2005).

4. Anchoring Bias

a. Overview

Anchoring is the common human tendency to rely too heavily, or "anchor", on one trait, number, or piece of information during the decision-making process. One well-known study on anchoring that has particular relevance to arbitrators involved a group of 265 judges who were put into two groups to determine an appropriate settlement for a personal injury case.[21] One group of judges was told that the plaintiff's lawyer was asking for 175,000 dollars while the other group was told that the plaintiff's lawyer was asking for 10 million dollars.[22] The group of judges that were given the 10 million dollar amount awarded a much higher settlement in the hypothetical than the other group of judges.[23] The difference in results occurs because individuals are often affected by the higher base number and adjust their estimates accordingly. It thus appears that, unless we, when acting as arbitrators, are alert to this heuristic risk and take countermeasures, we may be inclined to mis-evaluate a situation, based on how it is presented to us.

b. Solutions

Guthrie, Rachlinski, and Wistrich's article, *Inside the Judicial Mind,* discusses how judges can limit the effect of the anchoring bias through consciously differentiating between useful and meaningless anchors.[24] As suggested in their article, anchors can sometimes provide

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[21] Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information, The Difficulty of Deliberately Disregarding*, 153 U. Pa. L. Rev. 1251, 1288-89 (2005).
[22] *Id.*
[23] *Id.*
[24] Wistrich, Guthrie, & Rachlinski, *supra*, note 6, at 823.

useful information that can improve the quality of a decision.[25] However, misleading anchors can negatively affect the decision-making process.[26] Arbitrators should examine the evidence and use their experience to evaluate when they must limit the effect of certain anchors.

5. Framing Bias

a. Overview

The framing bias is the idea that different ways of presenting the same information often evoke different emotions within individuals. There are a number of examples and studies that have been done on the effect that framing has on how individuals interpret various statistics. For example, the statement that the odds of survival one month after surgery are 90 percent is more reassuring than the equivalent statement that the mortality rate within one month of surgery is 10 percent.[27] Arbitrators should be aware that parties may try to influence them by manipulating numbers to make a situation appear better or worse than the actual numbers may deserve.

b. Solutions

There are several ways for arbitrators to limit the framing bias within the decision-making process. Studies have shown that judges are less likely to be influenced by framing effects during settlement decisions than the average population, potentially because of their ability to look at multiple angles of a case.[28] Arbitrators also should rely on their ability and skills to consider the facts in a case from multiple angles to avoid the effects of the framing

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[25] *Id.*
[26] *Id.*
[27] *See, e.g.*, Kahneman and Tversky, *Rational Choice and the Framing of Decisions,* The Journal of Business, Vol. 59, No. 4, Part 2: The Behavioral Foundations of Economic Theory. (Oct., 1986), pp. S251, S254, available at http://www.cog.brown.edu/courses/cg195/pdf_files/fall07/Kahneman&Tversky1986.pdf (explaining how people choose different treatment options based on the language that is used).
[28] Guthrie, Rachlinski, and Wistrich, *supra* note 12, at 822-23.

bias.[29] Like judges, arbitrators have a potential ability to re-frame the discussion because they are able to hear both sides of an argument without having a stake in the outcome. As with the anchoring bias, an arbitrator should strive to bridge the gap between the two sides' framing of the issues in a case. As attorneys often use colorful language to frame their arguments in cases, it is important for arbitrators to use their wealth of experience to distinguish between factual arguments and language and statistics that can be misleading.[30]

6. Hindsight Bias

a. Overview

Hindsight bias is the concept that "you knew all along" that something or some event was going to happen. This bias can cause arbitrators to potentially miscalculate the predictability of past events. The ability to calculate the predictability of past events is something that can be very important to arbitrators. Therefore, it is important that arbitrators mitigate the effect that this bias can have on them.

Several studies have been conducted on the effect that this bias can have on the decision-making process. One study, completed by Baruch Fischoff analyzed the effect of hindsight bias on undergraduate subjects using the results of a war between the British and the Nepalese Gurkhas in the nineteenth century.[31] The account listed four possible outcomes for the war. The students were then separated into five groups, four of which were told the outcome of the war while one group was not given the results.[32] The four groups of subjects that were told the outcome were asked to give the probability they would have assigned to each outcome if they

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[29] *Id.*
[30] *Id.*
[31] Behavioral Economics, Law and Psychology, 79 Or. L. Rev. 61 (2000).
[32] *Id.*

had not been given the results.[33] The last group was asked to estimate the probability of each outcome without being given the result of the war.[34] The results showed that there was significant hindsight bias.[35] The groups that had been given the results rated the probability of that result higher than the groups did that were given a different outcome and the group that was given no outcome at all.[36]

b. Solutions

To overcome hindsight bias, arbitrators must avoid assuming a potential event was necessarily likely to occur just because it actually did occur. This is of particular concern in events involving negligence or foreseeability because the arbitrator's decision may turn on whether the actions a party took were reasonable considering the circumstances.

7. Overconfidence Bias

a. Overview

Overconfidence bias provides different concerns for arbitrators than some other cognitive biases. One reason is that arbitrators do and should rely on confidence in their abilities to make a decision on particular issues. Nonetheless, overconfidence bias can negatively affect an arbitrator's decision-making process as well. One of the major problems in professional fields is the tendency to be overconfident. An example of the overconfidence bias of professionals was explained in Daniel Kahneman's Thinking Fast and Thinking Slow.[37] A study was done by Duke University in which the CFO's of large corporations estimated the returns of the S&P

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[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] Kahneman, *supra* n. 2 at 261-62.

index over the following years.[38] The correlation between their estimates and the true value was slightly less than zero.[39] Despite this, CFO's gave 90% certainty of certain numbers for S&P returns that would turn out to be too high or too low.[40] Thus, their confidence was much higher than their actual success rate. Similarly to CFO's, arbitrators also tend to be experts within their own field and therefore can be prone to overconfidence bias.[41]

b. Solutions

Overconfidence bias affects arbitrators (as it affects all individuals) but it is extremely difficult to determine the proper solutions for limiting the effect of this bias because it is difficult to determine the line between confidence and overconfidence. Guthrie, Rachlinski, and Wistrich discussed this issue in their article *Inside the Judicial Mind*, "Among the five illusions we tested, the egocentric bias and the hindsight bias are essentially impossible to avoid. Egocentric beliefs are closely connected to good mental health, especially in instances where those abilities are important to one's personal or professional life. Inflated beliefs in one's personal and professional abilities allow people to enjoy a high sense of self-esteem; in fact, only people who are depressed appear to possess an accurate portrait of their abilities. Not only would it be difficult for judges to learn to avoid egocentric biases, it might be inadvisable for them to try. On balance, the social benefits of having confident, decisive judges likely outweigh the costs associated with an occasional erroneous decision caused by such self-assurance."[42]

This explanation demonstrates the conundrum that arbitrators face in their work. Arbitrators should try to temper their overconfidence by proceeding with caution and searching

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[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] Guthrie, Rachlinski, and Wistrich, *supra* n. 12 at 824.

for independent sources of judgment, if possible. Obviously, a three-person panel can help in this regard, as having three persons look at the situation may serve to compensate for misperceptions of individual members of the panel.[43]

Where we are acting as sole arbitrators, perhaps we need to submit our initial impressions to deeper assessment to make sure we are confident they are correct. As arbitrators we are often working alone and may need to make a special effort to make sure we consider all aspects of a situation before us. It may help for us to reflect on and analyze how other decisions or solutions might also be plausible. This is especially important, given the limited review of our arbitral awards.

Thus, it is important for us when acting as arbitrators to strive for a reasonable balance between being confident of our abilities and aware of our limitations, including our possible misperceptions and misjudgments. We need to maintain confidence in our ability to make good decisions while being careful to consider various ways of looking at the fact patterns before us.

C. Benefits of Arbitration

While arbitrators may be particularly susceptible to the foregoing heuristics, there are also benefits that come from years of experience as an arbitrator that can positively affect the decision-making process. The key thing would appear to be that we be aware of the possible pitfalls of our System 1 and take corrective actions along the lines of the approaches outlined here as we strive to make most appropriate decisions in the circumstances of the particular cases that come before us.

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[43] *See Id.*

III. Conclusion

Heuristics are a natural part of the decision-making process. However, it is important that we be aware of them and look for ways to limit the negative effects these shortcuts can have on our mental processes. Arbitration continues to be a favored alternative to litigation for many parties because of the assumption that arbitrators are experts in their particular field and can make efficient and fair decisions. Therefore, it is critical that arbitrators continue to maintain this edge by not taking the mental shortcuts that often plague decision-making and lead to inconsistent and incorrect decisions. The approaches suggested above can hopefully be helpful to us in avoiding the negative effects of heuristics biases. However, more research and studies need to be conducted in this field to enable us to further understand how we can best make critical decisions.

The challenge would appear to be that we, on as expeditious a basis as possible, raise our consciousness of these mental shortcuts and work to overcome them. Because of the nature of the beast here, it would appear that this effort will not be automatic, even though we are now aware of at least some of what may be at play in our System 1, since we are talking about the very structure and instinctive functioning of our minds. However, it seems clear that we can make progress on this effort if we train our System 2 to intervene when necessary, which, afterall, is its job.

Arbitration Ethics

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The Code of Ethics for Arbitrators in Commercial Disputes

Effective March 1, 2004

The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association® and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA®.

Preamble

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the **Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.**

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, all such persons are called "arbitrators," although in some types of proceeding they might be called "umpires," "referees," "neutrals," or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.

Note on Neutrality

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone, to appoint one arbitrator (a "party-appointed arbitrator") and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

Note on Construction

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator's fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.

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CANON I: An arbitrator should uphold the integrity and fairness of the arbitration process.

A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.

B. One should accept appointment as an arbitrator only if fully satisfied:

(1) that he or she can serve impartially;

(2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;

(3) that he or she is competent to serve; and

(4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.

C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.

D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.

E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.

F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.

H. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.

I. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

Comment to Canon I

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

CANON II: An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.

A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

(1) any known direct or indirect financial or personal interest in the outcome of the arbitration;

(2) any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;

(3) the nature and extent of any prior knowledge they may have of the dispute; and

(4) any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.

C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.

E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.

F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.

G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:

(1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or

(2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.

H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:

(1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or

(2) Withdraw.

CANON III: An arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties.

A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.

B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:

(1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:

(a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and

(b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.

(2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;

(3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;

(4) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX;

(5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or

(6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.

C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

CANON IV: An arbitrator should conduct the proceedings fairly and diligently.

A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.

B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.

C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.

D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.

E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.

F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.

G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

Comment to Paragraph G

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude *ex parte* requests for interim relief.

CANON V: An arbitrator should make decisions in a just, independent and deliberate manner.

A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.

B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.

C. An arbitrator should not delegate the duty to decide to any other person.

D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

CANON VI: An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.

A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.

B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.

C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.

D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

CANON VII: An arbitrator should adhere to standards of integrity and fairness when making arrangements for compensation and reimbursement of expenses.

A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.

B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:

(1) Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established;

(2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and

(3) Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

CANON VIII: An arbitrator may engage in advertising or promotion of arbitral services which is truthful and accurate.

A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.

B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

Comment to Canon VIII

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

CANON IX: Arbitrators appointed by one party have a duty to determine and disclose their status and to comply with this code, except as exempted by Canon X.

A. In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.

B. Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as "Canon X arbitrators," are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.

C. A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:

(1) Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;

(2) Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and

(3) Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.

D. Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

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CANON X: Exemptions for arbitrators appointed by one party who are not subject to rules of neutrality.

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

A. *Obligations Under Canon I*

Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

(1) Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and

(2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

B. *Obligations Under Canon II*

(1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and

(2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

C. *Obligations Under Canon III*

Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

(1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;

(2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3);

(3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;

(4) Canon X arbitrators may not at any time during the arbitration:

(a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;

(b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or

(c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.

(5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;

(6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and

(7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations Under Canon IV*

Canon X arbitrators should observe all of the obligations of Canon IV.

E. *Obligations Under Canon V*

Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations Under Canon VI*

Canon X arbitrators should observe all of the obligations of Canon VI.

G. *Obligations Under Canon VII*

Canon X arbitrators should observe all of the obligations of Canon VII.

H. *Obligations Under Canon VIII*

Canon X arbitrators should observe all of the obligations of Canon VIII.

I. *Obligations Under Canon IX*

The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.

Limitations on Arbitrators' Use of Associates

by Charles J. Moxley, Jr.

- General Practice: Arbitrators do not generally use associates or the like in domestic cases and only occasionally do so in international cases.
- Canon V.C of the Code of Ethics for Arbitrators in Commercial Disputes: "An arbitrator should not delegate the duty to decide to any other person."
- Canon VI.B: ".... An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon."
- Absence of Disclosure Requirement in Canon VI.B: Canon VI.B does not reference Canon II's requirement that "AN ARBITRATOR SHOULD DISCLOSE ANY INTEREST OR RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY."
- Reading of Canon II into Canon VI.B: Reading the disclosure requirements of Canon II into Canon VI.B seems prudent.
- Canon II's disclosure obligation: Canon II.A(2) requires that persons requested to serve as arbitrators disclose, *inter alia*:

  > any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. .... *They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts*; [emphasis supplied]

- Requirement under Canon II to Disclose the Associate's Connections with the Case: Even if Canon VI.B does not require disclosure of the associate's connection with the case, Canon II.A(2) would appear to require such disclosure.
- Billing Guidelines: Under the AAA's Billing Guidelines for Commercial, Construction, and Employment Neutrals, arbitrators may only bill for study time at the rates set forth on their panel cards. Arbitrators would need to make special arrangements with the parties through the AAA to be able to bill for an associate's time.

Who Is Responsible for Ethical Behavior by Counsel in Arbitration

By Steven C. Bennett

The author explains why attorneys must comply with applicable codes of professional conduct when they serve as counsel in arbitration proceedings and why it falls to arbitrators to deter and penalize unethical behavior by counsel that would affect the fairness of the proceedings.

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Arbitration is a significant (and growing) part of today's system of justice, albeit a largely private one. The ethical conduct of parties and attorneys in arbitration proceedings is essential to the legitimacy of the arbitration process. Arbitrators (at least in American Arbitration Association (AAA) proceedings) must follow the Code of Ethics for Arbitrators in Commercial Disputes (AAA/ABA Code).[1] This code stresses that arbitrators, as dispensers of justice, have a responsibility to the public as well as to the parties who request assistance in the resolution of disputes.[2]

There is no similar specific code of ethics for counsel in arbitration. Attorneys are subject to relevant state codes of lawyer conduct, generally modeled on the American Bar Association's Model Code of Professional Conduct (ABA Model Code). The prevailing view is that these codes apply to lawyers who serve as advocates in arbitration. But enforcing these ethical obligations in arbitration is another matter.

The questions addressed in this article are: Who is responsible for enforcing ethical conduct by attorneys in arbitration? What are the challenges involved? This article also suggests ways that arbitrators may encourage ethical and deter unethical conduct by parties and counsel. In addition, it suggests that arbitration-sponsoring institutions should create ethics committees whose advice arbitrators may seek when they are unsure whether they have authority to address particular unethical conduct. Finally, this article concludes that arbitrators must take primary responsibility for policing ethical violations that affect the fairness of proceedings. Arbitrators must take reasonable steps to deter and, when appropriate, penalize such conduct, including the imposition of appropriate sanctions.

Arbitrators must take reasonable steps to deter and, when appropriate, penalize ethical violations that affect the fairness of proceedings, including the imposition of appropriate sanctions.

Is Ethical Misconduct by Counsel a Serious Problem in Arbitration?

There is no documented, empirical answer to the question of the extent of unethical conduct in arbitration. Information on the scope of unethical behavior by attorneys in arbitration is largely anecdotal. For example, one commentator, reflecting on his 25 years' experience as a securities arbitrator, quickly recalled at least a dozen examples of unprofessional conduct by counsel.[3] If every arbitrator could so easily cite such instances of misconduct, a serious problem could appear.

The same commentator suggested that ethical violations could have serious consequences for parties and tribunals and threaten the public's confidence in arbitration as a viable dispute resolution system. For example, such violations could "result in unnecessary motions, longer hearings, duplication of effort and wasted time." Unethical behavior, moreover, could "slow the dispute resolution process and increase the cost of arbitration."[4]

The reputation of arbitration as a fair process certainly would be adversely affected if attorneys felt free to engage in unethical conduct either because the arbitration process is flexible and for the most part private, or because the attorneys in arbitration are unlikely to see the same arbitrators more than once.

Arbitrators may conclude that enforcement of ethical standards upon counsel in arbitration is not part of an arbitrator's job. Arbitrators are charged with deciding only the specific issues submitted to them for resolution. They are generally appointed through a private process, and they are often subject to a duty of confidentiality. Also, reviewing courts generally defer to arbitrators and are reluctant to inquire into the conduct of arbitration proceedings. Thus, the temptation to ignore misconduct may be great. But it is clear that at least some minimal ethical standards should apply to attorneys in arbitration.

Do Ethics Rules Apply to Counsel in Arbitration?

There is some authority for the proposition that lawyer ethics codes do not apply in arbitration.[5] This is not the mainstream view. It makes sense that lawyer codes of professional conduct apply in arbitration because such codes broadly address lawyer conduct in society by requiring lawyers to adhere in all their professional acts to high standards of conduct.[6]

It is also logical that these codes apply to arbitration because arbitration is a well-accepted means of resolving legal issues. Thus, courts have recognized that arbitrators are quasi-judicial figures and enjoy the same quasi-judicial immunity from civil liability as judges.[7] Similarly, at least one federal appellate court has held that witnesses who testify in arbitration are entitled to immunity from civil liability for such testimony.[8] There is little reason to consider representation in arbitration as other than the practice of law.

The 2004 ABA Model Code makes clear that lawyers have ethical obligations in connection with the provision of non-legal services, saying, for the most part, that attorneys who provide

both legal and non-legal services must comply with the ethics code in both regards.[9] Thus, state ethics codes should apply to attorneys serving as advocates in arbitration even if such work is somehow not the practice of law.

Courts have recognized that lawyers who breach certain ethical obligations in arbitration can be sanctioned. In a leading case, *People v. Bergmann*, the Colorado Supreme Court disbarred a Colorado lawyer for failing to file a client's demand for arbitration, despite repeated requests from his client.[10] The court held that the deliberate neglect of a legal matter (this included arbitration) violated several disciplinary rules.

The informal nature of modern arbitration proceedings could suggest that ethical obligations, such as those governing the unlicensed practice of law, should be relaxed in arbitration. But there is no logical reason to believe this to be so. Legal representation remains legal representation, whether a lawyer wears a suit or a sports jacket. Furthermore, changes in the unauthorized practice of law rules are the result, not of a belief that ethics rules have no place in arbitration, but of the huge growth in commercial and international arbitration, requiring counsel to be able to engage in multi-jurisdictional practice of law.

The unauthorized practice of law cases have often involved fee disputes in which the client claims that it need not pay its attorney for representation in arbitration because the attorney was not licensed in the jurisdiction where the arbitration took place. In *Williamson v. John D. Quinn Construction Corp.*, the court rejected such a claim, holding that representing a party in arbitration does not amount to the practice of law and thus cannot constitute the unauthorized practice of law.[11] The court noted the "informal nature" of arbitration, and that its rules of evidence and procedures differ from litigation.[12]

However, this rationale is not accepted by all courts. The contrary view appears in *Birbrower Montalbano, Condon & Franc v. Superior Court*.[13] The California Supreme Court held in *Birbrower* that a New York law firm committed the unauthorized practice of law (and thus was entitled to no fee) when its lawyers appeared in an arbitration proceeding in California. The court held that arbitration proceedings (despite their informal nature) "are important aspects of our judicial system." In response to this case, the California legislature changed the state Code of Civil Procedure, to permit a form of *pro hac vice* admission of foreign lawyers in California arbitrations.

Similarly, the NASD Code of Arbitration for investor arbitration has recently been changed to allow out-of-state attorneys to represent parties in NASD proceedings, notwithstanding state law to the contrary.

In response to the need for more flexibility in multi-jurisdictional practice, the ABA formed a commission on multi-jurisdictional practice to explore the issue. The commission concluded that an exception to the rule against the unauthorized practice of law is warranted for ADR proceedings, for several reasons. First, parties might have an interest in retaining counsel with particularized knowledge of the field in dispute. Second, parties also might have developed relationships with lawyers who could assist in resolving the dispute through an ADR process. Third, the commission pointed out that, in many instances, knowledge of the laws of the jurisdiction in which an ADR proceeding takes place may not be particularly important. Thus, the commission proposed a new rule allowing out-of-state attorneys to represent clients temporarily in ADR proceedings in the state without violating the rule on the unauthorized practice of law.

Connecticut has adopted a variant of this rule, but it conditions permission for out-of-state attorneys to practice arbitration in the state on the attorney's home state granting "reciprocity."[14] Connecticut's attorney ethics rules broadly define the practice of law as "ministering to the legal needs of another person and applying legal principles and judgment to the circumstances or objectives of that person." Included in this definition is "[r]epresenting any person in a court, or formal administrative adjudicative proceeding or *other formal dispute resolution process* or in any administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review." (Emphasis added.) The definition only excludes "[p]articipating in labor negotiations, arbitrations, or conciliations arising under collective bargaining rights or agreements."[15] Thus, representing parties in other forms of arbitration would be considered the practice of law in Connecticut.

While arbitration developed outside of litigation, the process recently adopted many of the trappings of modern litigation procedure. This development has been criticized. But until arbitration returns to its simpler roots, counsel must be prepared to respond when these litigation procedures are used in arbitration. This makes the case for requiring high standards of professionalism required by lawyer ethics codes to arbitration.

One aspect of that professionalism is the duty of lawyers to be as truthful and candid in all dealings with the arbitral tribunal as they would be with a court. This finds support in Rule 3.3(a) of

the ABA Model Code, which establishes the duty to avoid making false statements or failing to disclose legal authority to a "tribunal in the course of advocacy, and Rule 1.0(m) defines that term as denoting, in relevant part, "a court, *an arbitrator in a binding arbitration proceeding* or a legislative body, administrative agency or other body acting in an adjudicative capacity." (Emphasis added).

Moreover, Rule 4.1(a) of the ABA Model Code requires truthfulness in statements to persons other than clients, stating: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person."

Other ethical duties that advocates would have in arbitration include, for example, the duty to:

- provide competent representation to a client,[16]
- abide by a client's decisions concerning the objectives of representation,[17]
- consult with the client as to the means by which the client's objectives are to be pursued,[18]
- abide by a client's decision whether to settle a matter,[19]
- act with *reasonable* diligence and promptness in representing a client,[20] and
- explain matters to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[21]

There are surely other obligations in lawyer ethics codes that would govern advocates in arbitration.

Do Arbitrators Have the Power to Sanction Unethical Attorney Conduct?

The ideal arbitration is efficient, cost-effective and imbued with fairness. To achieve these goals, the rules of institutional arbitration providers give arbitrators the power to control the proceedings and to award broad forms of relief.[22] Arbitrators generally are not limited to awarding relief allowed by law; they may "base their decision upon broad principles of justice and equity[.]"[23] Since arbitrators manage the process, it falls to them to see that the arbitration process is fair and completed efficiently.[24] It follows from this essential fact that arbitrators have the authority to address abuses and disruption of the arbitration process.[25]

There is some case authority for this conclusion. For example, in *First Preservation Capital v. Smith-Barney*, an NASD panel of arbitrators granted a request to dismiss an arbitration as a sanction for discovery abuses.[26] On review the court confirmed the award dismissing the case. The court expressly stated that arbitrators have the authority to halt proceedings where "abhorrent behavior" appears:

> The great discretion arbitrators have over the proceedings must include the ability to halt proceedings such as this one, where plaintiff's abhorrent behavior was so clearly disruptive to the proceedings. If arbitrators are not permitted to impose the ultimate sanction of dismissal on plaintiffs who flagrantly disregard rules and procedures put in place to control discovery, arbitrators will not be able to assert the power necessary to properly adjudicate claims ... Allowing parties ... to abuse the process not only serves to undermine the principles of arbitration, it will ultimately diminish the integrity of any court in which information obtained through an abuse of arbitration is used.

Other types of sanctions that arbitrators can award include an allocation of the fees and costs of the proceedings, barring the assertion of claims or defenses, drawing adverse inferences, or precluding the submission of evidence or testimony.[27] Even monetary sanctions may be awarded in some cases.[28] The Supreme Judicial Court of Massachusetts upheld an arbitration award imposing monetary sanctions as damages for violation of a discovery order.[29] The arbitration was conducted under the AAA Commercial Arbitration Rules, which authorize arbitrators to resolve disputes involving information exchanges and to award "any relief that the arbitrator deems just and equitable."

The 5th Circuit suggested in *dicta* that arbitrators may have the power to impose sanctions even when inappropriate conduct by counsel cannot be shown to have directly affected the outcome of the dispute. In *Forsythe International, S.A. v. Gibbs Oil Co. of Texas*, the court said in a footnote: "Misconduct, even when deemed irrelevant to the merits, may nevertheless subject offenders to other sanctions. Arbitrators may, for example, devise appropriate sanctions for abuse of the arbitration process"[30]

Do Arbitrators Have the Power to Sanction Counsel Directly for Their Misconduct?

Counsels' participation in arbitration on behalf of parties who are within the jurisdiction of the arbitral tribunal arguably constitutes consent of counsel (who are non-parties to the arbitration agreement) to be bound by the results of the arbitration.[31] In *Polin v. Kellwood Co.*, for example,

the court confirmed an award that included sanctions against the claimant's counsel (half the cost of the arbitration, excluding attorney's fees).[32]

But there is contrary authority. In *Chem Asia 2000 Pte. Ltd. v. Oceana Petrochemical AG*, the court held that an arbitrator could impose sanctions on a party, but not on a party's attorney.[33] The court distinguished *Polin*, noting that it involved an NASD arbitration clause authorizing broad relief, including any relief "that would have been available to the parties had the matter been heard in court." But *Chem Asia* was a post-dispute submission to arbitration and the submission in that case permitted the arbitrator to award "any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties." The court found it significant that the submission agreement made no reference to the imposition of sanctions, or application of the Federal Rules of Civil Procedure (which do authorize sanctions on counsel). Absent an agreement on broad relief, the court questioned whether an arbitrator had inherent authority to award sanctions. The conflict between *Polin* and *Chem Asia* suggests that the arbitrator's ability to impose sanctions on counsel may depend on the terms of the arbitration agreement.

Fortunately, there are other ways arbitrators can deter unethical conduct by counsel. For example, in lieu of sanctions at the end of the process, arbitrators could bring up the issue of attorney ethics at an early preliminary conference and then ask counsel whether they will agree to be subject to sanctions if they behave unethically during the arbitration.[34]

Alternatively, on the authority of *Polin* and *Chem Asia*, arbitrators could announce, at the preliminary conference, or later in the event of misconduct by counsel, that they will hold the parties responsible for the misconduct of their counsel. Arbitrators also could make clear that unethical behavior will be viewed with skepticism (an indication, perhaps, that a party does not believe it has a credible position, sufficient to sustain without trickery).

Possible Objections to Arbitrators Sanctioning Attorney Misconduct

The scarce authority for arbitrators' sanctioning unethical conduct by counsel suggests, quite rightly, that there could be serious objections to arbitrator involvement in this area.

One possible objection is the inability of counsel to obtain timely court review of an order sanctioning counsel. In general, review can be had only after the award is issued, for example for "corruption" of the process.[35] The distant threat of vacatur may have less deterrent effect than other sanctions.[36]

Furthermore, courts afford arbitration awards a presumption of validity unless the fairness of the proceeding has been called into question.[37] Thus, deferential review cannot effectively address the unethical conduct of counsel. The problem is exacerbated by the fact that some arbitration proceedings are not transcribed. And even when they are, the record may not reflect all of counsel's misconduct. Absent a reference to that misconduct in the award, it would be very difficult for a reviewing court to determine whether the misconduct occurred and whether it had an impact on the award. Moreover, the court's power to vacate an award for misconduct cannot be based on relatively minor ethical violations.

The objections to arbitrators sanctioning counsel for ethical breaches suggest the need for caution, but they are not an absolute barrier to sanctions.

Court Control of the Profession Remains Vital

Certain sanctions for attorney misbehavior, such as disqualification from representation for conflicts of interest and disbarment belong under the purview of the courts. For example, *Bidermann*

Arbitrators have authority to establish what will be deemed inappropriate or disruptive conduct in the arbitration and to advise counsel that such conduct could lead to sanctions, even if limited to the party whose counsel engaged in misconduct.

Industries Licensing, Inc. v Avmar N.V. involved a motion for a stay of arbitration of the issue of whether petitioner's counsel should be disqualified from representing the petitioner in arbitration proceedings. The trial court granted a stay and the Appellate Division affirmed, holding that only a court may rule on an attorney disqualification issue.[38] The court stated: "Issues of attorney disqualification ... involve interpretation and application of the Code of Professional Responsibility and Disciplinary Rules, as well as the potential deprivation of counsel of the client's choosing[.]"[39]

Regulation of the legal profession presents a formidable problem for courts and bar association disciplinary bodies. Arbitrator regulation of attorneys in arbitral proceedings is not likely to intrude too far into the courts' domain because core regulations of the profession (such as bar admission, suspension, disbarment and the like) are so clearly beyond the purview of arbitrators. If arbitrators were to intrude too far into these areas, "public policy" concerns should allow for court review. Moreover, invoking these concerns, as in *Bidermann*, may permit immediate intervention by a court, to prevent such intrusions from going forward.[40]

If an arbitrator were to stray erroneously into areas exclusively regulated by the courts, an award based on such misplaced authority could be challenged on *de novo* review based on public policy concerns[41] or "manifest disregard" of law.[42]

The objections to arbitrators sanctioning counsel for ethical breaches suggest the need for caution, but they are not an absolute barrier to sanctions.

Confidentiality Concerns May Preclude Ethics Review

For many who choose arbitration over litigation, the preeminent advantage of the process is confidentiality. Canon VI(B) of the AAA-ABA Code of Ethics, states: "Unless otherwise agreed by the parties, or required by applicable rules or law, an arbitrator should keep confidential all matters relating to the arbitration proceedings and decision."

On the other hand, attorneys have an obligation under the rules of professional conduct to report unethical conduct of other members of the bar. If this obligation applies to attorneys when they serve as arbitrators, the arbitrators would have conflicting ethical obligations—to maintain confidentiality and to report unethical conduct by counsel in arbitral proceedings.

There is relatively limited guidance on this conflict issue. In a 1977 Informal Opinion, the ABA Standing Committee on Ethics and Professional Responsibility declined to answer the question, at least in the context of an attorney fee dispute.[43] But an ethics committee in Tennessee opined that fee arbitration committees were excused from their normal ethical obligations to report ethical misconduct.[44] At least one commentator has suggested that the answer may depend on whether the arbitration process is purely private or sponsored by a court.[45]

The concern for confidentiality in arbitration need not preclude arbitrators from taking steps to promote ethics and greater professionalism in arbitration. Arbitrators have authority to establish what will be deemed inappropriate or disruptive conduct in the arbitration and to advise counsel that such conduct could lead to sanctions, even if limited to the party whose counsel engaged in misconduct. The potential publication of an award imposing sanctions due to attorney misconduct (which would occur if proceedings were later brought to enforce or vacate the resulting award) could also encourage more ethical attorney behavior.

Conclusion

The task of an arbitrator is hard enough already. Adding a duty to control ethical misconduct may complicate the main task, which is to decide the dispute. It may add to the cost of arbitration and delay dispute resolution. It also could deter qualified people from serving as arbitrators.

Because parties in arbitration want a fair and impartial process, arbitrators have no choice but to adopt fair procedures and see that they are followed.[46] This inevitably puts policing attorney misconduct in arbitration under the arbitrators' control.

Institutional arbitration providers could help promote ethical attorney conduct in arbitration by offering education programs and developing specific sanctions for various kind of misconduct. One sanction that a provider's ethics committee

might impose on an attorney who is a repeat offender is a suspension from appearing in future arbitrations that the provider administers.

Provider organizations could also help arbitrators carry out their responsibilities by establishing an ethics or grievance committee from which arbitrators could seek guidance when they have a problem with misconduct by counsel. Such committees could also hear complaints by the parties, not only about attorney misconduct, but also about arbitrator breaches of ethics.[47]

State bar disciplinary committees also could actively encourage more ethical conduct in arbitration. They could draft procedures for confidential proceedings to deal with ethical misconduct in arbitration. The result (the decision whether discipline is or is not imposed) could become public.[48]

Unless arbitration providers step in, arbitrators are the only actors in the process who can police ethics in arbitration. Courts cannot be involved, since the whole purpose of arbitration is to eliminate court involvement.[49] Bar association ethics committees can do nothing unless alerted to violations of professional ethics in the arbitration process, but this is unlikely to happen unless a party to the arbitration makes a complaint. Arbitrators cannot make such complaints due to their obligation of confidentiality.

If the arbitrator does not police ethics in arbitration, that leaves the "fox to guard the hen house."[50] Although most attorneys can be counted on to uphold their professional obligations, unfortunately, some do not. As our society becomes less civil, so may attorneys in their conduct in arbitration.

Thus, even though ethics policing of counsel is not in the arbitrator's job description, and problems could arise while doing it,[51] the arbitrator's responsibility to control the process necessarily includes the obligation to promote ethical, professional conduct by parties and their counsel and, when appropriate, sanction ethical misconduct that would negatively affect the fairness of the process. The integrity of the arbitration process depends upon this remedy. ■

ENDNOTES

[1] Available at www.adr.org. The Code of Ethics for Arbitrators in Commercial Disputes was promulgated in 1977 by a joint committee of the American Bar Association (ABA) and the American Arbitration Association (AAA).

[2] There are other ethics codes for arbitrators in the labor, maritime, and international fields. *See, e.g.*, FMCS Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (1972), available at www.naarb.org, the International Bar Association's Code of Ethics for International Arbitrators (1987), available at www.iba.net; Society of Maritime Arbitrators, Code of Ethics, available at 6A *Benedict on Admiralty* §7-84.3 (1991). Ethics codes, however, do not necessarily have the force of law. See *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7th Cir. 1983) (the Code and AAA Rules "do not have the force of law"). Several states have legislated on specific ethical matters pertaining to arbitrators. See Carrie Menkel-Meadow, "Ethics Issues In Arbitration And Related Dispute Resolution Processes: What's Happening and What's Not," 56 *U. Miami L. Rev.* 949, 978-79 (2002) (citing examples and noting "absolute prohibition" of receipt of gifts or honoraria by arbitrators, adopted by California in the wake of "scandal" involving arbitrators who were given a cruise as a gift after their decision on behalf of a party).

[3] See J. Pat Sadler, "One Lawyer's Proposal for a Code of Professionalism in Securities Arbitration," 1264 *PLI/Corp* 67, 77 (2001).

[4] *Id* at 78

[5] However, this authority may be limited to negotiations of a labor-management agreement. See *Dunmore Police Ass'n v. Borough of Dunmore*, 528 A.2d 299, 311 (Penn. Commw. Ct. 1987). This was an arbitration to determine the terms of a collective bargaining agreement. The union's counsel testified as the union's only witness. The court rejected the argument that the union's lawyer violated the "lawyer as witness" proscription of the Code of Professional Responsibility. It stated: "An arbitration panel is neither a court nor an administrative agency." It went on to say that arbitration in this context "represents an extension of the collective bargaining process."

[6] Robert M. Jarvis, "Arbitration Ethics," in *Alternate Dispute Resolution in Florida* (2d ed. The Florida Bar, 1995)

[7] See *American Eagle Fire Ins Co v. New Jersey Ins Co.*, 148 N.E. 562, 564 (N.Y. 1925) (arbitrator "acts in a quasi-judicial capacity, and should possess the judicial qualifications of fairness to both parties").

[8] *Rolon v. Henneman*, 517 F.3d 140 (2d Cir. 2008).

[9] N.Y. Lawyers Code of Professional Responsibility, Ethical Considerations under Canon 1, EC 1-9 through EC 1-12.

[10] 807 P.2d 568 (Colo. 1991).

[11] 537 F. Supp. 613, 616 (S.D.N.Y. 1982). The court cited a New York ethics opinion—Committee Report, Labor Arbitration and the Unauthorized Practice of Law, 30 *Record of the Association of the Bar of the City of New York* (No. 5/6, May/June 1975).

[12] The *Williamson* court also noted that the arbitration "fact finding process is not equivalent to judicial fact finding." See *Prudential Equity Group, LLC v Ajamie*, 2008 WL 510047 at *2 (S.D.N.Y. Feb. 27, 2008) (citing *Williamson*; noting "material differences between an arbitration and a judicial proceeding, with the former being far more informal and applying much less [illegible] evidence and pro-

cedure").

[13] 949 P.2d 1 (Cal. 1998). See Cal. Civ. Proc. Code § 1282.4; see generally, Samuel Estreicher & Steven C. Bennett, "Is Arbitration the Unauthorized Practice of Law?," *N.Y.L.J.*, Jan. 6, 2005, at 3.

[14] Conn. Rules of Professional Conduct, R. 5.5(c).

[15] *Id.*

[16] ABA Model Code of Professional Conduct, R. 1.2(a).

[17] *Id.* and R. 1.4(a)(2).

[18] *Id.*, R. 1.2(a).

[19] *Id.*

[20] *Id.*, R. 1.3.

[21] *Id.*, R. 1.4(b).

[22] See, e.g., *Marshall & Co. v. Duke*, 114 F.3d 188 (11th Cir. 1997) (arbitrators had power to award "damages and other relief" under NASD rules, including an award of attorney fees), *cert denied*, 522 U.S. 1112 (1998); *Mutual Serv. Corp. v. Spaulding*, 972 F. Supp. 1126 (N.D. Ill. 1997) (same).

[23] *Moncharsch v. Heily & Blase*, 832 P.2d 899, 904 (1994). See James J. Marcellino, "Mediation and Arbitration–Ethical Considerations," 32 *Boston B J* 5-6 (Sept./Oct. 1988) ("Rule 3.3's rationale is that it promotes the determination of truth, which is a fundamental objective of the adversarial system. Arbitration, adversarial in nature, is also fundamentally concerned with the determination of truth. Thus, the rationale for Rule 3.3 of promoting the determination of truth is equally applicable in the arbitration context."). The *Restatement (Third) of the Law Governing Lawyers* similarly treats both arbitration and litigation as matters subject to the ethical obligations of appearance before a "tribunal." See ch. 7, intro. cmt. (2000) (chapter governing representation before a "tribunal" would be applicable in contested arbitration and similar trial-type proceedings).

[24] See Jarvis, *supra* n. 6, at § 13.48 (1995) ("arbitrators have a duty to promote ethics, at all times"). Although most arbitrators are lawyers (and many are former judges), they are not necessarily familiar with all the rules of ethics (though they should be). Of course, some conduct (for example, lying, intimidating witnesses, attempting to bribe a decision maker) is so obviously *malum in se* that an arbitrator does not need an ethics code to recognize it.

[25] Canon I(G) of the AAA-ABA Code states: "An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process."

[26] 939 F. Supp. 1559, 1565 (S.D. Fla. 1996).

[27] See Michele R. Fron & Kelly M. McIntyre, *Sanctions in Arbitration* 1264 PLI/Corp 1143, 1145, 1151 (2001) (citing sanction examples).

[28] Phillip O'Neil, "Mass. Allows Arbitrators to Award $$ Sanctions to Remedy Discovery Abuse," 61(2) *Disp Resol J* 8 (May-July 2006). The court acknowledged that there is contrary authority.

[29] *Superadio Ltd. Partnership v Winstar Radio Productions*, 844 N.E.2d 246 (Mass. 2006).

[30] 915 F.2d 1017, 1023 n. 8 (5th Cir. 1990) ("Arbitrators may, for example, devise appropriate sanctions for abuse of the arbitration process.") (citing *Bigge Crane & Rigging Co. v Docutel Corp.*, 371 F. Supp. 240, 246 (E.D.N.Y. 1973)).

[31] See generally Fredrick E. Sherman & Steven C. Bennett, "Binding Nonsignatories to Arbitrate: The Limits of the Federal Arbitration Act," *Commercial L. Advisor* 10 (1996).

[32] 103 F. Supp. 2d 238 (S.D.N.Y. 2000). But *Polin* did not involve a pre-dispute arbitration agreement. The parties agreed to arbitrate after litigation had been commenced.

[33] 373 F.Supp.2d 340, 356-57 (S.D.N.Y. 2005).

[34] A standard form sanctions agreement could be drafted by the major arbitration-sponsoring organizations and bar associations. To avoid any risk of coercion, the form might be raised with the arbitrator by a case administrator before the first preliminary conference. The arbitrator could later be told whether both counsel had signed the sanctions agreement.

[35] See *Gulf Guar. Life Ins. v Connecticut Gen. Life Ins.*, 304 F.3d 476, 490 (5th Cir. 2002) ("even where arbitrator bias is at issue, the FAA does not provide for removal of an arbitrator ... prior to an award....").

[36] A party seeking to vacate an award based on alleged attorney misconduct may be required to demonstrate that the misconduct had an effect on the award. See *Chopra v. Investcape, Inc*, 2003 WL 356325 at 3 (Mich. App. Feb. 18, 2003) (unpublished) (award upheld where party could not show counsel's misconduct "affect[ed] the validity of the arbitration award"); *In Re Bankhead*, 1985 WL 10399 at 2 (Ohio Ct. App. Mar. 18, 1985) (award upheld where attorney's unethical conduct was not one of the statutory grounds for vacatur).

[37] See *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 328 (6th Cir. 1998) (FAA "expresses a presumption that arbitration awards will be confirmed"); 1 Martin Domke, *Commercial Arbitration* § 36:01 (2001) ("procedural fairness assumes even greater significance in light of the strict limits on judicial review of arbitration awards").

[38] 570 N.Y.S.2d 33 (1st Dep't 1991) (referring to disqualification as a matter of "overriding public policy considerations").

[39] *Id.* at 34. See also *In re Erdheim & Selkowe*, 51 A.D.2d 705, 705 (N.Y. App. Div. 1976) (finding that arbitrators lacked the ability to censure attorneys and that this power "is reserved to the Appellate Division of the Supreme Court in each department"); *Munich Reinsurance America Inc v Ace Property & Casualty Ins.*, Opinion & Order, April 10, 2007, stating that the issue of attorney disqualification for an alleged conflict of interest is a substantive matter for the courts and not arbitrators), available at www.reinsurancefocus.com/uploads/MunichRe.pdf.

By contrast, in *Bell v. Seabury*, 622 N.W.2d 347 (Mich. Ct. App. 2001), the arbitrators denied a motion to disqualify counsel. On review, the appeals court held that, because it could not be shown that the need for counsel's disqualification resulted in an adverse award, there was no ground to vacate the award.

[40] See also *Larrison v. Scarola Reavis & Parent LLP*, 812 N.Y.S.2d 243, 246-47 (N.Y. Sup. Ct. 2005) (whether law firm's one-sided arbitration

agreement with client violated public policy was for the court to determine).

[41] *Schoonmaker v. Cumming & Lockwood of Conn.*, P.C., 747 A.2d 1017 (Conn. 2000), Connecticut Supreme Court applied a *de novo* standard of review of an arbitration award that the court said implicated issues of public policy. The court explained that heightened review is necessary to ensure that "public policy of this state is given the proper interpretation and application"). *Id.* at 1028 n. 10.

[42] See *Yusuf Ahmed Alghanim & Sons v Toys "R" Us, Inc*, 126 F.3d 15, 24 (2d Cir. 1997).

[43] See ABA Informal Ethics Op. No. 1393 (Aug. 9, 1977) (issue of confidentiality of arbitration of fee disputes presented "matter of law" not appropriate for ethics opinion).

[44] See Ethics Committee, Board of Professional Responsibility, Tenn., Formal Op. 89 (Aug. 8, 1989) (excuse from reporting obligation appropriate to "encourage greater participation and cooperation in the fee arbitration process").

[45] See C. Menkel-Meadow, "Ethics Issues in Arbitration," 56 *U. Miami L Rev.* 955 n. 32 (describing potential distinction as a "conundrum").

[46] See Canon I(F) of the AAA-ABA Code states: "When an arbitrator's authority is derived from an agreement of the parties, the arbitrator should neither exceed that authority *nor do less than is required to exercise that authority completely*." (Emphasis added)

[47] See Menkel-Meadow, *supra* n. 45, at 970 ("the existence of a formal complaint and grievance procedure is likely to render that provider more acceptable to courts").

[48] In *In re Zinman*, 847 P.2d 106 (Ariz. 1993), a lawyer was disciplined for misconduct (including use of profanity in an arbitration). Although the lawyer was identified in the bar committee's decision, the parties and the details of the arbitration were not.

[49] See *Commonwealth Coatings Corp. v. Continental Cas. Corp.*, 393 U.S. 145, 151 (1968) (judiciary should "minimize its role in arbitration" as judge of arbitrator impartiality").

In court-annexed arbitration, courts have imposed sanctions for attorney misconduct in arbitration. *Legair v Circuit City Stores, Inc.*, 2006 WL 278405 (S.D. Ohio Feb. 3, 2006) (court held counsel in contempt and imposed sanctions for "dilatory tactics and unprofessional conduct" in arbitration).

A court may admonish counsel for unprofessional conduct in arbitration, even where the conduct cannot be shown to have affected the award. See *Barcume v. City of Flint* 132 F. Supp. 2d 549, 558 (E.D. Mich. 2001) (noting "years of unprofessional behavior" by counsel in arbitration, but denying motion to vacate award).

[50] Menkel-Meadow, *supra* n. 45, at 952.

[51] One issue omitted from this discussion is how conflict-of-law principles apply to ethical obligations. In international arbitration, a transnational ethics code may need to be developed. The need for such a code has been proposed. Catherine A. Rogers, "Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration," 23 *Mich. Int'l L.J.* 341 (2002), and "Context and Institutional Structure in Attorney Discipline: Developing an Enforcement Regime for Ethics in International Arbitration," 39 *Stan J. Int'l L.* 1 (2002).

Challenging the Selection of Party-Appointed Arbitrators

Skadden

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As arbitration continues to be widely utilized in international commerce, the issue of how arbitrators should handle conflict checks, and who is suitable for appointment as arbitrator in complex cases, will remain a vital one. A pending case is likely to shed light on challenges to arbitral awards based on an arbitrator's conflicts or partiality.

Under most modern international arbitration rules (as well as those of the leading U.S. domestic commercial arbitration bodies), all members of an arbitral tribunal are expected to be neutral and independent of all parties. Thus, under the rules of most international arbitral institutions as well as the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), each arbitrator — not just the chair — is subject to challenge if there is a conflict that compromises independence or impartiality. Where, as often occurs, the arbitration agreement or rules provide for a three-person tribunal (a chair plus two arbitrators appointed by the parties), the opposing party's choice of arbitrator is often scrutinized to ensure there are no disabling conflicts or other considerations that would make the appointment inappropriate.

There are myriad cases dealing with evident partiality, with some disagreement among various federal circuits as to the precise test to apply when an arbitrator conflict is alleged.

For an arbitration seated in the United States, issues of arbitrator "conflicts" are occasionally raised after an award has been rendered, through a petition to vacate the award under Section 10(a)(2) of the Federal Arbitration Act (FAA) on grounds of evident partiality. There are myriad cases dealing with evident partiality, with some disagreement among various federal circuits as to the precise test to apply when an arbitrator conflict is alleged. For example, the U.S. Court of Appeals for the Second Circuit has suggested that there is a duty to check conflicts, and that "a failure to either investigate or disclose an intention not to investigate [conflicts] is indicative of evident partiality." *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*

In the pending case of *Republic of Argentina v. AWG Group*, a challenge was filed in the U.S. District Court for the District of Columbia that raises similar points on conflicts and evident partiality. In that case, a U.K. investor sought and obtained a significant damages award from an UNCITRAL tribunal after Argentina impaired its interests in an action found to violate the Argentina-U.K. bilateral investment treaty. In the course of that arbitration, Argentina challenged the claimant's choice of arbitrator on the basis that she was the director of an international bank that held an investment portfolio that included shares in one of the claimants. At an early stage in the case, the challenge was heard and rejected pursuant to Article 11 of the UNCITRAL rules, on the grounds that the arbitrator was not aware of the investment and that it was, in any event, immaterial.

In 2015, an award of damages was rendered against Argentina, which prompted it to seek *vacatur* of the award on the same grounds as stated in its prior arbitrator challenge, but this time, the issue was framed as whether the arbitrator's ties revealed evident partiality warranting *vacatur* under Section 10 of the FAA. Among the issues to be determined by the D.C. court is whether the prior decision rejecting the challenge should be granted deference, or whether the question of evident partiality can be litigated afresh. The case is pending, and practitioners will be watching closely.

Diversity, Inclusion and Elimination of Bias – Implicit Bias

Chapter 3

THE IMPORTANCE OF RECOGNISING CULTURAL DIFFERENCES IN INTERNATIONAL DISPUTE RESOLUTION[1]

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Everywhere we look we read or hear about Globalisation. But what exactly does it mean in our daily lives? For some businesspersons, it means the opening of international markets for goods, services, and operations. For the western labor force it often means export of jobs. For lawyers it means more cross-border transactions and disputes. For arbitrators and mediators it means more cultural variety in the disputes we seek to resolve. But for all of us it means, or should, nay MUST, mean the necessity to understand and accommodate diverse cultures and all their ramifications.

In this 21st Century we are encountering cultural diversity at every stage of our business and personal lives, particularly when any cross-border aspect is involved. For the dispute resolution practitioner, it pervades all negotiations, mediations and arbitrations. Perhaps above all other players in the world economy, it is incumbent upon us, as arbitrators and mediators, to be the most sensitive to these cultural nuances, as our mission to resolve disputes can succeed or fail according to how well we can understand and accommodate them. Thus keeping this kind of diversity in mind should become automatic and all pervasive in the international dispute resolution arena.

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[1] This paper is adapted from a paper presented at the CHARTERED INSTITUTE OF ARBITRATORS, MALAYSIA BRANCH INTERNATIONAL ARBITRATION CONFERENCE, held in Kuala Lumpur, 31 March - 1 April, 2006.

I. WHAT DO WE MEAN BY "CULTURE"?

There are various aspects to what may be referred to as "culture", the most commonly understood being national or ethnographic culture, the culture of the country or ethnic group to which each of the parties to a dispute or transaction belong and/or in which their business or project is located.

But there are other aspects of life which may be categorised as "cultures". Most fields of business or industry have their own particular culture, and there is often a characteristic corporate culture which may differ from company to company. There is, of course, the religious culture attendant to each belief, which normally will differ at least in part from sect to sect or community to community. And let us not forget differences in behavior between genders, or gender persuasions, which may also be characterised as a form or culture.

There may be different cultural aspects of life found in different geographic areas or ethnic groups residing within a single nation. Urban dwellers very often behave differently from, and have different expectations than, inhabitants of rural or agricultural communities. Even within a single city residents of different areas may have different behavioral or cultural patterns.

In each of these aspects the differences from one such culture to another may affect their manner of negotiation, style of attire, diet and cuisine, degree of formality and conduct in interpersonal relations, manner of communication, corporate responsibilities and powers, respect for law and legal systems applied, role of and respect for government and its officialdom, attitude towards corruption, towards contractual obligations, borrowing, lending and other financial matters, importance of family, ways of building relationships of trust, view of conflicts of interest, values, concept of time, approach to truth, and many other matters.

Every time we enter a country or other environment different from our own, if we have any sensitivity at all we immediately begin to notice some of the characteristic differences in behaviour of the inhabitants of such new environment. Normally the first we notice are those that hit our senses: sounds (language, accent, intensity,

music), sights (style, formality and color of attire and decor, architecture, and natural attributes), or smells (food, tobacco, hygiene, burning incense or oils). In Indonesia it is the subtle but pervasive aroma of *kretek*, clove cigarettes that announces one's arrival on her shores. Even before we leave the airport we often begin to get an idea of the style of interpersonal relations: how aggressively or respectfully do people interact with each other, and with us: do they shake hands, bow, push and shove or queue, ignore or nod to strangers, ignore or help others in need; how much personal space do they afford; how affectionate are they towards their companions; how loudly do they speak, do they tend more to smile or to frown; do they eat or smoke casually in public; do they hit or scream at their children? How well do the children behave? These are the differences of which anyone traveling abroad would need to be blind or insensitive not to take notice. But these are only surface matters. To resolve disputes among cultures we must look far deeper.

Ethnic or cultural *faux pas* may be excusable for a tourist, shopper or casual acquaintance, but they can be extremely detrimental, even fatal, to one's purpose for a prospective business partner and worse for those of us who are seeking to resolve a dispute in one form or another. In order to do this we must earn the respect of all parties involved, which invariably involves affording to them, their culture and their laws, the appropriate form of respect customary within their community.

The *bottom line* is communication. What we say and do, how we dress and act are all means of communicating not only our own culture, but also our understanding of and respect for that of others, and will affect how we are understood and how seriously we are taken. In order to ensure we give the message we wish and are respected, we must first understand what our behavior communicates to others and also what theirs is communicating to us and how these communications reflect their political, ethnic and other cultural history and environment.

A French arbitrator may go to Switzerland, Belgium or perhaps even Germany, and conduct himself the same as he does in France, understanding the submissions, statements and behavior of the

parties the same as he would in France, without having to concern himself with outside study. However, when he goes to Malaysia, Japan, Brazil or Nigeria, for example, he would be well advised to learn all he can about the language, legal and political systems, ethnic breakdown and its cross-relations, and the business, religious and family culture and mores of the society in general. If he or she fails to do this, how can he or she possibly expect to gain real understanding of the dispute to be resolved, or even what is really being said or sought by the parties?

Let us have a look at some of the more important aspects of these cultural differences of which we need to be aware, and perhaps even do some advance study on, if we hope to be successful in achieving either amicable or enforceable adjudicated resolution of disputes in a cross-cultural situation.

A. Attire

The first thing that is noticed is one's attire, which often reflects the general attitudes of formality or class of the society, and may indicate religious or moral beliefs as well. While it is perfectly acceptable in Australia to wear shorts and casual shoes, even flip flops, often even in business meetings, and certainly while traveling, Asians often find it offensive even to sit on an airplane next to a noisy Aussie showing hairy legs, let alone discuss business with such a person. The most *chique* Los Angeles or Parisian style may call for the shortest mini-skirt imaginable, but to wear even a knee length skirt, or sleeveless blouse in a Middle East country will gain one no respect whatsoever. There is an age-old standard of *respectable* business garb and while some cultures have relaxed these expectations, it is always safer to dress conservatively, at least until you have tested the waters and understood what is *de rigueur* and what is not.

Even formal or official national dress may not always be appropriate. Acceptable attire for formal occasions in the West normally consists of a black suit, white shirt and tie, if not a tuxedo and white tie. In Indonesia a long-sleeved, colorful batik shirt is acceptable no matter how formal the occasion, and in the Philippines

an embroidered *Barong,* pineapple-fiber, shirt serves the same purpose. But it is unlikely that a diplomat from either of these countries would wear batik or *barong* to a black tie dinner in London, as Asians normally take the trouble to learn what is acceptable and what is not. Fijian men wear tailored skirts as business suits, and many Papuans wear nothing but *koteka* (penis sheaths). But what would a Japanese businessman in his suit think of such men were they to appear at a negotiation meeting in Japan in their national dress?

B. Manner of Address

Australians and to a lesser extent Americans tend to address everyone on a first name basis even upon first meeting them, or even on the telephone or in emails where they have not yet met. But in many other cultures, including most European ones, this is considered extremely bad form – insulting or demeaning, such familiarity not affording any semblance of respect. It could be fatal to a mediation if an Australian mediator were to commence the mediation referring to Asian and European parties by their first names at the outset. This practice could evolve over time if the mediation is progressing in an amicable and cooperative atmosphere and a sense of familiarity is created all around. But to start the ball rolling by calling Count Heinrich von Richter-Mulhausen "Hans" or Tan Sri Dato' Dr. H Mohammad Ibrahim bin Dato' H. Samsuddin "Sam" could easily be taken as insulting and destroy the opportunity to gain the trust and cooperation so necessary for a mediator to succeed.

Italians use the third person, and the French the second person plural, when addressing superiors or anyone they do not know well, and improper use of the second person singular can be taken as an insult. There are at least three distinct levels of both Javanese and Balinese languages, the use of which depends upon the relative social status of the person speaking and the person being addressed.

In some cultures, such as American or Philippine, former ambassadors, or presidents, are referred to by such titles long after their term of office has expired, sometimes for the remainder of their lives. In others, to continue to use such term may be considered an

insult to their successors or a sign of ignorance of the current situation. In some European and Asian cultures, a long chain of titles before one's name is a show of respect. In other cultures such use is considered an affectation. And such titles may have different significance in different countries. For example "Esq." in the UK denotes landed gentry. In the United States it refers to anyone in legal practice, to the great bemusement of the British.

C. Dining

Countless cultural differences may be found in dining practices. Let us not explore differences in cuisine as were we to do so this Chapter could run on forever. Nor need we go into detail on dining etiquette. Suffice only to identify some of the questions one may be faced with when dining with colleagues, parties or clients of differing cultures.

When invited to dine at someone's home, does one bring a gift? What is appropriate? Clearly wine is not appropriate in most Islamic societies. Is one expected to be on time? Or just a bit late? When we sit at table do we wait for the host to begin eating before tasting any dish? Do we wait until everyone has been served before we begin eating? Do we await a prayer? Is it appropriate to make a toast? In some cultures the host's wife, or wives, serve the host and guests but do not join them at table, dining separately later on what is left over from the meal.

Do we serve ourselves or wait to be served? Do we share our food or eat only what is on our plate? Is it more polite to leave something on the plate, indicating that we have eaten to our satisfaction, or are we expected to eat everything we are served lest the host think we did not enjoy the food? Is it considered rude to add salt or a condiment? Is it impolite or a compliment to have a second helping?

What utensils are used and how? Fork and knife? Fork and Spoon? Chopsticks? Can we pick up the food with our hands? Be careful: in most eastern cultures one must never touch food with one's left hand, which is considered unclean.

Is it more polite to be early, on time or a bit late? How long do we remain at table, or in the premises, after the meal? While in some cultures it is normal to spend hours chatting after a meal, in others one is expected to leave immediately when the meal is over. In China an invitation will normally spell out the time, and one is expected to arrive, and leave, exactly at the times indicated. In Indonesia arrival time is very flexible and guests will often arrive as much as an hour, or more, late. But as soon as the meal is over, one person or couple will make their apologies that they must leave and immediately almost everyone else will leave as well. ("SMP" they joke, the abbreviation for the middle-level school but meaning: *sudah makan pulang*: "as soon as we have eaten we go home").

D. Face

Probably the most important element in interpersonal relations in most of Asia, be they private, business or diplomatic related, is the matter of *face*, a concept sadly lacking, and consequently misunderstood, in the West. Almost every Asian culture values *face*, or respect of self and others demonstrating respect for us. Many western cultures seem to consider people insulting each other as an acceptable means of communication – in some places, such as New York and Paris, almost an amusing competitive sport. But even an unintentional insult to an Asian, particularly in the presence of any third party, can have a devastating effect on the entire future relationship with such person, possibly jeopardising the ability to do any business with him whatsoever. Use of first names precipitously is only one example. Losing one's temper is another. Losing one's temper loses face not only for the person against whom one is ranting, but also for the rantor. Losing one's temper may lose the negotiation, or throw a mediation off track, altogether. Insulting a witness may be standard operating procedure in US courts, but in the international dispute resolution arena it can be extremely bad form indeed. In the West and parts of north Asia, such as Korea for example, mediators are taught to encourage the disputing parties to speak their minds, even scream at each other: get their anger off their

chest to clear the air so that they can focus on their essential substantive needs. But in parts of Asia, such as the Indonesian island of Java in particular, such a practice is almost certain to strike a death-knell for any chance to come to agreement, as it will only exacerbate the standoff.

To maintain one's face, and that of others, often requires silence, seen as the best alternative to making negative or assertive comments. Let us consider an hypothetical, but not at all uncommon, example: In an arbitration between a US company and an Indonesian one, each party presents a witness of fact. First comes the Indonesian witness, an aristocratic Javanese, who explains what he has seen precisely in an understated, polite manner. He is then cross-examined by an aggressive New York litigator who insults him, twists his words and, making him lose face, and completely unnerves him so that he becomes silent, fuming inside but ostensibly acquiescent to whatever the litigator thereafter may say (or shout). Then the US party puts on their witness, who tells a completely fictitious account of the same incident. The Asian arbitration counsel is polite in cross-examination and does not take him to task for lying, assuming the arbitrators will see through the facade. However, if the arbitrators are westerners who normally take things at face value and have not learned to be sensitive to the cultural aspects of this exchange, they will almost certainly believe the untruths of the western arrogant witness and ignore the truthful testimony of the Indonesian because he was so rattled by the way he was dealt with on the stand. They will interpret his embarrassment at the conduct of the aggressive litigator as indication of his own dishonesty. And thus so easily may complete injustice result. Insensitive arbitrators sitting before a mix of cultures proves far too often to be a recipe for all manner of injustice.

Western aggressive litigation practices are completely out of place in international arbitration, and even more so mediation. And yet they persist and continue to distort, or fail to serve, justice more and more every year.

E. Communications/Body Language

Some cultures eschew either negative or positive responses. The Japanese are extremely reticent to say "no", as are most Indonesian cultures, such as the Javanese. Any expression of negativeness is considered bad form. The Javanese in fact will never admit to any negative opinion nor give negative criticism, a disparaging comment being considered a face destroying insult. Other cultures, such as some eastern European ones, avoid positive or enthusiastic reactions and invariably will give a negative response, decline or criticise, at least in the first instance.

Nodding one's head is a classic example of an easily misunderstood gesture. In most of the West it is common to indicate assent by nodding one's head up and down, or even uttering "um hmm" or similar. This will mean nothing in some other cultures, and in some it may even indicate the negative. In Turkey, Iran, Bulgaria and some Melanesian islands nodding the head up (in Melanesia usually accompanied by a slight "tsk" sound) means a definite NO. In much of Asia nodding, sometimes accompanied by "yes", normally means: "I understand what you are saying, go on. . .", but is often misinterpreted by westerners to indicate agreement, usually of each specific point nodded at. This misunderstanding has on occasion been known to cause considerable disappointment to western businessmen.

Another easily confused gesture is the mostly western custom of twirling the forefinger in front of one's ear to indicate that someone is insane or unbalanced. But in certain cultures, such as that of Argentina, that gesture is common sign language meaning "telephone call for you". One can easily imagine the result of misuse of this gesture in the wrong circumstances.

Even waving one's hand can have different significance or impact in different cultures. While Americans might wave their hand, palm out, sideways to say goodbye, in much of Europe such a gesture indicates a negative answer, while to say goodbye they might wave their hand up and down with the palm down. But that latter gesture in Indonesia means "come here", while in the West "come here"

would be indicated by a similar gesture but with the palm facing in or just "beckoning" with the forefinger, which latter gesture would be found demeaning and thus highly offensive in Indonesia and some other parts of Asia. Likewise pointing one's finger at someone is often taken as an aggressive act. It is much more polite to point with one's whole outstretched arm and hand.

Posture may also have an impact. For example, the western habit of leaning back and putting one's feet up on one's desk or table is considered extremely rude in much of Asia. Showing the bottom of one's foot is taken as an insult to anyone the foot faces. Likewise standing with arms akimbo is quite a natural gesture for most westerners, but many Asians see this as an arrogant stance and may easily be offended by it.

While in England one must never turn ones back towards royalty. Showing one's back to anyone may be considered an insult in much of Asia. Touching someone with one's left hand is considered unclean in parts of Asia and the mid-East. Likewise touching someone's head without asking permission may be considered an aggressive act, in some cultures amounting to an invitation to fight. In such cultures, even a masseuse will not touch the client's head without first enquiring whether it is desired.

Smiling and silence can also have different meanings to people from different cultures. In much of Southeast Asia, particularly in Indonesia, simple courtesy dictates that people generally will maintain a smiling face, and smile and nod even to strangers when passing them on the street. Similarly, people will make pleasant small talk to strangers whom, by circumstance, one may encounter – in a shop, a waiting room or public transport, for example. In these cultures a scowling and closed face, and reticence to engage in polite conversation will be taken as rudeness, very bad form indeed, or perhaps covert intent. Conversely, some western cultures, such as the French, see gratuitous *chit chat* and smiling as signs of mental instability or suspicious attempt at confidence schemes. In some cultures preliminary *chit chat* and joking among participants in any meeting simply relaxes the atmosphere and allows things to commence on an amicable tone; whereas in others it is looked upon

as an attempt to divert attention away from the matters at hand and waste time, indicating a lack of seriousness.

F. Time

The concept of wasting time is also very much a western one. Time often has very different significance from one culture to another. The West primarily sees time as money, and saving time, being time efficient, is equated with cost efficiency. Delays, waiting for appointments, spending more time than necessary, doing anything unnecessary, all are considered as wasting time in the West. In many parts of Asia, Indonesia in particular, time can be a negotiating tool, or a means to give or withhold face. An Indonesian may let a visitor wait for an hour or more after an agreed appointment time, to unnerve the visitor and put him in an inferior position – make him lose face. Or he may arrive right on time to give face and show his respect or enthusiasm. Westerners made to wait, or worse, those that arrive to find that their counterpart has cancelled the meeting, see this as incompetence and lack of seriousness, and are usually very annoyed that they have been caused to waste their time. But the message is a matter of relative face and power, which the westerners often do not understand. Unfortunately the lack of understanding of urgency often results in losses for some Asians. The bureaucratic delays of Indonesian state-owned companies in making strategic decisions often results in such decisions being made too late, with attendant losses of business or lawsuits/arbitrations. The West says: "*strike while the iron is hot*". Asia says: "*let the dust settle*". How do we, as adjudicators, reconcile these contradictory philosophies? On the other hand, in other parts of Asia, such as China and Japan, strict punctuality is invariably expected – even demanded. Some Chinese companies have been known to force employees to stand in the corner, embarrassed in front of his co-workers, as punishment for arriving late to work.

G. Introductions

Most Asians invariably will shake hands upon meeting someone, whether that person is known to them or not. Introducing anyone encountered to those accompanying one in public is normal, even in great crowded receptions or similar. Westerners for the most part tend to ignore these pleasantries and speak only to those whom they know and to whom they have something to communicate. While the former may be considered aggressive and suspicious to westerners, the latter will certainly appear rude to Asians. On the other hand, many devout Muslim men are not permitted to touch any woman other than his own wife or mother, and thus may decline even to shake hands with any other woman. A woman mediator needs to understand this so as not to take it as an indication of hostility if a man will not shake her hand.

Then there is the complex issue of kissing as a greeting. This is uncommon in the common-law West, but quite normal and expected in much of Europe, the Mid-east and parts of Asia, where different nationalities seem to kiss a different number of times. Most of these cultures favor kissing on the cheek, but some will kiss on the lips. Indonesians generally kiss twice, once on each cheek, unless they are emulating the Dutch, who kiss three times, but these kisses are more often just "sniffs", and the Indonesian word for "kiss" and "sniff" is the same.

Asians normally exchange business cards immediately upon meeting with people they have not met before, and it may be considered an embarrassing lapse of courtesy, or perhaps an indication of intention to hide one's identity or contact details, not to have a card at hand for the purpose. Westerners have started to carry business cards as well, but the practice is not yet particularly widespread, and failure to follow this almost universal procedure could reflect rather badly upon a professional seeking to assist in resolving a dispute.

H. Religion

One of the more important cultural aspects which may differ greatly from one group to another is the practices and tenets of religion.

It is essential that arbitrators and mediators, as well as anyone in negotiations or seeking to transact business with or involving people of different cultures, recognise and be sensitive to the dictates of the various religions embraced by the parties and/or other participants. French schools outlawed students from wearing Islamic dress. Will French arbitrators and mediators bar women in headscarves from appearing before them? In Indonesia and Malaysia, as well as in the Middle East, some of the most prominent lawyers, doctors and businesspersons are Muslim women, many of whom wear headscarves or full Islamic dress. How can a western mediator expect to be successful, or a western arbitrator expect to have any credibility, if they discriminate against such women?

Likewise, while in the West it is considered rude to wear hats indoors, Muslim and Hindu men, and of course Indian Sikhs, often wear headgear, particularly for formal occasions and important meetings, and some at all times when in public. These headgear may indicate their position or religious leaning, giving hints to others what level of respect to show.

Perhaps more important is the observation of prayer obligations. One western woman arbitrator advised this writer that when she sat in an arbitration in which an Islamic woman appeared as counsel, she had the good sense to make sure she called a break, of her own volition, at each prayer time, so that the woman could go and pray without having to be embarrassed by asking for time to do so. This is an example which every one of us should follow. We must be sensitive to the religious practices of the parties who appear before us, and facilitate the parties' ability to follow such practices as a matter of course, just as arbitrators or mediators of their own culture would do automatically. If not, we can cause resentment which can defeat our mission to find amicable or judicious resolution of disputes.

A particularly egregious such abuse experienced by this writer was in an arbitration in Jakarta, in which although the parties had waived the time limitations contained in the Arbitration Act, the chair nonetheless insisted upon scheduling hearings during the highest Islamic holiday, Idul Fitri, despite strong objection of all Indonesians involved. One lead counsel, a highly regarded lawyer of Islamic faith, was thus prevented from his annual practice of receiving dignitaries who normally come to his home to pay their respects, while other counsel and witnesses were thus unable to visit their forebears' graves and attend to their families on this highest of holidays. It was made clear that had they not appeared a default award would have been issued against them. Fortunately for the tribunal this was prior to 2001. Today such hubris and insensitivity could easily have unfortunate wider consequences. But unfortunately such biased conduct is still not recognised as sufficient violation of due process to warrant annulment of an award, at least not to the knowledge of this writer.

I. Truth

Just as is the case with time, different cultures may view the concept of *truth* differently. In Indonesia, an archipelago of more than 17,000 islands with over 250 languages and cultural groups, there are certainly different views and any arbitrator or mediator must of necessity be aware of the different characteristics of these in order properly to evaluate witness testimony. While a visitor to Indonesia, such as a foreign arbitrator, will see it as a single homogeneous culture, everyone living or working in Indonesia is aware of the vast cultural diversity, to the extent that one needs to know from which of Indonesia's hundreds of ethnic groups a person originates in order even to understand what he or she says. Javanese (from central and east Java, the most populous and principal island in the archipelago) are the most self-contained and courteous people in the world and will rarely give an open and full response to any question, for fear of offending someone. To a Javanese, truth is a commodity that can be a very dangerous weapon if it falls into the wrong hands. It cannot be used or shown outright, but must be skirted and danced with until

the hearer figures it out for him/herself. On the other hand, the *Batak* people (from the north of Sumatra, the largest and most diverse of the islands) are extremely outspoken and forceful, and will tell you exactly what they think without any ceremony. Other cultures fall somewhere in between or have their own idiosyncrasies. For example, the *Minangkabau* (or "*Padang*") peoples of West Sumatra, enjoy a matriarchal society. Property is held by and bequeathed to the daughters so that the women rule the family. As a result the men can normally prevail only in the business arena and have been known to employ unconventional means to achieve success, and the more innovative such means the more respect he will win from his peers.

How can a mediator or arbitrator evaluate a statement, answer, or the conduct of a party or witness without understanding the cultural forces at work beforehand? And worse, how can the opposing party understand the real intention of such actions which to them may indicate the opposite of what is intended? The wise mediator or arbitrator must not only understand these differences but must be able, if necessary, to explain them to the parties in such a manner as not to insult nor be seen to patronise any of them.

J. Language

It is often said that language reflects culture and there are entire fields of study devoted to exactly this phenomenon. Leaving aside individual writing and speaking styles, the vocabulary, choice of words for different situations and structure of phrasing in any language may tell us a great deal about the culture which uses it. As mentioned above, some cultures use different terms of address depending upon their relationship with or relative social position to the person they are addressing. Other cultures which do not might generally be considered to be more democratic and "classless". Also as mentioned above, use of negative terms also can be taken as a reflection of respect or lack thereof, or as a general statement as to the world overview of such culture. Indonesians rarely will answer "no" to any question. They may use the word for "incorrect" if an error is made in a statement. But if asked if they have seen, read or

done something which they have not, they will not answer "no", but rather "not yet". An 80 year old spinster asked if she has children will reply "not yet". Similarly, the term "if" is used instead of "when" where discussing a planned action. This open-endedness, or uncertainty, reflects the Islamic philosophy that everything is in the hands of Allah. If asked if he or she will do something, most Indonesians will answer "Insha Allah", *God willing*.

Such philosophy is often credited as the reason many Indonesians will take loans or purchase on credit when they have made no analysis or plan as to whether or how they will be able to repay. This, and the Islamic tradition of sharing ones wealth with the poor, may explain why for many years, and still occasionally continuing, courts have deemed it unjust to expect a party to repay a loan when they are unable to do so, particularly where the lender is a bank or party with far greater wealth than the borrower. While this inclination is not reflected in the law, which is for the most part adapted from Dutch Law, it has been quite prevalent in application.

Even in cultures which are closely related and share almost the same language, ethnic makeup and history, differences may be reflected in linguistic usage. One notable example is the differences between the Indonesian and Malaysian languages. The Indonesian language was adapted from Malay, the early trading *lingua franca* of the region, by Indonesian nationalists in the 1920's, to allow open communication among Indonesia's many cultures, each with their own language. But since the Indonesian and Malaysian languages have each evolved separately in the context of their own culture (Indonesian with the influence of Dutch, Javanese, Balinese and English, Malaysian with influence of English and Indian languages) and today there are differences which cause difficulty in communication and may even cause embarrassment. For example, the Indonesian word for veteran is the same as the English: *veteran*. In Malaysian the translation is the phrase: "*laskar tak berguna lagi"*, meaning soldiers of no further use. In Indonesian a maternity hospital translates directly as "*Rumah Sakit Bersalin*" while in Malaysian such a hospital is called "*Rumah Sakit Mangsa Lelaki*" or hospital for the victims of males". A worse *faux pas* lurks behind the

term "*kelamin*", which in Malaysian means one's spouse, but in Indonesian refers to one's sexual organs.

Even someone who has studied a language in the past may not have kept up with how it has changed over the years as a result of cultural, historical or political factors and changes, and *faux pas* in a language or culture in which we purport to be conversant may be far more embarrassing than those in a language or culture with which we are clearly not, and do not purport to be, familiar.

II. LEGAL SYSTEMS

A. Common vs. Civil Law

Another important aspect of cultural differences is found among the legal systems, in particular between the most prevalent ones: common and civil law.

The general theory of common law trials, which have lapped over to arbitrations and probably affect mediation technique by counsel as well, is that the facts should evolve during the course of the proceedings and it is up to the opposing counsel to extract a party's evidence and determine its position; whereas in civil law each party is expected to make its case clearly and present its own evidence. These differences are apparent from the start, where civil law pleadings will generally state the entire case: the facts, the applicable law and the relief sought, while common law pleadings only give a suggestion of these points. Accordingly, a civil law trial or arbitration is conducted essentially upon documents, with oral hearings utilised primarily to establish procedural guidelines; and witness testimony necessary only to enable the judge or arbitrators to question a witness for clarification or, in the case of an opposing party, to try to discredit the witness in some way.

Discovery is non-existent in civil law courts and rather uncommon in arbitrations, left to the discretion of the tribunal or agreement of the parties. In common law trials the actual hearings are normally preceded by copious discovery and other preliminary applications and rulings, including virtually settling most questions of

law, prior to trial. Remember, in most common law trials it is the jury that decides the factual issues and thus meticulous rules of evidence are necessary to seek to ensure that the jury will focus only on those proper matters of fact presented to it and not be distracted or wrongly influenced by prejudicial materials. In civil law trials, as in any arbitration, there is no jury. At least in arbitration, the decision-makers are professionals with training and expertise in such adjudication and usually in the governing law, and therefore do not need to be shielded from irrelevancies or deceptive tactics, as presumably they can recognise these and disregard or sanction them appropriately. Foreign law is often considered a matter of fact to be pled and proved, an aspect that would be totally inappropriate in a jury trial.

Some of these trial procedures are extremely difficult to reconcile across the different legal systems. It is for this reason that arbitration becomes, and must be, the most appropriate forum for cross-border disputes that involve more than one legal system. Where each of the parties expect procedures to follow those with which they are familiar, but those procedures differ, only arbitration will allow a compromise situation, which can be worked out on a case by case basis among the parties, or rather their counsel, and the tribunal. The International Bar Association has tried to assist breaching this gap by providing its IBA Rules on the Taking of Evidence in International Commercial Arbitration, adopted in 1999.

B. Mediation Techniques

Likewise in a mediation, where the parties come from different legal systems, their expectations as to the role of the mediator may be vastly different. Some jurisdictions restrict mediators to a facilitative role only, while in others it is common for the mediator to take a more pro-active role in formulating suggested solutions. The mediator must understand the system or tendency in the home of the parties and give due respect to both, or all, in formulating the procedure to be followed. A mediator who simply dictates how things shall be done because that is the way he or she always conducts mediations, may not succeed, as one party may become

insulted or lose respect for the mediator, and simply walk away. Mediation is useless if the parties do not have confidence in and respect the wisdom, expertise and position of the mediator.

