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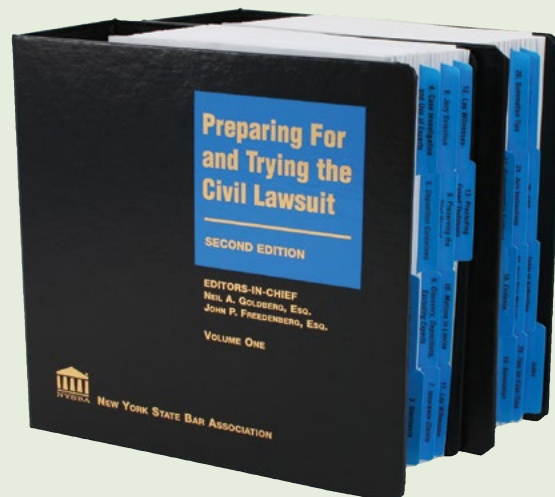
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Message from the Chair

The first half of my term has been full of memorable accomplishments by the members of the Dispute Resolution Section, and I continue to be amazed at the wealth of programming and activity in which our Section members engage. I am particularly proud of all the rich and robust connections we have made between our members (both Downstate and Upstate), with other sections, and with the courts. As a result of our Membership Committee's outreach efforts, the Section now comprises over 3,100 members, and I could not be more thrilled to have such an outpouring of interest and support from NYSBA members all over the state in the work of the Section. I look forward to having them engage with the Section in the coming months.

We also recently institutionalized our law school student liaison program by appointing liaisons at eight New York City area law schools. These dedicated members of our Section will serve as ambassadors for the Section at their respective schools, while also providing the Section with much needed feedback and insights into the needs of law students in connection with their anticipated entry into the dispute resolution field. We will be looking to expand this program statewide in the coming months.

Looking back at the past several months, the Section's contributions to the dispute resolution field are myriad. We began last summer with our *Report on Pre-Dispute Agreements to Arbitrate Employment Claims*. Co-authored by Abigail Pessen and David Singer, two former Chairs of the Section, the report described the characteristics of employment arbitration and the relevant legislation and resolutions; discussed both the advantages and disadvantages of arbitrating employment claims relative to court litigation; and considered ways to resolve or mitigate the concerns that have been raised. With the assistance of our Ethical Issues and Ethical Standards Committee, we also submitted two letters to the NYSBA Committee on Standards of Attorney Conduct (COSAC) in connection with COSAC's requests for comments on proposed amendments to certain of the New York Rules of Professional Conduct.

Perhaps most importantly, we began a dialogue with the New York State Courts by sending a letter to Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence K. Marks offering suggestions and



Theo Cheng

recommendations regarding the implementation of mediation under the courts' Presumptive ADR Initiative. The letter was principally developed by a working group co-chaired by Bart Eagle and Gary Shaffer and including Steven Bennett, Leslie Berkoff, Philip Goldstein, Adam Halper, Maria Hanford, Joan Hogarth, Jennifer Lupo, and Susan Salazar. Among the subjects we addressed were the need for competent, well-trained mediators; informing

parties about mediation and other relevant court-annexed mediation programs; the need to ensure that mediators are properly compensated; the selection of court-appointed mediators; and the collection of data on program outcomes. Most recently, in response to the need to both coordinate efforts within the Section and continue serving as a resource to the courts, the Section formed a Presumptive ADR Initiative Taskforce. Co-chaired by Dan Kolb, a former Section Chair, and Laura Kaster, the current Chair-Elect, this taskforce is charged with serving as a resource for those who are trying to inform others about the initiative, including establishing a separate Section webpage to collect pertinent information; coordinating with the different court administrators and judges throughout the state; and assisting in putting on programs with local bar associations throughout the state about the initiative.

Although the Section has always excelled in producing valuable reports, advocacy papers, statements, and other written work-product, it has really shined in its programmatic offerings. Here is just a sampling of the programs we have sponsored or co-sponsored during the last several months:

- The Role of the New York State Courts in International Arbitration with Reception Welcoming Justice Scarpulla (International Dispute Resolution Committee)
- Three-Day Commercial Arbitration Program for Arbitrators and Counsel
- Introduction to Sports Arbitration (Domestic Arbitration Committee)
- Introducing Arbitration for Resolution of Commercial Finance Disputes (Commercial Finance Dispute Resolution Committee)
- Mediation Choices for Effective Representation and Advocacy

•Fall Meeting (*The Future of ADR: Where Are We Going and How Do We Get There?*)

•Fifth Annual Judith S. Kaye Arbitration Competition

•Get-Together with Judges, Neutrals, and Litigators (Membership Committee)

•New Revenue Generation Opportunities for Diverse Attorneys Through Dispute Resolution

•Annual Meeting, Luncheon, and Reception

•NYSBA Gala Dinner

•Informal gathering for drinks during the 71st Session of UNCITRAL's Working Group II (International Dispute Resolution Committee)

•Three-Day Commercial Mediation Training Program

We also continued to focus on fulfilling our commitment to showcasing the diversity of our members in our presentations and in all of our work, including announcing the recipients of our annual Diversity Scholarships. These scholarships provide financial assistance to make it possible to register and attend either a basic mediation training program or the Three-Day Commercial Arbitration Program for Arbitrators and Counsel, along with a

free one-year membership in both NYSBA and the Section. In the coming months, the Section will also be holding a Financial Advocacy Clinic in conjunction with FINRA. And now that the New York Legislature is in session, our Legislation Committee will once again be closely monitoring the various attempts to enact anti-arbitration and other related legislation that would impede or impair the ability of parties to benefit from the utilization of dispute resolution processes other than litigation in the courts. Finally, in an effort to be both fiscally prudent and conscious of our impact on the environment, after this issue, we will be migrating towards an all-digital distribution (with the ability to opt for a hard copy) of our premier journal in the field, the *New York Dispute Resolution Lawyer*.

With all that is happening, there is no better time than the present to get more involved with the Section. And if you have not yet renewed your membership, please take a moment to do so—you won't want to miss a thing! It remains an honor and a privilege to serve as the Chair of this Section, and I look forward to even more exciting developments in the months ahead.

With warmest regards,

Theo Cheng

NEW YORK STATE BAR ASSOCIATION

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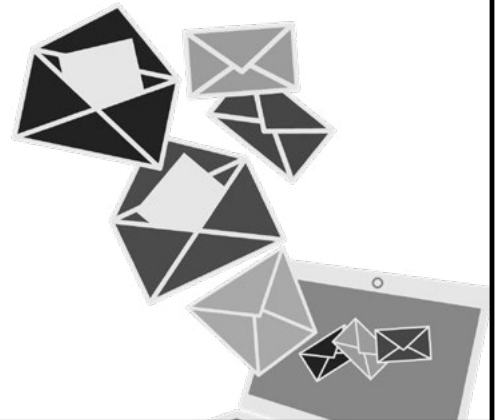
If you have written an article you would like considered for publication, or have an idea for one, please contact the Co-Editors-in-Chief:

Sherman W. Kahn
Mauriel Kapouytian Woods LLP
skahn@mkwllp.com

Laura A. Kaster
Laura A Kaster LLC
laura.kaster@gmail.com

Edna Sussman
SussmanADR LLC
esussman@sussmanadr.com

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Message from the Co-Editors-in-Chief



Edna Sussman



Sherman Kahn



Laura A. Kaster

The world of ADR is in the midst of rapid change. Here in New York, our courts have launched a presumptive ADR program and we have our own Dispute Resolution Section Presumptive ADR Task Force. The Singapore Convention has initiated what may be a profound increase in the use of mediation in international disputes. At the same time, the increased use of arbitration both internationally and nationally has been accompanied by increased attention by courts, consumers, legislators, and the media and has generated discussions about transparency and fairness. The work of the Global Pound Conference has suggested a need for flexible and interconnected processes. It is a time for ADR literacy both for advocates and neutrals. Heightened professionalism, commitment, and training are critical both when we act as advocates and when we act as neutrals in court-associated processes and when we assist parties who have selected a private substitute for what might have been a judicial process. Elayne Greenberg's Ethics column in this issue addresses some of these concerns. In addition, as always, we bring to you a wonderful and eclectic collection of articles, case reports, and book reviews that create a window into our interesting and growing field.

Our connection to the court systems is a connection to the rule of law. Although mediation relies upon party autonomy, the parties, especially those who have no familiarity with the process, will see the court-appointed mediator as a representative of the legal and judicial system. That is true, whether the issue is a small claim or a family matter, or whether it involves an injury, a home, or lifetime savings. That function as a perceived representative of the legal system is separate and in addition to

our process skills; we must take it seriously. We must assure a respectful process that will reflect well on the legal system. Arbitration's connection to the rule of law is one of the reasons it has been promoted by USAID as part of its democratization efforts to bring predictability and fairness to those who have limited access to reliable judicial systems or will not use them.

Our Section is an important contribution to the effort to expand access to justice and commitment to the rule of law. We hope you will continue to join in its work.

Laura Kaster

Edna Sussman

Sherman Kahn

Ethical Compass: Celebration¹

By Professor Elayne E. Greenberg

Introduction

Let's raise our glasses to toast our esteemed Chief Judge, the Honorable Janet DiFiore, for making Presumptive ADR a central part of the New York Office of Court Administration's civil case management. In her February 26, 2019 State of the Judiciary Address, Chief Judge Janet DiFiore announced that the New York Office of Court Administration is formally adopting Presumptive ADR. Although all ADR processes such as settlement conferences, negotiations, arbitration and early neutral evaluation may be used to help settle cases, a focus will be on mediation. Presumptive ADR will apply to almost all civil cases filed in New York Supreme, Civil and Surrogate Courts or NYC Civil Court.

Presumptive ADR recognizes several realities of legal practice, all realities that members of the NYSBA Dispute Resolution Section have worked tirelessly to bring to the forefront. Even though most cases eventually settle, it is preferable if cases settle earlier. When parties settle their cases earlier, they are less likely to waste money on litigation, less likely to entrench themselves in positions, and more likely to accept realistic settlements that they honor. For the past 30 years, court-annexed ADR programs have become a favored process to help settle cases. The Presumptive ADR initiative will build on and expand existing court-annexed ADR programs, making it a preferential approach for civil case management.

Plans are already underway to implement Presumptive ADR. Each judicial district in New York has already submitted its ADR plan for the chief judge's approval. These plans are currently being reviewed, and some are already being implemented. The chief judge has also convened the ADR Advisory Committee chaired by John Kiernan, of which I am a member, to help serve as a resource. Our Dispute Resolution Section has established a Presumptive ADR Task Force. Finally, there is a coordinated effort to educate members of the judiciary and bar about how they can advance the goals of Presumptive ADR.

As with any celebration noting the achievement of a long-sought professional advancement, our celebration of Presumptive ADR is an opportunity for us to reflect on how far we've come in promoting ADR and congratulate all those who helped advance this desired goal. It is also an opportunity for us to roll up our sleeves and begin to help actualize this new settlement-centric reality.

Elayne E. Greenberg is the Assistant Dean for Dispute Resolution, Faculty Director of the Hugh L. Carey Center and Professor of Legal Practice at St. John's Law School. She is also a member of the Chief Judge's Advisory Committee chaired by John Kiernan. She can be reached at greenbee@stjohns.edu. Thank you to Rachel N. Harris (St. John's Law '21), NYSBA Dispute Resolution Section's Student Liaison, for her assistance with this column.



The challenge of Presumptive ADR is how to institutionalize procedures and practices for the expanded volume of cases that are to be directed to ADR so that quality and integrity of each ADR process is maintained. Implementing Presumptive ADR also challenges us to rethink best practices for each ADR process, revisit what are the appropriate training and qualifications of neutrals and reconcile the competing views about the answers to these questions.

To meet this challenge, Presumptive ADR requires a large number of trained and committed lawyers and neutrals to help with both implementation and quality control. How can you help implement the Presumptive ADR initiative? This discussion will continue in two parts. First, I will discuss the ethical obligations lawyers, mediators and neutrals have to help advance the goals of Presumptive ADR. Given these ethical mandates, I will identify affirmative steps lawyers and neutrals can take to support New York's case management shift to a settlement-centric practice.

The Ethical Codes That Guide Our Obligation to Advance Presumptive ADR

The N.Y. Rules of Professional Conduct,² the ABA Model Standards of Conduct for Mediators,³ and the ABA Code of Ethics for Arbitrators in Commercial Disputes⁴ offer some ethical guidance about how lawyers, mediators and arbitrators may contribute to advancing Presumptive ADR. The N.Y. Rules of Professional Conduct for lawyers and the ABA Code of Ethics for Arbitrators in Commercial

Disputes provide that the ethical mandate to support such initiatives such as Presumptive ADR is a “responsibility.” Distinguishably, the ABA Model Standards of Conduct for Mediators clarifies what actions mediators should take to advance mediation practice. It explicitly provides that mediators *should*, inter alia, foster diversity, help make mediation economically accessible, educate the public about mediation, and mentor new mediators. The relevant parts of the three ethical codes are as follows:

The Preamble of the New York Rules of Professional Conduct, provides in relevant part:

A LAWYER’S RESPONSIBILITIES [1]” A lawyer, as a member of the legal profession, is a representative of clients and an officer of the legal system with **special responsibility for the quality of justice**. . . As an officer of the legal system, each lawyer has a duty to **seek improvement of the law; and to promote access to the legal system and the administration of justice**. . .” (emphasis added)⁵

The ABA Code of Ethics for Arbitrators in Commercial Disputes:

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.⁶

The ABA Model Standards of Conduct for Mediators explicitly provides that mediators have an ethical obligation to advance mediation practice:

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE: A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following: 1. **Fostering diversity** within the field of mediation. 2. Striving to **make mediation accessible** to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate. 3.

Participating in research when given the opportunity, including **obtaining participant feedback when appropriate**. 4. **Participating in outreach and education efforts** to assist the public in developing an improved understanding of, and appreciation for, mediation. 5. Assisting newer mediators through **training, mentoring and networking**. B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and **work together with other mediators to improve the profession** and better serve people in conflict.⁷

Given these ethical mandates, I suggest in the next section how you might do your part to advance Presumptive ADR.

What You Can Do to Advance the Goals of Presumptive ADR:

Help diversify the profession. Litigants should be able to have neutrals who are like them. Mentor diverse neutrals. Take affirmative steps to select and recommend diverse neutrals for your cases and those of your colleagues.

Get trained. If you are not yet an arbitrator, mediator or neutral evaluation, consider taking training and becoming one. Presumptive ADR is expected to generate an overabundance of cases. More neutrals will be needed. In addition, the culture will change to include a settlement or mediation opportunity in all cases, mediation training will help you distinguish yourself as an advocate.

Join court rosters. Trained mediators, arbitrators and early neutral evaluators: let your administrative judge know you are available to serve as a neutral to help resolve court-connected cases.

Volunteer to serve as a pro bono neutral. Generously agree to provide pro bono neutral services.

Mentor. Serve as a mentor to newly trained neutrals.

Get past “no.” Use your ADR skills to engage with ADR-resistant colleagues who insist “Not for my cases” or “I tried it once and it doesn’t work.” Have conversations of understanding.

Unbundle your legal services by volunteering to represent unrepresented parties in arbitration, mediation or early neutral evaluation.

Improve existing ADR programs. Re-think how the existing ADR programs might be further strengthened and made more effective.

Review the ethical codes prior to each case. The ethical codes are necessary anchors to help you deliver good quality practice to the ADR process.

Support Presumptive ADR by seeing how it applies to *your own cases*. Which of your cases will benefit from early settlement and what can you do to make that happen? If one ADR process doesn't work, what can you do differently? Try others.

Educate your clients about Presumptive ADR and explain how it might help for their case.

Law schools can rethink the learning opportunities Presumptive ADR offers your students.

Collaborate with courts and bar associations that are offering CLE and public education programs about Presumptive ADR.

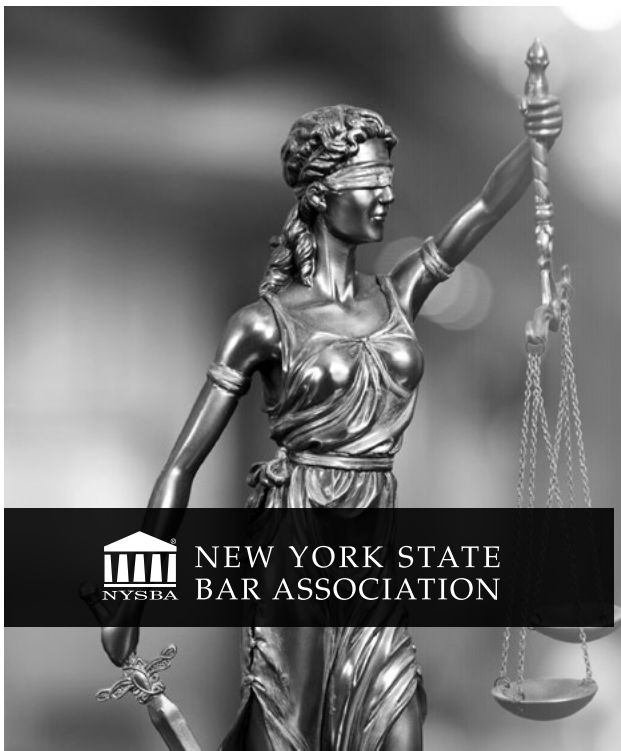
There are no monolithic views on what constitutes good practice for each ADR process. The Presumptive ADR initiative compels us to rethink ideas such as confidentiality parameters, qualifications for neutrals, what constitutes conflicts of interest and the acceptable way for each ADR process to be conducted. Now is the time for us to have conversations of understanding to reconcile different points of view.

Going Forward

In our celebratory mode, we must also be mindful of how we each can contribute to making Presumptive ADR a meaningful reality. Of course, we can pontificate more about what we can each do. For now, the better strategy is to "Just do it!"

Endnotes

1. Kool & the Gang, "Celebration" (De-Lite Records 1980).
2. NY CLS Rules Prof. Conduct (2009) (amended 2018).
3. Model Standards of Conduct for Mediators (Am. Arbitration Ass'n, Am. Bar Ass'n, Ass'n for Conflict Resol. 2005).
4. *Code of Ethics for Arbitrators in Commercial Dispute*, Am. Bar Ass'n (2014) https://www.americanbar.org/groups/dispute_resolution/resources/Ethics/Code_Ethics_Com_Arb_An
5. Model Standards of Conduct for Mediators at 3.
6. *Code of Ethics for Arbitrators in Commercial Dispute*, Am. Bar Ass'n (2014) https://www.americanbar.org/groups/dispute_resolution/resources/Ethics/Code_Ethics_Com_Arb_Ann/.
7. Model Standards of Conduct for Mediators at 9.



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The Committee on Professional Ethics has issued over 1100 opinions since 1964. It provides opinions to attorneys concerning questions of an attorney's own proposed ethical conduct under the New York Rules of Professional Conduct. It cannot provide opinions concerning conduct that has already taken place or the conduct of another attorney. When an inquiry is submitted, it will be researched to determine whether an existing opinion is responsive to the question. If no opinions exist, the inquiry will be forwarded to the committee for preparation of an opinion.

Inquiries submitted to the committee are confidential, and no identifying information is included in the opinion.

If you have a question about your own proposed conduct, send your inquiry to the committee by **email to ethics@nysba.org**; by **fax to (518) 487-5564**; or by **mail to One Elk Street, Albany, NY 12207**. Please include in all inquiries your name, mailing address, telephone and email address.

To view Ethics Opinions, visit: www.nysba.org/Ethics/

Have the Courts Opened the Section 1782 Door Wider?

Lawrence W. Newman and David Zaslowsky

Regular readers of this column will recall that, over the years, we have followed closely the development of the law under Section 1782 of Title 28 of the U.S. Code. In this article, we look at two highly publicized recent circuit court decisions and ask the question whether they have opened the door wider to the use Section 1782. The answer is, “yes” in some ways, but, in one very important way, there was a significant narrowing.

To start, a reminder about the statute. Section 1782 authorizes a federal district court to order the production of documents, as well as depositions of witnesses, in aid of foreign proceedings. The Section 1782 application is typically initiated through an *ex parte* application and does not require that the foreign proceeding even be pending at the time of the application. Section 1782 authorizes a district court to grant a petition for judicial assistance if three statutory requirements are met: (1) the request for discovery is made “by a foreign or international tribunal” or “any interested person”; (2) the discovery requested is “for use in a proceeding in a foreign or international tribunal”; and (3) the person from whom the discovery is sought resides, or is found, in the district of the district court where the request has been made.

If these statutory requirements are met, the district court may—although it is not required to—exercise its discretion and grant the petition. The Supreme Court’s only treatment of Section 1782, in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), identified four non-exclusive factors a district court should consider in exercising its discretion and it is now essentially *de rigueur* for every Section 1782 decision to discuss those factors. They are:

1. Whether the person from whom discovery is sought is a party or a non-party to the foreign proceeding (with discovery being much more difficult to obtain from a party).
2. The receptivity of the foreign government, court or agency to U.S. assistance.
3. Whether the Section 1782 request conceals an attempt to circumvent foreign truth-gathering restrictions.
4. Whether the request is unduly intrusive or burdensome.

The Second Circuit’s Recent Decision

The Second Circuit’s recent contribution to Section 1782 jurisprudence came in *In re: Application of Antonio Del Valle Ruiz and Others for an Order to Take Discovery for Use in Foreign Proceedings Pursuant to 28 U.S.C. Section 1782*, Case No. 18-3226 (2d. Cir. October 7, 2019). Banco Santander S.A. (Santander) acquired Banco Popular Español, S.A. after a government forced sale. Petitioners, a group of Mexican nationals and two investment and asset management firms, initiated or sought to intervene in various foreign proceedings contesting the legality of the acquisition. Petitioners then filed in the Southern District of New York two applications under Section 1782 seeking discovery from Santander and its New York based affiliate.

One of the issues before the Second Circuit was whether Section 1782 may be used to reach documents located outside of the United States. Lower courts had split on the issue. And, interestingly, one of the Second’s Circuit’s earlier decisions, *Application of Sarrio, S.A.*, 119 F.3d 143, 147 (2d Cir. 1997), is the decision that has been cited most often in support of the proposition that Section 1782 may not reach documents outside the U.S. The authors of this column represented the prevailing party in *Sarrio* and are well aware that there was no such holding. Rather, it was in *dictum* that the Second Circuit said in *Sarrio*, “there is reason to think that Congress intended to reach only evidence located within the United States.”

In *Banco Santander*, the court rejected its own prior *dictum*. The Second Circuit first clarified that this was not the type of situation in which the court would apply a presumption against extraterritoriality. The court explained that the presumption does not apply to a “strictly jurisdictional” statute, one not otherwise tethered to regulating

LAWRENCE W. NEWMAN is of counsel and DAVID ZASLOWSKY is a partner in the New York office of Baker McKenzie. They can be reached at lawrence.newman@bakermckenzie.com and david.zaslowsky@bakermckenzie.com, respectively.

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conduct or providing a cause of action. The court then applied the same plain-meaning interpretation that the Eleventh Circuit had followed in *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194, 1199 (11th Cir. 2016):

The text of § 1782 authorizes discovery pursuant to the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure in turn authorize extraterritorial discovery so long as the documents to be produced are within the subpoenaed party's possession, custody, or control. Hence § 1782 likewise allows extraterritorial discovery.

For specific jurisdiction "there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.'" In the context of a discovery request, the Second Circuit stated:

Where the discovery material sought proximately resulted from the respondent's forum contacts, that would be sufficient to establish specific jurisdiction for ordering discovery. That is, the respondent's having purposefully availed itself of the forum must be the primary or proximate reason that the evidence

"[A] district court is not categorically barred from allowing discovery under § 1782 of evidence located abroad."

The Second Circuit did try to tamp down the impact of this decision. Its holding was couched in the negative: "a district court is not categorically barred from allowing discovery under § 1782 of evidence located abroad." And, the court specifically noted that a district court should consider the location of documents and other evidence when deciding whether to exercise its discretion to authorize such discovery. Nevertheless, there should be little question that the Second Circuit's holding will lead to an increase in the number of Section 1782 applications. In other words, the decision did open the Section 1782 door wider with respect to documents held abroad.

But the other issue in the *Banco Santander* decision should result in reducing the number of Section 1782 cases and was a victory for Santander and, indeed, probably for many other foreign banks that are the targets of Section 1782 applications. Prior to this decision, lower courts were split on whether it was necessary to satisfy the jurisdictional due process requirements with respect to the targets of Section 1782 applications. But the Second Circuit held "that § 1782's 'resides or is found'" language "extends § 1782's reach to the limits of personal jurisdiction consistent with due process."

It will be the case for many foreign banks and other financial institutions that they are not subject to general jurisdiction because neither their place of incorporation nor principal place of business is in the United States. On the issue of specific jurisdiction, the Second Circuit rejected the argument that some lower showing of jurisdiction is needed in a case seeking non-party discovery, as compared to jurisdiction over a defendant.

sought is available at all. On the other hand, where the respondent's contacts are broader and more significant, a petitioner need demonstrate only that the evidence sought would not be available but for the respondent's forum contacts.

With respect to Santander, the district court said, it (1) maintains branches in New York City and is regulated by the New York Department of Financial Services, (2) manages wholly-owned U.S. subsidiaries from New York City, (3) is the ninth-largest banking group in the New York area, (4) is listed on the New York Stock Exchange, (5) holds executive meetings in New York, (6) has designated its New York City branch as a process agent, and (7) has admitted, in S.D.N.Y. filings in other actions, to maintaining offices and conducting business in the district. Because, however, petitioner could not meet the above specific jurisdiction test, Santander was not "found" in the Southern District of New York.

Section 1782 in Aid of Arbitration

Turning to the second important recent decision, prior to the Supreme Court's decision in *Intel*, two circuit courts had addressed whether Section 1782 may be used in aid of private, international arbitration—*Nat. Broad. Co. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 191 (2d Cir. 1999) (*NBC*) and *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999). Both the Second and Fifth Circuits had held that Section 1782 was not available.

In *Intel*, however, Justice Ginsburg quoted from an article written by the late Professor Hans Smit, the primary draftsman of the current version of Section 1782, in

which he wrote “[t]he term ‘tribunal’ ... includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.” It has been argued that this was not only *dictum*, but *dictum* contained in a parenthetical quotation to a law review footnote. Thus, as a one court has said:

It is completely implausible that the Supreme Court would have, in a parenthetical quotation supporting an unrelated proposition involving an quasi-judicial governmental body, expanded § 1782 to permit discovery assistance in private arbitral proceedings and reverse the only two circuits addressing this issue *sub silentio*, without even acknowledging the existence of the circuit precedent. *In re Grupo Unidos*, No. 14-226, 2015 U.S. Dist. LEXIS 50910, at *20 (D. Colo. Apr. 17, 2015).

Nevertheless, after *Intel*, although numerous courts held that *Intel* did not overrule *NBC* and *Biedermann*, and that Section 1782 was not available in aid of private international arbitration, there were other courts which held that Section 1782 was so available. At the circuit court level, the Fifth Circuit expressly affirmed that *Biedermann* remains good law post-*Intel*. *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 Fed. Appx. 31, 33-34 (5th Cir. 2009). The Second Circuit has not yet addressed the issue post-*Intel*.

Last month, the Sixth Circuit created a circuit split when it held that Section 1782 could be used in aid of a private, commercial international arbitration. *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, No. 19-5315, 2019 U.S. App. LEXIS 28348 (6th Cir. Sept. 19, 2019). Deciding the issue required the court to determine whether an arbitration fits within the part of the statute that makes it applicable to a “foreign or international tribunal.” Since there was no dispute that the DIFC-LCIA arbitration was “foreign,” the determinative issue was whether it was a “tribunal.” The court’s analysis was primarily textual.

The court noted that there were several legal dictionaries that contained definitions of “tribunal” broad enough to include private arbitrations. Turning to non-legal sources, at least two widely used English dictionaries define “tribunal” broadly enough to include private arbitrations. The court also remarked that American jurists and lawyers have long used the word “tribunal” in its broader sense; a sense that includes private, contracted-for, commercial arbitral panels. And, according to the Sixth Circuit, the courts used the word to describe private, contracted-for commercial arbitrations for many years before Congress added the relevant language to Section 1782, and still use it that way today.

