

NEW YORK STATE BAR ASSOCIATION
The Dispute Resolution Section
BENJAMIN N. CARDOZO SCHOOL OF LAW

**3 DAY COMMERCIAL ARBITRATION TRAINING: *Comprehensive
Training for the Conducting of Commercial Arbitrations Pursuant to
Contemporary Best Practices***
25.5 CLE credits

June 19-21, 2017

Benjamin N. Cardozo School of Law
55 Fifth Avenue
New York, NY 10003

Arbitration Scenario – Fact Pattern

In 2006, Hi-Life, LLC (“Hi-Life”), an entity organized by a group of young writers, created a weekly hour-long television series for XBO depicting life among the young, rich and pampered in Manhattan. The television series, entitled *The Well-Designed Life*, was a continuing series with numerous story lines and, despite having an extremely literate – almost literary – script, became a hit with the viewing public.

Under Hi-Life’s agreement with XBO (the “Agreement”), the writers of Hi-Life wrote and delivered scripts for use in the television series to XBO. Although the Agreement conferred on XBO the final authority to make changes, the writers, caring about the quality of their language, in practice exercise substantial control over the scripts consistent with XBO’s authority, and only minor changes were permitted without prior consultation with the writers. Hi-Life retained the copyright in the scripts.

The Agreement, rather unusually, further provided that XBO could grant a theatrical producer the right to produce a two-hour play, using any two consecutive hourly weekly programs in the XBO series as the story. The Agreement provided,

however, that such a play could not be merely patterned upon the storyline. Rather, the scripts for the two television shows were to be strung together and enacted “live”, thereby maintaining, insofar as possible, the integrity of the television scripts written by the Hi-Life writers.

XBO, in 2008, licensed to Jim Snark (“Snark”), a theatrical producer, the right to produce such a play, pursuant to an agreement (the “Theatrical Agreement”) that did not provide for arbitration, although a copy of the Hi-Life/XBO Agreement, which did provide for arbitration, was attached as an exhibit.

In 2009, the play, entitled *The Well-Designed Wife*, debuted on Broadway. While the play was indeed two hours in length and recognizably based on two one-hour consecutive programs in *The Well-Designed Life* series, large portions of the script were deleted. Inserted in place of the omitted language were tasteless songs, bordering on the pornographic. Moreover, the script was heavily sprinkled with four-letter words and the actress playing the role of the “Wife” bore a remarkable likeness to one of the writers of Hi-Life, Carole X. Cougar, a celebrity in her own right whose divorce over infidelity was highly publicized. (In the Snark production, the Wife was a serial adultress.)

There was no indication that *The Well-Designed Wife* was intended to be a parody. Moreover, Jim Snark claimed that he wanted the show to be a commercial hit – and that the added songs and changed language were designed to accomplish just that. His intention was to have a long-running sell-out show and to donate all the proceeds to create low-cost housing for unemployed actors. And indeed, with the ticket proceeds, Snark was able to create such housing for three hundred actors, who looked upon Snark as a life-saver and philanthropist.

Enraged with Snark's production, however, the writers of Hi-Life commenced what became an *ad hoc* arbitration in New York City against XBO and Snark, seeking to enjoin further presentations of the play, alleging that the stage production caused irreparable harm to their reputations as high-brow writers, and seeking declaratory judgment that the license to Snark was invalid and unenforceable as a matter of law and under the Agreement. The Hi-Life writers also sought damages, including punitive damages, from both XBO and Snark, on a variety of theories, including violation of the federal Lanham Act (on an unfair competition theory), damages for copyright infringement, as well as violation of rights of privacy and publicity.

The play, *The Well-Designed Wife*, was a smashing success, opening to, and maintaining, a full house, almost every night. Following the opening of the play, the viewership of the XBO television series, *The Well-Designed Life*, skyrocketed, yielding substantial advertising revenues to XBO and royalties to Hi-Life,. However, notwithstanding this commercial success, the "serious" critics continued scaldingly to criticize the play and lament the fact that the young writers making up Hi-Life had "sold out."

The Agreement contained the following choice of law and arbitration clauses:

Choice of Law: This Agreement and any dispute arising hereunder shall be governed by the law of New York.

Arbitration: Any dispute relating to this Agreement shall be resolved by arbitration pursuant to the CPR Rules for Non-Administered Arbitration. The Federal Arbitration Act ("FAA") shall apply to any arbitration conducted hereunder. The Parties specifically agree that, if XBO grants to a theatrical producer the right to produce a play hereunder, any such producer shall be bound by this Arbitration Agreement.