Cultural considerations may also affect whether parties will even attempt to mediate a dispute. While in many western jurisdictions mediation is so common that parties have no hesitancy in suggesting, or even insisting on, such attempt first, in many Asian jurisdictions suggesting mediation may seem a loss of face and/or an admission that the party does not believe its case is strong enough to win in an adjudicated procedure. The growing trend of court-annexed mediation should assist to allay this kind of perception. However, it is always advisable to provide for mediation as a condition precedent to arbitration or litigation when entering into a contractual relationship in the first place, to avoid any such perception of loss of face once a dispute arises later on. Voluntary agreement to mediate also frees the mediation from any restrictions and/or shortcomings of the applicable mandatory court procedures and, more importantly, from the necessity to choose a mediator from the court's roster, where applicable.

Mediators also might consider the attitude towards decision making which may differ from culture to culture. Some cultures have a strong sense of independence and both the government and its citizenry feel it important to make their own decisions and not be dictated by anyone else. This is certainly the case in Indonesia, the Philippines, and many other Asian jurisdictions. However there are others, many South American cultures for example, where they prefer to allow someone else to make decisions for them, perhaps so as not to have to take responsibility if such decisions do not bring the desired results. In the former case, clearly the mediator must take only a facilitative role, and allow the parties to direct the procedures insofar as appropriate, whereas a more proactive role will be expected, and appreciated, by the parties in the latter case, although they may not make that known.

Other differences between legal systems include the civil law concept that all contracts must be performed in good faith, the common law requirement of consideration, the divergent views on

sanctity of contracts and the way changed circumstances are dealt with in each. All of these expectations must be taken into consideration, and possibly explained in some detail to parties in a cross-system mediation or arbitration.

C. Corporate Culture – Powers and Responsibilities

Although most legal systems provide for establishment of some sort of limited liability legal entity, there may be considerable differences in how these are established, managed, taxed and regulated. Westerners, particularly those from common law jurisdictions, often tend to assume that any legal entity called a *company* or *corporation* will be essentially the same as the corporation to which they are accustomed, and not bother to delve any further. This can in some instances result in considerable error of law and sometimes miscarriage of justice. The chain of command and relative powers and responsibilities of each "corporate" organ may differ greatly from culture to culture, as may the administrative or reporting requirements or actions which are required to render corporate acts binding upon the company and/or third parties.

One such example in the experience of this writer did result in very serious miscarriage of justice and severe losses to the Indonesian populace where a tribunal, primarily comprised of Westerners, imposed fatal sanctions on the Indonesian Government for failing to order a state-owned limited liability company to withdraw a lawsuit it had commenced to seek redress against losses imposed upon it in an arbitration to which the same tribunal refused to join it as a party. Although the governing law was that of Indonesia, the tribunal refused to take notice of Indonesia's Company Law, under which a shareholder does not have power to dictate actions of a company, its only power being the ability to appoint or remove directors, while the board of directors are by law required to act in the best interests of the company, not those of the individual shareholders. The foreign arbitrators would not read the newspapers provided by their hotel every morning, ignored both expert witness testimony and the governing law, and apparently thought: well, if the government is the

owner it can do whatever it wants and any law or practice to the contrary can't be right because it differs from what we know in the West. Whether one considers this as negligence, or only arrogance, it should be inexcusable conduct when arbitrating anywhere, particularly in a foreign jurisdiction with which one is not familiar.

D. Attitudes on Borrowing/Lending

Certain national, ethnic or religious cultures may reflect a difference in the parties' attitudes towards borrowing and lending, and understanding of their respective rights and obligations in that regard. For example, Islam does not permit interest to be charged. We are now beginning to see a great increase of Shariah banking transactions, which are structured so that the incentive of the lenders is in other forms. However, there may easily be situations which arise, which would indeed go to mediation or arbitration, where a loan agreement with an Islamic party borrower does call for interest and such borrower might fail to pay on religious grounds. Not only do financing lawyers need to create more flexible structures so that the lenders may benefit in a cross-culturally acceptable way, but mediators and arbitrators must be sensitive to these conditions and seek to find some other way for the lender's expectations to be fulfilled without causing the borrower to violate his or her religious obligations.

Some cultures even have a perception that it is wrong or unjust to force a borrower to repay its indebtedness when the economic situation has changed unfavorably, either personally for the debtor, in his region or in the world. Indonesia is probably the place where this attitude is most frequently encountered, as mentioned above, and it is the unfortunate fact that the Indonesian courts seem to take a similar view, having often declined to order debtors to repay their debts, not only in the wake of the economic crisis of the late 1990's, but even prior thereto. This may be related to the general principle of Islamic charity, where the wealthy are expected to share their wealth with the poor. It is surprising that banks are still generally reticent to call for arbitration in their financing documentation, having the perception

that arbitration necessarily means compromise. However some such cases do go to arbitration, and probably more to mediation. If we are not aware of the cultural background, it would be impossible to facilitate a solution to such a dilemma.

E. Cultural or Intellectual Bias

Pre-conceived notions, prejudices and opinions of an arbitrator will always threaten to color his impartiality and ability to see any matter at issue in a clear and balanced manner. We seem to be seeing this more and more where western arbitrators sit to adjudicate disputes between western and "*third-world*" parties, and it is something that all of us must be on constant guard against in our own attitudes.

There is, unfortunately, still a widespread prejudice on the part of many Westerners who perceive that developing nations' cultures are inferior to, and its citizens less intelligent than, their own countrymen or their own race. Some Asian cultures enjoy a similar perception of their own superiority, but as Asian arbitrators and mediators are far less commonly engaged for cross-border disputes, and as Asians generally tend to show courtesy and respect to everyone, the problem is less pronounced in these cases. A western arbitrator may pay greater credence to a western witness than to an Asian one, even where the local witness may be a recognised expert in his or her field. The western witness not only speaks the same, or a similar language, as the western arbitrator, but also approaches his analysis from the western point of view, even though this may be completely irrelevant to the project or contract at hand or the original intentions or perceptions of the parties. Our challenge is to guard against falling into this ethnocentric trap.

Likewise, several of the most successful western arbitrators, in their hubris, hold no respect for the laws of non-western countries and often tend simply to ignore entirely the law chosen by the parties to govern or, worse, opine it to be meaningless. This is unforgivable and, unfortunately, not often recognised as a valid ground to set aside their awards. The courts of any country are often suspected of being nationalistically biased. But court judgments will be subject to review

by a higher court, whereas an arbitral award invariably will not. Therefore, although we arbitrators have more freedom to allow our personal prejudices to govern, we must be very much on our guard against such a tendency precisely because there is no effective review of the awards which we render.

III. CONCLUSION

Arbitrators hold a unique position in international commerce. The jurisdiction with which we are vested often spans international cultures and a multitude of diverse laws and legal systems. And there is no appeal against what we decide. No judge in any court has such power or responsibility. It is thus our duty, if we accept an appointment to adjudicate a dispute involving a culture of which we are not conversant, to make every effort to familiarise ourselves with the cultural values and idiosyncrasies of the parties and the project venue if we are to ensure justice. And when governments or government-related bodies are involved, a study of the history, political environment and real power structure is also essential.

This responsibility seems to feed a growing trend among some western arbitrators to consider that international arbitration stands above the law of any individual jurisdiction, and that such arbitrators are more powerful than the governments and courts of the jurisdictions in which they operate, and are thereby qualified to make awards unencumbered by local laws, policies, politics and customs. But arbitrators are only human. And we must not forget that we, too, are fallible and not allow the position of power granted to us as arbitrators to create in us such arrogance as to eclipse the fact that we are still subject to the culture and laws of the lands in which we operate. When we enter into a culture which we do not understand, operating under laws with which we are not familiar, with an attitude towards respect for and compliance with such laws that is also alien to us, we can no longer rely entirely upon our own experience, judgment and instincts which have been forged in our own and similar societies.

Cultural understanding and sensitivity, or the lack thereof, is perhaps the single major cause of international disputes in the first place. Let us rigorously guard against falling into the same trap as does the western businessman who closes a deal in unknown territory without first doing his homework, assuming the rest of the world operates the same as his own culture and is then baffled when his venture runs into trouble. Without judicial review of our awards we are under a far higher obligation to be as diligent and vigilant as we are able, and exercise the most rigorous degree of sensitivity and scrutiny, to ensure that we fully understand both the situation presented and the parties' intentions, and do not become unwitting parties to manipulation, corruption or injustice.

Chapter 6

THE ROLE OF THE CHAIR IN INTERNATIONAL COMMERCIAL ARBITRATION

Neil Kaplan, CBE QC SBS FCIArb and Karen Mills, JD FCIArb

There can be no doubt that the role of the Chair is pivotal in ensuring a smooth-running and fair arbitration.[1] An Appendix to this chapter will refer to the various institutional and statutory provisions relating to the role of Chair.

The Chair of an arbitration is, in a sense, the glue that holds the whole process together.[2] He must oversee all administrative matters as well as all procedural and substantive matters; be the key liaison among the parties and the other arbitrators, between the tribunal and any administering institution, if any, and sometimes must even mediate between the other arbitrators where not everyone sees eye to eye. One might like to consider the Chair as the conductor of the arbitral orchestra.

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[1] We are grateful to Doctor Robert Briner for his permission to refer to the material contained in his chapter 4 on the role of the Chairman contained in The Leading Arbitrators Guide to International Arbitration, ed. Newman & Hill, Juris Publishing (2004). We agree with and adopt his statement at page 49 where he says "*in this paper the term 'Chairman' designates a function, irrespective of the gender of the person exercising it. In keeping with the terminology used in the English Arbitration Act 1996 (e.g. section 20) and the ICC Arbitration rules of 1998 (e.g. Article 8 (4), the presiding arbitrator in a three-member arbitral tribunal will be referred to throughout as 'Chairman'. Like the term 'Chairman', that of 'Arbitrator' and its pronominal form 'he'/'him' should be understood in this article to refer to a function, which may be fulfilled by a man or a woman. As a matter of fact, there have already been ICC cases where all three members of the tribunal were women, not to mention those in which women act as sole arbitrators or chair tribunals in which the party-appointed arbitrators are men.…*"

[2] For other works on this topic see (i). 'Le President du tribunal arbitral' in *Etudes offertes a Pierre Bellet* (Paris: Litec, 1991, 467; (ii). The President of the Arbitral Tribunal' (1994) 9 ICSID *Review 1*; (iii) Christian Gavalda, 'Le President du Tribunal Arbitral International' *Les Petites Affiches*, No. 76, May 25, 1990, 13.

The role of the Chair can conveniently be considered at the following stages of an arbitration;

(a) Getting the arbitration on track

(b) Sorting out administrative and financial details

(c) Fashioning the first Procedural Order or Terms of Reference

(d) Supervising submissions

(e) Planning the hearings

(f) Conducting the hearings

(g) Planning the stages subsequent to the hearings

(h) Drafting the award

(i) Completing the mandate

Let us consider some of the duties of the Chair and issues that arise in each of these stages.

I. GETTING THE ARBITRATION ON TRACK

A. Concordance

In international arbitration one of the key functions of the Chair is to ensure that any cultural and legal differences between or among all concerned are fully understood. Nothing is worse than, for example, a common law Chair conducting an arbitration between, say, a Thai company and a Korean company and acting as if the only way to proceed was as if he were conducting an arbitration in London or New York. Conversely, a civil law Chair with common law parties or counsel appearing should likewise be sensitive to alternative ways of proceeding and differing expectations. Cultural differences can be found at all stages of an international arbitration. These can be summarised as follows;

(a) Cultural and legal differences between or among the parties. These may be partly responsible for the dispute itself;

(b) Cultural and legal differences between or among counsel representing the parties;

(c) Cultural and legal differences between or among counsel and some or all of the Tribunal; and

(d) Cultural and legal differences between or among members of the Tribunal itself.

A good Chair will be attuned to these differences at all stages of the arbitration and will attempt to accommodate them. The most important aspect of this is to ensure that everyone understands the procedure which the Tribunal intends to adopt. This applies just as much between members of the Tribunal from different jurisdictions. A good example is questions from the Tribunal. Some arbitrators will wait until all questioning has finished and will then ask some questions. Others may want to ask questions as issues arise. In the latter case it helps if it is explained to counsel (and perhaps other members of the Tribunal) that this might happen and that these questions should not be taken as evidencing any concluded view. If this is done it makes subsequent complaints sound hollow. As there is another chapter in this book devoted to cultural considerations only, we shall not elaborate further on this matter here.[3]

B. Appointment

Normally the Chair is appointed by the mutual agreement of the two party-appointed arbitrators. In this situation he will invariably be someone that both of the other arbitrators already respect, which should make for a smooth, amicable relationship among the members of the Tribunal, making the Chair's job relatively pleasant and not overly difficult. If two of the three arbitrators know each other (which is frequently the case) they should make a real effort to welcome the third and make him feel part of the team.

There are instances, however, where either the two party appointed arbitrators are unable to agree upon a Chair or the rules of an administering institution call for the institution itself to appoint

[3] Chapter 3, The Importance of Recognising Cultural Differences in International Dispute Resolution by Karen Mills.

the Chair. In such circumstances the arbitrators may not know each other, nor their respective capabilities, or be unfamiliar with their respective personalities and cultural background. Then the Chair has an added role, requiring some tact and charm, in trying to meld the procedural style of each of the other arbitrators, understand their intentions, their personalities, and how to neutralise any animosity which might lie behind their demonstrated persona.

C. Jurisdiction

In either case, the first responsibility of the Chair must be to ascertain that the Tribunal, as constituted, does have at least apparent jurisdiction to hear and decide the dispute; that the dispute is arbitrable and that each of the arbitrators is properly appointed, all in accordance with the contract under dispute, the *lex arbitri* (law governing the arbitral reference), and the rules that will govern the procedure. For this purpose it will be assumed that all three arbitrators have checked the arbitration clause which governs and have dealt with conflicts. Normally a look at the arbitration clause in the contract, the law and rules should satisfy the former point.

II. SORTING OUT ADMINISTRATIVE DETAILS [4]

A. Finances

The Chair must ensure that the financial arrangements for the Tribunal are in place. He should check to see whether the co-arbitrators have already agreed, either with the administering institution or the party that appointed each of them, upon the terms

[4] A useful reference point is The UNCITRAL Notes on Organising Proceedings, published in 1996 which was aimed at assisting practitioners "*by listing and briefly describing questions on which the appropriately timed decisions on organising arbitral proceedings may be useful*". See also "Organising an international Arbitration" a chapter by professor A. J. van der Berg- *The Leading Arbitrator's Guide to International Arbitration*, edited by Newman and Hill, Juris Publishing (2004). For ICC cases see "Techniques for Controlling Time and Cost in Arbitration", *8 March 2007 ICC Doc. 420/535 E*

of their engagement. If not it might be better for this to be done by the Chair on behalf of the Tribunal. If the co-arbitrators have agreed upon their fees then the Chair should also do so before commencing. In most cases the Chair will have submitted his terms and conditions which will be accepted upon joint appointment.

It must be recognised that different arbitrators may charge different rates, or bill on a different basis. This is not at all uncommon with *ad hoc* arbitrations, and it is not unheard of for one arbitrator to bill on a flat rate while others charge by the hour or day, or for each arbitrator to charge different billing rates. Sometimes the Chair's rate may even be less than one of the party-appointed arbitrators. As long as each of the arbitrators has negotiated and agreed upon his or her own terms and is satisfied with them, the arrangement should not be subject to dispute. In cases where an arbitrator has agreed on his own fees with the party that appointed him, it is wise for the arbitrators to share this information among themselves. It is also advisable for the parties to be aware of the fee structure of the Tribunal because one of them will almost invariably be responsible to cover such costs.

In cases where the Chair is in charge of the financial arrangements he should set up a dedicated bank account into which deposits can be paid in and third-party expenses and re-imbursement or periodic interim payments to the Tribunal paid out. Some arbitral organisations such as the Hong Kong International Arbitration Centre ("HKIAC") will provide this service to arbitrators at minimal cost. This is often attended to by an arbitrator's firm, or for arbitrators with chambers this can be done by the clerk. It is obviously crucial that monies deposited by the parties should not be co-mingled with other monies belonging to the Chair. A clean and case-specific account is essential. Some rules impose quite onerous duties on the Chair with regard to financial matters.[5]

If the arbitration is administered by an institution the Tribunal will probably not have to worry about terms, conditions and collections, as most institutions handle these matters. But even in

[5] See for example the January 2004 Swiss Rules of International Arbitration, particularly rules 38-41.

such cases it is the responsibility of the Chair to monitor the way the case is being funded. If it appears that the deposits are going to be insufficient to cover the case as being conducted by the parties then the Chair should take the matter up promptly with the institution.

B. Communications

Once the Tribunal has been fully constituted and compensation terms settled, the Chair should write to everyone acknowledging the appointment, confirming his and his co-arbitrators' co-ordinates and inviting confirmation of theirs from all concerned. He might at this point wish to set the parameters for how communications should be made: the most commonly used system being email and/or fax, followed up with hard copy by post or courier. If using email he should create 2 groups, one for writing to everyone and one for private communications among the arbitrators only. There have been occasions when an arbitrator pushed the wrong button and sent a private communication to the parties. In one case this led to an application to remove. Where an institution is involved, the Chair must ensure that the institution is copied on all communications between the parties and the Tribunal. This is important in cases where the institution needs to know the amount of work involved and the complexity of the case in order to fix fair remuneration for the Tribunal at the conclusion of the case. Sometimes this information is required in order for the institution to consider going above or below its published scale.

C. Time Limits

One matter that needs careful consideration by the Chair is that of time limits. The rules of the International Chamber of Commerce ("ICC"), and even the *lex arbitri* in some jurisdictions such as India, Taiwan and Indonesia, for example, impose time limits for the publication of the award. These limits need to be carefully watched by the Chair. In ICC cases, the ICC Court will automatically extend

the time for rendering the award. Nevertheless the Chair should see that time never runs out as administrative errors cannot be ruled out.

Another aspect that needs careful handling is that of contractual time limits. Some contracts actually specify a time limit for hearings and/or that the award shall be completed within, say, thirty days of the completion of the evidentiary hearing. Unless the Tribunal has agreed to a fast track arbitration and willingly takes on this additional responsibility, the Tribunal should be wary of committing itself to such a straitjacket.

The danger is that if the time limit, for whatever reason, runs out, one party may not agree to an extension and later the award may be arguably unenforceable. Or, if no extension is agreed upon the Tribunal may just issue its award quickly to meet the limit, without affording sufficient time to consider the issues fully, and justice may not be served. It is submitted that the Chair should attempt to get the parties to extend the time in advance and also allow for the possibility of a further extension at the request of the Tribunal. Another way to mitigate around the matter is to get the parties to agree that the period of time does not begin to run immediately after the hearings but only after all written submissions have been filed, including any request from the Tribunal for clarification of the written submissions to date. That will effectively put the time limit back in the control of the Tribunal. As written closing submissions, sometimes two rounds of them, are not uncommon, the initial time limit will otherwise expire before they have been completed. This would be most unsatisfactory. It is advisable to raise the issue of the contractual time limit at the time of the appointment or at latest in the initial procedural meeting/hearing, at which stage the parties may be more amenable to agree. A thirty day, or similar, time limit may be inserted by a contract drafter, usually a transactional lawyer unfamiliar with the arbitral process, but it can be quite unworkable for the trial advocate or arbitration practitioner. Here is another reason why the Chair in particular should scrutinize the arbitration clause most carefully before taking the matter on.

D. Administrative Secretaries

In a large case the Chair may well be assisted by an administrative secretary. This will usually be a young lawyer in the Chair's law firm or chambers or it may be a young arbitrator keen for more experience. The administrative secretary will usually deal with collecting and collating, and possibly distributing, the documents and liaising with the parties with regard to scheduling. It is invariably more cost-effective for such administrative tasks to be done by a junior lawyer with modest billing rates than for the arbitrators themselves to deal with such matters. In document-heavy cases such assistance is most beneficial. If it is thought necessary to engage such services the Chair should raise it with the parties and get their agreement in principle on the identity of the individual and the hourly rate. The parties should then advance such fees. The ICC takes a rather strange view of the use of administrative secretaries.[6] They seem to think it reasonable for the fees of the secretary to be borne by the Tribunal even though the use of a secretary can actually help to reduce the time spent by the Tribunal. However, even in ICC cases the parties are usually prepared to pay for this convenience. But it is wise to keep the institution informed.

E. Record of Proceedings

Except in very simple and straightforward cases, both the Tribunal and the parties, or their counsel, will usually wish to have a record of the hearings to refer to: counsel for further presentation of their case and the Tribunal for preparation of the award. One of the matters that should be decided at the outset is how such record is to be made. As the parties will have to bear the cost, consideration should be given to their preferences. The proceedings may be tape-recorded or a secretary or court reporter or transcript service utilised, and today's technology offers excellent simultaneous transcript services such as "*live note*" or similar. The latter can be of tremendous

[6] See the ICC note on this subject dated October 1, 1995.

service to the Chair, as well as to everyone else involved. The text of all testimony and other proceedings appears almost simultaneously on a computer set in front of each participant. This will assist not only in ensuring that the Tribunal understands what a witness has said, but it also allows counsel to refer to the witness's exact words and it also facilitates the job of any translator or interpreter. Other features allow the user to highlight and make notes on portions of his or her copy of the transcript, and it also enables the Tribunal to send notes on screen to each other during the hearings, which only the Tribunal will see, thereby avoiding the necessity to whisper comments among the Tribunal, which the parties may find discomforting.

III. FASHIONING THE FIRST PROCEDURAL ORDER OR TERMS OF REFERENCE

Having established how to correspond with all concerned and sorted out the financial arrangements the Chair must now turn to the procedure to be adopted to lead to a fair, just, expeditious and economical resolution of the dispute.

A. Initial Procedural Hearing

In most cases a smooth run arbitration can best be achieved by an initial procedural hearing or meeting.[7] Whether to hold such a meeting will depend upon a number of factors, including geographical location and schedules of the members of the Tribunal and the parties or their counsel, quantum and /or complexity of the claim, desire of the parties, and others. It may be more time and cost-efficient to hold such a meeting by teleconference or conference call or simply by correspondence. This should be discussed with the arbitrators and then with the parties to set up the most sensible arrangement, always keeping in mind costs. However, the experience of most arbitrators is that an early meeting with parties has enormous

[7] See the Hunter Questionnaire referred to by David Williams QC in his paper at IBA International Arbitration day in Madrid, 2 March 2007.

advantages and should not be avoided save in exceptional circumstances.

Where the parties are both, or all, represented by experienced arbitration counsel, one often finds that counsel have been, or will themselves be, able to reach agreement on many of the factors involved. These may include such matters as preferred scheduling for submissions and hearings, nature and quantity of submissions, discovery, if any, method of examination of witnesses, both factual and expert, transcript or other record of proceedings, location for hearings, and similar. Certainly, any such agreement of the parties must be subject to approval of the Tribunal. But, normally where the parties have been able to agree on some or all of these matters, the Chair should encourage the Tribunal to endeavour to assent, subject of course to its own schedules, as anything the parties can agree upon lessens the burden of the Tribunal and encourages an amicable atmosphere for the proceedings. To the extent that the parties and the Tribunal can agree, the Chair may wish to prepare, or allow the parties to prepare for the issuance of the Tribunal, a Consent Order to cover same.

If and to the extent that the parties cannot agree on these preliminary matters, the Chair may invite submissions from the parties on how they wish these things to be handled and the Tribunal, having considered these against its own schedules and preferred methods of hearing a dispute, will issue its own procedural orders. Prior to the first hearing it is often helpful if the Chair writes to the parties more or less along the following lines;

> "In preparation for the preliminary procedural hearing the Arbitral Tribunal will send you in due course an agenda as well as draft Terms of Procedure and Appointment. Furthermore, for the Tribunal to have some understanding of the dispute prior to the procedural hearing the Claimant is invited to file a brief submission (not more than 10 pages) setting forth its main allegations of fact and legal argument by (insert a date) and the Respondent is invited to file a brief response (again no longer than 10 pages) by (insert date).

> These brief submissions are without prejudice to any later or different submissions"[8]

Often the arbitrators will agree among themselves, or at the suggestion of the Chair, that the Chair shall have jurisdiction to decide upon procedural matters on behalf of the whole Tribunal, and to issue procedural orders under his sole signature. This should be raised at the earliest opportunity and reduced to writing. In ICC cases this should appear in the Terms of Reference (TOR) or at the latest in the First Procedural Order.

Article 29 of The Model Law is relevant here.[9] It states;

> "In arbitral proceedings with more than one arbitrator, any decision of the arbitral Tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by the presiding arbitrator, if so authorised by the parties or all members of the Tribunal."

There are a variety of clauses that are used in practice to achieve this end.[10] One suggested clause is as follows:

> "The Chair may make procedural (interlocutory) orders unless either side requests that the same shall be considered by the whole Tribunal. Any procedural (interlocutory) order signed by the Chair shall be deemed to be that of the whole

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[8] This wording is used by Professor Gabrielle Kaufmann-Kohler who kindly permitted David Williams QC to quote it in his paper "*Appointment, Organisation and Powers- organising the proceedings with reference to the UNCITRAL Notes*" delivered at IBA International Arbitration Day in Madrid on the 2nd of March 2007.

[9] The Model Law on International Commercial Arbitration prepared by UNCITRAL and recommended to member states by the General Assembly of the United Nations in June 1985.

[10] See also ICC Rule 25 (1) which deals with awards and permits the Chair to make the decision if there is no majority.

> Tribunal if it states that the matter has been considered by the whole Tribunal, whether face to face or on the telephone or in writing or in any combination thereof."

The term '*interlocutory'* is understood by common-law lawyers but *'procedural'* may be a more appropriate term to use where not all parties are from common law jurisdictions. The above clause clearly covers scheduling issues but will not cover any matter relating to the substance. Applications for interim measures of relief will, save in cases of utmost urgency, be required to be dealt with by the whole Tribunal. "*Writing*" clearly encompasses email, through which most communication now takes place.

B. Terms of Reference ("TOR")

In an ICC (International Chamber of Commerce) administered arbitration, many of the initial procedural matters are required to be codified in a written document, known as the Terms of Reference ("TOR") and the first duty of the Tribunal is to draft the TOR and get it signed by the parties and the Tribunal. The TOR is a convenient place to set out all the essential features of the arbitration such as the parties, their representatives and co-ordinates, the governing law (if agreed) and the place and language of the arbitration. Further, it is necessary for each party's case to be summarised in the TOR. The best practice is for the Chair to invite each party to provide a short summary of their case for insertion into the TOR.

At the same time as signing the TOR at a face to face meeting it is usual for the Chair to prepare a draft of the First Procedural Order unless the parties have been able mutually to do so. This can then be discussed with the Tribunal and finalised at the same meeting. The Procedural Order should be in a separate document and not included in the TOR.

In this regard, Article 18 (4) of the ICC rules should be noted as it provides for the schedule to be established in a separate document, either at the same time as the TOR or as soon thereafter as possible. This document might be in the nature of a direction or order of the

Tribunal, or even a consent order which can be altered at a later date as and when necessary.

Normally the most contentious point to be included in the TOR is identifying the issues to be determined. In relatively simple cases this will be evident from the submissions. However, in practice, few arbitrations are so simple and it may be difficult for the arbitrators to determine at this initial stage everything that is in issue, or for the parties to agree thereon. Often, as the reference progresses, issues not initially anticipated may emerge. Or whether or not a point may be in issue may depend upon determination of another substantive, or even procedural, issue. Thus, it is not always feasible to agree upon an exhaustive list of issues. Furthermore, it is possible that having agreed upon a set list of issues to be decided, subsequent events in the conduct of the reference may make determination of one or more of those listed unnecessary. This will put the Tribunal in a dilemma if the issues have been defined in the TOR. It will have agreed to determine one set of issues but, as a result of the progress of the reference, the award will not cover all of these, and/or will determine others not agreed upon in the TOR. Such a divergence could jeopardise the enforceability of the award if an objection were to be made pursuant to Article V of the New York Convention or Article 36 of the Model Law (where applicable) or an equivalent provision in the law of the place in which the award is sought to be enforced. These allow a court to refuse enforcement of an award where the Tribunal exceeds its mandate or fails to decide a matter which has been put before it.

In order to avoid the above situation, it may be more prudent, and certainly less contentious at that early stage, to mention only the very major issues that are certain to be at the heart of the controversy, with a notation allowing others to emerge, such as: " . *and such other issues as are raised by the parties in the course of the proceedings*". Or, in exceptionally complicated cases, the Tribunal may opt not to specify any issues at all, but simply to state that the Tribunal shall decide "*such issues as may arise in the course of the dispute as shall be set out in the submissions of the parties*." Article 18 (1) (d) of the ICC Rules would seem to allow for such language, as its

requirement is stated: ". . .*unless the Arbitral Tribunal considers it inappropriate, a list of issues to be determined*."

The parties should be invited at an early stage of an ICC Arbitration to provide the Chair with succinct synopses of their case for insertion into the TOR.

IV. SUPERVISING SUBMISSIONS

A. Pleadings

It must be remembered that in some cases such as those administered by the ICC and certain other institutions, there will have been some form of pleadings even before the Tribunal has been appointed. These would normally include the Request for Arbitration, and the Answer and Counterclaims, if any. In those circumstances the need for further pleadings may be limited. But in other cases there may only be a brief Notice of Arbitration and fuller pleadings may be required. This is something the Chair should be monitoring from the beginning.

B. Scheduling

The Chair should keep track of any time limits laid down by the Tribunal and whether they are met, and take appropriate action (either adjusting onward schedule or barring a submission) where they are late or not submitted at all. He ought also to create a method to ascertain and ensure that all such submissions are copied to everyone to whom they should be: the other party and/or its counsel, each of the arbitrators and the institution, where applicable. Invariably if a party does not receive what it is expecting on time it will take advantage of the opportunity to complain against the other party. But, an institution, and sometimes the arbitrators themselves, will not always keep track of the schedule for such submissions, so a system for ensuring that everyone receives all that they should might be in order.

The advent of email, of course, makes this less of a burden. But, note that there are still some senior arbitrators and counsel who do not use email, in which case other arrangements must be made to ensure that they do receive everything and in good time.

C. Matters Relating to Expert Witnesses

Parties often will wish to call expert witnesses, either on matters of governing law, particularly when such law is foreign to the arbitrators, or technical matters, including engineering matters, calculation of quantum of damages and similar things not within the competence of the Tribunal itself.

There are several methods that may be applied for this and it is best to discuss and decide upon this at the outset so that the parties may proceed accordingly. Left to their own devices, parties' counsel will normally each wish to call their own experts, who will each seek to persuade the Tribunal of the correctness of their view. But this can be costly and does not always achieve the most beneficial result to the Tribunal.

The role and function of an expert witness is to assist the Tribunal in making an informed analysis of either the applicable law or technical aspects of the dispute in order to allow it to make the legally and factually correct decision on the points in question and render a right and just award. Unfortunately there are also some so-called "*experts*" that see their role as reinforcement of the advocacy role of counsel: to try to persuade the Tribunal to find in favour of the party that appointed them rather than to arrive at the independent impartial truth.

Thus, it is not always very helpful to the Tribunal to have each party call its own expert witnesses, particularly where the issue upon which they will opine is outside of the scope of knowledge of the Tribunal. Sometimes a Tribunal will engage its own expert witness, either to clarify for its sake the discrepancies between the testimony of the experts appointed by the parties, or as an alternative to having opposing experts at all. Particularly in a case of modest quantum, the Chair should discuss with the other arbitrators and the parties

whether it might be more efficacious to have one expert, acceptable to both parties but engaged by the Tribunal, rather than two opposing ones, or sometimes three where the Tribunal has difficulty in deciding between the evidence provided by the two party-appointed experts and has to engage its own expert anyway.

Other matters that will need to be decided at an early stage regarding expert witnesses will be the nature of the expertise as well as the number of expert witnesses. Where there are two, consideration should also be given as to whether it would be better for experts to exchange their unsigned reports on a 'without prejudice' basis and thereafter meet again on a 'without prejudice' basis and see if differences can be limited. The experts could be asked to prepare a joint report setting out the matters upon which they are agreed and then stating their differences and the reasons for such differences. After this procedure they can sign and then exchange their reports. This procedure makes it easier for experts to vary their initial views in the light of discussion with their opposite number and perhaps in the light of evidence about which they were initially unaware.[11]

V. PLANNING THE HEARING

Having fixed the hearing dates, the Chair should carefully check and monitor the following issues:

(i) Is the hearing room appropriate in terms of size, location and available facilities? The Chair should ascertain the likely number of participants to ensure there is room for all. The Chair should also check the configuration of the room, and ensure there is some secure facility for document storage.

(ii) Is there sufficient space for the Tribunal and its papers? Is the witness to be seated in the correct position? Is there sufficient room for interpreters (if any) as well as transcribers? In one

[11] See article by Wolfgang Peter on witness conferencing in Arbitration International Vol. 18, No. 1, pp 47 ff

case recently, the parties could not agree on the venue because one side said that the venue was too far away from their offices and so much nearer to the other side's offices. In the event, the arbitrator located in that city had to visit the premises and rule on the appropriate venue. This is a very unusual occurrence. On the other hand, the parties may be sufficiently cooperative to agree to use the conference room of one of them or their counsel, which can result in considerable savings for the losing party.

(iii) The Chair should ensure that arrangements for appropriate refreshment are in hand as there tend to be frequent breaks in arbitral proceedings and some refreshment is needed; this also helps to break the ice and defuse tense situations.

(iv) It is suggested that in all cases today there should be a simultaneous live transcription service. This speeds up the hearing and assists greatly in preparing submissions as well as writing the award. After the hearing a mini-script finalized transcript with index facilities should be provided to the Tribunal in hard and soft copies. It is also possible to have hyper-linking from the transcripts to the exhibits referred to in the transcripts. This is a very useful tool.

(v) It is advisable for the Chair to determine in advance what hours the Tribunal should sit and what breaks are to be taken. Consideration should be given to local customs. In some cities, lunch is taken at noon whereas in others lunch is taken later and the Chair should be sensitive to such matters. In Moslem countries, for example, the scheduling must allow for prayer times, particularly on a Friday.

(vi) Prior to the hearing, the Chair should confirm precisely which witnesses will be required for cross examination. Not all witnesses may be needed. The Chair should invite the parties to provide a schedule of the witnesses, the dates they will be called and the amount of time that is to be set aside for the examination. This schedule can then be used to track

the progress of the actual hearing and facilitates the making of any reasonable adjustments.

(vii) In document heavy cases, the Chair may require the parties to have additional copies of some of the documents provided for the Tribunal at the hearing so that members of the Tribunal only have to travel with the submissions, statements and certain core documents.

(viii) The question of whether there ought to be written post hearing submissions is best left until towards the end of the evidentiary hearing. Sometimes the Tribunal may benefit from a brief oral discussion of key issues with the parties which could then be supplemented by written submissions later. Sometimes in large and complex cases, there is need for full lengthy closing submissions. Sometimes two rounds.

VI. CONDUCTING THE HEARING

The most visible aspect of the Chair's role is, of course, during the hearing stage. Here he is "on parade", no longer working in the background. Here he must be alert to all nuances of the interchange between the parties and among the arbitrators and the parties, while keeping control over the proceedings in a non-intrusive manner. In short, this is where the Chair must perform a multi-faceted balancing act.

A. Affording Parties Opportunity to Present their Case

Of course, every Chair has a particular style, some of which will be discussed below. But, the most important thing that must be kept in mind at all times is that natural justice (or due process) requires that each of the parties be allowed a reasonable and more or less equal opportunity to present its case. This requirement is normally provided for in most rules of procedure and the language may vary, but the intention is the same, and undue curtailment of the ability of a party to present its case is probably the most common ground for

annulment of, or refusal of a court to enforce, an award. This does not, and should not, mean that one must allow each party to carry on interminably on every issue and run up the costs of the arbitration unnecessarily. One of the most difficult tasks of the Chair is maintaining the delicate balance between not impeding the presentation of the parties' cases and not allowing the parties' counsel to get carried away with repetitions and/or irrelevancies, thereby causing legal, and arbitrators', fees to skyrocket, sometimes approximating or even exceeding the quantum of the claim.

The Chair has various options in running the hearings. Where the parties have been cooperating well, generally it is best to allow them to set the tone, decide how to divide up the time allotted (usually in such cases, they themselves have indicated how much time they will need), and so on. But, some control is usually in order. Left to their own devices, counsel, particularly those in common law jurisdictions with litigation background, are likely to seek to waste a great deal of time on unnecessary applications and objections.

Another delicate balance that the Chair needs to maintain is that between his fellow arbitrators and among them and himself.

B. Dealing with Witnesses

A well constituted arbitral Tribunal should consist of professionals, be they lawyers or technical experts, who know or can understand and analyse the law and can understand and evaluate factual materials and testimony put before them. Thus, not only are strict rules of evidence unnecessary and inappropriate in an arbitration, but far less explanatory introduction will be required. A written witness statement is a much better way to put before a Tribunal the testimony of the witness than a direct examination, and a written memorial is more efficient and perhaps more efficient than an impassioned address by counsel.

Parameters for handling evidence in chief should be set at the outset by the Tribunal, or normally by the Chair on its behalf. Where a witness has provided a written statement, no factual direct examination should be necessary, and thus the direct testimony may

be limited to a summary of the witness's qualifications to opine or testify on the matters he or she will address. Sometimes the witness will be permitted to comment on issues that have arisen since the witness's statement was submitted. On the other hand, a party may deem it necessary for a factual witness to tell in his own words what he has undergone or witnessed, and it may be helpful for the Tribunal to observe his or her demeanour to evaluate his or her veracity. Determining how witnesses will be examined is another task encompassed in the Chair's balancing act, and the system established should, or course, be the same for all parties.

Cross-examination is usual where the opposing party wishes to question the content of such witness's testimony, or even the veracity of the witness. Cross-examination should usually be limited to matters expressed in the written statement or direct testimony, if any, of the witness, and in most cultures should not be done in a threatening or aggressive manner. It should be forceful but polite. The Chair will need to control this, keeping both direct and cross-examination within the guidelines set. The Chair should also try to discourage aggressive attempts to discredit witnesses, in particular expert witnesses. It is, of course, difficult if not impossible to control this in written submissions, but a Chair can certainly admonish counsel who engage in what seems unnecessary harassing or manipulation of witnesses on the stand. In the writers' view unnecessary and seemingly unconscionable discrediting of the qualifications of a credible expert witness, as opposed to his or her testimony, can be counter-productive. An experienced arbitrator will certainly question the strength of a party's case if all they can do is attack the witness rather than the witness's testimony. But, actually controlling this is not always an easy matter, as counsel that do not understand this may claim they are being prevented from presenting their case, while in fact what the Chair may be seeking to prevent is their despoiling the other party's case as well as their own.

One of the primary differences between common law and civil law procedures is the system of witness examination. The civil law leans more towards the inquisitorial system, whereby the arbitrators themselves do most of the questioning of the witnesses whose

testimony otherwise stands primarily on its own. The common law practice is adversarial, where each party tends to provide as little factual material as possible in its submissions, including witness statements, both written and oral, and leave it up to the opposing party to adduce the facts and theories through cross-examination and requests for discovery. As international arbitration spans both systems, a balance is normally required, and this is also part of the Chair's balancing act. The parties' counsel, particularly if from common law jurisdictions, will want to do most of the questioning of witnesses themselves. But, those from civil law jurisdictions will expect the Tribunal to examine the witnesses as well. Thus, the Chair needs to evaluate the legal system to which each of the parties is accustomed and, if counsel for one party does not adequately question a witness called by the other party, decide whether or not it is incumbent upon the Tribunal to adduce the answers that are clearly missing.

Where there are clearly open and unaddressed questions which the Chair, or the other arbitrators for that matter, deem it necessity to clarify, or where the Chair or other arbitrators are more accustomed to civil law practice, the Tribunal may wish to examine the witnesses itself. Here the Chair must decide on the best way to proceed. Shall he go ahead and ask the questions on his mind? Shall he allow his fellow arbitrators to ask the ones they wish first? Or should he call for a short deliberation among the Tribunal members first to decide how they should proceed? This is very much a matter of individual practice style, but the writers of this Chapter are both of the view that it is best to allow the parties to present their case and keep actual participation of the Tribunal to a minimum, and even then to allow the party-appointed arbitrators to question if they wish, but for the Chair to take as passive role as possible in the hearings if the situation allows.

After the cross-examination of a witness, counsel presenting such witness will often wish to re-examine the witness on matters that arose in the cross, particularly if they were not covered in the original witness statement. The Chair will need to keep some control on this.

VII. PLANNING AND SUPERVISING STAGES SUBSEQUENT TO HEARINGS

A. Closing Submissions

After hearings are completed, the parties normally will wish to submit further memorials or other documents to complete their case. The Chair will need to supervise the arrangements for such submissions, either at the close of hearings or in subsequent correspondence.

In cases where written closing submissions are provided, the Chair should ensure that these are served as provided for. The Chair should check that such submissions do not contain materials not referred to in the hearing. Most importantly, the Chair should ensure that these submissions do deal with the main points in issue. If the submissions are shooting at different targets, the Tribunal will not be assisted and further submissions may need to be ordered.

B. Costs

The issue of costs is an important post hearing issue. If the case has been bifurcated (the matter of liability argued and decided first and that of quantum dealt with only if the Tribunal has found liability), then costs may be left over until after the quantum stage. In other cases, costs will need to be addressed. Experience has shown that it is best to request both parties to itemize their costs before they know the result of the arbitration. This also enables the Tribunal to compare the two set of costs. It does make it harder to challenge an item of costs where the same or similar sum does appear as well in the challenging parties' schedule of costs.

Where the arbitration is administered by an institution, the Tribunal may opt to leave evaluation, or "taxing" of the parties' costs to the institution.

Whatever is decided to be done about costs, it is something which the Chair must keep a very careful eye on. Parties should not be allowed to run up costs beyond reason, but the Tribunal should

not impede their presenting the relevant part of their case. A respondent who argues interminably that there is no jurisdiction of the Tribunal, or no valid contract, when they must be well aware that there is, is only running up costs, both its own and that of the claimant, all of which will ultimately have to be borne by him, or his client. In whose interests is such conduct?

C. Deliberations

During the course of the hearing it is normal for the Tribunal to discuss the case and even form provisional views. The Chair should guide the discussion emphasising at all times that such discussion is preliminary only.

In complex cases, it is often wise for the Chair to reserve time immediately after the hearing or shortly after receipt of the closing submissions for a detailed discussion with the whole Tribunal. If such time is not reserved at an early stage, it often becomes difficult to reconvene. Practice has shown that there are many arbitration conferences throughout the world which provide good interim meeting places.

But whether immediately after the hearings or at a later date, one of the most delicate balancing acts the Chair must perform is chairing deliberations and mediating between the views of the other arbitrators. It is submitted that the Chair should initially listen to the views of the co-arbitrators before stating a view. If they seem hesitant, then the Chair should lead the discussion, perhaps issue by issue.

The task of trying to achieve accord among the members of the Tribunal can be made much more difficult if one arbitrator fails or refuses even to discuss the matter with the others, who are at odds with his position. This issue has been expressed so elegantly by Dr. Robert Briner in his chapter in an earlier edition of this book that we include his words here rather than our own:

> "Even when the arbitrator who wants to frustrate the deliberation process has made this intention clear, he should still be given the opportunity to participate in all further steps

> of the deliberations. Dissenting opinions, not infrequently, state that the (Chair) had discussions with one arbitrator alone, without the dissenting arbitrator being present, or that the (Chair) did not give the dissenting arbitrator enough time to participate properly in the deliberations and submit his views to the other arbitrators. It is on the basis of such allegations that many challenges and setting-aside actions are brought. It should, however, be noted that what is important is that each arbitrator has the possibility to participate in the deliberations. If he chooses not to participate, this will not in itself affect the validity of the award. He must, however, be given the opportunity to make his position known to the other members of the arbitral Tribunal at every stage of the deliberations. He therefore has to be invited to all physical meetings and he must receive all drafts prepared by the (Chair) and the other arbitrator when the third arbitrator has chosen not to participate. Even if he has made it clear that he will not participate, he should continue to receive the drafts and be given adequate time to make his comments. The (Chair), once the necessary opportunity has been given to the two other arbitrators to express their views, should then not hesitate to close the deliberations, noting that all issues have been discussed and decided and that certain or all decisions are only carried by a majority or, possibly, by the (Chair) alone."[12]

VIII. DRAFTING THE AWARD

There are many ways in which this can be done but the most common is for the Chair to write a first draft and submit it for consideration to the co-arbitrators. In some cases the Tribunal might agree to split the task with members of the Tribunal writing different sections, or the Tribunal may agree on the basic points first and delegate one of the party-appointed arbitrators to prepare a draft.

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[12] Briner, *op cit*, at pg 65.

It should be noted here that the drafting of the award is a responsibility of the arbitrators themselves. It is neither appropriate nor ethical for the Tribunal, or any arbitrator, to delegate this task to an assistant, associate or clerk, or to the administering institution, if any. Of course, an assistant or secretary may be asked to draft the introductory portions, such as identification of the parties and, where required, procedural history. But, the discussion of the issues and, most importantly, decisions on such issues, should be drafted by the arbitrators themselves, as this is the ultimate "deliverable" for which they have been personally appointed and are remunerated.

The Chair must be careful to ensure that one arbitrator does not push unnecessarily hard for the party who appointed that arbitrator as such attitude can often result in the other two reacting against this.

One problem that has been seen in practice is where one arbitrator insists on many changes to a draft award, it not being unreasonable for the others to assume that if these changes are made that arbitrator will sign the award. But, after all the changes have been incorporated that arbitrator refuses to sign and indicates that a dissent will be forthcoming. What does the Chair do about all the changes that were made in order to achieve unanimity? It is submitted that in this scenario the Chair should make clear at the very beginning that these changes will only be adopted on the basis that the requesting arbitrator signs the award and does not dissent. If not, then these changes may be deleted. Changes should be tracked so that they can be reviewed.

Is there any obligation on the Chair to achieve a unanimous result? It is submitted that the Chair should make a best effort to achieve unanimity. An award signed by all three members of the Tribunal may be able to be more easily accepted by the losing party and may assist in enforcement. On the other hand the Chair should not bully his colleagues, recognising that different views are not unusual and can reasonably be held.

However, one very experienced arbitrator has expressed the private view that all three members of the Tribunal have a mission to produce an unanimous award. When differences do occur they

should not lead to a dissent unless the decision of the majority displayed some lack of due process which requires to be recorded.

Dissents are technically irrelevant.[13] They should not be considered by an enforcing court unless they established a due process violation by the majority.[14]

It is always possible that the full Tribunal will see most matters the same way, in which case the task of reaching accord will not be a difficult one. But, even the most professional of arbitrators may take different views on some points and, in the worst case, one or both party-appointed arbitrators may lean heavily towards the side of the party that appointed them, allowing that position to colour their impartiality. In such cases it is incumbent upon the Chair to try to bring them into line and impress upon them that their role is to act independently and confine their analysis to the applicable law and the facts as presented, as though each were appointed jointly by both parties.

There has been a great deal of discussion, both written in articles published in a variety of professional journals, and verbally at various conferences, on how a Chair, or other arbitrators, might handle the most grievous of this worst case scenario, where it appears that one of the arbitrators is not in fact acting independently, and may even be communicating clandestinely with one of the parties or its counsel or, worse, has been offered some financial interest in the outcome. Of course, it is virtually impossible to obtain proof of such misconduct, and the erring arbitrator will invariably deny it if confronted. But, for the Chair and the other arbitrator to simply sit by and allow such attitude to jeopardise the integrity, and possibly the enforceability, of the award cannot be justified. Of course, if both the Chair and the other party-appointed arbitrator are in full agreement contrary to the views of the erring arbitrator, they may render a proper award based upon their majority view and the misconduct of the erring arbitrator

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[13] See Wagoner "U.S. Court demonstrates pro-enforcement bias in a comprehensive review of a CIETAC award under the New York Convention" in *ASA bulletin* 2, 1998 pp. 289-310.

[14] See also Alan Redfern's 2003 Freshfields lecture, "Dissenting Opinion – The Good, The Bad and The Ugly", *Arbitration International*, Volume 20, No. 3, 2004, pp. 223 et seq.

may not affect the award itself nor result in a miscarriage of justice. However, where the erring arbitrator has been able to influence one of the other arbitrators, so that the award is coloured by his "corruption", or is able in some other manner to throw the deliberations out of balance, the Chair, or the third arbitrator, is sadly confronted by a most unpleasant and difficult situation, to which there is no easy solution. An arbitrator who believes there has been corruption by one or more of the others, and that corruption has resulted in an unjust award, may indeed write a dissenting opinion, stating his perception therein, or he may also step down from the Tribunal, making his reasons clear. This latter may or may not rectify the damage in the instant case, but it would at least bring the offender to the public view and perhaps prevent further such damage.

If the reference is administered by an institution, the matter should be brought to the attention of its supervisory board. If it is an *ad hoc* arbitration and no guidance is provided in the governing law or rules, the situation may be reported to the law society with jurisdiction over the offending arbitrator. Unfortunately, many arbitrators are not lawyers and there may be no professional organisation to which they are answerable.

There is no easy answer to this question, and as a result it is probable that such conduct normally passes un-remedied and un-sanctioned. However, such a situation should still not be tolerated as it can besmirch the good name of arbitration in general and undermine the high regard international arbitrators hold within the legal and business sectors worldwide. As arbitral awards are not appealable and, absent serious procedural defects, not subject to effective review, arbitrators should hold a higher degree of integrity and professionalism even than the highest court judges. It is the responsibility of every Chair, every arbitrator in fact, to do everything he or she can to uphold this position and the respect it holds in the international arena.

Fortunately, such incidences of serious misconduct are rare. More common is simple lack of consensus among the Tribunal, whether it be on sincere professional grounds, or the misperception that a party-appointed arbitrator should view questionable matters favourable to the party that appointed him.

IX. CONCLUSIONS

It is clear that the role of the Chair is crucial to the success of the arbitral process. From the very beginning the Chair should stamp his authority on the proceedings. The role needs to be carried out with courtesy and firmness as well as with sensitivity to different cultures and legal systems. Most importantly, the Chair should be careful not to import all the bag and baggage of his own legal system into an international arbitration with parties, colleagues and counsel from different systems and cultures.

Although a lightness of touch is needed on occasions to reduce the temperature, it should be noted that humour does not travel well cross-culturally, nor does it read well in a transcript in the cold light of a distant courtroom.

Not everyone can win an arbitration. But the role of the Chair is to ensure that the losing party knows precisely why it has lost and is satisfied that it had every reasonable opportunity of presenting its case to a Tribunal which had fully understood it even though disagreeing with it.

Appendix:

Provisions on the Role of Chairman

1. UNCITRAL Model Law

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Article 29: Decision-Making by Panel of Arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

2. UNCITRAL Rules of 1976

Article 7

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.
2. If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:
   (a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or
   (b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty days after receipt of a party's request therefor, the first party may request the Secretary-General

of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.

3. If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.

Article 14

If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.

Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.
2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.

Article 31: Decisions

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.
2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

3. ICC Rules

Article 9: Appointment and Confirmation of the Arbitrators

1. In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with these Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 9(2).
2. The Secretary General may confirm as co-arbitrators, sole arbitrators and chairmen of Arbitral Tribunals persons nominated by the parties or pursuant to their particular agreements, provided they have filed a statement of independence without qualification or a qualified statement of independence has not given rise to objections. Such confirmation shall be reported to the Court at its next session. If the Secretary General considers that a co-arbitrator, sole arbitrator or chairman of an Arbitral Tribunal should not be confirmed, the matter shall be submitted to the Court.

3. Where the Court is to appoint a sole arbitrator or the chairman of an Arbitral Tribunal, it shall make the appointment upon a proposal of a National Committee of the ICC that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee fails to make the proposal requested within the time limit fixed by the Court, the Court may repeat its request or may request a proposal from another National Committee that it considers to be appropriate.
4. Where the Court considers that the circumstances so demand, it may choose the sole arbitrator or the chairman of the Arbitral Tribunal from a country where there is no National Committee, provided that neither of the parties objects within the time limit fixed by the Court.
5. The sole arbitrator or the chairman of the Arbitral Tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that neither of the parties objects within the time limit fixed by the Court, the sole arbitrator or the chairman of the Arbitral Tribunal may be chosen from a country of which any of the parties is a national.
6. Where the Court is to appoint an arbitrator on behalf of a party which has failed to nominate one, it shall make the appointment upon a proposal of the National Committee of the country of which that party is a national. If the Court does not accept the proposal made, or if the National Committee fails to make the proposal requested within the time limit fixed by the Court, or if the country of which the said party is a national has no National Committee, the Court shall be at liberty to choose any person whom it regards as suitable. The Secretariat shall inform the National Committee, if one exists, of the country of which such person is a national.

Article 25: Making of the Award

1. When the Arbitral Tribunal is composed of more than one arbitrator, an Award is given by a majority decision. If there be no majority, the Award shall be made by the chairman of the Arbitral Tribunal alone.
2. The Award shall state the reasons upon which it is based.
3. The Award shall be deemed to be made at the place of the arbitration and on the date stated therein

4. 1996 Arbitration Act

20. -(1) Where the parties have agreed that there is to be a chairman, they are free to agree what the functions of the chairman are to be in relation to the making of decisions, orders and awards.

(2) If or to the extent that there is no such agreement, the following provisions apply.

(3) Decisions, orders and awards shall be made by all or a majority of the arbitrators (including the chairman).

(4) The view of the chairman shall prevail in relation to a decision, order or award in respect of which there is neither unanimity nor a majority under subsection (3).

33. (1) The tribunal shall-

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

34. -(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter

(2) Procedural and evidential matters include-

(a) when and where any part of the proceedings is to be held;

(b) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied;

(c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;

(d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;

(e) whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done;

(f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;

(g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law;

(h) whether and to what extent there should be oral or written evidence or submissions.

(3) The tribunal may fix the time within which any directions given by it are to be complied with, and may if it thinks fit extend the time so fixed (whether or not it has expired).

37. (1) Unless otherwise agreed by the parties-

(a) the tribunal may-

(i) appoint experts or legal advisers to report to it and the parties, or

(ii) appoint assessors to assist it on technical matters, and may allow any such expert, legal adviser or assessor to attend the proceedings; and

(b) the parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by any such person.

(2) The fees and expenses of an expert, legal adviser or assessor appointed by the tribunal for which the arbitrators are liable are expenses of the arbitrators for the purposes of this Part.

5. Singapore International Arbitration Centre Rules of 1997

Rule 8: Appointment of Three Arbitrators

8.1 If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the Tribunal.

8.2 If within twenty-one (21) days after the receipt of a party's notification of the appointment of an arbitrator, the other party has not notified the first party of the arbitrator he has appointed:

(a) the first party may request the appointing authority previously designated by the parties to appoint the arbitrator; or

(b) if no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within twenty-one (21) days after receipt of a party's request thereof, the first party may request the Chairman to appoint the second arbitrator.

8.3 If within twenty-one (21) days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority or by the Chairman if no appointing authority has been previously designated by the parties or, if the appointing authority previously designated refuses to act within the prescribed time, in the same way as a sole arbitrator would be appointed under Rule 7.

8.4 A decision on a matter entrusted by Rule 8.2 or 8.3 to the Chairman shall not be subject to appeal.

Rule 17: Conduct of the Proceedings

17.1 The parties may agree on the arbitral procedure, and are encouraged to do so.

17.2 In the absence of procedural rules agreed by the parties or contained herein, the Tribunal shall have the widest discretion allowed under such law as may be applicable to ensure the just, expeditious, economical, and final determination of the dispute.

17.3 In the case of a three-member Tribunal, the presiding arbitrator may, after consulting the other arbitrators, make procedural rulings alone.

Rule 28: The Award

28.1. Unless all parties agree otherwise, the Tribunal shall make its award in writing within forty-five (45) days from the date on which the hearings are closed and shall state the reasons upon which

its award is based. The award shall state its date and shall be signed by the arbitrator or arbitrators.

28.2. If any arbitrator refuses or fails to comply with the mandatory provisions of any applicable law relating to the making of the award, having been given a reasonable opportunity to do so, the remaining arbitrators shall proceed in his absence.

28.3. Where there is more than one arbitrator and they fail to agree on any issue, they shall decide by a majority. Failing a majority decision on any issue, the presiding arbitrator of the Tribunal shall make the award alone as if he were a sole arbitrator. If an arbitrator refuses or fails to sign the award, the signatures of the majority shall be sufficient, provided that the reasons for the omitted signature is stated.

28.4. The sole arbitrator or presiding arbitrator shall be responsible for delivering the award to the Registrar, who shall transmit certified copies to the parties provided that the costs of the arbitration have been paid to the Centre in accordance with Rule 30.

6. Arbitration Rules of Korean Arbitration Commercial Board of 2000

Article 33: Decisions of Tribunal

Whenever there is more than one arbitrator, simple majority rule shall apply for all decisions, including that of the arbitral awards, unless parties agree otherwise. However, if no majority rule is reached with regard to a procedural matter, then the presiding arbitrator shall decide.

7. Rules of the Arbitration Institute of the Stockholm Chamber of Commerce of 1999

Article 20: Procedures of the Arbitral Tribunal

(1) The manner of conducting the proceedings is to be determined by the Arbitral Tribunal in compliance with the

conditions set down in the arbitration agreement and these Rules, with due account taken to the wishes of the parties.

(2) The Arbitral Tribunal may decide that the Chairman alone may make procedural rulings.

(3) The Arbitral Tribunal shall maintain the confidentiality of the arbitration and conduct each case in an impartial, practical and expeditious manner, giving each party sufficient opportunity to present its case.

(4) The Arbitral Tribunal may, after consultation with the parties, decide to conduct hearings at a location other than the Place of Arbitration.

(5) Article 12 shall apply with respect to communications from the Arbitral Tribunal.

Article 30: Voting

When a vote is taken, that opinion shall prevail which has received more votes than any other opinion. If such majority is not attained, the opinion of the Chairman shall prevail, unless otherwise agreed by the parties

Article 32: Award

(1) The Award shall be deemed to have been rendered at the Place of Arbitration. It shall state the date on which it was rendered, contain an order or a declaration, as well as the reasons for it, and shall be signed by the arbitrators. In absence of the signature of an arbitrator, an Award may be rendered provided that the Award has been signed by a majority of the arbitrators with a verification to the effect that the arbitrator whose signature is missing participated in deciding the dispute.

(2) If any arbitrator fails without valid cause to participate in the deliberations of the Arbitral Tribunal on an issue, such failure will not preclude a decision being made by the other arbitrators.

(3) The parties may agree that the Chairman alone shall sign the Award.

(4) An arbitrator may attach a dissenting opinion to the Award.

(5) If a settlement is reached, the Arbitral Tribunal may, at the request of the parties, record the settlement in the form of an Award.

(6) The Arbitration Costs, in accordance with Article 39, and its apportionment between the parties shall be fixed in the Award or other order by which the arbitral proceedings are terminated. An Award may be rendered solely for costs.

(7) The Arbitral Tribunal shall immediately send the Award to the parties

8. Saudi Arbitration Regulation of 1983 and its Implementation Rules of 1985

Article (23):

The Chairman of the arbitration panel shall control and manage the hearings, direct questions to the parties or witnesses, and shall have the right to dismiss from the hearing any one in contempt of the hearing. However, if any one present commits a violation, the Chairman of the arbitration panel shall record the incident and transfer it to the concerned authority. Each arbitrator shall have the right to direct questions and examine the parties or witnesses through the Chairman of the arbitration panel

Article (27):

The arbitration panel shall record the facts and proceeding which take place in the hearing. in minutes written by the secretary of the arbitration panel under its supervision. The minutes shall contain the date and place of the hearing, names of arbitrators, the secretary and the parties. It shall also contain statements of the respective parties, the minutes shall be signed by the Chairman of the arbitration panel, arbitrators, and the secretary

Article (41):

Subject to articles 16 and 17 of the arbitration regulations, awards shall be adopted by the opinion of the majority of the arbitrators. The award shall be pronounced by the Chairman of the arbitration panel in the specified hearing. The award shall contain the names of the members of the respective panel, the date, place, and subject matter of the award, first names, surnames, description, domicile, appearance and absence of the parties, a summary of the facts of the claim, requests of the parties, summary of their defenses, substantial defenses, and the reasons and text of the award. The arbitrators and the clerk shall, within seven days form the filing of the draft, sign the original copy of the award which comprises the above contents and which shall kept in the file of the claim.

9. LCIA Rules

Article 26: The Award

26.1. The Arbitral Tribunal shall make its award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which its award is based. The award shall also state the date when the award is made and the seat of the arbitration; and it shall be signed by the Arbitral Tribunal or those of its members assenting to it.

26.2. If any arbitrator fails to comply with the mandatory provisions of any applicable law relating to the making of the award,

having been given a reasonable opportunity to do so, the remaining arbitrators may proceed in his absence and state in their award the circumstances of the other arbitrator's failure to participate in the making of the award.

26.3. Where there are three arbitrators and the Arbitral Tribunal fails to agree on any issue, the arbitrators shall decide that issue by a majority. Failing a majority decision on any issue, the chairman of the Arbitral Tribunal shall decide that issue.

26.4. If any arbitrator refuses or fails to sign the award, the signatures of the majority or (failing a majority) of the chairman shall be sufficient, provided that the reason for the omitted signature is stated in the award by the majority or chairman.

26.5. The sole arbitrator or chairman shall be responsible for delivering the award to the LCIA Court, which shall transmit certified copies to the parties provided that the costs of arbitration have been paid to the LCIA in accordance with Article 28.

10. Swiss Rules of International Arbitration (Swiss Rules)

Article 31:

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators. If there is no majority, the award shall be made by the presiding arbitrator alone.
2. In the case of questions of procedure, when the arbitral tribunal so authorises, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

Article 38:

The arbitral tribunal shall determine the costs of arbitration in its award. The term "costs" includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be determined by the tribunal itself in accordance with Article 39;

(b) The travel and other expenses incurred by the arbitrators;

(c) The costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) The costs for the administration of the arbitration payable to the Chambers in accordance with Appendix B (Schedule of the Costs of Arbitration).

Article 39:

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case, including, but not limited to, the discontinuation of the arbitral proceedings in case of settlement or other reasons. In the event of such discontinuation, the fees of the arbitral tribunal may be less than the minimum amount resulting from Appendix B (Schedule of the Costs of Arbitration).
2. The fees of the arbitral tribunal shall be determined in conformity with Appendix B (Schedule of the Costs of Arbitration).
3. The arbitral tribunal shall decide on the allocation of the fees among its members. As a rule, the Chairman shall receive

between 40 % and 50 % and each co-arbitrator between 25 % and 30 % of the total fees, in view of the time and efforts spent by each arbitrator.

Article 40:

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. With respect to the costs of legal representation and assistance referred to in Article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.
3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall determine the costs of arbitration referred to in Article 38 and Article 39, paragraph 1, in the text of that order or award.
4. Before rendering the award, the arbitral tribunal shall submit its draft award to the Chambers for consultation on the decision as to the assessment and apportionment of the costs.
5. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under Articles 35 to 37.

Article 41:

1. The arbitral tribunal, on its establishment, shall request each party to deposit an equal amount as an advance for the costs referred to in Article 38, paragraphs (a), (b), (c) and (f). The

arbitral tribunal shall provide a copy of such request for information to the Chambers.

2. Where a Respondent submits a counterclaim, or it otherwise appears appropriate in the circumstances, the arbitral tribunal may in its discretion establish separate deposits.
3. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties. The arbitral tribunal shall provide a copy of such request for information to the Chambers.
4. If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.
5. In its final award, the arbitral tribunal shall render an accounting to the parties of the deposits received. Any unexpended balance shall be returned to the parties.

11. CIETAC

Article 42: Making Award

1. The arbitral tribunal shall independently and impartially makes its arbitral award on the basis of the facts, in accordance with the law and the terms of the contract, with reference to international practice and in compliance with the principle of fairness and reasonableness.
2. The arbitral tribunal shall state in the award the claims, the facts of the dispute, the reasons on which the award is based, the result of the award, the allocation of the arbitration costs and date on which and the place at which the award is made. The facts of the dispute and the reason on which the award is

based may not be stated in the award if the parties have agreed so, or if the award is made in accordance with the terms of settlement agreement between the parties. The arbitral tribunal has the power to determine in the arbitral award the specific time period for the parties to execute the award and the liabilities to be born by a party failing to execute the award within the specified time.

3. The CIETAC's stamp shall be fixed to the award.
4. Where a case is examined by an arbitral tribunal composed of three arbitrators, the award shall be rendered by all three arbitrators or a majority of the arbitrators. A written dissenting opinion shall be docketed into the file and may be attached to the award, but it shall not form a part of the award.
5. Where the arbitral tribunal can not reach a majority opinion, the award shall be rendered in accordance with the presiding arbitrator's opinion. The written opinion of other arbitrators shall be docketed into the file and may be attached to the award, but it shall not form a part of the award.
6. Unless the award is made in accordance with the opinion of the presiding arbitrator or the sole arbitrator, the arbitral award shall be signed by a majority of arbitrators. An arbitrator who has a dissenting opinion may or may not sign his/her name on the award.
7. The date on which the award is made shall be the date on which the award comes into legal effects.
8. The arbitral award is final and binding upon both parties. Neither party may bring a suit before a law court or make a request to any other organization for revising the award.

Terms of Reference.

An Arbitrator's Perspective

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One of the features which sets ICC arbitration references apart from other arbitration procedures, institutional or *ad hoc,* is the requirement for Terms of Reference ("TOR"). Article 18 of the current (1998) ICC Rules sets the drawing up of the TOR as the first activity of the Tribunal, as soon as it has received the file from the ICC Secretariat. Article 13 calls for the Secretariat to transmit the file, consisting of, *inter alia,* the Request for Arbitration, the Answer thereto and any counterclaim, if any, to the Tribunal as soon as the Tribunal has been constituted, provided that the Secretariat has by then received an advance at least sufficient to cover costs through to the completion of the TOR.

Although a requirement only for ICC arbitrations, TOR, or a close equivalent, may sometimes be utilised in other references where the arbitral tribunal deems it appropriate or helpful, and although many arbitrators find it an unnecessary waste of time, some others with considerable ICC experience, tend, in appropriate cases, to carry this procedure through to other, non-ICC references as well.

Particulars of the TOR

The primary purpose of the TOR, today, is to define the scope of the arbitration and, unless the arbitrators do not deem it appropriate, identify the issues to be decided. Article 18 (1) of the ICC Rules requires the TOR to contain at least the following particulars:

"a) the full names and descriptions of the parties;

b) the addresses of the parties to which notifications and communications arising in the course of the arbitration may be made;

c) a summary of the parties' respective claims and the relief sought by each party, with an indication to the extent possible of the amounts claimed or counterclaimed;

d) unless the arbitral tribunal considers it inappropriate a list of issues to be determined;

e) the full names, descriptions and addresses of the arbitrators;

f) the place of arbitration; and

g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral tribunal to act as *amiable compositeur* or to decide *ex aequo et bono*."

Additional points may, in the discretion of the Tribunal or if requested by the parties, be included as well. These might include specification of the language of the arbitral reference, directions as to the giving of evidence, discovery, if any, exchange of witness statements, perhaps witness-conferencing, form for submission of documentary evidence and other notices between or among the parties and the Tribunal, and often a notation allowing the Chair to issue procedural directions on behalf of the other arbitrators, in the case of the three-person Tribunal.

Background

Terms of Reference have been a feature of ICC arbitration since the ICC promulgated its first set of rules in 1923, although at that time they were referred to as "Form of Submission" and were to be drawn up by the Secretary of the Court and not by the Tribunal. It was in the 1955 revision

of the rules that the phrase "Terms of Reference" was first applied, and at the same time the duty to draw these up was shifted to the Tribunal[1]. Since that time there have been several revisions to the form or substance of the TOR, perhaps the most significant ones occurring in the most recent, 1998, version, which has relaxed some of the requirements and given more discretion to the Tribunal.[2]

The ICC originally deemed the TOR necessary since many civil law systems, the French in particular, did not recognise as binding an agreement to arbitrate entered into by the parties prior to the existence of a dispute, such as an arbitration clause in their underlying commercial contract. Such systems required that the parties agree upon arbitration as the means to settle their dispute only after the dispute had materialised, by means of an agreement, often known as "*compromis*", which would not only designate the forum for resolution but also identify the issues to be adjudicated. Thus the TOR was originally intended to serve as a *compromis*, and the practice has continued in ICC arbitrations to this day, despite the fact that most civil law jurisdictions, France included, now recognise pre-dispute agreements to arbitrate as binding on the parties: a necessary adjunct to freedom of contract.

Civil Law vs. Common Law Practice

As undoubtedly some of my colleagues will also mention in this symposium, one of the great challenges, and beauties, of international arbitration has

1 Note we use the term "Tribunal" herein to designate the arbitrator or arbitrators sitting in any subject reference, despite the fact that most ICC arbitrations are heard by a single arbitrator rather than three, from which the term "tribunal" emanates.

2 See also Michael Schneider, *The Terms of Reference*, in The New Rules of Arbitration - Special Supplement, THE ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, November, 1997.

been its ability to merge, or reconcile, many common and civil law practices yielding almost a hybrid procedural regime, with considerable flexibility allowed to the arbitrators in their conduct of the proceedings. While civil law litigation techniques depend almost entirely on documents: comprehensive pleadings, witness statements, memorials and other documentary evidences, all of which are exchanged among the parties and the court or, in the case of arbitration, the Tribunal, with oral hearings held only where requested by a party or deemed necessary for clarification by the Tribunal; the usual common law strategy is to provide the minimum possible information to the opposing party and the court (or Tribunal) at the outset and allow the facts to emerge through requests for further information and documentation by the other party (discovery) and extensive cross-examination of witnesses in prolonged hearings. Often parties will not fully disclose even the issues at stake or the relief sought at the outset, so as not to allow their opponent sufficient notice adequately to prepare counter arguments and evidences. Indeed, the TOR eliminates this cost- and time-inefficient common law practice.

Almost all arbitration rules today allow the Tribunal to conduct the arbitration in such manner as it deems appropriate, and the tendency is normally, particularly where the parties originate from diverse systems of law, for the emphasis to be on documentary submissions, with only minimal hearings called, first to structure the procedures and schedule submission and hearing dates, and then for examination (generally only cross-examination) of witnesses, but only to the extent that the arbitrators or opposing party, needs to clarify or substantiate the evidence provided in witness statements. Limited discovery may be allowed, but for the most part each party's case will rely upon such evidences as that party itself will introduce. In this sense international arbitration seems to follow civil law procedures somewhat more than it does those of the common law, although it should be noted that the common law custom of citing and following

precedent in similar cases is applied, often even more broadly than it might be in a single common law jurisdiction, as cases from any jurisdiction may be cited and relied upon in a party's legal argument, to be considered by the Tribunal at least as guidance, although not necessarily binding precedent.

Drawing up of the TOR

As arbitration is a creature of consent of the parties, the parties will have the right to agree upon most aspects of the conduct of the arbitration. Where the parties do agree, the Tribunal is normally bound to follow such agreement. Parties, or more often their counsel, may take a cooperative attitude and agree upon such matters as scheduling, scope of discovery, if any, number and nature of witnesses and the procedure for presentation of evidence. Parties may also be able to agree upon the characterisation of the issues in dispute without intervention by the Tribunal. A high degree of cooperation between or among the parties makes the drawing up of the TOR a very smooth exercise for the arbitrator. Such cooperation is not common today, but it is certainly consistent with the original spirit of arbitration: a gentleman's way of resolving disputes where both sides cooperate to reach a solution, smoothly, quickly and fairly.

More often, however, the parties do not take the initiative to cooperate and sometimes, particularly where common law litigating counsel are involved, a party may utilise all manner of delaying or obstructing tactics to frustrate the other party's efforts to reach consensus. In such cases, the Tribunal will need to take a more pro-active role.

Article 18 (1) of the ICC Rules call for the Tribunal to draw up the TOR ". . *on the basis of documents or in the presence of the parties and in the light of their most recent submissions*. . ." as soon as it has received the file from the

Secretariat. Often there will be additional submissions of the parties in the interim between receipt of the file and drafting of the TOR, such as suggested language for the TOR itself, and these, of course, will also be considered. The TOR is to be signed by the parties and the members of the Tribunal and submitted to the Secretariat within two months of date of transmittal of the file to the arbitrators. This time limit may be extended if required, but most Tribunals seek to comply, and sometimes are able to complete and submit the TOR more quickly than that.

Clearly the Tribunal has discretion whether to formulate a draft on its own before submitting it to the parties for their consideration, or to consult the parties: in writing, by conference call or at a hearing/meeting to discuss the matters face to face. The latter is recommended where the parties and arbitrators are in geographical proximity, or where the issues are complex and the quantum of the dispute substantial. However, for a moderate claim, and particularly where the parties and arbitrators reside far apart, it may be more cost- and time-effective for the arbitrators to prepare a draft for the parties' consideration, either at the outset if the issues seem reasonably clear from the initial pleadings, or after discussing with the parties by teleconference, conference call, or in writing. Or the parties may be invited to submit their own suggested draft language for consideration by each other and by the Tribunal. And, as mentioned above, occasionally, if the parties are represented by cooperative counsel experienced in ICC practice, they may together prepare a draft for consideration by the Tribunal. While allowing the parties to prepare the draft TOR sounds attractive from the viewpoint of cooperation towards possible settlement, it may also have its drawbacks. More time than is warranted (with resulting waste of parties' legal costs) may be entailed in the negotiations. And, more importantly, if this task is done for them the arbitrators may not take the opportunity at this point to analyse the issues nor fully familiarise

themselves with the pleadings and nature of the dispute. Many ICC arbitrators use the TOR as a framework for the eventual drafting of the award, and this opportunity, and perhaps some of the issues, may be missed if the Tribunal itself does not take part in the drafting of the TOR.

Of course, the latter concern would not matter if the cooperation of the parties in drawing up the TOR should result in a settlement of the dispute. And indeed that is the potential beauty of the TOR, as it forces each of the parties to recognise each other's position and seek to reach consensus on certain matters right at the outset, a step in the right direction if the parties are sincere in their desire to seek resolution of the dispute. However, this kind of idealistic resolution is rare, and normally even negotiations for the TOR can be fraught with delay, recalcitrance and other difficulties.

If one of the parties refuses to participate in the drafting of the TOR, and/or to sign it, the Tribunal may submit the TOR to the ICC Court for its approval. Needless to say, a party not a signatory to the TOR cannot be held to be limited by the characterisation of its claims as set out in the TOR, and this should be kept in mind by the Tribunal during the later conduct of the reference. Once the TOR has been signed by all or, if not by all, approved by the ICC Court, the arbitration may then proceed, and should do so as time-efficiently as possible as the Tribunal is required to render its award within six months thereafter (Art. 23), although this time limit may be extended if deemed necessary.

Scheduling

In addition to the requirements set out in Article 18 (1), some parties seek to include in the TOR schedules for submissions and hearings. However, this is generally not recommend because the TOR is a contractual

agreement among the arbitrators and the parties, which each has signed on to (unless approval of the Court was necessitated by the failure of a party so to do), and thus any subsequent alteration to such schedule could require an amendment of the TOR, again to be signed by all parties and the arbitrators. This would give a recalcitrant party an excellent opportunity to cause unnecessary delay. As a practical matter, it is rare that an arbitration proceeds without some alteration to initially anticipated scheduling, and thus to bind everyone to a schedule at the outset is impractical.

Instead, Article 18 (4) provides for the schedule to be established in a separate document, either at the same time as the TOR or as soon thereafter as possible. This document might be in the nature of a direction or order of the Tribunal, or even a consent order of the parties which, creating arbitral rather than contractual obligations, can be altered at a later date as and when necessary.

Contents of TOR

As for content of the TOR, most of the particulars will not be in issue. The identification of the parties and the arbitrators and addresses for notification should raise no controversy. The place of arbitration normally will have been designated by the parties in their agreement to arbitrate but if it has not, and the parties have not subsequently agreed upon such a place, it will have been set by the ICC Court in accordance with Article 14 of the ICC Rules, although the Tribunal may wish to hold hearings elsewhere, and it may do so, after consultation with the parties. Procedural rules to govern an ICC arbitration will be those currently in force of the ICC, and, where such rules may be silent on an issue, such rules as may be agreed upon by the parties or, if the parties cannot agree, as designated by the Tribunal.

The TOR should also set out whether the parties have agreed, either in the underlying agreement to arbitrate or subsequently, to give the Tribunal the power to act as *amiable compositeur* or decide *ex aequo et bono,* or if they must strictly adhere to the letter of the governing law and the underlying contract only. This issue should be considered carefully, particularly if there may arise issues which are not specifically covered by the contract or the law. It is not always possible to determine this at this early stage and thus the arbitrators may wish to encourage the parties to allow this kind of flexibility for the Tribunal. But note, the Tribunal does not have discretion to assume this power. It can only be granted by consent of the parties.

The substantive matters contained in the TOR, which are the ones that are most likely to entail discussion and negotiation, are primarily the identification of the issues and the summary of the respective claims and relief sought by each party. As mentioned above, if the parties, or their counsel, are civil law based, the pleadings submitted with the file will probably be sufficiently clear to allow the Tribunal to draft a reasonable characterisation of all of these for submission to and discussion with the parties. Some common-law based parties may not have fully expressed their position in their initial written submissions to the ICC, in which case more clarification from such parties will be necessary, either in person or through written or telephonic communication.