Interestingly, even before the Sixth Circuit’s decision, the Restatement of U.S. Law of International Commercial and Investor-State Arbitration, in its Proposed Final Draft that was approved at the ALI meeting in May 2018, had taken the position that Section 1782 applies to requests “by an international arbitral tribunal or any interested person in an international arbitral tribunal,” based on the “plain language of the statute” and the reference in the *Intel* case. Restatement, Section 3.5 and Comments a and b. It was also, essentially, a textual analysis.

The district courts have been split on this issue since shortly after the *Intel* decision. The Sixth Circuit’s decision creates a split at the circuit level as well. The road back to the Supreme Court seems likely to be taken one day. But it could very well be years, meaning that, in the interim, parties will likely be doing the best forum shopping they can when seeking Section 1782 discovery in aid of private international arbitration.

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The Art of Art Authentication and a Global Alternative to Dispute Resolution

Judith Prowda

In an oft-cited 1903 Supreme Court decision which upheld copyright in a color poster drawing of circus performers, Justice Oliver Wendell Holmes Jr. wrote, “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious of limits.”¹ Nevertheless, courts decide all manner of art disputes—copyright, authenticity, title, contracts, even the very nature of art—often acknowledging their limitations, as Justice Holmes did so eloquently over a century ago. Courts hearing an authenticity dispute, for example, are aided by expert testimony adduced by both sides, and must ultimately determine, based on a preponderance of the evidence (more likely than not) standard, whether an artwork is real or fake. The judge or jury deciding the facts may have little or no expertise in art, the language of connoisseurship, the validity of a provenance report, or comprehend underlying scientific evidence supporting or discrediting the authenticity of the work.

It is not surprising, then, that the art market may disregard a court’s ruling. The art market is not required to accept it as truth and is not bound by it. Rather, the art market bases its belief in the validity of a work on the opinion of a recognized expert on that artist’s oeuvre, whether it be the artist’s foundation, family member, dealer, scholar or moral rights holder. Several courts have observed that litigation may not always fit with the objectives of an art dispute. Courts may base their determination on factors such as connoisseurship, provenance and forensic inquiry, but in the end, the art market is the final arbiter as to whether a work is “right” (salable) or not.

I. Battle of the Experts

A) Art Authentication in U.S. Courts: Preponderance of the Evidence

1) *Greenberg Gallery v. Bauman*

In *Greenberg Gallery v. Bauman*,² a group of art dealers bought a work they believed to be *Rio Nero*, a 1959 mobile by the renowned artist Alexander Calder (1898-1976). After failing to make it hang properly, the buyer dealers sought to rescind the sale. When the seller refused, they sued under theories of fraud, breach of express warranty and material mistake of fact. At trial, connoisseurship evidence was introduced by both sides. Klaus Perls, Calder’s exclusive American dealer for 20 years and a recognized Calder expert, testified in a deposition that a

Calder “forgery . . . is usually quite apparently a forgery because it does not fit in the feel of a real Calder.”³ Perls’s methodology was to compare the mobile to an archival photograph he had taken of the original mobile before it left his gallery in 1962. Despite Perls’s premier credentials as an expert on Calder, the court was critical of his cursory examination of the mobile and inattention to the “AC” signature.⁴

The seller’s expert, Linda Silverman, refused to examine the archival photograph because she found it unreliable. Clearly, the court was impressed by her meticulous hour-and-a-half long examination of every blade and joint of the work, as well as the “AC” signature. Moreover, the seller could establish flawless provenance for the piece, favoring a finding of authenticity. Thus, the court concluded that despite the great weight accorded to Perls and his superior credentials as an acknowledged expert on Calder, “the mobile is [more likely than not] not a forgery, but the original *Rio Nero* which has been misassembled and abused to the point that, on cursory examination, it

JUDITH B. PROWDA is a member of the Faculty at Sotheby’s Institute of Art Masters of Art Business program. She is an art lawyer, mediator, and arbitrator and a founding member of Stropheus Art Law. She is the author of *Visual Arts and the Law: A Handbook for Professionals* (2013). She is Past Chair of the Entertainment, Arts and Sports Law (EASL) Section of NYSBA, Co-Founder and Chair of EASL’s Committee on ADR, and Co-Chair of EASL’s Committee on Fine Arts. She gratefully acknowledges her fellow Court of Arbitration for Art (CAfA) working group members William Charron, Luke Nikas, Megan Noh, Nicola Wallace and Friederike Gräfin von Brühl and her colleagues at Authentication in Art and Netherlands Arbitration Institute for their unwavering dedication to this project. A special thanks to William Charron for his vision in imagining an art tribunal and his leadership in making it a reality. CAfA was nominated for “Best Innovation” in the field of arbitration by the Global Arbitration Review in 2019.

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does not exactly resemble the original photo and has lost its delicate balance required for proper hanging.”⁵

This case is a prime example of the art market rejecting a court-authenticated work and assessing it as having no market value. The seller kept the purchase price of \$500,000. The work, however, is excluded from the catalogue raisonné⁶ and reportedly remains in storage, unsaleable as a work by Calder.⁷ Unsurprisingly, the work has negligible market value because the art market trusts the opinion of Perls, not the court.⁸

2) *Thome v. Alexander & Louisa Calder Foundation*

In another authenticity case, coincidentally involving Calder, a New York State appellate court in *Thome v. Alexander & Louisa Calder Foundation*,⁹ was called upon to determine the authenticity of two theatrical stage sets that were purported to be works by Alexander Calder in a declaratory judgment action.

The *Thome* court observed that “because of the procedures and processes by which our civil litigation is decided, courts are not equipped to deliver a meaningful declaration of authenticity. For such a pronouncement to have any validity in the marketplace or artworld, it would have to be supported by the level of justification sufficient to support a pronouncement by a recognized expert with credentials in the relevant specialty. . . . [I]n our legal system, courts have neither the education to appropriately weigh the experts’ opinions nor the authority to independently gather all available appropriate information.”¹⁰ In ruling that the plaintiff was not entitled to a declaration of authenticity, the court pointed out that a declaration of authenticity would not resolve the plaintiff’s situation, “because his inability to sell the sets is a function of the marketplace.”¹¹ Moreover, the court ruled that the Alexander & Louisa Calder Foundation, a private entity, could not be compelled to include a particular work in its catalogue raisonné based solely on the court’s independent finding that the work is authentic.¹² The creation of a catalogue raisonné is a private scholarly endeavor, “and neither its issuance nor its contents are controlled by any governmental regulatory agency. . . . Whether the art world accepts a catalogue raisonné as a definitive listing of an artist’s work is a function of the marketplace, rather than of any legal directive or requirement.”¹³

B) Art Authentication in French Courts: Judicial Authentication v. Freedom of Expression

Whereas in the U.S., parties to an art authentication dispute solicit the opinions of competing experts, leaving it to the court to decide whether a work is authentic or not, in France, the judge appoints an expert—a “Master”—drawn from a list maintained by the Cour de Cassation, France’s highest appellate court (French Supreme Court) or from the appeal court of Paris. In exceptional circumstances the court has the discretion to name some-

one else when none of the persons on either list is able to perform.¹⁴ The Master’s opinion is usually adopted by the court and is binding on the parties. Moreover, once a French court has established a work as authentic, it may require that work to be included in the catalogue raisonné as a work by the artist.¹⁵ Nevertheless, the *droit moral* holder of the artist has the right to challenge the authenticity of the work in court, whether their opinion has been sought or not.¹⁶

In France, there have been a number of high-profile authenticity law suits in the past two decades in which an aggrieved owner has challenged an expert (author of a catalogue raisonné, artist’s foundation, or connoisseur deemed by the art market as the “leading expert” on a given artist).¹⁷

The aim of these cases is to challenge the expert’s denial of the work’s authenticity. Experts have defended themselves, not always successfully, by invoking their freedom of expression or by claiming that their rejection of a work in a catalogue raisonné was not an opinion on authenticity. French courts, relying on court-appointed Masters, have overruled opinions by leading experts, not only by ordering the inclusion of a work in a catalogue raisonné but also by finding those leading experts liable for negligence and monetary damages. Striking a compromise, the French Supreme Court has directed the author of an artist’s catalogue raisonné to include both the opinion of the court-appointed Master and that of the *droit moral* holder.¹⁸ In a recent landmark ruling, however, the French Supreme Court declined to engage in such a balanced approach, thereby holding that an expert’s freedom of expression in authenticity disputes is absolute and leaving the final word to the art market itself.¹⁹

1) *Fuantes/Atlan et Polieri*

This case involved a long-running dispute between the owner of a painting on one hand, and the artist’s moral rights holders and catalogue raisonné author, on the other.²⁰

In September 2001, Maurice Fuantes, the owner of a painting titled *Composition*, purportedly by Jean-Michel Atlan (1913-1960), sought the authentication of the work by the holder of Atlan’s *droit moral*, members of the deceased artist’s family, the artist’s widow and sister. Fuantes also requested that the work be included in the artist’s catalogue raisonné, prepared by Jacques Polieri. After both requests were denied, Fuantes obtained a legal opinion issued by the court’s expert in October 2001, who found both the work and the signature to be authentic. Once again, despite this additional documentation, the Atlan descendants and Polieri refused to recognize the painting as authentic.

Fuantes filed an action against Denise and Camille Atlan and Polieri for damages, alleging that they had wrongfully refused to recognize the painting as authentic,

“Several courts have observed that litigation may not always fit with the objectives of an art dispute. Courts may base their determination on factors such as connoisseurship, provenance and forensic inquiry, but in the end, the art market is the final arbiter as to whether a work is ‘right’ (salable) or not.”

and argued that as a moral rights holder, they had a duty to declare the work to be a genuine Atlan.

Ultimately, in 2008, after seven years of litigation, the French Supreme Court decided on a compromise solution that it believed would balance the freedom of expression of the author of the catalogue raisonné and the opinion of the court-appointed Master. The high court ordered the work to be included in future editions of Atlan’s catalogue raisonné, with the annotation “judicially authenticated.”²¹ In the court’s view, this declaration had the advantage of recording the work as an original work by the artist in a comprehensive listing of the artist’s works, without implying that the author of the catalogue raisonné was in agreement.²²

2) Laurent Alexandre/Bozena Nikiel

In 2014, the French Supreme Court took a 180 degree turn from past cases²³ in a landmark decision involving the authenticity of a work attributed to the French Cubist painter Jean Metzinger (1883-1956), titled *La Maison Blanche*.²⁴

In this case, the owner of the work, Laurent Alexandre, found a buyer willing to purchase the work for €60,000 on the condition that Bozena Nikiel, author of Metzinger’s catalogue raisonné and *droit moral* holder, authenticate the work and include it in her forthcoming catalogue raisonné. When Nikiel refused, claiming the work to be “painted in the style of” Metzinger, Alexandre requested an opinion by a court-appointed Master, who found the work to be authentic.²⁵ Nikiel continued to reject the work, however, and offered no evidence to support this opinion, whereupon Alexandre sued on the grounds that Nikiel was abusing her status as *droit moral* holder.

The Tribunal de Grande Instance of Paris (the lower court) ordered Nikiel, who disputed the work’s authenticity, to include the work in her catalogue raisonné, and to pay Alexandre €10,000 in damages for “the loss of

the chance to sell the painting.” On appeal, the Court of Appeals affirmed the lower court, finding that Nikiel’s refusal to authenticate the work and include it her the catalogue raisonné was a chargeable offense, in light of the opinion of the court-appointed Master to the contrary. The appellate court ordered Nikiel to pay Alexandre an additional €30,000 in damages or, in the alternative, authenticate the work and include it in the Metzinger catalogue raisonné within one month of the court’s decision.²⁶ Adamant in her position, Nikiel appealed the decision to the French Supreme Court, contesting the credentials of the court-appointed Master and insisting that her research should have led him to consider the authenticity of the work as “doubtful.”

In a sharp departure from past cases, the French Supreme Court overturned the Court of Appeals decision on the grounds that Nikiel’s refusal to authenticate the painting was the result of her “intimate conviction” of the *droit moral* of the artist concerning the authorship of the work. By finding Nikiel liable in damages because of her opinion, the Court of Appeals had breached her right to freedom of expression under Article 10 of the European Convention of Human Rights. Moreover, by ordering Nikiel to include the painting in her catalogue raisonné against her conviction to the contrary, the Court of Appeals had violated her right to express her beliefs under Article 9 of the European Convention of Human Rights.²⁷ As for the final determination of the work’s authenticity, at the end of the day, it is a matter for the art market to decide.

As illustrated in the cases above, authenticity decisions made by traditional courts are not always accepted in the art market. Traditional courts, which are not trained in art matters, may rule that a specific work is authentic. However, if the art market believes an expert – whether that expert is an artist’s former longtime dealer, artist’s foundation, author of the artist’s catalogue raisonné or

holder of the artist's *droit moral* – who attests otherwise, then doubt about the work may linger long after the ink has dried.

II. Reflections on the Resolution of Art Disputes

The original version of this article was intended to be a retrospective piece, not only in celebration of the New York State Bar Association, Entertainment, Arts and Sports Law (EASL) Section's 30th Anniversary, but also about changes in the field of art law and the advancement of alternative dispute resolution during that period. EASL's ADR Committee was co-founded in 2005 and has witnessed consistent recognition from the legal community of the value of resolving entertainment disputes by means of mediation, arbitration and processes other than litigation. The art world has been slower to embrace ADR.

As recently as a decade ago, the resolution of art disputes through arbitration and mediation of was fairly uncommon in the industry. In 2009, an informal survey for the New York City Bar Art Law Committee inquired at several museums and auction houses as well as private practitioners about their adoption of ADR. While the research was merely anecdotal, it nevertheless revealed limited adoption of ADR in art-related matters, with the exception of major auction houses, which had departments dedicated to facilitating a dialogue between a consignor and claimant to settle a title dispute. Museums tended to negotiate settlements without the assistance of third parties. For example, in 2006, the Metropolitan Museum and Italian government reached an agreement resulting in the Met's return of the Euphronios krater and other objects in its collection to Italy in exchange for long-term loans of other antiquities of "equivalent beauty and importance."²⁸ Overall, other kinds of disputes involving museums and auction houses tended to be litigated in court, with few exceptions.

When EASL's ADR Committee was created almost 15 years ago, its mission was primarily to educate EASL members in arbitration and mediation through CLE and non-CLE programs and to mentor those desiring training "to address what we perceive is a growing need for mediation and arbitration services for disputes in the arts, entertainment and intellectual property areas of law." The Committee's mission was formalized in 2012:

The EASL ADR Committee encourages EASL members to consider the resolution of disputes by means of mediation, arbitration and processes other than litigation. Since the Committee's formation in 2005, we have offered a wide range of CLE programs, including lectures, mock mediations and arbitrations and other interactive methods of instruction taught by some of the most distinguished practitioners in the field of Dispute Resolution.

Our events are geared for participants of all levels of experience and provide our members with an important set of skills for the practice of entertainment, arts and sports law.

Addressing the topic of the under-utilization of mediation in the art world at the Appraisers Association's Art Law Day in November 2010,²⁹ the audience seemed to be receptive and open-minded, even enthusiastic. Had the tides turned?

Over the past several years, there has been a gradual but significant increase in the use of mediation and arbitration and the inclusion of ADR provisions in art-related contracts in a broad range of transactions. Mock negotiations and mediations conducted in class by Master's of Art Business students at Sotheby's Institute of Art have led to creative settlements that a court would never have the power to reach. A new generation of art professionals was willing to consider alternatives to litigation.

III. Enter the Court of Arbitration for Art (CAfA)

To respond to a growing perception of a need for a specialized forum dedicated to resolving art disputes, a new tribunal has been created.³⁰

This court was founded by a working group, spearheaded and organized by William Charron, Partner at Pryor Cashman, and Advisory Board member of The Hague-based nonprofit, Authentication in Art (AiA),³¹ which holds an interdisciplinary congress on art authentication every two years. Following the AiA 2016 Congress, Bill set out to create a mediation and arbitration tribunal exclusively dedicated to resolving art disputes, which became known as the Court of Arbitration for Art (CAfA). The specialized court would be administered jointly by the AiA and the Netherlands Arbitration Institute (NAI),³² also based in The Hague. The original working group included New York-based art lawyers Luke Nikas, Partner at Quinn Emanuel Urquhart & Sullivan, LLP and Megan Noh, Partner at Pryor Cashman, and the author. Over the next year and a half, the working group met regularly to conceptualize the court, report back to each other on our interviews with art market participants, such as provenance researchers, art historians and forensic scientists, and critically, to develop a set of rules that would provide market legitimacy and decisional accuracy.³³ A literature review of ADR principles generally and other specialized tribunals specifically was conducted.

To provide a balanced international perspective to the working group, the original working group was joined by Nicola Wallace, Barrister and Mediator, 4 Paper Buildings, London and Friederike Gräfin von Brühl, M.A., K&L Gates LLP, Berlin.

Here are a few highlights:

- While CAfA is seated in The Hague, proceedings may be conducted around the globe, addressing a wide spectrum of art disputes, including authenticity, contract, chain of title, copyright and more. CAfA decisions are legally binding under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and other international conventions.
- CAfA mediators and arbitrators, seasoned art lawyers with extensive art market and ADR experience, are selected by a committee consisting of academics and former judges who have gained particular experience in art law.³⁴ The idea is that the market is more likely to accept decisions made by practitioners who are better equipped to understand and properly weigh the evidence than a traditional court.
- Disputes valued at €1.5 million and above are heard by a panel of three arbitrators (unless the parties have agreed to one arbitrator). Each party selects an arbitrator from the pool described above, and those two arbitrators select a third. Disputes valued below €1.5 million are heard by a single arbitrator agreed upon by the parties.
- In cases involving authenticity, CAfA appoints its own forensic and provenance experts from an internationally recognized pool rather than hear competing experts. The concept here is to reassure the market as much as possible that authenticity decisions are based on objective expert analysis, rather than having to weigh testimony favoring each side. Court-assigned experts are responsible to the court to ensure neutrality.³⁵ Costs and fees are evenly divided by the parties.
- Additionally, a “technical process advisor” (a role analogous to a “special master” in U.S. discovery procedures) is appointed in certain cases, with the parties’ consent, to oversee the discovery process and discuss it with the experts (together with the parties) where additional scientific testing is necessary.
- Arbitral proceedings are conducted in private, as with traditional ADR. At the conclusion of a case, the arbitrator(s) will publish a written opinion explaining how they reached their decision. The names of the parties are kept confidential, but the artwork is identified, to ensure market understanding and acceptance of the final determination.

- Concerning choice of law, the rule is quite simple. In cases involving a discrete transaction, such as a sale of a work of art, the governing law may be the law of the principal location of the seller, if known at the time of the transaction, or if no sale is involved, of the owner of the work at the time of the beginning of the arbitration.
- Arbitrators may evaluate time-based claims and defenses, but are not obligated to apply them rigidly. Applicable periods of limitation, prescription, and repose, as well as similar time-bar principles are respected when claims or defenses have not been acted upon within a reasonable time. This rule recognizes that parties to an art dispute may bring claims many years, or even decades, after they have arisen, particularly in the context of restitution claims. The purpose is to protect the other party from “stale” claims or defenses which were not pursued with reasonable diligence and other situations of undue prejudice, such as where evidence has been lost due to the passage of time.

Ultimately, the primary objective of the working group was twofold: to create a tribunal that could provide both market legitimacy and decisional accuracy. Everything we analyzed reflected back to the questions of whether this was something the market would likely accept and whether it would best position the tribunal to reach the correct results.

One of the most memorable EASL ADR Committee events, in my view, is the joint EASL Section and Dispute Resolution Section Fall Program in October 2010, which was co-sponsored by and held at Fordham Law School. This full-day CLE event lived up to its title, “How to Maximize Results in Mediation and Arbitration – An Illuminating and Engaging Day of Interactive Role Play with Experienced Mediators, Arbitrators and Counsel.” The morning program focused on arbitration and the afternoon program on mediation (with the author playing the role of an artist involved in a dispute). A reprise in 2020, anyone? With the creation of CAfA, there is truly an alternative to resolving art disputes. Now this, in addition to a joint 10th anniversary program between the EASL and the Dispute Resolution Sections, are well worth celebrating!

Endnotes

1. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903).
2. *Greenberg Gallery v. Bauman*, 817 F. Supp. 167 (D.D.C. 1993), *aff'd without opinion*, 36 F.3d 127, D.C. Cir. 1994 U.S. App. LEXIS 27175 (1994).
3. *Id.* at 170.
4. *Id.* at 174. The court stated in a footnote, "Plaintiffs' failure to attack, through Perls or some other expert, the validity of the 'AC' signature is as important to a trier of fact as would be the prosecution's failure to offer fingerprint evidence about an article handled by a party or to explain by testimony its omission."
5. *Id.* at 175.
6. A catalogue raisonné is a comprehensive catalog of works by one artist, usually presented chronologically, with details such as date, medium, dimensions, references, provenance, and exhibition history. It is typically prepared by scholars, art historians, dealers, committees and foundations consisting of *droit moral* holders, family members of the artist, and other experts, who critically examine the oeuvre of an individual artist and with the intent to be definitive and all-inclusive. Michael Findlay, *The Catalogue Raisonné*, in *THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS* 55, 55 (Ronald D. Spencer ed., Oxford Univ. Press 2004).
7. Ronald D. Spencer, *Authentication in Court: Factors Considered and Standards Proposed*, in *THE EXPERT VERSUS THE OBJECT*, *supra* note 6 at 197–198.
8. *See Thome v. Alexander & Louisa Calder Foundation*, 70 A.D.3d 88, 102-103 (App. Div. 1st Dept. 2009).
9. *Id.*
10. *Id.*, at 101.
11. *Id.* at 103. On June 29, 2010, the New York Court of Appeals rejected the plaintiff leave to appeal the decision.
12. *Id.* at 97.
13. *Id.* at 97-98.
14. E-mail from Van Kirk Reeves to Judith B. Prowda (Jan. 4, 2020) (on file with the author).
15. *See Van Kirk Reeves, The Rights and Risks of Experts in French and American Courts*, 12 IFAR J. 18, 24 (2013)
16. The *droit moral* doctrine, which applies in France and other European countries, gives an artist the right to protect their oeuvre and to designate a party to protect it after the artist's death. Van Kirk Reeves, *Droit Moral and Authentication of Works in France*, 8 IFAR J. 46, 46–7 (2006). In the absence of a specific designation, the right is passed down by law to the artist's heirs and remains the property of the family. Reeves, *supra* note 16 at 22; Spencer, *supra* note 7, at 194. The U.S. has no formal *droit moral* as it exists in Europe, whereby the authority to authenticate a work is inherited by an artist's heirs.
17. For examples of recent authenticity cases in France, *see* Michael Petrides, *Expert Opinion: A U-Turn by the French Supreme Court*, ART@LAW BLOG, <https://www.artatlaw.com/archives/archives-2014-jan-dec/expert-opinion-u-turn-french-supreme-court> (last visited Dec. 15, 2019).
18. Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., Mar. 13, 2008, Bull. civ. I, No. 74 (Fr.).
19. Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., Jan. 22, 2014, Bull. civ. I, No. 10 (Fr.).
20. Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., Mar. 13, 2008, Bull. civ. I, No. 74 (Fr.).
21. *Id.*
22. *Id.*
23. *Id.*
24. Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., Jan. 22, 2014, Bull. civ. I, No. 10 (Fr.); *see also* Petrides, *supra* note 17.
25. The Expert Report prepared by court-appointed expert, Roberto Perazzone is available at <http://www.expertise-ottavi.com/wp-content/uploads/2014/07/Pre-rapport-de-M-Perazzone-expert-28092011-.pdf> (last visited Dec. 15, 2019).
26. Vincent Noce, Experts en guerre autour d'un Metzinger, *Liberation* (Jul. 22, 2013, 3:55 PM) https://next.liberation.fr/arts/2013/07/21/experts-en-guerre-autour-d-un-metzinger_919834.
27. Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., Jan. 22, 2014, Bull. civ. I, No. 10 (Fr.); *See* Petrides, *supra* note 17.
28. Randy Kennedy, Hugh Eakin, & Elisabetta Povoledo, *The Met, Ending 30-Year Stance, Is Set to Yield Prized Vase to Italy*, N.Y. TIMES (Feb. 3, 2006) <http://query.nytimes.com/gst/fullpage.html?res=9C0DE2DE163EF930A35751C0A9609C8B63&scp=4&sq=euphronios%20krater&st=cse>.
29. Appraisers Association of America's Art Law Day, November 12, 2010, Panel entitled, "If Mediation's So Great, Why Isn't It Used More?," moderated by Professor Elayne Greenberg. *See* <https://www.appraisersassociation.org/index.cfm?fuseaction=page.viewPage&pageID=604&nodeID=1> (last visited Dec. 15, 2019). *See also*, Judith B. Prowda, *The Art of Resolving Art Disputes: A Case for Mediation*, in *All About Appraising: The Definitive Appraisal Handbook* (Appraisers Association of America eds., 2d ed. 2013), http://www.appraisersassociation.org/index.cfm?fuseaction=Store.viewProduct&product_ID=957&prod_cat_ID=0.
30. The Court of Arbitration for Art (CAfA) was officially launched by the Netherlands Arbitration Institute (NAI) in conjunction with The Hague-based Authentication in Art (AiA) at the AiA Congress on June 7, 2018.
31. Authentication in Art (AiA) comprises a group of prominent art world professionals who joined together to create a forum that can catalyze and promote best practices in art authentication. AiA provides leadership, shapes dialogue and develops sound practice guidelines with the global art community, including collectors, art historians, art market professionals, financial institutions, legal advisors, trust & estate practitioners and other industry stakeholders. <http://authenticationinart.org/about-us/> (last visited Dec. 15, 2019).
32. Netherlands Arbitration Institute, <https://www.nai-nl.org/en/> (last visited Dec. 15, 2019).
33. The CAfA Arbitration Rules consist of the NAI Arbitration Rules and the AiA/NAI Adjunct Arbitration Rules, and are published on the NAI and AiA websites at <https://www.cafa.world/docs/CAfA%20Arbitration%20Rules.1.pdf?v1908>.
34. Criteria for admission to the arbitrator and mediator pools can be found at <https://www.nai-nl.org/>. An application form for arbitrators can be requested at https://www.nai-nl.org/en/form/cafa_arbitrator/ and for mediators at https://www.nai-nl.org/en/form/cafa_mediator/ (last visited Dec. 15, 2019).
35. This is similar to the French legal system where declarations of authenticity are reportedly made by courts, who hear not only experts on both sides, but also the testimony of its own neutral expert who possesses the necessary expertise. *See* Thome v. Alexander & Louisa Calder Foundation, 70 A.D.3d 88, 101 (citing Van Kirk Reeves, *Establishing Authenticity in French Law*, in *THE EXPERT VERSUS THE OBJECT*, *supra* note 6).

The Mediation Window: An Arbitration Process Measure to Facilitate Settlement

Edna Sussman

Eighty percent of users of arbitration at a conference held in 2014 with 150 delegates from over 20 countries that spanned the globe voiced their desire to have arbitration institutions and tribunals explore in the first meeting what other forms of dispute resolution may be appropriate to resolve the case.¹ Over two-thirds of the users at that conference desired a cooling off period during the arbitration proceeding to make a good faith attempt to settle using a mediator.²

While users have expressed their interest in early discussion of mediation, it has not yet become common or accepted practice. Only a small percentage of the 75 respondents from across the globe who responded to a survey organized by the author and conducted by experienced practitioners each in their own jurisdiction (the "Mixed Mode Survey") discussed the possibility of a mediation window at the first conference with the parties. However, quite a few from diverse jurisdictions thought it would be a good idea. As one respondent stated: "I believe it might be necessary and a good way to promote settlement."

This article is intended to assist those who would be interested in considering a mediation window in understanding what it is and how it can best be utilized.

What is a mediation window?