The most simple approach may be to ask the parties to set out a brief summary of their respective positions themselves, or the Tribunal may simply copy, or summarise, the relevant portion of the parties' initial submissions as summaries of the parties' respective claims and relief sought. The ICC rules require the parties to state the relief they are seeking in their Request for Arbitration (in the case of the claimant) or

counterclaim, if any (in the case of the respondant), and these must be set out in the TOR. Of course it is always possible that, as the case develops, circumstances may arise which will necessitate a party to seek to revise the relief sought. Generally the parties will be bound by, and restricted to, the claims they have made in their Request for Arbitration and counterclaim, if any, as those are the instruments upon which the jurisdiction of the Tribunal is based. However, as long as no new claim is asserted, nor the basic nature of a claim altered, the Tribunal will have the discretion to allow certain adjustments by the parties, provided no breach of natural justice results (i.e. as long as the ability of the other party to present its case is not compromised.)

Issues

Normally the most contentious point to be included in the TOR is identifying the issues to be determined. In relatively simple cases this should be evident from the submissions. However in practice few arbitrations are so simple and it may be difficult for the arbitrators to determine everything that is in issue, or for the parties to agree thereon at the outset. Often, as the reference progresses, issues not initially anticipated may emerge. Or whether or not a point may be in issue may depend upon determination of another substantive, or even procedural, issue. Thus it is not always feasible to agree upon an exhaustive list of issues at the TOR stage. Furthermore, it is possible that having agreed upon a set list of issues to be decided, subsequent events in the conduct of the reference may make determination of one or more of those listed unnecessary. This will put the Tribunal in a dilemma. They will have agreed to determine one set of issues but, as a result of the progress of the reference, the award will not cover all of these, and/or will determine others not specified in the TOR. Such a divergence could jeopardise the

enforceability of the award if an objection were to be made pursuant to Article V of the New York Convention or Article 36 of the Model Law (where applicable) or an equivalent provision in the law of the place in which the award is sought to be enforced. These provisions allow a court to refuse enforcement of an award where the tribunal exceeds its mandate or fails to decide a matter which has been put before it.

In order to avoid the above situation, it may be more prudent, and certainly less contentious at that early stage, to mention only the very major issues that are certain to be at the heart of the controversy, with a notation allowing others to emerge. Such language as: ". . . and such other issues as may be raised by the parties in the course of the proceedings" might be inserted after a partial list. Or, in exceptionally complicated cases, the Tribunal may opt not to specify any issues at all, but simply to state that the Tribunal shall decide ". . . such issues as may arise in the course of the dispute as shall be set out in the submissions of the parties." Article 18 (1) (d) would seem to allow for such language, as its requirement is stated: "*..unless the Arbitral Tribunal considers it inappropriate, a list of issues to be determined*." Such flexibility can also be inferred from the fact that the previous version of the ICC rules made the listing of issues mandatory, and the new language, above, was inserted specifically to give the Tribunal some discretion as to whether, or to what extent, to bind themselves to a set list of issues for determination at the TOR stage. Again, this flexibility may sometimes be necessitated by the common-law tendency not to disclose all issues at the outset, but to utilise the element of surprise as a strategic tactic.

Does the TOR Replace the Agreement to Arbitrate?

As mentioned at the beginning of this paper, the practice of the ICC to require TOR emerged from the requirement in many civil law jurisdictions that an agreement to arbitrate may only be effective if entered into after the dispute has arisen. In such cases the TOR became the actual agreement to arbitrate which granted the jurisdiction to the Tribunal to resolve the dispute, thereby divesting the applicable courts of such jurisdiction.

Some parties have extended that reasoning and argue that, once executed, the TOR therefore supersedes and replaces the parties' original agreement to arbitrate, normally embodied in their underlying commercial contract. If we view the question logically we can see that the above is not at all a tenable position. The TOR is executed only after the Tribunal has been constituted and vested with jurisdiction to hear the dispute. If the TOR itself were the instrument granting such jurisdiction, the Tribunal could not be constituted until after the parties had executed the TOR. Nor would the ICC have the jurisdiction to administer the reference, as its jurisdiction derives from the original agreement of the parties to refer disputes to it, embodied in the underlying contract. Furthermore, if for some reason one of the arbitrators had subsequently to be replaced, the Tribunal, now being differently constituted, would no longer have jurisdiction over the dispute. Thus the correct way to consider the TOR today, is as an agreement among the parties and the Tribunal, clarifying the dispute and, in part, the conduct of its resolution, executed pursuant to the parties' agreement to arbitrate, which agreement remains in effect. It can a an excellent procedural tool for structuring the conduct of the proceedings and the eventual form of the award.

Should the TOR Take the Place of Pleadings?

Although the TOR requirement is often criticised as as an unnecessary duplication of effort and consequent waste of legal costs, the TOR can, for some relatively straightforward cases, be utilised to reduce costs by making them sufficiently comprehensive as to eliminate the necessity for further pleadings, at least until the final stages of the reference.

Certainly the initial pleadings cannot be replaced by the TOR since these will have been submitted even before the Tribunal has been constituted. By the time the file of the dispute has been provided to the Tribunal, both parties will already have set out at least some particulars of their claims or defenses, respectively, in an initial pleading, unless, of course, the respondant has defaulted entirely. However, once the Tribunal has been seized with the dispute, it may opt to hold a hearing, or meeting, of the parties right away to discuss and try to settle upon the TOR. Where the parties are agreeable, the Tribunal could in this meeting encourage them to set out their entire position sufficiently clearly so that no further pleadings would be necessary. To achieve this end, it may be necessary to ensure that a representative of each of the parties themselves are present at such a hearing accompanying their counsel, which is not always common practice at this stage. The reason for this is that while the parties themselves are invariably cost-conscious, this is not always true of counsel. With the actual parties participating in the hearing, it should not only be easier to elicit comprehensive identification of the case and its issues at this stage, but it may also encourage counsel to be more cooperative in this effort to achieve as cost-efficient a resolution of the dispute as may be possible.

While indeed this might often be a desirable situation, it may be a bit idealistic to expect the necessary response from all concerned. Thus, while in principle using the vehicle of TOR as a substitute for pleadings has the

potential to simplify the arbitral process considerably, in practice we are unlikely to see this mechanism utilised very often, at least not in the near future.

TOR Beyond ICC

Although, as mentioned earlier, the TOR is a requirement only for ICC arbitrations, there is nothing to prevent a tribunal from seeking to execute TOR or a similar agreement together with the parties to a non-ICC arbitral reference, provided neither the *lex arbitri* nor the applicable procedural rules would so prohibit. We might refer to this as *ad hoc* TOR, as opposed to the ICC TOR. For non-ICC arbitrations, the precise requirements of and controls on the ICC TOR would not need to be complied with and the tribunal might include whatever terms they deem appropriate to have agreed upon at the outset of the reference. In particular, using the vehicle of TOR to identify issues and set out other parameters for the conduct of the reference in the rare case where there are no pleadings, or in very simple "small claims" arbitrations may prove a most useful tool and aid for an efficient resolution of such dispute.

And, most importantly, sometimes the process of the parties and arbitrators reaching consensus on the matters to be included in the TOR may present an opportunity for the parties to get together and settle their differences entirely. In such circumstances, the TOR may even become a mechanism of ADR.

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Award Writing

Arbitral Decision-Making/Some Considerations
Charles J. Moxley, Jr.

- **Big opening question: whether the objective is**
  - Justice in the eyes of the arbitrator
  - Deciding issues presented by the parties
  - Some combination of the two
  - Relevance of
    - Pro se party
    - Imbalance in sophistication in presenting claims or defenses
- **Initial distinction: decision-making by**
  - Sole arbitrator
  - panel
- **Different levels of decision-making**
  - Non-substantive matters
    - Scheduling
    - Discovery
    - Adjournment requests
    - bifurcation
  - Substantive matters
    - Arbitrability
    - Merits
    - Forms of decision
      - Orders
      - Awards
        - Interim
        - Partial final
        - final
- **Decision-making by panel members**
  - Note-taking
    - During hearing
    - At end of day or group of days of hearing
  - Types of discussions
    - Informal discussions along the way
    - Formal deliberations
  - Types of arbitrators
    - Party appointed
      - Neutral
        - Seemingly neutral
        - Seemingly partisan

        - Non-neutral
    - Relations within a panel
        - Equality
        - collegiality
        - Hierarchical
            - Chair/wing
            - Preparedness/engagement
            - Stature
            - Other
        - Groupthink
        - Ethical requirements
    - Organization of discussions: Should the chair
        - Take the lead
        - Organize the discussions
        - Defer to the co-arbitrators
- **Process: when to decide**
    - On documents
    - Versus after a hearing
- **Timing of arbitrators' forming views of the case**
    - only after all the evidence is in
    - or sometime earlier
    - or back and forth as the evidence comes in
    - tentative preliminary views
    - significance of whether it is a case
        - with detailed pleadings, witness statements, expert's reports, pre-hearing motions and the like
        - that comes to hearing without much groundwork having been laid
    - cognitive risks of
        - early expressions of views on the case
        - early reduction of views to writing
- **Bias**
    - Actual
    - Unconscious
        - Psychological
        - physiological
- **The decision-making process: respective roles of**
    - The contract
    - The law
        - Where arbitrators
            - are already familiar with the law
            - are not familiar
    - concept of the contract and the law as the opening screens for considering the facts
    - The facts/evidence

        - Arguments of counsel
        - pleadings
        - Admissions
        - Testimony
        - Exhibits
        - Briefs
            - Pre-hearing
            - Post-hearing
            - other
    - Credibility
        - Significance
        - How determined
            - Can it be articulated?
            - Are we any good at it?
    - Burdens of proof
    - Personality/experience of the arbitrator
    - Eliciting of information by arbitrators
        - On legal and factual points raised by the parties
        - On points not raised by the parties
        - Before counsel have done their thing
        - Before or while counsel are doing their thing
    - Negotiations/compromise among panel members
        - Liability
        - damages
    - Splitting the baby?
- **Drafting the award**
    - do arbitrators decide
        - before drafting the award?
        - or as part of the award-writing process?
    - the actual drafting
        - by the chair
        - or different parts of the award by different panel members
- **Diversity**
    - Significance of diversity on decision-making
- **Comparison of arbitral versus judicial decision-making**
- **Appraisal**
    - Characterization of arbitral practices in these areas
        - Substantially uniform
        - Or idiosyncratic?
    - Areas that need
        - Change
        - Further study
- **Arbitrator perspective**
    - What parties, witnesses, and counsel do
        - That helps

        - That impedes the decision-making process
- **Counsel perspective as to these questions**

CONSIDERATIONS IN INTERNATIONAL AWARD WRITING

Steven A. Certilman

1) GENERAL CONSIDERATIONS

a) Write a reasoned award, even if it is a brief one
b) Write for enforceability
c) Do justice
d) Develop your own style

2) PREPARING FOR THE DRAFTING PROCESS

a) Familiarize yourself with governing procedural law (the *lex arbitri*) as it relates to an enforceable award
b) Familiarize yourself with the award provisions of the governing arbitral rules
c) Familiarize yourself with governing law of any jurisdictions where you have information that the award is likely to be enforced
d) Re-familiarize yourself with the arbitration agreement to ensure that you take into consideration any award-related requirements contained therein
e) Determine whether your award is to be a final award, or whether it is an interim/partial award, or a supplemental award or merely a procedural order. Then, ensure that it is clear as to which it is
f) Ensure that you have addressed all claims and counterclaims – NO MORE AND NO LESS
g) Remember that an award is subject to challenge at both the place where it is issued (the *arbitral situs*) and the place where it will be enforced
h) Both form and content affect the outcome of a challenge to the award

3) TYPES OF AWARDS

a) Final Awards
    i) Usually completes the engagement of the arbitrator
    ii) not to be rendered until the arbitrator determines that that his/her assignment and responsibilities are complete
b) Interim Awards
    i) Typically addresses preliminary issues such as jurisdiction, proper law
    ii) Also used to effect interim relief (a pre-award remedy). The interim award for a pre-judgment remedy can generally be taken to court for enforcement
    iii) Also often used if the arbitrator determines to bifurcate the hearings
    iv) Make sure your governing rules allow it. Generally they do
    v) Many state statutes, including CGS § 52-418 et seq. in CT, do not specifically address partial or interim awards so an Interim Award may not be considered a final award for purposes of enforceability in court. There may be lack of uniformity in how the courts address these.
c) Default awards

i) Should be carefully addressed as courts are most suspicious of them
ii) Be sure to articulate the procedural history

4) BASIC DRAFTING

a) Caption
b) Title of award (Final, Interim etc.)
c) Recitals
   i) The arbitration agreement
   ii) Method of service and other jurisdictional information
   iii) Appointment of arbitrator and date of oath
   iv) Particulars regarding default if applicable
      (1) Material interlocutory matters such as dispositive motions and decisions.
d) Briefly outline the dispute to give the big picture. Chronologically is often best but if Terms of Reference have been agreed, that is your guide.
e) Organize and state the material issues and your findings of fact. This is the meat and potatoes of the award
   i) It is often helpful to use the pleadings as a guide
   ii) Address the material questions of fact and issues of law in a logical order. Make findings of fact as you go along and address the legal issues where they fit in
   iii) As a matter of style, some arbitrators include the findings of fact within the outline of the case
   iv) Include references to testimony, documents and other evidence, both credible and incredible
f) Come to a well founded conclusion on all questions of fact and issues of law which lead you to the conclusion section
g) Damages and Remedies:
   i) Each particular remedy should be tied as a remedy to at least one particular claim
      (1) E.g. duty→ breach→ loss suffered→ remedy
   ii) See the next section for specifics regarding remedies
   iii) Spell out your calculations including the from-to dates and **double check your calculations**
   iv) Some damages are clearly computable from the contract and others require the arbitrator to make an assessment of the damages. If you are making an assessment, indicate the methodology
   v) Types of remedies
      (1) Monetary damages
      (2) Punitive damages and other penalties where appropriate and permitted
      (3) Injunctive relief
      (4) Restitution/Specific performance
      (5) Declaratory relief
      (6) Interest

(a) Compound or simple? What is the rate? Check the agreement, the rules and the law
(b) Again, recite the from-to dates
(c) Unless prohibited by the *lex arbitri*, the governing rules or the agreement of the parties, you can generally include a post-award interest rate, with the interest to begin to run on the date after the date on which the payment of the losing party is due to be made. If there is one, I always use the rate established in procedural law, such as the 10% rate for detainer of money in CT.

(7) Costs and fees
(a) Generally, these are party costs, fees of the arbitral organization and arbitrator fees
(b) Check the *lex arbitri* and the rules for constraints on allocation
(c) Generally the arbitrator has the discretion to assess the costs in the manner deemed fair

(8) Attorney fees
(a) Usually a matter of substantive law (the *lex contractus*) but check the arbitration agreement

h) Conclusion
i) Summarizes the award: who is to do what, when. E.g. By reason of the foregoing, I hereby award the Claimant the sum of Ten Dollars ($10.00) in full and final settlement of a all claims and counterclaims between/among the parties herein, such sum to be paid by the Respondent to the Claimant within fourteen (14) days of the date hereof."
ii) In the damages area, this might differ if the parties have made preliminary payments addressing the claims or, in the area of costs if, e.g., one party paid the costs ands they are being awarded against the other party
iii) To avoid failing to render an award as to some peripheral claim which you may have discounted but not written about directly, **always conclude** with an omnibus disposition clause such as "This Award is intended as full and final settlement of all claims and counterclaims between/among the parties herein **and all claims not expressly addressed herein are hereby denied.**"

i) Sign and date the award and ensure that if the *lex arbitri* requires it, the award is notarized/acknowledged. This may also be important in some jurisdictions where the award is to be enforced
j) Deliver the award promptly as required. Determine how many original executed copies will be required. By default, my preference is to deliver a number of originals equal to the number of parties plus one for the administrative body.
k) Assuming that the award may be enforced outside of the seat, add something to the following effect:
"This Award is a final award. It is effective immediately, without the necessity of further hearings and can be confirmed in any court having jurisdiction. The hearings have been declared closed and all claims with respect to which there has been no express disposition herein are denied. The seat of the arbitration is **New York, U.S.A**."

l) You MUST include a statement that: “This award is made at xxxx (the seat of the arbitration).”

5) ADDITIONAL CONSIDERATIONS

a) Dissenting opinions
b) Res judicata
c) Effect on third parties
d) After the award is rendered, further communication with the attorneys or parties is not ethically permitted.
e) Functus officio

6) FOR ANOTHER DAY

a) Challenges to the award
b) Post award requests such as amendments, reconsideration, articulation

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Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy

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Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy

*S.I. Strong**

ABSTRACT

Over the last few decades, international commercial arbitration has become the preferred means of resolving cross-border business disputes. The popularity of this particular device is due to a number of uniquely attractive features ranging from the mechanism's sophisticated blend of common law and civil law procedures to the routine use of reasoned awards. As a result, international commercial arbitration does not resemble domestic arbitration so much as it does complex commercial litigation.

Although international commercial arbitration is considered a highly mature form of dispute resolution, very little information exists as to what constitutes a reasoned award in the international commercial context or how to write such an award. This situation is becoming increasingly problematic given the rising number of international commercial arbitrations that arise every year, the expansion and diversification of the pool of potential arbitrators, and the significant individual and societal costs that can result from badly written awards.

This Article provides the first-ever in-depth analysis of the reasoned award requirement in international commercial arbitration. In so doing, the discussion draws heavily on the large body of material involving reasoned rulings in both common law and civil law courts and considers whether and to what extent those criteria apply in the arbitral context. As a result, this Article not only provides useful information to those seeking to better their understanding of the reasoning requirement in international commercial arbitration, it also provides key comparative insights into the judicial process in both common law and civil law legal systems.

Much of the analysis focuses on theoretical concerns relating to reasoned decision-making in judicial and arbitral settings. However, the discussion also incorporates a strong practical element. As a result, this Article is relevant not only to specialists in international commercial arbitration but also to judges involved in enforcing reasoned awards domestically or internationally, scholars studying arbitral and judicial decision-making, and domestic arbitrators seeking to understand the parameters of a reasoned award under national law.

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I. INTRODUCTION

Unlike many types of domestic arbitration where unreasoned awards (often called "standard awards") are the norm, international commercial arbitration routinely requires arbitrators to produce fully reasoned awards.[1] However, very little information exists as to what constitutes a reasoned award in the international commercial context[2] or how to write such an award.[3] This lacuna is extremely problematic given the ever-increasing number of international commercial arbitrations that arise every year[4] and the significant individual and societal costs that can result

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[1] *See* Rain CII Carbon, LLC v. ConocoPhillips Co., 674 F.3d 469, 473-74 (5th Cir. 2012) (distinguishing a standard award from a reasoned award); Cat Charter, LLC v. Schurtenberger, 646 F.3d 836, 844-46 (11th Cir. 2011) (same); *see also* S.I. STRONG, INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES 22 (2012) (comparing international commercial arbitration to other forms of arbitration), *available at* http://www.fjc.gov [hereinafter STRONG, GUIDE].

[2] *See Rain CII Carbon*, 674 F.3d at 473-74; *Cat Charter*, 646 F.3d at 844-46; GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3037-45 (2014). The debate about what constitutes a reasoned award extends to investment arbitration as well. *See* Tai-Heng Cheng & Robert Trisotto, *Reasons and Reasoning in Investment Treaty Arbitration*, 32 SUFFOLK TRANSNAT'L L. REV. 409, 409 (2009); Jason Webb Yackee, Book Review, *The Reasons Requirement in International Investment Arbitration: Critical Case Studies*, 103 AM. J. INT'L L. 629, 630 (2009).

[3] A few materials are available, although most are relatively short and provide only general advice. *See* George A. Bermann, *Writing the Award – An Arbitrator's Perspective, in* INTERNATIONAL ARBITRATION CHECKLISTS 171 (Grant Hanessian & Lawrence W. Newman eds., 2009); Thomas J. Brener et al., *Awards and Substantive Interlocutory Arbitral Decisions, in* COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 225, 237-39 (James M. Gaitis et al. eds., 2014); Daniel L. FitzMaurice & Maureen O'Connor, *Preparing a Reasoned Award,* 14 ARIAS U.S. Q. (2007), *available at* http://www.daypitney.com/news/docs/dp_1987.pdf; Marcel Fontaine, *Drafting the Award – A Perspective from a Civil Law Jurist*, 5 ICC BULL. 30 (1994); Humphrey Lloyd, *Writing Awards – A Common Lawyer's Perspective,* 5 ICC BULL. 38 (1994); Humphrey Lloyd et al., *Drafting Awards in ICC Arbitrations,* 16 ICC BULL. 19 (2005); Jose Maria Alonso Puig, *Deliberation and Drafting Awards in International Arbitration, in* LIBER AMICORUM BERNARDO CREMADES 131, 144-58 (Miguel Ángel Fernández-Ballesteros & David Arias eds. 2010).

[4] International commercial arbitration is the preferred means of resolving cross-border business disputes. *See* BORN, *supra* note 2, at 73; *see also* S.I. Strong, *Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration*, 2012 J. DISP. RESOL. 1, 2-3, 5-6 [hereinafter Strong, *Border Skirmishes*] (noting increase in arbitral proceedings over the last fifty years). More generalists are entering the world of arbitration as advocates and arbitrators, which may affect the quality and nature of international award writing. *See id.* at 4.

from a badly written award.[5] Indeed, much of the current debate about the need for appellate arbitration stems from controversies generated by awards that fail to provide reasoning that is sufficiently persuasive to the losing party.[6]

Helping arbitrators write awards that are clear, concise and coherent is vitally important if international commercial arbitration is to retain its place as the preferred means of resolving cross-border business disputes.[7] However, that task is not as easy as it sounds.

First, the relative scarcity of published awards means that novice arbitrators have very little to look at in the way of models.[8] Furthermore, many of the materials that are publicly available are typically offered only in excerpted, digested or translated form and may not be suitable for use as prototypes.[9] While arbitrators could seek guidance from other types of

[5] Badly written awards (which in this context means those that provide insufficient reasoning as opposed to those that reach the "wrong" conclusion) can not only diminish parties' and society's faith in the legitimacy of the arbitral process, they can also increase the time and cost associated with final resolution of a dispute, both by taking a long time to write and by increasing the chance for a successful challenge to the award. *See* BORN, *supra* note 2, at 3044; Herbert L. Marx Jr., *Who Are Labor Arbitration Awards Written For? And Other Musings About Award Writing,* 58 DISP. RESOL. J. 22, 23 (May-July 2003). Rising costs and delays have jeopardized the future of international commercial arbitration, and parties are now considering the viability of other dispute resolution alternatives, such as international commercial mediation. *See* S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J. L & POL'Y 11, 12 (2014); S.I. Strong, *Use and Perception of International Commercial Mediation and Conciliation: An Empirical Study*, 21 HARV. NEGOT. L. REV. __ (forthcoming 2015).

[6] *See* Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review,* 44 N.Y.U. J. INT'L L. & POL'Y 1109, 1111 (2012) (noting that the primary impetus for arbitral appeals in international commercial arbitration is error correction). Badly written awards, like badly written judicial decisions and opinions, fail to persuade the reader that the outcome is correct and therefore generate the desire for an appeal. *See* S.I. Strong, *Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced and Foreign Judges*, 2015 J. DISP. RESOL. __, __ [hereinafter Strong, *Writing*].

[7] *See* BORN, *supra* note 2, at 73.

[8] *See* Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration, in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 821, 821 n.4 (Mahnoush Arsanjani et al. eds. 2010) ("[I]t is uncommon to publish international commercial awards. . . ."). Although a number of arbitral institutions have been publishing denatured (anonymized) awards for decades, those materials are not widely available, since they are found only in specialized reporting series that are difficult and expensive to find. *See* S.I. STRONG, RESEARCH AND PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION: SOURCES AND STRATEGIES 44-45, 83-85 (2009) [hereinafter STRONG, RESEARCH] (listing sources for arbitral awards and noting that databases offered by generalist provides such as Westlaw and LexisNexis generally do not include the necessary information).

[9] See Lloyd et al., *supra* note 3, at 20; *see also* James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards,* 15 AM. REV. INT'L ARB. 9, 17 (2004) (discussing why reasoned awards can vary widely). There are no groups responsible for identifying those arbitral awards that are particularly noteworthy from a structural or linguistic perspective, although a brief review of recently published awards demonstrates a number of examples of good writing. *See* Contractor (Zambia) v. Producer (Zambia), Final Award, ICC Case No. 16484, 2011, XXXIX Y.B. COMM. ARB. 216 (2014); Consortium member (Italy) v. Consortium leader (Netherlands), Final Award, ICC Case No. 14630 XXXVII Y.B.

reasoned rulings that are more widely available (such as awards generated in investment arbitration[10] or reasoned decisions from national courts[11]), not all of those procedures are truly analogous to international commercial arbitration.[12]

Second, new arbitrators typically come to their duties with very little in the way of formal training.[13] Indeed, the underlying assumption is that anyone appointed to an *ad hoc*

COMM. ARB. 90 (2012). The situation is quite different in the judicial realm, where exemplary judicial writing is identified regularly. *See* The Green Bag Almanac & Reader, Exemplary Legal Writing, http://www.greenbag.org/green_bag_press/almanacs/almanacs.html (listing the best judicial opinions in the United States each year); *see also* WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT 97-98 (1997).

[10] Numerous investment awards are now publicly available as a result of the move toward increased transparency. *See* International Centre for Settlement of Investment Disputes (ICSID), Award – ICISD Convention Arbitration, https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Award-Convention-Arbitration.aspx (noting the presumption toward full or partial publication of investment awards); *see also* Gary Born, *A New Generation of International Adjudication,* 61 DUKE L.J. 775, 841-42 (2012); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions,* 73 FORDHAM L. REV. 1621, 1611-12 (2005).

[11] Reasoned judicial decisions exist in both civil law and common law countries, although there are some differences between the type of judicial opinions generated by common law courts and civil law courts. *See* Allen Shoenberger, *Change in the European Civil Law Systems: Infiltration of the Anglo-American Case Law System of Precedent Into the Civil Law System*, 55 LOY. L. REV. 5, 5 (2009); *see also infra* notes 58-61, 222-23 and accompanying text. For example, judges in civil law countries often do not undertake the same type of factual analysis as judges in common law countries because of the civil law's emphasis on deductive rather than inductive reasoning. *See* S.I. STRONG ET AL., COMPARATIVE LAW FOR BILINGUAL LAWYERS: WORKING ACROSS THE ENGLISH-SPANISH DIVIDE / DERECHO COMPARADO PARA ABOGADOS HISPANO Y ANGLOPARLANTES ch. 3 (anticipated 2016) (noting that whereas "the civil law . . . uses deductive reasoning to move from general principles of law to particular outcomes in specific cases, the common law uses analogical or inductive reasoning to generate general principles of law as a result of legal conclusions generated in large numbers of individual disputes"); Julie Bédard, *Transsystemic Teaching of Law at McGill: "Radical Changes, Old and New Hats,"* 27 QUEEN'S L. J. 237, 269-70 (2001).

[12] *See* Strong, *Writing, supra* note 6, at __ (discussing purposes of judicial opinions and decisions); *see also infra* notes 67-85 and accompanying text (concerning differences between arbitration and litigation). For example, the quasi-public nature of investment arbitration and the strong influence of international law means that investment awards often resemble opinions generated by the International Court of Justice (ICJ). *See* Born, *supra* note 10, at 780; Thomas Buergenthal, *Lawmaking by the ICJ and Other International Courts,* 103 AM. SOC'Y INT'L L. PROC. 403, 405 (2009) (noting investment awards often rely on decisions from the ICJ); *see also* Ernest A. Young, *Supranational Rulings as Judgments and Precedents,* 18 DUKE J. COMP. & INT'L L. 477, 491-96 (2008) (suggesting that international arbitral awards are enforced more readily than judgments of international tribunals); *compare* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment of Feb. 3, 2015, http://www.icj-cij.org/docket/files/118/18422.pdf, *with* Ambiente Ufficio S.p.A. v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (Feb. 8, 2013), http:// www.italaw.com/sites/default/files/case-documents/italaw1276.pdf.

[13] A number of universities have attempted to provide advanced training in arbitration, but most of those courses focus on preparing advocates rather than arbitrators. *See* American University, Washington College of Law, Center on International Commercial Arbitration, https://www.wcl.american.edu/arbitration/; Columbia Law School, Center for International Commercial

tribunal or to an arbitral roster is already competent to serve as an arbitrator as a result of that person's extensive experience as counsel.[14] Interestingly, this reliance on selection procedures rather than on training is similar to the educational model adopted by the judicial systems of many common law countries.[15] In those jurisdictions, judges are selected from a pool of experienced lawyers and placed on the bench with very little specialized training, based on the assumption that anyone who has become a top litigator is naturally competent to take on the role of a judge.[16] However, research into judicial education and performance has demonstrated that the skills associated with serving as an adjudicator are significantly different than those associated with acting as an advocate.[17] The transition to the bench is particularly difficult with respect to the task of writing fully reasoned rulings, with many new judges finding the "move from advocacy to decision, from marshalling and presenting evidence to fact-finding and synthesizing," to be extremely challenging.[18] As a result, it appears inaccurate to claim, as some authorities have, that international arbitrators can gain the necessary skillset simply through "observation, exposure, participation and experience."[19]

This is not to say that arbitrators are entirely without resources, since new and experienced arbitrators can seek out courses in award writing from any one of a variety of

& Investment Arbitration, Related Curriculum at Columbia Law School, http://web.law.columbia.edu/center-for-international-arbitration/curriculum; MIDS-Geneva LL.M. in International Dispute Resolution, Curriculum, http://www.mids.ch/the-program/curriculum.html; Queen Mary, University of London, School of International Arbitration, Specialist Programmes, http://www.arbitration.qmul.ac.uk/courses/index.html [hereinafter QMUL]; University of Miami, LL.M. in International Arbitration, Program Requirements, http://www.law.miami.edu/international-graduate-law-programs/international-arbitration/program-requirements.php?op=3. In the one case where a course on award writing is offered, it is limited to a single session. *See* QMUL, *supra* (describing one-day short course on award writing in international arbitration).

[14] *See* STRONG, GUIDE, *supra* note 1, at 7-9 (discussing institutional arbitration and *ad hoc* arbitration). Although most arbitral institutions require some training when a new arbitrator joins their roster, those programs focus heavily on administrative issues relating to that particular institution. Some substantive elements may be offered, but not in any detail.

[15] *See* Emily Kadens, *The Puzzle of Judicial Education: The Case of Chief Justice William de Grey*, 75 BROOK. L. REV. 143, 143-45 (2009); Charles H. Koch, Jr., *The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems*, 11 IND. J. GLOBAL LEGAL STUD. 139, 143 (2004). The situation in civil law countries is very different. There, judges are given instruction in judicial writing from the very beginning of their legal careers. *See* Kadens, *supra*, at 143-45; Koch, *supra*, at 143.

[16] *See* Kadens, *supra* note 15, at 143-45; Koch, *supra* note 15, at 143.

[17] *See* Kadens, *supra* note 15, at 143.

[18] Jeffrey A. Van Detta, *The Decline and Fall of the American Judicial Opinion, Part I: Back to the Future From the Roberts Court to Learned Hand – Context and Congruence*, 12 BARRY L. REV. 53, 55 (2009) [hereinafter Van Detta 1]. Indeed, U.S. Supreme Court Justice Hugo Black, one of the most influential writers to ever grace the bench, once said that "the most difficult thing about coming on to the Court was learning to write." DOMNARSKI, *supra* note 9, at 36 (citation omitted).

[19] *See* Doug Jones, *Acquisition of Skills and Accreditation in International Arbitration*, 22 ARB. INT'L 275, 281 (2006).

institutions specializing in international commercial arbitration.[20] However, the current approach is problematic in several ways.[21]

First, it is not clear how many new or experienced arbitrators capitalize on the opportunity to study award writing.[22] Although some organizations require their members to undertake continuing education in arbitration, that requirement is usually minimal (one one-hour course per year may suffice) and does not mandate instruction in any particular subject.[23] Given the various pressures facing both new and experienced arbitrators,[24] it is perhaps understandable that arbitrators overlook courses in writing, particularly since many arbitrators may feel that after decades of work as practicing lawyers, they are already competent writers.[25] However, many people do not appreciate the extent to which award writing differs from other forms of communication.[26]

Arbitrators who have worked previously as judges may be particularly disinclined to take courses in award writing, based on the belief that they already know how to write reasoned decisions.[27] However, arbitral awards are in many ways different than judicial opinions, and skills learned in the judicial context may not translate into the arbitral setting.[28]

[20] *See, e.g.*, Chartered Institute of Arbitrators (CIArb), https://www.ciarb.org/ (offering courses in award writing), last visited June 14, 2015; American Arbitration Association (AAA), Course Calendar, https://www.aaau.org/courses (same), last visited June 14, 2015.

[21] Commentators have suggested that the field of international commercial arbitration is under-regulated in a variety of ways. *See* Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 970 n.40 (2005) [hereinafter Rogers, *Vocation*].

[22] Although a number of organizations (such as the AAA and CIArb) require mandatory training on award writing, that requirement is usually limited a single course upon joining the organization or its roster.

[23] *See* Jones, *supra* note 19, at 288; Rogers, *Vocation*, *supra* note 21, at 978. This system is again remarkably similar to judicial education in common law countries, although that approach has been criticized in a number of ways. *See* S.I. Strong, *Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest?* 2015 J. DISP. RESOL. __, __ [hereinafter Strong, *Judicial Education*]; Strong, *Writing*, *supra* note 6, at __.

[24] Many arbitrators must not only juggle very busy dockets but must also learn a variety of new skills, ranging from the ability to manage difficult counsel and witnesses to issues relating to the type of evidence to allow or disallow. *See* Jones, *supra* note 19, at 281; AAA, Course Calendar, https://www.adreducation.org/courses (demonstrating the scope of courses available to arbitrators).

[25] Of course, it is possible that new arbitrators suffer from the Lake Woebegone Effect with respect to their writing skills. *See* A Prairie Home Companion, The Lake Woebegone Effect (noting that all the children in Lake Woebegone are above average), http://prairiehome.org/2013/04/the_lake_wobegon_effect/, last visited Jan. 19, 2015.

[26] *See* Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 503-06 (2013); Van Detta 1, *supra* note 18, at 55.

[27] *See* Bryan A. Garner, *Why Lawyers Can't Write*, ABA J. (Mar. 1, 2013), *available at* http://www.abajournal.com/magazine/article/why_lawyers_cant_write (discussing problems of judicial overconfidence); Strong, *Judicial Education*, *supra* note 23, at __ (same).

[28] *See infra* notes 67-85 and accompanying text. Furthermore, it cannot be assumed that every judge writes well. *See* Mark Painter, *No Mercy for Poorly Written Opinions*, WISC. L.J. (Sept. 10, 2010), *available at* http://wislawjournal.com/2010/09/10/no-mercy-for-poorly-written-opinions/.

Current practice regarding continuing education on award writing suffers from other problems as well. For example, most arbitral institutions only ask established arbitrators to act as faculty, presumably based on the belief that arbitrators are the only ones who have the skills and insights necessary to teach other arbitrators.[29] Not only can this practice create a number of self-reinforcing behaviors within the field as faculty members emphasize issues that they consider to be important with little input from external or empirical sources,[30] but most arbitrators are not especially qualified to teach writing, despite their practical experience in arbitration.[31] As a result, many award writing seminars end up focusing on personal anecdotes, basic writing techniques or logistical concerns that do not address the deeper challenge of producing fully reasoned awards.[32]

Many of these educational practices mirror those traditionally seen in common law forms of judicial education.[33] Although those similarities might lead some observers to conclude that the existing approach to arbitrator education is sufficient, commentators have sharply criticized the common law judicial education model.[34] This phenomenon, when combined with the various concerns enunciated within the arbitral community about the qualifications of international commercial arbitrators, suggest that the existing approach to arbitrator education needs to be changed, particularly with respect to the issue of award writing.[35]

[29] Many common law countries use a similar approach to judicial education, although that approach has been criticized. *See* Strong, *Judicial Education*, *supra* note 23, at __.

[30] *See* Oona A. Hathaway, *Path Dependence in the Law; The Course and Pattern of Legal Change in a Common Law System,* 86 IOWA L. REV. 601, 628-29 (2001); Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration,* 8 NEV. L.J. 341, 383 (2007) (noting the risk that international commercial arbitration may become autopoietic) [hereinafter Rogers, *Have-Nots*].

[31] The same issues exist in many forms of judicial education. *See* Strong, *Judicial Education*, *supra* note 23, at __. Many people cling to the belief that good writing cannot be taught, either because writing is an innate skill or because the range of opinions about what constitutes good writing is too diverse to support a single standardized treatment. *See* S.I. STRONG, HOW TO WRITE LAW EXAMS AND ESSAYS 1-2 (4th ed. 2014) [hereinafter STRONG, HOW TO WRITE]. While it is certainly true that good writing can vary a great deal in terms of form, tone and style, that does not mean that it is impossible to identify certain common features that exist in all good legal decisions and opinions. *See* LOUISE MAILHOT & JAMES D. CARNWATH, DECISIONS, DECISIONS . . . A HANDBOOK FOR JUDICIAL WRITING 100 (1998) (discussing judicial writing); *see also* DOMNARSKI, *supra* note 9, at 55-74, 90-115.

[32] *See, e.g.*, Marx, *supra* note 5, at 22-23. This type of approach is also evident in materials relating to judicial writing. *See* Strong, *Writing*, *supra* note 6, at __.

[33] *See* Strong, *Writing*, *supra* note 6, at __; *see also supra* notes 15-32 and accompanying text.

[34] *See* LIVINGSTON ARMYTAGE, EDUCATING JUDGES: TOWARDS A NEW MODEL OF CONTINUING JUDICIAL LEARNING (1996); Strong, *Judicial Education*, *supra* note 23, at __.

[35] *See* Jones, *supra* note 19, at 275. The decreased emphasis on arbitrator education has led many parties to equate experience as an international arbitrator with competence as an international arbitrator, thereby making it difficult for new arbitrators to enter the field. *See* Wendy Miles, *International Arbitrator Appointment: One vs. Three, Lawyer vs. Nonlawyer,* 57 DISP. RESOL. J. 36, 36 (Aug.-Oct. 2002) (citing Redfern & Hunter); Rogers, *Vocation*, *supra* note 21, at 967.

Indeed, these issues suggest there is a critical need for more rigorous analysis regarding the reasoned award requirement in international commercial arbitration.[36] This Article attempts to meet that need by scrutinizing the elements of a reasoned award in international commercial arbitration and providing both experienced and novice arbitrators with a structured and content-based approach to writing such awards.[37] Methodologically, the discussion draws heavily on the large body of material involving the use and drafting of reasoned judicial rulings in both common law and civil law jurisdictions.[38] However, the analysis only draws those analogies that are appropriate, since arbitration and litigation are not identical.[39]

[36] This is a subject that appears particularly suitable for a written guide, since this form allows arbitrators to review the material at their own speed and in the manner that is most useful to them. For example, arbitrators, like judges, "are generally autonomous [as learners], entirely self-directed, and exhibit an intensely short-term problem-orientation in their preferred learning practices." ARMYTAGE, *supra* note 34, at 149.

[37] This Article focuses on matters relating to final awards on the merits and does not consider the special issues relating to the writing of a procedural order, an award arising out of an arbitral challenge, a consent award or an interim or partial award, although some commentators have discussed such matters. *See* International Council for Commercial Arbitration (ICCA) REPORT NO. 2: THE ICCA DRAFTING SOURCEBOOK FOR LOGISTICAL MATTERS IN PROCEDURAL ORDERS (2015); Lloyd et al., *supra* note 3, at 38-40; Margaret Moses, *Reasoned Decisions in Arbitrator Challenges*, III Y.B. INT'L ARB. 199 (2013); Rolf Trittmann, *When Should Arbitrators Issue Interim or Partial Awards and/or Procedural Orders*, 20 J. INT'L ARB. 255 (2003). This Article also does not address the special nature of investment arbitration, which carries its own unique concerns as a result of its quasi-public nature. *See* Cheng & Trisotto, *supra* note 2, at 409. However, a number of the issues discussed herein apply to these other sorts of writings to the same extent as to final awards in international commercial arbitration. *See* Fontaine, *supra* note 3, at 30.

[38] *See* Ruth C. Vance, *Judicial Opinion Writing: An Annotated Bibliography*, 17 LEGAL WRITING 197, 204-31 (2011) (listing authorities); *see also* A.B.A., Appellate Judges Conference, Judicial Administration Division, JUDICIAL OPINION WRITING MANUAL (1991), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/judicial-writing-manual-2d-fjc-2013.pdf/$file/judicial-writing-manual-2d-fjc-2013.pdf; LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES (1993); Samuel A. Alito, Jr. et al., Panel Remarks, *The Second Conversation with Justice Samuel A. Alito, Jr.: Lawyering and the Craft of Judicial Opinion Writing*, 37 PEPP. L. REV. 33 (2009); Richard B. Cappalli, *Improving Appellate Opinions*, 83 JUDICATURE 286 (May/June 2000); Elizabeth Ahlgren Francis, *The Elements of Ordered Opinion Writing*, 38 JUDGES J. 8 (Spring 1999); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Joseph Kimble, *First Things First: The Lost Art of Summarizing*, 38 CT. REV. 30 (Summer 2001); Douglas K. Norman, *An Outline for Appellate Opinion Writing*, 39 JUDGES J. 26 (Summer 2000); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995); Strong, *Writing*, *supra* note 6, at __; Timothy P. Terrell, *Organizing Clear Opinions: Beyond Logic to Coherence and Character*, 38 JUDGES J. 4 (Spring 1999); Patricia M. Wald, *A Reply to Judge Posner*, 62 U. CHI. L. REV. 1451 (1995); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writing*, 62 U. CHI. L. REV. 1371 (1995); Nancy A. Wanderer, *Writing Better Opinions: Communicating with Candor, Clarity, and Style*, 54 ME. L. REV. 47 (2002); James Boyd White, *What's an Opinion for?* 62 U. CHI. L. REV. 1363 (1995); Charles R. Wilson, *How Opinions Are Developed in the United States Court of Appeals of the Eleventh Circuit*, 32 STETSON L. REV. 247 (2003); *infra* notes 193-366 (listing sources).

[39] *See infra* notes 56-57 and accompanying text.

Although this Article is aimed primarily at specialists in international commercial arbitration, the material is also useful to numerous other individuals. For example, the information contained herein can be used to assist judges involved in enforcing reasoned awards domestically or internationally,[40] scholars studying arbitral decision-making,[41] arbitrators and tribunal secretaries involved in the drafting of individual awards[42] and domestic arbitrators seeking to understand what a reasoned award is under national law.[43]

The primary focus of this Article is on analyzing various process-oriented and structural issues relating to reasoned awards in international commercial arbitration so as to improve the practical and theoretical understanding of international awards. That discussion, which is found in Section IV, considers various factors from both the common law and civil law perspectives so as to take into account the blended nature of international commercial arbitration.[44]

Of course, to be fully comprehensible, the detailed analysis in Section IV must first be put into context. Therefore, Section II describes the difficulties associated with defining a reasoned award in international commercial arbitration while Section III considers why such awards are necessary or useful as a functional matter.[45]

[40] *See* BORN, *supra* note 2, at 3037-48.

[41] Scholarship concerning international commercial arbitration is expanding at a phenomenal rate. *See* STRONG, RESEARCH, *supra* note 8, at 88-137.

[42] Discussion about the role of a tribunal secretary has become heated in recent years, particularly with respect to the question of whether and to what extent a tribunal secretary may assist in the drafting of an award. *See* ICCA REPORT NO. 1, YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES (2015); Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT'L ARB. 575, 576 (2006); Lloyd et al., *supra* note 3, at 21; Emilia Onyema, *The Role of the International Arbitral Tribunal Secretary*, 9 VINDOBONA J. INT'L COMM. L. & ARB. 99, 100 (2005); *see also* Michael Polkinghorne, *Different Strokes for Different Folks? The Role of the Tribunal Secretary*, kluwerarbitrationblog.com (May 17, 2014), http://kluwerarbitrationblog.com/blog/2014/05/17/different-strokes-for-different-folks-the-role-of-the-tribunal-secretary-2/. This Article takes no position on that issue but simply notes that it is possible that such a role may evolve over time, just as the role of judicial clerks has evolved to include assisting judges with drafting judicial opinions and decisions. *See* LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES 10, 86, 94-98 (2007), *available at* http://www.fjc.gov (discussing the role of U.S. law clerks in drafting judicial decisions and opinions); Joint Report, *supra*, at 576; Onyema, *supra*, at 100 (analogizing tribunal secretaries to judicial law clerks).

[43] Some countries require reasoned awards in all sorts of arbitration, including domestic proceedings, while other countries permit the parties to choose whether to obtain a reasoned award. *See* BORN, *supra* note 2, at 3037-48. In either case, domestic arbitrators would benefit from an increased appreciation of what constitutes a reasoned award and how such an award may be written, since the situation regarding the continuing education of arbitrators is often as dire domestically as it is internationally. *See supra* notes 22-32 and accompanying text. However, domestic awards differ from international awards in a number of key regards, so arbitrators should tailor their writing appropriately. *See infra* note 245 and accompanying text.

[44] *See* BORN, *supra* note 2, at 2207-10; STRONG, GUIDE, *supra* note 1, at 6.

[45] Experts in adult education have found that adult learners do best when they understand why certain information is being presented. *See* MALCOLM S. KNOWLES, THE MODERN PRACTICE OF ADULT EDUCATION: FROM PEDAGOGY TO ANDRAGOGY 45-49 (1980). These principles have been successfully

Before beginning, it is helpful to note two basic points. First, reasoned awards can vary a great deal in terms of form, tone and style.[46] As a result, this Article does not suggest a single, formulaic model that should be followed in all cases but instead provides an analytical framework that can be adapted to the particular needs of the dispute at hand. Second, when discussing how international commercial arbitrators should approach the drafting of a reasoned award, this Article does not address basic rules of good writing. Although these issues can be quite important,[47] they are covered in detail elsewhere and need not be discussed herein.[48]

II. WHAT CONSTITUTES A REASONED AWARD IN INTERNATIONAL COMMERCIAL ARBITRATION

The first matter to consider involves the question of what constitutes a reasoned award in international commercial arbitration. Most institutional rules applicable to international commercial arbitration[49] simply indicate that an award should include "reasons," at least as a default position, without any further explanation as to what is entailed by that term.[50]

applied in the context of judicial education and can be extended to arbitral education. *See* ARMYTAGE, *supra* note 34, at 106-11, 127-30.

[46] *See* Lloyd et al., *supra* note 3, at 20.

[47] Matters that initially appear to be questions of style can have substantive effect in the law. For example, legal decisions have been known to turn on the precise placement of a comma. *See* Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 449 (3d Cir. 2003) (construing the New York Convention).

[48] Some good manuals concerning general principles of standard and legal writing include THE CHICAGO MANUAL OF STYLE (2010); ALASTAIR FOWLER, HOW TO WRITE (2007); BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE (2002); BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES (2013); BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE (2006); ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008); STRONG, HOW TO WRITE, *supra* note 31; S.I. STRONG & BRAD DESNOYER, HOW TO WRITE LAW EXAMS: IRAC PERFECTED ch. 8 (2015); WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE (1999).

[49] Most international commercial arbitrations are governed by various procedural rules chosen by the parties, although it is possible to proceed in the absence of such provisions. *See* STRONG, GUIDE, *supra* note 1, at 7-9 (discussing institutional arbitration and *ad hoc* arbitration).

[50] *See* International Centre for Dispute Resolution (ICDR) International Arbitration Rules, art. 27(2) ("The tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons need be given."), *available at* https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_002037; International Chamber of Commerce (ICC) Arbitration Rules, art. 31(2) ("The award shall state the reasons upon which it is based."), *available at* http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/ICC-Rules-of-Arbitration/; London Court of International Arbitration (LCIA) Arbitration Rules, art. 26.2 ("The Arbitral Tribunal shall make any award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which such award is based."), *available at* http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx; Stockholm Chamber of Commerce (SCC) Arbitration Rules, art. 36(1) ("The Arbitral Tribunal shall make its award in writing, and, unless otherwise agreed by the parties, shall state the reasons upon which the award is based."), *available at* http://www.sccinstitute.com/media/56030/2007_arbitration_rules_eng.pdf; United Nations Commission

To some extent, the lack of detail regarding the shape and content of a reasoned award may be the result of the difficulties inherent in describing a reasoned award in the abstract. Indeed, it is often easier to identify specific examples of fully reasoned decisions than to provide a categorical definition of what constitutes adequate legal reasoning.[51] Nevertheless,

on International Trade Law (UNCITRAL) Arbitration Rules, art. 34(3), G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Jan. 10, 2011) ("The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given."), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf. However, in practice, many standard procedural orders used by arbitrators contain phrases such as "The award shall contain the reasoning of the Arbitrator, applicable precedent and findings of fact and conclusions of law."

Although the Chinese International Economic and Trade Commission (CIETAC) adopts an approach similar to that of other arbitral institutions, CIETAC's language is a bit more fulsome and indicates that

> The arbitral tribunal shall state in the award the claims, the facts of the dispute, the reasons on which the award is based, the result of the award, the allocation of the arbitration costs, and the date on which and the place at which the award is made. The facts of the dispute and the reasons on which the award is based may not be stated in the award if the parties have so agreed, or if the award is made in accordance with the terms of a settlement agreement between the parties.

CIETAC Arbitration Rules, art. 49(3), *available at* http://www.cietac.org/index/rules.cms. Other relevant portions of the CIETAC rules state that

> 1. The arbitral tribunal shall independently and impartially render a fair and reasonable arbitral award based on the facts of the case and the terms of the contract, in accordance with the law, and with reference to international practices.
> 2. . . .
> 3. . . . The arbitral tribunal has the power to fix in the award the specific time period for the parties to perform the award and the liabilities for failure to do so within the specified time period.
> 4. . . .
> 5. Where a case is examined by an arbitral tribunal composed of three arbitrators, the award shall be rendered by all three arbitrators or a majority of the arbitrators. A written dissenting opinion shall be kept with the file and may be appended to the award. Such dissenting opinion shall not form a part of the award.
> 6. Where the arbitral tribunal cannot reach a majority opinion, the arbitral award shall be rendered in accordance with the presiding arbitrator's opinion. The written opinions of the other arbitrators shall be kept with the file and may be appended to the award. Such written opinions shall not form a part of the award.
> . . . .

Id. art. 49.

[51] No such analyses have been conducted in the international realm, although some attempts have been made in judicial and other arbitral contexts. *See* Marilyn Blumberg Cane & Ilya Torchinsky, *Explaining "Explained Decisions": NASD's Proposal for Written Explanations in Arbitration Awards,* 16 U. MIAMI BUS. L. REV. 23 (2007); s*ee also* Hart v. Massanari, 266 F.3d 1155, 1176-77 (9th Cir. 2001) (discussing and reflecting the qualities of a reasoned ruling); The Green Bag Almanac & Reader, *supra* note 9

various authorities have attempted to provide a more fulsome explanation of what constitutes a reasoned award.[52] Thus, a reasoned ruling may be described as one that includes "findings of fact and conclusions of law based upon the evidence as a whole . . . [and that] clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached."[53]

As useful as this definition may seem, it only goes so far, since finding "the appropriate methodology for distinguishing questions of fact from questions of law [is], to say the least, elusive."[54] Indeed, "the practical truth [is] that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis."[55]

These kinds of practical difficulties suggest that the best way to define a reasoned award may be through a functional analysis.[56] That sort of approach is particularly useful in this setting because a functional inquiry not only overcomes various differences that exist between common law and civil law legal reasoning (an important feature given that international commercial arbitration consciously blends elements from both the common law and civil law legal traditions),[57] it also takes into account the various ways that arbitral awards differ from reasoned rulings generated by a court.

(listing well-written judicial rulings on an annual basis). One particularly detailed study has come in the world of investment arbitration, where commentators have claimed that annulment tribunals "have adopted no less than three different thresholds to meet the reasons requirement." Cheng & Trisotto, *supra* note 2, at 424. However, these tribunals

> appear to have achieved unanimity on one important conceptual point: the reasons requirement is in fact a reasoning standard. Disagreements among committees about whether the standard should be high or low are . . . fundamentally about what methods of reasoning are acceptable. The high standard countenances only reasoning that is correct on the law and facts and the rational derivation of outcomes therefrom; the low standard tolerates reasoning that is incorrect due to mistakes in the law or facts, so long as the reasoning is internally consistent; and the intermediate standard requires coherence and permits errors of law and fact, so long as these errors are reasonable errors.

Id. The highest level of scrutiny identified in investment disputes appears to contradict the standard applicable in the international commercial context. *See* BORN, *supra* note 2, at 3044 ("The requirement for a reasoned award is also not a requirement for a well-reasoned award: bad or unpersuasive reasons are still reasons, and satisfy statutory requirements for reasoned awards.").

[52] *See* BORN, *supra* note 2, at 3040-41, 3043-44.

[53] 77 Pa. Stat. Ann. § 834 (West 2013). Although this definition arises in the context of the statutory duties of a workers' compensation board, the principles appear to apply equally in other situations, including arbitration. *See* Jennifer Kirby, *What Is An Award, Anyway?* 31 J. INT'L ARB. 475, 476 (2014).

[54] Miller v. Fenton, 474 U.S. 104, 113-14 (1985) (citations omitted).

[55] *Id.* (citation omitted).

[56] *See* Ralf Michaels, *The Functional Method of Comparative Law, in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 342, 357 (Mathias Reiman & Reinhard Zimmerman eds., 2006).

[57] *See* BORN, *supra* note 2, at 2207-10; STRONG, GUIDE, *supra* note 1, at 6.

In this context, a functional analysis requires two separate steps. The first considers why reasoned awards might be necessary or useful in international commercial arbitration. This issue is taken up in Section III. The second looks into how the structure of reasoned awards might vary, depending on the particular type of dispute at issue. Those concerns are addressed in Section IV.

III. WHY REASONED AWARDS ARE NECESSARY OR USEFUL IN INTERNATIONAL COMMERCIAL ARBITRATION

Some people appear to believe that reasoned rulings are an exclusive feature of the common law legal tradition.[58] However, civil law countries have long considered reasoned legal opinions to be essential to procedural justice, even though the shape of a civil law judicial opinion can differ significantly from what is standard in common law jurisdictions.[59] For example, reasoned decisions in France are usually quite short and "formulated in a single sentence, including several 'whereas-es' (*attendus*)."[60] However, other civil law jurisdictions, most notably Germany, often generate reasoned opinions that are remarkable for their "length and thoroughness."[61]

Although French courts consider very brief, highly deductive opinions to be sufficiently reasoned as a matter of procedural fairness,[62] this particular structural approach does not appear to have been routinely adopted in international commercial arbitration.[63] Instead, the concept of

[58] *See* Michael L. Wells, *"Sociological Legitimacy" in Supreme Court Opinion,* 64 WASH. & LEE L. REV. 1011, 1029 (2007) (suggesting that "French practice belies the notion that well-reasoned [apparently meaning fully reasoned] opinions are in some sense necessary").
[59] *See* Fontaine, *supra* note 3, at 33; Shoenberger, *supra* note 11, at 5.
[60] Jeffrey L. Friesen, *When Common Law Courts Interpret Civil Codes*, 15 WISC. INT'L L. J. 1, 8 (1996) ("The succinctness of French decisions is consistent with—and probably produced by—the primacy of text, conceptualism, and deduction, as well as the post-revolutionary caution on the part of judges not to exceed their limited powers."); *see also* Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B. U. INT'L L.J. 331, 343 n.63 (1998) (citing Erhard Blankenburg, *Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany*, 46 AM. J. COMP. L. 1, 40 (1998) ("Whoever compares the arguments of a decision of a German Landgericht with those of a Dutch rechtbank will be impressed by the length and thoroughness of the German argument on the one hand, the straightforward, paper-saving decision of the Dutch court on the other. In appeal courts and before the highest courts the differences in elaborateness are even more apparent. German legal style is much more differentiated, scholarly worded; the style of Dutch courts is pragmatic . . . .")).
[61] Schadbach, *supra* note 60, at 343 n.63 (citing ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, THE CIVIL LAW SYSTEM, AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 1140 (2d ed. 1977); Blankenburg, *supra* note 60, at 40; Louis Goutal, *Characteristics of Judicial Style in France, Britain and the U.S.A.*, 24 AM. J. COMP. L. 43, 45 (1976)).
[62] *See* Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 533 n.286 (2015).
[63] *See* Gaitis, *supra* note 9, at 17 (describing what is typically included in a reasoned award); Fontaine, *supra* note 3, at 36 (noting that French-style "whereas" clauses (*attendus*) are generally not used in international awards, even in those countries where that style of writing is common in the judicial context). *But see* Interim Award in ICC Case No. 4131, IX Y.B. COM. ARB. 131, 135 (1984) (using

a reasoned award in international commercial arbitration appears to more closely resemble the longer, more discursive models seen in the common law and in civil law jurisdictions like Germany.[64] Thus, most awards in international commercial arbitration currently run dozens of pages in length.[65]

When considering why reasoned awards might be useful or necessary in international commercial arbitration, it is helpful to distinguish structural rationales for reasoned rulings from non-structural rationales. This approach not only overcomes matters relating to the common law-civil law divide, it also helps identify rationales that are exclusively associated with judicial rulings and that are therefore inapplicable in the arbitral context.[66]

A. Structural Rationales for Reasoned Awards

Perhaps the most well-known structural rationale supporting the use of reasoned rulings comes from the common law legal tradition, which requires "subsequent courts to adhere to the legal conclusions established in earlier judgments rendered by courts whose decisions are binding upon the ruling court."[67] Reasoned decisions are used in common law jurisdictions to provide "the necessary reasoning (the '*ratio decidendi*') for courts bound to adhere to precedent under *stare decisis*."[68] Because the principle of *stare decisis* does not technically apply in international

attendu clauses, although the decision was translated from French and comes from an earlier era in international commercial arbitration).

[64] *See, e.g.*, Contractor (Zambia) v. Producer (Zambia), Final Award, ICC Case No. 16484, 2011, XXXIX Y.B. COMM. ARB. 216 (2014); Fontaine, *supra* note 3, at 36; *see also* XXXIX Y.B. COMM. ARB. 30-305 (2014) (publishing a variety of recent awards); Schadbach, *supra* note 60, at 343 n.63 (comparing German and Dutch legal decisions).

[65] *See, e.g.*, *Contractor (Zambia),* XXXIX Y.B. COMM. ARB. at 216; Fontaine, *supra* note 3, at 36; Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1316-17 n.64 (2006) [hereinafter Rogers, *Transparency*]; *see also* XXXIX Y.B. COMM. ARB. at 30-305 (publishing a variety of recent awards); QMUL, *supra* note 13 (offering a course in award writing and indicating that the mock award produced by students must exceed 5,000 words). A somewhat shorter example can be found at Consortium member (Italy) v. Consortium leader (Netherlands), Final Award, ICC Case No. 14630 XXXVII Y.B. COMM. ARB. 90 (2012). Notably, some commentators have suggested that "in some instances, longer is not better." BORN, *supra* note 2, at 3041-42.

[66] *See* W. Laurence Craig, *The Arbitrator's Mission and the Application of Law in International Commercial Arbitration*, 21 AM. REV. INT'L L. 243, 284 (2010) (noting five reasons why Lord Bingham of Cornhill, former Lord Chief Justice of England and Wales, thought reasoned judgments were necessary in court and applying those rationales to arbitration); Jones, *supra* note 19, at 282-83 (suggesting arbitrators can learn from judges); Strong, *Writing*, *supra* note 6, at __.

[67] National Aeronautics and Space Admin. v. Nelson, 131 S. Ct. 746, 766 (2011) (citation omitted). Interestingly, it was not until the late nineteenth century that common law courts began to impose upon themselves a strict duty to follow previous case law. *See* KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 260 (Tony Weir trans., 3d ed. 1998).

[68] FitzMaurice & O'Connor, *supra* note 3. *Stare decisis* has been said to "reflect[] a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *National Aeronautics and Space Admin*, 131 S. Ct. at 766 (suggesting that reliance on precedent is

commercial arbitration, this rationale does not appear applicable to the arbitral forum, strictly speaking.[69]

However, arbitral awards are considered very important forms of persuasive authority and have been said to reflect a type of "soft precedent" in certain types of international disputes (most notably those involving investment and sports arbitration) and in certain types of matters (most notably those involving arbitral procedure).[70] The willingness of international arbitrators to consider and in many cases follow the reasoning reflected in previous awards can be traced directly to the need for predictability and consistency in international commercial arbitration.[71] Interestingly, the approach used in international commercial arbitration is similar to that found in many civil law countries, where judges routinely follow the decisions of higher level courts, even if the principle of precedent does not apply, so as to promote predictability and consistency.[72] Thus, reasoned awards may be said to be useful for this first type of structural purpose, even if they are not strictly necessary.

Reasoned rulings serve other structural purposes. For example, reasoned decisions are used in both common law and civil law jurisdictions to give context to lower court decisions and thereby help appellate courts determine whether and to what extent to uphold the judgment below.[73]

Initially, this rationale might also appear inapplicable to international commercial arbitration, since most jurisdictions do not allow courts to review the merits of an arbitral award.[74] However, some jurisdictions, most notably England, do allow judicial appeals of

preferable to other mechanisms "because it promotes the evenhanded, predictable, and consistent development of legal principles").

[69] *See* STRONG, GUIDE, *supra* note 1, at 21; STRONG, RESEARCH, *supra* note 8, at 26-27.

[70] Although the concept of "soft precedent" is most widely supported in investment arbitration and sports arbitration, where publication of denatured awards is relatively routine, some commentators believe that arbitral awards have some precedential value even in the international commercial setting. *See* STRONG, RESEARCH, *supra* note 8, at 26-27 (noting the precedential power of previous international awards is highest in matters of arbitral procedure); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357, 361-78 (2007) (discussing investment and sports arbitration); Rogers, *Vocation*, *supra* note 21, at 1004 ("In a meaningful sense, international arbitration produces precedents that are public goods."). Arbitral awards also contribute to the development of substantive legal principles via the *lex mercatoria*. *See* Fontaine, *supra* note 3, at 32.

[71] *See* STRONG, GUIDE, *supra* note 1, at 21 (quoting Interim Award in ICC Case No. 4131, IX Y.B. COM. ARB. 131, 135 (1984), which stated that "[t]he decisions of these [arbitral] tribunals progressively create caselaw which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated should respond").

[72] *See* PETER DE CRUZ, COMPARATIVE LAW IN A CHANGING WORLD 70 (3d edn. 2007); STRONG, GUIDE, *supra* note 1, at 17.

[73] *See* J.J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 26 (5th ed. 2007). Providing all of the relevant factual data and outlining each step of the legal analysis allows an appellate court to consider the propriety of the decision-making process below in a comprehensive and principled manner. *See id.*

[74] *See* BORN, *supra* note 2, at 83.

international awards, which could be seen as providing arbitrators with a strong incentive to render well-written reasoned awards in arbitrations seated in England.[75]

International awards may also be subject to other types of post-award scrutiny, both inside and outside of England.[76] One type of post-award judicial procedure involves a challenge to enforcement, either at the seat of arbitration or in a foreign jurisdiction.[77] Although these types of actions usually focus on procedural matters,[78] the likelihood of a challenge being brought in the first place may be affected by the quality of the reasoning found in the underlying award.[79] For example, a well-written and fully reasoned award may persuade the losing party that a decision is well-supported, even if the outcome is negative.[80] Alternatively, a fully reasoned award may diminish the likelihood of a judicial challenge by eliminating certain grounds for non-enforcement.[81]

Another type of post-award procedure involves collateral proceedings.[82] These types of actions may be on the rise, given the increasing incidence of parallel proceedings in

[75] The right to appeal an arbitral award is found in section 69 of the Arbitration Act 1996, although parties may opt out of this provision. *See* Arbitration Act 1996, § 69; Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?*, 30 J. INT'L ARB. 531, 534-43 (2013). Notably, England is one of the top jurisdictions in the world for international commercial arbitration. *See* Jan Paulsson, *Arbitration Friendliness: Promises of Principle and Realities of Practice*, 23 ARB. INT'L 477, 477 (2007).

[76] Although parties in international commercial arbitration usually comply with awards on a voluntary basis, the number and type of post-award challenges may be increasing. *See* BORN, *supra* note 2, at 3410 (claiming "[i]n practice, the overwhelming majority of international awards are complied with voluntarily"); Strong, *Border Skirmishes*, *supra* note 4, at 8 (discussing rising number of challenges).

[77] *See* Strong, *Border Skirmishes*, *supra* note 4, at 2-6.

[78] Public policy objections, which could be seen as a substantive in nature, are a possible ground for non-enforcement at the seat of arbitration and elsewhere. *See, e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]; 9 U.S.C. §§ 10, 208 (2015); Arbitration Act 1996 §§ 68, 103.

[79] *See* BORN, *supra* note 2, at 83. At one time, arbitrators were advised not to be too fulsome in their awards lest they create grounds for vacatur or non-enforcement. *See* Fontaine, *supra* note 3, at 33. However, arbitrators are now advised to "protect the award" through judicious drafting, which may include a more detailed description of the reasons for the award. *See* AAA, WRITING ARBITRATION AWARDS: A GUIDE FOR ARBITRATORS (April 23, 2014), https://www.aaau.org/media/20549/writing%20arbitration%20awards%20-%20materials.pdf (last visited Jan. 23, 2015); Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, XI REVISTA BRASILEIRA DE ARBITRAGEM 76, 83 (2014).

[80] *See* Fontaine, *supra* note 3, at 34; Marx, *supra* note 5, at 23 (quoting a party who stated, "We weren't at all happy with your award, but I can't complain because you explained it so well").

[81] For example, an international arbitral tribunal that explicitly takes European competition or U.S. antitrust law into account may dissuade a losing party from challenging an award in European or U.S. courts on certain public policy grounds. *See* BORN, *supra* note 2, at 3688-70 (discussing the "second look" doctrine); *see also* Eco Swiss China Time Ltd v. Benetton Int'l NV, [1999] E.C.R. I-3055; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 638 (1985).

[82] *See* BORN, *supra* note 2, at 3732.

international commercial disputes.[83] Although the law concerning preclusion and collateral estoppel are not as well developed in arbitration as in litigation,[84] a court may find itself unable to give preclusive effect to a ruling or award that is unreasoned, since the court cannot determine whether a particular issue was fully and fairly argued in the earlier action.[85]

The final type of post-award procedure involves "arbitral appeals," which are an entirely private, contractually created means of appealing the substance of an arbitral award.[86] Over the last few years, several arbitral organizations have established formal procedures for appellate arbitration.[87] The evolution of this particular procedure has important ramifications for the award writing process, both at first instance and on appeal.[88] For example, arbitrators hearing a dispute as an initial matter may need to be increasingly aware of the quality of their awards both to avoid creating an appealable issue[89] and to provide an appellate tribunal with a solid

[83] *See* NADJA ERK-KABAT, PARALLEL PROCEEDINGS IN INTERNATIONAL ARBITRATION: A EUROPEAN PERSPECTIVE 1 (2014); STRONG, GUIDE, *supra* note 1, 85-87.
[84] *See* BORN, *supra* note 2, at 3733; STRONG, GUIDE, *supra* note 1, 85-87.
[85] *See* BORN, *supra* note 2, at 3757.
[86] *See* Judge Rudolph Kass, *A Private Path to Appellate Arbitration*, 50 BOSTON B.J. 35, 35 (Jan./Feb. 2006); Paul Bennett Marrow, *A Practical Approach to Affording Review of Commercial Arbitration Awards Using an Appellate Arbitrator,* 60 DISP. RESOL. J. 10, 14-15 (Aug.-Oct. 2005). Because this process does not require any form of judicial review, it does not run afoul of the U.S. Supreme Court's prohibition on contractual expansions of judicial jurisdiction. *See* Hall St. Assocs. v. Mattel, Inc., 550 U.S. 968 (2007); Richard C. Reuben, *Personal Autonomy and* Vacatur *After* Hall Street, 113 PENN. ST. L. REV. 1103, 1150-51 (2009). Arbitral appeals are somewhat different than the kind of annulment proceedings used in certain investment arbitrations. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), Mar. 18, 1965, Rules of Procedure for Arbitration, Rules 50-55, [1966] 17 U.S.T. 1291, T.I.A.S. No. 6090. Arbitral appeals also differ from the types of appellate procedures contemplated by the Court of Arbitration for Sport (CAS). *See* CAS, Procedural Rules 47-59, http://www.tas-cas.org/en/arbitration/code-procedural-rules.html [hereinafter CAS Arbitration Rules] (discussing arbitral appeals from rulings generated by a federation or national sports body); Louise Reilly, *An Introduction to the Court of Arbitration for Sport (CAS) & The Role of National Courts in International Sports Disputes*, 2012 J. DISP. RESOL. 63, 64-65.
[87] *See* AAA, Optional Appellate Arbitration Rules (Nov. 1, 2013), http://go.adr.org/AppellateRules [hereinafter AAA Appellate Rules]; International Institute for Conflict Prevention and Resolution (CPR) Arbitration Appeal Procedure and Commentary, https://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/CPR%20Arbitration%20Appeal%20Procedure.pdf [hereinafter CPR Appellate Rules]; JAMS, Optional Arbitration Appeal Procedure, http://www.jamsadr.com/appeal/ [hereinafter JAMS Appellate Rules]. Such procedures are not limited to the United States. *See* Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Arbitration Appeals Tribunal, http://www.aminz.org.nz/Category?Action=View&Category_id=172. Furthermore, parties to do not have to adopt an appellate rule set but can instead simply establish arbitral appeal by contract. *See* STRONG, GUIDE, *supra* note 1, at 7-9; Marrow, *supra* note 86, at 13.
[88] Some authorities have suggested that in cases involving two tiers of arbitration, the first decision does not constitute an "award" per se. *See* BORN, *supra* note 2, at 2926 (citing a French decision). However, the initial decision will be referred to as an "award" for purposes of the current discussion.
[89] The notion of what constitutes an appealable issue is by no means entirely clear. *See* Marrow, *supra* note 86, at 14-15. At this point, parties must rely largely on the language reflected in the relevant rules. *See infra* notes 166-71 and accompanying text (discussing the standard and scope of appellate review).

understanding of how and why the initial decision was made.[90] Questions will also arise as to whether and to what extent an appellate award can or should differ from an award at first instance as a matter of form or content.[91]

B. Non-Structural Rationales for Reasoned Awards

As the preceding discussion suggests, there are a number of structural rationales supporting the use of reasoned awards in international commercial arbitration. These structural reasons apply despite the various functional differences between litigation and arbitration. However, there are also several non-structural reasons why reasoned awards are useful or necessary in international commercial arbitration.

First and perhaps most importantly, reasoned awards provide key assurances regarding the nature and quality of justice that is being dispensed by the arbitrator. Commentators have noted that both common law and civil law jurisdictions have recognized a "procedural trinity" that is necessary to establish the rule of law.[92] The three constituent elements include:

1. the audiatur principle (*audiatur et altera pars*), which in England and America forms part of natural justice and due process of law;
2. explicit reasons and fact finding; [and]
3. the right to appeal.[93]

While parties in arbitration are allowed to waive the right to an appeal as well as the right to explicit reasons and fact finding, such waivers are not a required feature of arbitration.[94] To the contrary, as the recent debate about arbitral appeals has shown, parties can enforce these procedural rights to the extent consistent with the arbitral setting.[95] Thus, while it remains to be seen how the reasons requirement in international commercial arbitration compares to similar standards applicable in litigation, it is clear that arbitrators must provide some minimal level of

[90] *See* Kass, *supra* note 86, at 35.
[91] *See infra* notes 157-71 and accompanying text (regarding drafting of appellate awards).
[92] Gunnar Bergholtz, Ratio et Auctoritas: *A Comparative Study of the Significance of Reasoned Decisions with Special Reference to Civil Cases*, 33 SCANDINAVIAN STUDIES IN LAW 11, 44 (1989); *see also* Rogers, *Vocation*, *supra* note 21, at 985 n.97 (claiming "the product of international arbitral decision-making is justice").
[93] Bergholtz, *supra* note 92, at 44.
[94] There has never been any claim that parties in arbitration can waive the audiatur principle. *See* S.I. Strong, *Limits of Procedural Choice of Law*, 39 BROOK. J. INT'L L. 1027, 1100-01 (2014) [hereinafter Strong, *Procedural Limits*]. Furthermore, some jurisdictions do not allow parties to waive the reasoning requirement. *See* Duarte Gorjão Henriques, *Motivation of Arbitral Awards: A Few Notes*, 10 YOUNG ARB. REV. 34, 34-35 (2013) (noting that arbitration awards must be reasoned under Portuguese law).
[95] Thus, for example, parties may require arbitral appeals but not judicial appeals. *See supra* note 86 and accompanying text.

reasoning once the parties have requested a reasoned award.[96] In fact, the length and detail associated with reasoned awards in international commercial arbitration suggests that international arbitrators are far exceeding any minimum requirements.[97]

Second, use of reasoned awards improves the quality of the decision-making process and consequently of the decision itself.[98] As U.S. Circuit Judge Richard Posner has noted, "[r]easoning that seemed sound when 'in the head' may seem half-baked when written down, especially since the written form of an argument encourages some degree of critical detachment in the writer, who in reading what he [or she] has written will be wondering how an audience would react."[99] By encouraging arbitrators to articulate their reasons for following a particular course of action, reasoned awards help "rationalize the . . . process," "safeguard against arbitrary decisions," "prevent consideration of improper and irrelevant factors," "minimize the risk of reliance upon inaccurate information," and "attain[] . . . institutional objective[s] of dispensing equal and impartial justice" while simultaneously "demonstrat[ing] to society that these goals are being met."[100]

Third, reasoned awards can be said to enhance the legitimacy of the arbitral process in the eyes of the arbitrators, the parties and the public by demonstrating the seriousness and integrity of the arbitral endeavor.[101] Reputational concerns may be particularly important as international arbitration comes under increased attack for matters ranging from the lack of transparency to the supposedly preferential treatment of large, multinational firms.[102]

Fourth, reasoned awards provide parties with a more fulsome and satisfactory explanation of why the arbitrator decided as he or she did.[103] This feature can be quite important, since parties – including parties to commercial disputes – are often motivated as much by emotion as by logic, and a party who believes that he or she has not been fully "heard" during the arbitration (a phenomenon that could be directly affected by the quality or content of

[96] *See* Lloyd et al., *supra* note 3, at 27; *see also infra* note 249 and accompanying text. For example, some commentators have suggested that arbitral awards do not necessarily need to have the same degree and depth of legal reasoning as judicial decisions and opinions. *See* BORN, *supra* note 2, at 3044.
[97] *See supra* note 65 and accompanying text; *see also infra* notes 166-306 and accompanying text. Critics of arbitration often claim that arbitration results in "second-class justice." *See* Hiro N. Aragaki, *Arbitration's Suspect Status,* 159 U. PA. L. REV. 1233, 1263 (2011) (tracing history of hostility to arbitration, primarily in the domestic U.S. context).
[98] *See* GEORGE, *supra* note 73, at 27; Fontaine, *supra* note 3, at 34; Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1302 (2008).
[99] Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1447-48 (1995).
[100] FitzMaurice & O'Connor, *supra* note 3, at n.19.
[101] *See id*.; Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 532 (1997) (quoting Thomas Carbonneau for the proposition that "reasoned awards 'could serve as a means of assessing the arbitrators' ability to assure the parties of a principled decisional basis'" (citation omitted)); *see also* GEORGE, *supra* note 73, at 26.
[102] *See* Born, *supra* note 10, at 821 n.202; Rogers, *Transparency*, *supra* note 65, at 1325.
[103] *See* Craig, *supra* note 66, at 284 (noting the importance of satisfying the parties' curiosity as to why the case has been decided as it has); Yackee, *supra* note 2, at 629.

the award) might mount a challenge, even if the chance of prevailing seems relatively low.[104] Indeed, empirical studies have shown that "the perceived fairness of arbitration hearings significantly predicts litigant decisions to accept an arbitration decision," which suggests that fully reasoned awards are beneficial to international commercial arbitration at both an individual and systemic level.[105]

IV. Writing Reasoned Awards in International Commercial Arbitration

The preceding section discussed various reasons why reasoned awards are either necessary or useful in international commercial arbitration. However, the frequency with which parties require reasoned awards suggests that few people need to be convinced of the benefits of reasoned awards in cross-border business proceedings.[106] Instead, the primary concern is with the execution of such awards.[107]

Experts agree that writing a reasoned award is an extremely challenging endeavor requiring both time and diligence.[108] However, the task can be greatly facilitated if the arbitrator has a solid grasp of the fundamental principles underlying reasoned awards. The following discussion therefore considers a number of process- and structure-oriented issues relating to reasoned awards in international commercial arbitration so as to improve the understanding of these types of awards and to assist new and experienced arbitrators who are called upon to draft such documents.