A mediation window can be structured as was suggested in the CEDR Rules for the Facilitation of Settlement in International Arbitration as "a period of time during an arbitration that is set aside so that mediation can take place and during which there is no other procedural activity."³ This structure would require a pause in the arbitration to allow the parties to focus on the mediation and the development of potential solutions without the conflicting simultaneous pursuit of their adversary positions. Because the CEDR Rules address a scenario in which the arbitrators themselves conduct the facilitation of the settlement, it would of course only make sense if there was a pause in other procedural activity. The pause, however, should be time-limited, so as not to unduly prolong the arbitration. A discussion of the actual conduct of the mediation during a mediation window by the arbitrators in the manner discussed in the CEDR Rules is beyond the scope of this article which is focused on in-

roducing the idea of the mediation window and providing for it the arbitration schedule.

Alternatively, assuming that a separate individual will be retained as the mediator as is usually the case, a mediation window can simply be a time set in the procedural schedule when the parties will discuss whether or not it would be useful to conduct a mediation. The mediation would proceed simultaneously with the arbitration and would create no delay in the schedule. If this process is used, the parties may, and, in this author's view should, be advised that the mediation window must be scheduled sufficiently in advance of the hearing that it will not interfere with the hearing dates set. The hearing date should not be adjourned for the parties' continuing discussions. This alternative will be preferable in many cases because it does not delay the arbitration at all and there is generally no compelling reason not to proceed on parallel tracks where the mediator is retained separately from the arbitration.

Why would a mediation window be helpful?

Ideally the mediation window will provide the opportunity for the parties to resolve the entire dispute. However, a mediation may also serve to resolve parts of the dispute, identify issues for early resolution, narrow the issues, maintain relationships, and streamline the proceeding.

The insertion of a mediation window in the schedule at the start of the arbitration which forces the conversation to take place at an appropriate time as the arbitration proceeds counters the continued expressed concern of parties that to suggest mediation or the commencement of settlement discussions is a show of weakness which will damage their negotiating position. Indeed, in a recent sur-

EDNA SUSSMAN (www.sussmanadr.com) is a full-time arbitrator and mediator of complex commercial domestic and international disputes. She serves as chair of the New York International Arbitration Center and chair of the AAA-ICDR Foundation. She formerly served as chair of the New York State Bar Association Dispute Resolution Section and is Co-Editor-in-Chief of *Dispute Resolution Lawyer*.

vey of barriers to settlement over 60% of the respondents from both East and West geographies believed that “parties hesitating to make the first move toward settlement” is a “highly relevant/significant” barrier to achieving a resolution amicably.⁴ While to those who practice in jurisdictions where mediation is commonplace this may seem somewhat surprising, for jurisdictions where mediation is just beginning to emerge, as is the case in many countries, one can well imagine this to be a significant barrier. The mediation window resolves that obstacle.

When should the idea of a mediation window be raised?

The mediation window is ideally raised at the first conference with the parties. The discussion of the objectives for the mediation, a determination of the best timing for the mediation window and its structure will serve to develop a process most suitable and helpful for the particular dispute. The arbitrator may not be involved in the discussion, but it might be helpful to include the arbitrator as well in determining the correct timing for the mediation window.

The mediation window should be raised at the first conference with the parties because the point of the mediation window is to have it as an established step in the arbitration schedule so that the subject does not have to be raised by any party or even by the arbitrator. There may be points in time at which a party may wish to discuss mediation or settlement but feels constrained by its own perception that it would show weakness to raise it. And there may be points of time where a discussion of mediation would be propitious but is not a time that the arbitrator would feel comfortable making the suggestion because of the posture of the case at that time. The mediation window, although at a set time in the schedule, overcomes these impediments.

When should the mediation window be scheduled in the arbitration schedule?

When the mediation window should be set in the schedule should be determined based on the conversation with the parties. It will vary depending on the dispute. In cases where the facts and issues are known or can be easily identified it may occur early in the arbitration, even after the filing of the demand and the answer. In complex cases which require extensive investigation, the parties may feel they need more time before they are comfortable participating in a mediation.

There are advantages to an early mediation even in complex cases. A mediation set at an early stage will, of course, deliver greater cost savings and potentially find parties more flexible in their positions and not yet locked into their views of the case. Moreover, a good mediator can start the process at an early stage and if it proves to be too soon to achieve a settlement can continue to be

in touch with the parties as the arbitration progresses to achieve a resolution later.

Ultimately, a mediation is most likely to succeed at a time that the parties are able to realistically assess the relevant facts and legal principles, the likely outcome and what a reasonable compromise might be, and the likely expense in terms of legal costs and damage to reputation commercial relationships and other non-monetary factors. If it is concluded that conducting the mediation after the filing of the initial pleadings is too early, in a traditional international arbitration with two successive rounds of submissions, a mediation conducted after the first round of submissions may be optimal. In some cases, the parties may wish to wait until after the exchange of documents, but while they may then be better informed as to their position it will decrease the cost savings.

It is also possible to schedule several mediation windows as the parties can continually assess whether the moment is opportune for a mediation or settlement discussions.

Who should the mediator be?

Appointing the arbitrator with full knowledge of the issues in dispute as the mediator may be tempting as being most cost-effective and efficient. Whether this is a viable option depends on the jurisdiction of the seat, the likely jurisdictions of enforcement, and the applicable institutional rules. Such a process is accepted in some jurisdictions and not in others. In some jurisdictions, it may even be a basis for challenge or vacatur of an award. It is permissible in some jurisdictions if the parties enter into a comprehensive informed consent to such a procedure. It is permissible under some institutional rules and not others. But there are also significant practical concerns as to the efficacy and appropriateness of having the same individual serve in both capacities. Concerns relating to due process issues, the coercive effect of having the arbitrator serve as mediator, lack of candor in the mediation by the participants if they are addressing the arbitrator have been discussed. Accordingly, while it may be possible for the arbitrator to serve as the mediator depending on the jurisdiction governing the arbitration, the likely jurisdictions of enforcement and the applicable rules, the choice is generally to retain a different individual.

Does the arbitrator have authority to suggest consideration of a mediation window?

Arbitration is a creature of contract and the arbitration clause provides the scope of the arbitrator’s authority. While an arbitrator may not have the authority to require the parties to mediate, the inherent authority of the arbitrator to conduct the arbitration process and assist the parties in the resolution of their dispute encompasses the authority to make a suggestion to consider alternative dispute resolution mechanisms. Over half of the respon-

dents to the Mixed Mode Survey stated that they raised settlement as an option at the first conference with the parties and over half said they raised settlement as an option later in the arbitration process.

Indeed, institutional rules and guidelines expressly provide for such assistance to the parties. For example, Section 29 of the ICC Mediation Guidance Notes, specifically references a mediation window and states that “it may be appropriate for the arbitration to be stayed to allow time for conducting the mediation.” The ICC Rules Appendix IV provides that the arbitrator may inform the parties “that they are free to settle all or any or part of the dispute... through any form of amicable dispute resolution methods... such as, for example, mediation...” Swiss Rules Article 15(8) provides: “With the agreement of each of the parties, the arbitral tribunal may take steps to facilitate the settlement of the dispute before it.” German DIS Rules Section 32 provides: “At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute, or of individual issues in dispute.” UNCITRAL 2016 Notes on Organizing Arbitral Proceedings “In appropriate circumstances, the arbitral tribunal may raise the possibility of a settlement between the parties.” ICDR Article 5 provides “The administrator may invite the parties to mediate.”

How would a mediation window be specified in the first procedural order: sample clause?

If the mediation window is established as a pause in the arbitration proceedings it will simply be reflected in the schedule for the arbitration. If the mediation is

window is established to create the opportunity for the parties to consider mediation, the following clause may be considered for the first procedural order:

On the date set in the annexed schedule, the parties will meet and confer with respect to whether they would like to engage in a mediation or other settlement discussions with respect to this arbitration. The [institution name] will be glad to assist in this process. The Tribunal will not be part of any mediation or settlement discussions between the parties. The parties will not communicate to the Tribunal with respect to such mediation or settlement discussions, other than advising of any settlement. If a mediation is agreed by the parties it will be scheduled for an early date, so as not to jeopardize the hearing dates. No adjournment of the hearing date will be granted on the grounds that a mediation or settlement efforts are ongoing.

Conclusion

The scheduling of a mediation window offers a way to introduce the subject of mediation and settlement into the arbitration at an early juncture in a manner and at a time of unquestioned neutrality and impartiality. It reflects no position, preliminary or otherwise, on the merits, by any party or the arbitrators. Building the mediation window into the arbitration schedule will require a discussion of mediation or settlement and thus lead to a conversation which might not otherwise take place. All parties, whether the case settles or not, would benefit from at least considering the possibility. Offering a mediation window option would meet users’ preference for exploration of alternative dispute resolution modalities and for opportunities to discuss settlement during the arbitration.

APPENDIX A

SURVEY RESPONSES

1. Do you set a mediation window at the first conference that requires parties to consider mediation at a set time in the schedule? YES: 24%; NO: 76%

2. Do you schedule a mediation window at the first conference that builds a pause into the arbitration to allow the parties to try to mediate? YES: 12%; NO: 88%

3. Do you raise settlement as an option at the first conference? YES: 56%; NO: 44%

Endnotes

1. International Mediation Institute and CEDR, *Shaping the Future of International Dispute Resolution* at p. 22 (reporting on preferences expressed at the 2014 conference), available at <https://www.imimmediation.org/wp-content/uploads/2018/11/London-2014-Final-data.pdf>.
2. *Id.* at pp. 52-53
3. CEDR Rules for the Facilitation of Settlement in International Arbitration, Article 1(5).
4. Shahla Ali, *Barricades and Checkered Flags: An Empirical Examination of the Perceptions of Roadblocks and Facilitators of Settlement Among Practitioners in East Asia and the West*, 19 Pac. Rim L. and Pol’y J. 243 (2010). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569302.

The New Hague Judgments Convention

David P. Stewart

Experienced litigators know that winning a U.S. judgment against a foreign party is only part of the battle. Getting that judgment recognized and enforced abroad can be a challenge. The United States is currently party to no multilateral treaty requiring foreign courts to give effect to U.S. judgments in general - in contrast, for instance, to arbitral awards covered by the New York and Panama Conventions.¹

Indeed, none has existed—until now. This past summer, the Hague Conference on Private International Law achieved a long-sought goal by adopting a new multilateral Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (“Judgments Convention” or “Convention”).² The Convention commits Contracting States to recognize and enforce civil and commercial judgments rendered by the courts of other Contracting States, and to do so without a substantive review of the merits of the underlying dispute.

The Convention applies only to judgments in “civil or commercial matters.”³ That critical term is not defined but is likely to be given a broad interpretation. At the same time, the Convention specifically excludes a number of substantive areas such as “revenue, customs or administrative matters,” “arbitration and related proceedings,” maintenance and family law matters, wills and successions, insolvency, carriage of passengers, trans-border marine pollution, liability for nuclear damage, defamation, privacy, intellectual property, law enforcement activities and certain antitrust matters.⁴

The term “judgment” is defined broadly to include “any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses of the proceedings by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention.”⁵

Article 4 contains the Convention’s core obligation. It provides that “[a] judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) . . . Recognition or enforcement may be refused only on the grounds specified in this Convention . . . There shall be no review of the merits of the judgment in the requested State.”⁶

This obligation, however, extends only to judgments that (for purposes of recognition) have “effect in the State of origin” and (for enforcement purposes) are “enforceable in the State of origin.”⁷ Recognition may be postponed or refused if the judgment in question is “the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired.”⁸

Although the Convention does not speak directly to the legitimacy of the jurisdictional basis (or bases) on which the “rendering” court adjudicated the underlying dispute itself, judgments are eligible for recognition and enforcement under the Convention if they meet at least one of the jurisdictional tests specified in Article 5(1). Broadly described, these “filters” limit a Contracting State’s obligations to judgments in which either:

- (1) some connection existed between the state of origin and the defendant—for example, where the judgment debtor was habitually resident, had its principal place of business, or maintained a branch or agency;
- (2) the defendant had expressly consented to the court’s jurisdiction in the course of the proceedings, or the court had been designated by an agreement “other than an exclusive choice of court agreement;”⁹ or
- (3) a connection existed between the claim and the state of origin, such as when the judgment was given by the court in which the contractual obligation took place (or should have).

DAVID P. STEWART (stewartd@law.georgetown.edu), Professor from Practice, Georgetown University Law Center, Washington D.C. The author attended the Diplomatic Session at which the Convention was adopted, as an observer on behalf of the International Law Association. This summary is based upon “Current Development: The Hague Conference Adopts a New Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters,” 113 Am. J. Int’l L. 772 (October 2019).

Article 7 specifies a number of defenses and exceptions to recognition and enforcement, including

- improper service of the documents instituting the proceeding,
- failure to notify the defendant in a timely and sufficient manner,
- the judgment has been obtained by fraud,
- recognition or enforcement would be “manifestly incompatible with the public policy of the requested State,”
- the proceedings were contrary to an agreement “under which the dispute in question was to be determined” in the courts of a different State,
- the judgment is inconsistent with an earlier judgment given by a court in the requested State between the same parties, or
- the judgment is inconsistent with an earlier judgment given by the court of another state in a dispute between the same parties on the same subject matter, if that earlier judgment fulfills “the conditions necessary for its recognition or enforcement in the requested State.”¹⁰

These grounds are exhaustive, in that recognition and enforcement may be refused only on the basis of the enumerated grounds. They are also discretionary, since courts of the Contracting State “may” (but need not) refuse recognition and enforcement based on any one of them.¹¹

Article 13(2) effectively excludes *forum non conveniens* objections by providing that recognition and enforcement may not be refused on the ground that it “should be sought in another State.”

In what may turn out to be a significant restriction from the perspective of plaintiffs with substantial U.S. judgments, Article 10 permits a court to refuse recognition or enforcement “if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.”¹² This provision reflects, of course, a significant difference in legislative policy and judicial practice between the United States and many other jurisdictions around the world.

In common with other private international law conventions adopted by the Hague Conference, Article 20 provides that “[i]n the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.” Accordingly, the courts of one Contracting State should take into consideration (although are not necessarily bound by) relevant decisions of the courts of other Contracting

States with respect to the interpretation and effect of the Convention.

One unique feature permits Contracting States to “bilateralize” the treaty by excluding treaty relations with one or more other Contracting States.¹³ This provision reflected a concern shared by some negotiators that Contracting States might be obligated to recognize and enforce judgments from other states whose legal systems were deemed likely to produce biased, unprincipled, or defective judgments. Rather than trying to agree on the substantive standards for making such decisions, or forcing courts to rely on the “manifestly incompatible with the public policy” exception to the obligation to recognize and enforce, the negotiators accepted this limited “opt out” mechanism as a point of compromise.¹⁴

The new Convention is detailed, complicated, and full of contingencies and compromises. It is intended to promote trade and commerce by enhancing certainty and predictability and reducing transactional and litigation costs in cross-border civil and commercial matters. Whether it will succeed depends, of course, on how quickly and widely it is ratified and on the willingness of domestic courts to interpret and implement its provisions in a broad pro-enforcement spirit. It is certainly much too early to predict whether it will have as significant an impact as the New York Convention has had over the past sixty years.

Prospects for U.S. adherence are more difficult to judge. Because U.S. judgments tend to receive less favorable treatment in foreign courts than foreign judgments do in U.S. courts, the Convention regime would seem beneficial to U.S. judgment holders, even taking into account limitations such as the exclusion of non-compensatory (exemplary or punitive) damages. One might expect support—perhaps even enthusiasm—from the U.S. business and legal communities.¹⁵

However, the general process of treaty ratification in the United States has moved slowly in recent years, and depending on how the issue of domestic implementation of the Convention is approached, adherence could face some challenges. In the United States, the recognition and enforcement of foreign country judgments today remains primarily a matter of state law.¹⁶ To be sure, a significant majority of states have adopted either the 1962 Uniform Foreign Money Judgments Recognition Act or the 2005 Uniform Foreign-Country Money Judgments Recognition Act.¹⁷ A careful comparison of the Convention’s requirements in light of this uniform approach will be required.

If ratified, the Convention would become part of the Supreme Law of the Land.¹⁸ A major consideration will be how to ensure consistent interpretation and application of the Convention throughout the U.S. judicial system (at the state as well as federal levels). One might anticipate some hesitation to entirely “federalizing” recognition and enforcement of foreign judgments in the United States. At

the same time, leaving the Convention's interpretation and implementation entirely in the hands of the state courts and legislatures, without federal coordination, could lead to discordant results and, in the worst case, possible inconsistencies with U.S. treaty obligations that the federal government would have limited or no ability to remedy. Some form of joint or coordinated implementation involving both the federal and state governments would seem a logical approach.

Similar considerations have to date frustrated U.S. adherence to the 2005 Hague Choice of Court Convention and led to a significant debate over the practicality of implementing that treaty (and other private international law instruments) on the basis of "cooperative federalism."¹⁹ Yet the problems are not insoluble. Both the 2005 Convention and the 2019 Judgments Convention have the clear potential to benefit U.S. interests, including both those of the business and commercial communities and the federal and state judiciaries. One possibility would be to take up the domestic implementation of both instruments at the same time, perhaps in conjunction with consideration of the new UN Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention"), signed by the United States on July 8, 2019.²⁰

Endnotes

1. UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 UST 2517, 330 UNTS 3; Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, TIAS 90-102, Pub. L. No. 101-369, 104 Stat. 448 (1990). The 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, to which the United States became a party in 2016, imposes obligations to recognize and enforce foreign spousal support orders. See 2008 Uniform Interstate Family Support Act, enacted in New York by the Family Court Act, §§ 580-701 *et seq.*
2. The text of the 2019 Judgments Convention can be found on the Hague Conference website at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137>.
3. Judgments Convention, art. 1(1).
4. Art. 1(1), (2) and (3). The "antitrust exclusion" does not reach matters "where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State of origin." Art. 2(1)(p). In other words, judgments regarding those actions would be covered by the Convention.
5. Art. 3(1)(b). An interim measure of protection is not a judgment. *Id.*
6. Art. 4(1) and (2).
7. Art. 4(3).
8. Art. 4(4).
9. Art. 5(1). The "filter" applicable to non-exclusive choice of court agreements in Art. 5(1)(m) is intended to preserve the autonomy of the 2005 Convention on Choice of Court Agreements, which provides for recognition and enforcement in cases where parties have entered exclusive choice of court agreements. Otherwise,

a judgment of a court designated by an exclusive choice of court agreement might benefit from the present Convention. At the same time, such a judgment might benefit from the Convention if one of the other filters in Art. 5 is satisfied.

10. Art. 7(1)(a)-(f).
11. *Id.*
12. Art. 10(1). The "to the extent that" limitation suggests that the remainder of the judgment must be recognized and enforced.
13. Art. 29.
14. This notification may only be made either (i) by a new Contracting State when it deposits its instrument or (ii) by existing Contracting States with respect to a new Contracting State upon notification that the new state has deposited its instrument. Art. 29(2) and (4). Under Article 29(4), a Contracting State may withdraw a "no relations" notification at any time.
15. See, e.g., Louise Ellen Teitz, "Another Hague Judgments Convention? Bucking the Past to Provide for the Future," 29 Duke J. Comp. & Int'l L. 491 (2019); Sarah Coco, "The Value of a New Judgments Convention for U.S. Litigants," 94 N.Y.U. L. Rev. 1209 (2019).
16. See generally Ronald A. Brand, "The Continuing Evolution of U.S. Judgments Recognition Law," 55 COLUM. J. TRANSNAT'L L. 277 (2017). The main exception is the Securing the Protection of our Enduring and Established Constitutional Heritage Act, § 3(a), Aug. 10, 2010, Pub. L. 111-223, 124 Stat. 2380, codified at 28 U.S.C.A. § 4102 (the so-called "Speech Act").
17. Foreign Money Judgments Recognition Act, 1962, 13 ULA 26; Uniform Foreign-Country Money Judgments Recognition Act, pt. 11, July 2005, 13 ULA. See NY CPLR 5301-09.
18. U.S. Const. Art. VI, cl. 2.
19. See, e.g., Alexander Kamel, *Cooperative Federalism: A Viable Option for Implementing the Hague Convention on Choice of Court Agreements*, 102 GEO. L.J. 1821 (2014); Linda J. Silberman, *The Need for a Federal Statutory Approach to the Recognition and Enforcement of Foreign Country Judgments*, in FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM, ch. 5 (Paul B. Stephan ed., 26th Sokol Colloquium 2014); David P. Stewart, *Implementing the Hague Choice of Court Convention: The Argument in Favor of "Cooperative Federalism"*, in Stephan, *id.*, at ch. 8.
20. U.N. Convention on International Settlement Agreements Resulting from Mediation, done at New York, Dec. 20, 2018 (the "Singapore Convention on Mediation"), text available at https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements.

Good Faith and Relational Contracts in the U.K.

Patrick Green

Good faith in business dealings. Who would have thought that would be controversial? Yet, it appears to be, at least in English law, and this is an issue often faced by international arbitrators. There are two facets to this: first, the starkly different approaches to obligations of good faith in contractual relationships taken by common law and civil law systems; and secondly, English law lagging behind other common law jurisdictions.¹

This article argues that much of the supposed controversy evaporates, once the difference between the common law and civil law approaches is properly understood—seen through that prism, it is the controversy that is surprising, rather than the implication of obligations of good faith. The argument focuses on implied obligations of good faith to test and illustrate key aspects of the supposed controversy, as well as giving a brief overview of the gently incoming tide of implied good faith obligations, lapping on the shores of English law.

The philosophical difference

Whilst the common law generally remains loyal to the principles of freedom of contract and party autonomy, the philosophy of civil law systems tends to see obligations of good faith as a matter of “*ordre public*.” French law provides a useful example: on October 1, 2016, new provisions came into force in the French civil Code,² in many cases codifying developments in French law. Those provisions include Article 1104, which mandates that contracts must be negotiated, concluded and performed in good faith.³

By contrast, the common law typically finds the relevant obligations in the contract itself. In practice, this means either seeking to give expression to the agreement which the court finds the parties objectively intended to make or, where there is a default rule in some jurisdictions, usually allowing the parties to contract out of such obligations—not normally possible in civil law systems.

This fundamental philosophical difference between the common law and civil law systems is particularly helpful in understanding the issues which arise in common law jurisdictions and, particularly for this article, in English law. It informs the limits to the implication of obligations of good faith, as much as the basis for such implication.

Upholding or defeating freedom of contract?

The importance of the principle of freedom of contract, and the allied principles of party autonomy and contractual certainty, is well understood. Those principles (“the Principles”) have played an important part in the development of the common law. They have also been important in the express choice of law governing many international contracts. For many, they are seen as attractions of the common law, including English law.

Historically, English law has been said to be hostile to any implication of obligations of good faith which the parties have not expressly set out in their agreement, on the basis that this is antithetical to the Principles. For several reasons, that suggestion may be misplaced, as recent developments in English law might be said to show.

In short, there is nothing new about implying terms in English law, provided they meet the well-established tests for doing so; nor is there any controversy that the court’s task when construing a contract is to ascertain the *objective* rather than *subjective* intentions of the parties.

An argument can be made that both of those exercises the cut across freedom of contract, party autonomy and contractual certainty. However, the better view may be that both of those tasks are necessary to give expression to parties’ bargain—so, on balance, more upholding than defeating both the bargain and the Principles.

PATRICK GREEN QC (PGreenQC@hendersonchambers.co.uk) is a barrister at Henderson Chambers in London. He appeared for the successful claimants in *Bates v. Post Office*.

The incoming tide

Many commentators regard the decision of Leggatt J (as he then was) in the case of *Yam Seng Pte Ltd v International Trade Corp Ltd*⁴ as the seminal judgment from which a wave of other cases follow. In that case, the judge held at § 131 that there was no difficulty in implying a duty of good faith into a commercial contract “based on the presumed intention of the parties” perhaps more readily where the contract concerned may be described as “a relational contract”, noting at § 142, that such contracts may:

... involve a longer term relationship between the parties [in] which they make a substantial commitment. Such ‘relational’ contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties’ understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long-term distributorship agreements ...

The judge then explained the good faith standard by reference to what was commercially acceptable by reasonable and honest people, at § 144:

... The test of good faith is objective in the sense that it depends not on either party’s perception of whether particular conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people ...

Leggatt LJ (as he now is) has lectured extrajudicially regarding both relational contracts⁵ and obligations to negotiate in good faith within the framework of ongoing contractual relationships,⁶ and I commend those speeches for their authoritative and detailed discussion. Standing back for a moment, what emerges from those articles read together, is an insightful appraisal of the development of the common law which is necessary to the essential functioning of modern commerce and a principled basis upon which contractual relationships are understood to be less brittle, more able to accommodate changing circumstances and therefore more loyal to the purpose and success of the bargain, as objectively ascertained.

In the waves of subsequent cases, it is fair to say there has not been an unqualified chorus of support and, indeed, there has been the odd ripple of disapproval. However, on careful analysis, much of the supposed op-

position to Leggatt LJ’s approach above is more imagined than real, for three reasons.

First, in *Yam Seng*, the judge made it clear that English law had not reached the stage at which it was ready to recognize a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Some objections overlook this important preface to the analysis of when, on established principles, such a requirement may properly be implied. It would be odd if, subject to this preface, other obligations could be implied into contracts on conventional principles, but obligations of good faith could not – leaving the right to perform a contract in bad faith uniquely privileged in the pantheon of contractual freedoms.

Second, the common law approach, reflected in the Principles above, not only explains the scope for implying obligations of good faith but also provides a clear framework for the limits to doing so, namely respecting provisions which parties have expressly chosen to include which preclude any such implication. So, a proper understanding of the rationale behind the implication of obligations of good faith makes clear that none of the Principles is threatened and the parties remain free to make such provision for their obligations as they may choose.

Third, some of the more cautious judicial observations in subsequent cases must be read in the context of the arguments which were being advanced to the court by the parties. Some of the more “ambitious” arguments in favor of implied obligations of good faith have not exactly helped to show how narrow the margin is between the high tide mark of judicial support and the low tide mark. What is clear (at least from the commentator’s perspective) is that arguments asserting the need to imply obligations of good faith require particularly careful formulation and attempts at wild overreach by advocates are likely to be counterproductive.

Bates v. Post Office

One recent judgment which explored the authorities in some detail is *Bates and others v. Post Office Ltd (No.3)*,⁷ which determined the legal relationship between the government-owned company Post Office Limited and the individuals who owned and ran local Post Office branches up and down the UK. The judge made an extensive review of the cases in order to determine, first, that ‘relational contracts’ were a category of contract recognized by English law (esp. at § 705) and, second, what the relevant characteristics of such contracts might be (at § 725):

1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.
2. The contract will be a long-term one, with the mutual intention of the par-

ties being that there will be a long-term relationship.

3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.

4. The parties will be committed to collaborating with one another in the performance of the contract.

5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.

acknowledged that obligations of good faith *might be more readily implied* in relational contracts, whereas in *Bates* the judge effectively treated the relational contracts as being confined to (or defined by) those into which some obligations of good faith *will be implied*, if otherwise not provided for. It might be said that the latter approach (in *Bates*) provides greater clarity and is easier to apply.

Parties are free to contract as they wish, but the English courts appear more ready to hold that they agreed to deal with each other in good faith. And, as Leggatt LJ said in his 2016 lecture to the Commercial Bar Association, “. . . since *Yam Seng*, the tide in the common law world has continued to flow in the same direction.”

“Parties are free to contract as they wish, but the English courts appear more ready to hold that they agreed to deal with each other in good faith.”

6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.

7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.

8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.

9. Exclusivity of the relationship may also be present.

Endnotes

1. Cf. for example, the Uniform Commercial Code in the United States (at § 1-304) and the U.S. Restatement (Second) of Contracts (at § 205) which make provision for obligations of good faith.
2. Order No. 2016-131 of February 10, 2016.
3. “Les contrats doivent être négociés, formés et exécutés de bonne foi. Cette disposition est d’ordre public.”
4. [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321, [2013] Bus LR D53.
5. “Contractual Duties of Good Faith,” Mr Justice Leggatt, Lecture to the Commercial Bar Association on 18 October 2016, <https://www.judiciary.uk/wp-content/uploads/2016/10/mr-justice-leggatt-lecture-contractual-duties-of-faith.pdf>.
6. Jill Poole Memorial Lecture 2018 <https://www.judiciary.uk/wp-content/uploads/2018/10/leggatt-jill-poole-memorial-lecture-2018.pdf>.
7. [2019] EWHC 606 (QB) – <https://www.bailii.org/ew/cases/EWHC/QB/2019/606.html#para702>.