A. Issues Relating to the Process

Although some people may view the mechanics of writing an award to be a purely logistical issue, process-related concerns can affect not only the method used to write an award but also its content and structure. The following subsections therefore consider those features that appear to have the most significant effect on the reasoning and form of an arbitral award. The list includes matters involving multi-person tribunals, dissenting and concurring opinions, ruling in

[104] *See* Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. Legal Stud. 121, 126 (2009); Don Peters, *It Takes Two to Tango, and to Mediate: Legal Cultural and Other Factors Influencing United States and Latin American Lawyers' Resistance to Mediating Commercial Disputes*, 9 Rich. J. Global L. & Bus. 381, 398 n.124 (2010).
[105] *See* Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 Ann. Rev. L. & Soc. Sci. 171, 177 (2005). The quality of international awards may be one reason why parties traditionally complied with the final decision of the arbitrators. *See* Born, *supra* note 2, at 3410 (noting most awards are complied with voluntarily). *But see* Strong, *Border Skirmishes*, *supra* note 4, at 2-3, 5-6 (noting increase in judicial procedures regarding arbitration).
[106] *See* Strong, Guide, *supra* note 1, at 22.
[107] *See supra* note 5 and accompanying text.
[108] *See* Hart v. Massanari, 266 F.3d 1155, 1176-77 (9th Cir. 2001); Domnarski, *supra* note 9, at 36; Henry G. Stewart, *Trials of a Neophyte Neutral: The Transition From Full-Time Advocate*, 58 Disp. Resol. J. 39 (Nov. 2003-Jan.2004) ("[D]eciding cases and writing opinions take much longer than I ever anticipated."); Van Detta 1, *supra* note 18, at 55.

the alternative or on ancillary points, conducting independent legal or factual research, and appellate awards.

1. Multi-person tribunals

Not surprisingly, the process of writing an award differs depending on how many arbitrators are involved.[109] As a rule, sole arbitrators have more flexibility in drafting a reasoned award than members of an arbitral tribunal, since sole arbitrators have only their own consciences to consider.[110] In cases involving multiple arbitrators, the drafting process often includes a certain amount of compromise and negotiation.[111]

Every tribunal approaches the process of writing judgments differently.[112] Usually the chair takes responsibility for putting together the initial draft, although that approach can be changed in any way that suits the arbitrators, such as by giving different panel members different sections to write.[113] Regardless of who has the responsibility for writing a particular section of an award, that person "does not have the luxury of writing independently, but should approach the . . . task so that it will reflect the collective mind of the collegial body that makes up the panel."[114]

Once the first draft is written and circulated, the panel considers the precise language of the proposed award.[115] Ideally, arbitrators who disagree with particular elements should not only identify the substantive grounds of concern but should also offer alternative language for the drafter to consider.[116] This process is critically important because the award must reflect the views of a majority of the tribunal.[117] If the arbitrators can reach only a narrow consensus, then the resulting award will have to be equally narrow.[118]

As the process of deliberation and drafting continues, it may become apparent that consensus cannot be reached on certain points.[119] In those cases, the majority may be able to

[109] *See* Lloyd et al., *supra* note 3, at 25-26.
[110] *See* Ruggero J. Aldisert et al., *Opinion Writing and Opinion Readers*, 31 CARDOZO L. REV. 1, 12-14 (2009).
[111] *See id.* (discussing how the deliberation process affects how an opinion is written); Tom Cobb & Sarah Kaltsounis, *Real Collaborative Context: Opinion Writing and the Appellate Process,* 5 J. ASS'N LEGAL WRITING DIRECTORS 156, 158-63 (2008); Lloyd et al., *supra* note 3, at 25-26.
[112] *See* DOMNARSKI, *supra* note 9, at 32-34; Daniel J. Bussell, *Opinions First – Argument Afterward*, 61 UCLA L. REV. 1194, 1196-97 (2014); Goodwin Liu, *How the California Supreme Court Really Works: A Reply to Professor Bussell*, 61 UCLA L. REV. 1246, 1250-58 (2014); Lloyd et al., *supra* note 3, at 25-26.
[113] *See* Lloyd, *supra* note 3, at 38-39; Lloyd et al., *supra* note 3, at 25-26.
[114] GEORGE, *supra* note 73, at 279.
[115] *See* Aldisert et al., *supra* note 110, at 12-14; Lloyd et al., *supra* note 3, at 25-26.
[116] GEORGE, *supra* note 73, at 281; *see also* Lloyd et al., *supra* note 3, at 26. Criticism should also be limited to matters of substance rather than style. *See* GEORGE, *supra* note 73, at 282.
[117] *See* Aldisert et al., *supra* note 110, at 14; Lloyd et al., *supra* note 3, at 26.
[118] *See* Aldisert et al., *supra* note 110, at 14; Lloyd et al., *supra* note 3, at 26.
[119] *See* Lloyd et al., *supra* note 3, at 26.

overcome the need for a separate opinion by taking the dissenting arbitrator's views into account in the award itself or by going forward with an award that is signed by only two members of the tribunal.[120] However, in some cases, a dissenting panelist may insist on submitting an individual opinion.[121] In those situations, the tribunal will need to refer to the arbitral rules governing the dispute to determine the availability and treatment of separate opinions.[122]

2. Dissenting and concurring opinions

The debate about individual opinions in international commercial arbitration has become increasingly heated in recent years.[123] Although most rule sets permit (or at least do not explicitly disallow) dissents and concurrences in situations where an arbitrator feels he or she cannot join the majority opinion as a matter of conscience, the strong cultural preference in international commercial arbitration is for a single majority award, since a separate opinion is both expensive to draft and largely unnecessary, given that most awards in international commercial arbitration are not published.[124]

Much of the push for dissenting opinions seems to have come from the investment realm, where there is more of an incentive for arbitrators to write separate opinions.[125] For example, a large percentage of investment awards are published in whole or in part, and an arbitrator may wish to write separately so as to help develop the type of "soft precedent" that is said to exist in treaty-based arbitration.[126] Alternatively, an arbitrator may want to set the record

[120] *See* Manuel Arroyo, *Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal*, 25 ASA BULL. 437, 459-64 (2008); Lloyd et al., *supra* note 3, at 26.
[121] *See* Arroyo, *supra* note 120, at 459-64.
[122] *See* C. Mark Baker & Lucy Greenwood, *Dissent – But Only If You Really Feel You Must: Why Dissenting Opinions in International Commercial Arbitration Should Only Appear in Exceptional Circumstances*, 7 DISP. RESOL. INT'L 31, 34 (May 2013). For example, the CIETAC Arbitration Rules indicate that dissenting opinions may be written but will not form part of the award. *See* CIETAC Arbitration Rules, *supra* note 50, art. 49. The CAS Arbitration Rules adopt a similar approach. *See* CAS Arbitration Rules, *supra* note 86, art. 46.
[123] *See* Arroyo, *supra* note 120, at 437; Baker & Greenwood, *supra* note 122, at 31-40; Ilhyung Lee, *Introducing International Commercial Arbitration and Its Lawlessness, by Way of the Dissenting Opinion*, 4 CONTEMP. ASIA ARB. J. 19 (2011); Alan Redfern, *Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, *in* ARBITRATION INSIGHTS: TWENTY YEARS OF THE ANNUAL LECTURE OF THE SCHOOL OF INTERNATIONAL ARBITRATION 367, 373-76 (Loukas Mistelis & Julian D.M. Lew eds., 2007); Jacques Werner, *Dissenting Opinions: Beyond Fears*, 9 J. INT'L ARB. 23, 24-25 (1992); *see also* Pedro J. Martinez-Fraga & Harout Jack Samra, *A Defense of Dissents in Investment Arbitration*, 43 U. MIAMI INTER-AM. L. REV. 445, 450-63 (2012).
[124] *See* Arroyo, *supra* note 120, at 458; Baker & Greenwood, *supra* note 122, at 31-40; Redfern, *supra* note 123, at 379-92 (suggesting the current approach is too lenient toward allowing dissents); van den Berg, *supra* note 8, at 821 n.4; *see also* GEORGE, *supra* note 73, at 282, 326-30.
[125] *See* Baker & Greenwood, *supra* note 122, at 39-40.
[126] *See* Kaufmann-Kohler, *supra* note 70, at 361-78; van den Berg, *supra* note 8, at 823.

straight as to his or her views on a particular matter so as to increase the likelihood of winning future appointments.[127]

Although most of the commentary in international arbitration focuses on dissenting opinions, it is also possible for an arbitrator to write a concurring opinion.[128] Concurrences are seen even less frequently than dissents in the international commercial context, since there is little need for such awards in a private, non-precedential system of justice. However, arbitrators in investment proceedings occasionally write concurring opinions for reasons similar to those applicable to dissenting opinions.[129]

Some people oppose the use of individual opinions in international commercial arbitration because such opinions are said to threaten the legitimacy of arbitration by demonstrating a lack of unanimity among the members of the arbitral panel.[130] However, other people believe that a well-written dissent or concurrence can be a positive feature, since such opinions can be seen as advancing the legal debate, so long as the individual opinion is written in a respectful manner.[131] Thus, sarcasm and *ad hominem* attacks should play no role in a dissent, just as they should not in a majority award.[132]

3. Ruling in the alternative or on ancillary points

Another issue that occasionally arises involves the question of whether an arbitrator can or should rule in the alternative or on ancillary points.[133] On the one hand, providing alternative grounds for a decision can be confusing and hence inefficient to the extent that parties who read the award are not able to discern the precise basis on which the holding is founded.[134] On the other hand, reasoning in the alternative can increase efficiency by allowing an appellate tribunal or enforcing court to uphold the decision on the alternative rationale, thereby avoiding the

[127] *See* Martinez-Fraga & Samra, *supra* note 123, at 467-70; van den Berg, *supra* note 8, at 821, 830-31.
[128] Concurrences arise when the decision-maker agrees with the outcome reached by the majority but arrives at that result through different analytical means. *See* van den Berg, *supra* note 8, at 837; *see also* SUPREME COURT OF OHIO, WRITING MANUAL: A GUIDE TO CITATIONS, STYLE AND JUDICIAL OPINION WRITING 153-54 (2012) (noting various types of concurrences), *available at* http://www.supremecourt.ohio.gov/ROD/manual.pdf.
[129] *See* Alemanni v. Argentine Republic, ICSID Case No. ARB/07/8, Concurring Opinion of Mr. J. Christopher Thomas, Q.C., Nov. 17, 2014, *available at* http://www.italaw.com/sites/default/files/case-documents/italaw4064.pdf; van den Berg, *supra* note 8, at 833.
[130] *See* GEORGE, *supra* note 73, at 329; van den Berg, *supra* note 8, at 833.
[131] *See* GEORGE, *supra* note 73, at 281; van den Berg, *supra* note 8, at 825.
[132] *See* GEORGE, *supra* note 73, at 281; van den Berg, *supra* note 8, at 832. Observers have suggested that the increasing use of sarcasm in the judicial context has been detrimental to the public's faith in the courts. *See* Debra Cassens Weiss, *Scalia Tops Law Prof's Sarcasm Index*, ABA L.J. (Jan. 20, 2015).
[133] "An alternative ground used to support a decision is not dictum." GEORGE, *supra* note 73, at 331.
[134] Avoidance of confusion is another reason why judges and arbitrators do not always outline the entire basis for their decision. *See* Konrad Schiermann, *A Response to the Judge As Comparativist*, 80 TULANE L. REV. 281, 287-90 (2005).

possibility of non-enforcement.[135] Providing multiple reasons why a particular party prevails can also provide additional persuasive power in cases where a single rationale might appear insufficient or overly legalistic to the losing party.[136]

Arbitrators might also wonder whether and to what extent awards can or should discuss matters that technically do not need to be decided in order to reach a final conclusion.[137] Normally, such rulings (referred to as *dicta* in common law countries) are unnecessary and unwise in arbitration, since the arbitrator's jurisdiction only extends to the parties themselves and the normal rationales justifying the use of *dicta* do not apply in arbitration.[138] However, some experts have suggested that "there may be occasions when an arbitral tribunal will acknowledge that the parties themselves . . . expect to know the views of the arbitral tribunal on a point of law or of fact which, strictly, does not have to be decided."[139] In those cases, an advisory ruling might be appropriate, so long as that discussion "cannot be used to undermine the central reasoning" of the award.[140]

4. Independent legal or factual research

Another process-oriented question that is often raised involves the extent to which arbitrators may conduct independent research into legal or factual issues.[141] The issue of independent legal research has been addressed extensively in the judicial context, where various authorities have suggested that

> [a] competent judge is not so naive to believe that briefs will always summarize the relevant facts and the applicable law in an accurate fashion. A competent judge uses the briefs as a starting line and not the finish line for his or her own independent research. Not only does a good judge confirm that the authorities

[135] Although this rationale is more important in the judicial context, where substantive appeals are common, arbitration also involves various types of post-award review. *See supra* notes 67-91 and accompanying text.

[136] For example, an arbitrator might find it helpful to indicate that a party who has lost because the claim is inadmissible for some reason (such as the running of the relevant statute of limitations) would also have lost on the merits. *See* Lloyd et al., *supra* note 3, at 33.

[137] *See id.* at 28.

[138] The primary use of *dicta* is to suggest how a court would rule in the future on certain facts not presently at issue. *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta,* 57 STAN. L. REV. 953, 958 (2005). Courts use *dicta* to guide the future behavior of the parties and those who are similarly situated, thereby reducing the amount of future litigation and increasing judicial efficiency. *See id.* at 1000. Although *dicta* may be useful to the parties in cases where they are in a longstanding relationship that might give rise to future disputes that are somewhat similar to the one in arbitration, none of the other rationales are relevant in the arbitral context.

[139] Lloyd et al., *supra* note 3, at 28.

[140] *Id.*

[141] *See* Phillip Landolt, *Arbitrators' Initiatives to Obtain Factual and Legal Evidence*, 28 ARB. INT'L 173, 173 (2012).

> cited actually support the legal propositions in the briefs, a good judge also makes sure that the authorities continue to represent a correct statement of the law. A member of the bench who fails to independently develop his or her own legal rationale does so at his or her own peril and the peril of the litigants.[142]

Some commentators have gone so far as to say that "[w]hile the briefs prepared by the parties will be useful, there is no substitute for independent research."[143] However, other observers have criticized independent judicial research because it denies the parties of "the opportunity for cross-examination, rebuttal, or the introduction of further testimony."[144] Nevertheless, experts agree that "the prerogative of the judge to search the case law independently and to consult legal treatises is soundly entrenched, presumably to promote uniformity and accuracy in legal interpretation."[145]

The debate about independent legal research also exists in the arbitral realm, although it is colored by the fact that arbitrators do not have the same duty that judges do to ensure the proper development of the law.[146] The contractual nature of arbitration has also led various commentators to argue that parties have a heightened right to develop their own cases and that concerns about "the opportunity for cross-examination, rebuttal, or the introduction of further testimony" should lead arbitrators to avoid undertaking any form of independent legal research.[147]

After weighing these competing interests, most authorities have concluded that arbitrators have the right to conduct independent research but that they should exercise that right in a limited fashion.[148] In particular, arbitrators should ask for supplemental briefing on any question of law that was not initially raised by the parties in their submissions.[149] This approach

[142] Camacho v. Trimble Irrevocable Trust, 756 N.W.2d 596, 298-99 (Wisc. Ct. App. 2008); *see also* Hampton v. Wyant, 296 F.3d 560, 564-65 (7th Cir. 2002).
[143] GEORGE, *supra* note 73, at 199.
[144] Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263, 1296 (2007) (noting that "[a] few judges and commentators have advocated against" independent legal research).
[145] *Id.*
[146] *See* GEORGE, *supra* note 73, at 275; Aldisert et al., *supra* note 110, at 14; Audley Sheppard, *Mandatory Rules in International Commercial Arbitration – An English Perspective*, 18 AM. REV. INT'L ARB. 121, 144 (2007) (discussing the concept of *jura novit curia* (*iura novit curia*) in international commercial arbitration).
[147] Cheng, *supra* note 144, at 1296; Marrow, *supra* note 86, at 24-30. *But see* Gaitis, *supra* note 9, at 17 (suggesting that "[t]he reasoning section of reasoned awards . . . , on occasion, contains citations to legal authorities that were not presented to the tribunal by the parties").
[148] *See* International Law Association, International Commercial Arbitration Committee, *Final Report – Ascertaining the Contents of the Applicable Law in International Commercial Arbitration* (2008) [hereinafter ILA Report]; Gaitis, *supra* note 9, at 17; Landolt, *supra* note 141, at nn.4-6, 39; Marrow, *supra* note 86, at 30; Sheppard, *supra* note 146, at 144-45.
[149] *See* ILA Report, *supra* note 148; Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, 14 ARB. INT'L 157, n.5 (1998); Gaitis, *supra* note 9, at 17; Landolt, *supra* note 141, at nn.4-6, 39; Marrow, *supra* note 86, at 30; Sheppard, *supra* note 146, at 144-45.

is justified on the grounds that it increases the likelihood that the arbitrator will arrive at the correct conclusion of law while simultaneously avoiding surprise and allowing the parties to take the lead in developing their cases.[150] However, concerns about surprise and autonomy are not implicated with respect to legal materials that have been cited by the parties in their submissions. Therefore, an arbitrator may and perhaps should "confirm that the authorities cited actually support the legal propositions in the briefs" and ensure that the authorities "continue to represent a correct statement of the law."[151]

The situation involving independent factual research is somewhat different.[152] For example, analogies to judicial processes are largely unhelpful, since "the rules governing independent [factual] research are astonishingly unclear" and the bench is sharply divided as to what the best course of action is.[153] To the extent that any sort of consensus exists, it appears to suggest that judges should conduct independent factual research very rarely and only in the interests of justice.[154]

Although the issue has seldom been discussed in the arbitral realm, those authorities that have considered the matter have indicated that independent factual research should be treated in the same way as independent legal research.[155] Thus, an arbitrator who has discovered a factual issue of relevance should ask the parties to provide further evidentiary submissions on that matter so as to avoid the possibility of a subsequent challenge.[156]

5. Appellate awards

Although arbitral appeals are not at this point a frequent occurrence, the amount of commentary and institutional activity currently being dedicated to this issue suggests that such procedures may become relatively routine in the future.[157] If that should indeed happen, the question then

[150] *See* A v. B, Tribunal Fédéral, Ière Cour de Droit Civil, 4A_554/2014 (Apr. 15, 2015), 33 ASA BULL. 406, 406–15 (2015) (discussing situation where "plaintiff applied to the Supreme Court to have an arbitral award annulled, alleging that the arbitral tribunal had violated due process by relying in its award on an unpredictable application of the law" and concluding "that arbitral tribunals are free to apply the law (*iura novit curia*), subject only to a prohibition on taking the parties by surprise"). Concerns exist that an arbitrator who has exceeded his or her power to conduct independent research could create a situation where the award would be unenforceable. *See* Landolt, *supra* note 141, at nn.39, 64-85.
[151] Camacho v. Trimble Irrevocable Trust, 756 N.W.2d 596, 298-99 (Wisc. Ct. App. 2008); *see also* Hampton v. Wyant, 296 F.3d 560, 564-65 (7th Cir. 2002).
[152] *See* Cheng, *supra* note 144, at 1297; Landolt, *supra* note 141, at nn.1-2.
[153] Cheng, *supra* note 144, at 1267; *see also* Hernandez v. State, 116 S.W.3d 26, 32 (Tx. Ct. Crim. App. 2003) (Keller, P.J., concurring); GEORGE, *supra* note 73, at 276.
[154] *See* GEORGE, *supra* note 73, at 276. In fact, empirical research suggests this is indeed what happens. *See* Joshua Karton, *The Arbitral Role in Contractual Interpretation*, 6 J. INT'L DISP. SETTLEMENT 4, nn.37-38 (2015).
[155] *See* Landolt, *supra* note 141, at nn.7-8, 91-94; *see also* Sheppard, *supra* note 146, at 144-45.
[156] *See* Landolt, *supra* note 141, at nn.7-8; *see also* Cremades, *supra* note 149, nn.17-26.
[157] *See* M. Scott Donahey, *A Proposal for an Appellate Panel for the Uniform Domain Name Dispute Resolution Policy*, 18 J. INT'L ARB. 131, 131-34 (2001); Christian A. Garza & Christopher D. Kratovil, *Contracting for Private Appellate Review of Arbitration Awards*, 19 APP. ADVOCATE 17 (2007)

arises as to whether an appellate award should be written differently than an award at first instance.[158] Unfortunately, there is no real analysis of this issue from the arbitral perspective. Indeed, most of the appellate rules that are currently in place do not discuss the form of the appellate award at all.[159]

Fortunately, a functional analysis provides some useful insights into this particular concern.[160] For example, if an appellate tribunal is seen as functionally equivalent to an appellate court, then an appellate award might need to be written slightly differently than an award at first instance, just as an appellate opinion is written slightly differently than a trial court decision.[161]

Appellate opinions differ from decisions at first instance in a number of ways, at least in the judicial context.[162] Many of these differences arise because appellate judges typically have an obligation to achieve an outcome that is not only appropriate in the dispute at bar (justice *in personam*) but also in any similar cases that may arise in the future (justice *in rem*).[163] However, this feature does not appear to translate to the arbitral realm, since the duty to provide justice *in*

(discussing various rule sets); Erin E. Gleason, *International Arbitral Appeals: What Are We So Afraid Of?* 7 PEPP. DISP. RESOL. L.J. 269, 286-87 (2007); Roger B. Jacobs, *Compared and Contrasted: Skepticism and Promise in the Major Providers' Appellate Arbitration Procedures,* 33 ALT. TO HIGH COST LITIG. 19 (Feb. 2015); Margie-Lys Jamie, *An Appellate Body in Treaty-Based Investment Arbitration: Redefining the Investor-State Dispute Settlement Mechanism*, 21 SPAIN ARB. REV. / REVISTA DEL CLUB ESPAÑOL DEL ARBITRAJE 93, 94-97 (2014); Platt, *supra* note 75, at 547-52; Mauro Rubino-Sammartano, *An International Arbitral Court of Appeal as an Alternative to Long Attacks and Recognition Proceedings*, 6 J. INT'L ARB. 181, 181-88 (1989); Hon. David B. Saxe, *An Appellate Mechanism in Arbitration,* 86 N.Y. ST. B.J. 44, 45 (Nov./Dec. 2013) (supporting arbitral appeals in some cases); Ten Cate, *supra* note 6, at 1111. The debate has been particularly pitched in the context of investment arbitration, which raises somewhat different questions due to the quasi-public nature of investor-state disputes. *See* Barry Appleton, *The Song is Over: Why It's Time to Stop Talking About an International Investment Arbitration Appellate Body*, 107 AM. SOC'Y INT'L L. PROC. 23, 23 (Apr. 3-6, 2013) (discussing an arbitral appellate procedure created by international treaty); David A. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges,* 39 VAND. J. TRANSNAT'L L. 39 (2006); Ian Laird & Rebecca Askew, *Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System?* 7 J. APP. PRAC. & PROCESSES 283, 286-87 (2005).

[158] *See supra* note 88 (discussing nomenclature regarding arbitral decisions below).

[159] *See* AAA Appellate Rules, *supra* note 87; CPR Appellate Rules, *supra* note 87; *see also* Platt, *supra* note 75, at 547-52 (discussing arbitral appeals under the Spanish Arbitration Act, the Rules of the Spanish Court of Arbitration, the Rules of the European Court of Arbitration and the International Arbitration Chamber of Paris (Chambre Arbitrale de Paris)). The one organization that does refer to the form of the appellate award does so only at a very general level, simply stating that "[t]he Panel's decision will consist of a concise written explanation, unless all Parties agree otherwise." *See* JAMS Appellate Rules, *supra* note 87, Rule D.

[160] *See* Michaels, *supra* note 56, at 342, 357; *see also supra* note 56 and accompanying text.

[161] *See* GEORGE, *supra* note 73, at 257 (considering appellate opinions in court).

[162] *See* Strong, *Writing*, *supra* note 6, at __.

[163] *See* GEORGE, *supra* note 73, at 275; Aldisert et al., *supra* note 110, at 14.

rem is directly related to the role that appellate opinions play in developing the rule of law and arbitral awards do not generate precedent in the same way that judicial opinions do.[164]

Appellate judges also have a heightened duty to include a detailed description of the procedural history of the dispute so as to establish the standard, scope and propriety of appellate review.[165] This feature could also be necessary in arbitration. However, a number of questions exist regarding the standard and scope of appellate review in arbitration.

Matters of scope are addressed, at least in some degree, by most appellate rule sets. Thus, for example, the American Arbitration Association (AAA) indicates in its rules on appellate arbitration that "[a] party may appeal on the grounds that the Underlying Award is based upon: (1) an error of law that is material and prejudicial; or (2) determinations of fact that are clearly erroneous."[166] Other arbitral organizations focus on similar criteria.[167] However,

[164] *See* Strong, *Writing*, *supra* note 6, at __; *see also supra* notes 68-69 and accompanying text. Although civil law jurisdictions do not adhere to precedent in quite the same way that common law countries do, civil law countries still recognize the need to develop consistent interpretations of the law. *See* DE CRUZ, *supra* note 72, at 70.

[165] *See* Strong, *Writing*, *supra* note 6, at __.

[166] AAA Appellate Rules, *supra* note 87, Rule A-10. The AAA further indicates that

> (a) Within thirty (30) days of service of the last brief, the appeal tribunal shall take one of the following actions:
> 1. adopt the Underlying Award as its own, or,
> 2. substitute its own award for the Underlying Award (incorporating those aspects of the Underlying Award that are not vacated or modified), or,
> 3. request additional information and notify the parties of the tribunal's exercise of an option to extend the time to render a decision, not to exceed thirty (30) days.
>
> The appeal tribunal may not order a new arbitration hearing or send the case back to the original arbitrator(s) for corrections or further review.

Id. Rule A-19.

[167] Thus, the CPR rules on appellate procedure state that

> 8.2 If the Tribunal hears the Appeal, it may issue an Appellate Award modifying or setting aside the Original Award, but only on the following grounds:
> a. That the Original Award (i) contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis, or (ii) is based upon factual findings clearly unsupported by the record; or
> b. That the Original Award is subject to one or more of the grounds set forth in Section 10 of the Federal Arbitration Act for vacating an award. The Tribunal does not have the power to remand the award.
>
> 8.3 If the Tribunal does not modify or set aside the Original Award pursuant to Rule 8.2 above, it shall issue an Appellate Award approving the Original Award and the Original Award shall be final as provided in Rule 8.6 below.

CPR Appellate Rules, *supra* note 87, Rule 8.

these provisions could be difficult to implement in practice, given the problems associated with distinguishing between findings of fact and conclusions of law.[168]

The situation is even more challenging with respect to questions relating to the standard of review, since only one arbitral organization – JAMS – addresses the standard of review in its appellate rules.[169] As a result, it is by no means clear in most cases whether and to what extent appellate arbitrators should defer to arbitrators at first instance as opposed to simply considering the matter *de novo*. In judicial appeals in the United States, the appropriate standard is usually determined by reference to the matter under review, with the three most frequently used standards – clear error, abuse of discretion and plenary (*de novo*) review – typically relating to evidentiary, discretionary and legal matters, respectively.[170] However, recent decisions from the U.S. Supreme Court have made that standard increasingly difficult to apply.[171] Other national laws could be similarly problematic.

B. Issues Relating to the Framework

As important as process-oriented issues are, perhaps the most challenging issue in this area of law involves the framework for reasoned awards. The following sub-sections therefore discuss various aspects of a fully reasoned award, including core considerations relating to scope, structure, and, to a lesser extent, style.

[168] *See* Miller v. Fenton, 474 U.S. 104, 113-14 (1985); *see also supra* notes 54-55 and accompanying text.

[169] The JAMS rules on appellate procedures state

> The Appeal Panel will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision. The Appeal Panel will respect the evidentiary standard set forth in Rule 22(d) of the JAMS Comprehensive Arbitration Rules. The Panel may affirm, reverse or modify an Award. The Panel may not remand to the original arbitrator(s), but may re-open the record in order to review evidence that had been improperly excluded by the Arbitrator(s) or evidence that is now necessary in light of the Panel's interpretation of the relevant substantive law. . . . The Panel's decision will consist of a concise written explanation, unless all Parties agree otherwise.

JAMS Appellate Rules, *supra* note 87, Rule D. However, JAMS does not address the scope or trigger for review. *See id.*

[170] *See* Aldisert et al., *supra* note 110, at 30. Notably, the standard of review differs from the scope of review. *See* GEORGE, *supra* note 73, at 297.

[171] Recent decisions from the U.S. Supreme Court have permitted, if not required, *de novo* analysis of certain mixed questions of law and fact. *See* Russell M. Coombs, *A Third Parallel Primrose Path: The Supreme Court's Repeated, Unexplained, and Still Growing Regulation of State Courts' Criminal Appeals*, 2005 MICH. ST. L. REV. 541, 547-48. However, distinguishing questions of law from questions of fact is quite challenging. *See Miller*, 474 U.S. at 113-14; *see also supra* notes 54-55 and accompanying text.

1. Style

Although this Article does not address issues relating to diction, sentence structure, punctuation and the like, some so-called elements of style have a significant effect on the substance of an award, since they affect not just the mode of an author's communication but the ability to communicate effectively.[172] Since the first duty of an arbitrator is to produce a clear, internationally enforceable award, it is necessary to consider a few stylistic concerns.[173]

The first point involves the audience for arbitral awards.[174] Because the parties "have an all-pervasive interest" in the outcome of the dispute,[175] conventional wisdom suggests that arbitrators should direct their statements primarily if not exclusively to the litigants.[176]

This conclusion has significant repercussions for the style that an arbitrator adopts when writing an award, since parties who have taken the trouble and expense of contracting for a reasoned award want to know not only who won, but why.[177] Most parties do not have extensive training in the law, which means that arbitrators need to write awards that are "clear, logical, unambiguous, and free of" legal jargon.[178] Indeed, many experts have recognized that "[t]he mark of a well-written opinion is that it is comprehensible to an intelligent layperson."[179] Furthermore, awards "should not . . . be turned into briefs or vehicles for advocacy."[180]

Although arbitral awards are directed primarily to the parties, arbitrators need to keep other potential audience members in mind. For example, an award may need to be read by a national court judge as part of a collateral or enforcement proceeding.[181] Not all judges are as knowledgeable about the arbitral process as they could be, which suggests that an arbitrator may need to explain the nuances of the governing law and arbitral procedure so as to avoid any judicial misunderstandings.[182] The possibility of judicial confusion may be heightened in cases

[172] *See supra* note 47 and accompanying text.
[173] *See* Lloyd et al., *supra* note 3, at 20-21.
[174] Knowing one's audience is one of the fundamental rules of good writing, regardless of context. *See* Jeffrey A. Van Detta, *The Decline and Fall of the American Judicial Opinion, Part II: Back to the Future From the Roberts Court to Learned Hand – Segmentation, Audience, and the Opportunity of Justice Sotomayor,* 13 BARRY L. REV. 29, 34 (2009) [hereinafter Van Detta 2].
[175] Aldisert et al., *supra* note 110, at 17.
[176] *See* Marx, *supra* note 5, at 23 (expanding the audience slightly); *see also* Aldisert et al., *supra* note 110, at 17 (discussing judicial opinions).
[177] *See* Lloyd, *supra* note 3, at 40.
[178] Aldisert et al., *supra* note 110, at 18. Those who are writing an award in a second language often must take additional steps to make sure that they are using foreign legal terms properly and adhering to party expectations regarding the form and content of the award. *See* STRONG ET AL., *supra* note 11, ch. 1; Lloyd, *supra* note 3, at 39.
[179] FEDERAL JUDICIAL CENTER, JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES 6 (2d edn, 2013) [hereinafter FJC MANUAL], *available at* www.fjc.gov.
[180] *Id.* at 5.
[181] *See* Lloyd et al., *supra* note 3, at 28.
[182] Judges are often confused about the special nature of international commercial arbitration. *See* STRONG, GUIDE, *supra* note 1, at 1. Numerous national and international organizations are taking steps to address this issue. *See* S.I. Strong, *Improving Judicial Performance in Matters Involving International*

where the award is being enforced across the common law-civil law divide. In those situations, the arbitrator may wish to be particularly careful about making sure that the award includes various elements that will be familiar to the enforcing judge.[183]

An award may also be read by various private parties.[184] For example, an insurer may need to read an award to determine whether and to what extent any damages granted by the arbitrator fall within the terms of a business insurance policy.[185] In these sorts of cases, an arbitrator may want to be particularly clear about the nature of the underlying financial calculations, including issues relating to taxes, interest and costs.[186]

The second stylistic issue to consider involves consistency and coherence in relation to the citation of legal authorities.[187] Advocates are often advised to take their audience into account when drafting written submissions in international commercial arbitration and, in particular, to make sure that the presentation and discussion of legal materials take into account the various differences between the civil and common law.[188] The diversity of potential audience members for international commercial awards suggests that arbitrators should follow this general rule as well, since there is no way for the author of an international award to anticipate all future uses of an award or the legal background of all potential audience members.[189] As a result, international arbitrators must be very familiar with the role that different legal authorities play in arbitration and the various ways in which common law and civil law courts approach the citation, interpretation and application of legal materials.[190]

The third and final stylistic issue to mention involves the use of headers. Commentators have noted that the length of international awards makes it useful for arbitrators to make generous use of headings, sub-headings and other types of subdivisions so as to increase the reader's understanding of the structure of the award.[191] It is also often "convenient to number the paragraphs or groups of paragraphs to facilitate cross-referencing within the award."[192]

Arbitration, *in* SELECTED TOPICS IN INTERNATIONAL ARBITRATION: LIBER AMICORUM __ (Julio César Betancourt ed., forthcoming 2015).

[183] *See* Lloyd et al., *supra* note 3, at 31; *see also infra* notes 187-90 and accompanying text.

[184] *See* Lloyd, *supra* note 3, at 41.

[185] *See* Lloyd et al., *supra* note 3, at 29.

[186] *See id.* at 33-34.

[187] *See* Aldisert et al., *supra* note 110, at 18.

[188] *See* STRONG, RESEARCH, *supra* note 8, at 9-37 (discussing role of legal authority in international commercial arbitration); S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. INT'L ARB. 119, 130-45 (2009) [hereinafter Strong, *Sources*] (same).

[189] *See supra* notes 76-85 and accompanying text.

[190] STRONG, RESEARCH, *supra* note 8, at 9-37 (discussing role of legal authority in international commercial arbitration); Karton, *supra* note 154, at n.6; *see also* Strong, *Sources*, *supra* note 188, at 130-45 (same); STRONG ET AL., *supra* note 11, at chs. 4-6 (discussing the interpretation and use of legal authority in common law and civil law jurisdictions, particularly in Spanish- and English-speaking countries).

[191] *See* Fontaine, *supra* note 3, at 36; *see also supra* note 65 and accompanying text.

[192] Fontaine, *supra* note 3, at 36.

2. Scope

One of the first things that an arbitrator must do when sitting down to draft an award is decide the scope of the analysis.[193] Conventional wisdom suggests that a reasoned award should include a full discussion of "the nature of the case, the issues, the facts, the law applicable to the facts, and the legal reasoning applied to resolve the controversy."[194] This type of content is necessary because the award "is the authoritative answer to the questions raised by the [arbitration] . . . [and] should explain the reasons upon which the [award] is to rest."[195]

Although this description may be useful as a starting point, it fails to provide sufficiently specific advice to arbitrators faced with drafting a reasoned award. In particular, this type of general guidance fails to recognize how an award can and should be adapted in response to different types of disputes.

i. A taxonomy of arbitral disputes

When drafting awards, arbitrators from both common law and civil law jurisdictions would be well-advised to consider reviewing *The Nature of the Judicial Process,* one of the seminal guides on judicial opinion-writing.[196] In that book, U.S. Supreme Court Justice Benjamin Cardozo suggests that there are three different types of disputes that can result in a judicial ruling and demonstrates how a reasoned ruling can and should be adapted to take those underlying differences into account.[197]

"The first category . . . is comprised of those cases where '[t]he law and its application alike are plain.' Such cases 'could not, with semblance of reason, be decided in any way but one.'"[198] Cardozo's suggestion in these sorts of situations is for the adjudicator to avoid drafting a lengthy written opinion because such a ruling would contribute nothing to the jurisprudence in the field.[199]

Of course, an arbitrator who is contractually bound to render a reasoned award does not have the luxury of refusing to write a reasoned award simply because the outcome of the dispute appears clear on its face.[200] However, Cardozo's analysis provides a useful way for arbitrators to save costs by suggesting that an award addressing this type of dispute need not be very long or very detailed to be considered "reasoned."[201] Indeed, judges addressing matters falling within

[193] *See* FJC MANUAL, *supra* note 179, at 3-7 (discussing scope in the context of judicial opinions).
[194] GEORGE, *supra* note 73, at 32-33.
[195] *Id.* at 32-33.
[196] *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1949).
[197] *See* CARDOZO, *supra* note 196, at 164-65; Aldisert et al., *supra* note 110, at 8.
[198] Aldisert et al., *supra* note 110, at 8-9 (quoting CARDOZO, *supra* note 196, at 164-65).
[199] *See* CARDOZO, *supra* note 196, at 164-65; Aldisert et al., *supra* note 110, at 8-9.
[200] CARDOZO, *supra* note 196, at 164.
[201] Writing an award can be a time-consuming task and an extremely expensive one in situations where arbitrators are paid by the hour. *See* Stewart, *supra* note 108, at 39 (noting the length of time it takes to write an award).

this first category of cases usually render a summary judgment order that runs no more than a single page in length.[202] While an international award would need to be longer than that due to a number of logistical requirements that arise out of the special nature of international commercial arbitration, an arbitrator could nevertheless be quite succinct in the analytical section and still produce an award that could be considered fully reasoned in the circumstances.[203]

The second category of cases described by Cardozo involves situations

> where "the rule of law is certain, and the application alone doubtful." In such cases,
>
> > [a] complicated record must be dissected, the narratives of witnesses, more or less incoherent and unintelligible, must be analyzed, to determine whether a given situation comes within one district or another upon the chart of rights and wrongs. . . . Often these cases . . . provoke difference of opinion among judges. Jurisprudence remains untouched, however, regardless of the outcome.[204]

In these sorts of situations, Cardozo suggests rendering a non-precedential judicial opinion.[205] On one level, this sort of advice may not seem helpful to arbitrators, since arbitral awards are already considered non-precedential.[206] However, closer examination of the nature of a non-precedential judicial opinion provides useful lessons for international arbitrators.

Judges faced with this second category of cases typically issue a memorandum opinion.[207] These documents are slightly more fulsome than the summary orders used in Cardozo's first category of cases and provide a short description of how the court arrived at its decision, even though they do not include a detailed discussion of the facts or a comprehensive explanation of the legal rationales underlying the decision.[208] Although arbitrators are again bound by their contractual duty to provide a fully reasoned award, Cardozo's taxonomy suggests that analyses in this second category of cases can and should focus on those elements that are most in contention (i.e., the facts) while spending less time on those matters that are not

[202] *See* CARDOZO, *supra* note 196, at 164; Aldisert et al., *supra* note 110, at 10-11; *see also* FJC MANUAL, *supra* note 179, app. B (suggesting that these types of orders include a brief statement of the findings of fact and conclusions of law, but without a detailed explanation of why the court reached the outcome that it did).
[203] *See* Lloyd et al., *supra* note 3, at 29-31 (describing various logistical requirements and basic data needs in international commercial awards); *see also infra* notes 255-56 and accompanying text.
[204] Aldisert et al., *supra* note 110, at 8-9 (quoting CARDOZO, *supra* note 196, at 164-65.
[205] *See* CARDOZO, *supra* note 196, at 164-65; Aldisert et al., *supra* note 110, at 8-9.
[206] *See supra* notes 68-69 and accompanying text.
[207] *See* CARDOZO, *supra* note 196, at 164; *see also* Aldisert et al., *supra* note 110, at 8, 11.
[208] *See* GEORGE, *supra* note 73, at 325-26; Aldisert et al., *supra* note 110, at 11; *see also* FJC MANUAL, *supra* note 179, app. A.

really debatable (i.e., the law).[209] By focusing on what is truly at issue and avoiding the notion that a reasoned award in international commercial arbitration requires exhaustive analysis of every nuance of the dispute, arbitrators can operate in an efficient, timely and cost-effective manner without jeopardizing the enforceability of the award or the parties' interest in understanding how and why the result was obtained.[210] Indeed, a number of civil law legal systems have shown that length has little to do with whether a legal ruling can be considered reasoned.[211]

Cardozo then goes on to discuss his "third and final category" of cases, which is the only one he believes should generate a fully reasoned ruling.[212] This category

> is comprised of cases "where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. . . ." From such cases, each modestly articulating a narrow rule, emerge the principles that form the backbone of a court's jurisprudence and warrant full-length, signed published opinions.[213]

Some aspects of Cardozo's analysis (for example, statements about "the development of the law") do not apply to arbitration.[214] However, Cardozo's description of this third category of cases is nevertheless useful because it helps arbitrators identify those types of disputes that merit a detailed analysis of both the facts and the law.[215] As a result, awards falling into this category will probably be somewhat longer than those in the previous two categories, since the legal and factual issues are both more complicated.[216]

Although Cardozo's taxonomy is useful in distinguishing between different types of disputes, it does not address a number of more detailed issues, such as how a judge or arbitrator is to distinguish between a factual finding and a legal conclusion.[217] That particular analysis is extremely challenging even for experienced decision-makers, since "the appropriate

[209] *See* CARDOZO, *supra* note 196, at 164; *see also* Aldisert et al., *supra* note 110, at 8, 11.
[210] *See* Fontaine, *supra* note 3, at 34. The international legal and business communities have expressed concern about the time it takes many arbitrators to generate their awards. *See* Berwin Leighton Paisner, International Arbitration: Research Based Report on Perceived Delay in the Arbitration Process 15-19 (2012), *available at* https://www.blplaw.com/media/pdfs/Reports/BLP_International_Arbitration_Survey_Delay_in_the_Arbitration_Process_July_2012.pdf.
[211] *See supra* notes 60-63 and accompanying text; *see also* BORN, *supra* note 2, at 3041-42 (noting that "in some instances, longer is not better").
[212] Aldisert et al., *supra* note 110, at 8-9 (quoting CARDOZO, *supra* note 196, at 164-65).
[213] Aldisert et al., *supra* note 110, at 8-9 (quoting CARDOZO, *supra* note 196, at 164-65); *see also* GEORGE, *supra* note 73, at 32-34 (discussing types of judicial writings).
[214] *See supra* notes 68-69 and accompanying text.
[215] *See* CARDOZO, *supra* note 196, at 164-65.
[216] *See supra* notes 198-211 and accompanying text.
[217] *See* CARDOZO, *supra* note 196, at 164-65.

methodology . . . has been, to say the least, elusive."[218] This matter is discussed in more detail in the following subsection.

ii. Distinguishing between factual findings and legal conclusions

When considered in the abstract, distinguishing between factual findings and legal conclusions appears relatively easy. For example, "[f]indings of fact may be defined as those facts which are deduced from the evidence and which are found by the . . . [arbitrator] to be essential to the judgment rendered in the case."[219] Conclusions of law, on the other hand, "are drawn by the . . . [arbitrator] through the exercise of her [or her] legal judgment from those facts he [or she] has found previously as the trier of fact."[220]

As straightforward as these definitions appear, they can be quite challenging to apply in practice.[221] The situation is further exacerbated in the international context by virtue of certain differences between common law and civil law analyses. For example, it has been said that

> [a] civilian system differs from a common law system much as rationalism differs from empiricism or deduction from induction. The civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, "What should we do this time?" and the second asking aloud in the same situation, "What did we do last time?" . . . The instinct of a civilian is to systematize. The working rule of the common lawyer is *solvitur ambulando*.[222]

Another way of describing the differences between the two legal systems is by recognizing that the common law places

> its faith in experience rather than in abstractions. It is a frame of mind which prefers to go forward cautiously on the basis of experience from this case or that case to the next case, as justice in each case seems to require, instead of seeking to refer everything back to supposed universals. It is a frame of mind which is not ambitious to deduce the decision for the case in hand from a proposition formulated universally . . . . It is the . . . habit of dealing with things as they arise

[218] Miller v. Fenton, 474 U.S. 104, 113-14 (1985) (citations omitted); *see also* GEORGE, *supra* note 73, at 235-38 (including examples).
[219] GEORGE, *supra* note 73, at 188 (noting findings of fact are "a form of judicial inquiry").
[220] *Id.* at 189 (noting "[w]hen the judge considers the facts and draws the legal conclusion . . . [the statement] becomes a conclusion of law").
[221] *See Miller*, 474 U.S. at 113-14.
[222] Lord Cooper, *The Common Law and the Civil Law – A Scot's View*, 63 HARV. L. REV. 468, 470 (1950), *as quoted in* ZWEIGERT & KÖTZ, *supra* note 67, at 259.

> instead of anticipating them by abstract universal formulas [as is the case with the civil law].[223]

Differences in the nature of common law and civil law analysis can have a significant effect on how an arbitrator writes an award. Indeed, both the form and the content of an arbitral award will likely be influenced by the legal system with which an arbitrator is most familiar, at least to some extent.[224]

This is not to say that an arbitrator cannot or should not adopt a more blended perspective in appropriate circumstances.[225] In fact, the most successful international arbitrators in the world are renowned for precisely that ability.[226] However, it can be difficult for novice arbitrators to overcome their early training and learn how to reflect an appropriately international perspective in their awards.[227]

Perhaps the best way to explain how this type of comparative methodology can be applied in international commercial arbitration is through an example involving a situation where an arbitrator has been asked to apply the substantive law of a country that not only differs from the law with which the arbitrator is most familiar but that falls on the other side of the common law-civil law divide.[228] In these types of cases, the arbitrator needs to adopt certain comparative legal skills to be sure that he or she is ascertaining, interpreting and applying the appropriate legal standard.[229]

[223] Roscoe Pound, *What Is the Common Law*, *in* THE FUTURE OF THE COMMON LAW 3, 18 (1937), as quoted in ZWEIGERT & KÖTZ, *supra* note 67, at 259.
[224] *See* Lloyd et al., *supra* note 3, at 20. For example, arbitrators from common law jurisdictions often spend a significant amount of time discussing the underlying facts and analyzing legal precedents while arbitrators from civil law jurisdictions focus more heavily on categorizing the type of legal issues at stake during the initial stages of the analysis. *See id.*; *see also* Bergholtz, *supra* note 92, at 42.
[225] This approach can not only be useful in communicating the arbitrator's rationale to the parties, it can be helpful in smoothing the path to enforcement. *See* Lloyd et al., *supra* note 3, at 31 ("If a national court has ever to examine an award, for example for the purposes of recognition or setting aside, it will naturally be less likely to be critical if the reasoning adopts a pattern with which it is familiar.")
[226] *See* Emmanuel Gaillard, *Sociology of International Arbitration*, 31 ARB. INT'L 1, 8 (2015) (listing most popular international arbitrators in the world).
[227] *See* Helena Whalen-Bridge, *The Reluctant Comparativist: Teaching Common Law Reasoning to Civil Law Students and the Future of Comparative Legal Skills*, 58 J. LEGAL EDUC. 364, 368-69 (2008). While an arbitrator should never pretend to be an expert in foreign law, that person cannot ignore the governing law simply because he or she is not qualified in that jurisdiction. However, each arbitrator was intentionally selected so as to be able to bring his or her unique technical or legal skills to bear on the problem at hand, resulting in a more blended analysis of the law and the facts at issue. *See* Cremades, *supra* note 149, at 172; Miles, *supra* note 35, at 39-41. Arbitrators in international commercial arbitration may not only be qualified in a jurisdiction different than the one whose law controls the dispute, they may be qualified as lawyers in no jurisdiction whatsoever. *See id.; see also* BORN, *supra* note 2, at 1679, 1745 (noting that only some jurisdictions require arbitrators to be legally qualified).
[228] *See* Friesen, *supra* note 60, at 3.
[229] *See* Strong, *Sources*, *supra* note 188, at 145-50. Interestingly, parties have been known to require arbitrators to apply common law and civil law principles simultaneously. *See* William W. Park, *Michael Mustill: A Reminiscence*, 31 ARB. INT'L __ (forthcoming 2015) (discussing the *Channel Tunnel Case*,

Thus, for instance, a French-qualified arbitrator who is faced with a dispute governed by U.S. law might want to adopt more of a common law methodology when seeking to ascertain the governing legal principles.[230] In so doing, the arbitrator would likely give considerable weight to case law in his or her deliberations and drafting[231] and might also place a stronger emphasis on factual considerations than he or she would normally do.[232] Finally, the arbitrator might consider discussing how the facts in the case generated the legal principles chosen to govern the dispute.[233]

Similarly, a U.S.-qualified arbitrator faced with a dispute governed by French law might want to approach the dispute from more of a civil law perspective.[234] In so doing, the arbitrator would likely rely heavily on scholarly commentary when interpreting and applying various statutes and would avoid focusing exclusively on case law as a guide to interpretation.[235] Similarly, the arbitrator might interpret legislation from more of a purposive or teleological perspective rather than rely on the four-corners or plain meaning doctrine[236] would perhaps aim to derive the applicable legal standard primarily by reference to various legal principles rather than through factual analogies.[237]

Although this approach may seem complicated and perhaps somewhat confusing to those who have not undertaken such analyses, all of the underlying interpretive techniques are used in both common law and civil law jurisdictions, even if conventional wisdom tends to associate particular methodologies more closely with one or the other of the two legal traditions.[238] Therefore, this approach does not require arbitrators to abandon their longstanding professional expertise but instead encourages them to supplement their analysis by incorporating techniques and authorities that are used and valued in the legal system whose law controls.[239]

Channel Group v. Balfour Beatty Ltd. [1993] Adj. L. R. 01/21, which involved a contract requiring application of common principles of English and French law); *see also* Karton, *supra* note 154, at nn.45-46 (discussing the ICC awards in the *Channel Tunnel Case*, referred to in this example as the *Eurotunnel* cases).

[230] *See* Strong, *Sources*, *supra* note 188, at 145-50; *see also* Karton, *supra* note 154, at nn.185-89.

[231] *See* ZWEIGERT & KÖTZ, *supra* note 67, at 259.

[232] *See id.*

[233] *See id.*

[234] *See id.*; Carl Baudenbacher, *Some Remarks on the Method of Civil Law*, 34 TEX. INT'L L.J. 333, 348-49 (1999) (discussing the hermeneutical nature of contemporary civil law analysis); Friesen, *supra* note 60, at 7-11. One commentator has suggested that that "a civil law perspective on contractual interpretation predominates" in international commercial arbitration. *See* Karton, *supra* note 154, at n.53.

[235] *See* Strong, *Sources*, *supra* note 188, at 145-50; *see also* Karton, *supra* note 154, at nn.185-89.

[236] *See* S.I. Strong, *Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty and Statutory Interpretation in International Commercial Arbitration*, 53 VA. J. INT'L L. 499, 571 (2013).

[237] *See* Strong, *Sources*, *supra* note 188, at 145-50. This is not to say that different interpretive techniques may not lead to different outcomes, since that is obviously the case. *See* Karton, *supra* note 154, at nn.111-22.

[238] *See* Strong, *Sources*, *supra* note 188, at 145-50.

[239] The technique is explained thusly by Bernardo Cremades, a highly esteemed international arbitrator:

Notably, arbitrators cannot hope to hide their evaluative approach, since any and all influences on the arbitrator's analytical methodology will necessarily affect the manner in which the final award is written, both as a matter of style and content.[240] Indeed, commentators have long recognized that the substance of a legal ruling influences the form, as well as the reverse.[241]

3. Structure

i. Required elements

As important as questions of style and scope may be, the real challenge for those charged with writing an arbitral award involves structure. Without a good structural framework, an arbitrator cannot hope to persuade or even inform his or her readers.[242]

Some structural concerns have already been resolved by the international arbitral community.[243] Thus, as noted previously, reasoned awards in international commercial arbitration are usually quite lengthy and tend to adopt an approach reminiscent of judicial opinions generated by common law and certain civil law courts.[244] As a result, international awards are often longer and more formal than arbitral awards rendered in domestic proceedings, even in cases that feature legal and factual issues that are as complicated those arising in the cross-border context.[245]

> [A]rbitrators display their real expertise and professionalism at the time of making their decision, placing aside their individual cultural background. Thus, the truly international arbitrator is one who is immediately able to distinguish what is purely local from that which is outside his own national frontiers and within a globalized economy. His professionalism leads his decision to be independent from the "bag and baggage" of the system or national systems from which he originates: *da mihi factum et tibi dabo ius*. In the final decision, he is not conditioned either by his geographical origin or by education, race, religion or even personal sympathies. Here lies the true professionalism of the international arbitrator who knows how to face the expectations of the parties, who have chosen him for his impartiality and neutrality.

Cremades, *supra* note 149, n.27 (citation omitted).

[240] Bergholtz, *supra* note 92, at 42 (noting that "[i]n the grounds of legal decisions form and substance, procedural form and substantive law, meet"); *see also* STRONG, RESEARCH, *supra* note 8, at 3-7; Baudenbacher, *supra* note 234, at 348-49; Cremades, *supra* note 149, at 161; Friesen, *supra* note 60, at 7-11. Although some commmentators have suggested that arbitrators do not explicitly describe their interpretive approach, that does not mean that the interpretive methodology cannot be gleaned from the structure, style and content of the opinion. *See* Karton, *supra* note 154, at nn.13-29.

[241] *See* Bergholtz, *supra* note 92, at 42.

[242] *See* STRONG & DESNOYER, *supra* note 48, ch. 1.

[243] *See supra* notes 60-63 and accompanying text.

[244] *See* Lloyd et al., *supra* note 3, at 29-31; *see supra* notes 60-61 and accompanying text.

[245] *See* STRONG, GUIDE, *supra* note 1, at 3-6. For example, class arbitrations are often as complex as international commercial arbitrations, with similar amounts in dispute. *See* S.I. Strong, *Does Class*

The length of international awards can be somewhat problematic, given that arbitration is supposed to reduce the time and costs associated with resolving legal disputes and writing a fully reasoned award is often both expensive and time-consuming.[246] Indeed, Gary Born, one of the leading commentators in the field, has recognized that "in some instances, longer is not better."[247]

However, the detailed analysis reflected in many international awards can be defended on several grounds. For example, an arbitrator may perceive a heightened need to explain international commercial arbitration's uniquely blended procedural approach to those who may be unfamiliar with the process.[248] Alternatively, an arbitrator may wish to demonstrate his or her faithfulness to the contractual obligation to produce a reasoned award.[249]

These are both reasonable justifications for longer and more detailed awards. However, the real reason for the length of most international awards may lie in the nature of a reasoned award itself. For example, experts have suggested that an award in international commercial arbitration

> should inform the reader that the arbitral tribunal has acted in a judicial manner, not just in the way in which it heard the dispute but in the manner in which the dispute was decided, i.e., the reasoning must be both thorough and self-sufficient. The award must therefore be – and be seen to be – the product of compliance by the arbitral tribunal with the fundamental principles of the processes by which civil disputes are to be resolved (insofar as they apply to arbitration). Thus the

Arbitration "Change the Nature" of Arbitration? Stolt-Nielsen, AT&T and a Return to First Principles, 17 HARV. NEGOT. L. REV. 201, 262-66 (2012). However, class awards often adopt a different structure and tone than international awards. *Compare* Contractor (Zambia) v. Producer (Zambia), Final Award, ICC Case No. 16484, 2011, XXXIX Y.B. COMM. ARB. 216 (2014) (reflecting an international award) *with* Hausner v. United – Clause Construction Award, AAA Class Arbitration Docket, www.adr.org.

[246] *See* Stewart, *supra* note 108, at 39 (noting the length of time it takes to write an award). Notably, some arbitrators in international commercial arbitration are not paid by the hour. *See* ICC Arbitration Rules, *supra* note 50, Appx. III, art. IV (basing arbitrator's fees on amount in dispute).

[247] BORN, *supra* note 2, at 3041-42.

[248] Enforcing courts often need to assess the fairness of the arbitral procedure, which will be reflected in certain aspects of the award. *See* Lloyd et al., *supra* note 3, at 24-25 ("National courts throughout the world also expect or require certain fundamental principles to be followed by arbitral tribunals, such as the right of a party to know and to be able to deal with the case against it. The award must make it clear that these principles have been observed by the arbitral tribunal and how the tribunal did so."); *see also* New York Convention, *supra* note 78, art. V.

[249] *See* Lloyd et al., *supra* note 3, at 27 ("The arbitral tribunal ought to facilitate voluntary compliance [with an award] by producing an award which explains clearly and persuasively how and why it has arrived at its conclusions."); *see also* Bergholtz, *supra* note 92, at 45, 48 (noting that judges also need to demonstrate their faithfulness with legal authority so as to avoid being perceived as arbitrary). These obligations include the duty to comply with necessary procedural rules as well as the duty to comply with the substantive law chosen explicitly or implicitly by the parties. *See* BORN, *supra* note 2, at 1963-64; Strong, *Procedural Limits*, *supra* note 94, at 1089-1109 (noting the limits on procedural and substantive autonomy in international commercial arbitration).

> arbitral tribunal must allow each party the opportunity to answer the case against it and also any pertinent point raised by the arbitral tribunal on its own initiative, as well as to deal with any fact or allegation brought to the attention of the tribunal.[250]

These requirements have significant ramifications with respect to the structure of the award, as discussed in the next sub-section.

ii. A classical structural framework

As mentioned previously, arbitrators do not need to adhere to any pre-established structural norms when drafting international awards.[251] Instead, arbitrators simply need to fulfill various functional requirements[252] that may be imposed privately, institutionally[253] or as a result of the special nature of arbitration.[254]

A number of these elements are relatively straightforward. For example, an international award should include:

- the names of the arbitrator(s)
- the manner in which the tribunal came to be appointed;
- the names and addresses of the parties (including any company or commercial registration number) and of their legal or other representatives;
- how the dispute arose (and thus why an arbitral award is required);
- the terms of the arbitration agreement (and any variations) – these are best set out in full as they establish the basis for the jurisdiction of the arbitral tribunal; . . .
- the place of the arbitration together with how it came to be chosen;
- the law or rules applicable to the merits of the dispute and whether they were agreed by the parties or decided by the arbitral tribunal (in the latter case, the reasons considered to be appropriate by the arbitral tribunal must be given at some point in the award); . . .
- the procedural rules agreed [by the parties] . . . or determined by the arbitral tribunal;

[250] Lloyd et al., *supra* note 3, at 21.
[251] *See id.* at 20.
[252] *See* BORN, *supra* note 2, at 3037-45.
[253] For example, the ICC has a number of form requirements that may not apply in other types of proceedings. *See* Lloyd et al., *supra* note 3, at 23; *see also* BORN, *supra* note 2, at 3030-37.
[254] For example, an arbitrator must be aware of any requirements imposed as a result of the national law of the seat or by the New York Convention. *See* New York Convention, *supra* note 78; Lloyd, *supra* note 3, at 41. Authorities also suggest that an arbitrator should be aware of any requirements imposed at the place where the award is likely to be enforced. *See* Fontaine, *supra* note 3, at 31-32.

- the language or languages of the arbitration (and any departures therefrom and the reason for any such deviation);
- the principal chronology both of the dispute and of the proceedings . . . ;
- the steps that the arbitral tribunal took, in accordance with the procedural rules, to ascertain the facts of the case;
- the dates of any evidentiary hearings and previous awards; [and]
- the date when the proceedings were closed.[255]

This material, which usually appears at the beginning of the arbitral award, is relatively easy to draft, which obviates the need for further discussion herein.[256] Instead, this Article will focus on issues relating to the arbitrator's legal reasoning and factual analysis, since those are the elements that are the most challenging for both new and experienced arbitrators.[257]

Although very little material exists on how arbitrators should draft the reasoning section of an international award,[258] extensive commentary exists regarding judicial reasoning.[259] While arbitral awards do not necessarily have to reflect the same degree and depth of analysis as judicial decisions and opinions, it nevertheless appears useful to consider the various recommendations made to judges in case the advice is transferrable to arbitration.[260] In so doing, it will of course be necessary to take into account the various functional differences between arbitral awards and judicial rulings.[261]

It is impossible to provide a comprehensive analysis of every type of reasoned analysis, since every nation takes its own particular approach to judicial writing.[262] However, one popular

[255] Lloyd et al., *supra* note 3, at 29-30 (footnotes omitted). Other logistical information, such as that relating to the appointment of a tribunal expert, can be included in this section if necessary. *See id.* at 30. This material is necessary in case the award ever needs to be enforced internationally and therefore should be presented in a strictly informational and non-controversial manner. *See id.*

[256] *See id.*

[257] *See id.* at 31-37.

[258] *See id.* at 29-31; *see also supra* notes 8-13 and accompanying text.

[259] *See supra* note 38 (listing authorities); *see also infra* note 262.

[260] *See* BORN, *supra* note 2, at 3044.

[261] *See* Michaels, *supra* note 56, at 342, 357; *see also supra* notes 56-57 and accompanying text.

[262] *See* FJC MANUAL, *supra* note 179 (United States); CHERYL THOMAS, REVIEW OF JUDICIAL TRAINING IN OTHER JURISDICTIONS 8, 16 (May 2006) (discussing judicial writing programs around the world and noting the United States, Canada and Spain are leaders in judicial education, offering numerous courses in "judge craft," which includes judicial writing), http://www.ucl.ac.uk/laws/judicial-institute/files/Judicial_Training_and_Education_in_other_Jurisdictions.pdf ; *see also* European Commission, European Judicial Training, Good Training Practices (noting courses on decision writing from Estonia and the Netherlands), https://e-justice.europa.eu/content_good_training_practices-311-en.do?clang=en#n03; National Judicial Institute – Institut Nacional de la Magistrature, Judicial Education Course Calendar, https://www.nji-inm.ca/index.cfm/publications/ (offering advanced courses in opinion-writing); Susan Glazebrook, *Restoring Image and Trust Through Judicial Training on Communication*, 2 JUD. EDUC. & TRAINING: J. INT'L ORG. JUD. TRAINING 50, 55-56 (2014) (discussing judicial writing in New Zealand); Plan Docente de Formación Inicial 66a Promoción de la Carrera Judicial, Curso 2014-2016 Escuela Judicial 22 (2014) (noting the need to provide training in writing

multicultural model is based on the classical principles of Greco-Roman rhetoric.[263] The long-standing appeal of this particular approach, combined with its proven effectiveness in a variety of countries and contexts, could prove very useful for those seeking to rationalize drafting techniques in international commercial arbitration.[264] Indeed, close examination of existing awards suggests that this approach is already quite common in the international realm.[265]

This model includes five different sections, including:

- an opening paragraph or orientation (*exordium*);
- a summary of the issues to be discussed (*divisio*);
- a recitation of material adjudicative facts (*narratio*);
- an analysis of the legal issues (*confirmatio a. confutatio*); and
- a conclusion indicating the holding or disposition (*peroratio*).[266]

Each section is considered in more detail below.

a. Orientation (exordium)

The classical principles of rhetoric suggest that every reasoned award should begin with an opening or orientation section that puts the legal and factual discussion into context and lets the

reasoned judicial rulings during the initial training (formación inicial) at the Spanish judicial training institute (La Escuela Judicial, part of the Consejo General de Poder Judicial), *available at* http://www.poderjudicial.es/stfls/CGPJ/ESCUELA%20JUDICIAL/FORMACIÓN%20INICIAL/PLANES%20DE%20FORMACIÓN/FICHERO/20141222%20Plan%20Docente%2066PCataleg%20justicia%20nou%20(negro).swf.

[263] *See* RUGGERO J. ALDISERT, OPINION WRITING 77-82 (2d ed. 2009); FJC MANUAL, *supra* note 179, at 13; GEORGE, *supra* note 73, at 291-304; MAILHOT & CARNWATH, *supra* note 31, at 37-38; EDWARD D. RE, APPELLATE OPINION WRITING 11 (1975), *available at* http://www.fjc.gov; SUPREME COURT OF OHIO, *supra* note 128 (providing an outline of a judgment); Aldisert et al., *supra* note 110, at 24; George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 ARK. L. REV. 197, 204 (1967); *see also* Justice Roslyn Atkinson, *Judicial Writing*, Australasian Institute of Judicial Administration (2002) (Australia; citing Greco-Roman principles and citing the FLAC (facts-law-application-conclusion) system, which is similar to analytical techniques used in the United States and England), *available at* http://www.aija.org.au/Mag02/Roslyn%20Atkinson.pdf.

[264] *See* Aldisert et al., *supra* note 110, at 24; Van Detta 2, *supra* note 174, at 32.

[265] *See* Fontaine, *supra* note 3, at 34-35 (writing from a civil law perspective); Lloyd, *supra* note 3, at 41-45 (writing from a common law perspective); Lloyd et al., *supra* note 3, at 29-37 (writing from a mixed common law-civil law perspective).

[266] *See* Aldisert et al., *supra* note 110, at 24; *see also* ALDISERT, *supra* note 263, at 77-82; FJC MANUAL, *supra* note 179, at 13; GEORGE, *supra* note 73, at 291-304; MAILHOT & CARNWATH, *supra* note 31, at 37-38; RE, *supra* note 263, at 11; SUPREME COURT OF OHIO, *supra* note 128, at 129-30; Smith, *supra* note 263, at 204.

reader know what is to come.[267] This sort of roadmap or executive summary[268] should include all of the critical information about the case and attempt to "pique the opinion reader's interest with its language."[269]

Experts suggest that a well-written orientation section should provide answers to six key questions known to every journalist: who, what, when, where, why and how.[270] "Who" is perhaps the easiest of the questions to answer, since it simply requires the arbitrator to identify the parties and their counsel.[271] If the matter is being heard on arbitral appeal, then the orientation section should also indicate who prevailed in the first proceeding.[272]

The concept of "what" is also relatively straightforward and simply requires the arbitrator to identify the major factual and legal issues that are at stake.[273] Thus, for example, an arbitrator might indicate that the case involved a claim in negligence and that the primary issue in contention involved whether the respondent owed a legal duty to the claimant.[274] This section should also outline any remedies or relief sought by the parties in their claims or counterclaims.[275]

"When" refers to the time of the legal injury so as to establish whether the dispute has been brought in a timely manner.[276] Timing may also be important to the calculation of damages or interest[277] or to the issue of whether an arbitral appeal has been brought within the proper period of time.[278]

"Where" can be considered a jurisdictional question. For example, it is critical in an international proceeding that the arbitrator identify the arbitral seat.[279] Appellate arbitrators may

[267] *See* Aldisert et al., *supra* note 110, at 24-25. Some commentators refer to this section as "the nature of the action." GEORGE, *supra* note 73, at 162.
[268] *See* Lloyd et al., *supra* note 3, at 32 (discussing "points on order"); *see also* STRONG, HOW TO WRITE, *supra* note 31, at 180-81.
[269] Aldisert et al., *supra* note 110, at 27. For examples of both good and bad orientation paragraphs, *see* Smith, *supra* note 263, at 205 (citing Johnson v. Smith, 219 S.W. 2d 926 (Ark. 1949); McClure Ins. Agency v. Hudson, 377 S.W. 2d 814 (Ark. 1964); Garner v. Amsler, 377 S.W.2d 872 (Ark. 1964); and Dereuisseaux v. Bell, 378 S.W.2d 208 (Ark. 1964)).
[270] *See* GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.
[271] *See* Aldisert et al., *supra* note 110, at 26.
[272] *See id.*
[273] *See id.*
[274] The tort of negligence typically requires the plaintiff to establish the existence of a legal duty, breach of that duty, legal causation, factual causation and damages, at least in the United States. *See* Detraz v. Lee, 950 So.2d 557, 562 (La. 2007); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §6, cmt. b. Only some of these issues will be in doubt in any particular case. *See* STRONG, HOW TO WRITE, *supra* note 31, at 39.
[275] *See* Lloyd et al., *supra* note 3, at 31.
[276] *See* GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.
[277] *See* GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.
[278] *See* Aldisert et al., *supra* note 110, at 26. Parties typically have between fourteen and thirty days from the date the underlying award is issued or finalized to file an appeal. *See* AAA Appellate Rules, *supra* note 87, Rule A-3 (providing for thirty days); CPR Appellate Rules, *supra* note 87, Rule 2.1 (providing for thirty days); JAMS Appellate Rules, *supra* note 87, Procedure B(i) (providing for fourteen days).
[279] *See* Lloyd et al., *supra* note 3, at 29-30.

wish to establish the provenance of the dispute so as to demonstrate that appellate jurisdiction exists.[280]

The next question relates to "why" the matter has been brought to the arbitrator's attention. Sometimes this issue will have already been answered as a result of the "who," "what," "when" or "where" analyses.[281] If the motivation for the suit has not already been addressed, the arbitrator should discuss the matter independently, since the question of "why is this matter being brought before this arbitrator at this time" is fundamental to every proceeding.[282]

"How" can be interpreted in two ways. First, "how" can refer to the manner in which the issue reached the arbitrator.[283] Because arbitration is a creature of contract, it is important for an arbitrator to demonstrate that all the necessary requirements have been met before taking jurisdiction over the dispute.[284]

Second, "how" can refer to the manner in which the arbitrator has decided to rule. While some arbitrators believe that withholding the result until the end of the award increases the reader's anticipation, there is little to be gained by not indicating the outcome of the dispute in the orientation paragraph, since most readers who do not find the outcome at the beginning of the award will simply turn to the dispositive section at the end of the document.[285] As a result, most authorities suggest that the orientation paragraph should include a reference to the holding or disposition "as a guide to the intelligent reading" of the award.[286]

When announcing the outcome of the dispute, either in the orientation paragraph or the dispositive section, arbitrators should avoid using the passive tense or other indirect language (such as "I believe"), since such phrases "dilute the vigour which should characterize the result."[287] A clear reference to the outcome of the case may be particularly important in "splintered" awards in which a claim is denied in part and granted in part.[288] Disputes with multiple opinions offer similar opportunities for confusion, which suggests a heightened need for a well-written orientation paragraph.[289]

[280] *See* Aldisert et al., *supra* note 110, at 26.
[281] *See* GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.
[282] *See* GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.
[283] *See* GEORGE, *supra* note 73, at 12; Smith, *supra* note 263, at 204.
[284] *See* Lloyd et al., *supra* note 3, at 29-30.
[285] *See* GEORGE, *supra* note 73, at 301; MAILHOT & CARNWATH, *supra* note 31, at 53; Lloyd et al., *supra* note 3, at 35 ("The award must contain, often at the very end, a section containing the dispositive part of the award.").
[286] Aldisert et al., *supra* note 110, at 27 (quoting B.E. WITKIN, MANUAL ON APPELLATE COURT OPINIONS §57, at 93 (1977)).
[287] MAILHOT & CARNWATH, *supra* note 31, at 54.
[288] *See* SUPREME COURT OF OHIO, *supra* note 128, at 150 (containing example).
[289] *See* Robin Kundis Craig, *Agencies Interpreting Courts Interpreting Statutes: The Deference Conundrum of a Divided Supreme Court*, 61 EMORY L. J. 1, 7-10 (2011) (discussing the difficulties associated with plurality opinions); Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 CONN. L. REV. 933, 935-37 (2013) (same).