On the facts, including the long-term commitments made by the individuals and perhaps to a lesser extent by the Post Office, the judge held the contracts to be relational contracts into which obligations of good faith, transparency and fair dealing would be implied. The Post Office’s application for permission to appeal was dismissed. This case has perhaps been the most high-profile case in which the characteristics of relational contracts has been examined and applied and is likely to be cited extensively in future. One particular feature of this judgment is that, in prior cases (e.g. *Yam Seng*) the courts has

Reflections on the Principle of Good Faith: Variants, Derivatives and Related Issues in MENA Region Jurisdictions

Mohamed S. Abdel Wahab

Introduction

International arbitrators and practitioners are asked to apply the law of many different jurisdictions, both common law and civil law. While there is considerable confluence with respect to some principles of law across jurisdictions, the question of the application of good faith varies depending on the governing law and requires that arbitrators familiarize themselves with the principles of good faith under the specific applicable law, without any preconceptions as to the validity of arguments based on those principles.

Good faith is generally a sacrosanct overarching principle that governs contractual dealings in Arab countries in the MENA (Middle East and North Africa) region. Various commonalities exist amongst Arab legal systems throughout the MENA region, due to, *inter alia*: (i) these legal systems being civil law based; (ii) the Egyptian legal system being a model that helped shape the laws of many jurisdictions within the region and contributed to the development thereof through Egyptian doctrine and jurisprudence; and (iii) Islamic *Shari'a* being a source of law, whether by express or implied reference in any constitutional or legislative texts.

It is worth emphasizing that many Arab laws have been heavily influenced by the Egyptian legal system. More specifically, the Egyptian legal system, which was originally based on and influenced by French law, has impacted and influenced, to varying degrees, the laws of Algeria, Bahrain, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia and the UAE. This influence is primarily due to the existence of a wealth of Egyptian doctrine and jurisprudence that are usually cited and relied upon by legal practitioners, scholars, and judges, in many MENA region countries.

In specific reference to good faith, which finds its roots in Islamic *Shari'a*, Egyptian law has helped shape its scope, bases and applications.¹ Good faith encompasses several duties and has many derivative obligations that generally span all phases of contractual dealings (from inception to execution).

The overarching principle of good faith and its variants and derivatives

Good faith and *pacta sunt servanda* (agreements must be kept) are not contradictory but rather complementary. It is undisputable and well-established that the contract makes the law of the parties, as per the fundamental principle of *pacta sunt servanda*. In accordance with the principle of *pacta sunt servanda*, the parties are bound to perform their contractual obligations in a manner consistent with the requirements of good faith. This may well involve construing and identifying the parties' common intention to ascertain the parties' reciprocal rights and obligations.

Good faith is intended to give effect to and properly uphold the parties' agreement (inclusive of its express and implied terms) and so it cannot generally contravene unambiguous express terms of the contract. It is frequently invoked in the context of contractual dealings and whenever disputes arise. However, not much attention is given to defining good faith and distilling its derivative obligations and particularizing its applications. Thus, it is necessary to establish what constitutes good faith in the context of contractual dealings.

The principle of good faith forms part of the Islamic *Shari'a* principles, where the principle of "*no harm and no reciprocated harm*" or "*no harm and no foul*" remains an unequivocal fundamental tenet. It entails the existence of a general sacrosanct duty to act in good faith and to avert any harm or prejudice, whether in a contractual relationship or beyond.

Since the beginning of their contractual relationship, the parties are expected to negotiate their contract in good faith.² During the negotiations phase, the parties shall disclose to each other in *transparency* and *sincerity* without any *dissimulation*, *concealment* or *hiding* all pertinent information that informs the parties' choices and decisions, insofar as such information is important for the purpose

PROF. DR. MOHAMED S. ABDEL WAHAB (MSW@zulficar-partners.com) is the Chair of Private International Law and Professor of International Arbitration, Cairo University. He is the founding partner and head of International Arbitration, Zulficar & Partners Law Firm (Egypt).

of contracting. Similarly, contracting parties are under a duty to exchange advice of and address risks so as to make an informed decision on the basis of good faith and fair dealing.³

In this respect, acting in good faith involves both acts and omissions (passive and active duties) and necessitates the absence of bad faith.⁴ Thus, good faith involves certain constraints and positives duties, which, *inter alia*, include:

- i. an obligation of cooperation amongst the party for the proper execution of a contract;⁵
- ii. an obligation to transparently disclose any matter or event that may impact or influence the performance of the contract;⁶
- iii. an implied obligation to avert any act or omission that may adversely impact the performance of the contract;⁷
- iv. an obligation to pursue the most suitable method of performance when there are two or more alternative methods;⁸
- v. an obligation to act reasonably and avert abuse of discretionary power or right(s);⁹
- vi. an obligation not to misrepresent any fact pertaining to the performance of the contract;¹⁰
- vii. an obligation to notify the other contracting party within a reasonable period of time;
- viii. an obligation to avert dilatory and surreptitious behaviour;
- ix. an obligation to act consistently with prudence¹¹ and observe commercial standards of dealing;¹²
- x. an obligation to act in accordance with the objective(s) of the contract and the justified [legitimate] expectations of the parties;
- xi. an obligation to avert deviation from the purpose the right was prescribed for¹³ (i.e. achievement of a serious and legitimate interest);¹⁴
- xii. an obligation to abandon strict adherence to a literal interpretation in case this leads to absurd results contrary to the spirit of the contract, its proper performance and the parties' common intention;
- xiii. an obligation to mitigate damage/harm if sustained by either party;
- xiv. an obligation to avoid any third party communications and dealings that jeopardize and/or adversely impact the existing contract;¹⁵ and
- xv. an obligation to avoid reaping the greatest advantage from the contract at the expense or to the detri-

ment of the other party by choosing to implement its right in a prejudicial way to its counterparty.¹⁶

The above constraints and duties are just examples and variants of the necessary sequels of the contract in view of the legal requirements of good faith, equity and customary practice. In other words, they could be implied into a contract, even if no explicit reference was made thereto, as they are necessary sequels of the duty to negotiate in good faith.¹⁷ This is also consistent with the proper implementation of the leading Islamic *Shari'a* principle of

“الجبعية الشرعية” (Ju'leyya Shar'iyya)

according to which the parties are bound by the duty of good faith and its variants, even if not explicitly mentioned in their agreement, as this represents the norms of *Allah* [God].¹⁸

That said, *estoppel* (in a civil law context) constitutes another important variant of the duty of good faith,¹⁹ where it is perceived as a general principle of law that bars a party from negating its actions or previous conduct. Estoppel is recognized in the civil law legal systems of the MENA countries and is applied by their courts. Simply put, no system or court could tolerate bad faith and “he who attempts to negate what has been maintained shall be precluded and estopped.”²⁰

Similarly, the doctrine of “abuse of right” qualifies as another variant of the prevailing principle of good faith, such that a person is not entitled to use his/her right in an abusive/illicit manner. A party that abuses his/her right when performing a contract would breach his/her duty to act in good faith and would also breach his/her obligation not to exercise his/her rights illicitly.

Various Arab laws provide legislative references to illustrious situations of abuse of right, where a right would be illicitly exercised if: (i) there exists an intention of aggression;²¹ (ii) the pursued interests are illegitimate;²² (iii) there is a disproportionality between the benefit(s) and prejudice(s) resulting from the exercise of the right;²³ and/or (iv) if the illicit/abusive usage of right goes beyond the standard dictated by customary and habitual practices.

By and large, from a legal perspective, and subject to burden of proof requirements, when a person fails to show the reasonableness of his/her conduct and such conduct unwarrantedly causes damage or harm to others, the exercise of the right becomes abusive/illicit and would be tantamount to a breach of an overarching duty of good faith.

Perceptions on the applications of the principle of good faith

It is often the case that the invocation of breaches of good faith are perceived as secondary and pleaded when all other arguments fail. This misconception has to some extent shaped unwarranted perceptions towards the application of good faith and created an unconscious bias against its application in some cases and by some tribunals who are not familiar with the scope, specificities and role of the principle of good faith as a sacrosanct principle that goes to the heart and core of contractual dealings and relations. The issue ought to be one of demonstrating and providing evidence of the breach of the requirements of good faith and not one that questions the very existence and importance of those requirements.

Good faith governs and is applicable to all contracts irrespective of their nature, sophistication and whether they warrant implication of terms or not. The application of the principle of good faith is not conditional upon the level of sophistication of a contract or upon the level of detail in certain provisions or lack thereof. Good faith applies to all contracts and dealings with varying degree depending on the alleged breaches and invoked events.

As mentioned herein above, the role of good faith is not to negate the expressed unambiguous terms of the contract (as reflective of the parties' common intention), but to give effect to the parties' dealing to ensure that it was entered into, construed and performed in good faith. Again, good faith and implied terms are distinct concepts but there is may be a connection between both, because good faith could indeed be a rich source of terms and conditions that need to be implied into a contract to give proper effect to the unambiguously expressed terms and the parties' common intention and envisaged purpose of the dealing.

Finally, courts/tribunals examining the merits of the case have the discretion and authority to ascertain the facts of the case and the role good faith may play in respect of the parties' positions on the disputed issues and what is gleaned from the circumstances and surroundings.²⁴

Conclusion

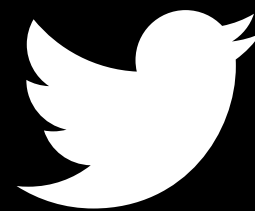
Good faith is a principle deeply rooted in the civil law systems of the MENA region and does indeed govern all aspects of the contractual relationship. Whilst its role is not to negate the unambiguous expressed terms of a contract, it remains a rich source of rights and obligations irrespective of the level of sophistication of a contract or of the contracting parties. Good faith does have variants and manifestations which ought to be considered by the

parties when making informed choices regarding their contracts (from inception to termination).

Despite being a fundamental sacrosanct tenet of the legal systems of Arab states within the MENA region, its very nature and scope militates against developing an all-encompassing definition of good faith. However, the variants and derivative rights and obligations discussed above offer considerable guidance on the application of good faith. This guidance may serve to dispel common misconceptions on the importance of good faith related arguments and their worthiness. The matter is often one of establishing and evidencing the breach of good faith and considering the remedies for such breaches, if and when established, and not disputing the very existence of good faith obligations and their variants.

Arbitrators not familiar with the scope and specificities of the principle of good faith and its variants and derivatives should avoid unconscious bias against its application. When deciding disputes subject to the laws of Arab countries within the MENA region, arbitrators ought to dispense with predispositions regarding the worthiness of good faith related claims and arguments and should carefully consider the matter in light of the factual matrix of the case, as well as the parties' pleaded cases, claims and requests for relief.

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Endnotes

1. See, for example, Article 148/1 Egyptian Civil Code (ECC) (1948), Article 107/1 Algerian Civil Code (1975), Article 129 Bahraini Civil Code (2001), Article 197 Kuwaiti Civil Code (1980), Article 148 Libyan Civil Code (1953), Article 172 Qatari Civil Code (2004), Article 149 Syrian Civil Code (1949), Article 202 Jordanian Civil Code (1976), Article 246 UAE Civil Code (1985), Article 231 Moroccan Code of Obligations and Contracts (1913), Article 221 Lebanese Code of Obligations and Contracts (1932) and Article 243 Tunisian Code Obligations and Contracts (1907).
2. See Ragab Karim, *Negotiating the Contract*, 1st ed., (2000 ed.), p. 416-417; also see Ramzy Rashad Abdel Rahman Sheikh, "The Consequences of Bad Faith in Bilateral Contracts in Civil Law," (2015 ed.), p. 65.
3. See Ragab Karim, *Negotiating the Contract*, 1st ed., (2000 ed.), pages 424, 426 and 428. In this regard, in the context of construction contracts, an arbitral tribunal has tackled good faith, essential mistake and fraudulent misrepresentation in the conclusion of the contract and stated that if one party knew of a mistake pertaining to the conclusion of the contract and refrained from communicating it to the other party, the former shall be deemed to be acting in bad faith. See Mohi-Eldin Ismail Alam-Eldin, *Construction Arbitral Awards Rendered under the Auspices of CRCICA*, Case No. 43/1995 dated 15 November 1995, p.228 et seq.
4. See Walid S. Morsey, *The Binding Power of a Contract and the Exceptions therewith: A Comparative Study between Islamic Jurisprudence and Civil Law* (2009), p.265.
5. This constitutes a variant of the duty to negotiate in good faith, such that a party has an obligation to negotiate and deal with the other party in a spirit of cooperation and goodwill. See Ragab Karim, *Negotiating the Contract*, 1st ed., (2000 ed.), p. 445-446.
6. This obligation is an extension of the duty to negotiate in transparency and offer advice derived from the Islamic *Shari'a* where a party shall enlighten [inform] the other party of the reality of the subject matter of negotiation and disclose its vices before its benefits. This has been emphasized by the Prophet Muhammad who respectfully said, "Muslims are brothers, and it is impermissible for a Muslim to deal in sale with his brother without informing him of the defects therein," and the Prophet's Hadeeth, "Religion requires giving advice." See Ragab Karim, *Negotiating the Contract*, 1st ed., (2000 ed.), p. 474-475.
7. More specifically, it is submitted that acting in good faith necessitates the consideration of honesty, moderation and care so that the performance of the contracts does not adversely impact the interests of the other party. See Soliman Morkos, *El Wafy in the Explanation of the Civil Law*, Vol. 2, 4th ed. (1987 ed.) p. 509.
8. For example, where a contractor has a choice to perform a task in simpler and more cost effective manner (without compromising on quality and standards) but chooses to engage in a more costly performance; and where a contractor is expected to connect the power cords from a nearby place, but elects to connect same from a farther place. See M.A. Bakry, *The Encyclopaedia of Doctrine, Judiciary, and Legislations in the New Civil Code*, Vol. 2 (1985), p. 622.
9. See Egyptian Court of Cassation, Challenge No. 3473 of Judicial Year 75, Hearing Session dated 27 April 2006.
10. Under Egyptian law, a party who had committed, in the performance of the contract, an act of willful misconduct or fraud is considered to be acting in bad faith. See Anwar Tolba, *Explanation of Civil Law*, Vol.1 (2010 ed.), p. 747.
11. See Tunisian Court of Cassation, Challenge No. 7461 of Judicial Year 2005, Hearing Session dated 4 April 2005.
12. See Soliman Morkos, *El Wafy in the Explanation of the Civil Law*, Vol. 2, 4th ed. (1987 ed.) p. 509.
13. See Egyptian Court of Cassation, Challenge No. 3473, Judicial Year 75, Hearing Session dated 27 April 2006.
14. See Mohamed Kamal Abdel Aziz, *The Civil Codification in Light of the Judiciary and Doctrine*, Vol. 1, (1985 ed.), p. 79-80.
15. See Egyptian Court of Cassation, Challenges No. 4726 and 4733 of Judicial Year 71, Hearing Session dated 15 April 2004.
16. By way of illustration, this would be the case of a contractor who chooses to perform its obligations by using unnecessary expensive material within its possession in order to dispose of same at the expense of the employer and to its detriment. See Soliman Morkos, *El Wafy in the Explanation of the Civil Law*, Vol. 2, 4th ed. (1987 ed.) p. 508.
17. See Ragab Karim, *Negotiating the Contract*, 1st ed., (2000 ed.), p. 423.
18. *Id*, p. 426.
19. It is worth noting that in civil law systems the legal principle of estoppel is not strictly the same as promissory estoppel in common law.
20. See, for example, Cairo Court of Appeal, Case No. 35, 41, 44 and 45 of Judicial Year 129, Hearing Session dated 5 February 2013; Omani Supreme Court, Challenge No. 68 of Judicial Year 2004, Hearing Session dated 19 December 2004; Kuwaiti Court of Cassation, Challenge No. 14 of Judicial Year 87, Hearing Session dated 16 November 1987; Saudi Court of Cassation, Civil Judgments, Challenge No. 84/2 of Judicial Year 1435, Hearing Session dated 8/6/1435 Hijri Year; see also the principle set by the Arbitral Award dated 17 May 2010, CRCICA Case No. 621, in *Journal of Arab Arbitration*, Vol. 14, June 2010, p. 224; and Case No. 310/2003 *Ad Hoc*, Extract from Final award dated 8 August 2005, cited by Mohi-Eldin Ismail Alam-Eldin, *Construction Arbitral Awards Rendered Under the Auspices of CRCICA*, ed. 2010, p. 5.
21. This would be the case if a person's main intention is to inflict harm, even if his/her act or omission is associated with a secondary intention to achieve a benefit. See Al Sanhoury, *Al Wasit in the Explanation of the Civil Code*, Vol.2, (1998 ed.), p 758-759.
22. This denotes the absence of a legitimate and serious interest. See Mohamed Kamal Abdel Aziz, *The Civil Codification in light of the Judiciary and Doctrine*, Vol. 1, (1985 ed.), p. 79-80. In this respect, the prevailing views confirm that the provisions of the Islamic *Shari'a* may have a role to play in assessing the illicit nature of the pursued interest. Also see Mohamed Kamal Abdel Aziz, *The Civil Codification in Light of the Judiciary and Doctrine*, Vol. 1, (1985 ed.), p. 83, citing the Preparatory Works of the Egyptian Civil Code.
23. This is so whether the person who exercised the right was: (i) *recklessly inconsiderate of the damage others may suffer for the sake of a minor benefit*, or (ii) had a hidden intent to inflict harm under a pretext of a fictitious or minor benefit that is *clearly outweighed* by the damage sustained by another person. See Al Sanhoury, *Al Wasit in the Explanation of the Civil Code*, Vol.1, (2010 ed.), p. 760- 761.
24. See Egyptian Court of Cassation, Challenge No. 49 of Judicial Year 35, Hearing Session dated 4 February 1969.

Damages and Loss of a Chance or Loss of Opportunity

Herfried Wöss

Different approaches

The notion of loss of a chance or loss of opportunity is one of the least understood and controversial issues in comparative and international damages law. German law does not recognize it as it is not considered loss,¹ but courts would grant the compensation of wasted expenses.² CISG does not provide for the loss of a chance³ but interprets the notion of lost profits in a wide manner.

The recovery of loss of a chance is recognized under U.K. law as a form of loss of profits. Such chance may depend on contingencies including acts to be performed by third parties or the defendant. The question is whether the profits would have occurred, on the basis of probability. If the answer is yes, then lost profits are awarded on a pro rata basis consistent with the likelihood of such losses.⁴ Under French law, the *perte d'une chance* or loss of a chance is considered damage. The extent of damages depends upon the probability that the chance would have led to the desired result, which is to be resolved according to the discretion of the court. In order to obtain damages under the heading of loss of a chance, two requirements have to be met: (a) the probability of the realization of a profit, and (b) establishing the amount of such profit.⁵

Under the UNIDROIT Principles of International Commercial Contracts (PICC 2016), when lost profits are uncertain with respect to quantum, they may be considered as *loss of a chance* according to the official comment number 2 to Article 7.4.2 (Full Compensation) PICC. Article 7.4.3 (Certainty of Harm), reads in its paragraph (2): Compensation may be due for the loss of a chance in proportion to the probability of its occurrence. Arbitral tribunals should not decline to award loss of profit or loss of a chance on the basis of the complexity of the case. In particular, the arbitral tribunal or court is entitled to 'make an equitable quantification of the harm sustained.'⁶

The importance of the contractual scope of expectation

Paragraph 3.16 of the CISG Advisory Council Opinion No. 6 on the 'Calculation of Damages under CISG Article 74' makes the following differentiation between loss of a chance or opportunity and lost profits:

The prohibition on damages for loss of chance or opportunity does not apply when the aggrieved party purposely enters into a contract in order to obtain a

chance of earning a profit. In such a case, the chance of profit is an asset, and when a party chooses to enter into a contract to obtain such a chance, the party is entitled to compensation when the promisor unjustifiably does not perform.

The arbitral tribunal in *Bridas v. Turkmenistan* made a similar statement when stating that there is 'a considerable difference between the loss of a specific contractual right and the loss of a general opportunity to trade in a speculative market'.⁷

The issue is whether income expectations are subject to an aleatory element ('*alea*' or a game of chance under Roman law) related to the performance of a contract such as in games or public tenders, which depend on external circumstances not controlled by the parties. In those cases, damages would be limited to the pro rata probability of obtaining the profits where allowed under the applicable law. Income expectations deriving from contractual obligations, even when subject to contingencies, should not be considered loss of a chance, but as lost profits, as contingencies refer to situations that can be overcome by the parties and that merely increase the risk that the profits expected will occur.⁸

From a practical perspective, the key issue is the contractual scope of expectation. In this respect, a distinction has to be made between typical bilateral sales and works contracts and income generating contracts or *synallagmatic triallagmas*.⁹ In the former, goods or services are exchanged for money. Profits are often achieved in subsequent sales or transactions. For example, in case

DR. HERFRIED WÖSS is an international arbitrator domiciled in Mexico City and Vienna's Palais Aurora and licensed as Special Legal Consultant in Washington D.C. He is an arbitrator, party counsel, expert adjudicator and damages consultant with respect to gas pipelines, aqueducts, power plants, oil platforms and energy tariffs. He is the author of an international damages doctrine for income-generating contracts and investments developed in the Oxford University Press monograph *Damages in International Arbitration under Complex Long-term Contracts* (2014) and subsequent publications cited in commercial and investment arbitration awards.

of a turn-key construction contract of a carton freezer between a meat company and a freezing technology firm the specifications required that pork meat was frozen to -18°C within 24 hours. At testing it turned out that only 12% of the meat boxes met the specifications which meant that the carton freezer was useless as for sanitary reasons 100% of the meat boxes had to be properly frozen in order to be exported to Japan.

In that case, the meat company had already entered into a long-term supply contract with a Japanese buyer that paid a higher price for premium pork meat than the one prevailing in the country of export. The profits made from the pork business were made under the subsequent supply contract with the Japanese buyer and not under the original turn-key construction contract. The profits lost due to the non-functioning carton freezer are, therefore, consequential damages, and are normally foreseeable under applicable theories of foreseeability (U.S., France, CISG, PICC), remoteness (UK) and adequacy (Germany, Austria). This means that the lost profits may be recovered. In particular, those lost profits are not a loss of a chance as the meat company had already entered into a business relationship with its customers. There is no aleatory element. Even if the meat producer had not entered into a long-term supply agreement with a Japanese customer, the possibility of exporting to Japan would be a matter of proof and if such proof could not be delivered, the meat producer would not be awarded the higher profits arising from exports to Japan but perhaps lower lost profits based in the sales prices to existing and regular markets of the meat producer.

The loss of a chance theory has been raised in breach of contract claims in the U.S. with respect to the winning of a price. In *Miller v. Allstate Ins. Co.*, 573 So. 2d 24, 20 (Fla. Ct. App. 1990), the court stated that: "It is now an accepted principle of contract law, nonetheless, that recovery will be allowed where a plaintiff has been deprived of an opportunity or chance to gain an award or profit even where damages are uncertain," referring to a case where the probability of obtaining the price could be calculated. For example, if there is a 50% probability of winning the price of \$100,000, compensation would be \$50,000.00.¹⁰ However, most loss of a chance cases in the U.S. are limited to medical malpractice or professional liability and price competitions and not commercial disputes.¹¹

With respect to public tenders, a differentiation has to be made where the award to a bidder, among several bidders that have met the bidding requirements, is a matter of the chance of winning the bid, or when the award is the consequence of decisions on the bid which do not give rise to an aleatory element. The latter situation would apply when a bidder would have won a public tender, if it had not been excluded from the tender in violation of the bidding guidelines, as it made the best offer and had met all conditions and requirements under the bidding guidelines. This was actually the case of the

judgment of the Upper State Court of Saarbrücken of 24 February 2016 (1 U 60/15) which ordered a municipality to pay lost profits to the illegally excluded bidder.¹² In this case, the question of loss of a chance did not arise as chance or alea did not play a role but the analysis was made under the heading of lost profits.

The situation is different with so-called income generating contracts or synallagmatic triallagmas where the issue of loss of a chance does not even arise. In income generating contracts or investments the parties contribute assets to the common undertaking and there is no exchange of goods and services for money but a partnership-like relationship. The income-stream comes from third parties, normally other market participants. For example, the State grants a 25-year concession to a consortium that builds and operates a toll highway. The non-performance of the concession agreement by one of the parties deprives the undertaking of the income stream which serves to amortize the investment and to generate a reasonable profit commensurate to the risks taken by the project company and the investors.

The generation of the income stream is the precise purpose of the income generating contract that is normally designed by project finance experts on the basis of a complex risk matrix.¹³ Income or cash flows lost because of the violation of the project agreement by one of the parties is direct and not consequential damages. The loss is caused by the impact of the breach on the income stream or the difference between the economic situation of the project company subject to the violation of the project agreement and the hypothetical situation without such breach which is measured by the so-called but-for premise often through the discounted cash flow method (DCF).

The project company does not have a chance to make profits, but the whole project is designed under the project agreement to produce income stream. The contractual scope of expectation is precisely the generation of income stream. There is no element of luck or alea and the issue of loss of a chance or loss of opportunity does not arise.

Conclusions

Lost profits may be considered as loss of a chance if there is an additional aleatory element which has to be favorable to achieve the income claimed and which is not directly foreseen or contemplated in the contract. Where the loss of a chance damages theory is viable under the applicable law, such damages are awarded according to the probability of the realization of income. Loss of a chance is often confused with lost profits that are subject to risks either based on subsequent contractual relationships or in long-term income generating contracts. In case of the former, the issue is one of the applicable doctrine of foreseeability and a matter of proof. As regards the latter, the generation of income is the very purpose of income generating contracts and foreseeability does not play a

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Removing an Arbitrator for Undue Delay

Douglas F. Harrison

Speed is often cited as a major benefit of arbitration over litigation for international disputes. Yet it is not uncommon for an international arbitration to be slowed down, because counsel are busy, expert reports take longer than expected, or parties employ tactics to avoid a day of reckoning. Arbitrators can also be a source of delay. In order to head off undue delay, many arbitral institutions have implemented measures to ensure arbitrators remain available to handle their cases, or meet required deadlines. However, when arbitrators' delay becomes inordinate or unbearable, a party might seek their removal.

While the U.S. Federal Arbitration Act¹ does not provide for the removal of an arbitrator before an award is made,² the UNCITRAL Model Law does, as do the provisions of arbitration laws in other jurisdictions such as England³ and the rules of leading arbitral institutions.

Article 14(1) of the UNCITRAL Model Law provides for the removal of an arbitrator for an inability to perform arbitral functions or for undue delay. It states:

If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

The Model Law or legislation based on it has been adopted in 80 countries in a total of 111 jurisdictions,⁴ including California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon and Texas.

Section 24(1)(d)(ii) of the English Arbitration Act of 1996 permits the court to remove an arbitrator who has "refused or failed ... to use all reasonable despatch in concluding the proceeding or making an award ... [provided] that substantial injustice has been or will be caused to the applicant."⁵

Article 12(3) of the 2010 UNCITRAL Arbitration Rules, commonly employed in *ad hoc* international arbitrations, provides for the termination of an arbitrator's mandate in the event that the arbitrator "fails to act."⁶

Similarly, the rules of the major international arbitration institutions, including the International Centre for Dispute Resolution (ICDR),⁷ the International Institute for Conflict Prevention & Resolution (CPR),⁸ the International Chamber of Commerce (ICC),⁹ the London Court of International Arbitration (LCIA)¹⁰ and many others,¹¹ allow the institution to terminate an arbitrator's mandate for delay where the delay amounts to a failure to perform the arbitrator's duties, including being available for the proceeding and devoting sufficient time to it.

Where courts have been asked to address the issue, they have consistently emphasized that removal of an arbitrator should be viewed as a remedy of last resort.¹² Not surprisingly, there have been few successful applications to remove an arbitrator for delay. As noted by the authors Mustill and Boyd, since an arbitrator will usually have notice that a party is considering such a move, most "will readily take the hint" and either get on with the matter or tender their resignation.¹³

"Undue delay" in the context of an arbitration has been held by a Canadian court to be a delay that is "excessive and in violation of propriety or fitness."¹⁴ However, delay has to be considered in relation to the case at hand.¹⁵ An arbitration based only on documents would normally be expected to take far less time to conclude than one with numerous witnesses, extensive productions, and expert opinions.

Courts are not meant to be policing alleged arbitral inefficiency. The question is whether an arbitration is "moving along, not whether the conduct of the proceedings is wise and efficacious."¹⁶ Indeed, a Singapore High Court judge has cautioned that "an arbitrator who moves the proceedings along at a breakneck speed may well be accused of misconduct in subordinating fairness to

DOUGLAS F. HARRISON is an independent arbitrator and mediator based in Toronto, Ontario, Canada, and was formerly a litigation partner with Stikeman Elliott LLP. He is a Fellow of the Chartered Institute of Arbitrators, as well as a member of the International Arbitration Institute and the Executive Committee of the Toronto Commercial Arbitration Society, and a Co-Chair of the University Tribunal of the University of Toronto.

speed.”¹⁷ By the same token, the California Court of Appeal has held that delays that are not attributable to the arbitrator cannot amount to a “failure to act” on the part of the arbitrator.¹⁸ Meanwhile, the English Court of Appeal held that an arbitrator’s duty to proceed “diligently” does not entail a duty to be available for specific hearing dates, only to be available at such times as may reasonably be necessary “having regard to all the circumstances including the exigencies of their own practices.”¹⁹

The authors of the U.N. Analytical Commentary on the Model Law listed some considerations that may be relevant when determining whether an arbitrator has failed to act:

What action was expected or required of the arbitrator in light of the arbitration agreement and the specific procedural situation?

If the arbitrator has done what was expected or required, has the delay been “so inordinate” that it is “unacceptable” in light of the circumstances, including “technical difficulties” and the “complexity” of the case?

If the arbitrator has done what was expected or required, did the arbitrator’s conduct “fall clearly below” the standard of what “may reasonably be expected” from an arbitrator? Determinations of what may reasonably be expected from an arbitrator in a particular arbitration turn on (i) the arbitrator’s ability to “function efficiently and expeditiously” and (ii) any specific competence or qualifications that the parties have agreed are required for the arbitrator.²⁰

Other factors important in considering whether to remove an arbitrator for delay include the time and expense of recommencing the arbitration with a new arbitrator, the extent to which the proceeding’s complexity or duration has exceeded the parties’ expectations, any warnings the arbitrator gave about their availability, and who nominated them.²¹

How Courts and Arbitral Institutions Have Handled Requests to Remove Arbitrators for Delay

The Australian Federal Court was asked to remove two arbitrators for undue delay under the UNCITRAL Model Law after they chose to defer consideration of jurisdictional issues until the hearing of the arbitration.²² Edelman J. rejected this challenge on three grounds:

The question of a failure to act without undue delay had to be considered in the context of the arbitration as a whole. A thorough review of the chronology of the arbitration did not reveal undue delay; the true situation was “rather the contrary,” especially in light of the fact that

the applicant was also arguing that the tribunal had acted with undue haste in making certain procedural decisions.

A decision to defer considering a jurisdictional issue until the hearing does not involve undue delay within Article 14. The intention of Article 14 was not to have a court second-guess a tribunal on what amounts to a case management decision.

The decision the tribunal made in this instance was within the bounds of appropriate discretion, and was actually the most appropriate decision to make as it was an “efficient and effective” way of getting the matter to a hearing.

In 1998, the Hong Kong High Court removed an arbitrator who was 16 months late in delivering an award.²³ The arbitrator’s principal reason for the delay was his other commitments, which the judge found to be an inadequate explanation. Calling the matter a “sorry tale of delay,” Mr. Justice Findlay said that if he had delayed making a decision as this arbitrator did, “I would be thoroughly ashamed and deserving of being roundly criticised.” Similarly, in 2007 an Alberta court found that being 33 months late with an award was not a “reasonable delay due to unforeseen circumstances” and terminated the arbitrator’s mandate.²⁴

Notably, section 24(1)(d)(ii) of the English Arbitration Act of 1996 requires that before removing an arbitrator, the court must be satisfied that “substantial injustice has been or will be caused to the applicant.”²⁵ In the context of a delay in delivering an award, this means showing that but for the inordinate delay, the arbitrator “might well have reached a different conclusion more favourable to [the applicant].”²⁶ In a 2019 decision, a judge of the English High Court criticized, but did not remove, a tribunal for an “inordinate and unacceptable” delay of two years in rendering an award, as no “substantial injustice” had occurred.²⁷

The issue of what to do when arbitrators fail to abide by deadlines that are established by statute or agreement is related to removing arbitrators for delay. The Model Law is silent on this issue. Courts in Alberta, British Columbia, India and Singapore have held that a tribunal’s mandate is terminated when an award is not delivered within the agreed deadline and the parties do not consent to extend it.²⁸ In *Hasbro Inc. v. Catalyst USA Inc.*, the U.S. Seventh Circuit Court of Appeals did not vacate an untimely award where it found that time was not of the essence under the arbitration agreement, although it pointedly added that it did not condone the tribunal’s “substandard performance.”²⁹

The doctrine of *functus officio*, which refers to a tribunal’s completion of its mandate at the end of an arbitral proceeding, is distinguished from an arbitrator’s premature resignation or removal that terminates his

mandate before it is completed, although the proceedings continue.³⁰ A loss of a tribunal's jurisdiction due to the expiry of a time limit for the delivery of an award would not strictly be considered a matter of *functus officio* as the tribunal will not have adjudicated upon the issues submitted and the parties can seek to have the dispute arbitrated by another tribunal, absent some intervening issue such as an expired limitation period. However, at least one commentator has suggested that the expiry of a time period by when a tribunal was required to render an award would mean that "no later award is possible, the tribunal being *functus officio*."³¹

In considering a request to remove a tribunal under the UNCITRAL Arbitration Rules, the Secretary-General of the Permanent Court of Arbitration held that he must (a) be satisfied that they had continuously neglected their duties, (b) take into account their overall conduct, and (c) find, on an objective basis, that their conduct fell clearly below the standard of what may reasonably be expected from an arbitrator. In ultimately rejecting the challenge, the Secretary-General said that the third ground can be made out only in "exceptional and serious circumstances." The Secretary-General also cited Dutch law, which required a demonstration of "serious indifference" on the part of the tribunal.³²

In August 1991 at the Iran-United States Claims Tribunal, which had largely adopted the 1976 UNCITRAL Arbitration Rules for its procedure, Iran challenged one of the arbitrators, Judge Arangio-Ruiz, alleging he had neglected his duties, which thereby constituted a failure to act. The challenge was dismissed by the Appointing Authority on the basis that Judge Arangio-Ruiz had not "consciously neglected his arbitral duties in such a way that his overall conduct fell clearly below the standard of what may be reasonably expected of an arbitrator and chairman."³³

Examples of arbitral institutions removing arbitrators for delay are rare. In 2014, the ICC handled two cases in which the arbitrator was challenged for undue delay. In one instance, the ICC Court opted to extend the applicable time limits. In the other, the chair of the tribunal was replaced for excessive delay in preparing Terms of Reference and in responding to the parties and the Secretariat. The ICC Court justified his removal on the basis that "his management of the case was unlikely to improve in the future."³⁴ The Secretariat of the ICC Court considers the removal of an arbitrator for delay to be "a very delicate matter", and the ICC Court will look ahead rather than backwards when considering what is in the parties' best interests. Its preference is always to "continue exerting pressure on the existing arbitrator" rather than replacement.³⁵

The LCIA Court rejected a 1998 challenge of an arbitrator for lack of diligence on the basis that the complaint amounted to a criticism of the arbitrator's third interim award.³⁶ In 2011, the LCIA Court rejected two challenges

for lack of diligence and in 2016 it rejected one, finding in one case that the complaint was unsustainable because in fact the tribunal had acted with "complete diligence",³⁷ in another that the challenge amounted to little more than a vague allegation of dilatoriness,³⁸ and in the third that the challenge was untimely.³⁹

Taking Measures at the Time of Appointment to Avoid Future Delays

Arbitral delay can of course be avoided if arbitrators do not overextend themselves. Jan Paulsson has written that it is "dishonest to accept appointment without ... a considered commitment to give the matter full and timely attention."⁴⁰ The International Bar Association's 1987 Rules of Ethics for International Arbitrators state that a "prospective arbitrator should accept an appointment only if he is able to give to the arbitration the time and attention which the parties are reasonably entitled to expect."⁴¹

As mentioned above, many arbitral institutions have implemented measures in recent years to ensure arbitrators will be available to deal with the cases they take on, or to ensure that they meet the required deadlines to move the case along toward an award.⁴²

For example, under the 2017 ICC Arbitration Rules, at the time of acceptance of a mandate, an arbitrator must positively confirm, on the basis of the information presently available, that the arbitrator can "devote the time necessary to conduct this arbitration throughout the entire duration of the case as diligently, efficiently and expeditiously as possible in accordance with the time limits in the Rules, subject to any extensions granted by the Court."⁴³ Arbitrators must also disclose the number of arbitrations in which they are currently involved either as arbitrator or counsel, and the number of litigation matters in which they are involved as counsel. In addition, since 2016 the ICC has had the discretion to reduce arbitrators' fees when draft awards are not submitted for scrutiny within three months after the last substantive hearing or the filing of the parties' last written submissions, whichever is later.⁴⁴ In June 2019, the ICC reported that the number of awards rendered three to six months late decreased from 52 in 2016 to 33 in 2018, and that awards delayed by seven months or more decreased from 18 in 2016 to 6 in 2018.⁴⁵

Article 5.4 of the 2014 LCIA Rules requires that candidates for arbitral appointments sign a written declaration stating whether they are "ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration."⁴⁶ Arbitrators who then fail to do so risk having their appointment revoked by the LCIA Court.⁴⁷

ICDR does not ask arbitrators to positively confirm their availability for a particular matter. However, ICDR panel members must commit to uphold the American

Arbitration Association's Code of Ethics for Arbitrators (2004), which states that a potential arbitrator should accept an appointment only if "fully satisfied" 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."⁴⁸

The Code of Professional and Ethical Conduct of the Chartered Institute of Arbitrators does not address availability at the time of appointment but states that a member "shall not unduly delay the completion of the dispute resolution process."⁴⁹ The Chartered Institute reserves the right to discipline members whose conduct amounts to "misconduct," which can include a "significant breach of ... the Code of Professional and Ethical Conduct."⁵⁰

Leaving aside any formal discipline, an arbitrator who fails to devote sufficient time to a proceeding risks not receiving any further appointments from a given institution or from the parties involved. In respect of the latter, Article 11 of the 2010 UNCITRAL Arbitration Rules sets out a Model Statement that can be requested from potential arbitrators, to confirm that they "can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules." Apart from encouraging arbitrators to remain diligent, such a statement could also form the basis of sanctions against an arbitrator who thereafter failed to perform.⁵¹

Endnotes

1. Title 9, U.S. Code, Section 1-14.
2. See American Law Institute, *Restatement of the Law, The U.S. Law of International Commercial and Investor-State Arbitration* (Proposed Final Draft) (Philadelphia, PA: The American Law Institute, 2019) at § 3.2(b), and at pp. 431, 434-435.
3. Arbitration Act 1995 (U.K.), c. 23, available at <https://www.legislation.gov.uk/ukpga/1996/23>.
4. https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.
5. *Supra* note 3.
6. <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf>.
7. See Article 14(4) of the ICDR International Arbitration Rules, available at https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf.
8. See Rule 7.10 of the 2019 CPR Rules for Administered Arbitration of International Disputes, available at <https://www.cpradr.org/resource-center/rules/international-other/arbitration/2019-international-administered-arbitration-rules>.
9. See Article 15(2) of the 2017 ICC Arbitration Rules, available at <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>.
10. See Article 10 of the 2014 LCIA Rules, available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx.
11. For example, the British Virgin Islands International Arbitration Centre, the Chartered Institute of Arbitrators, the Stockholm Chamber of Commerce, the Milan Chamber of Arbitration, the Vienna International Arbitration Centre, the Hong Kong International Arbitration Centre, the Singapore International Arbitration Centre, the Australian Centre for International Commercial Arbitration, and the Arbitrators' and Mediators' Institute of New Zealand, as well as the Court of Arbitration for Sport, the World Intellectual Property Organization and P.R.I.M.E. Finance. The arbitration rules of industry associations such as the Grain and Feed Trade Association also provide for terminating an arbitrator's mandate on account of a failure to act or undue delay.
12. *Succula Ltd. and Pomona Shipping Co. Ltd. v. Harland and Wolff Ltd.*, [1980] 2 Lloyd's Rep. 381 (Q.B. (Comm. Ct.)) at p. 388. See also *AOOT Kalmneft v. Glencore International AG*, [2001] EWHC QB 461 at paras. 7 and 96.
13. See Sir Michael J. Mustill & Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed. (London, UK: Butterworths, 1989) at p. 531, fn. 8.
14. *Ben 102 Enterprises Ltd. v. Ben 105 Enterprises Ltd.*, 2014 BCSC 64 at paras. 18-19.
15. In *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 2 QB 229 (C.A.), Salmon L.J. stated, at p. 268: "It would be highly undesirable and indeed impossible to attempt to lay down a tariff – so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case ..."
16. See Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (The Hague: Kluwer, 1989), at p. 440.
17. *Anwar Siraj v. Ting Kang Chung*, [2003] 2 SLR(R) 287.
18. *Bosworth v. Whitmore*, 135 Cal App 4th 536 (Cali. Ct. App. 2006), available at: <https://caselaw.findlaw.com/ca-court-of-appeal/1341541.html>.
19. *K/S Norjari A/S v. Hyundai Heavy Industries Co. Ltd.*, [1991] 3 All ER 211 (C.A.) at p. 223.
20. See UNICTRALOR, 18th Sess, UN Doc A/CN.9/264 at Commentary to Article 14, para 4.
21. See Mustill & Boyd, *supra* note 13 at pp. 531-32.
22. *Sino Dragon Trading Ltd. v. Noble Resources International Pte Ltd.*, [2015] FCA 1028. The UNCITRAL Model Law was incorporated into Australian federal law by the *International Arbitration Act 1974 (Austl)* 1974/136, online at <https://www.legislation.gov.au/Details/C2018C00439>.
23. *A Ltd. v. B*, (December 21, 1998, CT80, unreported), available at: <https://legalref.judiciary.hk/lrs/common/ju/judgment.jsp>. Section 15(3) of the Hong Kong Arbitration Ordinance (Cap. 341) provided that the court could remove an arbitrator who failed "to use all reasonable dispatch in ... making an award", language similar to that found in s. 24(1)(d)(ii) of the English Arbitration Act of 1996, *supra* note 5. The decision was upheld on appeal: *Kailay Engineering Co (HK) Ltd v Charles W Farrance*, [1999] HKCA 565.
24. *Flock v. Flock*, 2007 ABQB 307.
25. *Supra* note 3.
26. *B.V. Scheepswerf Damen Gorinchem v. The Marine Institute*, [2015] EWHC 1810 (Comm) at para. 34; *K v P*, [2019] EWHC 589 (Comm) at paras. 3-5.
27. *K v P*, [2019] EWHC 589 (Comm).
28. *Petro-Canada et al. v. Alberta Gas Ethylene Co. Ltd. et al.*, [1991] 121 AR 199 (Q.B.), aff'd. [1992] 127 AR 128 (C.A.); *Ian MacDonald Library Services Ltd. v. P.Z. Resort Systems Inc.*, (1987), 39 DLR (4th) 626 (B.C.C.A.); *N.B.C.C. Ltd. v J.G. Engineering Pot. Ltd.*, [2010] INSC 5 at paras 10-12; and *Ting Kang Chung John v Teo Hee Lai Building Constructions Pte. Ltd.*, [2010] SGHC 20 at para 32.

29. 367 F.3d 689 (2004).
30. Gary Born, *International Commercial Arbitration* (2nd ed.) (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2014), at p. 3116.
31. Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2012), at p. 1291.
32. See Sarah Grimmer, “The Determination of Arbitrator Challenges by the Secretary-General of the Permanent Court of Arbitration,” and Judith Levine, “Late in the Day Challenges and Resignations,” in Chiara Giorgetti, ed., *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Leiden, The Netherlands: Koninklijke Brill NV, 2015) at pp. 112-113 and 277-278, respectively.
33. See David D Caron & John R Crook, *The Iran-United States Claims Tribunal and the Process of International Claims Resolution* (Ardsey, NY: Transnational Publishers, 2000) at pp. 170-71.
34. See Loretta Malintoppi & Andrea Carlevaris, “Challenges of Arbitrators, Lessons from the ICC”, in Giorgetti, *supra* note 32 at pp. 157-59.
35. See Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat’s Guide to ICC Arbitration* (Paris: International Chamber of Commerce, 2012) at para. 3-619, and see Thomas H. Webster & Michael W. Bühler, *Handbook of ICC Arbitration*, 4th ed. (London, UK: Sweet & Maxwell, 2018) at paras. 15-21–15-43.
36. LCIA Reference No. 96/X22, decision rendered 22 July 1998, published in (2011) 27:3 Arb Intl 325.
37. LCIA Reference No. 91431-91442 (the First Challenge Decision) at para. 62, decision rendered 5 April 2011. LCIA challenge decisions made since mid-2010 are accessible through the LCIA Challenged Decision Database, available at: www.lcia.org/challenge-decision-database.aspx.
38. LCIA Reference No. 101735 at para. 75, decision rendered 7 October 2011, available at: <https://www.lcia.org/challenge-decision-database.aspx>.
39. LCIA Reference No. 142603 at paras. 44-45, decision rendered 16 February 2016, available at: <https://www.lcia.org/challenge-decision-database.aspx>.
40. Jan Paulsson, *The Idea of Arbitration* (Oxford, UK: Oxford University Press, 2018) at p. 149.
41. “IBA Rules of Ethics for International Arbitrators”, Rule 2.3, available at: https://www.trans-lex.org/701100/_/iba-rules-of-ethics-for-international-arbitrators-1987/.
42. In addition, to help parties and institutions gauge arbitrators’ availability for appointments, ICSID publishes on its website the names of tribunal members who are sitting on its pending cases, as do the ICC, the Milan Chamber of Arbitration and the Vienna International Arbitration Centre.
43. International Chamber of Commerce, “ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence form,” available at: <https://iccwbo.org/publication/icc-arbitrator-statement-acceptance-availability-impartiality-independence-form/>.
44. International Chamber of Commerce, News, “ICC Court Announces New Policies to Foster Transparency and Ensure Greater Efficiency” (1 May 2016), available at: <https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/>. Arbitrators’ fees may be reduced 5 to 10 per cent for draft awards submitted up to seven months late; 10 to 20 per cent for draft awards submitted up to 10 months late; and 20 per cent or more for draft awards submitted more than 10 months late.
45. International Chamber of Commerce, News, “ICC Arbitration figures reveal new record for awards in 2018” (11 June 2019), available at: <https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/>.
46. The LCIA’s Notes for Arbitrators state, at para. 12, that to support the statement required by Art 5.4 of the LCIA Rules, the LCIA also asks all arbitrators “to complete a form of availability, providing details of the number of hearings, the number of outstanding Awards, and all pre-existing commitments that might impact the arbitrator’s ability to devote sufficient time to this arbitration.” The LCIA does not share this form with parties. LCIA Notes for Arbitrators, available at: <https://www.lcia.org/adr-services/lcia-notes-for-arbitrators.aspx>.
47. See Article 10.1 of the LCIA Rules: “The LCIA Court may revoke any arbitrator’s appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party if: ... (ii) that arbitrator ... becomes unable or unfit to act; ...” Under Article 10.2, the LCIA Court “may determine that an arbitrator is unfit to act under Article 10.1 if that arbitrator: ... (iii) does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry.” LCIA Rules, *supra* note 10.
48. American Arbitration Association, “The Code of Ethics for Arbitrators in Commercial Disputes,” available at: https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf.
49. Chartered Institute of Arbitrators, “The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members (October 2009)” at Part 2, Rule 7, available at: <https://www.ciarb.org/media/1367/code-of-professional-and-ethical-conduct-october-2009.pdf>.
50. Chartered Institute of Arbitrators, “Royal Charter Bye-Laws and Schedule to the Bye-Laws” (August 2013) at s. 15.2, available at: https://www.ciarb.org/media/1558/ciarb_bye-laws_a-pdf-jan14.pdf. See also Chartered Institute of Arbitrators, “How CIARB Investigates Complaints of Misconduct Against its Members”, available at: <https://www.ciarb.org/media/4155/complaints-handling-booklet.pdf>.
51. See Jan Paulsson & Georgios Petrochilos, *UNCITRAL Arbitration* (Alphen aan den Rijn, The Netherlands: Kluwer, 2018) at p. 86. In 2010, the Secretary-General of the Permanent Court of Arbitration dealt with a challenge at the outset of a proceeding under the UNCITRAL Arbitration Rules, in which a party raised concerns that an arbitrator would not be able to devote sufficient time to the matter due to her busy schedule. The challenge was rejected in part due the arbitrator’s written confirmation that she understood the “deontological requirements for an arbitrator” and that she was a “dedicated and scrupulous arbitrator.” See paras. 4-6 of the Award on Jurisdiction (22 October 2012) in *European American Investment Bank AG (Austria) v. The Slovak Republic*, P.C.A. Case No. 2010-17, available at: <https://www.italaw.com/sites/default/files/case-documents/italaw4226.pdf>.

The Inauguration of ALI's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration

An Interview with George Bermann, Reporter

Laura A. Kaster

On May 20, 2019, a 12-year journey culminated when the American Law Institute (ALI) approved the final draft of the first Restatement of Law, the U.S. Law of International Commercial and Investor-State Arbitration. The Restatement is an extraordinary recognition of the growing importance of arbitration law, the decisional law that impacts the judiciary and advocates throughout the life cycle of an international arbitration, from assuring that the arbitration takes place to post-award relief. The U.S. law on international arbitration is really a development of only the last sixty or so years from the adoption of the New York Convention in 1958 and the ICSID Convention (the International Convention on the Settlement of Investment Disputes) in 1965. But this body of law has reached sufficient maturity to require the help of a coherent analytical and organizational framework and now we have that in the Restatement.

This article is a brief introduction to this liminal work by way of an interview with its leader, reporter George A. Bermann of Columbia Law School. Professor Bermann is a renowned international arbitrator and a founding member of the Governing Board of the ICC Court of Arbitration and Chair of the Global Advisory Board of the New York International Arbitration Center (NYIAC), but as he reminds us throughout this interview, the Restatement is not about the arbitral process, it is about the judicial treatment of the law of arbitration and it aims to collect and restate that law in a coherent and accessible way. It does not—in its main body—theorize or specifically recommend. Instead, it examines what is and what it means. The reporter's comments do express some thoughts on potential resolution or analytical approaches to difficult issues and advances positions that on occasion do not prevail in the courts, but its central role is to tell the courts and lawyers, foreign and domestic, what the U.S. law regarding international arbitration actually provides. The law of international arbitration is largely federal law and, despite the presence of a federal statute—the Federal Arbitration Act of 1925 (FAA)—predominantly judge-made. It is law about a separate regime founded on a party agreement to arbitrate.

Q: Professor Bermann, can you give us some background on the development of this Restatement?

A: This is the first ever Restatement on this topic. We began at its launch in December 2007 focused on the U.S. law of international commercial arbitration. In 2017-2018, we determined that we should add to the title "Investor-State Arbitration." We had always intended to cover

investor-State arbitration in the Restatement, but use of the term "commercial" and no mention of "investor-State" led some to suppose that it would not be covered. Hence the name change. All ALI Restatements first identify the nature of the controlling rule if the Supreme Court has spoken or the majority rule if it has not. Where there is no clear majority, we attempt to ascertain the trends in the law; to determine what specific rule fits best and most coherently within the broader body of law; and to weigh the desirability of competing positions.

Q: What approach did you take to the work?

A: We understood that there were many open questions addressed by only one or two U.S. Courts of Appeals, if any, and by very few controlling decisions by the Supreme Court. I had three associate reporters, Professors Jack J. Coe, Jr., of Pepperdine University School of Law, Christopher R. Drahozal, of University of Kansas School of Law, and Catherine Rogers of Penn State Law and Queen Mary College of the University of London. In addition, we had 32 official advisers, including additional law faculty, judges and practitioners, as well as house counsel. There were also 154 members of the Consultative Group, all ALI members. There were 94 members of the ALI Council and Council Emeriti, who also considered and debated the issues, and whose approval was necessary in order for any portion of the draft to proceed to discussion and vote at an annual meeting of ALI members.

We began with the drafting of definitions in 2010, and those definitions became Chapter 1; they were amended continuously through 2019 as the work progressed and new terms emerged. We then proceeded to the chapter on Post-Award Relief, encompassing confirmation, annulment, recognition, enforcement and correction of award, which became Chapter 4. There followed the chapter on enforcement of the arbitration agreement, ultimately

LAURA A. KASTER is a Co-Editor-in-Chief of this journal and a full-time neutral. She is a fellow in the College of Commercial Arbitrators and co-edited its *Arbitrators Guide to Best Practices in Commercial Arbitration* (Juris 4th ed. 2017) and she is Chair-Elect of the DR Section of NYSBA.

Chapter 2. Chapter 5 on investor-State arbitration followed. It by then became apparent that issues of state law preemption pervaded the work and so material on preemption was introduced into chapter 1 alongside the definitions, which likewise were transversal in significance. At the suggestion of advisers, concerned about lack of basic knowledge of international arbitration among bar and bench, a third topic was introduced into Chapter 1 setting out the basic institutions and principles of this body of law. The final substantive chapter, Chapter 3, addressed the judicial role in connection with arbitral

fest disregard of the law' as the grounds for vacating arbitral awards under the FAA. The Supreme Court has indicated that the FAA § 10 grounds are exclusive, thus excluding any non-statutory vacatur grounds. Accordingly, this Section proceeds from the view that if manifest disregard is available under the FAA, it must be derived from § 10(a)(4) of the FAA as an instance in which the arbitrators exceeded their powers.

"This will be the courts' first step for understanding the difference between the domestic and international law of arbitration."

proceedings themselves. The complete text was submitted and considered in 2018, and revised and finalized in 2019. At the further suggestion of advisers, there was added a historical introduction to the law of international arbitration in the U.S.

Altogether, work on the Restatement was thorough, demanding and in truth intense, as it is for all ALI Restatements. The result is a black letter Restatement and essentially explanatory Comments, followed by detailed reporters' notes.

Q. What were some of the key issues that you had to address?

A. Your readers will be aware of and interested in many of the issues we had to address. Many of them have been the source of practical and academic controversy. I will highlight as we proceed just a few issues, not necessarily in the order of their presentation or consideration, or even their relative importance.

For example, we needed to address the topic of manifest disregard of the law—and more specifically whether it constitutes an independent grounds for vacatur of an award under Section 10 of the FAA. The question is dealt with in Section 4.20(c). On this, we were unequivocal:

A court does not vacate or deny confirmation of a U.S. Convention award or deny recognition or enforcement of a non-Convention award for manifest disregard of law.

Comment g on this point explains the state of the law and the basis for our conclusion:

Manifest disregard of the law. Courts are divided over the availability of 'mani-

The Restatement then has, as usual, reporters' notes with cites to the key cases, and the occasional academic writing, on which we rely upon in reaching our Blackletter principles and comments. This is the format for each Section in the Restatement.

Q. Are some of the questions you addressed reflected in the Chapter 1 Definitions?

A. Yes, the definitions chapter is a rich source of information and can be critical to understanding the Restatement approach. For example, we define "interim measure" in Section 1.1(t) as a grant of temporary relief "to maintain the status quo, help ensure the satisfaction of an eventual award, or otherwise protect the rights of one or more parties." Importantly, we go on to state that "An interim measure is presumptively treated as a partial award," which means that it is subject to both vacatur and enforcement. The comment provides that the same presumption applies to an emergency arbitrator's award of relief.