Although the orientation section is comprehensive in scope, it should be very brief.[290] Learning to write a good orientation takes practice, and even experienced arbitrators spend considerable time getting the wording just right.[291] However, the benefits of a clear, concise opening justify the time spent.

b. Summary of legal issues (divisio)

The second section of a reasoned award involves a summary of the various legal issues that will be discussed in the body of the document.[292] This section focuses exclusively on legal issues, since factual issues are considered separately.[293]

Some common law arbitrators may worry about discussing legal issues outside their factual context, thinking that such an analysis is too academic and treatise-like.[294] However, the goal in this subsection is not to discuss the law in a vacuum but rather to provide a clear analysis of the legal dispute that will ultimately be informed by the material adjudicative facts.[295] This technique not only brings the discussion of legal concerns down to a manageable size, it helps the reader understand the materiality of the facts that that are presented later in the decision or opinion.[296] As one expert notes, "[t]he effect is like reading a review of a movie before seeing it, so that one knows what to look for in the theater."[297] Arbitrators from civil law systems are less likely to be troubled by this particular element of the award, since they have a great deal of experience in categorizing legal disputes as an initial matter.[298]

Some disputes present more than one legal issue.[299] In those cases, an arbitrator can either present all of the potential issues in a single summary paragraph or split up the various issues and introduce them in separate paragraphs under topic sentences introducing individual sub-issues.[300] Either approach is fine, so long as the structure is clear to the reader. The arbitrator should also note if any changes have been made to the claims or counterclaims and

[290] *See* Aldisert et al., *supra* note 110, at 26.
[291] *See id.*
[292] *See id.* at 28.
[293] An issue can be defined as "a point in dispute between two or more parties." BLACK'S LAW DICTIONARY (2009). Strictly separating the legal and factual analysis is a skill that is first taught in law school, at least in the United States and the United Kingdom. *See* STRONG, HOW TO WRITE, *supra* note 31, at 53-97 (discussing legal education in England and Wales); STRONG & DESNOYER, *supra* note 48, chs. 4-5 (discussing legal education in the United States).
[294] *See* STRONG, HOW TO WRITE, *supra* note 31, at 69, 81.
[295] *See* Aldisert et al., *supra* note 110, at 28. Adjudicative facts are those that are adduced through evidence at trial. *See, e.g.*, FED. R. EVID. 201, advisory committee note (a).
[296] *See* Aldisert et al., *supra* note 110, at 28.
[297] *Id.*
[298] *See* Cooper, *supra* note 222, at 470 (noting the civil lawyer's need to "systematize"); *see also* ZWEIGERT & KÖTZ, *supra* note 67, at 259.
[299] *See* STRONG, HOW TO WRITE, *supra* note 31, at 42-43 (discussing cases with multiple causes of action and/or multiple party pairings); Aldisert et al., *supra* note 110, at 28.
[300] *See* Aldisert et al., *supra* note 110, at 28-29.

how those changes came about (for example, through a party amendment to the pleadings or as a result of a decision by the arbitrator).[301]

When discussing legal issues, it is usually not necessary to address everything raised by counsel in detail, since not every point will be equally contentious.[302] While it is important to address any claim, defense, error or objection that has been properly raised, some concerns do not merit lengthy analysis and can be handled in a relatively succinct manner.[303] Furthermore, it is important to separate the arguments of the parties from the legal conclusions identified by the arbitrators.[304]

Awards generated by appellate arbitration need to include one additional item, namely a brief description of the appropriate standard of review.[305] Debates involving the standard of review will likely increase in the coming years, since existing rules on arbitral appeals provide little guidance as to what either the scope or the standard of review should be in arbitration.[306]

c. Statement of facts (narratio)

All reasoned rulings, be they judicial or arbitral, must include a statement of the relevant facts.[307] This is an area where common law and civil law arbitrators may differ in their approach, since common law lawyers often see a wider range and number of facts as relevant to the dispute at hand.[308] However, lawyers trained in civil law jurisdictions have long recognized the importance that factual issues play in legal reasoning, even if civil law methodology differs from that of the common law.[309]

A well-written factual analysis "requires an identification of resemblances, which we may call positive analogies, and differences, which we may call negative analogies."[310] Although an arbitrator must include all the relevant facts, he or she must avoid introducing any unnecessary facts, since additional elements not only slow the reader down but may cause

[301] *See* Lloyd et al., *supra* note 3, at 31.
[302] *See* GEORGE, *supra* note 73, at 167; Aldisert et al., *supra* note 110, at 29; *see also* MAILHOT & CARNWATH, *supra* note 31, at 51 (noting "if the plaintiff is in favour of a proposition the reader can usually infer the defendant is against it"); *supra* notes 197-218 and accompanying text.
[303] *See* GEORGE, *supra* note 73, at 295; Aldisert et al., *supra* note 110, at 29.
[304] *See* Lloyd et al., *supra* note 3, at 33.
[305] *See* Aldisert et al., *supra* note 110, at 30-31.
[306] *See supra* notes 166-71 and accompanying text.
[307] *See* Aldisert et al., *supra* note 110, at 24; Lloyd et al., *supra* note 3, at 32.
[308] *See* Fontaine, *supra* note 3, at 34 ("The summary of the facts will be confined to the essential points (even though arbitrators from common law countries tend to lend particular weight to this part of the award), taking a stand on any disputed points.").
[309] *See* Baudenbacher, *supra* note 234, at 348-49 (discussing the hermeneutical nature of contemporary civil law analysis); *see also supra* notes 221-23 and accompanying text.
[310] ALDISERT, *supra* note 263, at 136.

confusion about the scope of the legal principle enunciated in the award.[311] As a result, "[o]nly material, adjudicative facts" should be reflected in the award.[312]

To determine what facts are material, an arbitrator must look to the substantive law controlling that issue.[313] Only "facts that might affect the outcome of the suit under the governing law" can be considered material.[314] Focusing on facts "that are truly essential as opposed to those that are decorative and adventitious" allows the "conclusion . . . to follow so naturally and inevitably as almost to prove itself."[315]

When summarizing the facts, arbitrators must ensure the accuracy of each individual element.[316] "While the author may interpret the law liberally or strictly, he [or she] must not take this kind of liberty with the facts."[317] As a result, arbitrators should avoid adopting any proposed findings of facts submitted by the parties, both to minimize error and to prevent claims that the arbitrator did not exercise independent judgment when reviewing the facts.[318]

When describing the material facts, an arbitrator needs to do more than simply recount the evidence.[319] Instead, the award must "set out express findings of fact showing how the . . . [arbitrator] reasoned from the evidentiary facts to the ultimate fact" that decides a particular

[311] *See* Aldisert et al., *supra* note 110, at 31.
[312] *Id.*
[313] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (considering materiality in the context of a motion for summary judgment). Different jurisdictions may adopt different definitions as to the materiality of a certain issue. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010), Brief of the International Chamber of Commerce et al. as Amicus Curiae in Support of Respondents, at 24 (noting the different definitions of materiality under U.S. and Swiss law).
[314] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (considering materiality in the context of a motion for summary judgment); *see also* Youngblood v. West Virginia, 547 U.S. 867, 870 (2006); Willis v. Roche Biomedical Lab., Inc., 61 F.3d 313, 315 (5th Cir. 1995); Buirkle v. Hanover Ins. Co., 832 F. Supp. 2d. 469, 471-73, 489 (D. Mass. 1993); People v. White, 308 N.W.2d 128, 131-32 (Mich. 1981); ALDISERT, *supra* note 263, at 137. For examples from both U.S. and English law, *see id.* at 139-40 (discussing Rylands v. Fletcher, (1868) L.R. 3 H.L. 330 (HL), and Brown v. Board of Education, 347 U.S. 483 (1954)).
[315] Aldisert et al., *supra* note 110, at 31-32 (quoting Benjamin N. Cardozo, *Law and Literature*, 14 YALE L.J. 705 (1925)); *see also* ALDISERT, *supra* note 263, at 138-40. In some ways, the task of deciding what constitutes a material versus non-material fact is not as difficult as it seems, since an arbitrator has been considering those issues throughout the proceedings. *See* GEORGE, *supra* note 73, at 232 (noting the "definition of what is and is not [legally] at issue . . . determines the evidence to be presented and limits what will be heard" at trial)
[316] *See* Aldisert et al., *supra* note 110, at 33.
[317] GEORGE, *supra* note 73, at 164.
[318] *See* El Paso 376 U.S. 651, 656-57 (1964); United States v. Crescent Amusement Co., 323 U.S. 173, 184-85 (1944); Bright v. Westmoreland County, 380 F.3d 729, 731-32 (3d Cir. 2004); GEORGE, *supra* note 73, at 187. Commentators have cautioned against "judicial plagiarism," which occurs when a judge does not give proper credit for a particular statement or proposition. *See id.* at 707-27. Arbitrators could be subject to a similar charge if they copy parties' proposals too closely.
[319] *See* GEORGE, *supra* note 73, at 194-95.

legal issue.[320] While experts often suggest a chronological approach to the factual analysis, some disputes lend themselves to another type of organizational structure.[321]

If witnesses testified at the hearing, the arbitrator should address issues of credibility.[322] However, the award does not need to list all of the witnesses who have appeared.[323] Instead, it is sufficient to "identify the undisputed facts and make findings of those in dispute, all within the rubric of pertinence. It is important to make findings of credibility when establishing the probative force of a witness' testimony, and to give reasons."[324]

Some authorities believe that the summary of facts should precede the summary of legal issues, although there is no consensus on that point.[325] Ultimately, the order of the various sections is a matter of logic and individual preference.[326] However, most experts suggest writing the summary of legal issues before writing the summary of facts so as to avoid the introduction of immaterial factual information.[327] Sections can be rearranged later, during the editing process.[328]

d. Analysis of the legal issues (*confirmatio a. confutatio*)

The fourth section of a classically constructed award involves a detailed analysis of the legal issues and describes why the arbitrator has reached the outcome in question.[329] Some authorities refer to this as the "application" section, since this is the place where the law that has been identified in the legal summary is applied to the facts.[330]

Arbitrators can organize this section in a variety of ways, depending on the nature of the dispute. For example, if one issue can be considered dispositive, then the arbitrator may want to

[320] *Id.* at 195 (discussing an example). The arbitrator "must formulate the ultimate or conclusionary fact by scrutinizing the evidentiary facts." *Id.* (discussing judicial practices).
[321] *See* MAILHOT & CARNWATH, *supra* note 31, at 48.
[322] *See id.* at 50.
[323] *See id.*
[324] *Id.*
[325] *See* Aldisert et al., *supra* note 110, at 24. One expert suggests that "[f]acts should be stated in the past tense" while "[p]ropositions of law should be stated in the present tense," but that does not appear to be a hard and fast rule. GEORGE, *supra* note 73, at 163.
[326] *See* Aldisert et al., *supra* note 110, at 28, 33.
[327] *See* MAILHOT & CARNWATH, *supra* note 31, at 45-47; Aldisert et al., *supra* note 110, at 28.
[328] *See* Aldisert et al., *supra* note 110, at 28, 33. Editing is as important as writing. *See* MAILHOT & CARNWATH, *supra* note 31, at 84 (suggesting judges revise their draft texts somewhere between three and eight times).
[329] *See* Aldisert et al., *supra* note 110, at 34.
[330] *See* Lloyd et al., *supra* note 3, at 33. This technique is reminiscent of the legal writing methodology used in the United States, England and Australia. *See* STRONG, HOW TO WRITE, *supra* note 31, chs. 3-6 (discussing the IRAC (issue-rule-application-conclusion) system in the United States); STRONG & DESNOYER, *supra* note 48, chs. 3-6 (discussing the CLEO (claim-law-evaluation-outcome) system in England); Atkinson, *supra* note 263, at 3 (discussing FLAC (facts-law-application-conclusion) in Australia).

begin by addressing that element.[331] Alternatively, if no single issue controls the outcome, then the arbitrator could adopt the organizational approach used by counsel or begin with either the easiest or the most difficult of the outstanding issues, whichever seems best.[332] Regardless of which technique is used, "[t]here is but one obligation: to correctly describe the arguments in support of each party's position on each issue, and to give clear reasons justifying the result."[333]

When drafting an award, an arbitrator needs to be aware of the various ways that reasoned awards differ from written advocacy.[334] For example, reasoned awards

> resemble[] a form of justification. . . . [Arbitrators] are not required to convince, but rather to make themselves understood. They must therefore express their reasons in a fashion that will carry with them the support of the majority of the readers. The losing parties may never be convinced their cause was wrong but they are entitled to know why they lost and how the judge reached that result.[335]

Experts suggest that arbitrators adopt a thoughtful and neutral tone so as to give the parties reason to trust in the integrity of the award.[336] Arbitrators also should be careful about adopting any proposed conclusions of law submitted by a party, since that may cause the losing party to have doubts about the independence and impartiality of the arbitrator.[337]

Functionally, arbitrators "must decide all the issues in a case on the basis of general principles that have legal relevance; . . . and the opinion justifying the decision should contain a full statement of those principles."[338] Although "[t]he legal conclusion should cover each of the legal elements required to decide the case,"[339] the goal is not to "state the law [as] fully and comprehensively . . . as might be expected in writing a law review" or "to resolve unasked questions or legal issues not yet in dispute."[340] Furthermore, a well-drafted legal analysis

[331] *See* MAILHOT & CARNWATH, *supra* note 31, at 51.
[332] *See id.*
[333] *Id.*; *see also* GEORGE, *supra* note73, at 172 (noting each issue discussed requires a separate conclusion); MAILHOT & CARNWATH, *supra* note 31, at 52 (noting "reasons are the foundation of the result, a form of justification"); Aldisert et al., *supra* note 110, at 34.
[334] MAILHOT & CARNWATH, *supra* note 31, at 52.
[335] *Id.*; *see also* ALDISERT, *supra* note 263, at 157-66 (discussing inductive and deductive reasoning).
[336] *See* Aldisert et al., *supra* note 110, at 34; Fontaine, *supra* note 3, at 36-37. Arbitrators may also need to discuss any concurring or dissenting opinions. *See* Arroyo, *supra* note 120, at 459-64. While some authors address their colleagues' concerns in the body of the award (a step that may be necessary if the analysis of the dissent or concurrence is quite long), it is also possible to address these matters in the footnotes.
[337] *See* GEORGE, *supra* note 73, at 187-88; William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 635-38 (2009); Rogers, *Vocation*, *supra* note 21, at 987-88.
[338] Kent Greenawalt, *The Enduring Significance of Legal Principles*, 78 COLUM. L. REV. 982, 990 (1978); *see also* Aldisert et al., *supra* note 110, at 36.
[339] GEORGE, *supra* note 73, at 195.
[340] *Id.* at 13. *But see supra* notes 137-40 and accompanying text. Indeed, it is generally considered "improper for the . . . [arbitrator] to state more in a decision/opinion than is necessary or to resolve or

"should not be a recitation of the case [or statutory] authorities, but rather their specific application to the precise issues raised by the case."[341] "In drawing a legal conclusion it is important to identify the factual elements necessary to support that conclusion."[342]

When undertaking a legal analysis, an arbitrator faces three possible scenarios.[343] First, after "identify[ing] the flash point of the conflict," the arbitrator may find him or herself required to "choose among competing legal precepts to determine which should control."[344] Here, the arbitrator needs to identify a controlling principle from a series of cases or statutes.[345] Once the controlling principle of law is determined, that principle must then be interpreted and applied to the facts of the case.[346]

In the second scenario, the arbitrator may not have any difficulties identifying which of several competing legal principles controls the issue but may nevertheless need to decide how to interpret that principle.[347] This type of concern arises most frequently in cases involving statutory construction.[348] In this situation, the arbitrator does not need to discuss other potential legal principles at length but can focus on the interpretation of the law and the application of that law to the facts.[349]

The third alternative arises when the dispute is primarily factual in nature. When faced with these kinds of situations, the bulk of the analysis will involve describing and weighing the evidence.[350] Once that task is complete, the arbitrator can apply the governing law (as chosen and interpreted) to the facts that have been established.[351]

attempt to resolve future problems." GEORGE, *supra* note 73, at 13; *see also id.* at 233-34 (discussing the advantages and disadvantages of so-called "lecturing" decisions).

[341] GEORGE, *supra* note 73, at 195; *see also* STRONG & DESNOYER, *supra* note 48, ch. 5.

[342] GEORGE, *supra* note 73, at 234.

[343] These scenarios are reminiscent of Cardozo's taxonomy of legal disputes, although the two analyses are not identical. *See supra* notes 196-218 and accompanying text.

[344] Aldisert et al., *supra* note 110, at 35.

[345] *See id.* For example, an arbitrator faced with a question governed by the law of a common law jurisdiction must study the various authorities, which each announce "a specific rule of law attached to a detailed set of facts." *Id.* Some commentators suggest that this process allows an adjudicator "to 'find' or create a broader legal precept attached to a broad set of facts." *Id.*; *see also* GEORGE, *supra* note 73, at 349-68; DEBORAH B. MCGREGOR & CYNTHIA M. ADAMS, THE INTERNATIONAL LAWYER'S GUIDE TO LEGAL ANALYSIS AND COMMUNICATION IN THE UNITED STATES 142-91 (2008). Although this process may appear problematic to lawyers trained in the civil law tradition, Justice Cardozo has explained how the common law method complies with certain notions of natural law and is indeed consistent with certain readings of the civil law approach to statutory interpretation. *See* CARDOZO, *supra* note 196, at 142-45 (citing FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF, vol. II (1919)).

[346] *See* Aldisert et al., *supra* note 110, at 35.

[347] *See id.*

[348] *See id.* A number of common law jurisdictions have become increasingly codified. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 5-7 (1982) (discussing the United States).

[349] *See* Aldisert et al., *supra* note 110, at 35.

[350] *See id.*

[351] *See id.*

As the preceding suggests, different types of disputes not only demand different types of analyses but also generate different type of awards.[352] In deciding how best to draft an award, an international arbitrator must not be afraid of exercising his or her judgment and discretion.[353] However, arbitrators "must not rely on value judgments to the exclusion of reasoned analysis."[354] Furthermore, the award must "not be written as a record of the tribunal's internal deliberations but for consumption by those for whom it is intended."[355]

e. Conclusion indicating the holding or disposition (*peroratio*)

The final section of a reasoned award involves the holding or disposition of the dispute.[356] In judicial opinions, this section usually constitutes "a single paragraph or sentence at the end" of the award.[357] Arbitral awards usually require a slightly lengthier conclusion, since the issue of fees and costs usually must be addressed in addition to the outcome of the various substantive claims.[358] Notably, if the issue of fees and costs is at all contentious, it may merit a special subsection following the legal analysis and prior to the conclusion.[359]

The dispositive section of the award is usually relatively formulaic so as to avoid any possible misunderstandings.[360] Arbitrators must be sure to address all alleged claims and defenses, since the doctrine of *functus officio* may make it difficult if not impossible to go back and address any gaps that have been left.[361] As a result, it is often considered a best practice to conclude the award with a provision stating that all matters not explicitly addressed in the award have been considered and determined to be without merit.[362]

Appellate arbitrators may be required to identify which aspects of the initial award have been affirmed, reversed, vacated and/or modified, although at this point very little analysis exists regarding the scope of an appellate arbitrator's powers.[363] However, existing appellate

[352] *See also supra* notes 196-218 and accompanying text.
[353] Arbitrators have long been selected for their ability to exercise appropriate discretion. *See* William W. Park, *The 2002 Freshfields Lecture – Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, 19 ARB. INT'L 279 nn.2-3 (2003).
[354] Aldisert et al., *supra* note 110, at 37.
[355] Lloyd, *supra* note 3, at 40.
[356] *See* Aldisert et al., *supra* note 110, at 24.
[357] GEORGE, *supra* note 73, at 176.
[358] *See* Lloyd et al., *supra* note 3, at 35-37.
[359] *See id.* at 34-35. Fee-related issues in international commercial arbitration can become quite complicated and could require detailed submissions regarding the allocation of costs, interest and attorneys' fees. *See id.* In those cases, the discussion of fees and costs can run several pages in length and should be analyzed in a separate section in the award. *See id.*
[360] *See id.* at 34-37 (including model language).
[361] *See* Gaitis, *supra* note 9, at 12.
[362] *See* Aldisert et al., *supra* note 110, at 38.
[363] *See* GEORGE, *supra* note 73, at 302-04; Aldisert et al., *supra* note 110, at 38.

rules suggest that appellate arbitrators do not have the power to remand a matter to the original tribunal.[364]

The conclusion should also include any formalities that are required as a matter of national or international law.[365] Thus, for example, an award should be signed by all arbitrators (or at least a majority thereof if a dissent exists) and should include both the date and the place of arbitration.[366]

V. CONCLUSION

As the preceding discussion suggests, writing a reasoned award is one of the most important and challenging tasks that an international arbitrator must undertake.[367] Not only do international awards typically reflect the same degree of analytical complexity as many judicial decisions, they also require a uniquely international perspective that is very difficult to master. Learning to overcome the allure of parochialism and incorporate key elements of both the common law and the civil law legal traditions into one's legal analysis is something that requires a great deal of skill and training.[368] Unfortunately, the arbitral community has adopted the view that international arbitrators can become competent in award writing simply through "observation, exposure, participation and experience."[369]

To some extent, this highly deferential approach to arbitral education would appear unassailable, since it strongly resembles the standard means by which many common law jurisdictions have educated their judges.[370] However, experts have expressed a number of concerns about the efficacy of the common law approach to judicial education, thereby raising similar questions about the nature and quality of arbitral education, particularly with respect to award-writing.[371]

[364] *See* AAA Appellate Rules, *supra* note 87, Rule A-19(a) ("The appeal tribunal may not order a new arbitration hearing or send the case back to the original arbitrator(s) for corrections or further review."); CPR Appellate Rules, *supra* note 87, Rule 8.2(b) ("The Tribunal does not have the power to remand the award."); JAMS Appellate Rules, *supra* note 87, Procedure D ("The Panel may not remand to the original Arbitrator(s) . . . .").

[365] *See* Lloyd, *supra* note 3, at 41; Lloyd et al., *supra* note 3, at 37.

[366] *See* Lloyd et al., *supra* note 3, at 37 (suggesting the phrase "Place of Arbitration" should be used to designate the arbitral seat rather than the more archaic "Done at").

[367] *See* Hart v. Massanari, 266 F.3d 1155, 1176-77 (9th Cir. 2001); *see supra* note 38 and accompanying text.

[368] McGill University in Canada is one of the few institutions that teaches law on a transsystemic basis. *See* Bédard, *supra* note 11, at 239; *see also* McGill University, Paul-André Crépeau Centre for Private and Comparative Law, http://www.mcgill.ca/centre-crepeau/transsystemic/.

[369] *See* Jones, *supra* note 19, at 281.

[370] *See* Strong, *Judicial Education*, *supra* note 23, at __; *see also* Symposium, *Judicial Education and the Art of Judging: From Myth to Methodology*, 2012 J. DISP. RESOL; *supra* note 38 and accompanying text.

[371] *See* Strong, Judicial Education, *supra* note 23, at __; THOMAS, *supra* note 262, at 113.

The current approach to arbitral education has also been defended on the grounds that market forces will ensure the requisite degree of competence in writing international awards.[372] The hypothesis is that good arbitrators – meaning those that can and do comply with national and international requirements regarding reasoned awards and who reflect an appropriately international perspective in their analyses – will be rewarded through repeat appointments, while those arbitrators who do not rise to the task of drafting an adequate award will eventually find themselves without jobs.[373] However, this argument breaks down in several ways. First, commentators have long recognized that the lack of transparency in international commercial arbitration can allow sub-standard arbitrators to continue to work for a significant period of time.[374] Second, experts have noted that that "no selection method can guarantee the continued fitness" of an adjudicator.[375] Indeed, many judges "turn out to be ill-suited for the job," despite having complied with selection procedures that are ostensibly more rigorous than those facing international arbitrators.[376]

As it turns out, there are a number of ways to improve the skills of international arbitrators. One is to increase the number and quality of educational opportunities concerning award-writing in international commercial arbitration.[377] In so doing, the arbitral community can consider some of the recent innovations in judicial education to see what types of improvements are possible on both a procedural and substantive level.[378] For example, educational providers can combine in-person sessions with written guidebooks so as to take the particular needs and learning style of international arbitrators into account.[379]

Another possibility is to create more rigorous standards regarding arbitrator education, such as by imposing a mandatory minimum regarding the number or type of courses a new or experienced arbitrator should take.[380] Similar initiatives have met with significant resistance in

[372] *See* Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 62 (2010). However, it is also likely that market forces and concerns about predictability will limit the number of arbitrators who are chosen on a regular basis. *See id.* at 68.

[373] *See id.* at 62 (applying a law and economics approach to arbitrator appointment); Rogers, *Transparency*, *supra* note 65, at 1316-17.

[374] *See* Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. INT'L & COMP. L. 499, 516-17 & n.75 (2006). One particularly noteworthy effort to overcome lack of transparency in international commercial arbitration involves *Arbitrator Intelligence*, a new database developed by Professor Catherine Rogers to provide parties in arbitration with accurate information on arbitrators and arbitral awards. *See* Arbitrator Intelligence, http://www.arbitratorintelligence.org/.

[375] Wayne Doane, Note, *The Membership of Judges in Gender Discriminatory Clubs*, 12 VT. L. REV. 459, 461 (1987); *see also* Keith R. Fisher, *Education for Judicial Aspirants*, 54 AKRON L. REV. 163, 164 (2010).

[376] Fisher, *supra* note 374, at 164.

[377] *See supra* notes 13-36 and accompanying text.

[378] *See supra* note 262 and accompanying text.

[379] *See* ARMYTAGE, *supra* note 34, at 149; KNOWLES, *supra* note 45, at 45-49; *see also supra* note 36 and accompanying text.

[380] *See* David Lord Hacking, *Ethics, Elitism, Eligibility: A Response – What Happens if the Icelandic Arbitrator Falls Through the ICC?* 15 J. INT'L ARB. 73, 77 (1998).

the judicial context on the grounds that such measures were somehow "insulting," and similar types of objections can be anticipated in the arbitral context.[381] However, mandatory minimums in arbitrator education would be consistent with other efforts to improve the quality of international commercial arbitration.[382] Furthermore, mandatory education would help overcome the fact that those individuals who are most in need of additional training are often the least likely to recognize that need.[383]

At this point, international commercial arbitration is considered to be one of the legal world's most remarkable success stories,[384] and nothing in this Article should be taken as criticizing the excellent work done by the large majority of international arbitrators. Indeed, studies suggest that most observers and participants appear satisfied with decision-making in international commercial arbitration.[385] However, the arbitral community must continue to be vigilant if international commercial arbitration is to retain its position as the preferred method of resolving cross-border business disputes.[386] One of the best ways of ensuring the continued excellence of international commercial arbitration is to ensure the quality of reasoned awards. While it is not recommended that the international arbitral community attempt to adopt a single standard approach to award writing, new and experienced arbitrators would undoubtedly benefit from an improved understanding of what is involved in a reasoned award.[387] Hopefully this Article has proven useful in that regard.

[381] *See* National Judicial Education Program, Testimony to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct 15 (Apr. 2004), *available at* http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/Comm_Code_HechtSchafran_0504ddt.authcheckdam.pdf ("Mandatory judicial education is a vexed question. Many judges find it insulting and strenuously oppose it."). Concerns have also been raised about whether and to what extent a mandatory educational regime would infringe on judicial independence, although those questions can easily be answered. *See* Strong, *Judicial Education*, *supra* note 23, at __.

[382] *See* Rogers, *Have-Nots*, *supra* note 30, at 377 ("[T]he international arbitration community is highly sensitive to perceptions of its own legitimacy."). The International Bar Association has been particularly active in this regard. *See* International Bar Association, Arbitration Committee Publications, http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Publications.aspx.

[383] *See* Stephen V. Burks et al., *Overconfidence and Social Signalling*, 2013 REV. ECON. STUD. 1, 4 (2013); Garner, *supra* note 27 (discussing the problem of judicial overconfidence); Strong, *Judicial Education*, *supra* note 23, at __ (discussing sociological studies regarding overconfidence and the illusion of competence).

[384] *See* BORN, *supra* note 2, at 73.

[385] *See* Hacking, *supra* note 379, at 75; Ten Cate, *supra* note 6, at 1148-49; *see also* Queen Mary, University of London, 2013 International Arbitration Survey, Corporation Choices in International Arbitration: Industry Perspectives 5, 7 (2013), http://www.arbitration.qmul.ac.uk/docs/123282.pdf.

[386] *See* BORN, *supra* note 2, at 73; *see also supra* note 5.

[387] Indeed, some efforts have already been made in this regard. *See* QMUL, *supra* note 13 (offering a short course on award-writing); *see also supra* notes 20-22 and accompanying text.

RULES-of-THUMB

for

DELIBERATIONS and AWARD DRAFTING

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RULE 1

Keep an open mind throughout the proceedings

RULE 2

Avoid discussing ultimate conclusions with Tribunal members while the record is still open

- Discussing unanswered questions, demeaner can be OK
  - so long as it does not reflect a closed mind as to the ultimate questions submitted to the tribunal for decision

RULE 3

Make sure all tribunal members are working with the same record

- Put counsel to the task, before the record is closed, to keep the tribunal organized

RULE 4

Prepare for deliberations

- Re-read
  - The pleadings
  - Witness statements and exhibits
  - Any post-hearing briefs and make a list of questions / discussion topics for the tribunal
- Prepare a list of Decision Points
  - Cover what the Parties raise – No More, No Less
- If there is a transcript – read it thoroughly
- Take notes, highlight, flag points for discussion
- Read the exhibits with the transcript
- Annotate your Decision Points with transcript and exhibit references

If there is no transcript, make sure you take good notes and read them in connection with deliberations and drafting

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RULE 5

"Arbitral discretion" is no substitute for reasoning

- Reasoning explains <u>why</u> arbitrators exercise discretion in a certain manner
- "The Tribunal, in the exercise of its wide discretion, finds that…" is excess verbiage
  - except to remind counsel and a reviewing court of the standard of review
  - comes across as defensive
    - or worse, *lazy*

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RULE 6

Resolve any doubts as to applicable law long before the parties brief the law

Be comfortable with the briefing before the record closes

Limit yourself to the law as it has been briefed, unless you disclose and obtain consent *in advance* authorizing you to independent legal research

- *Iura novit curia* is for the *courts* in civil law countries
- In common law countries, the typical party expectation is that, in arbitration, the arbitrators will confine themselves to the law as briefed

Do not check your prior knowledge at the door – make use of it before and during the hearing process to make sure the briefing is adequate

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RULE 7

- Never compromise on essential points
- Compromise on non-essential points to achieve consensus

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RULE 8

- Listen carefully to your tribunal colleagues
- Remain collegial even if a disagreement is heartfelt
- Look for points of agreement in the midst of any disagreement

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RULE 9

- THINK AGAIN
  - Sleep on it

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RULE 10

- Have your draft of the award reviewed
  - By co-arbitrators (INSIST) and/or by the institution
    - Language
    - Sense
    - Reasoning
    - Calculations

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Supplemental Rules for the

Preservation of Arbitrator Sanity

(the "Sanity Rules")

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SANITY RULE 1

In the pre-hearing phase, maintain an up-to-date chronology of procedural developments

- Avoid the need to re-construct it at the end of the case
- Keep it concise, but include dates
  - American parties tend to find lengthy procedural preambles to be an infuriating waste of time and money in commercial cases
  - A detailed procedural history may be necessary or helpful to enforce the award in some countries, so strike an appropriate balance

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SANITY RULE 2

Have counsel for the parties keep you organized

- Stipulated chronology
  - Stated in the most neutral terms possible
  - Temporal relations of events to one another – nothing more or the parties will not agree
- A list of the named parties with essential descriptions
  - Alignment of each party
  - Legal nature/nationality of the party
  - Legal headquarters/ relevant place(s) of operations
  - Membership in any Corporate Group

    Affiliates relevant to the case

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SANITY RULE 2 cont.

- Witness Lists
  - Identity
  - Affiliation(s)
  - Citizenship; place of business
  - Topic areas of testimony
  - For experts, short description of areas of expertise
  - Date(s) of witness statement(s), testimony
- Exhibit Lists
  - In a logical order
  - Brief description of each document with other identifiers
  - Area(s) of relevance
  - Cross-references, if used with multiple witnesses

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SANITY RULE 3

Persuade the parties to arrange for a verbatim transcript

- Explain that a transcript will empower the tribunal to provide more detailed reasoning
  - If necessary, explain that the lack of a transcript will adversely impact the level of detail in the award or will increase the time and cost of deliberations, or both

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SANITY RULE 4

Develop a workplan with tribunal members while you are all still together at the hearing

- Ensure that all tribunal members have their calendars with them on the last day of the hearing
- Agree on a workplan to ensure completion of the award, taking into account the institutional review process, within the deadline set by the applicable rules
  - Confirm the workplan in writing as soon as you get back to your computer

    Use your computer to deny your colleagues deniability – send them calendar appointments with the deadlines and with generous reminders.

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Advocates' Best Practices in Selecting Arbitrators

Business Alternative Dispute Resolution (ADR) Provides Fast, Fair, Flexible, Expert, Economical, Private, Customized Justice

By David J. Abeshouse

I. Introduction

Several years ago, I attended a gathering in Manhattan of nearly 100 business neutrals—commercial arbitrators and mediators. One of the presenters asked the assemblage to describe succinctly the basics of ADR (Alternative Dispute Resolution). I raised my hand, eventually was called on and out spouted this torrent of words: "ADR provides fast, fair, flexible, expert, economical, private, customized justice." The crowd reacted favorably, I was asked to repeat it so that others could jot it down, and, so, the title of today's article was born.

ADR (also referred to increasingly as "Appropriate" Dispute Resolution) encompasses several non-court processes, the best known of which are arbitration and mediation. Many myths and misconceptions about both abound, even among lawyers, some of whom are unfamiliar with the profound distinctions between these two very different forms of dispute resolution. The transactional lawyers who draft business agreements often lack direct experience in dispute resolution, which usually relegates them to mechanically re-using clauses from the past, which may or may not have worked well in those circumstances but clearly are not tailored to the present contract. So summarizing the differences between arbitration and mediation, and occasionally contrasting them with the more familiar court litigation, should forge a good starting point.

(a) Business/Commercial Arbitration

Arbitration (here we address private, not court-annexed, arbitration) essentially is a more streamlined form of litigation, typically conducted in a conference room in a law firm, business party's office, hotel or private club. The arbitrator hears evidence and renders a binding, enforceable award. Federal and state court procedural and evidentiary rules do not apply unless specifically invoked; instead, the applicable arbitral rules, usually promulgated by the governing forum, are designed to expedite the process and afford the parties, their counsel, and the arbitrator(s) more control over how the matter proceeds. (Examples of commercial arbitration rules can be found on the websites of the ADR forums/providers mentioned in the conclusion of this article.) Control over the process can be accomplished in the first instance by including a customized ADR clause in the parties' underlying agreement (rather than the tired, old "standard" clause of two or three bare sentences, use of which squanders the opportunity to guide strategically the future course of any dispute arising out of that agreement).

In the absence of an existing contractual clause, enlightened parties can agree, after the dispute has arisen, to submit it to arbitration by executing a simple submission agreement (a/k/a consent to arbitration); however, it generally is better to put a process in place during the parties' contractual "honeymoon" phase than to try to arrange it once the parties have asserted their enmity. The confluence of the contractual provision, the governing arbitral rules and the participants' input charts the course of the proceeding, which is flexible and party driven.

(b) Business/Commercial Mediation

Mediation, at least in the commercial or business arena, is a settlement negotiation facilitated by a neutral trained in techniques geared to get the parties to "yes." Parties and lawyers can use mediation either before or while the parties are engaged in litigation or arbitration. It also occasionally surfaces in the context of putting together a deal between or among non-disputing parties seeking to work together (*i.e.*, "deal mediation"). We address here mediation principally as a business dispute resolution modality.

What happens in mediation? The full answer is more properly the topic of a separate, longer article or book; but for present purposes suffice it to say that the parties, their counsel and the mediator convene in settlement mode, and the mediator listens to both sides' offerings. It is more of a conversation than an interrogation. Mediators apply numerous techniques to help bring the parties together. Many mediators use the caucus, or private meeting, to elicit information—held in confidence absent express permission to reveal—that can help the mediator to assist the parties in achieving resolution of their dispute. Other mediators prefer to keep the parties in joint general session at all times, reasoning that only in this way can the parties effectively hear each other and the mediator maintain the utmost neutrality.

Most commercial mediators are "facilitative" in nature, whereas some are more "evaluative," either suggesting or opining outright regarding how (and at what dollar figure) the case should settle. Some combine elements of

both (as well as other approaches, such as "transformative" mediation techniques). Mediators add value to the settlement process by, among other things, changing the usual two-sided dynamic, and suggesting creative solutions (based on experience and training) that the parties themselves may not have conjured up.

From that quick foundation, we now examine the characteristics of ADR that might make it suitable for use by clients through inclusion in their business agreements.

II. Fast

(a) Arbitration

Business arbitration usually goes significantly faster than court litigation. Although exceptions occur, statistically cases of similar levels of complexity traveling through the New York State courts and the private processes of the main domestic arbitral forums reflect arbitration durations of between one-third and one-quarter those of litigation. Also, past complaints that arbitrators were more reluctant than courts to grant dispositive motions have been met recently with amendments to arbitration rules encouraging appropriate use of dispositive motions, which has leveled that playing field and neutralized the criticism.

Moreover, the actual time devoted to testimony and argument at trial (typically 3 to 4 hours of active trial time per court day) compares unfavorably with that at arbitration (flexibly, depending on the preferences of arbitrators and parties, from 6 to 10+ hours of active testimony and argument per day). So multi-day hearings in particular can be efficiently attenuated via arbitration, where, for example, a 5-day trial could be heard in a 2 or 3-day arbitration hearing. This is a great boon to all, especially parties conducting hearings in distant cities, as it abbreviates travel. And beyond the math, arbitration also streamlines the processes by eliminating some of the more time-consuming and less useful aspects of court litigation such as excessive discovery and repetitive or otherwise unnecessary motion practice. Most businesses cannot risk the uncertainty inherent in having a significant case languish in court for several years, so the more expeditious arbitration process is preferable in this regard.

(b) Mediation

Business mediation usually is faster than court litigation or even arbitration. Whether the mediation commences instead of arbitration or court litigation, or during it, mediations usually take between one and four months from start to finish, and many are completed with just one in-person session. Shorter duration = fewer billable hours expended (= fractional cost relative to adversarial proceedings).

III. Fair

(a) Arbitration

Commercial arbitration is fair, incorporating essentially all of the procedural safeguards of court litigation: due process, designated rules, standards of adjudicator training and conduct, and even review of decisions. Awards may be reviewed either through the courts based on federal (Federal Arbitration Act) or state (e.g., NY CPLR Article 75) statutory standards and the interpretive decisional law thereunder, or optionally—if contractually provided—through expedited arbitral review (appellate) panels that some forums recently have instituted. For many reasons, not the least of which is that widespread use of arbitration helps relieve overburdened court dockets, federal and most state courts strongly favor arbitration, with the vast bulk of case decisions upholding arbitral awards and supporting broad interpretation of the arbitrability of cases.

(b) Mediation

Commercial mediation is fair because the parties themselves determine the outcome, assisted by counsel and the mediator. Although the process is flexible, there are rules and standards. A party is not compelled to settle through mediation; it is a consensual act. No one other than the parties commits them to a particular result. And if they choose not to resolve the dispute through mediation, they can resort to the binding dispute resolution options such as court litigation or arbitration and delegate responsibility for the eventual outcome to a neutral decider.

IV. Flexible

(a) Arbitration

Business arbitration is flexible; the parties are free, almost without limit, but within the bounds of legal reason, to determine the outlines and particulars of their proceeding by including an arbitration clause in their agreement that sets out how they want the matter to proceed. Several examples distinguish the flexibility of arbitration from the more one-size-fits-all nature of court litigation—in your arbitration clause, you can: (i) select the forum of the proceeding (*e.g.*, American Arbitration Association, JAMS, CPR); (ii) decide which set of rules applies; (iii) determine the breadth or limitation of scope of the arbitration clause—in other words, what is covered by the clause and what is not (*e.g.*, relegating very low-dollar claims to be heard in small claims court); (iv) designate whether one or three arbitrators will constitute the panel; (v) mandate general or specific educational or experiential credentials of the arbitrators to qualify to serve, to ensure expertise of the panel; (vi) designate the venue or locale of the hearing as well as the applicable governing

law; (vii) create a "stepped" clause (*see* section VIII(b), below) incorporating ratcheted levels of resolution efforts such as negotiation and mediation as conditions precedent to arbitration, with stated criteria for moving from one phase to the next; (viii) set some general or specific limits on discovery (here, it is usually advisable to tread lightly, leaving flexible interpretation of stated principles to the arbitration panel, or risk infecting the entire proceeding); (ix) allow in smaller cases for a documents-only evidentiary hearing or a telephonic hearing; (x) permit witness affidavits in lieu of direct testimony so long as the witness appears for cross-examination; (xi) provide that a failure of a party to pay its share of deposits may result in specified sanctions; (xii) direct that the form of the award issued by the arbitrator be either a bare, standard award or a fully reasoned award; (xiii) dictate whether the arbitration panel has discretion to apportion costs and expenses, and/or award prevailing party attorneys' fees; (xiv) invoke arbitral appellate review; and (xv) provide many other options for the proceeding. Note that for enforcement purposes, an arbitration clause always should provide that judgment on the award rendered may be entered in any court having jurisdiction.

(b) Mediation

Business mediation similarly is flexible for all the same reasons as arbitration, plus there are fewer rules to follow in the proceeding itself. There are no evidentiary strictures to which the parties must adhere; sometimes "venting" can help to move the matter along. Ironically, parties obtain their "day in court"—the opportunity to have their stories heard—better in mediation than they do in court litigation. The mediator, the parties, and their counsel are free to determine how they will proceed, and can change the process "on the fly," so long as they maintain standards. For example, some mediations start with separate *ex parte* conference calls with the mediator, whereas others have all sides on the phone together. Similarly, in many commercial mediations the parties submit pre-mediation statements and supporting documents to the mediator before the first in-person session to inform the mediator of the relevant facts, law and settlement positions of the parties. The participants can agree that these pre-mediation statements will be exchanged between the parties or will be private or will be hybrid—partly exchanged and partly private. Another example of mediation flexibility is that whether or not to break out into a private caucus might be decided on the spot, without advance notice, based on how the discussion has developed to that point. A mediation also might include a site visit, a video or online demonstration, provision of information from someone not directly involved in the matter but who need not be qualified formally as an expert witness, or a welter of other possibilities that might be helpful to the process. The creative results that mediation can produce go far beyond those of court litigation or arbitration, where the boundaries are delineated by the rules.

V. Expert

(a) Arbitration

Commercial arbitration affords expert resolution of disputes because the parties have the opportunity—both in drafting the governing contractual clause and often in the initial administrative conference call with the case manager of the arbitration forum—to have a say about what the qualifications of the panelist(s) will be. One might require that the members of a tripartite panel include a lawyer with at least 15 years of commercial litigation experience; a CPA with similar years of audit or fraud or tax experience; and an industry business person with decades of ownership or senior management experience in the garment industry, the oil and gas business or financial services. Parties could seek a French-speaking sole arbitrator with both intellectual property and commercial litigation experience at large- or medium-sized law firms or corporate in-house law departments. Although the possibilities are wide open, it is advisable to avoid excessive specificity or risk rendering the clause less susceptible of performance.

In the ordinary course, once the forum has considered the parties' preferences, they will be provided with the resumes of prospective arbitrators from among whom they may select their choices through the "strike and rank" method. Factors to consider here include the arbitrator's substantive business or legal area experience, presence of a meaningful track record of service as an arbitrator, and the level of arbitrator training. Does the arbitrator's resume reflect substantial and continuing involvement in training over a number of years? Does it reflect that s(he) has conducted numerous arbitrations in the past, as a neutral? Do the substantive areas of the prospective arbitrator's business or legal experience match well with the nature of the matter at hand? What is the arbitrator's reputation for personality, patience, punctuality, proactivity, and other performance criteria? Engaging in this sort of basic pre-selection analysis helps parties reap the benefits of being able to select the adjudicator (disfavored as "judge shopping" in the court system).

(b) Mediation

Commercial mediation applies expertise in both the subject area of the controversy and also mediation itself. So parties and counsel considering engaging a mediator will look to the prospect's background in the substantive area(s) of the case as well as in mediation.

Training is key. The 40-hour mediation certification courses are just the beginning. It is widely accepted that it takes most mediators hundreds of hours of training and several years of mediating experience to develop substantial expertise as a mediator.

VI. Economical

(a) Arbitration

Business arbitration is economical because—as noted earlier—shorter duration and lesser expenditure of hours necessarily yields lower costs, even after adding in the costs of arbitration. The cost of the arbitrator is subsumed by the savings from the fractional duration of the entire process. This becomes particularly clear when considering that the number of hours an arbitrator typically spends on a given matter is a very small proportion of the time that the lawyers representing each party spend on the case because, for example, it takes far greater expenditure of time to create and assemble documents and deal with clients than it does to read those documents. (A fair generalization would be that other than in small, simple cases, the arbitrator might spend one-tenth the time on the case that the lawyer(s) representing each side would spend). Usually, all parties split the costs of arbitration.

With a three-arbitrator panel, the arbitral costs will increase, but need not triple, as the Chair of the panel can deal exclusively with preliminary matters such as discovery issues, and given the special expertise of some neutral arbitrators (*e.g.*, a CPA with a Certified Fraud Examiner or Business Valuator certification, or someone with specific industry expertise), costs for expert witnesses may be eliminated. Three-arbitrator panels should be reserved for large and complex cases, particularly those where having three adjudicators with disparate areas of expertise will be helpful. (The old method of each side selecting an arbitrator, two of whom in turn together select the neutral chair of the tripartite panel, generally has become disfavored.) Regardless of the number of arbitrators on the panel, counsel never will waste several hours—as they might on several occasions during the course of a court case—sitting while waiting for the case to be called on the calendar, often to have it adjourned to another date, both of which instances get billed to the client. Arbitration is individualized justice, not mass justice, and that results in many often overlooked areas of economic savings.

(b) Mediation

Business mediation is economical because it is even more expeditious than arbitration, and with far fewer hours billed by counsel and mediator, the cost savings relative to court litigation and even arbitration can be, and usually are, immense. Inasmuch as over 95% of business litigations eventually settle before trial, getting an earlier and better settlement via mediation makes sense for most parties in most cases. Essential discovery can be conducted early, setting the stage for prompt resolution that saves the parties the vast bulk of fees and expenses that they otherwise would have incurred.

VII. Private

(a) Arbitration

Commercial arbitration generally is private and confidential, and can be made more so by the execution by the parties and counsel of a confidentiality agreement, which can be "so-ordered" by the arbitrator(s). Business arbitration awards are not published like court decisions, and there exists no searchable database of these private awards, so arbitration awards set no precedent. Arbitrators are held to standards of privacy and confidentiality that ensure that they will not divulge information regarding a proceeding over which they have presided, and the law generally protects arbitrators from being called to testify as witnesses in subsequent proceedings. The privacy and confidentiality of business arbitrations stands in stark contrast to the "public record" of court litigation and is viewed as a significant advantage to certain businesses that prefer not to air their dirty laundry in public, particularly considering the easy access to video and online information that abounds today.

(b) Mediation

Commercial mediation is private. Mediators are held to standards of privacy and confidentiality that ensure that they will not divulge information regarding a proceeding in which they have participated, and the law generally protects mediators from being called to testify as witnesses in subsequent proceedings. Most private mediation agreements (which parties and counsel execute to engage the mediator) reiterate these principles, so they enjoy contractual foundation as well.

VIII. Customized

(a) Arbitration

Business arbitration is customized, as noted in section IV(a) above on flexibility. This starts with the contractual arbitration clause and follows in the arbitration panel's application of the rules and clause to developments in the matter. And because in arbitration the rules of evidence are bent, not broken, the progress of the hearing itself is not impeded with excessive evidentiary objections and arguments. Arbitrators tend to take most evidence "for what it's worth," assessing how relevant, probative and reliable it is, based on their experience. There is no need to protect the evidentiary integrity of the arbitral process from layperson jurors. Private arbitrators as a rule do

not maintain large dockets, so they can afford each case more individualized attention than can judges, who are governmental employees.

(b) Mediation

Business mediation likewise is customized, as noted in section IV(b) above on flexibility. Indeed, one can create a "stepped" clause, encompassing multiple levels or steps of dispute resolution. For example, a stepped clause might start with requiring negotiation of a conflict and move through increments ending in either binding arbitration or court litigation. Perhaps the best known of these stepped clauses is the "med-arb" clause, which first requires mediation of the dispute and, failing that, arbitration (usually before a different neutral, because the mediator has been "tainted" by hearing non-evidentiary and legally irrelevant information proffered in a wholly different context with a different purpose than parties and counsel apply in arbitration). Every aspect of mediation is tailor-made for the proceeding at hand, and changes in the process can occur on an as-needed basis.

IX. Conclusion

So, business ADR indeed provides fast, fair, flexible, expert, economical, private, customized justice for parties who invoke ADR processes. Doing so takes a modicum of lawyerly strategic foresight, deciding which process(es) to use; how to customize the myriad potential particulars of the clause to best suit the situation and/or the party being represented; and how best to raise the negotiation issue of including an ADR clause in the parties' underlying business agreement. The many advantages of ADR answer in large measure that final issue, so it is important to be armed with knowledge about ADR processes. Online resources for drafting clauses can be found on the websites of ADR providers/forums such as the American Arbitration Association (AAA) (www.adr.org); JAMS (www.jamsadr.org); and CPR (www.cpradr.org); as well as best practices organizations such as the College of Commercial Arbitrators (www.thecca.net). The AAA last year designed an online tool to help practitioners construct clear and effective ADR provisions (www.clausebuilder.org). This article and these online resources furnish a good starting point for fulfilling a lawyer's professional obligations to (i) fully inform clients about all options for resolving conflicts that might arise out of a business agreement, and (ii) be able to draft an appropriate dispute resolution clause if the informed client wishes to invoke ADR.

David J. Abeshouse is a solo business ADR litigator, arbitrator, mediator, writer, speaker, and past adjunct professor of ADR Law. He is a Fellow of the College of Commercial Arbitrators (CCA), a member of the National Academy of Distinguished Neutrals (NADN), and has been selected for inclusion for several years on the New York Metro Area "SuperLawyers" list, in the category of ADR Law. He represents clients in B2B dispute resolution, and serves on the Commercial Panels of Neutrals of the American Arbitration Association and several other national and international ADR forums. He can be reached at his Uniondale, NY office through his website: www.BizLawNY.com.

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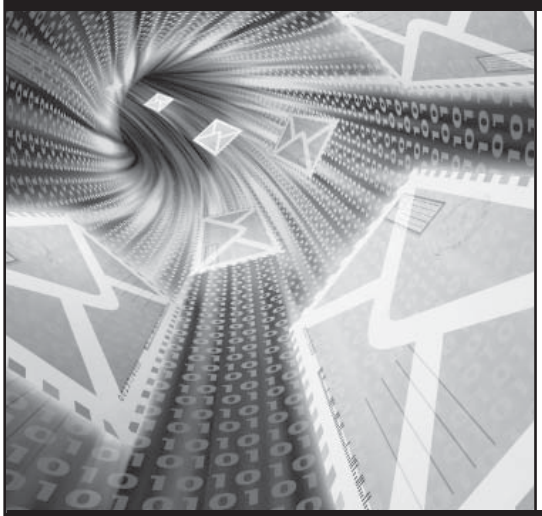

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Alternate Dispute Resolution

Non-Forum Pro Se Arbitration of International Commercial Dispute: A Unique Case Study

Alternative dispute resolution – also known as appropriate dispute resolution — provides fast, fair, flexible, expert, economical, private, customized justice. What follows is an example of the flexibility, efficiency, and cost-effectiveness of a private arbitration proceeding. Certain inconsequential details, including names, have been changed to protect the identities and confidentiality of the participants.

David J. Abeshouse

In an "ordinary" international commercial arbitration, filed with and managed by a forum,[1] the case proceeds through a formalized process that varies from forum to forum. Some are more streamlined and flexible than others. Several have processes that require, for example, multiple post-filing redrafts of the initial pleading, which often takes considerable time and expends significant resources in terms of counsel time and arbitrator time. In contrast, the ad hoc (non-forum) scenario in the case described below provides for great flexibility, to allow the process to bend to the needs and desires of the parties, while still maintaining the requisite legal controls such as due process.

Fact Pattern: Why International Arbitration?

Albert and Bob were American entrepreneurs and friends in their mid-thirties who lived and worked in China and the United States. They each had been involved in founding one or more substantial companies in the technology and service arenas, and each owned interests in one or more of these companies. They had a falling-out, however, over whether Bob contractually was a substantial minority shareholder of three of these companies: one Hong Kong entity, one Chinese entity, and one U.S. entity.

They recognized that reliance on the courts of any one country could be fraught with complication, delay, expense, and risk. Court rules and procedures typically result in greater duration of the dispute resolution process than occurs in arbitration, one of the hallmarks of which is the relatively streamlined nature of the proceeding. Moreover, some countries' court systems apply a much lower standard of due process than do American courts. Since the companies at issue here were based in three different countries, the courts of no one country had jurisdiction over the entire matter. Accordingly, the parties understandably turned to international arbitration for resolution of their dispute.

Why Non-Forum Arbitration?

Albert and Bob decided not to submit their dispute to one of the large international forums, largely to avoid substantial filing fees and additional procedures they deemed unnecessary. Instead, they researched prospective arbitrators in the New York metropolitan area – a hub of international arbitration resources — to adjudicate this controversy, found multiple candidates through online searches, and arrived at a mutual choice. They contacted the Arbitrator, and explained that they sought a relatively unique process for their case: an ad hoc (non-forum) arbitration in which they both would appear pro se (representing themselves, without legal counsel).

Although this proposed scenario set off several prospective alarms in the mind of the Arbitrator, the parties' intelligence and apparent willingness to work within a designed framework piqued his interest and – after discussing some of the threshold issues — the Arbitrator tentatively agreed to serve. The parties said they wanted a week to consider the process and refine their thoughts. They returned eager to proceed. Although the parties lacked the common pre-dispute arbitration agreement, they entered into a submission agreement (i.e., an agreement to arbitrate made after the dispute has arisen), setting out the terms of the proceeding, the scope of the issues to be determined, the governing rules and applicable law, and other key elements.

Arbitral Neutrality with Pro Se Parties

The Arbitrator noted prospectively that the absence of counsel might result in a heightened incidence of requests from the parties for explanation of rules, policies, and procedures, and that as a neutral, there were some questions he would be precluded from answering, such as matters of legal advice or strategy.

Focal to the arbitrator's role as a neutral in all cases is the need to refrain from making statements that might give the appearance of partiality; providing legal advice or strategy would run afoul of this requirement.[2] The parties appeared to understand and were willing to risk incurring some additional Arbitrator time and expense and some additional uncertainty, in order to avoid the expense and what they viewed as potential complication of having counsel represent them. (It was apparent to the Arbitrator from the outset that it was this same maverick approach to some of the legalities of their business together — including failure to have counsel oversee careful contractual and other documentation of their respective ownership interests in the three entities – that had gotten them into this situation in the first place.)

The parties and Arbitrator discussed the possibility of mediating the dispute instead of arbitrating it, but the parties expressed a preference for a binding expert decision, not a facilitated negotiated settlement.

Arbitration Agreement: Day 1

The Arbitrator prepared an Arbitration Agreement setting out in detail the terms of the arrangement, including fees, applicable law, confidentiality, immunity, reference to existing rules of commercial arbitration procedure that would govern to the extent feasible, and myriad other provisions.

After asking some questions and obtaining some modifications, particularly to the critical provision delineating the scope of the arbitration proceeding (*i.e.*, specifically which issues were being submitted to the Arbitrator for adjudication), the parties both signed the Arbitration Agreement on "Day 1" and paid their respective deposits (representing nearly 35 hours of arbitrator billable time) by international wire transfer.

Schedule for Discovery: Days 3–17

Initially, the parties guesstimated that they would each produce less than 100 pages of documents in discovery, and likely less than that as exhibits for the evidentiary hearing to take place at the Arbitrator's Long Island, N.Y. office. During the Preliminary Hearing Conference Call (PHCC) on Day 3 after execution of the Arbitration Agreement, it became apparent to the parties that pre-hearing discovery would be more extensive than they had anticipated.

See STUDY, Page 23

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STUDY ...

Continued From Page 9

During the PHCC, the parties and Arbitrator addressed the scheduling of all aspects of the pre-hearing and hearing phases of the arbitration proceeding, likely issues that might arise, procedures to be followed, and a welter of other matters. Prompt resolution of the dispute was of utmost importance to both parties. The following day, the Arbitrator issued a Preliminary Hearing Conference Order (PHCO), memorializing all that had been agreed to during the PHCC and setting out additional terms governing the process.

The agreed schedule in the PHCO called for service of document production requests, responsive production of documents, resolution of any discovery disagreements, and completion of documentary discovery all by Day 17 after execution of the Arbitration Agreement — a seemingly improbable schedule. The hearing was scheduled for Day 35 (exactly five weeks after execution of the Arbitration Agreement), with marked exhibits, any direct testimony affidavits of witnesses, pre-hearing briefs, and other documentation to be filed directly with the Arbitrator several days in advance of the hearing, to afford him the opportunity to review all submissions in advance of the hearing. The Arbitrator's written Award would be due for receipt by the parties within 30 days following closure of the hearing.

Often in a commercial arbitration, the Arbitrator must remind the parties' counsel that arbitration is intended to be more streamlined than and different from litigation, and is governed by different rules and procedural law. In this instance, the instructions and reminders were necessarily more fundamental and frequent throughout the pre-hearing phase, as the parties were not professional litigants. As this had been discussed in advance, it did not pose an issue going forward.

Discovery Extended from Days 17–22

Albert and Bob predictably experienced some disagreements and misunderstandings during the discovery process, but these were promptly resolved through e-mailed motions resulting in directives or orders issued by the Arbitrator (including one motion relating to the scope of the issues in the arbitration). During the pre-hearing phase of the matter, the parties and Arbitrator collectively exchanged more than 250 e-mails, maintaining open channels of communication to ensure the smooth progress of the case.

This stands in stark contrast to the level of communication that courts engage in with counsel for parties in litigation. The discovery phase was extended from Day 17 to Day 22, as a result of the motion practice. Several days before the hearing, the parties together submitted more than 1,000 pages of documentary exhibits for the hearing, and each filed a pre-hearing memorandum of up to 15 pages.

Evidentiary Hearing: Day 35

On day 35, Albert and Bob flew from China to New York, and met at the Arbitrator's Long Island office for the evidentiary hearing. It started at 9 a.m. and concluded at 4:30 p.m. (with a half-hour lunch break). The Arbitrator heard approximately seven hours of testimony and argument (likely double what gets accomplished in the typical trial day in state court). Both sides presented their testimonial and documentary evidence, and one domestic non-party witness appeared voluntarily, without need for subpoena,[3] by telephone conference call, for direct and cross-examination. At the conclusion, the parties decided not to submit post-hearing memoranda, content to rely upon their presentations, including oral closing statements. Both parties expressed their satisfaction at having had a full and fair opportunity to be heard.

The aggregate arbitral fees incurred and paid were a small fraction of what this case would have cost the parties had they gone to court (or a large international arbitration forum). Total billable Arbitrator time expended throughout the proceeding — from inception through final Award — was less than 40 hours. With issuance of the Award, the Arbitrator submitted a final invoice, for the remaining approximately 5 hours of billable time, which both parties paid within the week.

Arbitral Award: Day 43

From initial contact through the evidentiary hearing, the process spanned two months. More significantly, the period from entry into the Arbitration Agreement (Day 1) through evidentiary hearing (Day 35) comprised five weeks. The Award was transmitted eight days after the evidentiary hearing (Day 43). So, from formal start through final Award, the entire case took six weeks. The parties received what they sought, and expressed emphatic appreciation following the hearing.

The flexibility that this process afforded the participants in the arbitration permitted them to secure the rapid, high-quality, binding dispute resolution process that they needed while avoiding the expense, delay, and complications that any country's court proceedings would entail. This ad hoc, pro se international commercial arbitration was fast, flexible, very economical for the parties, and wholly unique. This is but one case study example of what can be done through the alternative dispute resolution process of commercial arbitration.

David J. Abeshouse is a solo business ADR litigator, arbitrator, mediator, writer, speaker, past Chair of the NCBA ADR Law Committee, and past adjunct professor of ADR Law. He served as Arbitrator in the case described in this article. He is a Fellow of the College of Commercial Arbitrators (CCA), and a member of the National Academy of Distinguished Neutrals (NADN). He represents clients in B2B dispute resolution, and serves on the Commercial Panels of Neutrals of the American Arbitration Association and several other national and international ADR forums. He can be reached at his Uniondale office through his website, www.BizLawNY.com

1. *E.g.*, International Centre for Dispute Resolution (ICDR), International Court of Arbitra-tion of the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), or Hong Kong International Arbitration Centre (HKIAC).
2. *See generally*, American Arbitration Association/American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes, Canon I.D., available at http://tinyurl.com/pmmx98j (accessed 8/31/15).
3. Subpoenas are available in arbitration under the Federal Arbitration Act, 9 USC § 7.

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Expectations of AAA-ICDR and ADR Users

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The AAA's official mission statement and vision statement are based on the following core values:

Integrity

Conflict Management

Service

Diversity & Inclusion

The Truth

- Most arbitrator service is infrequent, not a full time job.
- Most arbitrators (unless retired) maintain a profession, law, academia, industry professional, etc.
- The baby boomer generation is retiring and interested in pursuing arbitration and mediation appointments (a lot of competition).
- The focus should always be on what is the right fit for ADR users.

AAA-ICDR and ADR User Focus

AAA-ICDR Focus

- It's not about AAA-ICDR or you
- The 3 Ps: the **Public,** the **Process** and the **Parties**

ADR Users

- They want Arbitrators/Mediators with expertise in a field that uses ADR
- The importance of industry expertise
- Additional focus - former judges

ADR Resource – www.adr.org

- Rules: Commercial, Construction, Labor, Employment, International, Insurance
- Guidelines: how to draft ADR clauses
- Codes: Code of Ethics for arbitrators all areas, including mediation
- Protocols: Employment, Consumer, Healthcare
- Articles: Dispute Resolution Journal
- AAA-ICDR Webfile, electronically filing a dispute
- Information on special programs (Storm Sandy)
- eCenter – arbitrators/mediators update resume
- AAAMediation.org
- ClauseBuilder Program
- Education Services – see the calendar of nationwide programs

ADR Resource – LexisNexis/Westlaw/BNA

- Thousands of decisions, full text, redacted (employment, international and labor)

ADR Resources

LinkedIn

- AAA-ICDR
- AAA-ICDR Vice Presidents
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- High hourly rate, cancellation terms, unreasonable cancellation or postponement fees.
- Poorly drafted resume.
- Billing Practices: study time. Review Code of Ethics and AAA-ICDR Billing Guidelines.
- Lack of flexibility when parties agree – remember, PARTIES PROCESS, YOU ARE NOT A JUDGE.

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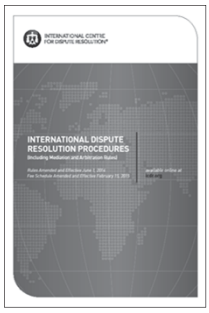
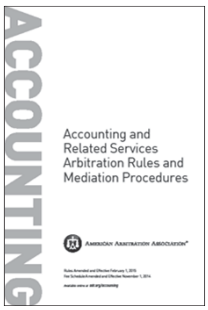
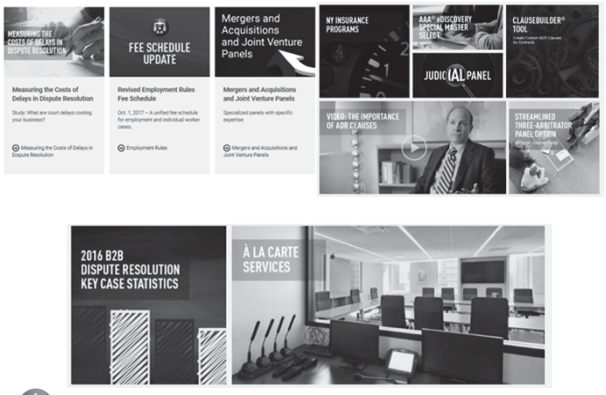
Know the Rules

Keep Current on Rules – Rules Change/New Offerings





Keep Current on the Latest AAA-ICDR Developments



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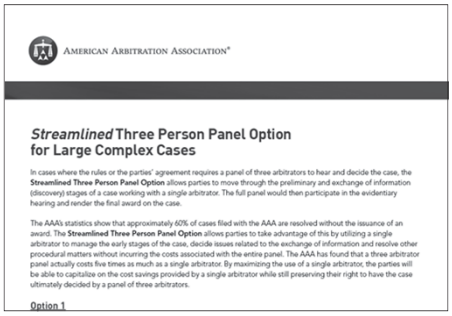
Know of New Services Offered by AAA-ICDR



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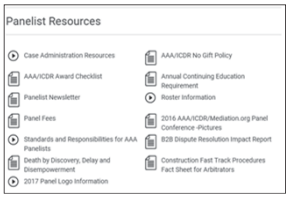

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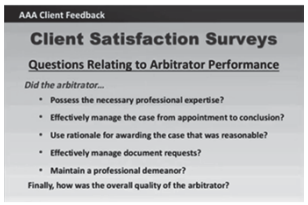

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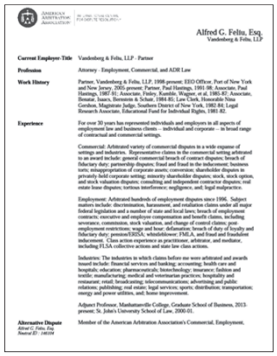
- Why: helping parties in their consideration and selection of the arbitrator

Arbitrator Continuing Education Requirement

AAA-ICDR Resume

- Do not inflate your expertise or experience
- Advocates know when you inflate your resume
- AAA-ICDR can share sample resumes of successful arbitrators
- Keep resume updated



Alfred G. Feliu, Esq.
Vandenberg & Feliu, LLP

Current Employer/Title Vandenberg & Feliu, LLP - Partner

Profession Attorney - Employment, Commercial, and ADR Law

Work History Partner, Vandenberg & Feliu, LLP, 1998-present; EEO Officer, Port of New York and New Jersey, 2003-present; Partner, Paul Hastings, 1981-98; Associate, Paul Hastings, 1987-81; Associate, Finley, Kumble, Wagner, et al, 1985-87; Associate, Bosniak, Isaacs, Bernstein & Schatz, 1984-85; Law Clerk, Honorable Nina Gershon, Magistrate Judge, Southern District of New York, 1982-84; Legal Research Associate, Educational Fund for Individual Rights, 1981-82.

Experience For over 30 years has represented individuals and employers in all aspects of employment law and business clients – individual and corporate – in broad range of contractual and commercial settings.

Commercial: Arbitrated variety of commercial disputes in a wide expanse of settings and industries. Representative claims in the commercial setting arbitrated to an award include: general commercial breach of contract disputes; breach of fiduciary duty; fraud; misrepresentation; theft of trade secrets; unfair competition torts; misappropriation of corporate assets; conversion; shareholder disputes in privately-held corporate setting; minority shareholder disputes; stock, stock option, and stock valuation disputes; consulting and independent contractor disputes; real estate lease disputes; tortious interference; negligence, and; legal malpractice.

Employment: Arbitrated hundreds of employment disputes since 1996. Subject-matters include: discrimination, harassment, and retaliation claims under all major federal legislation and a number of state and local laws; breach of employment contracts; executive and employee compensation and benefit claims, including severance, commission, stock valuation, and change of control claims; post-employment restrictions; wage and hour; defamation; breach of duty of loyalty and fiduciary duty; trade secrets; ERISA; wrongful discharge; fraud and fraudulent inducement. Class action experience as practitioner, arbitrator, and mediator, including FLSA collective actions and state law class actions.

Industries: The industries in which claims before me were arbitrated and awards issued include: financial services and banking; accounting; health care and hospitals; education; pharmaceuticals; biotechnology; insurance; utilities and energy; telecommunications; computer technology; transportation; utilities and restaurant; retail; broadcasting; telecommunications; advertising and public relations; publishing; real estate; legal services; sports; distribution; transportation; energy and power utilities, and; home improvement.

Adjunct Professor, Manhattanville College, Graduate School of Business, 2013-present; St. John's University School of Law, 2000-01.

Alternative Dispute Member of the American Arbitration Association's Commercial, Employment,

Hourly Rate and Billing Practices

- Study fees/expense section of the Code of Ethics
- Rates range between $200 to $1,200 per hour
- Consider necessary adjustments to your rate
- Detailed invoicing: understand AAA-ICDR Billing Guidelines
- Transparency: parties have the right to see your invoices

Volunteer

- Pay your dues: volunteer your services as an arbitrator or mediator to develop skills and network.
- There are various pro bono community and court programs.
- Reduced fee, fast track and expedited cases for AAA-ICDR

Your Geographic Area

- Advocates typically do not see a reason to “import” arbitrators for most cases.
- You will most likely be selected to serve in you geographic area.
- In your geographic area, advocates may know of you and your reputation.
- It is a national panel, however, and you could be picked outside your geographic area. Your travel expenses should be reasonable.

Area of Expertise

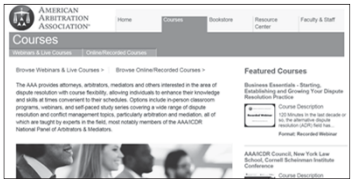
- AAA-ICDR and parties do not want “Jack of All Trades”
- Think hard: what areas are you really an expert?
- Most panelists will not see appointments if their area of expertise is **not** using ADR.
- Focus should be on cases in your biggest area of practice

Keep Subject Matter Expertise Up to Date

- Training in subject matter expertise, not simply ADR training
- Some industries and legal areas change rapidly

AAA-ICDR Educational Programs

- AAA-ICDR sponsors and conducts hundreds of programs each year
- If you know of areas AAA-ICDR should offer educational programs to advocates, let us know
- AAA-ICDR and panelists collaborate on educating the public and user communities



Publish & Post Blogs

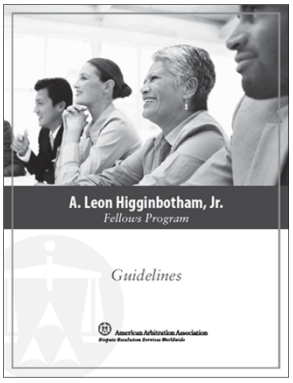
- AAA-ICDR publishes articles by panelists – reprints can be made
- Articles should focus on your subject matter expertise
- AAA-ICDR will soon be launching a new blog

Diversity Initiatives – Higginbotham Fellows Program

Increasing Diversity Among Arbitrators

A Guideline to What the New Arbitrator and ADR Community Should Be Doing to Achieve This Goal

By Sasha A. Carbone and Jeffrey T. Zaino



Social Media

- Advocates/parties do extensive social media research on prospective panelists. Be aware of what they **will** find.
- Google yourself: what should appear is positive, free information about you.
- Know of potential social media pitfalls: ***Guidance Note: Arbitration and Social Media*** by the Chartered Institute of Arbitrators.

GUIDANCE NOTE: ARBITRATION AND SOCIAL MEDIA

INTRODUCTION

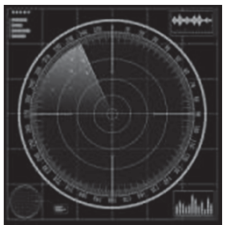
Social Media Disclaimer

In Notice of Appointment, disclosures, not resume

"I use a number of online professional networks such as LinkedIn and group email systems. I generally accept requests from other professionals to be added to my LinkedIn profile but do not maintain a database of all these professional contacts and connections. ***LinkedIn now features endorsements, which I do not seek and have no control over who may endorse me for different skills.*** *The existence of such links or endorsements does not indicate any depth or relationship other than an online professional connection, similar to connections in professional organizations."*

AAA-ICDR Radar

- Keep AAA-ICDR informed on your speaking engagements, publications, etc.
- Know your local Vice President



Summary

- Be prepared to serve occasionally – not full time
- It will be rare that both sides agree to your selection
- Remember the 3 Ps – we are about:

the Public
the Process
the Parties

Expectations of AAA-ICDR and ADR Users

POWERED BY
BNET.com

Selecting the Ideal Arbitrator

Moxley, Charles J Jr

In addition to being well prepared, there is no more important step in arbitration than selecting the arbitrator. This article stresses the importance of identifying a well-qualified arbitrator who will be responsive to the client's side of the case. It also describes the "Enhanced Neutral Selection Process" that the American Arbitration Association recently launched, which is available in certain large, complex cases administered by the AAA.

The quality of an arbitration obviously depends on the fair-mindedness, experience and ability of the arbitrator or panel selected to hear the dispute. But is it sufficient for counsel to select arbitrators having such qualities? If the question were asked in the context of jury selection, the answer would clearly be "no." Litigators go to famous lengths to select jurors who seem likely to view their case favorably. Why shouldn't those who select arbitrators do the same?

Yet many attorneys seem to believe that, in arbitration, it is sufficient to select well-qualified arbitrators without regard to their potential responsiveness to the client's case. I believe that following such an approach misses a crucial step in the process. In over 28 years as a commercial arbitrator I have seen many cases in which intelligent and fair-minded arbitrators hearing the same evidence have reached significantly different conclusions as to the appropriate award.

Identifying arbitrator candidates who are likely to be responsive to one's case is a daunting task. However, with the Internet and ever-expanding data bases, information from which to make such a judgment is greater than ever before.

The Need for Early Evaluation of One's Case

Asked to identify the differences between arbitration and litigation, most lawyers and experienced business people would mention arbitration's relative informality and substantial limitations on discovery and the right to appeal, which generates savings in both time and cost. Many would also mention the ability to participate in the selection of a decision maker (whether a sole arbitrator or a panel of three) who has knowledge and expertise in the subject area of the dispute.

But a further major difference between the two processes is the fact that in arbitration the attorneys need to have much greater knowledge of their case when they are launching or preparing to defend it than is generally necessary at the early stage of a lawsuit. In litigation, by the time the attorneys select the jury, they have generally lived with the case for years.

In arbitration, the arbitrator selection process starts at the administrative conference held shortly after the case is filed. At that conference, counsel for both parties have the opportunity to tell the case manager what types of persons they want to see on the list of potential arbitrators. In order to do this well, both counsel must know their clients' case inside and out, and have determined their arbitrator preferences-for example, whether the arbitrator should be male or female; young or old; experienced or inexperienced; employed (full time or part time) or retired; a lawyer or non-lawyer; if a non-lawyer, an accountant, business person, or technical expert; an "in-demand" arbitrator with a busy calendar or an arbitrator who can deal with the case right now; an entrepreneurial or "establishment" type of person; a naturally bright high achiever or a serious hard worker; or a proactive or laid back individual.

To select sympathetic and qualified arbitrators, the attorneys need to understand the strengths and weaknesses of their clients' case and have a sense of the personalities involved. The ideal arbitrator always depends on the particular case. At the deepest

level, both counsel need to figure out the chain of logic whereby the client has the potential to win-whether based on the facts, the law, the equities, or sleight of hand. Then they must determine what types of potential arbitrators would be likely to respond in a favorable manner to such a case.

"Broad-Picture" People versus Sticklers

Perhaps the broadest distinguishing characteristic of arbitrators, cutting across such categories as age, gender, education, experience, profession and substantive knowledge, is a psychological one-the distinction between the conceptual, open-minded, equity-oriented person at one extreme, and the rule-oriented, no-nonsense, by-the-numbers strict constructionist at the other. These two types of individuals have very different ways of looking at the world and may generally be expected to view many fact patterns in very different ways.

It seems to me that the relatively few cases that go to trial do so largely because they involve a gray area of fact or law that causes each side to believe its position is correct. In such circumstances, there is often no strong objective basis for either side to convince the other it is wrong. One side often urges strict construction of the contract and related documents, while the other argues the parties' intent and the equities of the case. Daunting as the task may be, counsel for both sides need to anticipate the likely mindset of potential arbitrators in making their selections.

Importance of the Chair

The interpersonal dynamics on a panel, particularly between the arbitrator selected to chair the panel and the two co-arbitrators, can have a substantial impact on the outcome of a case.

In my experience, the chairperson usually has a strong leadership voice with one co-arbitrator and often with both. This multiplies the importance of the arbitrator who is likely to be designated to chair the panel.

In arbitration proceedings administered by the AAA, the AAA will designate the chair based on experience as an arbitrator, knowledge of ADR, the amount of AAA training the arbitrator has taken (for example, training for the large, complex case panel, and training as a chair), and good feedback from users of AAA services. There is no rule of which I am aware calling for a lawyer to be appointed to serve as the chair, although it appears to me that lawyers are often selected for this role. However, a non-lawyer who has more experience with, knowledge of and training in arbitration, who is positively reviewed by AAA clients, could be appointed to chair the panel.

Investigative Steps

Experienced counsel take steps to check out the people whose names are on the list of arbitrator candidates prepared by the ADR provider. The first step is to review the list of candidates and the accompanying biographical information and circulate them to the attorneys at the firm and to other trusted colleagues at other firms, seeking feedback about candidates of potential interest. Some law firms active in the field of arbitration collect information about arbitrators and potential arbitrators in a computer data base. In addition, it is important to send the arbitrator candidate list to the client, who may have access to independent information about persons on the list.

It is very useful to search for information about the potential arbitrators on the Internet using search engines such as Google and Yahoo, and legal and news-oriented data bases (for example, the Lexis/Nexus and Westlaw databases are available only to subscribers). These searches can yield valuable information about arbitrator candidates, which could include tides of articles and books they have written. Counsel should always read whatever the potential arbitrator has written in order to learn how this person thinks and perhaps his or her views on issues involved in the case. Sometime briefs can be found on the Internet

that were written by candidates who are (or were) litigators, as well as information about litigation in which candidates (or entities or persons with whom they are closely identified) have been involved. As to potential arbitrators of any prominence, it may be possible to find leads to people they have dealt with in other cases. Calling these people for information can mean avoiding a big mistake.

It can be helpful to interview potential arbitrators. However, arbitrator interviews should only be conducted on a joint basis with the adversary to avoid risking disqualification of the candidate or undermining the award.

AAA's Enhanced Neutral Selection Process

The AAA recently introduced the Enhanced Neutral Selection Process to facilitate counsel's selection of arbitrators in certain large, complex cases. This process has the potential to greatly facilitate the process of identification and selection of desirable arbitrators.

As part of the new process, the AAA will provide the parties with an early, initial sample of arbitrator resumes selected on the basis of qualifications identified by the parties. This should enable the parties' attorneys to determine whether the Association is on the right track in offering arbitrator candidates. If necessary, the AAA can redirect its efforts in preparing the list.

The AAA also will send out so-called "block lists" of arbitrators, categorizing potential panel members by professional expertise-such as attorney, retired judge, industry expert, accountant, or other categories of experience requested by the attorneys.

The new program specifically contemplates joint interviews of potential arbitrators by both sides, either by telephone or written questions. In the interview, both counsel (through the case manager) will have the opportunity to ask prospective arbitrators a reasonable number of general questions agreed upon by the parties and the arbitrator (but not questions specific to the fact pattern involved), in order to get a sense of the prospective arbitrator and his or her view of the world.

Given the importance of arbitrator selection, the opportunity to interview the candidates in large, complex cases is always worth taking.

The new process also contemplates that counsel may request references for prospective arbitrators. References would be of great value in evaluating candidates.

The AAA Enhanced Neutral Selection Process is only available if both sides agree and the case is administered pursuant to the AAA's Procedures for Large, Complex Disputes. Otherwise, the case will be administered according to the regular arbitrator selection process in the AAA Commercial Arbitration Rules.

Lawyers versus Industry Experts

How important is it to select arbitrators with industry expertise? Again, it depends on the case. Many experienced business people and attorneys provide arbitration clauses in their contracts precisely because arbitration offers the opportunity to have potential disputes resolved by decision makers who know the practices of the industry the parties are involved in and are likely to decide any dispute that arises in accordance with such practices. Being judged by one's peers is believed to lead to decisions that better reflect industry expectations. "Architects judging architects" should produce decisions that make sense in the context of architectural practice. Decision making by arbitrators with industry expertise also fosters efficiency, since less time needs to be spent educating them about technical matters. Arbitrators with such expertise can "cut through" the issues.

Yet once disputes arise, the law comes into play. The arbitrators, whatever their technical expertise, will need to have "process" expertise. By that I mean experience conducting arbitration proceedings effectively and expeditiously. Litigators who come to an arbitration with expectations derived largely from their litigation experience (i.e., those who do not have a great deal of experience in arbitration) may not understand this.

In cases involving substantial legal or procedural issues, each side will typically want at least one lawyer. In cases involving substantial technical issues, each side will typically want at least one technical expert. Yet such predilections should not be followed on a knee-jerk basis. Attorneys need to exercise judgment based on the specific case. If their client seems more likely to win based on application of the law, perhaps an effort should be made to select an all-lawyer panel. If the client seems more likely to win based on industry practice or other non-legal considerations, perhaps a panel made up solely of industry experts should be sought.

The issue is most acutely posed in a case to be heard by a single arbitrator where significant legal and technical issues are presented. In such a case, the attorneys for each side have to make the hard choice and seek to select the type of arbitrator believed to be most likely to respond favorably to their client's case.

I do not mean to suggest that there is always a disconnect between decisions based on application of law and those based on industry practice or other non-legal considerations. Having participated in many deliberations on panels with lawyers and industry experts, it seems to me that industry practice is generally substantially consistent with the law and provides a fair result. Yet there are cases where law and practice conflict and where strict application of law conflicts with considerations of fairness and equity. One of the distinctive advantages of arbitration is that it offers the potential for decision-making based on industry practice and equitable considerations in such circumstances.

Yet such decision making does not come automatically. Attorneys must seek to select arbitrators who are potentially amenable (or not amenable) to decision making on a particular basis.

One potential problem with basing the selection of an arbitrator largely on industry expertise is that the arbitrator candidate may have gained the expertise working on one side or the other of the relevant issue. This could make the person desirable to one party and undesirable to the other.

Retired Judges

Do retired judges make better arbitrators than lawyers? This depends on the judge and the case. Perhaps the central questions for parties who are seeking to obtain (or avoid) decision making based largely on industry expertise and equitable considerations are: (1) is the retired judge open to such decision making? (2) does the former judge have the arbitration mindset of expedition and economy? and (3) will he or she be open to spending substantial study time in a particular case if necessary and desired by counsel?

If a case fits into a familiar legal paradigm, the party whose case fits that paradigm may fare better with a retired judge. Correspondingly, the party who needs to overcome that paradigm may fare better with an arbitrator who is not a judge, perhaps a lawyer who specializes in an area of law other than the one involved in the case, or a nonlawyer. Such a person may be more inclined to take a fresh look at the matter.

Some retired judges are more sympathetic to requests for extensive discovery (particularly depositions) than arbitrators imbued with the arbitral mindset of speed and expedition. So retired judges may appeal to parties who think there is something to be gained (but not a speedy proceeding) from more discovery.

An important consideration in deciding whether to select a retired judge is the attitude of the client toward arbitration. If a client is nervous about the prospect of arbitrating, having a prominent former judge as the arbitrator might increase the client's comfort level and acceptance of the result, even if it is adverse.

Single Arbitrator or Panel of Three

Should there be a single arbitrator or a panel of three? Often this question is answered in the parties' arbitration agreement. Of course, the parties can always reach a new agreement on that point when the dispute arises. So the issue is always, in a sense, open.

The question is an important one in a case where expense or a speedy decision is of major concern. Having three arbitrators increases the arbitrator fees. It also makes scheduling more difficult and can cause delays.

On the other hand, having a panel brings more perspective to the decision-making process. I never cease to be amazed at the range of recollections and perceptions of the evidence that members of panels bring to deliberations. Lawyers who do jury trial often say that the jury sees everything. In my experience, the same can be said of a panel of arbitrators.

A key factor in deciding whether to have a sole arbitrator or a panel is the attorney's level of confidence in the potential sole arbitrator. After all, in federal and state courts throughout the land attorneys regularly appear before a single trial judge, even in the largest of cases. However, at the appellate level there are at least three judges and sometimes more. Given the limited scope of appeal in arbitration, arbitrators in a sense act as both trial and appellate judges.