Q. Another "hot topic" has been the use of discovery under Title 28 Section 1782. Did the Restatement address that issue?

A. It did and, in doing so, addressed in Section 3.5 the factors that courts should weigh in determining whether to grant or deny such a request. The view was that in *Intel v. Advanced Micro Devices*, 542 U.S. 241 (2004), the Supreme Court interpreted Section 1782 to apply to a broad range of tribunals, although it was dicta as to foreign arbitral tribunals. The Restatement takes the position, based largely on the plain language of the statute, that Section 1782 does apply to international commercial arbitration proceedings, commercial and investor-State alike.

Q. All of the issues you addressed have an impact on arbitrators as well as the courts, but there are two more of particular interest: the Competence-Competence debate and arbitral immunity. Can you briefly tell us the Restatement approach on those issues?

A. The delegation issue is a difficult one. Competence-Competence means that an arbitral tribunal may rule on issues relating to its own jurisdiction, including, but not limited to the existence, validity, or scope of an international arbitration agreement. However, under U.S. law, courts may, if asked, rule prior to arbitration, on certain “gateway issues,” such as the existence or validity of the arbitration agreement, its scope, and its binding effect on non-signatories.

However, the Supreme Court ruled in the *First Options* case that the parties may “delegate” even those issues exclusively to the tribunal, and thus courts must decline to address them, provided the parties’ intention to delegate authority is “clear and unmistakable.”

The prevailing view among courts is that the inclusion of a Competence-Competence provision in the institutional rules the parties may have adopted in their arbitration agreement suffices to constitute such a “clear and unmistakable” manifestation of intent. For reasons explained in the Comments and Reporters’ notes, the Restatement rejects that view, despite its being the prevailing one.

I will end with a topic that may be close to your readers’ hearts, the question of arbitral immunity. Section 3.10 of the Restatement provides that both international arbitrators and appointing authorities, by analogy to judges, are immune from civil liability for acts or omissions within the scope of their duties. This is the dominant view among courts, but has always been contested and is in fact rejected by most legal systems

There is, of course much more. There are important resolutions on forum non conveniens and class actions. I hope your readers will find the Restatement an important resource and that it will, going forward, promote the uniform and enlightened development of the law.

Conclusion

The legal community and in particular our Dispute Resolution Section are grateful for the enormous contribution that Professor Bermann and his colleagues have made to the law of international arbitration. This will be the courts’ first stop for understanding the difference between the domestic and international law of arbitration, and it has already been cited more than 20 times.

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Arbitration Decision Making—By the Numbers

William G. Horton

Do arbitrators always base their decisions on the strict application of the law, or do they sometimes base their decision on what seems fair? When, in the course of an arbitration, do arbitrators make up their minds? How open are they to changing their minds and how often do they do it? How certain are arbitrators that they are right, and how often do they think that other arbitrators may have come to a different result?

These are intriguing questions, but can we ever know the answers?

The Toronto Arbitration Society Gold Standard Course in Commercial Arbitration, of which I serve as course designer and director, has offered a modest opportunity to explore the possible answers to these questions in a somewhat systematic way. The course runs from September to May and culminates in a highly realistic award writing exercise. I based the materials for the exercise on a real case but substantially rewrote the facts and the submissions to try to make it as hard as possible to decide for one side or the other.

In the assignment scenario, the claimant relies on the strict wording of the agreement to obtain a result that may seem unfair to many. The respondents urge a more contextual approach to interpreting the contract to achieve what they suggest is a more fair result. The specifics of the case are not important, and I do not want to reveal them here. But in almost every case involving contract interpretation, this is the paradigmatic conflict. Canadian case law supports giving effect to the plain meaning of contractual language but also provides room for a contextual analysis based on the surrounding circumstances (“factual matrix”) at the time the contract is entered into. In any given case, counsel can usually find support in the case law to support either a strict constructionist or contextual approach as the most applicable to that case. In each case, one of these two approaches will prevail over the other, based upon a myriad factors at play in the that case, among which the pre-dispositions of the judge or arbitrator will almost certainly play a role. Thus, the conflict between fairness and strict interpretation never goes away. And, I would suggest, never will.

In each of the first two years of the course (which is now entering its fourth year) there were 20 students enrolled. With one exception (who audited the course and did not do the award writing exercise) they were all practicing lawyers who aspired to be arbitrators.¹ Their

years of practice ranged from three years to 43 years, but most were in the middle years of their careers. The award writing exercise was conducted over a period of about six weeks. The materials were provided to the students in three stages: first the pleadings and witness statements, second the written submissions and finally a summary of the written submissions that were made at the hearing. There is a twist in the evidence at the end and the (fictional) parties elect to proceed without oral examinations of the witnesses.

Despite some compromises from what an actual arbitration might involve, it occurred to me that there was in this exercise a replication of the core decision making process. Also, the students in the first two years of the course could be seen as a reasonable proxy for arbitrators. (For the purpose of this article, I will refer to them as such.) I felt that it was interesting to see if we could learn something about the arbitral decision-making process by asking all of the students some questions after they had completed the exercise. Their answers were sent to FTI Consultants in Toronto, who compiled the responses confidentially into chart form.²

The combined results for the two years are reproduced below without extensive commentary, so that you can explore them yourself and draw your own conclusions.

I would make the following few observations of my own:

1. In the sample of 39 arbitrators³, 24 (60%) decided in favor of the claimant (legal correctness) and 15 (40%) decided in favor of the respondents (fairness).
2. Those coming down on the side of fairness found it slightly harder to decide the case and were somewhat less confident in their conclusion.

WILLIAM G. HORTON is an independent arbitrator of business disputes who frequently arbitrates cross-border disputes in ICDR, ICC and ad hoc arbitrations. He is a member of the CPR Panel of Distinguished Neutral and is based in Toronto. For more information and contact details visit www.wgharb.com. Co-published in the *Canadian Arbitration and Mediation Journal*, Vol 29, No. 1 (Spring 2020).

3. Most arbitrators initially came to whichever conclusion they finally reached in the award well before the final hearing (some as early as the pleadings).
4. Most arbitrators changed their minds at least once before coming to their final conclusion (presumably often ending up returning to their initial conclusion).
5. Almost all recognized that other arbitrators could come to a different conclusion.
6. More of those applying a strict analysis felt that it was in conflict with a fair result; whereas more of those who came down on the side of fairness felt that it was also the legally correct result.
7. There is some evidence that if an arbitrator has encountered an issue in practice, they will tend to decide a case consistently with the position they advocated in practice.
8. Some arbitrators admitted to having been influenced by some factor which they did not express in the award, but most said they were not.

No doubt there are many faults with my approach from a methodological standpoint. There are obvious questions as to whether the sample size is meaningful and whether the aspiring arbitrators are a reasonable proxy for the real thing. I am also sure that there are many other questions that could have been asked and parameters that could have been explored. This was an exercise in professional curiosity, not in behavioral science. Nevertheless, based on my own experience as an arbitrator, I am inclined to think that the human dynamics of arbitral decision making are quite well represented in the results of this survey. Perhaps there is room for a more elaborate experiment by those who would like to explore this further to see whether the results can be replicated.

I stopped the survey after the first two years of the course because I wanted to be able to refer to the results in the teaching of the course. However, it is interesting to note that in its third year, enrollment rose to 26, and four non-lawyers took the course. The non-lawyers included an executive in the mining construction industry, an insurance executive, an individual involved in the condominium management business and a law student. One of the students in the same year of the course (who is a lawyer) remarked, "I don't know how a non-lawyer could process the issues in the case given the complexity of the problem."

Perhaps predictably, one of the non-lawyer students did struggle to come to a decision and was unable to complete the assignment. But the remaining three came to a well-reasoned conclusion that demonstrated an understanding of the basic issue in dispute. One favored the claimant and two favored the respondents. That tiny

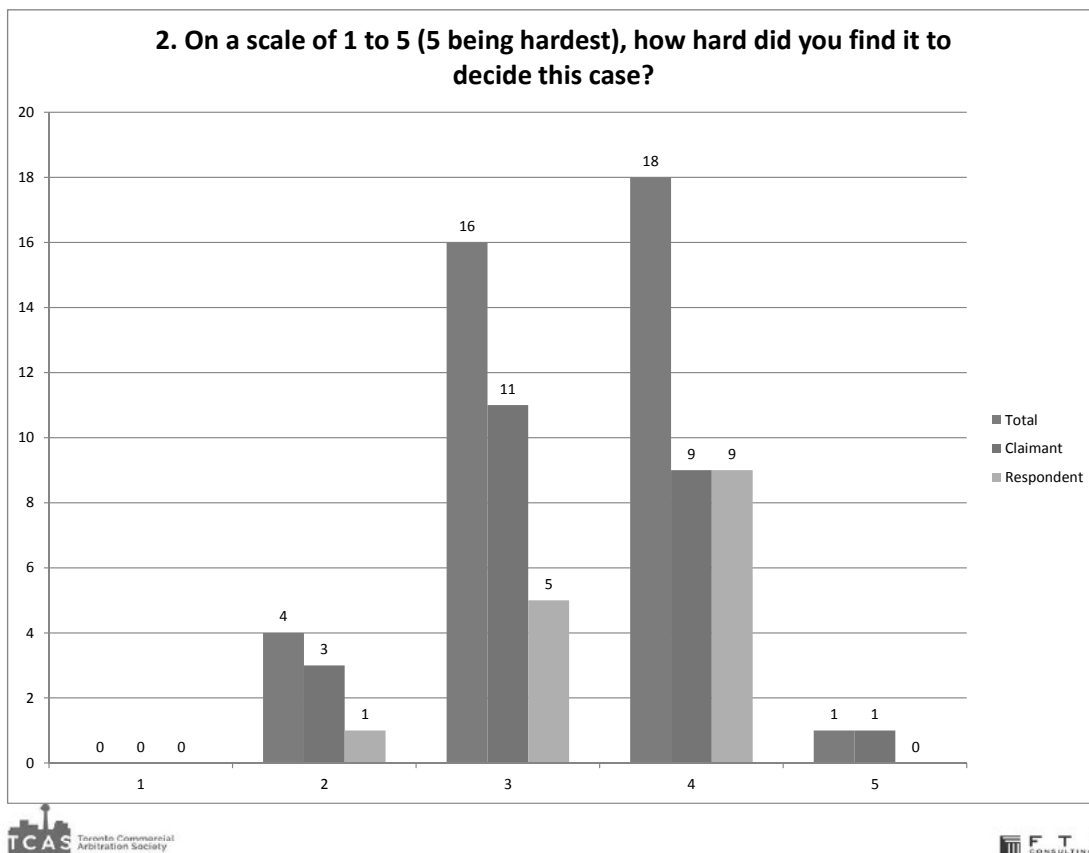
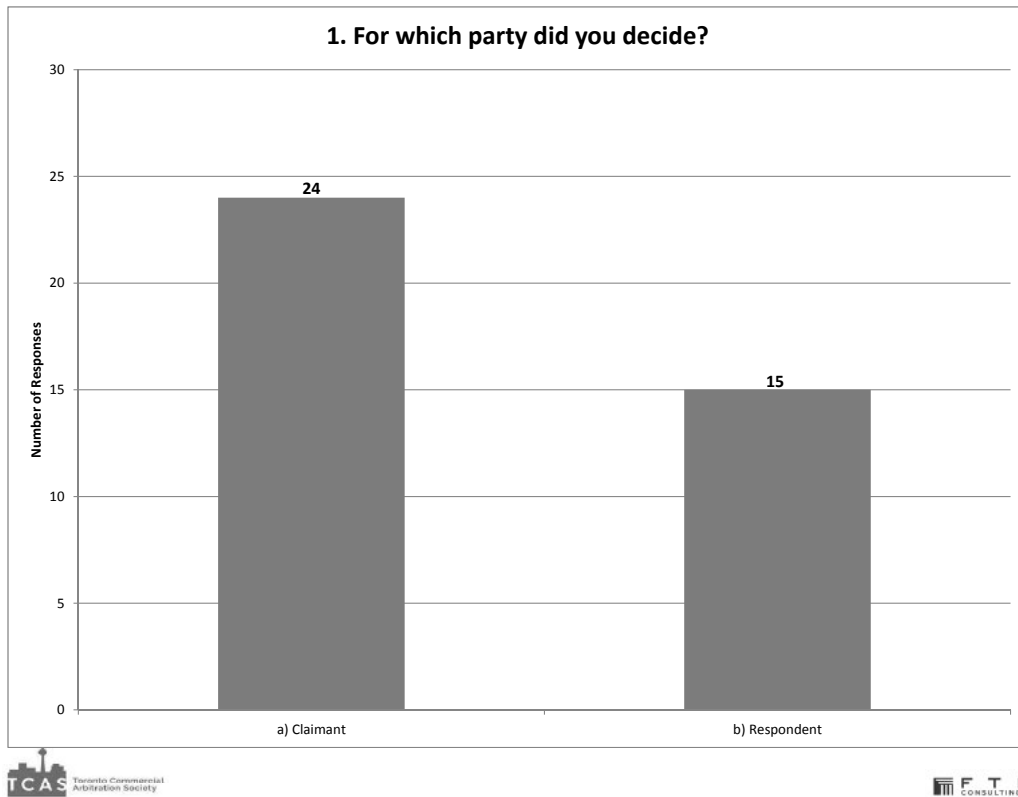
sample is consistent with what most lawyers would probably assume, i.e. that those not qualified in the law are more likely to decide based on fairness. Hence the prohibition in almost all rules and statutes written by lawyers enjoining against the determination of disputes *ex aequo et bono*, unless the parties expressly agree. However, given the results of the survey, who can say that any of the non-lawyers was more right or wrong in the result than their legally qualified colleagues?

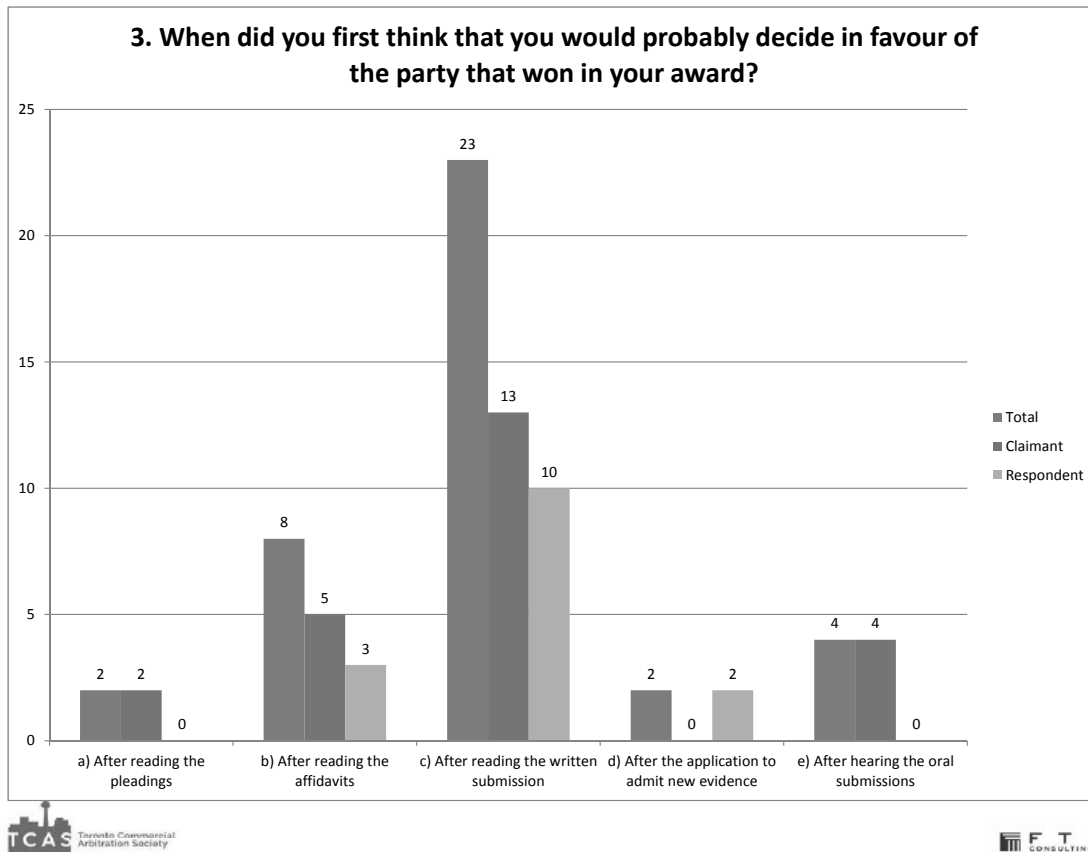
Based on the survey, it could be argued that no result is "right" in any absolute sense of the word. But the exact opposite conclusion may also be drawn. Barring procedural unfairness, bias or excess of jurisdiction, every result in an arbitration can be said to be the right result for those parties and for that case. Ultimately, in arbitration the parties bargain for the judgment of the particular arbitrators who they select, or who are selected by an agreed upon method. The judgments of others on the same issues, as variable as they may be, are not germane.

Whether or not you agree with that statement, I hope you will find the results that are illustrated by the following charts thought provoking.

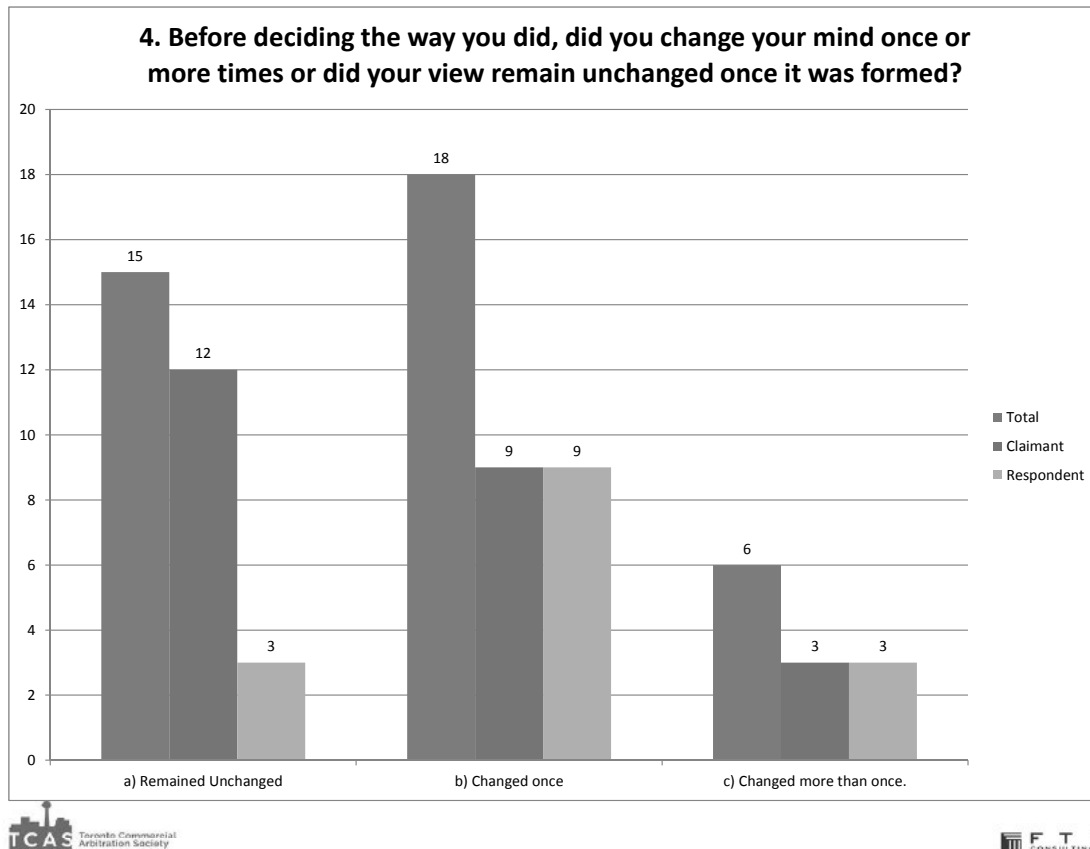
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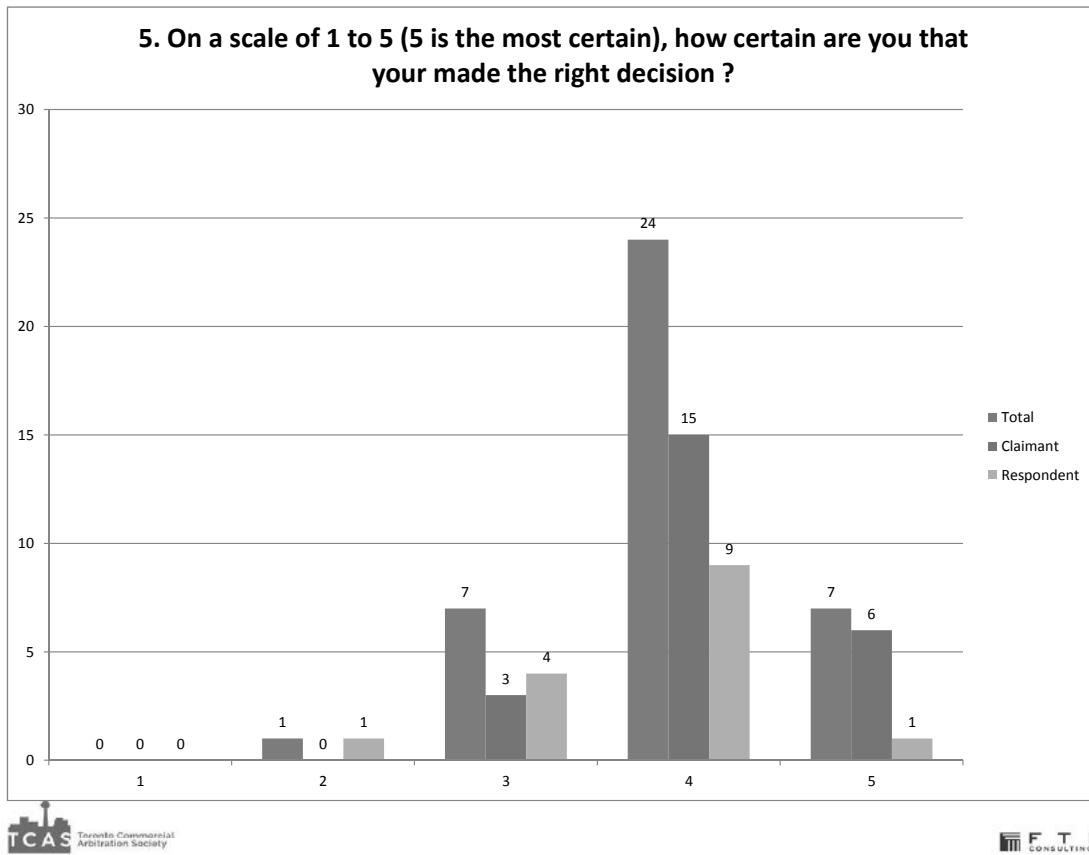
1. The course leads to a Q.Arb designation which is conferred by the ADR Institute of Canada through its provincial affiliates.
2. I am most grateful for the assistance of FTI Consultants in Toronto with this project.
3. One student audited the course and did not do the final assignment. Not all arbitrators answered all questions so there is some variability in the numbers.



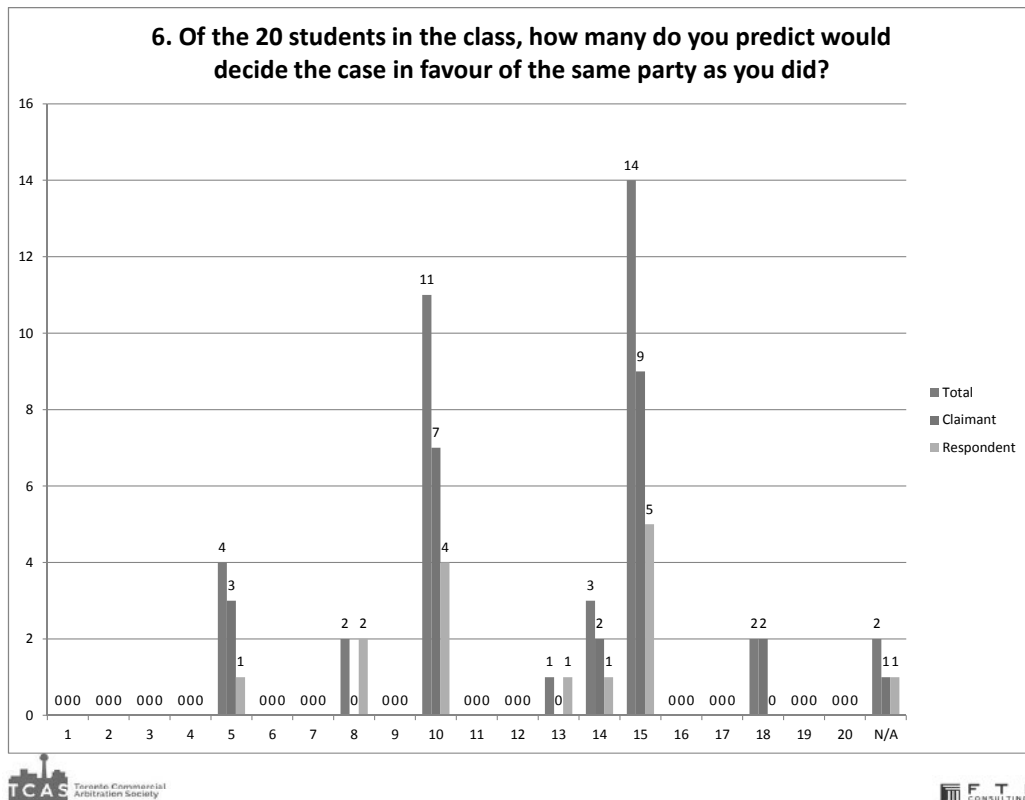


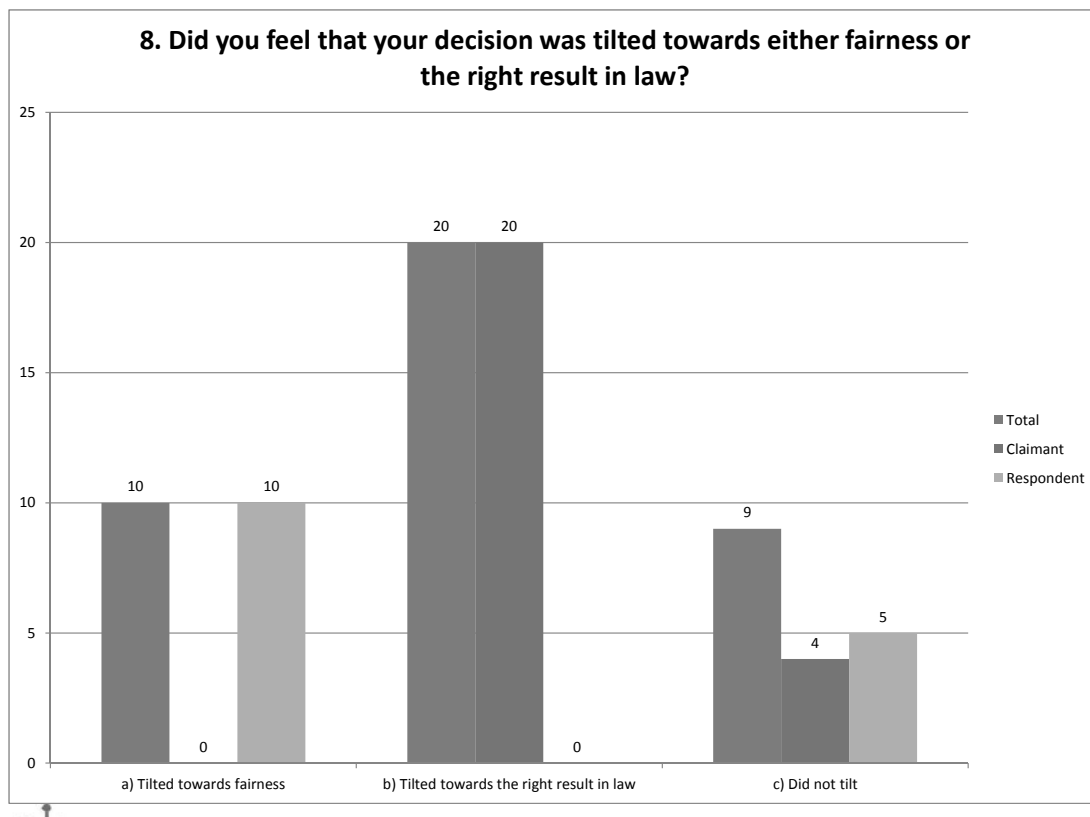
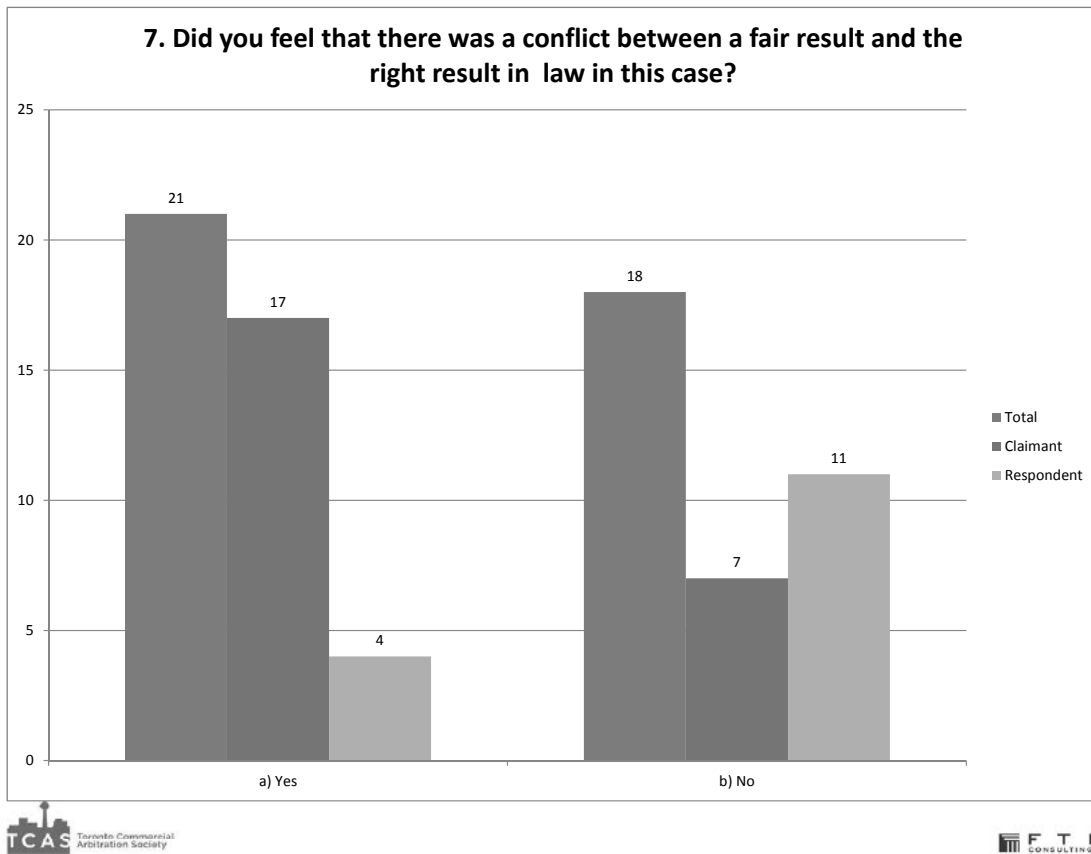
2017-2018 BHEL v. Cutler Anonymous Adjudication Questionnaire Survey Response Summaries

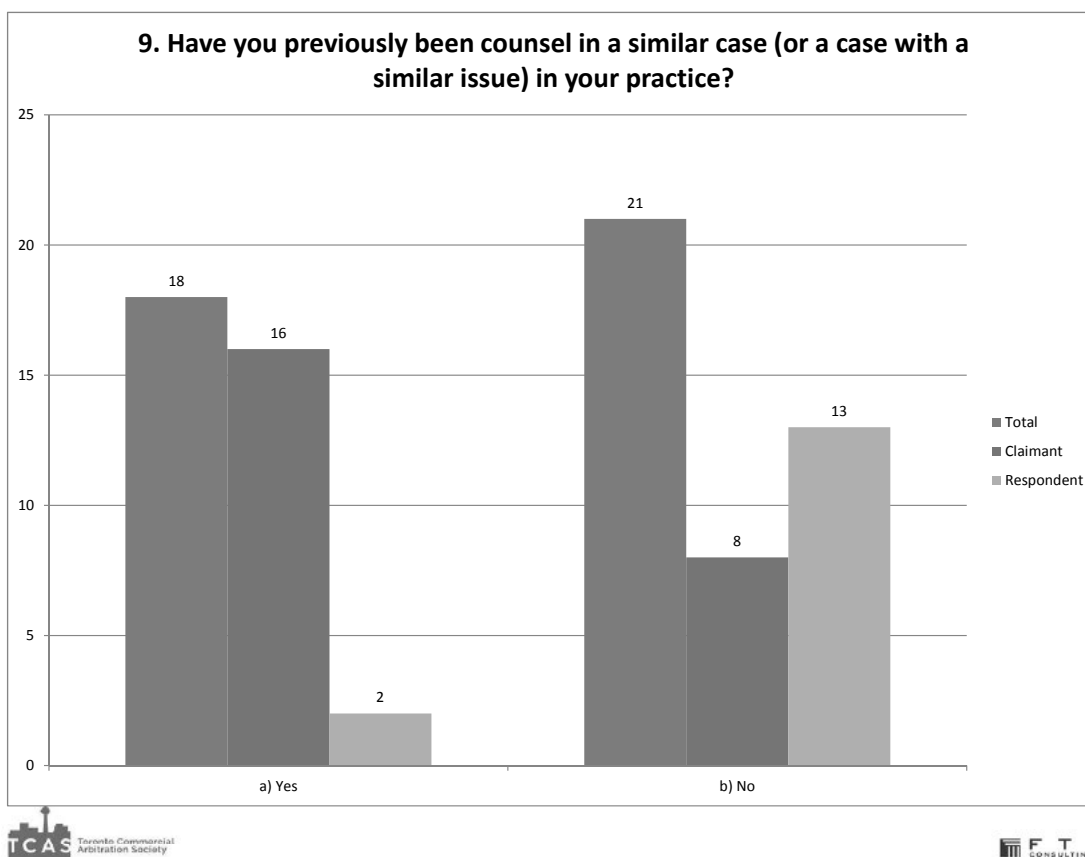




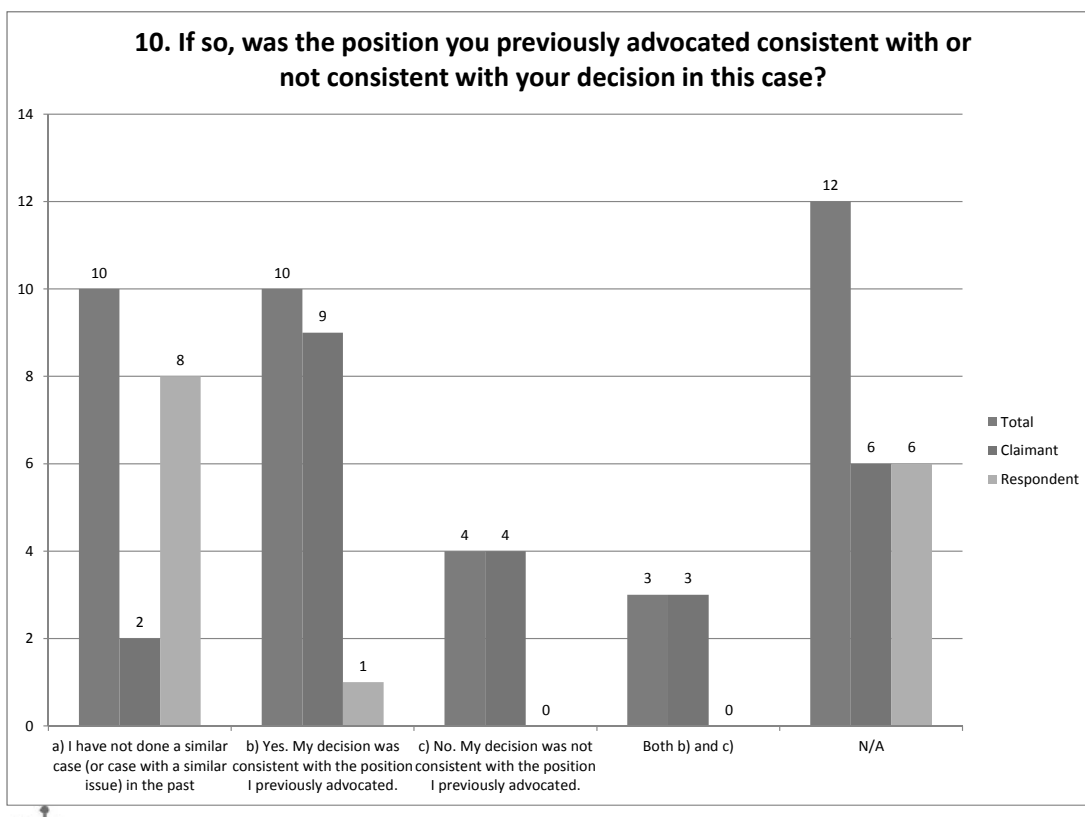
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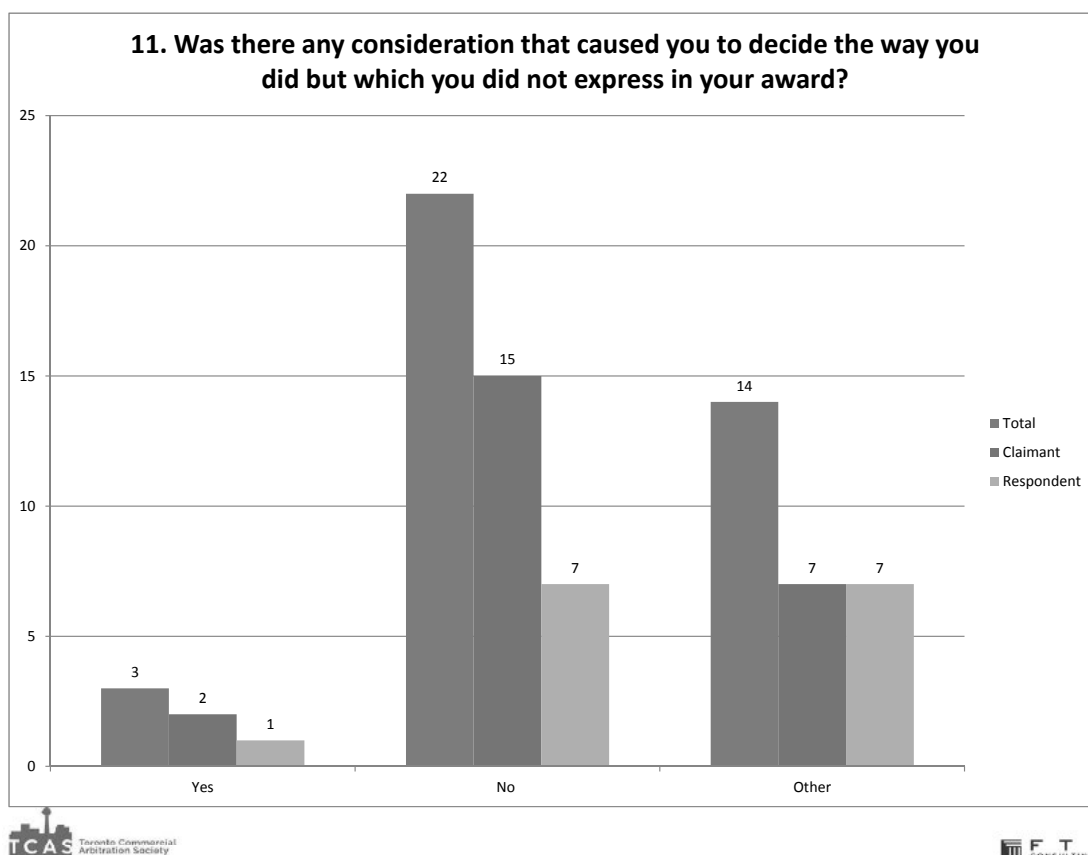






2017-2018 BHEL v. Cutler Anonymous Adjudication Questionnaire Survey Response Summaries





11. Was there any consideration that caused you to decide the way you did but which you did not express in your award?

Comments for "other" responses *

2017	"That's not what a tribunal is supposed to do!"
2017	"Commercial reality"
2017	"Respondents argument seemed more fair only because of the amount of the [third party] offer. It would not be compelling if the offer was much less or much more."
2017	"Clean hands doctrine. The claimants were seeking equitable relief but it was unclear whether fiduciary duties to the corporation (like self dealing) were involved. Ultimately unnecessary and would require further evidence."
2017	"Need for predictability and certainty in contractual application and interpretation."
2018	"I wanted to deal with the idea but since the claimant had not discussed this legal idea, I didn't propose it, either."
2018	"Respondents missed too many opportunities to address the issues themselves."
2018	"I don't think so."
2018	"Throwing mud on the wall to see if any of it sticks."
2018	"There was no specific legal authority that came to mind, except that equity will not act without a wrong. There was no wrong."
2018	"No particular case."

* 3 of the respondents did not provide a response for this question.

The Impact of Summary Disposition on International Arbitration: A Quantitative Analysis

B. Ted Howes and Allison Stowell

By now, the arguments for and against the adoption of summary disposition rules in international commercial arbitration are familiar. Proponents of summary disposition, largely from the U.S. and other common-law jurisdictions, argue that it will reduce the length and cost of international arbitration by providing parties with the means to dispose of meritless claims and defenses early in the dispute resolution process. Proponents argue that even when a summary disposition application is unsuccessful, it nonetheless encourages settlement by focusing the parties and the tribunal on potentially dispositive issues, or at least on factually or legally specious claims.

Opponents of summary disposition, largely from civil-law jurisdictions, counter that parties will turn the procedural tool into a vehicle of harassment and delay, producing groundless summary disposition applications and adding another rote procedural step to the arbitral process. Opponents also contend that summary disposition presents due process concerns by denying defending parties the full opportunity to be heard, thereby potentially placing awards at risk of challenge under the New York Convention.

Due to the lack of available statistics, the arguments for and against summary disposition procedures in international arbitration have largely remained unexamined hypotheses. However, May 12, 2018 marked the 10th anniversary of the first decision issued under the International Centre for Settlement of Investment Disputes (ICSID) summary disposition rules. With over 10 years of accumulated public data from ICSID, it is now possible to conduct at least an initial quantitative analysis of the impact of summary disposition applications on international arbitration.

ICSID Rules of Procedure for Arbitration Proceedings 41(5) and (6) (“Rule 41(5)” and “Rule 41(6)”) permit a party to “file an objection that a claim is manifestly without legal merit” within 30 days after the arbitral tribunal is constituted and before the tribunal’s “first session.” After the parties have “opportunity to present their observations on the objection,” the arbitral tribunal must issue its decision at that first session or “promptly thereafter[.]”¹

Between its implementation in 2006 and the end of 2018, twenty-six decisions on Rule 41(5) applications have been issued. The data to date is intriguing. Fears that summary disposition would become a routinely abused procedural tool is, thus far at least, unsupported.

Moreover, the summary disposition process remains relatively expedited, lasting, on average, less than three and one-half months from start to finish. Most interestingly, ICSID arbitrations in which summary disposition applications have been made are resolved, on average, *over a year earlier* than the average ICSID arbitration—regardless of whether the applications are successful.

A longer and more detailed version of this article originally appeared in the May 2019 issue of *Dispute Resolution International*. Readers interested in a more fulsome presentation of, and evidentiary support for, the statistics presented below are encouraged to review the *Dispute Resolution International* article.

A. Summary Disposition Has Not Become a Rote Tool of Harassment

Parties were slow to begin invoking summary disposition following Rule 41(5)’s implementation in 2006. For ICSID arbitrations registered between 2007 through 2011, no more than two Rule 41(5) objections were filed. Its use caught on in 2012, when it was invoked five times, and remained relatively steady at four to five arbitrations each year until 2015, after which its use appears to have declined again. Overall, Rule 41(5) has only been invoked in 6.1 percent of arbitrations through 2018; at its peak, in 2013, it was only invoked in 12.5 percent of ICSID arbitrations registered that year.

Rule 41(5)’s low usage rate, extending now for over a decade, should allay fears of summary disposition becoming a rote and widespread tool for harassing or dilatory tactics in international arbitration. It should be noted,

B. TED HOWES (bhowes@mayerbrown.com) is a partner and Head of the U.S International Arbitration Group at the law firm of Mayer Brown LLP. ALLISON STOWELL (astowell@mayerbrown.com) is a senior associate in Mayer Brown’s U.S. International Arbitration Group.

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however, that two characteristics of ICSID arbitration safeguard against this potential for abuse: (1) Rule 41(5) imposes the high legal standard that a claim must be “manifestly without legal merit”; and 2) ICSID tribunals, like most international arbitration tribunals, are authorized to award costs to the prevailing party. The imposition of a high legal standard within Rule 41(5) itself limits

a total of 163.2 days. Between 2012 and 2017, Rule 41(5) procedures lasted, on average, 103.7 days,⁵ a reduction in excess of two months. All other statistical measurements—median, standard deviation, and minimum and maximum—likewise confirm this time reduction.

“Most interestingly, though the sample size remains small, concluded ICSID arbitrations in which summary disposition applications have been determined are resolved over a year earlier than the average ICSID arbitration—regardless whether the applications are successful.”

the spectrum of claims to which the rule apply, and the prospect of bearing the opposing party’s costs seems to provide an effective deterrent to aggressive or groundless Rule 41(5) objections.

B. Summary Disposition Remains an Expedited Process

The data to date also evidences a relatively expedited summary disposition process. Two early Rule 41(5) procedures were notoriously lengthy, with one lasting eleven months from the objection’s filing to a decision,² and a second lasted nearly eight months.³ In reference to one of these cases, a later tribunal lamented that “[t]he scheduling problems created by the expectations inherent in Rule 41(5) as drafted are by now well-known and documented.”⁴

Since 2012, however, parties and tribunals have made observable efforts to maintain an expedited Rule 41(5) procedure. As testament to arbitration’s much-lauded flexibility, arbitrators have used a wide array of procedures to expedite the resolution of Rule 41(5) objections, including reducing the number of rounds of briefing, reducing the time between briefs, and foregoing oral argument.

Reflecting these efforts, the average length of the Rule 41(5) process—from the filing of the objection to the issuance of a decision—has been declining over time. Through 2011, Rule 41(5) procedures lasted, on average,

C. Summary Disposition Is Associated with Speedier ICSID Arbitrations

Of the 26 arbitrations in which a Rule 41(5) objection has been determined to date, 16 are original (*i.e.*, non-annulment) proceedings that have concluded.⁶ The difference in the average duration of these sixteen concluded Rule 41(5) proceedings and the average duration of all ICSID concluded arbitrations is significant: *Rule 41(5) arbitrations have ended, on average, more than a year earlier than all ICSID arbitrations.*

To date, the average duration of all ICSID arbitrations, from constitution of the tribunal to conclusion, has been 37.8 months. In contrast, the average duration of Rule 41(5) arbitrations, has been only 23.0 months—14.8 months less. This is true even though, through 2018, only three Rule 41(5) objections had been granted in their entirety.⁷

There may be multiple reasons why Rule 41(5) arbitrations are currently observed to conclude more swiftly. On the one hand, the filing of a Rule 41(5) objection could simply correspond with weaker claims, which could, in turn, correspond with a faster dispute resolution process regardless of Rule 41(5). On the other hand, the possibility remains that Rule 41(5) assists in streamlining the arbitration by focusing participants on the substance of the dispute early in the proceeding, narrowing issues, or concentrating attention on potentially dispositive issues at the outset—even when the Rule 41(5) objection is denied.

The experience of parties and tribunals in Rule 41(5) arbitrations would appear to support the latter hypothesis. One ICSID tribunal directly attributed the Rule 41(5) process to streamlining the arbitral process: “[t]he Tribunal also agrees with the Respondent that its Rule 41(5) Application has significantly expedited and focused the discussion on the issues of jurisdiction.”⁸ The impact of Rule 41(5) objections on other ICSID arbitrations is readily apparent from their procedural history. In *Accession Mezzanine Capital L.P. v. Hungary*, for example, the claimant withdrew claims as a result of the Rule 41(5) process.⁹ Similarly, the claimant withdrew one of three claims during oral argument on the Rule 41(5) objection in *Trans-Global Petroleum v. Hashemite Kingdom of Jordan*; in so doing, counsel observed that the claim was “on further reflection and consideration, manifestly without legal basis.”¹⁰ In a fourth example, the tribunal in *CEAC Holdings Limited v. Montenegro* requested that the parties brief a specific issue one month after issuing its Rule 41(5) decision, and then rendered a final award resolving all claims based on that issue.¹¹

Conclusion

While further analysis is warranted as more ICSID data becomes available, the data available to date—over 10 years of data—supports arguments for the wider adoption of summary disposition in international arbitration. Rule 41(5)’s infrequent invocation—invoked in only 6.1 percent of all ICSID arbitrations to date—evidences that summary disposition has not become a tool for harassment or delay, nor has it become a rote procedure. The Rule 41(5) summary disposition procedure has also become increasingly expedited over time, lasting, on average, just a little more than three months. Most significant, the data to date strongly correlates summary disposition applications with the faster completion of the arbitral process—almost 15 months faster on average.

Proponents and opponents of summary disposition in international arbitration may, and should, continue to rely on anecdotal evidence. We suggest that statistics also has a role to play in this debate. The ICSID data, as currently observed, is a compelling argument for the further experimentation with summary disposition in international arbitration.

Endnotes

- Rules 41(5) and (6) state in full:
 - Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.
 - If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.

These rules have been interpreted to apply mutatis mutandis to annulment proceedings. See *Elsamex, S.A. v. Republic of Honduras* (ARB/09/4)—Annulment, Decision on Elsamex S.A.’s Preliminary Objections ¶¶ 100, 118-131. ICSID’s Arbitration Additional Facility Rules contain similar rules with “effectively the same language.” See *Lion Mexico Consol. L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Decision on the Respondents’ Preliminary Objection under Art. 45(6) of the ICSID Arbitration (Additional Facility) Rules, ¶ 56 (Dec. 12, 2016).
- See ICSID Case Details, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/09/11>.
- See ICSID Case Details, *Pan American Energy LLC v. Plurinational State of Bolivia*, ICSID Case No. ARB/10/8, <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/10/8>.
- MOL Hungarian Oil and Gas Co. Plc v. Republic of Croatia*, ICSID Case No. ARB/13/32, Decision on Respondent’s Application Under ICSID Arbitration Rule 41(5) ¶ 9 (Dec. 2, 2014) (citing *Global Trading Resource Corp.*).
- This average excludes days in which an arbitration was suspended during the Rule 41(5) process, which occurred in two arbitrations.
- Seven Rule 41(5) arbitrations remain pending and three more are annulment proceedings, which are excluded from this analysis to enable comparison with ICSID’s calculation of the average duration arbitration proceedings from 2010 to 2017.
- Some circumspection of this conclusion is warranted given that six Rule 41(5) arbitrations are still pending. This analysis should be updated once these six outstanding arbitrations have concluded and their final duration is known.
- PNG Sustainable Dev. Program Ltd. v. Indep. State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award ¶ 410 (May 5, 2015).
- Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyongazeltő Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondents’ Objection under Arbitration Rule 41(5) ¶ 64 (Jan. 16, 2013).
- Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, The Tribunal’s Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules ¶ 119 (May 12, 2008).
- CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Award, ¶¶ 10, 226 (July 26, 2016).

Contrasts in Preparing for International v. Domestic Arbitration

Philip D. O'Neill, Jr.

Advocates have a tendency to gravitate toward the familiar. Unsurprisingly, U.S. litigators frequently seek to import into international arbitration procedure the comfortable practices that prove effective in their domestic commercial dispute resolution experience. After all, there is considerable functional overlap in preparing for an evidentiary hearing in an adversarial process, whether in litigation or arbitration. But the driving force for potentially significant substantive and procedural differences internationally stems primarily from the varied legal cultures of the parties, counsel, and/or the arbitrators. With these differences often come contrasting assumptions about what is “fair game” with respect to how things are properly done. All concerned benefit from at least identifying those differences sooner rather than later in the preparatory process to avoid costly surprises. As a result, pre-hearing conferences are an important opportunity to confront contrasting approaches, which necessitates going into considerable detail about how things will be done through both the information exchange phase and the evidentiary hearing.

The need for clarification is well illustrated by some examples, for conflicting positions can arise in a wide variety of process related matters. Information exchange, for example, is almost inevitably explored from the outset of the arbitral proceeding. A host of issues may arise in the context of document production. One trigger is the question of privilege. The range of issues in this regard include the threshold question of whether a particular privilege is legally recognized. For example, does any privilege attach to the guidance of in-house counsel? What happens when the answer differs depending on whether documents are located in or governed by law in European jurisdictions which do not recognize the privilege, in contrast with the more nuanced U.S. position?¹ Moreover, there can be differences over whether a privilege, even if recognized, protects only written communications made by an attorney admitted to practice in a member state bar.²

The varying scope of what arbitrators will consider to be proper information requests adds to the lack of predictability. Permissible scope may change from tribunal to tribunal, even if the same institutional rule, such as the “material and relevant” rule of the AAA/ICDR, is being applied. It is noteworthy that the AAA eventually harmonized its international and domestic rules governing discovery standards based on its experience with international cases and user feedback seeking to better control

discovery costs.³ Despite the fact that domestic arbitral practice has not yet really caught up with that narrowing shift, given different expectations in an international case, counsel should shape their information exchange requests in a manner that is mindful and respectful of the tribunal’s likely approach based on factors that take into account legal cultural differences.

To explain, members of a tribunal, opposing counsel or both may come from a legal culture where disclosure of an adversary’s records is not commonplace at all, or from places where it is the norm. Bridging the gap is a matter of evolving customary practice, often influenced by “soft law.” The IBA Rules on the Taking of Evidence,⁴ the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration⁵ and the Chartered Institute’s Protocol for E-Disclosure⁶ each reflect some recognition of the need for information exchange as a matter of fairness. The varying degrees of acceptance stem from both the increasing complexity of the case types and sheer magnitude of what is at stake in contemporary international arbitrations. Even with enhanced document production under such guidelines in cross border fights, the exchange still tends to be more specific in focus and more constrained than the breadth permitted in domestic U.S. litigation and arbitration practice. Practice also varies with the international institutional rules involved and situs of the arbitration—the tribunal is likely to be sensitive to these variations, even if counsel are not.

On the other hand, there are also mandatory requirements reflecting policies that may constrain a party’s ability to disclose certain business records under national secrecy laws. International arbitrators usually recognize the possibility of mandatory constraint from frequent encounters with foreign “blocking” statutes. There are similar information constraints that may prevent an American party from information exchange under applicable export

PHILIP D. O’NEILL, JR. (poneillarb@gmail.com) is an international and domestic arbitrator in the U.S. and abroad who has taught international arbitration for many years at top national law schools.

restrictions. Such impediments in the defense industry, for example can prevent producing documents and even briefs that reference those documents not only to the opposing foreign party, but also to a foreign arbitrator, foreign nationals who are witnesses or party representatives at the hearing, foreign staff at the arbitral institution, and even foreign translators—at least in the absence of what is called a Technical Assistance Agreement⁷ authorized by the U.S. Department of State (with Pentagon concurrence).

Another basic area of difference between domestic and international procedure that will likely be considered by a tribunal at the pre-hearing stage is the method of proof and argument to be followed at the evidentiary hearing. In international arbitration, a more homogenized procedure has evolved. Customary practice now places greater emphasis on the scheduling and content of written submissions (e.g. memorials in ICC practice), witness statements and exhibits as well as expert reports at the initial pre-hearing stages. International tribunals will expect the submission of written direct proof and authority for positions well before oral evidentiary hearings. The focus of the hearing tends to be on the resulting material factual differences that emerge, explored either by arbitrator inquiry and/or cross examination by counsel. In light of the fact that experienced international arbitrators expect this sequenced combination of a written evidentiary approach with oral examination, they are likely to focus on it from the start.