Reasoned v. Conclusory Awards

Should you ask for a reasoned decision? This question is closely related to the type of arbitrator and, in a broader sense, the type of process, desired for a given case. Requiring a reasoned decision requires the selection of at least one arbitrator who is capable of writing the decision. It also raises the likelihood that the arbitrators will view the case in a legalistic fashion, focusing on the fine points of counsels' arguments rather than an overall sense of the equities of the case. It also will increase the cost of the process.

Use of Consultants

Understanding a case does not necessarily imbue counsel with the wisdom to fathom which arbitrator candidates are likely to be favorably disposed to the client's side. Many litigators who do jury trials use consultants to help with jury selection. It seems that jury consultants are used little if at all in arbitrator selection, although the same expertise is involved. Based on a recent informal survey conducted by a law student at my request, jury consultants regard themselves as qualified to provide arbitrator selection services and would be interested in such assignments.

An Arbitrator Who Has Time

An arbitrator may be superb but must have time for the case. The most experienced and capable arbitrators may be overbooked in the short run. However, in my experience, most complex commercial cases need at least three to five months from the preliminary hearing for document production and preparation of expert reports, pre-hearing memoranda, and exhibits and witness lists. When additional discovery is sought or substantive motions are made, more time-over a longer period of time-is needed to deal with the case. This reality generally allows for the selection of very sought-after arbitrators (as long as they commit to be available for discovery and pre-hearing issues in the interim).

Conclusion

Arbitrator selection is one of the most important steps in the arbitration process. Counsel for both parties must have a solid grasp of their case before they go into the administrative conference so they can tell the case manager what kind of arbitrator or panel they want. Then, using available investigative methods and information provided to the parties about the arbitrator candidates, counsel should strive to find arbitrators who are most likely to be responsive to the client's case.

BY CHARLES J. MOXLEY, JR.

Charles J. Moxley, Jr. is counsel to the law firm of Kaplan Fox & Kilsheimer LLP in New York City, where he specializes in litigation and arbitration. He is also an adjunct professor of law at Fordham University School of Law. He has served on the American Arbitration Association's Commercial Panel since 1977. This article is adapted from a presentation he made in New York in June 2005 on the process of selecting an arbitrator. Mr. Moxley welcomes comments from readers about their experiences with arbitrator selection. He may be reached at cmoxley@kaplanfox.com.

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ABOUT The ADR Providers

American Arbitration Association or AAA

www.adr.org
www.mediation.org
www.icdr.org

The AAA is a not for profit offering mediation, arbitration and other neutral services. They are the largest administrator of alternative dispute resolution services worldwide. The AAA offers specialty rules for sectors such as commercial, construction and labor/employment. Their website contains educational tools for users that provides options for drafting clauses and other important information. The AAA also trains thousands of neutrals and advocates each year.

The AAA provides services in the U.S and abroad through the International Center for Dispute Resolution (ICDR). Its headquarters is in lower Manhattan but they have twenty offices throughout the U.S. The AAA established Mediation.org in 2013 to focus its efforts on mediation.

The AAA offers education to mediators and arbitrators through AAA Education Services.

CPR or International Institute for Conflict Prevention and Resolution

www.cpradr.org

CPR was formed in 1977 bringing together Corporate Counsel and their firms to find ways to lower the cost of litigation. CPR was the first to develop an ADR Pledge©. Today, this Pledge obliges over 4,000 operating companies and 1,500 law firms to explore alternative dispute resolution options before pursuing litigation.

CPR's membership is comprised of executives and legal counsel from global companies and law firms, government officials, retired judges, highly experienced neutrals, and leading academics. Through their numerous Committees and Task Forces, CPR uses the expertise of these legal minds to develop rules, protocols, white papers and other tools to more effectively resolve conflict.

CPR is best known as a think tank that publishes books and best practices that are models in the dispute resolution field. They have an award-winning newsletter called *Alternatives* that previews many of the changes, and a blog

called "*CPR Speaks*" that covers more fast-breaking developments.

Until recently CPR's model was to offer non-administered rules. They developed rules and a list of mediators and arbitrators but it was up to the parties and the panel to administer the case unless the parties arranged for CPR administration through a program (e.g. The Wellington Agreement) or in their contracts. CPR will serve as billing agent for matters filed under the non-administered rules charging the parties on an hourly basis.

On July 1, 2013, CPR launched its administered rules targeting complex commercial disputes. The rules provide for party appointment of arbitrators but absent party agreement, the Chair must be from the CPR arbitrator panel. Several companies have included the administered rules in clauses and one matter (later settled) was filed under the new Rules. In another case, the filing party filed under the Administered Rules but in the end the case used the Global Accelerated Commercial Rules due to the date of the clause. The International Administered Rules were released in December 2014. A dozen cases have been filed under these Rules.

JAMS – The Resolution Experts
www.jamsadr.com

JAMS was founded in 1998 by combining a California based dispute resolution provider named Judicial Arbitration and Mediation Service[1] and an East Coast dispute resolution provider named Endipute. Some JAMS' neutrals have an ownership interest in JAMS and take part in the management and direction of the Organization. Historically, JAMS is known for having a panel primarily comprised of retired federal and state judges because of its roots in California. By combining with dispute resolution providers like Endispute and active recruitment, JAMS has expanded its panel to include attorneys that do not have prior judicial experience and neutrals that do not serve full-time. Similar to the AAA, JAMS resolves disputes involving a myriad of subject matters including business/commercial, construction, and disaster recovery. The majority of JAMS filings are resolved through mediation; however, it has a robust arbitration practice.

ARIAS-US
www.arias-us.org

[1] Judicial Arbitration and Mediation Service was established in 1979.

ARIAS•U.S. is a not-for-profit corporation that promotes improvement of the insurance and reinsurance arbitration process for the international and domestic markets.

They are promoting mediation, however most disputants in the reinsurance arena want a resolution and not a compromise.

Most cases are resolved by a handful of arbitrators. Most of their arbitrators are former senior executives with carriers.

FINRA
www.finra.org

FINRA operates the largest securities arbitration forum in the United States to assist in the resolution of monetary and business disputes involving investors, securities firms, and individual brokers. All rules related to the FINRA arbitration program have been filed with and approved by the SEC, after publication in the Federal Register and a finding by the SEC that such rules are in the public interest. FINRA's arbitration forum has 71 hearing locations—at least one in every state. Depending on the amount of damages being sought, disputes in the arbitration forum are heard by either a panel of three arbitrators, or by a single arbitrator. In all cases involving investors, parties have the option to have their case decided exclusively by public arbitrators who have no ties to the securities industry. Brokerage firms pay for most costs, and FINRA waives fees for investors experiencing financial hardship. The average turnaround time across all arbitration cases is 15 months. FINRA publishes detailed arbitration statistics on its website, including the number of cases filed and their respective outcomes. All arbitration awards are made publicly available on FINRA's website.

Training and Credentials for Becoming an Arbitrator or Mediator

International Mediation Institute
www.imimediation.org

IMI is a non-profit public interest initiative that drives transparency and high competency standards into mediation practice across all fields worldwide.

IMI has 40 Qualified Assessment Programs (QAPs) worldwide that certify mediators. In the U.S. the AAA, CPR, JAMS, The New Jersey City University Center for International Dispute Resolution, Columbia University's School of Continuing Education and The Bridges Academy are QAPs. IMI is user driven and the feedback digest for mediators that is required as part of being a certified

mediator is a resource for potential users considering the selection of a mediator. The digests can be found on IMI's website.

In 2013 IMI launched standards for certifying mediation advocates. Law firms can use certification as a competitive edge.

IMI has a network with the Singapore International Mediation Institute/Singapore International Mediation Center (SIMC) and the Florence International Mediation Chamber (FIMC). Additional relationships in Africa, the Middle East, Europe, and South America are being formed. Both SIMC and FIMC require IMI certification for inclusion on their panels.

ABA/DR Section

http://www.americanbar.org/groups/dispute_resolution.html

The ABA offers training for neutrals on a regular basis. Some particular programs include:
Arbitration Institute – Three-day program developed by the College of Commercial Arbitrators, AAA and JAMS. The program is focused on arbitrators and arbitration practitioners and is held in the early summer.
Mediation Institute – Three-day program focused on mediator and mediation advocacy. The program is held each year in November.
Spring Conference – The Conference will be held in Minneapolis in April 2019. The ABA solicits presenters and programs during the summer preceding the conference and generally accepts 90 programs.
The ABA offers international programs. In November 2014 a trip was offered for Cuba and in 2015 a Summit was held in India. In 2019 they will be traveling to Florence, Italy.
Monthly webinars and teleconference CLEs are offered.
Women In Dispute Resolution or WIDR was established in 2012 to develop women neutrals. WIDR offers programs that combine practice development, networking and substantive learning. In 2015, the ABA launched Minorities in Dispute Resolution with similar goals to WIDR.

The ABA also offers professional liability insurance for mediation and arbitration practice. Specifics can be found on the Section's webpage.

AAA

The AAA roster includes over 8,000 people with backgrounds as business executives, law firm partners, educators and others. All candidates for the AAA panel of neutrals are required to satisfy their requirements and attend annual trainings offered by the AAA. Information about the AAA's educational programs can be found at https://www.adr.org

The AAA is committed to diversity and offers a special program for people with diverse backgrounds to break into the field – the Higginbothem Fellows Program.

Neutrals are paid their going hourly or per diem rate for services provided.

CPR

When determining whether to accept a candidate for CPR's panel of neutrals, CPR considers candidates' education, experience with complex commercial matters, ADR training, ADR experience, references and, where appropriate, substantive experience in a given field. CPR strives for geographic and other diversity. All CPR neutrals are expected to maintain the highest ethical standards as set out by the governing ethical codes and rules.

To apply to be a CPR Neutral, a candidate must complete a Neutral Application Form and return it by email. Neutrals are approved for specific panels such as employment, insurance, policy-holder, intellectual property to name a few. Committees in each of the specialized areas review completed applications. There is a three to six month backlog for Specialty Committee review of applications to CPR's Panels.

CPR does have a listing fee to continue on its panel. The fee is $395 for the first panel and $100 for each additional panel plus 5% of amounts billed for hearing/mediation sessions. A refund of a portion of the fee will be made the following year for years in which no case is received. Panelists set their own rates for assignments. For more information go to www.cpradr.org

CPR offers arbitrator training in collaboration with other organizations like the Chartered Institute of Arbitrators. CPR also offer mediator skills training in conjunction with the Center for Effective Dispute Resolution (CEDR).

FINRA

FINRA maintains a roster of more than 7,500 arbitrators. FINRA regularly recruits professionals with established careers, including attorneys, professionals with MBAs, and business owners. More than 3,500 of FINRA's approximately 7,500 arbitrators are attorneys. More than 100 arbitrators are currently, or were formerly judges. Additionally, FINRA actively recruits minority and female arbitrators, and publishes data on the diversity of the arbitrator pool on its website.

Arbitrator applicants must have a minimum of five years of paid work experience—inside or outside of the securities industry—and two years of college-level credits. No previous arbitration, securities, or legal experience is required to apply. FINRA provides free training and continuing education for arbitrators on a broad range of topics.

Arbitrators receive an honorarium for each hearing session they attend: typically $600 per day or $725 per day for arbitrators serving as chairpersons.

In addition to arbitrators, FINRA has a highly qualified roster of mediators. FINRA mediators have subject matter knowledge and significant and relevant experience in both investor disputes and securities employment disputes. For more information about becoming a FINRA arbitrator or mediator, go to the Become an Arbitrator and Become a Mediator pages on FINRA's website.

OTHER ORGANIZATIONS

ARIAS-US

ARIAS neutrals are generally senior executives or lawyers from the insurance or reinsurance industries. ARIAS has a number of ways to become certified that include industry experience and training. Recertification is required every two years. Look to the ARIAS-US website at http://www.arias-us.org for details. There is a separate website for reinsurance arbitrators in London.

Neutrals are paid their going rate. A limited number of arbitrators are appointed to most of the cases.

ICC

http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Articles/2014/ICC-Court-further-extends-worldwide-reach-in-2013

In 2013 the ICC opened an office in New York to administer cases in North America. The entity formed is called SINCANA, Inc. Anyone can add their name to ICC's directory of experts for consideration as an arbitrator or mediator. In order to be selected, a potential neutral needs to become known by the SINCANA staff or the lawyers who select neutrals. The ICC charges a fee to be listed as an expert on their list of experts.

New York State Bar Association Section for Dispute Resolution

www.nysba.org

The Section for Dispute Resolution offers many education programs for potential mediators and arbitrators. Some target new neutrals while others enrich the skills of more experienced neutrals and advocates. Some regular offerings include:

Mediator Skills and Advanced Mediator Skills – This is a two part multi day program that will help qualify an attendee for the Commercial Division mediation panel.

Arbitration Training – This is a multi-day program offered for new and experienced arbitrators and arbitration advocates both domestic and international.

Fall Conference – This is a one day program focused on skills for members.

Annual Meeting – This is a half day program held during the NYSBA annual meeting in January each year.

The Section also offers programming and other opportunities for law students and young lawyers including:

- Arbitration Moot
- NYSBA ACCTM Writing Competition
- Dispute Resolution Clinic
- Law Student and Young Lawyer Reception
- Scholarships for women and minorities
- Mentoring for women and minorities

The Section has about 20 Committees that develop policy, monitor the field, and offer education programs. The Committees are subject and field oriented including: Arbitration, Mediation, ADR in the Courts, International Dispute Resolution, Diversity, and Legislation. The Mediation Committee created a video for pro se disputants so they understand the value and goal of mediation.

Finally, the Section publishes a quarterly magazine focused on the field. The Section regularly seeks contributors to the Dispute Resolver

Small Business Arbitration Center of New York

www.sbacnyc.com

This Center was established in New York to assist small business owners in resolving disputes. They describe their neutrals as planning change advocates. The Center offers several certification programs for neutrals.

List Serves

John Jay Listserve

http://listserver.jjay.cuny.edu/cgi-bin/wa.exe?SUBED1=NYC-DR&A=1

Peter Lurie's Arbitration Listserve

MEDIATE-AND-ARBITRATE@PEACH.EASE.LSOFT.COM

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DISCLAIMER: This document was prepared to assist individuals who are thinking of a career as a mediator or arbitrator. Anyone using the information should refer to the websites referenced for the latest information on the organizations or programs.

CLIMBING THE ADR NEUTRAL LADDER

A NEXT STEPS GUIDE FOR NEUTRAL OPPORTUNITIES IN NEW YORK CITY

BY: M. SALMAN RAVALA, ESQ. This guide is prepared to assist newly trained neutrals in navigating mediator and arbitrator opportunities in New York City. The opportunities relate primarily to commercial and employment law and are outlined here for information purposes only. Please verify final information directly with the court-annexed ADR program, ADR institution or provider. For updates to this document or to report an inactive weblink, please contact the author at SRavala@lawcrt.com.

FINRA

FINRA has opportunities to serve as both Mediator and Arbitrator in areas serving investors, brokerage firms, and brokers in the securities industry. The Mediation roster is small compared to the Arbitration roster and it is therefore more selective, requiring significant mediator training and experience.

Mediation
Candidates must possess mediator experience and securities knowledge or expertise. One of the requirements for FINRA mediators is that they have significant, relevant mediation experience and subject matter knowledge in securities. The program requires pre-qualification and then completion of an application. For the application and more information, see: https://www.finra.org/arbitration-and-mediation/become-a-mediator.

FINRA prefers multi-day mediator training that includes role-playing techniques; certifications or membership on other mediator rosters; relevant experience as a mediator in ten to fifteen mediations in business related disputes; and four letters of reference to be supplied with the mediator's application and from parties or attorneys who have mediated with the applicant and can attest to the applicant's skills and experience as a mediator.

Arbitration
FINRA has two classifications of arbitrators: public and non-public. Public arbitrators are select individuals who are not required to have knowledge of the securities industry. Non-public arbitrators have a more extensive securities industry background. Unless waived by FINRA at its discretion, the program requires candidates to have a minimum of five years of paid work experience—inside or outside of the securities industry. For the application and more information, see: https://www.finra.org/arbitration-and-mediation/apply-now.

Background checks and employment verification will be conducted as part of the application review process. Expect some back and forth to clarify your entries in the application and a final approval between 60-90 days of submission of your application. Upon approval, Arbitrators must attend FINRA specific arbitrator training and pass an exam.

NYS PART 137 FEE DISPUTE PANEL

Mediation
Neutrals on the Part 137 panel generally serve as arbitrators but may also be called to serve as mediators.

Arbitration
Administrators manage local programs in various Districts across New York State. For New York and Bronx Counties, the 1st and 12th Districts, the Administrator is NYCLA. For a list of other Districts and to contact their Administrators, see https://www.nycourts.gov/admin/feedispute/local_programs.shtml.

There are two components to the Part 137 training. The first is to watch an online orientation video and the second is to obtain arbitration training offered by the NYS Office of ADR. No online orientation is required if the candidate's arbitration training is the actual Part 137 Fee Dispute Panel specific arbitrator training, which is six hours long. While other arbitration training may qualify on a case by case basis in lieu of the Part 137 specific training, the Part 137 specific arbitration training is highly recommended as it reviews core principles and comes with a Part 137 training book which provides sample forms and essential guidance on issues that regularly come up during Part 137 arbitrations. For more information, see http://ww2.nycourts.gov/admin/feedispute/faqs.shtml#arbitrator.

For a list of upcoming trainings, see the NYCLA calendar of events or see New York State ADR Training website at https://www.nycourts.gov/ip/adr/Training.shtml. You may contact NYCLA Fee Dispute Program Administrator, Elizabeth Biberman, at Phone: 212-267-6646, ext. 207 or E-mail: EBiberman@nycla.org.

Once training is completed, candidates must submit a bio; resume; and Oath of Arbitrator. A complete submission packet

should be sent to the Fee Dispute Program Administrator in the candidate's District for formal submission to the New York State Office of Court Administration Attorney Client Fee Dispute Program Board of Governors for approval.

CIVIL COURT OF THE CITY OF NEW YORK

Mediation
Mediators are experienced volunteers who have training in civil court dispute resolution. Candidates, including lawyers, are required to obtain formal mediation training. Mediation training can be obtained via the Peace Institute. To become certified, candidates must complete the five-day formal training; a three-month, once a week, apprenticeship; pass a video course; and obtain an additional one-day civil court training, which is also provided by the Peace Institute. A six-week mentorship at the Civil Court is also required. Mediation takes place at Court or at a local community dispute resolution center, depending on where the action is brought. For more information, see: For more information, see https://www.nycourts.gov/ip/adr/NYCCivil.shtml.

For a list of upcoming trainings, see http://nypeace.org/basic-mediation-training/. You may contact Mediation Services Coordinator, Eddy Valdez, at Phone: 646- 386-5417 or E-mail: mediationcivil@courts.state.ny.us.

Arbitration
Not Applicable

NYS SMALL CLAIMS PART

Mediation
Neutrals on the Small Claims Part panel generally serve as arbitrators but may also be called to serve as mediators.

Arbitration
The only court-annexed arbitration program in New York State Courts is the Small Claims Part Arbitration, which is cited by many as an excellent way to get actual arbitrator training. The program runs throughout the five boroughs of New York City. The scope is limited to small claims cases under $5000.00.

To become an arbitrator and hear cases before the Small Claims Part, a candidate must be licensed to practice law in the State of New York for five or more years; complete Small Claims court arbitration training, which is two hours long; and observe at least two arbitrations in the program. Once training and observations are completed, the candidate will be sworn in and may choose the county in which he or she wishes to serve as an arbitrator. For more information, see: https://www.nycourts.gov/courts/nyc/smallclaims/sc_volunteeropps.shtml.

For a list of upcoming trainings, see the New York State ADR Training website at https://www.nycourts.gov/ip/adr/Training.shtml. You may also contact New York County Small Claims Part administrator, Ananias Grajales, at Phone: 646.386.5730 or E-mail: agrajale@nycourts.gov.

NY COUNTY COMMERCIAL DIVISION

Mediation
Cases are referred to the Program by Order of reference of the assigned Commercial Division Justice or authorized non-Division Justice. Mediators provide three hours of actual mediation at no charge to the parties but are paid at the rate of $400.00 per hour thereafter.

Candidates must have at least ten years of experience as a practitioner of commercial law and have the requisite forty hours of Part 146 approved mediation training, with at least twenty-four hours in basic mediation training and at least sixteen hours in commercial mediation techniques. Training in arbitration does not suffice. Prior experience as a mediator is not required, but is strongly preferred. Candidates must submit a completed application, resume; cover letter; and satisfactorily complete an interview in order to join the roster. Candidates that are added to the roster are required to be available to handle at least three mediations each year for the Commercial Division. Candidates are also required to attend at least six hours of additional training in commercial law every two years. For the application or more information, see: https://www.nycourts.gov/courts/ComDiv/NY/PDFs/ADR-NeutralAp.pdf.

A recommended training is NYSBA's 3-day commercial mediation training but for a list of upcoming trainings, see the New York State ADR Training website at https://www.nycourts.gov/ip/adr/Training.shtml. You may contact New York County, Commercial Division ADR Program administrator, Simone Abrams, at Phone: 212-256-7986 or E-mail: sabrams@nycourts.gov.

Arbitration
Not Applicable

U.S. DISTRICT COURT, SDNY & EDNY

Mediation
Any individual may apply to serve as a mediator if he or she satisfies the following criteria, at outlined in the Mediation Program Procedure: 1) member in good standing of any US District Court; 2) with substantial exposure to mediation in federal court or mediation in other settings; 3) provides letter of reference from a party, training provider, judge, court administrator, or ADR institution that addresses the applicant's mediation process skills including their ability to listen well, facilitate communication, and assist with settlement discussions; and 4) is willing to participate in training, mentorship programs, and ongoing assessment. Those that join the roster are required to be available to handle at least two mediations.

Mediators in the SDNY serve without compensation but qualify for *pro bono* service hours. For the application and more information, see:

http://www.nysd.uscourts.gov/docs/mediation/Mediation%20Program%20Volunteer%20Application/Mediation%20Program%20Volunteer%20Application.5.25.17.pdf.

Mediators in the EDNY provide four hours of actual mediation at no charge but are paid at the rate of $300.00 per hour thereafter. For the application and more information, see: https://img.nyed.uscourts.gov/files/forms/adrapplicationsandycases.pdf.

For those interested, observation of an actual SDNY or EDNY mediation is permissible upon identifying a mediator that will allow candidates to sit-in on the mediation. Follow rule 6 (g) of the SDNY Mediation Program Procedures which requires consent of all parties, consent of all attorneys, consent of mediator, and written notice by mediator of the observer to the Mediation Office. Observers must sign the Mediation Confidentiality Agreement.

Both the SDNY and EDNY also have a Pro Bono Mediation Counsel program for *pro se* clients (also referred to as the Mediation Advocacy Program or MAP) which offers a federal employment mediation training free of charge. This is a great way to meet SDNY & EDNY mediators, attend networking events, and get a candidates foot in the door.

You may contact SDNY Mediation Office, Rebecca Price, at Phone: 212-805-0643 or E-mail: mediationoffice@nysd.uscourts.gov. You may contact EDNY ADR Administrator, Robyn Weinstein, at Phone: 718-613-2578 or E-mail: Robyn_Weinstein@nyed.uscourts.gov.

Arbitration
Arbitration in the EDNY is governed by Local Rule 83.7 and is limited to cases under $150,000.00. Candidates must complete an application; submit a resume; and one letter of reference from a person with direct knowledge of the applicant's experience. For the application and more information, see: https://www.nyed.uscourts.gov/arbitration.

You may contact EDNY ADR Administrator, Robyn Weinstein, at Phone: 718-613-2578 or E-mail: Robyn_Weinstein@nyed.uscourts.gov.

AAA

AAA maintains a roster of both mediators and arbitrators. AAA administered disputes typically arise out of contractual conflicts or business disagreements, but stem from a wide range of industries. The AAA only recruits individuals who have expertise in areas that align with the types of cases the AAA administers, because this ensures the candidates are appealing to parties seeking a AAA administered arbitration or mediation.

Mediation
Candidates must have at least ten years of senior level experience in business, industry or profession; an education degree or professional license appropriate to the candidate's field of expertise; and maintain membership in at least one business, trade, or professional association. The candidate must also complete at least twenty-four hours of training in mediation process skills; and have served as mediator on at least five mediation cases within the last three calendar years.

For the application or more information, see: https://www.adr.org/aaa-panel.

A recommended training is AAA's 4-day Mediator Essentials course by Harold Coleman and/or Neil Carmichael but for a list of upcoming trainings, see the AAA's Education Services website at https://www.adreducation.org/courses. You may contact AAA, VP of Commercial Division, Jeffrey T. Zaino, at Phone: 212-484-3224 or E-mail: zainoj@adr.org.

Arbitration
Candidates must have at least fifteen years of senior level experience in business, industry or profession; an education degree or professional license appropriate to the candidate's field of expertise; and maintain membership in at least one business, trade, or professional association. Candidate must submit a resume and cover letter to their local AAA office. Upon receipt of the candidate's application, AAA schedules an in-person meeting or a teleconference with the candidate. Thereafter, the candidate is required to submit to the AAA a nomination letter and three letters of reference.

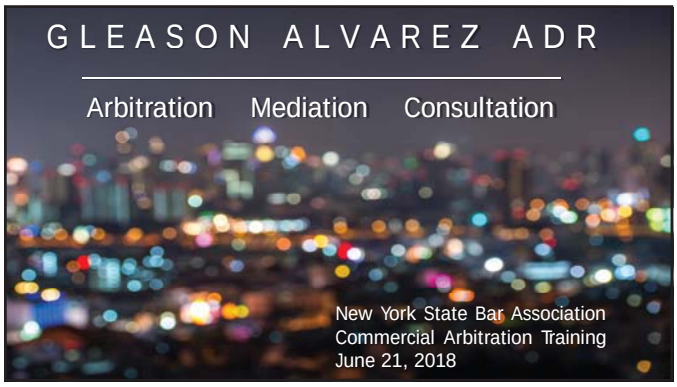
For the application or more information, see: https://www.adr.org/aaa-panel.

A recommended training is NYSBA's 3-day Commercial Arbitration Training by Charlie Moxley, Lea Haber Kuck, and Edna Sussman, and AAA's Arbitration Fundamentals & Best Practices for New AAA Arbitrators course by Edna Sussman but for a list of upcoming trainings, see the AAA's Education Services website at https://www.adreducation.org/courses. You may contact AAA, VP of Commercial Division, Jeffrey T. Zaino, at Phone: 212-484-3224 or E-mail: zainoj@adr.org.

CPR

CPR maintains a roster of both mediators and arbitrators. To become a neutral with CPR, candidates must submit a completed application; resume; two letters of references; and a processing fee of fee of $150.00, plus $50.00 for every specialty panel the candidate is applying for. CPR will consider a candidate's education, commercial experience, ADR training and experience, substantive experience in specific fields, and references, in order to determine whether the candidate will be awarded a position on the CPR neutral roster.
For the application and more information, see: https://www.cpradr.org/neutrals/become-a-neutral.

You may contact CPR Corporate Secretary, Helena Tavares Erickson, at Phone: 646-753-8237 or E-mail: herickson@cpradr.org.



Building Your Arbitration Practice

Practice Start-up Checklist

- ✓ Self-assessment
- ✓ Business plan
- ✓ Marketing strategy
- ✓ Intellectual pursuits
- ✓ Measuring progress and success

3

Step one…

What does your ideal day look like?

4

Self-assessment

- What is your niche?
- What qualities do you possess that set you apart (and are advantageous in the arbitration context)?
  - What do you need to cultivate?

5

Self-assessment, continued

- What does your network look like now?
  - Professional network
  - Bar associations
  - Other affiliations

6

Self-assessment, continued

- Is your online presence conveying the best message about you?
  - Website
  - Social networking
  - Articles/blogs
  - Personal information

7

Self-assessment, continued

- Do you know how you want to set up your practice?
  - Name
  - Structure
  - Location
  - Records management
  - Insurance
  - Cyber security
  - Banking and finance
  - Other resources you may require

8

Business plan: Mission

- Mission statement: What is the purpose of your practice?
  - Examples:
    - Not great: To arbitrate cases
    - Better: To serve as an arbitrator in business to business disputes, primarily focused in the New York Metro area
    - Best: To deliver fair and efficient services as an arbitrator in disputes relating to reinsurance, both domestically and internationally

9

Business plan: Vision

- How do you envision the future of your arbitration practice?
  - Examples:
    - Within two years, I will have a consistent and full-time arbitrator practice, focused on a mix of domestic and international matters.
    - Within five years, I will conduct all proceedings online.
    - Within ten years, I will conduct arbitrations from my own spaceship.

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Business plan: Goal setting

- SMART Goals: What are four-five specific goals that will help you to achieve your mission/vision?
  - Specific: who, what, when and where
  - Measurable: put a number on it
  - Attainable: be realistic
  - Relevant: relate to your mission/vision
  - Time-bound: set a deadline

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Business plan: Goal setting examples

- I will be accepted to two panels by December 31.
- I will have at least ten speaking engagements in 2019.
- I will write one scholarly article by June 30.

12

Business plan: Tasks to support your goals

- What activities must you undertake in order to achieve your goals?

- Example:
  - Goal: I will have at least ten speaking engagements in 2019.
  - Tasks:
    - Identify target organizations/conferences by July 1.
    - Write three blog posts and two articles that may serve as topic of interest at these events by September 1.
    - Arrange meetings to discuss idea with potential co-panelists by September 30.

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Maintaining your business plan

- Review at least once a week
- Set up report out meetings with a colleague
  - Helps hold you to task
  - Brainstorm
  - Comradery!
- Living document – revise as needed

14

Marketing strategy:

How is anyone going to know about you? And what do you want them to know?

- Who is your target audience?
- What are their interests?
- Where do they spend their time?
- When is it appropriate for you to make contact? In what form?
- Why should anyone care about you? (Harsh!)

Always be mindful of and avoid the potential for creating conflicts…

15

Intellectual pursuits:

There is always something new to learn

- Write
- Teach
- Speak
- Listen

16

Measuring progress & success

- Success metrics tied to goals/tasks
- Ask for feedback, as appropriate
- Meet with mentors and sponsors regularly and appropriately
- Develop professional support networks with colleagues

Your health and happiness:
if it's not off the charts, fix immediately

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Suggested reading

- Springboard, G. Richard Shell
- How to Make Money as a Mediator (And Create Value for Everyone): 30 Top Mediators Share Secrets to Building a Successful Practice, Jeff Krivis

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Financial Industry Regulatory Authority

THE FINANCIAL INDUSTRY REGULATORY AUTHORITY'S DISPUTE RESOLUTION ACTIVITIES

Revised May 16, 2018

I. BACKGROUND

The Financial Industry Regulatory Authority (FINRA) administers a dispute resolution forum for investors, brokerage firms, and their registered employees in the U.S. through its network of 71 hearing locations, including at least one in each state and Puerto Rico. FINRA annually administers between 4,000 and 8,500 arbitrations and numerous mediations. FINRA maintains a diverse roster of over 7,400 arbitrators and 200 mediators. The National Arbitration and Mediation Committee (NAMC), which is composed of investor, industry, and neutral (arbitrator and mediator) representatives, provides policy guidance to FINRA's Dispute Resolution staff. A majority of the NAMC members and its chair are public. FINRA is regulated by the United States Securities and Exchange Commission (SEC).

FINRA's Dispute Resolution program is administered out of four regional offices: Northeast, Southeast, Midwest, and West, located in New York City, Boca Raton, Chicago, and Los Angeles, respectively, with headquarters in New York City. Contact information for the regional offices, as well as for other FINRA staff, is available on FINRA's website at www.finra.org. Below is a map showing the hearing locations and the regional offices to which they are assigned:

To accommodate changing and diverse cases, FINRA continually adjusts its procedures. Below are highlights on: Statistics and Trends; FINRA Dispute Resolution Task Force; Recent Significant Rule Change; Proposed Rule Changes; Regulatory Notice on Forum Selection; Significant Initiatives; FINRA Neutrals; Office of Dispute Resolution Technology Initiatives; FINRA Investor Education Foundation; and Mediation.

II. STATISTICS AND TRENDS

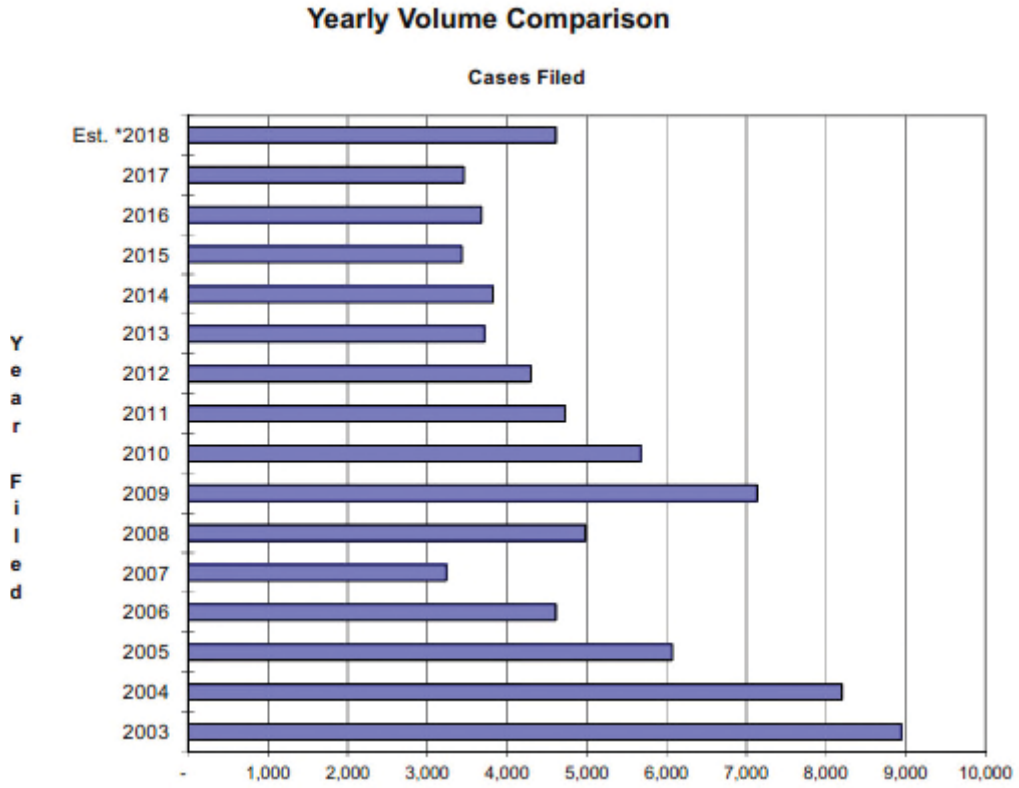
Arbitration case filings increased in April 2018 compared to April 2017. Through April 2018, parties filed 1,538 cases – a 47% increase from the1,047 cases filed through April 2017. Customer claims increased by 40% compared to April 2017. In April 2018, 39% of filed claims were intra-industry cases.

Mediation cases decreased in April 2018 compared to April 2017. Through April 2018, parties filed 172 mediation cases – a 27% decrease compared to the 237 mediation cases filed through April 2017.

Case Filing Statistics for 2018 - This section provides key filing data and trends.

Overall arbitration case filings:

- April 2018: 1,538 (47% increase compared to April 2017).



Mediation case filings

- April 2018: 172 (27% decrease compared to April 2017).

Customer Award Statistics

- Cases in which customers are awarded damages
  - April 2018:
    - Overall: 39% (43% in 2017, 41% in 2016, and 42% in 2015).
    - Hearing cases (not including cases decided by review of documents only): 40% (45% in 2017, 42% in 2016, and 45% in 2015).

Case Processing Statistics

Processing times from service of the claim to close of the case

- April 2018:
  - Overall: 14.3 months (1% decrease compared to April 2017)
  - Hearing cases: 15.8 (no change compared to April 2017)
  - Simplified cases (decided on the documents submitted without a hearing): 7.4months (3% increase compared to April 2017)

- Percentage of cases closed by award
  - April 2018: 17% (compared to 18% in 2017, 21% in 2016, and 24% in 2015).
  - In April 2018, Customer cases closed by award or settlement approximately 86% of the time.

Statistic Enhancements

In December 2015, we made multiple enhancements to our monthly statistics. Our charts now display case filing volume for the 15 most popular controversy and security types over a five-year period. The information is further separated by customer cases and intra-industry case filings. We also added a new interactive map that displays the number of pending cases and the number of arbitrators by type in each hearing location.

FINRA Office of Dispute Resolution
Top 15 Controversy Types in Customer Arbitrations Through April

Type of Controversy*		2018 Cases Served	2017	2016	2015	2014
Breach of Fiduciary Duty	**Through April**	783	534	629	493	667
	Year-End	--	1,899	2,002	1,807	2,064
Suitability	**Through April**	669	440	483	338	432
	Year-End	--	1,606	1,606	1,364	1,401
Misrepresentation	**Through April**	651	440	518	394	504
	Year-End	--	1,663	1,670	1,499	1,593
Negligence	**Through April**	651	484	583	480	664
	Year-End	--	1,662	1,862	1,677	1,977
Failure to Supervise	**Through April**	635	472	571	428	559
	Year-End	--	1,621	1,802	1,554	1,733
Fraud	**Through April**	568	375	384	250	1
	Year-End	--	1,389	1,301	1,089	41
Omission of Facts	**Through April**	561	382	408	321	416
	Year-End	--	1,493	1,394	1,216	1,384
Breach of Contract	**Through April**	553	372	484	390	572
	Year-End	--	1,318	1,495	1,444	1,755
Violation of Blue Sky Laws**	**Through April**	262	138	106	59	--
	Year-End	--	547	344	236	--
Unauthorized Trading	**Through April**	88	92	110	79	75
	Year-End	--	263	362	264	239
Manipulation	**Through April**	76	79	81	42	64
	Year-End	--	299	236	208	173
Elder Abuse**	**Through April**	74	--	--	--	--
	Year-End	--	61	--	--	--
Churning	**Through April**	68	88	89	79	67
	Year-End	--	219	254	247	213
Errors-charges	**Through April**	28	17	14	24	23
	Year-End	--	66	56	64	71
Execution Error	**Through April**	21	12	27	36	60
	Year-End	--	53	85	96	153

**Each case can be coded to contain multiple controversy types. Therefore, the columns in this table cannot be totaled to determine the number of cases served in a year.*
***These categories were not tracked in years which no data appear.*

FINRA Office of Dispute Resolution
Top 15 Security Types in Customer Arbitrations Through April

Type of Security *		2018 Cases Served	2017	2016	2015	2014
Municipal Bonds	**Through April**	279	94	151	104	116
	Year-End	--	565	433	559	553
Municipal Bond Funds	**Through April**	265	85	175	97	169
	Year-End	--	558	480	607	684
Common Stock	**Through April**	235	177	210	167	217
	Year-End	--	604	646	610	572
Mutual Funds	**Through April**	224	109	80	70	112
	Year-End	--	447	352	373	369
Government Securities	**Through April**	135	29	7	9	6
	Year-End	--	229	96	169	31
Exchange-Traded Funds	**Through April**	70	46	50	47	32
	Year-End	--	131	133	127	120
Real Estate Investment Trust	**Through April**	66	67	51	63	84
	Year-End	--	177	184	191	232
Options	**Through April**	64	37	42	39	46
	Year-End	--	127	124	128	143
Limited Partnerships	**Through April**	56	53	40	29	46
	Year-End	--	183	199	79	82
Corporate Bonds	**Through April**	51	37	44	25	21
	Year-End	--	119	154	194	66
Private Equities	**Through April**	39	36	43	28	29
	Year-End	--	111	114	92	77
Annuities	**Through April**	38	38	41	25	38
	Year-End	--	115	127	81	105
Variable Annuities	**Through April**	33	48	33	32	33
	Year-End	--	129	115	104	116
401(k)**	**Through April**	33	28	--	--	--
	Year-End	--	69	27	--	--
Warrants/Rights	**Through April**	27	1	5	2	5
	Year-End	--	30	13	13	10

**Each case can be coded to contain multiple controversy types. Therefore, the columns in this table cannot be totaled to determine the number of cases served in a year.*

FINRA Office of Dispute Resolution
Top 15 Controversy Types in Intra-Industry Arbitrations Through April

Type of Controversy*		2018 Cases Served	2017	2016	2015	2014
Breach of Contract	**Through April**	108	145	125	124	141
	Year-End	--	403	389	373	347
Promissory Notes	**Through April**	88	100	129	121	160
	Year-End	--	296	401	401	476
Libel, Slander, or Defamation	**Through April**	59	39	41	35	38
	Year-End	--	117	83	115	99
Suitability	**Through April**	49	2	1	0	1
	Year-End	--	59	15	1	2
Compensation	**Through April**	47	55	51	42	64
	Year-End	--	161	163	140	146
Libel or Slander on Form U-5	**Through April**	45	40	36	43	44
	Year-End	--	136	124	119	110
Misrepresentation	**Through April**	40	6	3	7	16
	Year-End	--	54	21	17	33
Wrongful Termination	**Through April**	38	42	37	41	38
	Year-End	--	116	127	123	79
Commissions	**Through April**	24	40	19	27	30
	Year-End	--	103	60	73	77
Breach of Fiduciary Duty	**Through April**	21	11	6	7	22
	Year-End	--	52	18	28	52
Negligence	**Through April**	17	7	4	8	12
	Year-End	--	25	17	21	25
Discrimination or Harassment**	**Through April**	13	13	21	19	21
	Year-End	--	37	58	54	43
Raiding Disputes	**Through April**	12	8	11	14	10
	Year-End	--	33	42	42	39
Fraud	**Through April**	11	5	4	5	0
	Year-End	--	26	11	13	1
Indemnification	**Through April**	6	6	4	4	3
	Year-End	--	25	14	12	16

**Each case can be coded to contain multiple controversy types. Therefore, the columns in this table cannot be totaled to determine the number of cases served in a year.*
****
This category combines the following discrimination controversy types: disability, age, gender, race, sexual orientation, national origin, religion, employment discrimination, and sexual harassment. This number does not represent the number of cases served, as one case may have multiple discrimination claims.

Award Outcomes

In 2017, investors prevailed 48% of the time (66 out of 137 cases) in cases decided by all-public panels and 37% of the time (26 out of 71 cases) in cases decided by majority-public panels. Through April 2018, investors prevailed 40% of the time (20 out of 50 cases) in cases decided by all-public panels and 44% of the time (8 out of 18 cases) in cases decided by majority-public panels.

Comparison of Results of All-Public Panels and Majority-Public Panels in Customer Claimant Cases

Year Decided	Cases Decided by All-Public Panels	Number of Cases Decided by All-Public Panels Where Customer Awarded Damages	Percentage of Cases Decided by All-Public Panels Where Customer Awarded Damages	Cases Decided by Majority-Public Panels	Number of Cases Decided by Majority-Public Panels Where Customer Awarded Damages	Percentage of Cases Decided by Majority-Public Panels Where Customer Awarded Damages
2013	128	55	43%	107	47	44%
2014	135	59	44%	104	39	38%
2015	163	77	47%	84	38	45%
2016	145	63	43%	72	26	36%
2017	137	66	48%	71	26	37%
YTD 2018	50	20	40%	18	8	44%

III. FINRA DISPUTE RESOLUTION TASK FORCE

In 2014, FINRA formed the FINRA Dispute Resolution Task Force to suggest strategies to enhance the transparency, impartiality, and efficiency of FINRA's securities dispute resolution forum for all participants. The Task Force brought together a diverse group of leading investor advocates, academics, regulators, and industry representatives to help ensure that FINRA's arbitration and mediation processes continue to serve the needs of the investing public. Seven Task Force members serve on FINRA's arbitrator roster.

The Task Force established an email inbox, which was available throughout the process, to solicit comments from interested parties. It also directly solicited written comments from more than 30 interested organizations and individuals. Over a period of 14 months, the Task Force held four in-person meetings, and its ten subcommittees met 57 times. On December 16, 2015, the Task Force issued its final report and recommendations Final Report and Recommendations of the FINRA Dispute Resolution Task Force). The Task Force recommendations focus, among other matters, on arbitrator training and recruitment, and expanded use of explained decisions and mediation.

FINRA Dispute Resolution Task Force members:

- Barbara Black – Retired Professor and Director, Corporate Law Center, University of Cincinnati College of Law (Chair);
- Philip Aidikoff – Investor attorney, Aidikoff, Uhl & Bakhtiari;
- Joseph Borg – Director, Alabama Securities Commission;
- Philip Cottone – FINRA arbitrator and mediator;
- John Cullem – FINRA arbitrator;
- Sandra Grannum – Industry attorney, Davidson & Grannum;
- Mark Maddox – Investor attorney, Maddox Hargett & Caruso;
- Kevin Miller – General Counsel, Securities America;
- Joseph Peiffer – Investor attorney, Peiffer Rosca Wolf Abdullah Carr & Kane;
- Barbara Roper – Director of Investor Protection, Consumer Federation of America;
- Lisa Roth – President, Tessera Capital Partners (formerly Principal, Keystone Capital Corporation);
- Edward Turan – Managing Director, Citigroup Global Markets; and
- Harry Walters – Managing Director, Morgan Stanley Wealth Management.

On September 30, 2016, FINRA published a status report detailing the progress on the FINRA Dispute Resolution Task Force recommendations. As of October 19, 2017, FINRA ODR staff had discussed all of the recommendations with the NAMC. FINRA has taken action on 39 of the 51 recommendations; 12 are pending.

Many of the recommendations, particularly those involving forum transparency, arbitrator recruitment and training, and case administration processes did not require rulemaking and were implemented in 2016. Among those, FINRA received 945 arbitrator applications in 2016, far exceeding its goal to recruit 750 new arbitrators. FINRA's latest arbitrator demographic survey, which was conducted by an external consulting firm, showed particular progress in adding women and African-Americans to the roster. In 2016, 33 percent of the arbitrators added were women (compared to 26 percent in 2015) and 14 percent were African-American (compared to 4 percent in 2015).

FINRA commenced the rulemaking process on six of the recommendations. Of those, the SEC has already approved two proposals related to the number of public arbitrators on lists and motions to dismiss; there are four proposals in various stages in the rulemaking process, including a proposal addressing the task force recommendation to develop an intermediate form of adjudication for small claims.

FINRA staff will continue working on recommendations related to new staff procedures, technology enhancements and rulemaking, and provide periodic updates on its progress going forward.

IV. RECENT SIGNIFICANT RULE CHANGE

Rule Change Regarding Award Offsets

On August 11, 2016 the SEC approved SR-FINRA-2016-015, which amends the Customer and Industry Codes of Arbitration Procedure to provide that when arbitrators order opposing parties to make payments to one another, the monetary awards shall offset and the party assessed the larger amount shall pay the net difference. The amendments streamline the payment of arbitration awards, and mitigate the risk of failure to pay by an opposing party that may arise when multiple parties in a dispute are found to owe non-equivalent awards simultaneously.

See Securities Exchange Act Release No. 34-78557, published in the *Federal Register* on August 17, 2016 (Vol. 81, No. 159, p. 54901).

Rule Change for Panel Selection in Cases with Three Arbitrators

On September 14, 2016, the SEC approved amendments to FINRA Rule 12403 of the Code of Arbitration Procedure for Customer Disputes to increase the number of arbitrators on the public arbitrator list that FINRA sends to parties during the arbitration panel selection process, from ten to fifteen. The amendments also increase the number of strikes to the public arbitrator list from four to six, so that the proportion of strikes is the same under the amended rule as it is under the current rule. FINRA believes that this rule change will provide greater choice of public arbitrators during the panel selection process, and minimize the burden of vetting additional public arbitrators later in the process.

The amendments are effective for all arbitrator lists FINRA sends to parties on or after January 3, 2017 for panel selection in customer cases with three arbitrators.

See Securities Exchange Act Release No. 34-78836, published in the *Federal Register* on September 20, 106 (Vol. 81, No. 182, p. 64564).

Rule Change on Motions to Dismiss

On November 10, 2016, the SEC approved amendments to Rules 12504 and Rule 13504 of the Customer and Industry Codes of Arbitration Procedure to provide that arbitrators may act upon a motion to dismiss a party or claim prior to the conclusion of a party's case in chief if the arbitrators determine that the non-moving party previously brought a claim regarding the same dispute against the same party, and the dispute was fully and finally adjudicated on the merits and memorialized in an order, judgment, award, or decision.

The rule change, effective January 23, 2017, allows arbitrators to grant a motion to dismiss relating to a particular controversy if they believe the matter was adjudicated fully, even in instances where a claimant adds a new cause of action, or adds additional facts. FINRA believes this will enhance efficiency for forum participants because arbitrators will be permitted to dismiss previously adjudicated cases at an earlier point in an arbitration proceeding.

See Securities Exchange Act Release No. 34-79285, published in the *Federal Register* on November 17, 2016, (Vol.81, No. 222, p. 81213).

Rule Change to Mandatory Use of the Party Portal

On November 14, 2016, the SEC approved amendments to the Customer and Industry Code of Arbitration Procedure to require all parties, except customers who are not represented by an attorney or other person, to use the FINRA Office of Dispute Resolution's Party Portal to file initial statements of claim and to file and serve pleadings and other documents on FINRA or any other party. FINRA is also amending the Code of Mediation Procedure to permit mediation parties to agree to use the Party Portal to submit and retrieve all documents and other communications.

The amendments are effective for all cases filed on or after April 3, 2017.

See Securities and Exchange Act Release No. 34-79296, published in the *Federal Register* on November 18, 2016 (Vol. 81, No. 223. p. 81844).

Rule Change on Broadening Chair Eligibility

On December 2, 2016, the SEC approved amendments to FINRA Rules 12400 and 13400 of the Customer and Industry Codes of Arbitration Procedure to provide that an attorney arbitrator is eligible for the chairperson roster if he or she has completed chairperson training provided by FINRA and served as an arbitrator through award on at least one arbitration, instead of two, administered by a self-regulatory organization in which hearings were held. The amendments apply to all chairperson applicants.

This rule change, effective January 9, 2017, is expected to provide a greater selection of local chairpersons for forum users, thereby potentially reducing the number of instances in which chairpersons must travel for hearings.

See Securities Exchange Act Release No. 34-79455, published in the *Federal Register* on December 8, 2016 (Vol. 81, No. 236, p.88720).

Rule Change to Amend the Customer and Industry Codes to Expedite List Selection in Arbitration

On June 19, 2017, the SEC approved amendments to FINRA Rules 12402 and 12403 of the Customer Code and FINRA Rule 13403 of the Industry Code to provide that the Director of FINRA's Office of Dispute Resolution will send the list or lists generated by the Neutral List Selection System to all parties at the same time, within approximately 30 days after the last answer is due, regardless of the parties' agreement to extend any answer due date.

The purpose of this rule amendment, effective for cases filed on or after September 18, 2017, is to promote efficiency in case processing. Currently, ODR must send a list within 30 days after the last answer is due, taking extensions into account. This change would require us to send a list within 30 days of the latest original answer due date, even if any or all respondents have been granted an extension to answer.

See Securities Exchange Act Release No. 34-80634, published in the *Federal Register* on June 23, 2017 (Vol. 82, No. 120, p. 28724).

Rule Change Regarding Revisions to the Definition of Non-public Arbitrator

On July 10, 2017, FINRA filed a proposed rule change with the SEC to amend FINRA Rule 12100 of the Code of Arbitration Procedure for Customer Disputes, and FINRA Rule 13100 of the Code of Arbitration Procedure for Industry Disputes, to define a non-public arbitrator as a person who is otherwise qualified to serve as an arbitrator, and is disqualified from service as a public arbitrator under the Codes.

The purpose of this proposed rule amendment, effective October 9, 2017, is to close the "Eligibility Gap" created by the current arbitrator definitions, which precludes otherwise qualified individuals from serving as FINRA arbitrators based in most instances on affiliations related to family members or coworkers. Under the proposed rule amendments, those previously ineligible arbitrators and arbitrator-applicants would be classified as Non-public.

V. PROPOSED RULE CHANGES

Proposed Rule Change to Create a $100 Fee and Honorarium for Late Cancellation of a Prehearing Conference

On May 4, 2018, FINRA filed a proposed rule change with the Securities and Exchange Commission to amend FINRA Rules 12500 and 12501 of the Code of Arbitration Procedure for Customer Disputes and FINRA Rules 13500 and 13501 of the Code of Arbitration Procedure for Industry Disputes to charge a $100 per-arbitrator fee to parties who request cancellation of a prehearing conference within three business days before a scheduled prehearing conference. The proposed rule change would also amend FINRA Rules 12214(a) and 13214(a) of the Codes to create a $100 honorarium to pay each arbitrator scheduled to attend a prehearing conference that was cancelled within three business days of the prehearing conference.

Proposed Rule Change to Eliminate the Fee for an Explained Decision

On February 21, 2018, FINRA filed a proposed rule change with the Securities and Exchange Commission to amend FINRA Rules 12214(e)(1) and 12904(g)(5) of the Code of Arbitration Procedure for Customer Disputes and FINRA Rules 13214(e)(1) and 13904(g)(5) of the Code of Arbitration Procedure for Industry Disputes to eliminate the $400 fee for an explained decision. By proposing to remove this provision, if parties jointly request an explained decision, the chairperson drafting the explained decision would receive $400, but the fee would not be assessed to the parties. The purpose of this proposed rule change is to remove a potential barrier to parties making joint requests for explained decisions.

Proposed Rule Filing Relating to Simplified Arbitration

On January 29, 2018, FINRA filed a proposed rule change with the Securities and Exchange Commission to amend FINRA Rules 12600 and 12800 of the Code of Arbitration Procedure for Customer Disputes and 13600 and 13800 of the Code of Arbitration Procedure for Industry Disputes to amend the hearing provisions to provide an additional hearing option for parties in arbitration with claims of $50,000 or less, excluding interest and expenses. This intermediate form of adjudication would provide parties with claims of $50,000 or less an opportunity to argue their cases before an arbitrator in a shorter, limited telephonic hearing format than a regular hearing.

There would be two options for hearings; Option One would follow the regular provisions of the Codes relating to prehearings and hearings, including all fee provisions. If the parties choose Option One, they would continue to have in-person hearings without time limits, and they would continue to be permitted to question opposing parties' witnesses.

Option Two would be the new Special Proceeding subject to the regular provisions of the Code relating to prehearings and hearings, including all fee provisions, with several limiting conditions, including timing limitations for hearings, making telephonic hearings the default hearing method (unless the parties jointly agree to another method of appearance), and limiting total hearing sessions to two sessions to be completed in one day, exclusive of prehearing conferences.

The comment period for this proposed rule change ended on March 9, 2018. See Securities Exchange Act Release No. 34-82693, published in the *Federal Register* on February 16, 2018 (Vol. 83, No. 33, pp 7086-7090).

Regulatory Notice on Expungement (Regulatory Notice 17-42)

On December 6, 2017, FINRA published Regulatory Notice 17-42 to seek comment on establishing a roster of arbitrators with additional training and specific backgrounds or experience from which a panel would be selected to decide an associated person's request for expungement of customer dispute information. The arbitrators from this roster would decide expungement requests where the underlying customer-initiated arbitration is not resolved on the merits or the associated person files a separate claim requesting expungement of customer dispute information. The proposed rule amendments would also establish a roster of public chairpersons with additional qualifications to decide expungement requests filed against a firm under the Industry Code.

The Notice also proposes additional changes to the expungement process that would apply to all requests for expungement of customer dispute information. The proposed amendments to the Codes would make a number of important changes to the current framework related to the expungement of customer dispute information. Among other things, the proposed amendments would amend the Codes to require that for all requests for expungement of customer dispute information. The associated person who is seeking to have his or her CRD record expunged must appear at the expungement hearing, and, to grant expungement, a three-person panel of arbitrators must unanimously agree that expungement is appropriate under Rule 2080(b)(1) and find that the customer dispute information has no investor protection or regulatory value.

The proposed amendments would also limit an associated person who is named as a party to one opportunity to request expungement, and that opportunity must be exercised during the underlying customer case. It would also create limitations on requests for expungement of customer dispute information, including a one-year limitation period after the underlying customer case closes for an associated person to file an expungement request that was not decided during the underlying customer case. The amendments would also codify a party's ability to request expungement on behalf of an associated person not named as a respondent in the underlying customer case (hereinafter referred to as an unnamed person) during the underlying customer case, and establish procedures for such requests.

Furthermore, the amendments would r require associated persons who file expungement requests outside of the underlying customer case to file the request under the Industry Code against the firm at which he or she was associated at the time of the events giving rise to the customer dispute, and remove the option to file an expungement request outside of the Underlying Customer Case against a customer. Lastly, the amendments would specify a minimum filing fee of $1,425 for expungement requests.

In simplified arbitration cases, the proposed amendments would require that an associated person or an unnamed person wait until the conclusion of a customer's simplified arbitration case to file an expungement request, which must be filed against the firm not the customer and would be heard by a panel selected from the Expungement Arbitrator Roster.

For expungement requests relating to customer complaints that do not result in an arbitration claim, the proposed amendments would require that the associated person seek expungement of the customer dispute information relating to a customer complaint within one year of the member firm initially reporting the customer complaint to CRD.

FINRA is currently reviewing the comments that have been submitted on the proposal. The comment period ends on February 5, 2018.

Regulatory Notice on Unpaid Awards (Regulatory Notice 17-33)

On October 18, 2017, FINRA published a Regulatory notice which proposes to amend the Code of Arbitration Procedure for Customer Disputes to expand a customer's option to withdraw an arbitration claim and file in court, even if a mandatory arbitration agreement applies to the claim, to situations where a member firm becomes inactive during a pending arbitration, or where an associated person becomes inactive either before a claim is filed or during a pending arbitration, and related changes to allow customers to amend pleadings, postpone hearings, request default proceedings and receive a refund of filing fees under such situations. The comment period expires on December 18, 2017.

Regulatory Notice on Non-Attorney Representatives (Regulatory Notice 17-34)

On October 18, 2017, FINRA published a Regulatory Notice which outlines FINRA's review of compensated non-attorney representatives' (NAR firms) activities at the forum and seeks responses to questions related to forum users' experiences with NAR firms. The comment period expires on December 18, 2017.

Proposed Rule Change to Codify the Expanded Expungement Guidance

The Board authorized FINRA to file with the SEC proposed amendments to Rules 12805 and 13805 (Expungement of Customer Dispute Information under Rule 2080) of the Codes of Arbitration Procedure in September 2015. The proposed amendments would codify the best practices from the Expanded Expungement Guidance that was issued as a notice to parties and arbitrators in 2013, and last updated in December 2014. The guidance provides arbitrators with best practices and recommendations to follow, in addition to the existing expungement framework, when deciding expungement requests.

VI. REGULATORY NOTICE ON FORUM SELECTION PROVISIONS INVOLVING CUSTOMERS, ASSOCIATED PERSONS AND MEMBER FIRMS

In July 2016, FINRA published *Regulatory Notice 16-25* to remind member firms that customers have a right to request arbitration at FINRA's arbitration forum at any time and do not forfeit that right under FINRA rules by signing any agreement with a forum selection provision specifying another dispute resolution process or an arbitration venue other than the FINRA arbitration forum. In addition, FINRA reminded member firms that FINRA rules do not permit member firms to require associated persons to waive their right to arbitration under FINRA's rules in a pre-dispute agreement.

VII. SIGNIFICANT INITIATIVES

Expanded Expungement Guidance for Arbitrators and Parties

Notice to Arbitrators and Parties: In October 2013, the forum sent to all arbitrators a notice and published on its website guidance for parties and arbitrators concerning expungement requests. The guidance emphasizes the extraordinary nature of expungement relief and advises arbitrators to consider the importance of the Central Registration Depository (CRD) information to regulators, firms, and investors (through BrokerCheck) when considering requests for expungement. The guidance encourages arbitrators to request any documentary or other evidence they believe is relevant to the expungement request, particularly in cases that settle before an evidentiary hearing or in cases where only the requesting party participates in the expungement hearing. It also suggests that arbitrators ask the broker requesting expungement to provide a current copy of his or her BrokerCheck report when determining the appropriateness of expungement. The guidance further recommends that arbitrators identify in the award the specific documentary evidence that they relied upon when recommending expungement.

On July 22, 2014, the SEC approved FINRA Rule 2081, which prohibits conditioned settlements, and it became effective on July 30, 2014. In August 2014, the forum sent to all arbitrators a notice and published on its website updated guidance wherein we addressed settlement payments and prohibited conditions relating to expungement of customer dispute information. The updated guidance reminds arbitrators to consider whether the party seeking expungement contributed to the settlement. Further, the updated guidance provides that if arbitrators learn of prohibited conditions, as described in Rule 2081, they should consult FINRA’s procedures on disciplinary referrals.

In September 2014, we e-mailed to arbitrators a notice and published on our website updated guidance wherein we addressed the importance of allowing customers and their counsel to participate in the expungement hearing in settled cases. This section of the updated guidance reminds arbitrators to allow the customer, among other things, to introduce documents and evidence at the expungement hearing, cross-examine the broker and other witnesses called by the party seeking expungement, and to present opening and closing arguments if the panel allows any party to present such arguments.

In December 2014, we published on our website updated guidance about cases in which an associated person will file an arbitration claim against a member firm solely for the purpose of seeking expungement, without naming the customer in the underlying dispute as a respondent. This section of the updated guidance reminds arbitrators to order the

associated persons to provide a copy of their Statement of Claim to the customer in the underlying arbitration to ensure that the customer is aware that an expungement claim is pending regarding his or her prior dispute. This will also give the customer an opportunity to advise the arbitrators and parties (in writing or through participation in the expungement hearing) of their position on the expungement request, which may assist arbitrators in making the appropriate finding under Rule 2080.

In September 2017, we updated the guidance published on our website to discuss requests for expungement prior to the conclusion of the underlying arbitration. This section states that a broker may not file a request for expungement of customer dispute information arising from a customer arbitration claim until the underlying arbitration has concluded. If a broker files a request for expungement prior to the conclusion of the related customer arbitration, the Director will deny the forum as to the second expungement-only case. This procedure ensures that the underlying customer arbitration is resolved before any subsequent request to expunge customer dispute information from the underlying customer arbitration is considered.

Neutral Workshop: In February 2015, FINRA filmed a neutral workshop addressing expungement, among other matters. In May 2014, FINRA conducted a neutral workshop that provided expanded expungement guidance and an overview of the proposed new rule to address expungement of customer dispute information. In December 2013, FINRA conducted a neutral workshop that provided an overview of CRD and BrokerCheck, stressing the important role arbitrators play in safeguarding the integrity of the information in CRD in the expungement process. The recorded workshop can be found on the Neutral Workshop page under our website, along with other recorded neutral workshops, providing an additional resource for information to neutrals. FINRA pre-records the workshops to allow neutrals to pause and playback the audio file.

The Neutral Corner: The December 2013 edition (Volume 4, 2013) of the arbitrator newsletter, *The Neutral Corner*, was devoted to the topic of expungement. The issue included an article emphasizing the procedural requirements in recommending expungement and another article discussing the limitations on the types of disclosures that may be expunged from CRD through arbitration. The September 2014 edition (Volume 3, 2014) included articles about the revised Award Information Sheet, the new Rule 2081 to address prohibited conditions relating to expungement of customer dispute information, and expanded expungement guidance for arbitrators to allow customers and their counsel to participate in the expungement hearing. The October 2015 edition (Volume 3, 2015) included information on recent court decisions on expungement. The December 2015 edition (Volume 4, 2015) included information on parties making second expungement requests after a previous denial.

We also developed enhanced online training for arbitrators that expanded on and emphasized the points addressed in our expungement guidance.

Online Arbitration Claim Filing Guide: FINRA revised the Online Arbitration Claim Filing Guide to include new information that asks claimants filing expungement claims to provide the occurrence number for the underlying disclosure and other registration information.

Award Information Sheet: To assist arbitrators with the updated expungement guidance, FINRA revised the Award Information Sheet.

We believe the above initiatives will help arbitrators safeguard the integrity of the information in CRD.

Renewed Emphasis on Arbitrator Disclosure

FINRA continually stresses to arbitrators the need to make complete and accurate disclosures. Below are recent measures we have taken to emphasize the importance of disclosing all information that may be relevant:

Further Enhancements to Disclosure Language: In February 2014, FINRA added the following language to: the arbitrator application and arbitrator training; the portal for neutrals and related user guides; and the FINRA Website:

> You must disclose any circumstance or event that might affect your ability to serve impartially or might create an appearance of bias. This includes, but is not limited to, lawsuits (even non-investment related lawsuits); any publications (even if they appear only online); professional memberships; service on boards of directors; etc. When in doubt disclose. Failure to disclose may result in vacated awards which undermine the efficiency and finality of our process. Failure to disclose may also result in removal from the roster.

Oversight of Arbitrators and Mediators: In 2013, FINRA implemented new procedures whereby staff conducts Internet searches of neutrals prior to appointment to a case. If staff finds information during an Internet search that the neutral should have disclosed but did not, staff contacts the neutral, confirms the validity of the information, and requests the neutral's permission to disclose the information on the neutral's Disclosure Report. If an arbitrator does not authorize disclosure of the information, FINRA may seek the arbitrator's recusal from the case or removal from the roster. During 2013 – 2014, FINRA also worked with a third-party vendor to complete an extensive review of the entire neutral roster which included criminal background checks and verification of professional licenses, among other criteria. The project was an additional means of identifying unknown disclosure issues.

In September 2015, FINRA hired additional temporary staff to verify the accuracy of arbitrator disclosure by conducting Internet searches of the entire arbitrator roster. To date, we have reviewed more than 920 arbitrators.

In October 2015, FINRA started conducting reviews of arbitrators with CRD records through its Enterprise Alert system. By leveraging FINRA's regulatory and disclosure functions, ODR is able to timely identify arbitrators with disclosure events on their CRD records.

Neutral Workshop: In July 2014, FINRA conducted a neutral workshop that emphasized the arbitrator's continuous and imperative duty to disclose. In November 2015, FINRA filmed a neutral workshop focusing on practical tips for arbitrators, including: how to make disclosures, how to use the Neutral Portal, and how to conduct a successful hearing. In April 2016, we filmed a neutral workshop featuring arbitrators who provided tips on case

management and using the portal including conducting conflict checks and making disclosures through the portal. The recorded workshops can be found on the Neutral Workshop page of our website, providing an additional resource for information to neutrals. FINRA pre-records the workshops to allow neutrals to pause and playback the audio or video file.

The Neutral Corner: In 2014, two editions (Volumes 1 and 3, 2014) of the arbitrator newsletter, *The Neutral Corner,* included articles about FINRA's expanded background verification and Internet search procedures. FINRA continues to publish regular notices and articles about disclosure in *The Neutral Corner*.

Notice to Arbitrators: In May 2013, FINRA sent a broadcast e-mail to all arbitrators reminding them to disclose all professional affiliations and legal representations. In 2015, FINRA started sending a quarterly disclosure reminder email to all arbitrators. We sent our last disclosure reminder email on August 23, 2016 and continue to remind arbitrators of their disclosure obligations in each issue of *The Neutral Corner.*

FINRA Website: FINRA added a page to the Dispute Resolution portion of the corporate website that explains what arbitrators must disclose, with links and guidance to help arbitrators make proper disclosures.

Disclosure Checklist: FINRA revised the Oath of Arbitrator and Disclosure Checklist to elicit more effectively disclosures from arbitrators. Among other items, the Checklist adds new questions to seek information about memberships with professional organizations, publications, and non-investment related lawsuits. FINRA also reformatted the Checklist as a fillable form that can be submitted through the DR Portal for neutrals. This new format will make it easier for arbitrators to complete the form and provide thorough answers.

We believe these initiatives will increase arbitrators' awareness of the importance of making timely and complete disclosures will help to maintain the integrity of the forum and to ensure the finality of awards.

Updated Arbitrator Reimbursement Guidelines

FINRA recently updated its reimbursement guidelines to decrease the mileage reimbursement rate to 53.5 cents per mile (per IRS Regulation). FINRA has also expanded the number of arbitrators who will get reimbursement for transportation and lodging under our reimbursement guidelines. Arbitrators who live or work more than 75 miles (decreased from 120 miles) away from their primary hearing location are now eligible. We have also increased the daily meal allowance for arbitrators who travel at FINRA's expense to a hearing to $75 per day (up from $55 per day).

The updated reimbursement guidelines can be found at www.finra.org.

Short List Option to Reduce Extended List Appointments

Forum constituents want to select their own neutrals from the roster and thus have complained about the appointment of "extended list" arbitrators. Extended list arbitrators are not selected by the parties and may only be challenged for cause. (FINRA has virtually

eliminated the appointment of extended list arbitrators in the initial appointment process.) FINRA has increased parties' options to reduce the likelihood of extended list appointments when an arbitrator withdraws or is no longer available, no ranked arbitrators remain on the parties' initial ranking lists, and hearing dates are scheduled in a case. Under the "short list option," parties may stipulate to use a list of three arbitrators to select a replacement arbitrator. All parties must agree to use the short list option. Each side may strike one arbitrator's name from the list and may rank all remaining arbitrators' names in order of preference within a prescribed number of days.

If a hearing is scheduled within five calendar days of an arbitrator's withdrawal, removal, or unavailability, parties need to postpone the hearing to use the short list option. The postponement allows FINRA staff time to prescreen arbitrators for conflicts and to ensure they are available for scheduled hearing dates and to provide parties with time to review the list and strike and rank arbitrators. A postponement fee is charged in accordance with current FINRA rules. An additional fee is assessed for postponements granted within ten business days of the hearing date, also in accordance with current FINRA rules. Arbitrators may allocate the fees among the parties that agreed to the postponement. Arbitrators may also waive the fees.

FINRA began to highlight the parties' ability to use this option in February 2012. As of December 2016, 64% of qualifying cases have used the short list option to select a replacement arbitrator.

Voluntary Program for Large Cases

On July 2, 2012, FINRA implemented a voluntary program in all regional offices for large cases (i.e., cases with damages claims of at least $10 million exclusive of interest, costs, and attorneys' fees). FINRA Office of Dispute Resolution processes many cases that involve very substantial amounts in dispute. Currently, FINRA is administering approximately 200 cases that seek damages of at least $10 million. While the rules give the parties flexibility to agree on an ad hoc basis to vary from the procedures in the Arbitration Codes, the large case program was introduced to provide a more formal approach to these cases.

Upon receiving written party agreement to use the program, the Regional Director and an experienced, specially trained case administrator will conduct an early administrative conference with counsel to develop a plan for the administration of the case. Areas to be discussed will include: arbitrator qualifications and the procedures for appointing arbitrators; the use of depositions and interrogatories; the form of the hearing record; and different hearing facilities (costs would be paid by the parties). Parties can use arbitrators from outside of FINRA's roster or provide FINRA with criteria/qualifications to screen arbitrators on FINRA's roster. Parties may pay additional compensation to arbitrators above the standard FINRA honorarium. There is also a non-refundable administrative fee of $1,000 for each separately represented party to use the program. As of August 30, 2016, nine cases have opted into the program, five of which have been decided by award. The Northeast Regional Office has administered five of the cases that have been filed to date, the West Regional Office has administered three cases, and the Southeast Regional Office has administered one case. The large case program is available to eligible cases in each of our regional offices.

The program is targeted at cases involving damages claims of at least $10 million. However, any case can participate in the program where all parties agree and are represented by counsel.

A list of frequently asked questions and the news release for the voluntary program for large cases are available on our website.

VIII. FINRA NEUTRALS

Renewed Emphasis on Arbitrator Recruitment

A primary goal of FINRA's arbitrator recruitment program is to identify and train a qualified pool of potential arbitrators from which parties can choose to hear their disputes. The strategic goal has been to continue to shift the balance of the arbitrator pool to include more public arbitrators and a more diverse roster nationwide. FINRA has implemented an aggressive recruitment campaign to seek individuals from diverse backgrounds from across different industries to serve as arbitrators. Ongoing recruitment initiatives thus far have included more than 100 women and minority organizations nationwide to source and recruit all types of people through on-site events, targeted recruiting advertisement and direct marketing campaigns.

To help maximize our resources and opportunities further, we leveraged our staff talent in the regions to assist with recruitment efforts, particularly in reaching women-focused groups, LGBT communities and other untapped diverse organizations. We also hired an additional full-time national recruiter in 2015. FINRA's latest arbitrator demographic survey, which was conducted by an external consulting firm, showed that we had particular success in adding women and African-Americans to the roster. In 2016, 33 percent of the arbitrators added were women and 14 percent were African-American.

Finally, to become more flexible in how we communicate our message, we have begun using social media to recruit arbitrators. All Office of Dispute Resolution Twitter updates can be found under FINRA's Twitter handle, @FINRA, and LinkedIn users can search "FINRA Dispute Resolution" to find our LinkedIn page. We also released our first formal recruitment video on several social media platforms including Vimeo, LinkedIn, and YouTube in December 2016: https://vimeo.com/188349814.

Arbitrator Application and Approval

Individuals interested in becoming an arbitrator can apply to our roster using the online arbitrator application available in the "Become an Arbitrator" section of our website. Applicants can complete the arbitrator application and submit it electronically along with a completed Consent to Background Search and Investigation Form and Social Security Number Verification Form. FINRA conducts a review of applications and works with applicants to ensure their submissions are complete before forwarding them to a subcommittee of the NAMC for final approval. FINRA processes applications and notifies applicants within 120 days from the date of receipt.

In 2017, we received 781 arbitrator applications, and the average time for application process completion was 74 days. As of May 2018, there are 3388 public arbitrators on our roster.

Arbitrator Training

Arbitrator applicants must complete the Required Basic Arbitrator Training program: 1) online basic training; 2) online expungement training; and 3) classroom training. After successfully completing the online basic and expungement courses, candidates must attend the classroom training at one of our regional offices or by live video. FINRA offers live video training in an interactive WebEx format to allow candidates to participate remotely. In 2017, the average time it took arbitrators to complete this training was 103 days.

To be considered for the chairperson roster, arbitrators must complete FINRA's online chairperson training and satisfy the case service requirement. FINRA staff has discretion to select arbitrators to serve on the chairperson roster from among those arbitrators who have completed the online chairperson training and: 1) have a law degree, are a member of a bar of at least one jurisdiction, and served as an arbitrator through award in at least one arbitration administered by an SRO; or 2) if not an attorney, served as an arbitrator through award in at least three arbitrations administered by an SRO (Customer Code Rule 12400(c) and Industry Code Rule 13400(c)).

In addition to the required trainings, FINRA offers advanced, subject-specific courses.

IX. OFFICE OF DISPUTE RESOLUTION TECHNOLOGY INITIATIVES

Online Portals

Portal for Parties. In November 2016, the SEC approved a rule change to make use of the Portal mandatory for all parties, excluding pro se investors. This rule change applies to all cases filed on or after April 3, 2017. Parties using the Portal can sign in to a secure website and perform many functions online, including:

- filing a claim;
- receiving service of a claim;
- submitting an answer to a received claim;
- submitting additional case documents;
- viewing the status of a case;
- viewing case documents;
- striking and ranking arbitrators online;
- viewing and downloading disclosure reports of prospective arbitrators;
- scheduling hearing dates online; and
- paying invoiced fees.

Portal for Neutrals. In October 2012, we successfully implemented an online Portal for neutrals. Neutrals are not required to use the portal on a mandatory basis, but arbitrators and mediators must register in the Portal to take advantage of the numerous functions it provides, such as:

- viewing and printing their disclosure reports;
- viewing and updating their personal profiles and disclosures;

- accessing information about their assigned cases, including upcoming hearings and payment information;
- viewing case documents;
- submitting documents;
- scheduling hearing dates; and
- viewing how often their names have appeared on arbitrator ranking lists sent to parties, and how often they are ranked or struck on those lists.

Paperless Office Initiative

All Regional Offices have digitized their respective paper-based arbitration files (including portal and non-portal cases). Any paper documents received will be converted to an electronic format, and all case documents will be stored in electronic arbitration and mediation case files. The initiative involves the use of an electronic mailbox for organizing and distributing staff assignments. FINRA has also started digitizing neutral files.

FINRA Office of Dispute Resolution Website

FINRA Office of Dispute Resolution's website, www.finra.org, provides various resources for parties and neutrals regarding FINRA's arbitration and mediation processes. Through the website users can obtain, among other things: an overview of arbitration and mediation; information on how to file a claim; forms that parties and arbitrators need in the arbitration process; arbitrator and mediator application and certification information; the Codes of Arbitration Procedure; and rule filing information. The website also contains a "What's New" section, where users can access case statistics and information on recent FINRA initiatives and announcements.

In December 2015, we made multiple enhancements to our monthly statistics. Our charts now display case filing volume for the 15 most popular controversy and security types over a five-year period. The information is further separated by customer cases and intra-industry case filings. We also added a new interactive map that displays the number of pending cases and the number of arbitrators by type in each hearing location.

Arbitration Awards Online

FINRA's Arbitration Awards Online database is available without charge on FINRA's website at www.finra.org. Through the database, users can access FINRA arbitration awards from January 1989 through the present.

In addition, users can access all NYSE arbitration awards, as well as the awards of all arbitration programs absorbed over the years by FINRA (which include the American Stock Exchange, Chicago Board Options Exchange, International Stock Exchange, Philadelphia Stock Exchange, and Municipal Securities Rulemaking Board) and NYSE (which includes Pacific Exchange/NYSE ARCA).

The database provides users with instantaneous access to awards and the ability to search for awards by using multiple criteria, such as by case number, keywords within awards, arbitrator names, date ranges set by the user, and any combination of these features. FINRA now includes in customer awards information about the panel selection method and

panel composition.

Videoconferencing

All four of FINRA's regional office locations now have videoconferencing capabilities. With the consent of all parties or with the permission of the arbitration panel, parties or witnesses may appear at hearings by videoconference for hearings held in one of the regional office locations. There is no additional cost to use the videoconferencing equipment at FINRA. Parties are encouraged to notify their case administrator at least 30 days prior to the hearing to request videoconferencing services. All videoconferencing requests are honored in the order they are received.

In addition, the following companies offer videoconferencing services compatible with FINRA's:

- Regus
  www.regus.com
  1-800-633-4237

- Veritext
  www.veritext.com
  (contact phone numbers vary by region and are listed on the Veritext website).

Additional information on specific Regus and Veritext locations, costs, and reservations to use videoconferencing services are available by contacting these companies directly. All costs to use videoconferencing services outside of a FINRA regional office location are the responsibility of the party reserving the facilities.

X. FINRA INVESTOR EDUCATION FOUNDATION

The FINRA Investor Education Foundation (Foundation) undertakes and supports research and innovative educational projects that give underserved Americans the knowledge, skills, and tools necessary for financial success throughout life.

In 2004, the Foundation awarded a grant to the Northwestern University School of Law to establish the first securities arbitration clinic in the Midwest to provide legal representation for small investors with limited income. As part of the grant project, Northwestern developed the *Guidelines for Establishing a Law School Investor Advocacy Clinic* to provide practical advice and tools for other law schools interested in starting a clinic. The manual is available on the Foundation's website at www.finrafoundation.org.

The Foundation also funded the development of the Pace Law School *Investor's Guide to Securities Industry Disputes* through a 2006 grant. The *Guide* takes investors through the arbitration and mediation processes and seeks to assist investors representing themselves by providing a foundation in the basic rules and procedures in arbitration and mediation. The *Guide*, updated in 2013 through a second Foundation grant, is available on the Foundation's website.

Through three rounds of grant making in 2009, 2010 and 2012, the Foundation provided start-up funding and assistance to law schools located in high-need areas not served by existing clinics. These clinics joined a roster of clinics across the country that may be found on the FINRA website at www.finra.org/FindAnAttorney.

For more information about the Foundation and its programs, visit www.finrafoundation.org.

XI. MEDIATION

Mediation remains an important service that FINRA offers. Since the program's inception in 1995, FINRA's mediation staff has administered thousands of cases involving a wide variety of securities disputes with over 80 percent resulting in settlement between the parties.

Parties interested in mediation can fill out an online Request for Mediation Form on FINRA's website at www.finra.org. In order to solicit parties' use of mediation and raise awareness of its mediation program, FINRA provides an annual "Settlement Month" program every October, which offers reduced mediation fees for smaller cases.

Mediation Program for Small Arbitration Claims

Since January 2013, FINRA has offered reduced fee and pro bono telephone mediation to parties in simplified cases. Under the program, mediators serve on a pro bono basis on cases alleging $25,000 or less in damages. We have also offered significantly reduced fee mediation at $50 per hour on cases alleging damages between $25,000.01 and $50,000. The program benefits forum users by: 1) increasing the number of cases that settle and giving parties more control over the results of their cases; 2) reducing travel and preparation costs; and 3) providing an alternative for senior, seriously ill, and physically challenged parties who may find traveling to and attending an in-person mediation especially difficult; and 4) offering parties in small cases an efficient and cost-effective option to meet their needs within our forum.

Separately, the program provides newer mediators with an opportunity to demonstrate their mediation skills. Staff has processed hundreds of arbitration requests to mediate through the Mediation Program for Small Arbitration Claims with parties settling over 80% of cases mediated. FINRA continues to communicate the opportunity for parties to mediate through this program to all eligible cases, and highlights the benefits of this affordable mediation option for small claims.

Discontinuation of Mediator Annual Membership Fee

The $200 Mediator Annual Membership Fee has been discontinued in order to increase FINRA's mediator roster and add diversity and visibility to an expanded pool of mediators. FINRA mediators who were unavailable to mediate due to non-payment of the annual fee may email mediate@finra.org should they wish to become available again.

Become a Mediator

FINRA Mediation Program

What Is FINRA Dispute Resolution?

FINRA operates the largest securities dispute resolution forum in the United States, handling more than 99 percent of all securities-related arbitration and mediation claims filed by customers of brokerage firms, and brokerage firms and their employees.

What Is FINRA Mediation?

FINRA developed a mediation program to provide additional dispute resolution options for parties. The goal of the mediation program is to provide public customers, member firms and associated persons with another effective way to resolve their disputes. Accomplishing these goals requires a highly qualified national roster of FINRA mediators.

Mediating through FINRA's Mediation Program provides an informal, voluntary process in which the mediator facilitates negotiations between disputing parties, helping them to find their own mutually acceptable resolution. What distinguishes mediation from other forms of dispute resolution is that the mediator does not impose the solution; rather, he or she helps make it possible for the parties to craft and reach a solution they accept themselves. Most cases that mediate through the FINRA forum are converted to mediation after the case is filed in arbitration.

What Duties Does a Mediator Perform?

The mediator assists and guides the parties toward their own solution by helping them to define the important issues and understand each other's interests. The mediator focuses each side on the crucial factors necessary for settlement and on the consequences of not settling. However, he or she **does not** decide the outcome of the case and **cannot** compel the parties to settle.

The mediator can defuse hostile attitudes and remedy miscommunications. He or she is a mirror of reality and, as such, can help soften or eliminate extreme negotiating positions. Through the mediator, parties assess weaknesses in their own case and recognize the potential strengths of the other side. As a result, the parties can more clearly view matters previously distorted by anger and emotion. Most significantly, the mediator can explore creative and innovative solutions that the parties—sometimes caught up in adversarial negotiations—might not have considered. The success of any mediation program depends on the skills of its mediators.

Who Are Our Mediators?

FINRA mediators are independent neutrals, not employees of FINRA. They are knowledgeable in the subject matter of the controversies. FINRA carefully identifies candidates and selects its mediators from a cross-section of highly qualified individuals who are diverse in culture, profession and background. Each applicant is vigorously scrutinized against demanding qualification criteria. Formal mediator training, combined with experience as a mediator, is crucial.

Many FINRA mediators are also arbitrators with training and experience in resolving securities matters. However, the skills required for each role are unique, and the two neutral pools are separate and distinct. Rules prohibit an individual from serving as both a mediator and arbitrator in the same case.

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What Are the Benefits of Being a FINRA Mediator?

Service. As a FINRA mediator, people from all walks of life will receive the benefits of your experience. FINRA mediators are an integral part of a process that provides quick, fair and affordable resolutions to disputes involving the securities industry. The mediation process is less formal than arbitration. You will help parties identify and work through their issues, and assist them in crafting creative solutions that are not often available in arbitration or litigation. The case proceeds quickly, and the settlement potential is high (80 percent in our forum). Even in the rare instances when parties do not reach a settlement, mediators help improve the lines of communication, placing the parties in a better position to settle their cases at a later stage.

Compensation. Mediators set their own hourly rate (subject to a modest revenue fee of $150 per case, collected by FINRA—with the exception of the Small Claims Program, where no such fee is collected). FINRA mediators benefit from:

- inclusion on a prestigious securities mediator roster;
- FINRA's marketing efforts to bring cases into mediation;
- inclusion on proposed mediator lists (along with your Mediator Disclosure Report) for parties to review when requesting assistance selecting a mediator;
- immediate payment for mediation session fees and expenses, eliminating the need for any collection efforts on the part of the mediator; and
- FINRA's promise to indemnify its neutrals.

Flexibility. Parties can mediate in person, by telephone, by video conference or a combination of methods. They can mediate in person or by video conference at FINRA facilities at no cost, or they can select a location of their choice (if needed, the parties will cover the cost of the room rental). The parties can hold their mediation session in any city, and the FINRA mediation staff can assist with finding a location. Most often, the parties hold the mediation in the same city as where the parties' arbitration case is scheduled. All parties and the mediator must be in agreement with the arrangement.

Publications. FINRA publishes materials that provide vital information about its arbitration and mediation programs, as well as updates on FINRA Board actions, mediation procedures and training issues. Among these publications is **The Neutral Corner**, an award-winning newsletter geared specifically for FINRA mediators and arbitrators.

How Can I Become a FINRA Mediator?

FINRA is looking for experienced mediators in specific locations as noted on our website listed below. Prospective applicants need relevant training, service as a mediator and expertise in securities and employment issues. Mediation skills include having a demonstrated ability to help parties communicate better, analyze risks and explore options that can result in their mutual satisfaction with the outcome. To qualify as a FINRA mediator, an individual must complete a thorough screening process and a detailed application. In the application, potential mediators are asked to provide information about his or her work history and experience, and to submit four letters of reference. (At least three of these letters should be from parties who have observed the applicant's mediation technique.)

For more information, please email mediate@finra.org.

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BIOGRAPHIES

David J. Abeshouse is a **Business Mediator, Arbitrator, Dispute Resolution Lawyer, Trainer, Consultant, Author, and Speaker** with over 35 years of business-to-business disputes law practice experience, and over 20 years of experience as a neutral. David initially practiced commercial litigation at a medium-sized law firm in New York City, but gradually morphed his practice to a mix between that and Alternative Dispute Resolution (ADR) as an equity partner in a mid-sized law firm on Long Island, and for more than a decade and a half has concentrated essentially exclusively in ADR, principally as a neutral arbitrator and mediator, as well as a sole practice lawyer.

A graduate of the Univ. of Pennsylvania in Philadelphia and the Vanderbilt Univ. School of Law in Nashville, David has broad and deep commercial experience as lawyer or neutral in thousands of cases involving small, medium, and large business enterprises and professional practices. David serves as neutral Arbitrator on the Commercial Panel of Neutrals of the American Arbitration Assn. and the International Centre for Dispute Resolution, and several other major ADR forums. He acts as a private commercial case judge, hearing evidence and rendering binding awards. He also is a forum-based and private Mediator, a neutral facilitator of settlement negotiations leading to agreements resolving business disputes. David also serves as a "deal mediator" and an ADR consultant to other lawyers.

David has earned numerous honors over the years:

He was selected for charter membership in The New York Academy of Mediators & Arbitrators (NYAMA; Executive Committee Member), Chapter of The National Academy of Distinguished Neutrals (NADN). The NADN is an association of distinguished attorney-neutrals well-versed in Alternative Dispute Resolution. Membership is by invitation only, and limited to neutrals with proven experience in resolution of commercial disputes, recognized through a peer-nomination and client review process. The NYAMA has 31 top-tier ADR practitioners, only 4 of whom are on L.I. http://www.nadn.org/david-abeshouse and http://www.nadn.org/index.php

David was selected for membership as a Fellow of the College of Commercial Arbitrators (CCA). Membership is by invitation only. There are 50 CCA Fellows in NY State, and only 4

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Erin Gleason Alvarez is an independent arbitrator and mediator with 17 years of experience in commercial, insurance and employment disputes. She has extensive expertise in ADR consulting and in the design and implementation of successful, cost-saving, corporate ADR initiatives and programs. Ms. Gleason is a sought-after contributor and thought partner to the domestic and international ADR and arbitration communities, where she teaches, speaks and writes regularly.

Her accomplishments include:

- American Arbitration Association Commercial Arbitration Panel
- CPR Institute Panel of Distinguished Neutrals, Accredited Mediator
- Former Global Head of Dispute Resolution Programs at AIG
- LLM in International Arbitration from the Straus Institute for Dispute Resolution, Pepperdine University School of Law

Ms. Gleason is an active member of the CPR Institute, co-chairing the Mediation Committee and serving on CPR's Executive Advisory Committee. She also co-chairs the New York City Bar Association President's Committee for Enhanced Efficiency in Dispute Resolution.

Based in New York, Ms. Gleason is available for appointment in any location.

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Practice Group

Litigation

Education

J.D., New York University School of Law, 1969

B.S., The Wharton School of Business, University of Pennsylvania, 1966

Albert M. Appel serves as an arbitrator and mediator following a career in general commercial and complex litigation and health law.

Mr. Appel has substantial experience in commercial and health care disputes. Arbitrations have ranged from sole arbitrator of a one-day hearing to chairs of several three-member panels conducting preliminary injunction hearing and multi-week hearings on the merits; requests for relief have ranged from $100,000 to $50 million and also equitable relief. Matters have included breach of contract; corporate buy-sell and purchase price dispute; business torts, including breach of duty of loyalty and other fiduciary obligations, tortious interference, deceptive business practices, fraud, conversion and embezzlement; physician relationships and medical practice management; shareholder and partnership disputes; provider terminations from health insurer networks; managed care relationships; provider/payer relationships and contractual reimbursement disputes, including coverage, medical necessity, coding, billing, sequestration and other provider agreement compliance issues; indemnification, representation and warranty claims regarding plant and equipment and billing issues arising out of hospital acquisition; post-merger purchase price adjustments; corporate shareholder, employment, severance, compensation, profit sharing and pension disputes; interpretation of supply and pricing contract provisions; national residency program accreditation dispute with academic medical center; copyright infringement; request for an accounting; employment and discrimination claims; product liability and medical device recall; securities fraud; and defamation.

Mr. Appel also has counseled and litigated in courts and arbitrations throughout the country in a wide variety of matters, including health care; contracts; fraud and misrepresentation; interference with contractual and business relations, and other business torts; general business and commercial disputes; fiduciary obligations; government investigations; director and officer liability; employment disputes and discrimination law; wage and hour investigation; products liability; environmental law; partnership and shareholder disputes; corporate governance; health care payer-provider relationships, including contracting, liability, denial of claims, adequacy of reimbursement payments, and termination of network providers; hospitality law; antitrust; securities law; accountant's liability; bankruptcy and workout negotiations; insurance coverage; mergers, acquisitions and joint ventures; trademark and trade dress; unfair competition; misappropriation of trade secrets; and non-compete litigation.

As counsel to a prominent New York City medical center, large HMO and other providers and managed care organizations, Mr. Appel has provided advice regarding

compliance with health care laws and regulations; fraud and abuse and self-referral issues; government agency investigations regarding billing, performance of fiduciary obligations, patient care issues and other matters; physician and management employment agreements and related employment matters; managed care and other contractual arrangements, including development of provider delivery system and management services organizations; confidentiality of protected health information; corporate and commercial matters, including business arrangements among insurers, other third-party payers and providers and dissolution of entities; institutional affiliation agreements; physician and medical staff credentialing (granting and denying of privileges, including economic credentialing issues), and disciplinary proceedings (corrective action, suspension, curtailment and revocation/termination of privileges); institutional accreditation issues; corporate and medical staff governance; patient care advice and litigation and general litigation and dispute resolution.

Representative Matters

Some of Mr. Appel's notable representations include:

- Chair of three-arbitrator panel determining hospital's $18 million reimbursement claims against insurance company involving multiple reasons for underpayment and denial of claims and statistical sampling, including numerous coding, coverage, medical necessity, timeliness and other contract compliance issues;
- Sole arbitrator of $12 million claim by multi-hospital health system against insurance company for breach of contract and statutory violation;
- Chair of three-arbitrator panel determining corporate ownership, governance, operations, partnership dissolution, shareholder buy-out and interim and permanent injunctive issues;
- Sole arbitrator of claims for $10 million regarding plant and equipment and billing issues arising out of hospital acquisition;
- Sole arbitrator of dispute involving claims and counterclaims for employment compensation, severance pay, pension and deferred compensation and breach of contract and fiduciary obligations;
- Member of three-arbitrator panel determining claims and counterclaims for damages and interim and permanent injunctive relief relating to corporate deadlock, conversion and embezzlement of $5 million, breach of fiduciary duty and removal of corporate officers;
- Chair of three-arbitrator panel determining appropriateness of insurance company's recoupment from hospital based on statistical sampling and extrapolation;
- Sole arbitrator of physician claim for wrongful termination from health insurer network;
- Sole arbitrator of $4 million reimbursement and breach of contract claims and counterclaims between hospital and health insurer;
- Sole arbitrator of closely-held corporation shareholder dispute regarding profit-sharing, compensation and dissolution;
- Member of three-arbitrator panel determining $9 million claims of withdrawing member of excess insurance consortium;
- Sole arbitrator of dispute regarding insurance company's reduction of claims payments based on federal government sequestration as impacted by provider agreement provisions;
- Chair of three-arbitrator panel determining coverage claim for insurance recovery;
- Member of three-arbitrator panel addressing claims for breach of contract, defamation, tortious interference and deceptive business practices;
- Sole arbitrator of physician practice dissolution and compensation dispute;
- Hearing officer for hospital Fair Hearing;
- Sole arbitrator of dispute regarding termination of shareholder interest and request for corporate dissolution based on shareholder deadlock;
- Sole arbitrator of dispute involving accreditation of national residency training program;
- Mediation of $50 million contract and reimbursement dispute between health insurer and national laboratory provider;

- Mediation of billing and reimbursement dispute between hospital system and insurer;
- Mediation of dispute involving marketing of nationally recognized sports figure;
- Mediation of product liability and product recall dispute;
- Mediation of numerous employment and discrimination disputes;
- Mediation of fraud and misrepresentation claims against broker-dealer;
- Represented a prominent medical center in providing the equivalent of in-house counsel services regarding all areas of operation;
- Represented a leading HMO in restructuring its relationships with large provider organizations, including bankruptcy litigation regarding same;
- Served as national coordinating counsel for manufacturer of dietary supplements and over-the-counter products in multidistrict proceedings consisting of more than one hundred federal and state product liability actions;
- Appointment as Liaison Counsel by numerous defendants and the court in parallel criminal and civil class action antitrust actions;
- Represented client in multiple lawsuits arising out of physician practice management relationships;
- Represented client in successfully defeating U.S. Department of Justice lawsuit to prevent hospital merger; and
- Represented client in successful resolution of New York Attorney General investigation of major not-for-profit institution.

Honors and Awards

Mr. Appel has been recognized by a number of industry publications, including Best Lawyers in America and Super Lawyers. He has also been featured in various editions of *Who's Who*, including "Who's Who in American Law," "Who's Who in Medicine and Health Care" and "Who's Who in Finance and Industry."

Selected Activities

- Member, American Bar Association
- Member, New York State Bar Association
- Member, Association of the Bar of the City of New York
- Member, American Health Lawyers Association
- Member of Commercial and Health Care Roster of Neutrals of the American Arbitration Association
- Member of Dispute Resolvers Panel of the American Health Lawyers Association
- Member of Commercial Panel of Neutrals of the International Institute for Conflict Prevention & Resolution ("CPR")
- Member of CPR's National Health Care Panel of Neutrals
- Accredited as MCIArb by the Chartered Institute of Arbitrators
- Court-appointed member of Mediation Panel of the U.S. District Court for the Southern District of New York
- Frequent lecturer on the Health Insurance Portability and Accountability Act ("HIPAA")
- Speaker, "Arbitration of Health Care Payor-Provider Disputes: What's Different? What's New?" Boston Bar Association, April 2017
- Author, "The Benefits of Mediation and Arbitration for Dispute Resolution in Health Law," *New York State Bar Association, Dispute Resolution Section*, January 2011
- Author, book review of "Legal and Ethical Aspects of Organ Transplantation," *New York Law Journal*, Vol. 225, No. 96, May 18, 2001

Admitted to Practice

New York; U.S. District Court, Southern District of New York; U.S. District Court, Eastern District of New York; U.S. Court of Appeals, Second Circuit; U.S. Court of Appeals, Fourth Circuit; U.S. Court of Appeals, Eleventh Circuit

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General Biography

Hon. Ariel E. Belen (Ret.) joined JAMS in 2012 and serves as an arbitrator and mediator in complex domestic and international disputes spanning a wide array of practice areas. During his nearly eighteen-year tenure on the bench he served as an Associate Justice of the Appellate Division, Second Department and as Administrative Judge of the Supreme Court, Kings County (Brooklyn). Judge Belen also helped create and presided over the Commercial Division in Brooklyn. Judge Belen has earned a reputation as a calm, intelligent, fair, and hardworking professional while facing the many complicated issues that may arise in a dispute.

Judge Belen is a highly experienced international mediator and arbitrator. He is fluent in Spanish and can effectively communicate with Spanish speaking litigants and clients. Judge Belen is a popular international speaker and trainer for ADR. He has presented at ADR training programs for judges, attorneys, and business leaders in Guatemala, Puerto Rico and Mexico. Judge Belen is a fellow of the Chartered Institute of Arbitrators, a member of the Advisory Council of the CPR International Institute for Conflict Prevention and Resolution, a Distinguished Fellow of the International Academy of Mediators, and a member of the International Mediation Institute. Judge Belen is a member of the Board of Advisors of the Scheinman Institute on Conflict Resolution of the Cornell University School of Industrial and Labor Relations.

Judge Belen is often retained as a special master in complex commercial and civil matters. He was appointed as the Federal Facilitator to guide the Joint Remedial Process in the New York City stop and frisk and trespass enforcement class action settlements as described in the Remedies Opinion in *Floyd v. City of New York*, 959 F. Supp. 2d 668 (SDNY 2013). In this program, Judge Belen was charged with assisting the City of New York and its residents with developing sustainable reforms to the stop and frisk and trespass enforcement practices of the New York City Police Department through a community based civic engagement process.

Justice Belen is fluent in Spanish. He can effectively communicate with Spanish speaking litigants and clients in all matters. Download Justice Belen's biography in Spanish.

Representative Matters

International

- Chaired an international arbitration concerning a breach of contract between major international telecommunication conglomerates
- Mediated a matter involving a joint venture with a Taiwanese firm and the financial damages and partnership dissolution associated with the terminated venture
- Served as a Special Master in a matter involving agency and authority disputes in a business commercial case involving a Korean real estate contract breach
- Mediated a breach of contract and alleged fraud claims in a patent transaction between American and European parties
- Mediated a breach of contract and misrepresentation matter between American and Chinese parties engaged in a major joint venture concerning the purchase of a New York City landmark
- Mediated a dispute between a major Mexican chemicals manufacturing company and a North American based insulation manufacturer

Business/Commercial

- Mediated a class action lawsuit arising from Superstorm Sandy damages to waterfront property in lower Manhattan
- Arbitrated first party insurance claims resulting from Superstorm Sandy damages to graphics and printing plant
- Arbitrated a securities case arising from breach of fiduciary duty, negligent misrepresentation, negligent failure to supervise, and aiding and abetting fraud
- Arbitrated a dispute concerning ownership and operation of a medical facility
- Arbitrated a dispute over a broker commission on purchase of a property used to develop a major commercial mall
- Arbitrated a breach of contract case involving forensic expert consulting services
- Mediated a business commercial dispute involving a breach of contract between a major hotel conglomerate and a major supplier
- Mediated breach of contract dispute between business partners in an international joint venture in South America.
- Mediated several disputes concerning legal malpractice lawsuits
- Mediated several dissolutions of legal and medical practices
- Mediated case involving a multinational corporation in a misrepresentation and breach of contract dispute
- Mediated breach of contract case involving alleged fraud claims brought by international party against American company
- Mediated breach of contract dispute concerning marketing services agreement
- Mediated a consumer class action lawsuit brought against major Tobacco manufacturer for alleged fraudulent pricing scheme
- Mediated a dispute between master licensor and sub-licensee in the fashion industry
- Mediated a dispute between a bank managing an IRA, creditors, and heirs of the decedent

Construction

- Mediated construction defect case involving the installation of a HVAC system with an alleged faulty functionality
- Arbitrated construction defect matter involving damages resulting from burst plumbing in a New York landmark hotel converted into luxury condominiums
- Chaired breach of contract arbitration involving independent contractor providing business consulting services to a general contractor
- Mediated case involving claims arising from a freeze-up and water leakage of a pipe located in an apartment building
- Mediated construction defect case involving a dispute between a major hotel conglomerate and the manufacturers and installers of heat pump units in guest rooms
- Mediated breach of contract claims in a condominium conversion
- Mediated the collapse of a commercial building during construction of an adjacent luxury hotel in lower Manhattan
- Mediated dispute between luxury apartment developer, general contractor, and subcontractors relating to unfinished work, change orders, and claimed defects
- Med/Arb involving construction defects in a luxury Manhattan condominium building
- Mediated disputes between owner, construction manager, general contractor, subcontractors, and second tier subcontractors centered around the construction of a high rise luxury building
- Mediated dispute involving construction defects and zoning restrictions in a luxury condominium building converted from a commercial printing press building

Employment

- Arbitrated executive compensation and deferred compensation claims upon the termination of a high-level executive in a multinational corporation based in Europe
- Mediated breach of contract dispute between an employer and employee related to contractual bonus obligations

- Arbitrated age discrimination claim brought by an executive of a Fortune 100 company
- Mediated case arising from issues related to a separation agreement for law firm employees' retirement and termination
- Arbitrated civil rights matter involving alleged racial discrimination against party in a restaurant
- Mediated several FLSA disputes
- Chaired breach of contract arbitration involving termination of chief executive officer and minority shareholder in a closely held corporation
- Mediated cases involving discrimination, unlawful retaliation, and hostile work environment claims
- Mediated dispute involving employees' failure to repay company issued loan
- Mediated case involving employees' termination due to disability caused by alleged work-related injuries
- Mediated a breach of contract and sexual harassment claims involving high level executive in a venture capital firm
- Mediated executive compensation, deferred compensation claims and cross claims on a promissory note upon the termination of a high-level investment advisor in a Swiss bank

Personal Injury

- Mediated several medical and dental malpractice cases
- Mediated several cases involving auto accidents where parties negotiated settlement amounts ranging from two to twenty-eight million dollars
- Mediated personal injury and fatality cases in a 2008 crane collapse in New York City
- Mediated case involving plaintiff's catastrophic injuries due to a slip and fall into a New York City subway manhole
- Mediated personal injury case involving a bicyclist and a truck driver alleging catastrophic injuries that required multiple major surgeries
- Mediated personal injury/premises liability case involving injuries sustained allegedly from an attack on private property
- Mediated case involving injuries sustained for an allegedly faulty elevator
- Mediated several cases having to do with the results of knee, back, neck and shoulder surgeries
- Mediated several cases alleging violations of the New York Labor Law, scaffolding statutes, and regulations
- Mediated a wrongful death case involving food poisoning from contaminated fish
- Mediated a premise liability matter involving a national producer and shooting victims during a rap concert performance
- Mediated an eight figure settlement of claims of catastrophic injuries pursuant to the New York Labor Law

Special Master

- Serving as Federal Facilitator to guide the Joint Remedial Process in the New York City stop and frisk and trespass enforcement class action settlements as described in the Remedies Opinion in *Floyd v. City of New York*, 959 F. Supp. 2d 668 (SDNY 2013)
- Serves as court appointed trustee to manage a multi-million-dollar trust estate that requires financial oversight of assets, investments, and property pending litigation in the New York Commercial Division
- Served as court appointed Special Referee for damages in a legal malpractice matter
- Served as Court Appointed Mediator in federal bankruptcy case related to the construction of a luxury skyscraper in midtown Manhattan
- Served as Special Discovery Master in a securities arbitration
- Serving as a Special Discovery Master in a New York Commercial Division real estate litigation
- Served as Court Appointed Special Referee to conduct forensic examination of computer spyware

Honors, Memberships, and Professional Activities

- **Select Honors**
  - New York State Bar Association Commercial and Federal Litigation Section, Tenth Anniversary Award, 2002
  - William Goldstein Memorial Award, Association of Law Secretaries of the Supreme and Surrogate's Courts, 2007
  - Hon. John Carro Award for Judicial Excellence, Association of Judges of Hispanic Heritage, 2010
  - Puerto Rican Bar Association Award Recipient, 2007
  - Saint Thomas More Award, Catholic Lawyers Guild of Kings County, 2007
  - Jurist of the Year Award, Metropolitan Black Bar Association, 2005
- **Memberships**
  - Member, Judicial Task Force on the New York State Constitution, July 2016-Present

- Member, CPR Advisory Council: International Institute for Conflict Prevention & Resolution Panel of Distinguished Neutrals, 2013-Present
- Member, Board of Advisors, Scheinman Institute on Conflict Resolution at the Cornell University School of Industrial and Labor Relations, December 2015-Present
- Chair, ADR Committee, New York County Lawyers Association, 2013-2016
- Member, New York State Grievance Committee for the Second, Eleventh and Thirteenth Judicial Districts
- Member, Committee on Character and Fitness, Appellate Division, First Department, Supreme Court of the State of New York
- Member, Cornell University Committee on Alumni Trustee Nominations, 2013-2017
- Vice Chair, Cornell University Council, 1998-2010
- Member, Cornell University Council, 1996-Present
- Member, New York State Bar Association, Commercial and Federal Litigation Section, Executive Committee
- Member, Hispanic National Bar Association, Task Force on Judicial Selection

- **Professional Activities**
  - Member, Judicial Task Force on the New York State Constitution, July 2016-Present
  - Fellow, Advanced Science and Technology Adjudication Resource Center
  - Vice Chair, Franklin H. Williams Judicial Commission on Minorities, New York State Unified Court System, 1998-2015
  - Founding Member, The Cervantes Society, 1996-Present
  - Member, Task Force to Implement the New York State Unified Court System's Program on the Profession and the Courts Subcommittee on Mandatory Continuing Legal Education Subcommittee on Part 130 of the Rules of the Chief Administrator, 1996-1997
  - Member, Cornell Latino Alumni Association
- **Publication**
  - Co-author along with Edward Birnbaum and Carl Grasso, *New York Trial Notebook*, (James Publishing, 2008) (supplemented annually), an 850-page comprehensive practice treatise for the trial of a civil case in New York
- **Lectures and Teaching**
  - Panelist, Global Pound Conference, Guatemala City 2017
  - Presented to the Federal Bar Council at the Supreme Court of Puerto Rico, "Effective Techniques in Mediation Advocacy", March 2016
  - Presented to a delegation of attorneys from the Japanese Medical Malpractice Information Center, "Medical Malpractice Mediation in New York", JAMS, 2014
  - Moderator, Constructive Perspectives, "Are New York's Construction Safety and Insurance Laws Serving the Public?", New York City Bar Association, March 2014
  - Moderator, CLE Program, "Effective Techniques in Mediation Advocacy", JAMS, February 2013
  - Speaker, "2013 CPLR Update: 2012-2013 Major Appellate Decisions", Colombian Lawyers Association, April 2013
  - Moderator, "Effective Techniques in Mediation Advocacy", Asian American Bar Association of New York, April 2013
  - Moderator, "Bootcamp for Lawyers: The Ultimate Trial Clinic", New York State Trial Lawyers Institute, May 2013
  - Served as a member of the New York State Unified Court System Civil Law Curriculum Development Committee and taught for many years at the New York State Judicial Institute
  - Cornell Extern and Shadow Programs and the Brooklyn Law School Judicial Clerkship Clinical Program. Clinical programs at Hofstra Law School, Brooklyn Law School, and St. John's University Law School

Background and Education

- Associate Justice, Appellate Division, Second Department, Supreme Court of the State of New York, 2008-2012
- Justice of the Supreme Court of the State of New York, 1995-2012
  - Administrative Judge, Civil Term, Supreme Court, Kings County, 2007-2008
  - Associate Justice, Appellate Term, Supreme Court, Second and Eleventh Judicial Districts, 2005-2012
  - Justice of the Commercial Division, Supreme Court of the State of New York, 2002-2005
- Chief, Bronx Borough Office, City of New York Law Department, Office of the Corporation Counsel, Tort Division, 1994-1995
- Deputy Chief, Brooklyn Tort Division, City of New York Law Department, Office of the Corporation Counsel, 1993-1994
- Assistant Corporation Counsel, City of New York Law Department, Office of the Corporation Counsel, 1990-1993
- Supervising Attorney, Legal Aid Society of New York, Criminal Defense Division, 1986-1989
- Criminal Trial Attorney, Legal Aid Society of New York, Criminal Defense Division, 1981-1986

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- J.D., with Specialization in International Legal Affairs, Cornell Law School, 1981
- B.A., *cum laude*, Brooklyn College, 1978

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Education

New York University School of Law, J.D., 1984

- Special Issues Editor, *Fordham Law Review*
- Editor, *N.Y.U. Law Review*

Macalester College, B.A., 1979

- Summa cum laude
- Phi Beta Kappa

Bar Admissions

New York State

U.S. District Court (Southern, Eastern and Western Districts of New York)

U.S. Court of Appeals (Second Circuit, Sixth Circuit, D.C. Circuit)

Practice Description

Steven C. Bennett's practice focuses on complex domestic and international commercial litigation and arbitration, including bankruptcy, construction, corporate governance, data security, energy, privacy, real estate and other matters. Mr. Bennett gained extensive trial experience during six years at the Office of the United States Attorney for the Southern District of New York, where he served as Chief of the Tax and Bankruptcy Unit, and nearly twenty years as a partner in a major international law firm.

Representative Matters

- Counsel to Asian company on appeal from restraint of assets
- Counsel to Asian investors in dispute with U.S. manager of a company
- Counsel to French company in dispute with investor
- Counsel investor in arbitration hearings, and on enforcement of award
- Counsel to Chapter 11 Trustee in bankruptcy proceedings involving alleged financial impropriety
- Counsel to hedge fund defendants in clawback litigation involving an alleged Ponzi scheme
- Counsel to major creditor (and unsecured creditors committee member), in bankruptcy proceedings involving two evidentiary hearings regarding approval of multi-lateral settlement terms
- Counsel to telecommunication company in defense of claims by terminated dealer, including week-long arbitration hearing
- Counsel to multinational company in U.s. and South American litigation involving indemnification provisions in an acquisition transaction
- Counsel to manufacturer on appeal from arbitration award involving former executives of the company
- Counsel to American company bringing claims against foreign software provider, including week-long arbitration hearing
- Special counsel to debtor in connection with claims against company based on foreign law, including two-day hearing on foreign law issues
- Counsel to major creditor in support of plan confirmation, over valuation objections, including multi-day hearings
- Counsel to company in defense of shareholder litigation focused on merger transaction
- Counsel to manufacturer in defense of product liability and contract breach claims
- Counsel to manufacturer in cost sharing and pricing dispute with co-venturer

- Counsel to manufacturer in connection with tax-sharing agreement attendant to merger transaction
- Counsel to debtor in connection with evidentiary hearings and expedited appeal on Section 363 sale of assets
- Counsel to major creditor in opposition to plan exclusivity, including two-day hearing
- Counsel to company on claims against service supplier for breach of contract
- Counsel to developer on claim for breach of architect agreement
- Counsel to American financial institution on claims of fraud against foreign financial institution
- Counsel to debtor, rejecting request for rescission of plan confirmation
- Counsel to real estate developer on claims by lender for rescission of lending/development agreement
- Counsel to debtor on environmental, tax and employment claims, including multi-day evidentiary hearings
- Counsel to power producer on claims against distributor, for breach of energy supply contract, including two-week trial, and appeal
- Counsel to foreign manufacturer in defense of claims by American company for alleged breach of machinery supply contract
- Counsel to entertainment company for alleged breach of buy-out agreement, including week-long trial, and appeal
- Counsel to committee on debtor's motion to modify wages and benefits, including multiday evidentiary hearing
- Counsel to entertainment company, on claims against seller of real estate, for breach of contract
- Counsel to foreign transportation company in defense of claims based on Alien Tort statute, including motion to dismiss and appeal
- Counsel to private equity fund in defense of claims by shareholders in company arising out of investment in company
- Counsel to interim receiver in cross-border insolvency proceedings
- Counsel to foreign financial institution in defense of securities law claims arising out of financing at American company
- Counsel to construction consortium on enforcement of arbitration award against foreign energy company
- Counsel to architectural firm in defense of claims arising out of alleged defects in construction at manufacturing facility
- Counsel to amicus in connection with Supreme Court proceedings on privacy claims

Professional Affiliations

- Founding Member, Sedona Conference Working Group on International Data Security and Disclosure Issues
- Co-Chair, E-Discovery Committee, New York State Bar Association
- Dispute Resolution Committee, New York State Bar Association
- Advisory Committee, Cardozo Data Law Initiative
- Editorial Advisory Committee, American Law Institute
- Qualified Arbitrator, American Arbitration Association
- Advisory Committee, CPR Institute for Dispute Resolution
- Adjunct Professor (Conflicts of Law), Hofstra Law School
- Adjunct Professor (Business Law), Manhattan College

Prior Activities

- Assistant U.S. Attorney and Chief, Tax and Bankruptcy Unit, Office of the United States Attorney for the Southern District of New York
- Clerk, Hon. Carl McGowan, United States Court of Appeals for the District of Columbia Circuit
- Information Policy Committee, U.S. Council for International Business
- Hearing Officer, pursuant to consent decree, United States v. Local 14-14B IUOE (E.D.N.Y.)
- Election Monitor (two terms), pursuant to consent decree in United States v. District Council of Carpenters (S.D.N.Y.)
- Adjunct Professor (E-Discovery), New York Law School
- Adjunct Professor (E-Discovery), Rutgers Law School
- Adjunct Professor (Arbitration), Brooklyn Law School
- Adjunct Professor (Legal Writing), Fordham Law School

Publications

- Bennett & Lopata, Commercial Settlement Agreements: Line By Line (Aspatore/Thomson Reuters 2012)
- Bennett (ed.), A Privacy Primer For Corporate Counsel (Aspatore/Thomson Reuters 2009)
- Bennett, Arbitration: Essential Concepts (Am. Law. Media Pubs. 2002)
- Bennett, EU Privacy Shield: Practical Implications For U.S. Litigation, 4/16 Practical Lawyer (60-64) (2016)
- Bennett, Witness Preparation For Trial Testimony, 8/15 Practical Litigator 33-36 (2015)
- Bennett, Proportionality And Cooperation In E-Discovery, 10/14 Practical Lawyer 5-6 (2014)

- Bennett, How To Reduce The Risks Of U.S. Litigation: A Guide For Foreign Business, 6/14 Practical Lawyer 1-19 (2014)
- Bennett, E-Discovery: Reasonable Search, Proportionality, Cooperation And Advancing Technology, 30 John Marshall J. of Info Tech. & Priv. L. 227-57 (2014)
- Parver, Rakower, Boland & Cohen (eds.), New York State Bar Association Commercial And Federal Litigation Section Report On Proposed Amendments To Federal Rules Of Civil Procedure, 18 NYSBA New York Litigator 8-29 (2014) (contributor on discovery cooperation issues)
- Bennett & Dutton, Modem Distinctions Between The U.K. And U.S. Commercial Legal Systems, 28:12, Mealey's Int'l Arb. Report 50-57 (2013), reprinted in 11:10 Mealey's Int'l Asb. Liab. Report 1 (2013)
- Bennett, Confidentiality Issues In Arbitration, 68:2 Disp. Resol. J. 1-8 (2013)
- Bennett, International Issues In Privilege Protection: Practical Solutions, 82:18 U.S. Law Week 708-14 (2013)
- Bennett, Conflicts Between Arbitration Agreements And Arbitration Rules, 15:1 Cardozo J. Disp. Resol. 221-29 (2013)
- Bennett, Does AT&T v. Concepcion Justify The Arbitration Fairness Act?, 4 Penn. St. Yearbook On Arb. & Med. 103-25 (2012)
- Bennett, Daley & Gerlach, Storm Clouds Gathering For Cross-Border Discovery And Data Privacy: Cloud Computing Meets The U.S.A. Patriot Act, 13 Sedona Conf. J. 235-52 (2012)
- Bennett, International Discovery Requests In Private Litigation Versus Government Investigation, 12 Dig. Discov. & E-Evid. 375 (Sept. 2012)
- Bennett, Is An Arbitration Panel A "Tribunal?", N.Y.L.J., Aug. 14, 2012

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David W. Brown

A partner in the Litigation Department at Paul, Weiss, Rifkind, Wharton & Garrison LLP, David represents a diverse group of clients in white collar criminal defense and regulatory matters, and also conducts internal investigations. He also handles civil matters in a variety of areas, including securities, intellectual property, and general commercial litigations and arbitrations. In addition, David maintains a robust pro bono practice, with a particular emphasis on defending charter schools in New York City.

David graduated from Harvard Law School, *cum laude*, in 2000 and from Harvard College, *magna cum laude*, in 1997. He served as a law clerk to Judge Judith Rogers of the U.S. Court of Appeals for the District of Columbia Circuit in 2000-2001.

William J.T. Brown,
Arbitrator, Mediator, Attorney at Law
New York, New York
williamjtbrown@gmail.com

Independent law practice as Attorney, Arbitrator and Mediator, New York, N.Y.; Avocat au Barreau de Paris; Adjunct Professor, St. John's University Law School, teaching Law of International Arbitration, Coach of St. John's Law School Vis Arbitration Team.

Partner, Donovan Leisure Newton & Irvine, 1976-98; Partner in charge of Donovan Leisure Paris Office, 1983-90; Partner, LeBoeuf, Lamb, Greene & McRae, 1998-2007; Of Counsel, Dewey & LeBoeuf 2007-2008.

Graduated magna cum laude, Harvard Law School, served as an editor of Harvard Law Review. Graduated with honors from University of Wisconsin. Knox Fellow, London School of Economics.

Admitted to the bar in New York, Michigan, France, numerous U.S. federal courts.

As counsel in arbitration for claimant Asian internet company in 2014 obtained award of more than $35 million in Singapore arbitration, judgment confirming award entered U.S. District Court, SDNY, May 6,2015 ; other notable cases as arbitration counsel include dispute related to sale of Korean paper products business; antitrust dispute related to conspiracy to refuse license of patented insecticides; numerous contractual disputes related to vaccines, diagnostics, electric power, nuclear power generation, sovereign petroleum concessions, securities, etc. Representative arbitration case: The Shaw Group, Inc. v. Triplefine Int'l Corp., 322 F.3d 115 (2d Cir. 2003). Case established the authority of the ICC arbitrator, rather than a court, to decide the scope of matters subject to arbitration.

As arbitrator, acted in international licensing dispute with estimated value of eight billion dollars involving flash memory devices; as well as other notable cases concerning, e.g., Cameroon petroleum concession granted to American investors; distribution of growth hormones in Asia; Canadian banking business; securities disputes; distribution of growth hormones and licensing of birth control products. Serves on AAA/ICDR panel of commercial and international arbitrators. Also serves as arbitrator for ICC.

In general litigation acted in major cases involving: monopolization of U.S. uranium markets by the international uranium cartel; see In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980); alleged monopolization of photographic markets, validity of election of regents of state university by the joint session of the New York State legislature; disputed acquisition in vaccine business: see Institut Pasteur v. Cambridge Biotech Corp., 186 F. 3d 1356 (Fed. Cir. 1999); civil claim against sovereign government for use of commercial activity of government's airline to implement terrorist attack in U.S. territory, see Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984), and numerous other subject matters.

Chairman, NYCLA Arbitration and ADR Committee, 2010-13; Co-Chair, NYSBA Dispute Resolution Section's Legislation Committee, 2008-2011; Chair, NYSBA Dispute Resolution Section Subcommittee on Enactment of the UNCITRAL Model Law for international arbitration in New York, 2011-13); International Arbitration Club of New York. Charter Member, New York International Arbitration Center; National Academy of Distinguished Neutrals. Certified in New York County as Part 137 arbitrator for resolution of attorney-client fee disputes; mediator for Commercial Division, New York State Supreme Court, New York County; mediator for U.S. District Court for the Southern District of New York.

Publications include "Reaffirming Basic Powers of the New York Arbitrator: A Plea for Harmony in State and Federal Arbitration Law". NEW YORK DISPUTE RESOLUTION LAWYER, p. 31, Fall 2011; "Clash of the New York Convention with the McCarran-Ferguson Act: Can State Insurance Law Ban Arbitration of International Insurance Disputes?," NEW YORK DISPUTE RESOLUTION LAWYER, p. 65, Spring 2010; "Stolt-Nielsen: The Supreme Court Takes Up Issues of Class Arbitration," NEW YORK DISPUTE RESOLUTION LAWYER, Fall 2009; "The Dark Before The Dawn: How New York's Venerable but Outdated Arbitration Statute Has Fallen into Desuetude, and How Enactment of the Revised Uniform Arbitration Act Can Restore Logic and Reason to New York Arbitration," NEW YORK DISPUTE RESOLUTION LAWYER, Spring 2009, p.41; "Heightened Review of Arbitration Awards under State Law after the Supreme Court's Decision in Hall Street Associates v. Mattel," NEW YORK DISPUTE RESOLUTION LAWYER, Fall 2008; co-author, "Risk and Uncertainty of Arbitrating in the United States: Overcoming the Choice of Law Problem," 2 REVISTA ROMANA DE ARBITRAJ, no. 2, April, 2008; "Is Uniform Act the Answer to a Choice of Law Crisis?," NEW YORK LAW JOURNAL, May 31, 2007; "Federal Arbitration Act Applied Broadly in Interstate Commerce" in "Outside Counsel," NEW YORK LAW JOURNAL, January 26, 2005; "California Arbitration Law Affirmed over Federal Arbitration Act" in "Outside Counsel," NEW YORK LAW JOURNAL, June 2, 2004; co-author, "Arbitrating International Antitrust Disputes," 7 JOURNAL OF INTERNATIONAL ARBITRATION, 1990.

Other Activities: Coached St. John's University team in 2011 Willem C. Vis International Arbitration Moot in Vienna to third place finish in field of 256 schools and Universities from 65 countries. Vice President and Treasurer of MidHudson Chapter of New York State Archaeological Association.

John F. Byrne

Offices of John F. Byrne, Esq.
Brooklyn, NY

For more than 30 years, Mr. Byrne has acted as a commercial and international arbitrator and litgator, ten with a multi-national law firm concentrating on complex commercial and financial transactions, including mergers and acquisitions, for Fortune 500 companies, significant shareholders, class actions and investment bankers.

He is a frequent speaker at seminars and CLE programs on ADR topics at Bar Associations, law schools and AAA forums.

Steven A. Certilman has represented emerging and established businesses, high-tech and low-tech, for more than twenty-five years. Mr. Certilman provides experienced counsel over a broad range of legal areas including corporate transactions and financings, contracting, real estate, intellectual property protection and commercial litigation. He has represented clients in more than one hundred fifty IT transactions and other matters since 1988, chaired the Technology Law Section of the Connecticut Bar Association for more than five years.

In representation of general corporate clients, Mr. Certilman employs a *Preventive Lawyering* philosophy, which encourages clients to be proactive in planning to minimize their legal entanglements and maximize their advantages when difficulties arise. Mr. Certilman focuses on the special needs of emerging businesses and helps them to protect their financial and intellectual property resources, maximize security in business dealings, protect the personal assets of the principals, deal with human resource issues, obtain access to investment capital and use available legal resources to avoid or minimize problems which might otherwise lead to the distraction of conflict.

A supporter of Alternative Dispute Resolution, Mr. Certilman serves as a member of the Roster of Neutrals of the American Arbitration Association on the large, complex case and technology panels, the commercial, trademark and technology panels of the International Institute for Conflict Prevention and Resolution, and the commercial and technology rosters of other major ADR providers worldwide. He has also been recognized in the field by being awarded fellowship in the College of Commercial Arbitrators and is also a member of numerous arbitration and mediation panels including the Roster of Neutrals of the American Arbitration Association and serves as a mediator in ad hoc cases and for the U.S. District Court (Southern District of New York). Mr. Certilman is a published author, speaker and educator in the field of ADR and serves as a Magistrate and Trial Referee for the Superior Court of the State of Connecticut.

Stephanie Cohen, Independent Arbitrator
www.cohenarbitration.com

Stephanie Cohen is a Canadian arbitrator based in New York City. She has arbitrated international and domestic commercial disputes under the ICC, ICDR, AAA Commercial, UNCITRAL, and Society of Maritime Arbitrators rules, sitting frequently as tribunal chair or sole arbitrator, but also as co-arbitrator. She has also served as emergency arbitrator for the ICDR and is among the first thirty emergency arbitrators appointed by the ICC. Stephanie is a member of the international and domestic arbitrator panels of the AAA/ICDR as well as a Fellow of the Chartered Institute of Arbitrators.

Previously, Stephanie was Counsel in the international arbitration and commercial litigation practice groups at White & Case LLP in New York where she represented clients in complex, high-value disputes before international arbitration tribunals and courts. She is dually qualified as a lawyer in New York and Ontario, Canada. *Who's Who Legal* (2018) recognizes Stephanie as one of the "*most highly regarded*" arbitration practitioners aged 45 or under and says she is "'*an entrepreneurial and courageous independent arbitrator' who excels in international commercial disputes*."

Stephanie plays a leading role in promoting cybersecurity awareness in arbitration. In 2018, she received the CPR Institute Outstanding Professional Article Award for *A Call to Cyberarms: The International Arbitrator's Duty to Avoid Digital Intrusion*. On behalf of the New York City Bar Association, she also joined forces with ICCA and the CPR Institute to form a Working Group on Cybersecurity in International Arbitration that won the 2018 GAR Award for Best Development.

Stephanie is Co-Chair of the International Dispute Resolution Committee of the Dispute Resolution Section of the New York State Bar Association and Treasurer of the New York Branch of the Chartered Institute of Arbitrators.

HON. BARRY A. COZIER (Ret.)

Barry A. Cozier maintains a litigation practice, where he represents institutions and individuals in complex business and commercial litigation, real estate litigation, estates litigation, partnership disputes, federal and state appeals, arbitration and mediation, and advisory litigation strategy. He is affiliated with Hubell & Associates LLC, of counsel. From 2016 to 2017, Mr. Cozier was Special Counsel at Fensterstock & Partners LLP, a litigation boutique; from 2012 to 2016, Mr. Cozier was a member of LeClairRyan in its litigation practice; and from 2006 to 2011, Mr. Cozier was a member of Epstein Becker & Green, P.C., in the firm's national litigation and labor and employment practice groups. He was formerly an Associate Justice of the Supreme Court, Appellate Division, Second Judicial Department (2001-2006), Justice of the New York Supreme Court (1993-2001), Deputy Chief Administrative Judge for the New York State Courts (1994-1998), and a Judge of the Family Court of the State of New York (1986-1992). Prior to his judicial service, Mr. Cozier was in private practice with a concentration in civil litigation, and served in various public sector legal positions.

Mr. Cozier currently is an Adjunct Professor at Fordham University School of Law, Vice-Chair of the Mayor's Advisory Committee on the Judiciary, an Examiner on the Committee on Character and Fitness for the Supreme Court, Appellate Division, First Department, a Mediator in the Civil Appeals Mediation Program ("CAMP") for the U.S. Court of Appeals for the Second Circuit, a member of the Board of Directors of New York University School of Law Alumni Association, a Fellow of the New York Bar Foundation, and a member of the Executive Committee of the Commercial and Federal Litigation Section of the New York State Bar Association. Mr. Cozier was a contributing author to the Thomson West New York Practice publication entitled "Commercial Litigation in New York State Courts," where he authored the chapter on Summary Judgment. Mr. Cozier received his Bachelor of Arts, *magna cum laude,* from the State University of New York at Stony Brook in 1971 and his Juris Doctor from New York University School of Law in 1975.

Joseph V. DeMarco is a partner at DeVore & DeMarco LLP where he specializes in counseling clients on complex issues involving information privacy and security, theft of intellectual property, computer intrusions, on-line fraud, and the lawful use of new technology. His years of experience in private practice and in government handling the most difficult cybercrime investigations handled by the United States Attorney's Office have made him one of the nation's leading experts on Internet crime and the law relating to emerging technologies. In addition to his counsel practice, Mr. DeMarco serves as an Arbitrator, resolving complex commercial and high-technology disputes between businesses. He is on the National Panel of Neutrals of the *American Arbitration Association* (AAA) and *Federal Arbitration, Inc.* (FedArb).

From 1997 to 2007, Mr. DeMarco served an Assistant United States Attorney for the Southern District of New York, where he founded and headed the Computer Hacking and Intellectual Property (CHIPs) Program, a group of five prosecutors dedicated to investigating and prosecuting violations of federal cybercrime laws and intellectual property offenses. Under his leadership, CHIPs prosecutions grew from a trickle in 1997 to a top priority of the United States Attorney's Office, encompassing all forms of criminal activity affecting e-commerce and critical infrastructures including computer hacking crimes; transmission of Internet worms and viruses; electronic theft of trade secrets; illegal use of "spyware"; web-based frauds; unlawful Internet gambling; and criminal copyright and trademark infringement offenses. As a recognized expert in the field, Mr. DeMarco was frequently asked to counsel prosecutors and law enforcement agents regarding novel

investigative and surveillance techniques and methodologies, and regularly provided advice to the United States Attorney concerning the Office's most sensitive computer-related investigations. In 2001, Mr. DeMarco also served as a visiting Trial Attorney at the Department of Justice Computer Crimes and Intellectual Property Section in Washington, D.C., where he focused on Internet privacy, gaming, and theft of intellectual property.

Since 2002, Mr. DeMarco has served as an Adjunct Professor at Columbia Law School, where he teaches the upper-class I*nternet and Computer Crimes* seminar. He has spoken throughout the world on cybercrime, e-commerce, and IP enforcement. He has lectured on the subject of cybercrime at Harvard Law School, the Practicing Law Institute, the National Advocacy Center, and at the FBI Academy in Quantico, Virginia, and has served as an instructor on cybercrime to judges attending the New York State Judicial Institute.
Prior to joining the United States Attorney's Office, Mr. DeMarco was a litigation associate at Cravath, Swaine & Moore in New York City, where he concentrated on intellectual property, antitrust, and securities law issues for various high-technology clients. Prior to that, Mr. DeMarco served as law clerk to the Honorable J. Daniel Mahoney, United States Circuit Judge for the Second Circuit Court of Appeals.

Mr. DeMarco holds a J.D. *magna cum laude* from New York University School of Law. At NYU he was a member of the *NYU Law Review*. He received his B.S.F.S. *summa cum laude* from the Edmund A. Walsh School of Foreign Service at Georgetown University.
Mr. DeMarco is active in numerous professional associations including the:

- International Bar Association (Technology and Litigation Sections);
- American Bar Association, Criminal Justice Committee (Co-Chair, *Cybercrime Committee*, 2010-2011);
- New York State Bar Association, Commercial and Federal Litigation Section (Co-chair,*Internet and IP Committee*, 2009-present); and
- New York City Bar Association (Member, *Copyright Committee*; Past Member, *Information Technology Committee*).

Mr. DeMarco is a *Martindale-Hubbell* AV-rated lawyer for Computers and Software, Litigation and Internet Law, and is also listed in Chambers USA: *America's Leading Lawyers for Business* guide as a leading lawyer nationwide in Privacy and Data Security. He has also been named as a "*SuperLawyer*" for his expertise and work in the area of Intellectual Property Litigation. He has published numerous articles and appeared on major news programs in his practice areas; is a member of the Professional Editorial Board of the prestigious Computer Law and Security Review (Elsevier); and serves on the Board of Advisors of the *Center for Law and Information Policy at Fordham University School of Law.*

Mr. DeMarco has received numerous professional awards, including the U.S. Department of Justice *Director's Award for Superior Performance*, as well as the *Lawyer of Integrity Award* from the Institute for Jewish Humanities. In his spare time he enjoys parenting, golf, and listening to classical piano.

Alexandra Dosman

Managing Director

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ALEXANDRA.DOSMAN@VANNIN.COM

In her role as Managing Director, Alexandra Dosman advises clients on funding options for international arbitration cases (both commercial and investor-state) and for litigation relating to the enforcement of arbitral awards in U.S. courts. She is based in New York as part of the global International Arbitration team.

From May 2013 to October 2017, Alexandra was the first Executive Director of the New York International Arbitration Center (“NYIAC”), a non-profit organization that works alongside practitioners, academics, and the judiciary to promote and enhance the conduct of international arbitration in New York. Prior to taking up her role at NYIAC, Ms. Dosman practiced arbitration and litigation in the New York office of Shearman & Sterling LLP for seven years, where she played a leading role in international commercial and investment treaty arbitration cases.

Alexandra writes and speaks widely on international arbitration topics. In January 2018, she was awarded the Smit-Lowenfeld Prize for best article in the field of international arbitration for “Ten Years of Emergency Arbitration,” co-authored with Grant Hanessian, 27(2) American Review of International Arbitration (Fall 2016). Alexandra also sits as an independent arbitrator and has adjudicated cases under the Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce (ICC) and the UNCITRAL Arbitration Rules.

Alexandra was educated at McGill University in Montreal and at the University of Toronto. She is a Canadian national and is bilingual English/French.

Eugene I. Farber

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Professional Recognition:
- President, College of Commercial Arbitrators, 2012-2013
- Chair, American Bar Association Arbitration Committee, 2013-Present
- Board of Directors, American Arbitration Association, 2014-Present
- Adjunct Professor of Law teaching Arbitration and Mediation, Pace Law School, 1985-Present

Work History:
- Partner, Farber, Pappalardo & Carbonari (and predecessor firms), 1982-present
- Associate Attorney, Weil Gotshal & Manges,1974-1977
- Associate Attorney, Moses & Singer, 1978-1981

Experience:
Over 35 years experience as civil trial lawyer and advocate, negotiator, mediator and arbitrator in federal, state, administrative, arbitration, and mediation proceedings related to partnerships, energy (oil, gas, coal and solar including photovoltaic), malpractice (against accountants, attorneys, architects and engineers), franchise, construction, real estate investments and valuations, entertainment, bankruptcy, international, manufacturing, marketing, product development, financing, banking, securities, insurance and employee-employer disputes. Arbitrations involving dissolution of law, accounting, construction, architectural, and other professional firms, and regarding ownership, licensing and patents for intellectual property including genetic, agricultural and chemical technology and formulas; insurance coverage including subrogation, reinsurance, officers' and directors' errors and omissions, appraisals, property and casualty, health, title, and malpractice insurance; manufacture of foreign products for distribution in the United States and vice versa including jewelry, diamonds, medical equipment, food processing ingredients and machinery, underwear, women's clothing, shoes, gambling casinos, watches, musical instruments, cookies, corn, a tunnel, a jail, covenants not to compete, satellites, bats, perfume, flowers, barbeque grills, structured financial transactions including proprietary financial data, medicines, artificial hearts; weapons, comic books, fast food, movies, hotels, baseball cards, defense industry products and major franchises for food, chemicals, cabinets, beds, medical equipment, ice cream, and hotels; accounting disputes including application of complex GAAP and GAAS provisions; technology claims involving hardware, software, applications, web-sites and data storage and retrieval; disputes between landlords and tenants regarding amounts due, renewal rights, new rent rates, and exercise of options. Claim against brokers including churning, suitability, and Rule 10b-5 violations.

Hon. Helen E. Freedman (Ret.)

Case Manager

Melanie O'Harra

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General Biography

Hon. Helen E. Freedman (Ret.) joined JAMS in 2014 after serving 36 years on the New York State bench. She was an Associate Justice of the Appellate Division, First Department for six years and served for over eight years as a Justice in the Commercial Division. Justice Freedman was the Presiding Justice of the Litigation Coordinating Panel for Multi-district Litigation in New York State from 2002 to 2014.
Since joining JAMS she has conducted multiple mediations, arbitrations, and neutral evaluation matters varying in type and complexity. Widely renowned for her intellect and persistence in managing large and complex matters, Justice Freedman is well respected by both the bench and bar. Justice Freedman brings a distinct understanding and perspective to dispute resolution given her impressive tenure presiding over both commercial and appellate matters while on the bench. She has developed the same reputation at JAMS helping many parties find resolution despite intricate and contentious matters. Justice Freedman is regarded as knowledgeable, fair and well prepared. As a result of both her impressive experience at JAMS and her distinguished career on the bench, she is highly sought after for her skills as a special master, neutral in mock trials and as a court or party-appointed special master. Justice Freedman believes strongly in pro bono services and increasing the use of alternative dispute resolution (ADR); as such, she serves as a volunteer mediator at the Appellate Division First Department.

ADR Experience and Qualifications

- Employment
- Breach of Contract
- Business/Commercial
- Real Estate
- Insurance Coverage
- Disability
- Insurance Property Damage
- Construction
- Medical Malpractice
- Personal Injury
- Premises liability

- Jones Act/ Maritime
- Product Liability
- Wrongful Death
- Labor Law

Representative Matters

Arbitrations

- Arbitrated employment disputes involving discrimination, sexual harassment, and contract interpretation
- Arbitrated a consumer action involving a disability discrimination claim
- Arbitrated breach of contract dispute involving a breach of loan and lease agreement between owner and lessee

Mediations

- Mediated numerous commercial breach of contract matters involving insurance, energy, real estate, and employment
- Mediated insurance dispute between and among a manufacturer and its insurers over asbestos liability claims
- Mediated medical malpractice disputes
- Mediated numerous personal injury claims involving Labor Law 240(1) and 241(6), premise liability and automobile accidents
- Mediated a fee dispute and legal malpractice counterclaim
- Mediated multiple disputes among shareholders who were also lessees of a major urban shopping center in Queens, N
- Mediated product liability disputes involving a popular weight loss drug, a heart implant device, and an asbestos claim
- Mediated complex interpersonal relationship dispute

Neutral Evaluations

- Served as a neutral evaluator in a mock appellate hearing involving a family business dispute
- Served as a neutral evaluator in a mock oral hearing involving insurers' potential liability for a billion dollar settlement
- Served as a court appointed neutral appraiser involving insurance claims in a major property damage dispute arising out of Sandy claims
- Served in a mock hearing to analyze contract provisions and develop the best approach in a commercial securities dispute

Significant trials presided over by Justice Freedman include the following:

- *In re New York City Asbestos Litigation, (NYCAL),* Index No. 40,000(1987-2008):
  - Managed entire litigation involving resolution of tens of thousands of cases by trial or settlement. Two of many published decisions include: ·Established "two injury rule" in *Fusaro v. Porter-Hayden Co,* 145 Misc2d 911, 548 NYS2d 856 (1989), aff'd 170 AD2d 239, 565 NYS2d 357 (1st Dept 1991) and required bankrupt defendants to appear on verdict sheet for purposes of Article 16 offsets in *In re New York City Asbestos Litigation: Tancredi v. AC&S, et al.,* 194 Misc2d 214, 750 NYS2d 469 (2002), aff'd6 AD3d 352, 775 NYS2d 520 (1st Dept.2004)
  - Case Management Order provided for extensive use of special masters for mediation and discover
  - Designated as Judge in charge of all New York City asbestos personal injury cases from 1987-2008
- *BT Triple Crown Merger Co., Inc. v. Citigroup Global Markets Inc., et al.,* 19 Misc3d 1129(A)(2008) (Matter involving anticipatory breach of contract by funders of leveraged buyout of Clear Channel Communications, Inc. by private equity firms, Bain Capital Partners, LLC and Thomas H. Lee Partners)
- *Loral Space Communications Holdings Corporation v. Rainbow DBS Holdings, Inc., et al.,* 48 AD3d 296, 852 NYS2d 77 (1st Dept2008) (Matter involving affirmance of jury verdict following trial where jury awarded lender damages of $52 million dollars pursuant to a "make whole" provision of the letter agreement that was triggered by the sale of defendant's assets)
- *Sports Channel Associates v. Sterling Mets, L.P.,* 8 Misc3d 1027(A), 806 NYS2d 448 (2005) and 7 Misc3d 1007(A),801 NYS2d 242 (Sup.Ct.NY Co 2005), aff'd 25 AD3d 314, 807 NYS2d 61 (1st Dept.2006) (Matter involving licensing agreement for broadcast television rights of baseball games played by the New York Mets. $54 million payment pursuant to termination provision ended parties relationship and supported the right to immediately launch a Mets network)

- *McCain et al. v. Koch, et al.,* 806 N.Y.S.2d 448 (Sup. Ct. N.Y. Co. 2005); *McCain v. Giuliani,* 226 AD3d 256, 653 NYS2d 556 (1st Dept 1997); *McCain v. Dinkins,* 84 NY2d 216, 616 NYS2d 335, aff'g 192 AD2d 217,601 NYS2d 271 (1993); *Lamboy v. Gross,* 129 Misc 2d 564, 493 NYS2d 393 (Sup Ct. NY Co 1985), affid 126 AD2d 265, 513 NYS2d 393 (1st Dept 1987)
  - These are a few of many decisions rendered during Justice Freedman's 25 years of managing the homeless families with children litigation. To the extent that her decisions were appealed, all were affirmed. Justice Freedman made extensive use of mediation and of the services of Special Masters to resolve the many issues that arose during the course of these litigations.

Honors, Memberships, and Professional Activities

- Civil Practice Award, New York County's Lawyer's Association (NYCLA), 2015
- Louis J. Capozzoli Gavel Award, New York County Lawyer's Association (NYCLA), 2005
- Civil Court Distinguished Service Award for Accomplishments Enhancing the Status of Women in the Judiciary, New York County Lawyer's Association (NYCLA), 2004
- Smith College Medal, "Judicial Independence", 2000
- American Bar Association's Award of Judicial Excellence, State Trial Judges Conference, 1998
- Vice-Chair on the Pattern Jury Instructions Committee of the Association of Justices of the Supreme Court, New York
- Lectured and written extensively on the use of ADR in mass torts and public interest litigation
- New York County Lawyer's Association
  - Board of Directors, 2013-2016
  - Chair, Judicial Section, 2009-2012
    - Task Force on Judicial Selection, 2011-present
    - Task Force on Budget Cuts, 2011-present
- New York Objections; Author – 18th Revision
- Board of Trustees, Historical Society of the Courts of the State of New York, 2016
- Editor of Judicial Notice, semi-annual publication of the Historical Society, 2016

Background and Education

- Associate Justice, Appellate Division First Department, 2008-2014
- Presiding Judge of the Litigation Coordinating Panel for Multi-District Litigation in New York State, 2002-2014
- Justice of the Commercial Division of the New York County Supreme Court, 1999-2008
- Adjunct Professor at New York Law School, 1996-2007
- Associate Justice, Appellate Term Supreme Court, First Department, 1995-1999
- New York State Supreme Court Justice, 1989-2008
- Acting Supreme Court Justice, 1984-1989
- Civil Court Judge, New York County, 1979-1984
- Supervising Attorney, District Council 37 Legal Services Plan, 1976-1978
- Senior Attorney, New York Department of Housing Preservation and Development, 1976
- Law Clerk to Hon. Seymour Schwartz, 1974-1975
- Litigation Attorney, 1967-1974
- J.D., New York University School of Law
- B.A., Smith College

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WALTER GANS

Profession

Arbitrator & Mediator,Self-employed

Current Employer

Arbitrator & Mediator, Self-Employed, 2002 - present
Special Counsel, Kaye Scholer, LLP, 2000 - 2002
Vice President, General Counsel & Secretary, Siemens Corporation, 1979 - 1999
Senior Counsel, International / Counsel, Olin Corporation, 1967 - 1979
Attorney, International Latex Corporation, 1963 - 1967
Associate, Fried Frank Harris Shriver & Jacobson, 1961 - 1963

Area of Expertise

Work History

Over 40 years of experience in legal profession with emphasis on alternative dispute resolution, international business transactions, management, antitrust, corporate and commercial, legal compliance, and ethics.
ADR Experience: As general counsel, directed management and legal department in the use of ADR processes (including mediation, mini-trial, and arbitration) in a variety of business matters of a $15 billion multinational enterprise. Conducted mediation sessions and directed institutionalized use of alternative dispute resolution. Fellow & former board member, College of Commercial Arbitrators. Member of the AAA

Cases

Court of Arbitration for Sport, Training Seminar, Lausanne, 11/01; North American Court of Arbitration for Sport, Technical Training Seminar, LA l/01; AAA Commercial Arbitrator Training Workshops, New York, 12/01 and 5/99; Harvard University, Program on Negotiation; various other ADR training.

Training

Admitted to the Bar, New York, 1961.

Awards

CPR International Inst. for Conflict Prevention & Resolution
AAA / ICDR : Commercial, International & Complex Disputes
ICC Commission on Arbtration

Panels

American Bar Association (Antitrust Section; Business Law Section; Dispute Resolution Section; Litigation Section; International Law and Practice Section); International Bar Association; American Foreign Law Association; The Corporate Bar; The American Corporate Counsel Association (New York City Chapter, Board of Directors); Food and Drug Law Institute (Board of Trustees); The Conference Board (Council of Chief Legal Officers); CPR Institute for Dispute Resolution (Executive Committee); Forum for EU-US Legal-Economic Affairs (Mentor Group); ABA Committee of Corporate General Counsel.

Associations

Bowdoin College (BA, Comparative Government, with honors-1957); New York University (JD-1961; LLM, Comparative Law-1967).

Education

Saving Time and Money in Cross-Border Commercial Disputes

Publications

DISPUTE RESOLUTION JOURNAL, AAA, 1997; ADR: The Siemens' Experience

Miscellaneous

DISPUTE RESOLUTION JOURNAL, AAA, 1996; contributor, ANTITRUST LAW DEVELOPMENTS, second edition, American Bar Association, Antitrust Section, 1984; contributor, CORPORATE ACQUISITIONS AND MERGERS, Matthew Bender &Co.

Citlalli Grace
Manager, Dispute Resolution Services

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Citlalli Grace is an attorney admitted to practice in Mexico and in New York. She obtained her Bachelor of Laws with a specialization in International Law from the Universidad de las Américas Puebla (UDLAP) in Mexico in 2009, where she received the Jenkins Excellence Scholarship from the University and the TELMEX Foundation Scholarship. Citlalli studied a semester abroad in the Law School of the Université de Lausanne in Switzerland, where she also worked as an intern for the Permanent Mission of Mexico to the United Nations Oce in Geneva. Upon graduation, Citlalli interned at the Inter-American Commission on Human Rights in Washington, D.C. where she later got a position as a legal consultant. Citlalli returned to Mexico to accept an opportunity in the Federal Public Administration, where she obtained broad expertise in public international, human rights, constitutional, and administrative law. She worked as a legal advisor to the Attorney for Tax Legislation and Consultation of the Ministry of Finance, and to the Deputy Minister of Legal Aairs and Human Rights at the Ministry of the Interior. She also worked as a Technical Secretary to the Oce of the Federal Attorney of Environmental Protection, supervising the responses to environmental damage complaints. In 2015, Citlalli obtained an LL.M. in International Legal Studies at New York University School of Law, with the support of the Mexican National Council on Science and Technology (CONACYT), the Mexican Foundation for Education, Technology and Science (FUNED), and the Ministry of Public Education of Mexico (SEP). At NYU Law, she worked with the Immigration Law Clinic as a Spanish interpreter, as a volunteer with the NYU Immigrant Rights Project's Detention Center program and as a legal intern at the Permanent Mission of Mexico to the United Nations in New York, for which she was the recipient of the Public Interest Law Prize for LLMs, awarded by NYU to a LLM student who demonstrated a clear commitment to a publicservice oriented cause or project outside and separate from any Law School or Admission requirement. Previously to coming to CPR, Citlalli was the recipient of an International Finance and Development Fellowship from NYU School of Law, with which she worked at the Codication Division of the Oce of Legal Aairs of the United Nations analyzing international arbitration awards for a study to the International Law Commission. Copyright © 2018 CPR International Institute for Conict Prevention & Resolution, All Rights Reserved.

JAMES HOSKING

Partner

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James Hosking has 20 years of international dispute resolution experience. Immediately prior to co-founding Chaffetz Lindsey, he was a partner in Clifford Chance's New York litigation department, focusing primarily on international arbitration.

James is a recognized expert in international arbitration, having handled disputes under the rules of all the leading institutions, including ICC, AAA/ICDR, SIAC, LCIA, WIPO, CRCICA and ICSID, as well as the UNCITRAL Rules. His recent cases have involved international commercial contracts, corporate acquisitions, construction/engineering, insurance and reinsurance, licensing, energy/power projects, JV/shareholder disputes, mining, and investment treaty claims. James also sits as an arbitrator, having been appointed in arbitrations under the ICC, ICDR, AAA and CRCICA Rules. He has experience as a sole arbitrator, chairperson, co-arbitrator and emergency arbitrator.

In addition to his arbitration practice, James also represents clients in US commercial litigation and has argued cases at all levels of the New York courts, as well as in federal court in New York and elsewhere. His cases often arise out of cross-border transactions and/or involve issues of sovereign immunity and public international law. James is admitted in New York and previously practiced in New Zealand.

Sherman W. Kahn, Esq.

Morrison & Foerster LLP
Of Counsel

Sherman W. Kahn has broad experience with all aspects of complex business litigation with a particular emphasis on international arbitration and intellectual property.

Mr. Kahn represents clients and acts as an arbitrator in international arbitration proceedings presenting complex technical and commercial issues and has arbitrated under the AAA, JCAA, ICC, and other arbitration and dispute resolution rules. The subject matter of these arbitrations has ranged from patent and trademark issues to construction and commercial issues. Mr. Kahn provides advice regarding clause drafting and pre-dispute issues in connection with major construction and infrastructure projects. He also provides advice to clients regarding structure of investments with respect to arbitration pursuant to bilateral investment treaties. Mr. Kahn is a member of the International Centre for Dispute Resolution (ICDR) Panel of Arbitrators and the American Arbitration Association Roster of Commercial Arbitrators.

Mr. Kahn has published many articles regarding arbitration and dispute resolution and is active in numerous bar associations and other arbitration-focused organizations. Mr. Kahn was elected Vice-Chair of the Dispute Resolution Section of the New York State Bar Association for the 2012-2013 year, has been nominated as Chair-Elect for the 2013-2014 year and formerly served as chair of the Section's Arbitration Committee. Mr. Kahn is Vice-Chair of the American Bar Association Dispute Resolution Section Arbitration Committee. He is a member of the New York International Arbitration Club and the CPR Institute Arbitration Committee. Mr. Kahn speaks frequently on arbitration at meetings and conferences.

In addition to arbitration, Mr. Kahn has litigated patent matters involving complex technologies, such as programmable logic devices, microprocessors and controllers, memory devices, construction equipment, medical devices, supercomputers, LCD & PDP display devices, LED Lighting, various computer software products, and networking technologies. Mr. Kahn also litigates trade secret, trademark, copyright, and antitrust matters. Mr. Kahn advises clients regarding information security and privacy issues for compliance and in privacy-related regulatory proceedings and litigation. Mr. Kahn represents clients in FTC and state attorney general investigations of privacy and information security practices.

Mr. Kahn practiced in Morrison & Foerster's Tokyo office for five years. During that time he was licensed as a *gaikokuho jimu bengoshi* and a member of the Dai-Ni Tokyo Bar Association

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Daniel F. Kolb

Senior Counsel, Davis, Polk & Wardwell LLP

Dan Kolb has for over 45 years been a practicing litigator and trial lawyer in both federal and state courts throughout the United States. He has also frequently acted as an advocate and neutral in significant arbitrations and mediations.

Dan has successfully handled a long list of high profile matters with significant client exposure. His clients have typically been major accounting firms, financial and industrial corporations, law firms, and a range of public interest organizations. His experience includes extended trials in courts throughout the United States and significant government investigations. Many of the matters have included litigation in European or Canadian courts.

Claims and charges have included alleged securities and banking law violations, financial, accounting and tax fraud, professional malpractice as to both accountants and lawyers, breach of contract, mass torts and antitrust violations Also included have been significant Constitutional issues, probate issues as to one of the largest estates in the United States, significant issues as to jurisdiction and venue, related bankruptcy law issues, and attempts to pierce the corporate veil.

Among others, the matters have required focus on the following industries and businesses: Accounting and Auditing, Banking, Underwriting, Investment, Brokerage, Tobacco, Telecommunications, Aluminum Cable, Dairy Products, Rendering, Retail Sales Practices, Auto Parts, Nursing Homes, Franchising, Nuclear Energy, Discount Chain Stores, Newspapers, Mining, Food Safety, Marketing of Pharmaceutical Products, and Toys.

Dan has been appointed to serve as a Mediator in the U.S. District Court for the Southern District of New York and New York's Supreme Court Commercial Division and Appellate Division for the First Department. He is also a member of the AAA Commercial and Accounting Panels of Arbitrators and CPR's Panel of Distinguished Neutrals. He has just completed his term as Chair of the Dispute Resolution Section of The New York State Bar Association and is currently serving as Co-Chair of the President's Committee for the Efficient Resolution of Disputes at the New York City Bar. He is also currently serving as a member of Chief Judge DiFiore's Advisory Committee on ADR in the Courts.

He has served as an arbitrator or mediator in disputes involving claims of accounting and lawyer malpractice, the sale of distressed debt, valuation of investment partnership interests, commercial contract interpretation, identity theft, sale and ownership of commercial real estate in the United States and abroad, estate matters, employment discrimination, payment of professional advisory fees, nursing homes franchising and sale of technology.

Since he became senior counsel in July of 2011, Dan has devoted himself primarily to service as an arbitrator and mediator and to handling impact cases for those in need.

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Lea Haber Kuck

Skadden

Partner, New York

International Litigation and Arbitration

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Education

J.D., New York University School of Law, 1990 (Senior Production Editor, *Annual Survey of American Law*)

A.B., Hamilton College, 1987 (*magna cum laude*)

Bar Admissions

New York

Experience

Law Clerk, Hon. Steven D. Pepe, U.S. Magistrate Judge, U.S. District Court for the Eastern District of Michigan (1990-1992)

Lea Haber Kuck concentrates her practice on the resolution of complex disputes arising out of international business transactions. She represents clients in federal and state courts in the United States, as well as in international arbitrations conducted under UNCITRAL, ICC, ICDR, LCIA and other arbitration rules.

Ms. Kuck regularly advises clients on a variety of issues relating to international dispute resolution, including forum selection, jurisdiction, service of process, extraterritorial discovery and enforcement of judgments, as well as drafting of arbitration, dispute resolution and choice-of-court clauses. She has been selected for inclusion in Lawdragon 500 Leading Lawyers in America and is a member of the Skadden team that was named the 2013 Law Firm of the Year: Dispute Resolution by *Chambers Global*.

Notable representations include:

- Japanese telecommunications company NTT Docomo in an LCIA resulting in a $1.2 billion award against Tata Sons Limited of India;
- a Brazilian insurance company in an expedited ICC arbitration and related litigation arising out of parallel litigation in Brazil;
- the trustees of CommonWealth REIT in a two-week arbitration arising out of efforts by an activist hedge fund to take control of the trust, which resulted in an award by the arbitration panel invalidating the hedge fund's consent solicitation;
- an international investment bank in connection with disputes involving proceedings in New York and London relating to several billion dollars of structured finance products;
- an Australian gaming and entertainment company in connection with litigation arising out of the failed Fontainebleau resort construction project in Las Vegas;
- a shareholder of a major telecommunications company with operations in the former Soviet Union in an UNCITRAL arbitration and related litigation concerning a shareholder dispute with a European telecommunications company;
- IRB-Brasil Resseguros, S.A., the largest reinsurer in South America, in multiple actions seeking to recover amounts due under certain global notes in which judgments in excess of $100 million were obtained for IRB and affirmed in a seminal case by New York's highest court;
- a helicopter manufacturer in connection with a CPR arbitration relating to certain intellectual property rights;
- an individual in cross-border litigation arising out of the Icelandic banking crisis, including obtaining dismissal on *forum non conveniens* grounds of an action filed in New York;
- an international beverage company in connection with its successful defense against a multibillion-dollar claim in an UNCITRAL arbitration arising out of the terms of an investment agreement with a Mexican company and its stockholders;
- a Hong Kong shipping company as claimant in an ICDR arbitration in which preliminary relief in aid of arbitration was obtained in a New York court;

Lea Haber Kuck

Continued

- a computer manufacturer as claimant in an ICC arbitration arising out of a share purchase agreement in which preliminary relief in aid of arbitration was obtained;
- DaimlerChrysler AG in connection with multiple litigations arising out of the merger of Daimler-Benz AG and Chrysler Corporation, one of which involved successfully defending at trial federal securities and state law fraud claims brought by a prominent Chrysler investor seeking more than $1 billion in damages, a victory *The National Law Journal* dubbed the 2005 Top Defense Win of the Year;
- multiple international issuers in their defense of securities class actions filed in the United States, including several actions where the complaints were dismissed at the pleading stage;
- a Brazilian energy company in connection with an ICC arbitration against a subsidiary of a large U.S. energy company relating to an investment in an electrical power project in Brazil; and
- *pro bono* clients in several cases brought under the Hague Convention on International Child Abduction, including acting as lead counsel in the seminal case of *Croll v. Croll*.

Ms. Kuck frequently writes and speaks on international arbitration and cross-border litigation topics. In 2010, she received the Burton Award for Legal Achievement, which recognizes excellence in legal scholarship.

Ms. Kuck is a former member of Skadden's Policy Committee, the firm's governing body, and was the firm's first global attorney development partner. She also serves on the board of trustees of Hamilton College.

Associations

American Bar Association, International Law Section, Liaison to the Litigation Section

International Institute for Conflict Prevention and Resolution (CPR), Arbitration Committee

Institute for Transnational Arbitration, Advisory Board

Arbitral Women

Fellow, American Bar Foundation

Selected Publications

"US Supreme Court to Decide Whether Foreign Defendants May Be Served by Mail," *Skadden, Arps, Slate, Meagher & Flom, LLP*, (January 24, 2017)

"New D.C. Circuit Ruling Impacts International Arbitration," *Law360*, (October 13, 2016)

"'RJR Nabisco' and the Future of Extraterritoriality," *The National Law Journal*, (July 4, 2016)

"Standard Arbitration Clauses for the AAA and ICDR," *Thomson Reuters* (October/September 2015)

"Recent Cases Are Likely to Reduce the Use of New York Courts for 'Turnover' Actions," Co-Authored With Timothy G. Nelson, *Banking Law Journal* (July/August 2015)

"The Evolving Landscape for Enforcement of International Arbitration Awards in the United States," Co-Authored With Timothy G. Nelson, The International Comparative Legal Guide to International Arbitration (July 2015)

"Multijurisdictional Enforcement of Foreign Judgements," *Corporate Disputes* (January/March 2015)

"Class Arbitration Decisions in 2013 Confirmed the Importance of Class Action Waivers," Co-Authored With Gregory A. Litt, *NYSBA New York Dispute Resolution Lawyer* (Spring 2014)

"US Supreme Court Further Limits Jurisdictional Reach of the US Courts Over Foreign Torts," Co-Author, *Skadden's 2014 Insights* (January 2014)

"The New York Courts Are Open for Business to Foreign Litigants," *Corporate Disputes* (April/June 2013)

"Inside *Mariana Islands v. Canadian Imperial Bank*," *Law360* (May 6, 2013)

"International Cases Court of Appeals Decided in 2012, Looking Ahead to 2013," *New York Law Journal* (March 11, 2013)

"Debate Over Arbitral 'Competence/Competence' Heats Up in US Courts," *Corporate Disputes* (October/December 2012)

Chapter 30: International Class Arbitration, Co-Authored With Gregory A. Litt, *World Class Actions: A Practitioners Guide to Group and Representative Actions Around the Globe*, Oxford University Press (2012)

"Vacating an International Arbitration Award Rendered in the United States: Does the New York Convention, the Federal Arbitration Act or State Law Apply?" *Penn State Yearbook on Arbitration and Mediation* 1 (2011)

"Will Stolt-Nielsen Push Consumer, Employment and Franchise Disputes Back Into Courts?" *NYSBA New York Dispute Resolution Lawyer* (Spring 2011)

"Standard Arbitration Clauses for the AAA, ICDR and ICC," *Practical Law The Journal* (July/August 2010)

Chapter 9: Discovery, Co-Authored With John Gardiner and Julie Bédard, *International Commercial Arbitration in New York*, Oxford University Press (May 2010)

"Starting With the End, An Overview of Strategies for Litigating in the United States to Obtain Judgments Enforceable Abroad," *New Jersey Lawyer* (February 2010)

Co-Author, "'Inexcusable' Gamesmanship Sinks Arbitration Pact," *The National Law Journal* (August 3, 2009)

Jack P. Levin

Arbitrator and Mediator

The New York Times Building
43rd Floor
620 Eighth Avenue
New York, NY 10018

Office: (212) 430-5430
Mobile: (917) 806-6736
E-mail: levin@levinadr.com
Add Contact

For nearly forty years, Jack Levin litigated in courts and arbitral forums throughout the United States, beginning his career with a federal clerkship and then with Davis Polk & Wardwell. In 1983 he was a founding partner of Howard, Darby & Levin and its successor firm, Howard, Smith & Levin LLP, which in 1999 merged with Covington & Burling LLP. Beginning in the late 1990's, he began to acquire training and experience in mediation and other alternatives to litigation, as clients increasingly sought conflict solutions with reduced cost and risk. For several months in 2001, while a Covington partner, he served as acting head of litigation (North America) for UBS Warburg. He took Retired Partner status from Covington in 2011 to work full-time as an independent, domestic and international mediator, arbitrator and creator of conflict solutions.

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Experience/Credentials

Experience

Accounting	Art/Auction	Aviation
Banking	Civil rights	Commercial
Contracts	Copyright	Corporate Raiding
Defense Contracting	Discrimination	Distributorships
Domestic Relationships	Employment	Entertainment
Family Business /Succession	Financial Institutions	Financial Instruments
High Conflict Disputes	ICC Arbitration Tribunal	Insider Trading
Insurance	Immigration	Information Technology
International Trade	Intellectual Property	Licensing
Mergers & Acquisitions	Investment Banking	Non-Competition
Non-Solicitation	Multi-Party Disputes	Professional Firms
Professional Malpractice	Partnership Disputes	Securities
Securities Clearing	Real Estate	Unfair Competition
	Trademark	

Panels

Commercial, Large Complex Case and Mediation Panels of the American Arbitration Association

Arbitration Panel of the International Centre for Dispute Resolution

Banking, Accounting and Financial Services, Cross-Border and Employment Panels of CPR: The International Institute for Conflict Prevention and Resolution

Mediator Roster of FINRA DR (Financial Industry Regulatory Authority Dispute Resolution)

Special Master of the Appellate Division, First Judicial Department (New York)

Mediation Panel of the Commercial Division of Supreme Court New York County

Mediation Panel of the United States District Court for the Southern District of New York

Licenses/Credentials/Affiliations

Admitted to the Bar: New York, 1972; New Jersey, 1972; U.S. District Court, Southern and Eastern Districts of New York, 1972; U.S. Court of Appeals, Second Circuit, 1972; U.S. Supreme Court, 1992; Fellow, Chartered Institute of Arbitrators (Executive Committee of New York Branch); CPR: The International Institute for Conflict Prevention and Resolution (Advisory Council, Arbitration Committee, Mediation Committee, Banking & Financial Services Committee); International Arbitration Club of New York; American Bar Association (Dispute Resolution Section); New York State Bar Association (Dispute Resolution Section).

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Presentations/Publications/Awards

CPR Brazil Business Mediation Congress, São Paulo, Panel Member on Banking and Financial Services, April 2015

"New York Super Lawyers" 2007 - 2014, (2009 - 2014 for Alternative Dispute Resolution)

New York State Bar Association Dispute Resolution Section Panel, "Nothing But the Truth? - Ethical Duties in ADR," January 2015

New York State Bar Association Dispute Resolution Section Panel, "Cross Cultural Mediation," September 2014

Chartered Institute of Arbitrators; Instructor, Accelerated Route to Fellowship in International Arbitration, May 2014

New York State Bar Association, Commercial Arbitration Training, Panel on Award Writing, June 2013, 2014

2013 American Bar Association International Law Section Spring Meeting, Panel Moderator, "Cross Cultural Mediation in Action: Exploring the Challenges of Using ADR in International Arbitration," April 2013

2013 American Bar Association Dispute Resolution Spring Conference, Panel Member, "Is the Demand for Mediation Declining?" April 2013

2013 Annual Meeting, CPR Institute for Conflict Prevention & Resolution, Panel Co-Moderator, "Planning for Cost-Effective Dispute Resolution" and "In-House Counsel Workshop: Mediating the Complex Case / Developing and Implementing a Mediation Based Resolution Strategy," January 2013

"What it Takes to Be An Effective International Mediator," presentation with Robert B. Davidson, International Arbitration Club of New York, May 2012

New York State Bar Association, Dispute Resolution Section, Panel, "Crisis in the Courts, Panel on How Can Advocates, Neutrals and Service Providers Help Break the Gridlock?" October 2011

New York State Bar Association, Commercial Arbitration Training, Panel, "Perspectives on Practice Development in the Arbitration World," June 2011

"Mistakes Mediators Make," *New Jersey Lawyer Magazine* (a publication of the New Jersey State Bar Association, reprinted here with permission) April 2011, Co-Author with Hon. William G. Bassler

"Podcast: Jack Levin - Using Mediation Skills Both in the Workplace and at Home:" Jane Gunn - "*The Corporate Peacemaker*" http://www.corpeace.com, September 2010

Tutor, Fast Track Program to Fellowship in International Arbitration, Chartered Institute of Arbitrators, New York 2010

"Settlement Counsel," New York American Inns of Court, May 2009

Congress Moderator, CPR European Congress, Vienna, Austria, May 2008

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Education and Training

Education

Rutgers College (BA, 1968); University of Pennsylvania (JD, 1971)

Training

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AAA/ICDR Neutrals Conference, 2010 - 2012
AAA Advanced Mediator Training, 2010
AAA Arbitration Awards: Safeguarding, Deciding & Writing Awards, 2009
AAA Arbitration Fundamentals and Best Practices for New Arbitrators, 2008
Ackerman Institute for the Family, Basic and Advanced Mediation Training, 2008 - 2009
CPR Institute/Chartered Institute of Arbitrators, Advanced Arbitrator Training, 2007
Chartered Institute of Arbitrators, Fast Track Program to Fellowship in International Arbitration, 2006
CPR Institute, Excellence in Ethics, 2006
CPR Institute, Mediator Training, 2004
U.S. District Court for the Southern District of New York, Mediator Training, 1997

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Lela P. Love

EDUCATION

B.A., 1973, Harvard University
M.Ed., 1975, Virginia Commonwealth University
J.D., 1979, Georgetown University

BIO

In addition to two decades of teaching, training, consulting and writing in the dispute resolution field, Professor Love serves as a mediator, arbitrator and dispute resolution consultant in a wide range of cases. Since 1985, with Cardozo students, she has mediated hundreds of community, civil court and employment discrimination cases. Independently, she has served as the mediator of family, human rights, civilian and police-officer, school-based and commercial cases. She has arbitrated numerous cases in NYC Civil Court, Small Claims Court and Attorney-Client Fee Disputes. Her mediation of a public policy dispute in Glen Cove, NY, brought widespread publicity to the use of mediation in resolving complex litigation.

Professor Love serves on the Council of the ABA Dispute Resolution Section and the NYS Unified Court System Alternative Dispute Resolution Advisory Committee.

In addition to her work in ADR, she developed and directed the Small Business Clinic at George Washington University's National Law Center. She is a member of the Bar in New York, New Hampshire and the District of Columbia.

Professor Love is the Director of Cardozo's Kukin Program for Conflict Resolution, the sixth ranked alternative dispute resolution program in the country*, and the Cardozo Mediation Clinic.

For further information, see Professor Lela Love's CV.

Chrystal Loyer, Esq.
FINRA One Liberty Plaza
165 Broadway, 27th Floor
New York, NY 10006
Chrystal.Loyer@finra.org
(212) 858-4325

Chrystal Loyer is a Principal Analyst in FINRA's Office of Dispute Resolution where she provides compliance oversight, counsel, and training to department staff on FINRA rules and procedures. Prior to joining FINRA, Chrystal practiced tax litigation and estate planning. Chrystal graduated cum laude from Seton Hall University School of Law in 2012. She is a member of the New York and New Jersey bars.

LUIS M. MARTINEZ

Vice President of the International Centre for Dispute Resolution, (ICDR) the international division of the American Arbitration Association, (AAA). Luis M. Martinez is also the President of the Inter-American Commercial Arbitration Commission, (IACAC).

Luis M. Martinez is the Vice President of the International Centre for Dispute Resolution located in New York. Mr. Martinez serves as an integral part of the ICDR's international strategy team and is responsible for international arbitration and mediation business development for the North-East (from Washington, D.C. to Maine, including New York City) and Central and South America.

Mr. Martinez in his capacity as President of the IACAC is responsible for the oversight of its network of arbitral centers throughout the Americas and as the only institution that is expressly included in the Inter-American Convention on International Commercial Arbitration conducts numerous arbitration and mediation initiatives throughout the hemisphere aimed at developing the ADR culture.

Mr. Martinez joined the AAA in 1996 as the first attorney hired to staff the newly created ICDR and later served as the ICDR's first director. For the last several years Mr. Martinez worked as the Vice President responsible for the ICDR's international administrative services and prior to that he held the position of a staff attorney for the AAA's Office of the General Counsel before assuming his current position.

Mr. Martinez received a Bachelor's Degree from Georgian Court College and a Juris Doctor degree from St. John's University School of Law. He has had numerous articles published on international arbitration and has appeared as a speaker in programs throughout the world. Mr. Martinez is admitted to practice law in the State of New York and the State of New Jersey. He is a dual citizen of Spain and the United States and is fluent in Spanish and has a functional understanding of Portuguese.

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Richard L. Mattiaccio

Partner

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Richard Mattiaccio focuses his cross-border practice on the arbitration, litigation, mediation and service as settlement counsel in complex cases involving investor disputes, long-term supply relationships, intellectual property rights, patent and trademark licensing arrangements, manufacturing and distribution agreements, and compliance with manufacturing standards. He has served as lead counsel and as arbitrator in international disputes in a broad range of industries, including aerospace, automotive, banking and finance, energy supply and services, engineering, electronics, retailing, fashion brands, food and beverage, and commercial real estate. He is active in the firm's Settlement Counsel Program. He has represented a sovereign in obtaining the return of cultural patrimony (archaeological artifacts) found in the US.

RELATED SERVICES

Litigation | Commercial Litigation | Intellectual Property & Technology | Class Action & Multidistrict Litigation | Products Liability Litigation | Food & Beverage Litigation | Real Estate Litigation | Financial Services Litigation | Brand Protection, Trademark & Copyright | Cross-Border Litigation | Latin America | Anticounterfeiting

About

Richard has represented clients in connection with claims of breach of contract, unfair competition, breach of warranty, product defect, fraud, breach of fiduciary duty, IP (patent, trademark and copyright) infringement, and failure to comply with safety standards and regulations. Richard has also acted as US coordinating counsel for an importer of automotive vehicles and related products.

Richard has more than 30 years of experience in arbitration. He has represented parties in large complex cases administered under American Arbitration

Association (AAA), International Centre of Dispute Resolution (ICDR), ICC International Court of Arbitration (ICC), United Nations Commission on International Trade Law (UNCITRAL) and other rules.

Richard is a Fellow of the Chartered Institute of Arbitrators (FCIArb) and a Fellow of the College of Commercial Arbitrators (CCA). He is the incoming chair (2016-19) of the International Commercial Disputes Committee (ICDC) of the New York City Bar Association, and is a member of the International Arbitration Club of New York. He serves as arbitrator under leading international and commercial rules, principally AAA, ICDR and CPR rules. He serves as a mediator for ICDR in cross-border disputes and for the Commercial Division of the New York State Supreme Court.

Richard's recent publications include: "In-House Counsel's Key Role in Arbitration: Ensuring the Process Meets Company Expectations," *Inside,* NYSBA Corporate Counsel Section vol. 33, no. 3, Winter 2015; "Expert Q&A on International Arbitration in New York," *Practical Law*, February 2015; "Arbitration Tips and Traps for Corporate Counsel," *Corporate Counsel*, October 16, 2014; "Arbitration Do's and Don'ts for the Trial Lawyer," *NY Litigator*, NYSBA CommFed Section vol. 19 no. 2, Fall 2014; and "Mediation in Italy: A Bridge Too Far," *Dispute Resolution Journal*, vol. 66, no. 3 (2011).

Richard is a founding director and member of the executive committee of the New York International Arbitration Center, Inc. (NYIAC). He serves on the executive committee of the Chartered Institute of Arbitrators (CIArb) New York Branch and as co-chair of the International Dispute Resolution (IDR) Committee of the New York State Bar Association (NYSBA) Dispute Resolution Section. Richard has served as co-chair of the New York City Bar's In House/Outside Litigation Counsel Group, as chair of its Products Liability Committee and as a member of City Bar committees related to arbitration and litigation, civil rights, judicial selection, professional and judicial ethics and professional discipline.

Richard is a co-founder and has served as co-chair of the Daniel M. Friedman Memorial Committee and Lecture on Appellate Advocacy of the Federal Circuit Bar Association.

Richard is a life-long New Yorker and a dual citizen of the United States and Italy.

Experience

- Representing plaintiffs and defendants in cases involving allegations of breach, wrongful termination or non-renewal of exclusive licensing, distribution or franchise, and long-term supply and manufacturing agreements in a variety of fields.
- Defense of product defect claims asserted in international arbitration against a manufacturer of solar panels.
- Representing a windfarm developer in connection with the wrongful

termination of long-term energy supply contracts.

- Acting as lead counsel in cross-border litigation and international arbitration on behalf of an aerospace manufacturer against a sub-tier supplier threatening to disrupt an aircraft assembly line over the supplier's demand for a price increase in a long-term, fixed price supply contract.
- Representing the Government of Italy in litigation resulting in US judicial compulsion, and in negotiations to obtain the voluntary return of Classical and Hellenistic period artefacts illegally removed from Sicily and southern Italy.
- Representing a high-fashion trademark owner and its licensee manufacturer in trademark anticounterfeiting cases brought against major discount retailers and their suppliers in litigation in the Southern District of New York (SDNY) resulting in permanent injunctions and multimillion dollar recoveries.
- Obtaining confirmation of international arbitral awards.
- Acting as lead counsel in a federal securities fraud case that proceeded to a jury trial in SDNY and verdict for the client.
- Defending an Italian bank in purported class actions brought against foreign bank defendants and their manufacturer-customers for alleged violations of US anti-terrorism laws.
- Defending Lanham Act, RICO and common law claims brought by New Jersey and Florida franchisees of a supplier of high-fashion leather goods, clothing and accessories.
- Representing the purchaser of an engineering firm in purchase price adjustment arbitration.
- Representing a minority shareholder/former CEO of a closely held corporation in arbitration to obtain fair value for his shares.
- Representing clients based in Italy, Japan, the People's Republic of China and the US in connection with challenges to the jurisdiction of local federal and state courts.
- Representing non-US based parties seeking federal discovery under 28 USC §1782 in aid of civil proceedings pending or threatened in courts located outside the US.
- Representing an energy services company in UNCITRAL arbitration to obtain payment from a multinational organization for services rendered to a peacekeeping mission.
- Representing an oppressed minority shareholder of a South Carolina textile manufacturer in litigation in Delaware and South Carolina resulting in the transfer of the majority shareholder's entire interest to the minority

shareholder.

- Representing executives or employers in contract disputes arising from termination of the employment of highly compensated executives.
- Representing investors, managers and tenants in Manhattan office, retail and hotel properties in contract disputes with investors, contractors, landlords and brokers.
- Defending automotive, machine tool, industrial equipment and medical device manufacturers in product defect litigation.
- Serving as New York trial counsel and as national coordinating counsel for major Italian automotive manufacturers in the defense of product liability cases.
- Serving as arbitrator in a dispute between a patent holder and a biopharmaceutical company regarding whether the filing of new patents violated the terms of a materials transfer agreement.
- Serving as arbitrator in a claim brought by a terminated patent agent for a declaratory judgment that it had earned contingent fees in connection with worldwide software patent litigation.
- Serving as arbitrator in numerous claims of wrongful termination of exclusive long-term supply or distribution agreements.
- Serving as arbitrator in disputes between Italian suppliers and their exclusive US importers.
- Serving as arbitrator in a complex contract dispute between a hedge fund manager and founders of the fund.
- Serving as arbitrator in a case between two competitors regarding alleged infringement of a famous service mark.
- Serving as arbitrator in a dispute between a real estate brokerage franchise system and its exclusive Manhattan franchisee.
- Serving as arbitrator in executive compensation (including investment banker bonus) cases.
- Successfully mediating in the Italian language a dispute between two Italian investors who participated in the mediation without benefit of counsel.

Credentials

Education

- Columbia University, J.D., articles editor, *Columbia Journal of Law and Social*

Problems

- Columbia University, B.A.

Admissions

- New York, 1979

Courts

- U.S. Ct. of App., District of Columbia Circuit
- U.S. Ct. of App., Federal Circuit
- U.S. Ct. of App., Second Circuit
- U.S. Dist. Ct., E. Dist. of New York
- U.S. Dist. Ct., S. Dist. of New York
- U.S. Supreme Court

Memberships and Affiliations

- Fellow, College of Commercial Arbitrators (CCA)
- Member, executive committee of the board of the New York International Arbitration Center, Inc. (NYIAC)
- Member, International Commercial Disputes Committee (ICDC) of the New York City Bar Association
- Member, International Arbitration Club of New York
- Executive committee member, NYSBA Dispute Resolution Section
- Co-chair, NYSBA Dispute Resolution Section International Dispute Resolution (IDR) Committee
- Founding member and former co-chair, New York City Bar's In House/Outside Litigation Counsel Group
- Former chair, New York City Bar's Product Liability Committee
- Member, NYSBA and New York City Bar committees related to arbitration, litigation, judicial selection, and professional and judicial ethics

Languages

- English
- Italian
- Spanish

About Squire Patton Boggs

Squire Patton Boggs is one of the world's strongest integrated law firms, providing insight at the point where law, business and government meet. Our multidisciplinary team of over 1500 lawyers in 46 offices across 21 countries provides unrivaled access to expertise and invaluable connections on the ground. We give our clients a voice, support their ambitions and are committed to working alongside them to achieve successful outcomes. It is a seamlessly connected service that operates on any scale - locally or globally - and encompasses virtually every matter, jurisdiction and market. Our solutions are shaped by a clear, commercially-focused understanding of our clients' business goals, while our robust and open culture enables us to find the right answers quickly and effectively from lawyers who understand the geographic, sector or issue specific challenges they face.

Karen Mills

J.D., F.CIArb., F. SIArb., F. HKIArb.

Chartered Arbitrator

Karen Mills is recognized as one of the leading arbitrators in Asia according to every publication and survey published. She sits as arbitrator in Indonesia, Singapore, Hong Kong, Malaysia and the US and is also on the panel of arbitrators of institutions in the Philippines, Hong Kong, Singapore, Malaysia, China, Korea, New Zealand, ICDR in the US, and several online Domain Name Dispute Panels, and teaches all level of courses for the Chartered Institute of Arbitrators and other institutions.

Ms. Mills has sat as arbitrator in cases involving oil, gas, mining, power, insurance, finance, tax, commercial real estate, and various matters of general investment and trade. As counsel she often acts as lead counsel for the Indonesian Government in investor-state disputes, including successfully winning a multi-billion dollar mining dispute and successfully dismissing one ICSID claim for lack of jurisdiction, and another multilateral treaty case on the merits. She also represents a number of state-owned companies and acts for many multinational and local companies in arbitration as well as in structuring transactions in all sectors.

Ms. Mills founded, for ten years Co-Chaired, and now sits on the Advisory Board of, the Chartered Institute of Arbitrators Indonesia Chapter, is a founding member and serves on the Executive Board of ArbitralWomen international, a member of the IBA Task Force on Investor-State Mediation, and advises various other institutions and publications on dispute resolution matters.

Ms. Mills's substantive fields of specialization include investor-state disputes, financing and restructuring, oil, gas, mining and energy matters, hotel and leisure management, insurance, maritime law, information technology and general cross-border investment and transactions. She has published over 150 papers in international professional books and journals.

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KarimSyah Law Firm

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Jakarta, 12430, Republic of Indonesia
Telephone: (62-21) 2966 0001; Telefax: (62-21) 2966 0007
Direct e-mail: kmills @cbn.net.id
Website: www.KarimSyah.com

Mark C. Morril

Independent Arbitrator and Mediator, MorrilADR, New York, United States

Mark C. Morril is an independent arbitrator and mediator based in New York City. He has served as sole arbitrator, co-arbitrator and chair in both domestic and international matters involving, among other subjects, complex commercial contracts, patents, copyrights, trademarks, oil and gas equipment, construction, mergers and acquisitions, commodities, partnerships, joint ventures, media and entertainment, Internet and Internet domain names and new technologies. He has served as an emergency arbitrator and has mediated numerous large commercial disputes.

Mr. Morril is a Fellow of the Chartered Institute of Arbitrators and certified by the International Mediation Institute (IMI). Previously, he served for ten years as General Counsel of Simon & Schuster, then the largest English language publisher in the world, and for thirteen years as Deputy General Counsel of the global media company Viacom. Viacom's businesses comprise Paramount Pictures and 170 cable TV channels and multiplatform properties (including MTV, VH1, Nickelodeon, COMEDY CENTRAL and BET) and formerly included CBS Broadcasting, CBS Radio, Viacom Outdoor, Showtime, Simon & Schuster and the discontinued industrial operations of Westinghouse, Gulf+Western and Charter Oil. He managed Viacom's large worldwide law department and was responsible for the enterprise-wide disputed matters docket.

Mr. Morril is on the roster of many of the leading dispute resolution institutions worldwide. He is involved in dispute resolution activities in the New York City and New York State Bar Associations. He is a United States Representative to the ICC Commission and Arbitration and ADR and the ICC's Task Force on Emergency Arbitrator Proceedings and its Task Force on the Role of In-House Counsel in Dispute Resolution. He has spoken on cybersecurity, case management techniques and effective collaboration between business clients and outside counsel, to audiences of law firm leaders, clients and judges.

Mr. Morril is co-author of *A Call to Cyberarms: The International Arbitrator's Duty to Avoid Digital Intrusion*, which appeared in the *Fordham International Law Journal* in 2017. He is also a member of the Working Group on Cybersecurity in Arbitration set up by the New York City Bar Association, the International Council for Commercial Arbitration (ICCA), and the International Institute for Conflict Prevention and Resolution (CPR), which released a consultation draft Cybersecurity Protocol at the ICCA Congress in Sydney in April 2018.

Charles J. Moxley, Jr.
MoxleyADR LLC
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New York, NY 10022
Tel: (212) 329-8553
Cell: (917) 699-8801
E-mail: cmoxley@moxleyadr.com

Charlie Moxley is an experienced arbitrator, mediator and litigator. The principal in MoxleyADR LLC, he is an Adjunct Professor of Law at Fordham Law School, teaching arbitration and international law, the Distinguished ADR Practitioner in Residence at the Benjamin N. Cardozo School of Law, and a Fellow of the College of Commercial Arbitrators and of the Chartered Institute of Arbitrators.

Charlie has been a litigator handling large commercial, securities, insurance, corporate, employment, construction, international and other cases in federal and state courts throughout the United States for over 35 years.

In recent years, he has spent most of his time as an arbitrator and mediator. He has conducted more than 300 arbitrations and mediations, primarily in the commercial, securities, employment, insurance, construction, and international areas, with many of the cases involving substantial claims. He is a member of arbitration and mediation panels of the American Arbitration Association (AAA), the International Institute for Conflict Prevention and Resolution (CPR), the U.S. Council of International Business (USCIB) for the ICC International Court of Arbitration, and Supreme Court, New York County (Commercial Division and Part 137), and of the arbitration panel of ARIAS-US. He also serves as arbitrator and mediator in *ad hoc* cases.

Charlie has published widely in the arbitration area and regularly lectures at academic and professional functions on the subject, including at law schools and at American Arbitration Association, American Bar Association, New York State Bar Association (NYSBA), New York City Bar Association, and ARIAS-US functions and events. He has also written widely and teaches in the public international law area.

Charlie is active in professional associations in the arbitration and mediation areas. He is past Chair of the Dispute Resolution (DR) Section of the NYSBA and a member of the DR Section's Executive Committee, and a former delegate to the NYSBA's House of Delegates. He currently serves as Chair of the Committee on Arbitration and ADR of the Commercial and Federal Litigation Section of the NYSBA.

Charlie started out his career at Davis Polk & Wardwell, following his graduation from Columbia Law School and a clerkship in the United States District Court for the Southern District of New York.

Camille M. Ng

Deputy Counsel at the International Court of Arbitration of the International Chamber of Commerce

Summary

N/A

Experience

Deputy Counsel at International Chamber of Commerce
June 2015 - Present

Assistant Legal Counsel at Permanent Court of Arbitration
January 2013 - June 2015 (2 years 6 months)

Registered Foreign Lawyer
June 2012 - December 2012 (7 months)

Intern - Dispute Resolution at Norton Rose Fulbright
November 2011 - December 2011 (2 months)

Litigation Associate at Kirkland & Ellis LLP
September 2008 - December 2009 (1 year 4 months)

Public Interest Law Institute (PILI) Fellow
June 2008 - September 2008 (4 months)

Summer Associate at Kirkland & Ellis LLP
May 2007 - July 2007 (3 months)

Research Assistant
May 2006 - February 2007 (10 months)

Account Executive at Ace Saatchi & Saatchi
October 2004 - March 2005 (6 months)

Education

New York University
Master of Laws (LL.M.), Global Business Law, 2012 - 2013
National University of Singapore
Master of Laws (LL.M.), International and Comparative Law, 2012 - 2013
Notre Dame Law School

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J.D., Law, 2005 - 2008
Activities and Societies: Journal of Law, Ethics and Public Policy
Ateneo de Manila University
B.S., Management, 2000 - 2004
Activities and Societies: Ateneo Debate Society

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Michael S. Oberman

Counsel

New York

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Michael S. Oberman litigates a wide variety of complex civil cases at the trial and appellate levels and in arbitration. Mr. Oberman joined Kramer Levin in 1973, served as a partner between 1980-2015, and became counsel on January 1, 2016. His experience spans a wide and varied range, and includes copyright, arbitration law and major commercial cases.

Mr. Oberman served as lead counsel for Sirius XM Radio in an arbitration lasting 20 days in which the claimant sought over $130 million in damages for alleged breach of contract and tortious conduct. The arbitrators dismissed all of the claims. Mr. Oberman successfully handled the case through judicial review, ultimately securing a unanimous affirmance of the arbitration award from the New York Court of Appeals in a decision of first impression on the standard for “evident partiality” to be applied by New York state courts under the Federal Arbitration Act.

An experienced advocate in intellectual property matters, Mr. Oberman obtained injunctive relief from the U.S. Court of Appeals for the Ninth Circuit on behalf of a publisher of video games in a landmark decision providing expansive copyright protection for video games. In another case, he obtained a judgment dismissing a claim for $100 million in consequential damages in litigation that set limitations under New York law on claims for consequential damages.

Mr. Oberman heads Kramer Levin’s Alternative Dispute Resolution Practice Group. A fellow of the College of Commercial Arbitrators, he serves as an arbitrator and a mediator, in addition to representing parties in ADR proceedings. He is a member of the Large Complex Commercial Case Panel of the American Arbitration Association, as well as its Commercial Arbitration and Mediation Panels, and of the International Institute for Conflict Prevention & Resolution Inc. (CPR) Panel of Distinguished Neutrals. Mr. Oberman was one of the first attorneys chosen as a mediator for the Mandatory Mediation Program of the U.S. District Court for the Southern District of New York. He serves as a member of the Dispute Resolution sections of the American Bar and New York State Bar associations.

Mr. Oberman has written extensively on copyright law, arbitration law and federal civil procedure. He has also been active in efforts for court and ADR reform. He served as a member of New York Chief Judge Judith Kaye’s Commercial Courts Task Force, which created the Commercial Division of the New York Supreme Court, and as a member of the Advisory Committee on Rules and Operating Procedures for the U.S. Court of Appeals for the Second Circuit. Since 1989, he has served as a member of the Executive Committee of

Education

J.D., cum laude, Harvard Law School, 1972

A.B., cum laude, Columbia College, 1969

Bar Admissions

District of Columbia, 1992

California, 1981

New York, 1973

Clerkships

U.S.D.C., Southern District of New York

Court Admissions

U.S. Supreme Court

U.S.C.A., 2nd Circuit

U.S.C.A., 5th Circuit

U.S.C.A., 7th Circuit

U.S.C.A., 9th Circuit

U.S.D.C., Central District of California

U.S.D.C., Northern District of California

U.S.D.C., Southern District of California

U.S.D.C., Eastern District of New York

U.S.D.C., Southern District of New York

Michael S. Oberman *Continued*

the Commercial and Federal Litigation Section of the New York Bar Association and was the section's delegate in the New York State Bar Association House of Delegates from 1989 to 1991.

Representative Matters

- Successfully represented Sirius XM Radio Inc. in a purported consumer class action brought in an arbitration claiming misrepresentation of discounts for multi-radio subscriptions. The arbitrator issued an award denying class certification in December 2014, which was confirmed by the Supreme Court, New York County, in 2015.
- Successfully represented Sirius XM Radio Inc. in a breach of contract action seeking $330 million brought by Howard Stern's production company and manager. The trial and appellate courts granted summary judgment and dismissed with prejudice the claims, holding that "the clear, unambiguous language" of the parties' agreement defeated the plaintiffs' claims.
- Successfully represented Sirius Satellite Radio Inc. in a 20-day arbitration seeking over $130 million in damages alleging breach of contract and tort claims, and then successfully defended the arbitral award against a challenge of evident partiality on the part of the chairman of the arbitration panel, in a case ultimately decided by the New York Court of Appeals.
- Successfully represented Rajat K. Gupta in a civil action alleging short-swing profits in violation of Section 16(b) of the Securities Exchange Act of 1934.
- Successfully represented Rajat K. Gupta in an action challenging the Securities and Exchange Commission's filing of an administrative proceeding against Mr. Gupta, alleging insider trading. The administrative action was discontinued and superseded by a civil action in federal court.
- Successfully represented Sirius XM Radio Inc. in a purported consumer class action alleging breach of contract and deceptive trade practices based on an administrative fee for invoices. The federal district court dismissed the action, and the federal court of appeals affirmed. The Supreme Court, New York County, dismissed a subsequently filed action.
- Successfully represented Michael Eisner, the Chief Executive Officer of The Walt Disney Company, in a shareholders' derivative action arising from the hiring and termination of Michael Ovitz, in which the claims were dismissed after trial by the Delaware Chancery Court and the dismissal was affirmed by the Delaware Supreme Court.
- Successfully represented a video game publisher in a breach of contract action seeking over $100 million in consequential damages; claims were dismissed on summary judgment, with the dismissal affirmed by the state appellate court.
- Settled on favorable terms an action seeking declaratory and injunctive relief to prevent sale of Sony's digital audio tape recorder, brought on behalf of owners of copyrights in musical compositions licensed by The Harry Fox Agency Inc. for the making of sound recordings, which terms were later incorporated in the Audio Home Recording Act of 1992.
- Successfully represented music publishers in a test case to determine the application of the termination of transfer provisions of the federal Copyright Act between music publishers and songwriters. The United States

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Michael S. Oberman *Continued*

Supreme Court decided the issue in favor of the music publishers. Testified for a music publisher before a Senate Judiciary Subcommittee on the bill (not enacted) intended to overrule the Supreme Court decision.

- Successfully represented the operator of a limousine service between points on Long Island and Kennedy and LaGuardia airports against a challenge by New York City to terminate the company's service. The case was ultimately decided by the New York Court of Appeals in favor of the limousine service, holding that New York City had no regulatory authority and therefore no basis to seek franchise fees for limousine service.
- Served as counsel of record on an amicus brief filed for the Committee of Copyright and Literary Property of the New York City Bar Association in the Betamax case before the U.S. Supreme Court.

Publications

- Author, Practice Points, "Arbitration Clause Covers Disputes Over Related Agreements" (March 7, 2016)
- Author, Alternative Dispute Resolution: ABA Section of Litigation, "Second Circuit Refuses to Confirm Foreign Arbitration Award" (July 23, 2015)
- Author, Alternative Dispute Resolution: ABA Section of Litigation, "Court Should Not Limit Remedy Before Award is Issued" (May 1, 2015)
- Co-author, Business and Commercial Litigation in Federal Courts, "Venue, Forum Selection and Transfer" (December 2014)
- Author, Alternative Dispute Resolution: ABA Section of Litigation, "New York Court Rejects Award as Imperfectly Executed" (September 23, 2014)
- Author, Alternative Dispute Resolution: ABA Section of Litigation, "Arbitrator May Raise Dispositive Issue Sua Sponte" (July 25, 2014)
- Author, Alternative Dispute Resolution: ABA Section of Litigation, "District Court Confirms Award Despite Lack of Express Consent" (July 14, 2014)
- Author, Alternative Dispute Resolution: ABA Section of Litigation, "2nd Cir. Denies Motion to Compel Insurer to Arbitrate Fraud Claims" (May 28, 2014)
- Author, Alternative Dispute Resolution: ABA Section of Litigation, "Preliminary Injunction Reversed and Arbitration Allowed to Proceed" (May 1, 2014)
- Author, Alternative Dispute Resolution: ABA Section of Litigation, "Does the FAA Authorize an Order to Compel Mediation?" (March 17, 2014)
- Co-author, "Intellectual Property & Litigation Alert: Forum Selection Clauses - Now the Supreme Court Has Spoken" (December 5, 2013)
- Author, Alternative Dispute Resolution: ABA Section of Litigation, "Arbitrator May Exclude Hearsay Evidence" (August 1, 2013)
- Author, Alternatives, "'The Other Shoe': Are Agreements Narrowing Judicial Review Enforceable?" (May 5, 2013)
- Author, CPR International Institute for Conflict Prevention & Resolution, "Exceeding Powers – May an Arbitrator Amend a Contract As Part of an Award?" (April 22, 2013)
- Author, New York Dispute Resolution Lawyer, "Breaking News, Now Leading Precedents on "Evident Partiality": Scandinavian Reinsurance and U.S. Electronics" (Spring 2012)
- Co-author, "Securities Litigation Alert: Supreme Court Rejects Rule That Statute of Limitations in Short Swing Profit Actions Remains Tolled Until the Filing of Forms 4" (April 10, 2012)

KRAMER LEVIN
KRAMER LEVIN NAFTALIS & FRANKEL LLP

Michael S. Oberman *Continued*

- Author, New York Law Journal, "Clarifying the Standard for Determining Arbitrator Bias" (April 2, 2012)
- Author, The Metropolitan Corporate Counsel, "Arbitration Law - One Issue Settled, Another Issue Still Percolating" (April 1, 2012)
- Author, New York Dispute Resolution Lawyer, "The Hall Street Parade: State Courts Step Out and Consider Expanded Review of Arbitration Awards" (Fall 2011)
- Co-author, New York Law Journal, "'Forum Selection' or 'Forum Shopping': Framing the Divide" (February 28, 2011)
- Author, NYLitigator, "Practice Points for Excluding Lost Profits Damages" (January 25, 2010)
- Author, Commercial and Federal Litigation Section Newsletter, "Practice Points for Forum Selection Clauses" (Fall 2009)

Speaking Engagements

- Speaker, New York State Bar Association: Dispute Resolution Section and Benjamin N. Cardozo School of Law: Commercial Arbitration Training (June 1-3, 2015)
- Speaker, New York State Bar Association: Dispute Resolution Section and Benjamin N. Cardozo School of Law: Commercial Arbitration Training (July 2014)
- Speaker, New York State Bar Association: Dispute Resolution Section and Benjamin N. Cardozo School of Law: Commercial Arbitration Training (June 2013)
- Speaker, New York State Bar Association: Dispute Resolution Section: 2013 Annual Meeting (January 2013)
- Speaker, College of Commercial Arbitrators: Annual Meeting (October 2012)
- Speaker, New York State Bar Association: Dispute Resolution Section and Benjamin N. Cardozo School of Law: Commercial Arbitration Training (July 2012)
- Speaker, College of Commercial Arbitrators: Annual Meeting (October 2011)
- Speaker, New York State Bar Association: Dispute Resolution Section and Benjamin N. Cardozo School of Law: Commercial Arbitration Training (July 2011)

Honors and Distinctions

- New York Super Lawyers (2006-2015)

Professional Affiliations

- New York State Bar Association: delegate, House of Delegates (1989-1991); member, Committee on Federal Courts (1977-1989); member, Executive Committee, Commercial and Federal Litigation Section; member, Executive Committee, Intellectual Property Law Section (1993-1996); member, Dispute Resolution Section
- New York City Bar Association: member, Committee on Federal Legislation (1978-1981); Committee on Copyright and Literary Property (1981-1985, 1988-1991, 1997-2000, 2007-2009)
- American Bar Association, Litigation Section and Dispute Resolution Section
- The State Bar of California
- Federal Bar Council
- The New York Bar Foundation, fellow

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Michael S. Oberman *Continued*

- Columbia College Alumni Association, director
- College of Commercial Arbitrators, fellow
- New York International Arbitration Center, director

Abigail Pessen, Esq.
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(212) 961-0668

Abigail Pessen has her own dispute resolution firm. She is an arbitrator for the American Arbitration Association's Large, Complex Case and Employment Panels and for the ICDR. She is also a mediator, serving on the Master Mediator Roster for the American Arbitration Association.

Abigail was honored to be chosen NYC Best Lawyers' 2016 "Lawyer of the Year" for Arbitration. She is Chair of the NY State Bar Dispute Resolution Section.

Abigail was appointed by the Court to be Settlement Administrator for a major federal class action. She is a frequent speaker and author on ADR-related topics. Before becoming a full-time neutral, Abigail clerked for federal judge Whitman Knapp, was an assistant professor at New York Law School, and had a successful career as a commercial litigator. She is a graduate of Barnard College and the University of Chicago Law School. Abigail has earned U.S. News & World Report's top-tier ranking for both mediation and arbitration in 2016, has an AV rating from Martindale-Hubbell, and is regularly listed as a "Super Lawyer" for ADR. She can be reached at abigail@pessenADR.com.

Amy Pontillo, Esq

Senior Counsel to the Office of ADR Programs. Amy has been with the ADR office since 1999. She served as co-counsel to the Board with Dan from 2007 until 2017 when he moved on; she now serves as Counsel to the Board and the programs. Amy is also the currently the Chair the Committee on Animals and the Law of the State Bar

Rekha Rangachari, Esq.

Rekha Rangachari is the second Executive Director of the New York International Arbitration Center ("NYIAC"). Founded in 2013, NYIAC is a non-profit organization that promotes and enhances the conduct of international arbitration in New York, offers educational programming, and operates world-class hearing facilities for rent in Midtown Manhattan.

Prior to joining NYIAC in October 2017, Ms. Rangachari was Director of ADR Services for the New York Commercial Division of the American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR). Therein, she led the New York Corporate Innovation Team, and served on the Diversity Committee – spearheading initiatives for greater cross-cultural representation and collaboration – and on the AAA/ICDR Foundation Committee. She is a 2017 Recipient of the AAA/ICDR President's Award for Service. Ms. Rangachari also served as Case Counsel for the ICDR, focusing her efforts on the European and Sub-Saharan Africa Regions.

Ms. Rangachari serves as Member of the New York State Bar Association (NYSBA) Dispute Resolution Section's (DRS') Executive and Diversity Committees, Co-Chair of the NYSBA DRS' Arbitration Committee, Advisory Member of the NYSBA Planning Committee for the Judith Kaye Moot Court Competition, Member of the International Arbitration Club of New York, Member of the New York City Bar's Standing Committee on Women in the Legal Profession, Board Member of the New York Coalition of Women's Initiatives, Member of the American Bar Association (ABA) Section of International Law's International Arbitration Committee, and Member of the ABA Section of Dispute Resolution's Women in Dispute Resolution Committee, among other professional and personal affiliations. She is also a Contributor to Investment Claims. Ms. Rangachari was educated at New York University and the University of Miami School of Law, and is trilingual in English/Tamil/Spanish. She is admitted to practice law in the U.S. (New York).

STROOCK

SHIRA A. SCHEINDLIN

Of Counsel, New York

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PRACTICE AREAS

Litigation

Former United States District Court Judge Shira A. Scheindlin serves as an arbitrator, mediator and special master. She also conducts neutral evaluations, mock trials and arguments as well as internal investigations and is a member of the firm's Litigation Practice. Since leaving the bench in May of 2016 she has conducted many mediations and arbitrations and has handled a number of mock trials and arguments. She is also a member of Stroock's Internal Investigations Unit, formed to help companies and organizations respond to suspected sexual misconduct.

Judge Scheindlin, who was appointed to the bench in 1994 by President Bill Clinton, has presided over numerous criminal and civil cases during her 22-year tenure with the Southern District of New York. Among many important cases, her opinions in electronic case management are recognized as case law landmarks, and she is the co-author of the first casebook on electronic discovery. Judge Scheindlin previously served as an Assistant United States Attorney for the Eastern District of New York, a Magistrate Judge in the Eastern District of New York and General Counsel for the New York City Department of Investigation. Earlier in her career she spent many years in private practice, including a stint as a litigation associate at Stroock.

Judge Scheindlin is a frequently published author and lecturer. She is currently an adjunct professor at NYU Law School and has also held that position at Cardozo and Brooklyn Law Schools. She is a member of the College of Commercial Arbitrators (CCA) and the CPR Panel, where she serves as Co-Chair of the Diversity Task Force. She is also a member of the American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR). She is the Chair of the Federal Courts Subcommittee of the ABA's Standing Committee on the American Judicial System, the former Chair of the Commercial and Federal Litigation Section of the New York State Bar Association and the Co-Chair of the Section's Task Force on Women's Initiatives. She is or has been a member of various committees of the American Law Institute, the New York City Bar Association, the New York County Lawyers' Association, the Federal Bar

Council and the New York Inn of Court. She also served for seven years on the Advisory Committee on Civil Rules of the Judicial Conference of the United States. She now serves on the Board of Directors of the Lawyers Committee for Civil Rights Under Law, the American Constitution Society, the Bronx Defenders and the Justice Resource Center.

HONORS & AWARDS

- David G. Trager Award, Eastern District U.S. Attorney's Office, 2016
- Stanley Fuld Award for Contributions to Commercial Litigation, New York State Bar Association, 2014
- Jurist of the Year, New York Criminal Bar Association, 2014
- Judicial Recognition Award, National Association of Criminal Defense Lawyers, 2008
- William Nelson Cromwell Award for Outstanding Public Service, New York County Lawyers' Association, 2007
- Edward Weinfeld Award for Distinguished Contributions to the Administration of Justice, New York County Lawyers' Association, 2005
- William J. Brennan Award, New York State Bar Association, 2003

MEMBERSHIPS

- Chair, Federal Courts Subcommittee of the Standing Committee on the American Judicial System, American Bar Association
- Member, Advisory Council, Cornell Law School
- Member, New York State Bar Association
- Member, Federal Bar Council
- Member, New York County Lawyers' Association
- Member, Council on Judicial Administration, Association of the Bar of the City of New York
- Board of Directors, Justice Resource Center (Mentor)
- President's Council, Good Shepherd Services
- Judicial Advisory Board, The Sedona Conference
- Board of Directors (Executive Committee), Lawyers Committee for Civil Rights Under Law
- Board of Directors, American Constitution Society

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- Board of Directors, Bronx Defenders

SPEECHES & EVENTS

Judge Scheindlin is a frequent lecturer at law schools, bar associations and professional associations. Below is a select list of some presentations. She speaks on many topics including: complex civil litigation, class actions, discovery of electronic data, ADR, women in the law, the Sentencing Guidelines, impact litigation, race and policing and the War on Terrorism.

- American Bar Association
- Columbia University Law School
- Cornell Law School
- Federal Judicial Center
- Fordham Law School
- Georgetown Law School
- New York State Bar Association
- Practising Law Institute
- Princeton University
- Stanford Law School
- UCLA School of Law
- University of Chicago Law School
- University of Pennsylvania School of Law
- Yale Law School

PUBLICATIONS

- Co-author, "Electronic Discovery and Digital Evidence in a Nutshell," *West Academic Publishing*, 2009; Second Edition, 2016
- Co-author, "Electronic Discovery and Digital Evidence, Cases and Materials," American Casebook Series, *West Academic Publishing*, 2008; Second Edition, 2012; Third Edition, 2016
- "Random Thoughts of a Federal District Judge, Fourth Annual Institute for Investor Protection Conference: The New Landscape of Securities Fraud Class Actions," *Loyola University Chicago Law*

Journal, Spring 2015, Vol. 46, No. 3

- "Big Data and Privacy: Finding the Balance," *New York Law Journal*, February 10, 2014
- Co-author, "Criminal Law Catches Up: New ESI Guidelines Issued," *New York Law Journal*, February 29, 2012
- "The Future of Litigation," *New York Law Journal*, February 5, 2010
- Co-author, "Sanctions in Electronic Discovery Cases: Views from the Judges," *78 Fordham L. Rev*. (2009)

ADMITTED TO PRACTICE

New York

U.S. Supreme Court

EDUCATION

J.D., *cum laude*, Cornell Law School, 1975

M.A., Columbia University, 1969

B.A., University of Michigan, 1967

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Richard H. Silberberg
Dorsey & Whitney LLP
New York, New York

Mr. Silberberg is a Partner in the New York office of the international law firm Dorsey & Whitney LLP. He is Co-Chair of the firm's Class Action Litigation Practice Group, and a member of the firm's Policy Committee. Mr. Silberberg has a highly-diversified litigation practice, which includes the defense of national and state-wide class actions, representative actions and other multi-party litigation matters.

Mr. Silberberg is a member of the Commercial and Large Complex Case Panels of the American Arbitration Association, a Fellow of the College of Commercial Arbitrators, a member of the Board of Directors of the New York International Arbitration Center, a member of the London Court of International Arbitration, and a member of the National Academy of Distinguished Neutrals and the New York Academy of Mediators and Arbitrators. He is also a member of the Panel of Mediators for the Mandatory Mediation Program of the United States District Court for the Southern District of New York, and the Panel of Arbitrators for the Plan of Court-Annexed Arbitration of the United States District Court for the Eastern District of New York. In addition to acting as counsel for clients in domestic and international arbitration proceedings, Mr. Silberberg has acted as sole arbitrator, as a member of an arbitration panel, or as presiding arbitrator in approximately 150 arbitration proceedings. He has been recognized by Best Lawyers in America in the field of Arbitration and Mediation for the period 2007-2013.

Mr. Silberberg has written and lectured extensively on issues relating to alternative dispute resolution, including for programs sponsored by the American Arbitration Association, the Association of the Bar of the City of New York, and the Practicing Law Institute.

David C. Singer

Partner

New York
P: (212) 415-9262
F: (212) 953-7201

Mr. Singer is a litigation partner and has served as lead litigation and trial counsel on matters involving business contracts, business torts, executive employment agreements, restrictive covenants, interference with business relationships, fraud, misappropriation of trade secrets, employment termination, employment discrimination, real estate valuations and other commercial matters. He has successfully tried and defended cases in federal and state courts and before arbitration panels, and represented clients in appellate arguments, mediations and negotiations. Mr. Singer advises clients on litigation avoidance and preparedness and performs litigation risk assessments. Mr. Singer also focuses on alternative dispute resolution, and has served for more than 20 years both as an arbitrator and mediator, primarily focusing on business and executive employment matters.

Representative Litigation

- *Beijing Huakong Technology Co. Ltd. v. SMAR* Equipamentos Industriais Ltda (lead counsel for Brazilian respondent-counterclaimant in arbitration under the auspices of Stockholm Chamber of Commerce between high-tech Chinese and Brazilian corporations involving claims of breach of contract for failure to provide product that conformed to specifications, and counterclaims for theft of computer software and related technology; arbitration held in London; award in favor of respondent on claims and award of counterclaims)
- *Brady & Sun, Inc., v. Four Seasons Solar Products Corp.* (lead counsel for defendant solarium manufacturer and distributor in complex federal court contract and unfair trade practices case; jury verdict for defendant and award of counterclaims)
- *Willis Re Inc. v. Simon Hudson and John B. Collins Associates, Inc.* (lead counsel for corporate defendant in action asserting claims of breach of restrictive covenant, confidentiality agreements and fiduciary duty, tortious interference with contracts; summary judgment awarded in favor of defendant; affirmed on appeal)
- *NJ Plastic Surgery, Inc. v Ceridian, Inc.* (lead counsel for defendant tax services provider in New Jersey state court fraud and breach of contract case; jury verdict for defendant)
- *Peter Connolly v. Canon U.S.A., Inc.* (defense of age discrimination case, including successful trial before New York State Division of Human Rights)
- *Koren-DiResta Construction Co., Inc. v. Indonesian Mission to the United Nations* (lead counsel in AAA arbitration for owner in construction dispute; after 22 days of hearings, settled for nominal amount)
- *Mark Jones v. Canon Business Solutions-East, Inc.* (defense of employment discrimination/whistleblower action in Michigan federal court asserting retaliation and unlawful termination of employment; summary judgment awarded in favor of defendant)

Honors

Named a New York Super Lawyer, 2012-2013

Listed in *Best Lawyers in America*, 2010-2014

"AV Preeminent" peer rating by Martindale-Hubbell

Education

New York University School of Law (J.D., 1980), Recipient of Moot Court Advocacy Award; Selected for Moot Court Board; Selected for Urban Law Clinic

University of Pennsylvania (B.A., 1976), *magna cum laude* Urban Studies; Dean's List with Distinction

Admissions

New Jersey

New York

United States Court of Appeals for the Second Circuit; United States District Courts for the Southern, Eastern and Northern Districts of New York, District of New Jersey and Eastern District of Michigan

Related Services

Franchise and Distribution Law

Appellate

Insurance Law

International Arbitration and Litigation

Products Liability

Labor and Employment

Construction Litigation

Executive Compensation

Real Estate and Land Use

Financial Services

Commercial Litigation

- *Aero Falcon, S.A. v. G. Andrew Deutsch and Falcon Jet Aircraft* (lead counsel for owner of Argentinian jet aircraft distributor brought by prior owner alleging interference with contract and related claims; after three week bench trial in New Jersey Superior Court, decision in favor of defendant)
- Peregrine v. large financial services company (lead counsel for plaintiff in federal court involving claims of breach of ISDA Master Agreement; favorably settled)
- *Matt Ellman v. Marcella Corporation* (lead counsel for defendant in New Jersey litigation involving claims by independent contractor for unpaid sales commissions and other compensation; favorably settled)
- *Elghanayan v. Eshaghian* (lead counsel for respondents in AAA arbitration concerning real estate partnership dispute among partners, including contract, fiduciary duty, constructive trust and fraud claims; after hearing, award in favor of respondents)
- *Electricity Pensions Trustee Limited v. Creek Funding Corporation and Sarakreek Holding N.V.* (lead counsel for British pension fund in arbitration under auspices of the International Chamber of Commerce concerning alleged multi-million dollar breach of stock purchase agreement involving sale of hotel and office complex; favorably settled)
- *Mt. Lucas Associates, Inc. v. MG Refining and Marketing, Inc.* (lead counsel for plaintiff/counterclaim-defendants in action involving commodities investment consulting agreement, including contract, fiduciary duty, securities and commodities claims; partial summary judgment granted and affirmed on appeal; successful bench trial of remaining claims)
- *Fidelity Partners, Inc. v. First Trust of New York National Association* (defense of federal claims involving international indirect securities holding systems; dismissal of claims and affirmance on appeal by Second Circuit)
- *1174 Lexington Avenue Owners Corp. v. 1174 Lexington Avenue Corp.* (lead counsel for defendant in commercial lease dispute; after bench trial, decision in favor of defendant)
- *Elghanayan v. Eshaghian* (lead counsel for defendants in partnership dissolution action; after trial involving valuation of commercial and residential real property, decision in favor of defendants)

Experience as ADR Neutral

Over 25 years of experience as neutral mediator and arbitrator, including as chair of three arbitrator panels and single arbitrator. Known for case management skill and moving cases to conclusion in an efficient and cost effective manner. As neutral, arbitrated more than 100 cases, including breach of dealer contract between large telecommunications company and dealer; breach of executive employment agreements between former executive employees and financial institutions; breach of series of contracts between insurance company and pharmaceutical company; breach of agreement concerning sale of accounting firm; breach of agreement between importer and distributor of alcoholic beverages; breach of contract involving sale of restaurant business; contract dispute between major electronics manufacturer and computer software vendor; determination of liability for losses between purchaser and seller of seed company. As neutral, mediated more than 100 cases, including disputes between supplier and purchaser of computer technology products; financial institutions and former executive employees; religious institution and catering and restaurant vendor; retail employer, EEOC, ethnic based rights organization and former employees; real estate owner/developer and consultant/broker; and employment discrimination cases.

- Member, Panel of Arbitrators of American Arbitration Association
- Complex Commercial Litigation Panel and Employment Panel
- Member, Panel of Mediators of American Arbitration Association
- Distinguished Neutral, International Institute for Conflict Prevention and

Resolution

- Fellow, College of Commercial Arbitrators
- Court Appointed Arbitrator, Commercial Division of NYS Supreme Court, New York County
- Court Appointed Mediator, U.S. District Court, Southern District of New York
- Court Appointed Mediator, U.S. District Court, Eastern District of New York
- Mediator, FINRA Dispute Resolution Mediation Program
- Court Appointed Arbitrator, Civil Court of the City of New York
- Certified Mediator, International Mediation Institute
- Charter Member, National Academy of Distinguished Neutrals

Presentations

- Presenter, “Arbitration, The Preliminary Hearing,” American Arbitration Association Webinar, 2014; "Arbitration of Employment Disputes," Labor and Employment Section of NYS Bar Association, 2011; "Preparing for Mediation: Tips for the Advocate and Tips for the Mediator," Dispute Resolution and Labor and Employment Sections of NYS Bar Association, October 2009; "Employment Mediation," New York County Bar Association, 2011, 2003, 2001

Professional Activities

- Chair/Elect, Dispute Resolution Section of New York State Bar Association
- Co-Chair, Mediation Committee of New York State Bar Association
- Member, Executive Committee of Dispute Resolution Section of New York State Bar Association
- Board Chair, Project Enterprise, a microfinance, job creation, anti-poverty non-profit organization, providing micro-lending, business training, networking opportunities, access to markets, pro bono legal and other services.

Attorney Articles

December 18, 2013	American Arbitration Association Adopts New Appellate Rules
October 11, 2011	"Exploring Duty of Good Faith In Mediation Proceedings," New York Law Journal
April 28, 2011	"Arbitrator, Impartiality and the Duty to Disclose," New York Law Journal
August 25, 2010	"The Duty of Good Faith in Mediation Proceedings," New York Law Journal
March 9, 2004	"Title VII Retaliation Claims: What Constitutes Protected Activity?," New York Law Journal

News & Press Mentions

September 13, 2013	Super Lawyers Recognizes 18 Dorsey Lawyers in New York
October 17, 2008	Dorsey Named A ‘Champion of Entrepreneurship’ by Project Enterprise

Michelle Skipper

Michelle Skipper is the Vice President of the Commercial Division for the American Arbitration Association for the mid-Atlantic which includes North Carolina, South Carolina, Ohio, Indiana, Kentucky, Tennessee & West Virginia. In addition to her management activities, she conducts presentations for public and private sector audiences on a variety of ADR-related topics and assists large and small businesses with the design and implementation of ADR programs. Ms. Skipper has been a featured speaker and panelist on various arbitration and mediation topics. Michelle is Chair of the AAA Healthcare Dispute Resolution Advisory Council—which leads AAA HC-ADR initiatives and Chaired the AAA Healthcare Payor Provider Arbitration Rules.

Ms. Skipper has over twenty years of experience in healthcare where she served in various executive positions. She received her undergraduate degree in Finance from the University of Texas – San Antonio and her M.B.A. from the McColl Scholl of Business at Queens University in Charlotte, NC.

She is a member of the North Carolina Bar- Dispute Resolution Section, and several healthcare trade associations including MGMA & HIMSS where she serves on the legal task force.

STEVEN SKULNIK

Steven Skulnik's law practice focused on litigation and arbitration matters. He previously was counsel at Squire Patton Boggs (US) LLP and a partner at Pavia & Harcourt LLP. He has trial and appellate experience in many areas including commercial contracts, art and antiquities law, banking, employment law, real estate, shareholder and partnership disputes, trade secret, trademark, information technology and unfair competition. He has tried cases in federal and state courts and in international and US arbitrations and remains active as an arbitrator and mediator with the AAA/ICDR, CPR, and other providers. He is a Senior Arbitration Editor at Practical Law – Thomson Reuters.

Steve has chaired of the Arbitration Committee of the New York State Bar Association's Dispute Resolution Section and is the incoming chair of the New York City Bar Association's Arbitration Committee. He is a member of or affiliated with: Silicon Valley Arbitration & Mediation Center, International Arbitration Club of New York, New York International Arbitration Center (NYIAC), and the National Academy of Distinguished Neutrals.

Education

- Benjamin N. Cardozo School of Law, J.D., 1983.
- Brandeis University, B.A., Economics, 1980.

Edna Sussman, SussmanADR LLC, Mailing Address: 20 Oak Lane, Scarsdale New York 10583
New York City Address: Suite 3500, 10 East 40th Street, New York, NY 10016
E-mail: esussman@SussmanADR.com Tel: 212-213-2173

Edna Sussman is a full time independent arbitrator and mediator and is the Distinguished ADR Practitioner in Residence at Fordham University School of Law. She was formerly a litigation partner at the law firm of White & Case LLP. Ms. Sussman has served as the chair, sole and co-arbitrator in over 150 complex commercial disputes and over 150 complex commercial mediations, both international and domestic, under various institutional rules and ad hoc involving contract interpretation, financing and banking transactions, energy, environment, franchises/distributorships, partnership and joint venture, insurance, mergers/acquisitions, accounting, intellectual property, construction, securities, real estate, pharmaceuticals, hospitality, aviation and professional liability. Ms. Sussman is a member of the panel of many of the leading dispute resolution institutions including the AAA, ICDR, AAA/ICDR Energy Arbitrators list, CPR, Hong Kong, Singapore, South China, Shanghai, Swiss, Vienna, Korea, Kuala Lumpur, Vietnam, British Columbia, Dubai and Kigali Arbitration and Mediation Centres, U.S. Institute for Environmental Conflict Resolution, Financial Industry Regulatory Authority, and the National Futures Association and is listed by the ICC. Ms. Sussman serves on mediation panels of federal, state, bankruptcy courts in NYC.

Ms. Sussman serves on the Board and as President of the College of Commercial Arbitrators and sits on the Board and the Executive Committee of the American Arbitration Association. She is the chair of the AAA-ICDR Foundation and is the Vice-Chair of the New York International Arbitration Center. Ms. Sussman is a fellow of the Chartered Institute of Arbitrators and certified by the International Mediation Institute. She is a former Chair of the Dispute Resolution Section of the NYS Bar Association and serves as co-editor-in-chief of the NY Dispute Resolution Lawyer. She is a past co-chair of the Arbitration Committees of the ABA's International and Dispute Resolution Sections and served as the chair of the Renewable Energy Comm. and the Alternative Dispute Resolution Comm. of the ABA's Section of Environment Energy and Resources. Ms. Sussman served as the chair of the NYC Bar Association's Energy Comm. and the ADR Comm. of the Energy Bar Association. Ms. Sussman has been recognized by Chambers USA 2015 for International Arbitration and in the International Who's Who of Commercial Arbitration and Commercial Mediation and by SuperLawyers and Best Lawyers. She was named as one of the ten outstanding international mediators by Who's Who Legal 2013 and selected as Best Lawyer's "2012 New York City Mediation Lawyer of the Year." A graduate of Barnard College 1970, and Columbia Law School 1973, Ms. Sussman has lectured and published widely on arbitration, mediation, energy and environmental issues.

Robyn Weinstein

Robyn Weinstein is currently employed as the Director of Arbitration and Mediation Program at the United States District Court for the Eastern District of New York. She attended Benjamin N. Cardozo School of Law, Yeshiva University studying Conflict Resolution, receiving her Juris Doctor in 2009.

Nicholas R. Weiskopf is Professor of Law at St. John's University School of Law. He attended Columbia College and Columbia Law School, where he was an Editor of the Columbia Law Review before graduating *magna cum laude* in 1969. After remaining at Columbia for two years as an Associate at Law, Professor Weiskopf continued there for almost two decades as Lecturer in Law, an adjunct position.

Professor Weiskopf was a commercial litigator at two major firms. He came to St. John's in 1981, and was tenured as a full professor in 1985. Since that time, and consistently with his academic responsibilities, he has served both here and abroad as a consultant and expert witness on commercial law, served as a commercial arbitrator, and served as trial counsel in securities and other arbitral and court cases. He has also done extensive appellate work in both the federal and state courts.

Since coming to St. Johns, Professor Weiskopf has taught both semesters of Contracts, and has developed upper class legal writing and drafting courses specially designed to prepare students for larger law firm practice. For the past nine years, he has also taught Commercial Arbitration. It is the teaching materials he assembled for that course which are found, together with significant additional materials, in his book Commercial Arbitration: Theory and Practice (Vandeplas 2d Ed. 2012). That book is a teaching vehicle but also contains practitioner oriented materials designed both to enrich the classroom and to assist the rapidly growing number of lawyers who increasingly deal with commercial arbitrations. Professor Weiskopf has also been published in several leading legal journals, and has written in the areas of securities regulation, contract and commercial law and, of course, commercial arbitration.

Professor Weiskopf's new book traces the long-standing rejection of compulsory arbitration by the British and American common law courts and the adoption of state and federal statutes designed to overcome that hostility, starting in the 1920's. It sets forth the basic neutrality and other requirements for arbitration, discusses the use of designated arbitrators here and abroad, and focuses on whether, and under what circumstances, arbitrators are strictly obligated to apply "the law." That issue is readdressed in connection with materials dealing with the arbitration of so-called "public" statutory claims for workplace discrimination, securities fraud and antitrust. Indeed, the book discusses basic legal doctrine in each of these areas, and possible differences in case presentations in court as opposed to arbitration. Considerable emphasis is placed on the preemptive impact of the so-called federal law of arbitration on the states, and on the limited scope of judicial review of awards. There is also discussion of arbitral procedures at major tribunals, and Appendices containing extensive background materials.

The book also attempts to trace the United States Supreme Court's recent jurisprudence empowering parties to shift fundamental so-called "gateway" functions of the courts to the arbitrator, that Court's newer pronouncements concerning the scope of review of rewards, and its newer decisions on the very important issue of the place of class action procedures in arbitration.

Daniel Weitz

Daniel M. Weitz, Esq. is the Director of the Division of Professional and Court Services and Statewide Coordinator of the Office of ADR Programs for the New York State Unified Court System. Dan oversees the statewide responsibilities of alternative dispute resolution, attorney for the child contracts, judiciary civil legal services contracts, office of language access, criminal disposition reporting, office of grants and contracts, guardianship and fiduciary services, legal information, office of the court record, parent education and awareness program, records management, the federally funded child welfare court improvement project, the court appointed special advocates assistance program, the children's centers program, and operational issues related to the Americans with Disabilities Act. As ADR Coordinator, Dan oversees a statewide program of court-annexed ADR initiatives involving mediation, arbitration, neutral evaluation, parenting coordination and collaborative law. He also directs the Community Dispute Resolution Centers Program.

Dan serves as Co-Counsel to the Board of Governors of the New York State Attorney-Client Fee Dispute Resolution Program. He is a past Chair of the New York City Bar Association ADR Committee and past Co-Chair of the ABA Dispute Resolution Section, Court ADR Committee. Dan has also served on the NYC Bar Domestic Violence Committee and Science and Law Committee. Dan was appointed by New York's Chief Judge to serve on the Unified Court System=s Matrimonial Commission for which he Co-Chaired the Subcommittee on The Use of Experts. He also served as Counsel to the Technology and Case Management Subcommittee of the New York State Judicial Advisory Council.

Dan has over eighteen years of experience as a court administrator and twenty six years of experience in the field of ADR, serving as an administrator, professor, trainer and practitioner. He is an Adjunct Clinical Professor of Mediation at Cardozo School of Law, an Adjunct Professor of Clinical Law at NYU School of Law and has taught

ADR and conflict resolution related courses at Vermont Law School, Mitchell Hamline School of Law, John Jay College of Criminal Justice and Long Island University. Dan is an international ADR speaker having presented across the United States and beyond including Japan, China, Thailand and South Africa. He has also served as mediator in a wide range of matters including, general civil, family, employment, human rights, community, and police conduct cases.

Dan received his law degree from the Benjamin N. Cardozo School of Law, where he participated in the Mediation Clinic and was a Teaching Assistant in Legal Negotiation. He has worked at JAMS, the United States Court of Appeals for the Second Circuit (The Civil Appeals Management Plan), and served as an original member of FutureLinks Inc., working in South Africa with youth leaders from all backgrounds to conduct workshops in non-violent social change, conflict resolution, and community development.

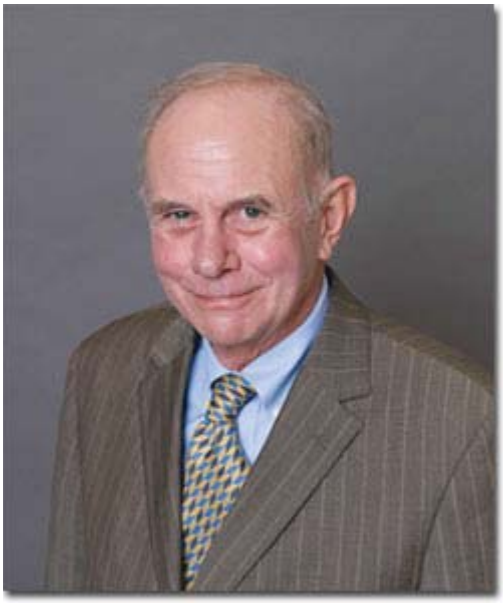
JOHN H. WILKINSON, ESQ.

Fulton Vittoria, LLP—Of Counsel

Profession
Attorney

Work History
Of Counsel, Fulton Vittoria, LLP, 1998-present. Partner/Associate, Donovan Leisure Newton & Irvine, 1968-98; Clerk, Honorable Walter R. Mansfield, Southern District of New York, 1966-67.

Professional Background And Experience, General



As a trial attorney, litigator and partner at Donovan Leisure Newton for more than 25 years, he represented clients in numerous arbitrations, mediations, and trials of complex corporate disputes.

He serves on the panels of neutrals of the American Arbitration Association; the International Centre for Dispute Resolution; CPR Institute for Conflict Prevention and Resolution (National and International Panels of Distinguished Neutrals); Hong Kong International Arbitration Centre; and Kuala Lumpur Regional Centre for Arbitration.

Wilkinson has been recognized in a number of well known publications, including:

- **Best Lawyers in America, 2015.**
- **Super Lawyers, NY Times Magazine, 2015.**
- **New York Area's Best Lawyers, NY Magazine, 2015.**
- **Marquis, Who's Who in the World; Who's Who in America, 2015.**
- **Wall Street Journal, Best Lawyers in New York City, Nov. 15, 2015.**
- **American Registry, America's Most Honored Professionals, (Top 1%) 2015.**
- **American Lawyer, Top Lawyers, 2015.**
- **2016 Lifetime Achievement Award, American College of Civil Trial Mediators.**
- **American Arbitration Association, Master Mediator (1 of 9 in New York State).**

- **ACQ Global Awards, U.S., Independent ADR Adviser of the Year, 2017.**
- **Albert Nelson Marquis Lifetime Achievement Award (Who's Who), 2017.**

Specific Experience in Arbitration, Mediation, & Alternative Dispute Resolution

Professional Licenses Admitted to the Bar: New York, 1965; U.S. District Courts, Southern and Eastern Districts of New York (1968); U.S. Court of Appeals: Second (1981), Eleventh (1982), Third (1984), Fifth (1987) and Seventh (1990) Circuits.

Professional Associations Wilkinson is a member of the ABA, the NYC Bar Ass'n and the N.Y. State Bar Ass'n and, in addition, serves or has served as:

- **Fellow, Board of Directors, College of Commercial Arbitrators (current).**
- **Vice Chair, ABA Arbitration Committee (2012-13).**
- **Chair of the Dispute Resolution Section of the NY State Bar Ass'n ("NYSB DRS") (2013-2014).**
- **Executive Committee of the NYSB DRS (2008 to present).**
- **Co-Chair, Arbitration Committee, NYSB DRS (2010-12).**
- **Co-Chair, Mediation Committee, NYSB DRS (2008-10 and current).**
- **Member, National Academy of Distinguished Neutrals (2012-13).**
- **Member of the Board of Directors of the NY International Arbitration Center (2013-15).**
- **Special Master, Appellate Division, First Department, NY.**

Education Williams College (BA-1962); Fordham Law School (LLB-1965); Note Editor, Law Review; Awards for highest grades in eight separate law school courses.

Publications and Speaking Engagements Wilkinson is co-author and editor of the ADR Practice Book (John Wiley & Sons), which received an award and honorarium as the best dispute resolution book of the year. In addition, he has authored numerous publications on arbitration and mediation, including the following, among many others

Arbitration Discovery—Getting It Right, ABA Dispute Resolution Journal, Fall 2014
Lead article in the ABA Dispute Resolution Journal, Fall 2014 and was one of a few articles selected by the ABA for reprinting in GP Solo (best ABA articles of the year). The article cites liberally to the *New York State Bar Association's Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic, Commercial and International Arbitrations,* of which I am a co-author. Click *HERE* to view the Guidelines.
Cover Story, Raising the Bar, Worldwide Law Review, Feb. 2017. Click *HERE*.

- **Co-Author, *NYS Bar Ass'n, Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of Domestic and International Commercial Arbitrations*, Nov. 2011.**
- **Co-Author, College of Commercial Arbitrators, *Guide to Best Practices in Commercial Arbitration (2d ed. 2010).***
- ***Arbitration Tools, Increasing Efficiency Through Discovery Protocols*, Alternatives to the High Cost of Litigation, March 2010.**
- ***Arbitration Contract Clauses, a Potential Key to a Cost-Effective Process*, ABA Dispute Resolution Magazine, Fall 2009.**
- ***Arbitration Contract Clauses*, GPSOLO (The Best Articles Published by the ABA),**

March 2010.

- ***The Future of Arbitration, Striking a Balance Between Quick Justice and Fair Resolution of Complex Claims*, BNA, Inc., April 21, 2008.**
- ***Streamlining Arbitration of the Complex Case*, Dispute Resolution Journal, August 2000.**
- ***Book Review, Arbitration and the Constitution, ABA Dispute Resolution Magazine, Summer 2013*.**

Wilkinson is a frequent speaker on arbitration and mediation to professional and bar organizations, corporate legal departments, and law school classes, as well as to groups such as the legal department of the Navy.

Citizenship United States of America.

Locale New York, NY

Jeffrey T. Zaino

American Arbitration Association
New York, NY

Vice President of the Labor, Employment and Elections Division of the American Arbitration Association in New York. He oversees the operations, business development and panel of arbitrators for the Labor and Employment Arbitration caseloads in New York. He joined the Association in 1990. Mr. Zaino is dedicated to promoting ADR methods and neutral election services for our nation's unions, associations, corporations, and colleges. His professional affiliations include the Connecticut Bar Association, District of Columbia Bar Association, New York State Bar Association, and New York City Bar Association. He has also written and published extensively on the topic of election reform and has appeared on CNN, MSNBC, and Bloomberg to discuss reform efforts and the Help America Vote Act.

Western New England University School of Law