Another difference between international and domestic arbitration involves the presentation, written or oral, of witness testimony. For example, can counsel assist fact witnesses in the preparation of their testimony? While that is certainly common and acceptable practice in our domestic legal culture and even is endorsed by the non-binding 2013 IBA Guidelines on Party Representation in International arbitration,⁸ counsel are ultimately regulated by their licensing jurisdiction. As a result, foreign counsel may abide by different rules. If so, how does the arbitral tribunal deal with the different constraints on the fair role of counsel, so as to make sure no side is at a disadvantage? Deciding whether advocates may assist witnesses can also be complicated by the legal tradition of the arbitrators, particularly the chair. Counsel preparing to interact with the tribunal on such matters should be guided by the “know your audience” principle. To that end, formulating positions in the language of the tribunal’s legal traditions can be helpful. Similarly, focusing on the grounds for award non-enforcement can sharpen the impact of arguments. For example, one might argue when appropriate that a particular procedural disposition unfairly favors one side, would not treat the parties equally, and/or effectively denies one side its right to be heard in some respect.

Domestic practice may not be readily embraced in connection with the evidentiary hearing itself resulting in myriad issues. For example, what is to be the role of counsel in the questioning of witnesses? Arbitrators and counsel from a civil law tradition may be influenced by their inquisitorial tradition in which the judge or arbitrator examines the fact witness.⁹ Indeed this right of arbitrators to examine witnesses at any time is enshrined in the IBA Rules.¹⁰ Yet, both the IBA and Prague Rules also provide for examination by counsel.¹¹ Additionally, the Tribunal may appoint its own expert,¹² sometimes instead of or else in addition to the adversarial approach of dueling experts so common in our domestic practice. There may even be “hot tubbing” of experts where they are collectively examined, particularly in an international construction arbitration.

A final illustrative difference that results from legal culture is the weight to be given to contemporaneous written documentation versus the oral testimony of witnesses. The civil law tradition places greater reliance on business records, while the common law tradition, where the role and involvement of lawyers is more pervasive, may discount “papering the record” and rely more heavily on the credibility of oral testimony.

At bottom, there is greater sensitivity to procedural fairness and attention to detail by the arbitrators going into the pre-hearing conference when there is the likelihood of differing views of how the administration of justice works. Thus, a tribunal is likely to be looking at what are common practice and expectations in the host countries of the parties and counsel as well as the situs, all viewed through the lens of the arbitrators’ own background. Additionally, at least with experienced tribunal members, they will likely be aware of what is a common tribunal compromise in the increasingly harmonized customary practice of international arbitration today.

Other differences from domestic practice also can be encountered in applying institutional rules of arbitral institutions contractually chosen by the parties. There are always exceptions of course, for parties can vary such rules by agreement. Still, the choice of applicable rules impacts such considerations for the tribunal by omission as well as prescription. For example, the UNCITRAL rules,¹³ which are used frequently in ad hoc arbitrations, are considerably more flexible; they are calculated to provide greater freedom to tailor procedure to the particularized needs of the parties and the case. But this also can result in greater expense, as the parties jockey to have the tribunal accommodate their preferences. International arbitrators are usually mindful of this tension as they seek to manage the pre-hearing process.

Some international arbitral institutions introduce unique requirements or rules to clarify or to eliminate issues altogether by prescription. An example of the former is the ICC requirement of the early formulation and entry

into what are called “terms of reference,” which tend to identify the various issues, contentions and particularized procedural steps to be followed in the proceeding. That document is signed by counsel on behalf of the parties and by the arbitrators very early in the proceeding following an initial pre-hearing conference. Terms of reference also serve the salutary purpose of acting as a “compromis;” that is, a signed written agreement to arbitrate entered into at the time when the dispute has already arisen. That approach also satisfies requirements of jurisdictions that still preclude pre-dispute arbitration dispute resolution agreements as a matter of public policy.

There are other pre-hearing contexts in which institutional rules are more constraining than domestic counterparts. Topics that will influence international arbitrators at the outset of a proceeding vary from institution to institution, ranging from privilege¹⁴ to trade usage,¹⁵ to choice of law.¹⁶ The rationale for such prescription is that certainty gives the parties greater predictability and economy. Similarly, institutional rules may be prescriptive to promote enforceability of awards. One trap for the unwary is the contrast in rules governing the availability of punitive damages depending upon whether the AAA’s domestic commercial rules or its international rules apply.¹⁷

At bottom, foreign counsel and an international arbitral tribunal will likely view the pre-hearing process with different sensitivities and agendas than they would in domestic arbitration. The examples provided above are not exhaustive, but the tip of the iceberg. Still, if counsel proceed with a recognition of the need to identify and clarify positions on a host of knotty issues early in an international arbitration, then there is far less likelihood of costly surprise fights as the proceedings unfold. Forewarned is forearmed....

Endnotes

1. See, e.g., Pepper Hamilton, “Careful! Your Attorney-Client Privilege May Not Travel Well,” accessed at: <https://www.pepperlaw.com/publications/careful-your-attorney-client-privilege-may-not-travel-well-2018-08-30/> and “Attorney-Client Privilege for In-house Counsel Is Not Absolute in Foreign Jurisdictions” accessed at <https://ccbjournal.com/articles/attorney-client-privilege-house-counsel-not-absolute-foreign-jurisdictions>.
2. See, e.g., “Beware: Legal Privilege Rules Differ Between the U.S. and the E.U.” accessed at: https://www.willkie.com/~media/Files/Publications/2008/06/Beware%20%20Legal%20Privilege%20Rules%20Differ%20Between%20the___/Files/LegalPrivilegeRulesDifferBetweenUSandEU.pdf/FileAttachment/LegalPrivilegeRulesDifferBetweenUSandEU.pdf.
3. Compare AAA International Rule 21(4) with AAA Commercial Rule 22(b)(iii) accessed at <https://www.adr.org/Rules>.
4. See [https://www.ibanet.org/document/IBA Rules on the Taking of Evidence in Int Arbitration 201011 FULL.pdf](https://www.ibanet.org/document/IBA%20Rules%20on%20the%20Taking%20of%20Evidence%20in%20Int%20Arbitration%20201011%20FULL.pdf).
5. See <https://praguerules.com>. While rule 4.2 encourages the tribunal and parties to avoid any form of document production, Rule 4.3 nevertheless permits it upon a persuasive showing of need.

6. See <https://www.ciarb.org/media/e-iscolureinarbitration>.
7. See, e.g., O’Neill, “Technical Assistance Agreements in International IP Arbitration” accessed at: <https://americanbar.org/groups/publications/justresolutions> (March 2016 Intellectual Property Issue).
8. See comments to Article 20 discussed at <https://www.ibanet.org/document>.
9. See generally, Prague Rules 3.1 and 5.9.
10. See IBA Rules at Article 8(3)(g).
11. See IBA Rules at Article 8.2 and Prague Rule 5.9.
12. See IBA Rules at Article 6(1) and Prague Rule 6.1. See, e.g., AAA International Rules at Article 25.
13. See UNCITRAL Arbitration Rules (2013) accessed at: <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf>
14. ICDR Article 22 provides application of the rule of the highest protection.
15. ICC Article 21(2) provides that it “shall” be taken into account in contract interpretation.
16. Swiss Chamber Rule 33(1) provides for application of the law with the closest connection as the standard to be applied in the absence of party agreement. Accessed at: https://www.swissarbitration.org/files/33/Swiss-Rules/SRIA_EN_2017.pdf.
17. See AAA International Rules at Article 31(5)(waiver of punitive damages).

Lawyers Should Not Paint Houses: Lessons from *The Irishman*

Anthony R. Daims

Did you know Robert De Niro has blue eyes? Is Joe Pesci's head really that big? Why is a 40-year-old man shuffling about like a 70-year-old man? These are comments some viewers of *The Irishman* have expressed about Martin Scorsese's latest film. Which is a shame because *The Irishman* is one of his best works.

Whether you find yourself in the camp that believes how Martin Scorsese chose to tell Frank Sheeran's story is distracting or not, lawyers can learn quite a lot from *The Irishman*—the good, the bad, and the universal. This piece begins by working through the bad, or what viewers found distracting because distractions are a lawyer's biggest presentation enemy. It then shows the good, ending finally with some universal advocacy tips, both written and oral.

THE BAD: How to distract your audience

Distractions come in all forms. Obvious distractions like poor writing, dishevelled appearances, or simply not knowing one's case, are obvious culprits. The more pernicious ones, the ones tackled here, are trickier to catch.

The Irishman's distractions reeled viewers' attention away from much of the filmmaker's evocative story. For example, the fight scene where an early middle-aged Frank Sheeran (depicted by a digitally "de-aged" Robert De Niro) beats up a middle-aged grocer was farcical to some. The audience was expected to believe that a de-aged 70-year-old actor—who moves like the 70-year-old man he is—could pummel an actual middle-aged man who moves (and ostensibly fights) as would a middle-aged man.

De Niro "stomping" on the grocer's hand looked no more menacing than a toddler tugging on a German Sheppard's tail. And yet, this scene was critical to understanding why Frank Sheeran lacked a genuine relationship with his daughter. Recognizing why their relationship was fraught was the scene's purpose, but this purpose was easy to miss unless the viewer could get past the "de-ageing" distraction, which many could not.

The Irishman's visual distraction has its equivalent for lawyers both in their written and oral submissions.

When lawyers use filler words, phrases, and sounds, they distract their audience. This happens both when they write and speak. Legalese, Latin, as well as useless and imprecise words, are different categories of filler words and phrases. Below are just some examples. Law-

yers, like directors, must learn to edit and cut these words and phrases from their scripts or risk erecting barriers that distract the audience from the message.¹

Legalese

You can easily replace *in the event that, due to the fact, prior to, and subsequent to*, with *if, because, before, and after*. But lawyers don't do it. Instead, some believe it sounds more "lawyerly" to say, "prior to coming to meet you, I had a cup of coffee." What's wrong with saying, "before meeting you, I had a cup of coffee"? After all, we're talking about a cup of coffee!

Legalese is Hollywood lawyer talk. It's the language that non-lawyers, like television and movie scriptwriters, believe lawyers use. The problem is that future lawyers—those not yet lawyers—watch these same television shows and movies and believe this is how lawyers speak. These phrases, therefore, imprint themselves onto the minds of recruits, and once these recruits become lawyers, they continue to use this Hollywood speak. The cycle is tough to crack.²

Latin Is Dead! Long Live Latin?

Latin is a dead language. People don't speak it, and aside from anachronistic curricula, it is not taught in school. So why do lawyers still use it? If it has any place at all, it fits under *jargon* (see footnote above, or if you prefer, *supra*). As few people understand Latin, it's worth asking why lawyers clutch to Latin words and phrases? Is the Latin *onus* of proof more explicit than *burden*? Is *quantum* clearer than *amount*? It's doubtful.

Clearly, the Next Point Is Extremely Important

Lawyers should also avoid using false intensifiers.³ Words like *clearly, extremely, obviously, and surely* are all words that good lawyers don't use. And indeed would

ANTHONY DAIMS is a lawyer and law professor at the University of Ottawa, where he teaches contracts law, international arbitration, international sales law, and coaches the faculty's Vis, Jessup, and FDI moot teams. He also works as an international arbitrator and is an Associate Door Tenant in Littleton Chambers in London, England.

never use. Good lawyers know that they will never convince a judge that their client is innocent or right merely by saying, “my client is *clearly* innocent!” or “my client is *obviously* right!” A skeptical judge does not become less skeptical only because you add the word *obviously*. Clearly. Yet, lawyers use these false intensifiers all the time, in both their written and oral submissions. They shouldn’t.

We Need Steady Hands⁴

Although hands did not factor much in *The Irish-*

man, finger rings did. In particular, three signet rings made from one-dollar liberty coins. I will not torture the reader by linking rings to a lesson, but suffice it to say, hands can either augment or detract from a lawyer’s presentation.

“Whether you find yourself in the camp that believes how Martin Scorsese chose to tell Frank Sheeran’s story is distracting or not, lawyers can learn quite a lot from The Irishman—the good, the bad, and the universal.”

Bill Clinton is masterful at using his hands when he speaks. To experience a master class in how to use hands to enhance your message, simply watch the first 90 seconds of Bill Clinton’s State of the Union address from 2000. Pay attention to the first time he lifts his left hand from the podium. Waving his hand from side to side is perfectly timed to his words never before. When he refers to his “record” on job creation, he gently touches the papers on his podium as a signal that he has the evidence to back his claim. When speaking to the future, he points forward, and finally, as he speaks to the strength of the U.S. economy under his stewardship, he uses the universal symbol for power: a closed fist.⁵

THE GOOD: Synchronicity and silence

Rodrigo Prieto, *The Irishman*’s cinematographer, explained how *The Irishman*’s story informed how Martin Scorsese chose to shoot his movie.⁶ For example, because Frank Sheeran was a methodical man, when filming him, the camera shots were deliberately methodical. In this way, the filming tracked the protagonist’s tone.

THE GOOD: Synchronicity and silence

Lawyers can learn a lot from this technique. Allowing the story to inform the cinematography is not unlike the adage *show don’t tell*, a method good lawyers use to com-

An Ounce of Silence Is Worth a Pound of Words⁷

municate their clients’ stories. Good lawyers understand that it is more effective to *show* a judge why their client is right rather than to *tell* a judge their client is right. It is much more effective to *show* acts of jealousy, for example, than to say *the defendant is jealous*.

The actress Anna Paquin, who played Peggy Sheeran, the daughter with whom Frank suffered the strained relationship, spoke seven words in the entire film. And yet, we remember her. Martin Scorsese knows how to

use silence to build tension and to make a point. Lawyers should learn to use silence to their advantage. More importantly, what they should not do is fill the silence with puerile sounds. Chief among these sounds are *ums* and *ahs*. A video that has made the rounds in Canada shows Prime Minister Justin Trudeau tallying over 50 ums in under a minute.⁸ That’s nearly one *um* per second. Justin Trudeau is a handsome man, but stately, he is not. The Canadian Prime Minister doesn’t seem to enjoy silence or know what to do with it. Listeners need time to process information. If your point is a good one, you want it to resonate. And if it does resonate, you must allow your listener time to receive it.

Universal Static

Michio Kaku, a prominent theoretical scientist and futurist, has explained that “when you turn on the TV and you pick up static, when you turn on the radio and you pick up static, some of that static comes from creation itself. You can actually listen to some degree to the actual explosion that created the universe.”⁹

I am often asked to reveal the secret to my moot coaching track record. Over the years, teams I’ve coached have won more than 10 titles, placed first in global competitions many, many times, have won global writing prizes, and my students have won copious individual speaker awards. My secret is easy to explain, but not so easy to execute. And it comes down to this: static. More precisely, it comes down to reducing and eliminating static.

Scorsese Hates iPhones

Imagine displaying *The Irishman* on a static-filled screen. Or watching it with the sound turned down so low that 30% of the dialogue is missed. Although Michio Kaku's romanticized version of static is beguiling, lawyers should follow Martin Scorsese's approach. He implores viewers not to watch *The Irishman*, or any of his films, on their phones because it affects the theatrical experience.¹⁰ That's what static can do. At the extreme, it makes it impossible to see or hear the message. But more often, static in any form affects how the listener hears, and therefore understands your message. For lawyers, this is critical as expressing and understanding an argument often turns on words and moments.

No Static Cling

Here are some universal rules to reduce static. Become aware of your neutral mask. In acting, the neutral mask has a rich history, but basically, it amounts to the idea that an expressionless face will not betray the actor's message. A lawyer must control their "neutral" listening, thinking, and speaking masks. Many are surprised to learn that their neutral mask is rarely, if at all, neutral. Ask someone you trust (and won't later dislike) to let you in on your "neutral" masks. The lesson here is that facial gesticulation can create static for your listener. You can distract your judge if your neutral listening mask is a nasty grimace!

Your Eyes Are Not the Window to Your Argument's Soul

Eye contact. Anyone who has taken a basic course on public speaking or oral advocacy is advised to "make eye contact." But not all eye contact is equal. In fact, eye contact can become quite distracting and thus create a great deal of static. Imagine an advocate staring down a judge! Or the "darting eyes" problem, which is when an individual's eyes dart around the whole room never to land still.

The best way to think about eye contact is to imagine you're enjoying coffee or dinner with friends. In this setting, you share eye contact with all your friends, sometimes sharing more with one friend than another, which is quite natural. Use this idea to drive how you use your eyes when presenting oral submissions.

Pardonnez-moi?

If you find yourself presenting in your second or third language, don't worry about it. I have trained many second and third language speakers with great success. The rule to follow is this. Ensure that the keywords in each of your sentences are pronounced the same way the native ear would hear them. Our brains are great at filling in gaps. If you work on pronouncing the keywords the

way the native ear is accustomed to hearing them, your listeners' brains will take care of the rest. Most online dictionaries include a function that lets you hear how the word is pronounced. Take advantage of this.

No Need for Speed

Finally, consider your speed. How many words is a 15-minute talk? We rarely measure time in terms of words, which is odd, given that it's our words that fill the time in our 15-minute talk! So here's an easy trick. The ideal speaking speed is somewhere between 120 and 140 words per minute. When explaining technical information, it's best to slow down to about 120 words per minute. But when discussing straightforward information, 140 words per minute is about right. So, you're tasked to give a 10-minute speech, or allotted 30 minutes to talk in court, you now have a formula to use to know how many words you have to play with. Of course, this is an average. You'll need to reduce the number of words to account for possible questions and you may wish to have a short, medium, and long version of your script just in case the bench is really in a feisty mood. After all, if you end with a kicker, you want that kick to land.

Final Thought

An apocryphal, but nevertheless helpful, story repeated by many has the Pope asking Michelangelo: "Tell me the secret of your genius. How have you created the statue of David, the masterpiece of all masterpieces?" "It's simple," answers Michelangelo, "I removed everything that is not *David*."¹¹

I suspect Martin Scorsese would identify with Michelangelo. And until the rest of us become masters, at least we can follow the course that their teachings have provided: remove all the static that is not *David*.

Endnotes

1. A few useless words that jump to mind include *anyways* (a word that does not exist) and *utilize* (a word used by lawyers trying to sound “smart”).
2. It is essential to distinguish legalese from jargon. Jargon has its virtue. It helps like-minded professionals speak more efficiently. For example, in common-law contracts, “consideration” means something quite different to a lawyer than it might mean to a non-lawyer.
3. This wonderful term was coined by Justice Laskin in his often-quoted “Forget the Wind-Up and Make the Pitch: Some Suggestions for Writing More Persuasive Factums”: <http://www.ontariocourts.ca/coa/en/ps/speeches/forget.htm>.
4. Hillary Clinton’s speech to AIPAC: “We need steady hands, not a president who says he’s neutral on Monday, pro-Israel on Tuesday, and who knows what on Wednesday, because everything’s negotiable.” <https://www.theguardian.com/us-news/2016/mar/21/hillary-clinton-aipac-donald-trump-israel-us-election>.
5. The 2000 State of the Union https://www.youtube.com/watch?v=vg_qI3yzCLk.
6. See “The Irishman” Lenser on How the Mind of the Killer Influenced the Cinematography.” <https://variety.com/2019/film/global/the-irishman-rodrigo-prieto-1203399512/>.
7. See Kathrine Narducci’s interview with *Variety* where she addresses the character’s paucity of words: <https://twitter.com/Variety/status/1202809005006966784>.
8. <https://www.youtube.com/watch?v=FmgWcasOjIk>.
9. Michio Kaku, *Big Think* interview: <https://bigthink.com/videos/big-think-interview-with-michio-kaku>.
10. Martin Scorsese interview: <https://ew.com/movies/2019/12/02/martin-scorsese-irishman-phone/>.
11. Rolph Dobelli as told in the epilogue to his *The Art of Thinking Clearly*, Harper Collins, 2014.



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Necessary Change: Planning Past Bias Through the ArbitralWomen Diversity Toolkit™

Rekha Rangachari

On November 8, 2018, ArbitralWomen (AW), an international nonprofit organization dedicated to promoting women and diversity, launched the ArbitralWomen Diversity Toolkit™ (Diversity Toolkit).

The Diversity Toolkit is an innovative first-of-its-kind training module for international arbitration practitioners. AW launched the Diversity Toolkit at the conclusion of a full-day diversity conference entitled “The Diversity Dividend: Moving from Bias to Inclusiveness in International Arbitration,” which celebrated both the launch of the Diversity Toolkit and AW’s 25th anniversary. This November 2018 celebratory event was generously hosted by the American Arbitration Association-International Center for Dispute Resolution (AAA-ICDR) at its mid-town New York headquarters.

By way of background, the Diversity Toolkit is a full-day training session for practitioners who want to make a difference for diversity. ArbitralWomen certified trainers offer a multi-media participatory experience including video clips, mini-lectures, and guided small group sessions, the aim is to demonstrate the value of diversity and to explore the reasons why delegates may find themselves outside the “inner circle,” regardless of their stature in the community as independent arbitrator, managing partner, and lead or corporate counsel. (See <https://www.arbitralwomen.org/diversity-toolkit/>).

Although women are a focal audience (as AW launched the Diversity Toolkit), the knowledge and skills are generic and applicable to any group wanting to gain greater awareness of and sensitivity to the biases that impede achieving true diversity and inclusiveness. The Diversity Toolkit was funded by a generous grant from the AAA-ICDR Foundation® and the AAA-ICDR further supported the initiative by subsequently hosting two Diversity Toolkit trainings at their offices.

The Diversity Toolkit focuses on recognizing unconscious biases and how attitudes, experience, and education build these internally in the brain. Time is spent exploring how unconscious biases interfere with rational decision making, with exercises and focused discussions encouraging delegates to step away from their comfort zone and confront such biases live. The Diversity Toolkit underscores the research-driven data that diverse groups make better decisions, foster creativity and better management, and are great for any company’s financial bottom line.

Delegates are asked in advance of each session to take at least two implicit association tests from Harvard’s Project Implicit, to better understand how conscious and unconscious biases operate on a personal level, with suggested reading to bring relevant topics, theories, and statistics to the main stage. During the subsequent live segments, delegates dive into the empirical metrics, underscoring that what can be measured can be changed. From big picture items on managing blind spots, delegates also take part in a walk of privilege to build candor and community within the group, culminating in brainstorming sessions to create individual strategy lists targeting venue (e.g. law office, corporation institution, government, non-profit organization, etc.), goals, and specific actions to achieve progress.

Following its November 2018 launch, throughout 2019 and in early 2020, multiple Diversity Toolkit trainings were conducted at global venues including:

- New York (September 2019) delivered at the AAA-ICDR;
- Ottawa (October 2019) delivered at the Trade Law Bureau of the Global Affairs Canada and the Department of Justice;
- Mexico City (November 2019) delivered at the law firm Von Wobeser y Sierra;
- Miami (November 2019) delivered at the Miami offices of the AAA-ICDR; and Mexico City (February 2020) delivered at the law firm Creel, García-Cuellar.¹

REKHA RANGACHARI (rrangachari@nyiac.org) is the Executive Director of the New York International Arbitration Center (NYIAC). NYIAC is funded in part by the Dispute Resolution Section of the NYSBA. Rekha is actively engaged with the arbitration community, serving as Member of the NYSBA Dispute Resolution Section’s Executive Committee and Co-Chair of the International Disputes Resolution Committee, and Member of AW and its Diversity Toolkit Committee, co-training the New York delegation.

Each Diversity Toolkit training session welcomed 25-35 participants, with overwhelmingly positive written and oral feedback. A follow-up survey is also circulated six months after each session to track progress. In the follow-up comments, delegates shared their experience that it as eye-opening to understand the thinking fast and slow modules—how to activate and actualize the thinking slow brain to counteract the thinking fast implicit biases. Others appreciated the reminder of existing inclusion strategies (e.g. mentoring and sponsorship) to create demonstrable paths to success and evolution of the practice. It was equally interesting to hear from the delegates on the various initiatives that they had been involved with in an attempt to move the needle, which actually served to affirm the endemic problem and the need for more ingenuity within the law and beyond.

AW's Diversity Toolkit takes a large step towards acknowledging the diversity of the legal practice and the need for multiple lenses for examining ways to change long-established patterns. Although much remains to be done, progress lies at the foothills of focused goals and clear policies carefully aimed to implement and foster inclusiveness in the workplace.

Endnote

1. Multiple Diversity Toolkit training programs are planned throughout the remainder of 2020 at global venues including Singapore, Paris, Geneva, Milan, Toronto, Dubai, Beirut, and Hong Kong—with requests for translation of the Diversity Toolkit training and supporting materials into Spanish for broad consumption within Latin America.



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The AAA: A History of Working with Federal and State Governments

By S. Pierre Paret and Jeffrey T. Zaino

The American Arbitration Association (AAA) currently helps resolve hundreds of thousands of disputes yearly under governmental authority and stands ready to assist other government agencies in developing programs to leverage the efficiency, speed, and cost-effectiveness of alternative dispute resolution (ADR). This article will look at the history (past and current) of government programs using the AAA and various ADR programs.

Congress and state legislatures, federal and state agencies, and local governments have designated the AAA in statutes, regulations, executive orders, and contracts to resolve a wide range of disputes under government authority. Many of these programs incorporate innovative elements that provide an alternative to traditional administrative or judicial mechanisms.

The AAA's expertise and qualifications, coupled with its nonprofit status and strong track record of delivering results in the governmental and commercial environments, has led governments to delegate significant responsibilities to the AAA. The AAA has also developed ethical standards for arbitrators and mediators. It has over 6,000 trained and qualified neutral arbitrators and mediators and specialized rules and procedures to increase the fairness and efficiency of dispute resolution in different subject areas, such as healthcare, consumer, and employment disputes. The ability of the AAA to customize and tailor ADR procedures, rules, and timelines can be particularly useful when designing alternative programs in a governmental setting. As demonstrated by the examples below, the burdens on government agencies and court systems throughout the country can be significantly reduced by using ADR.

U.S. Department of Justice and FCC Antitrust Settlement

AAA staff worked (under a confidentiality agreement) with the U.S. Department of Justice to develop an AAA binding arbitration mechanism that was incorporated in a proposed settlement of a major antitrust case, and ultimately incorporated in a final judgment by the federal court. The AAA concurrently worked with the Federal Communications Commission on this antitrust matter, and also developed an arbitration mechanism that the agency adopted.¹

AAA Automobile Industry Special Binding Arbitration Program

The AAA's experts worked with key members and committees of the U.S. Senate and House of Representatives to design a program to resolve a large number of complex cases resulting from the bankruptcy and reorganization of General Motors and Chrysler on an expedited schedule. The AAA was ultimately designated by Congress in a statute, which was signed by the President, to administer a nationwide ADR program that resolved over 1,500 disputes through settlement, mediation, and binding arbitration administered by the AAA, and completed within a statutory timeline of approximately seven months.²

U.S. Department of Commerce Privacy Shield Program

The AAA and ICDR (International Centre for Dispute Resolution, a division of the AAA) were selected by the U.S. Department of Commerce's International Trade Administration to develop and implement the EU-U.S. Privacy Shield Arbitral program. This multi-year contract includes development of arbitral rules and procedures,

S. PIERRE PARET is the Vice President for Government Relations of the American Arbitration Association. He is responsible for federal and state legislative, regulatory, and policy issues, as well as federal ADR program development. Mr. Paret joined the Association in 1989, and previously worked in a private lobbying firm, a federal agency, and as a state-level political appointee.

JEFFREY T. ZAINO is the Vice President of the Commercial Division of the American Arbitration Association in New York. He oversees administration of the large, complex commercial caseload, user outreach, and panel of commercial neutrals in New York.

This article is based on *The American Arbitration Association: A Long History of Working with Government*, a paper available on the AAA website at www.adr.org/Government.

administration of arbitral cases, and administration of the Arbitral Fund, which has as of January 2019 received over \$5 million in mandatory contributions from over 5,000 U.S. businesses. In 2018, the contract was expanded to include the Swiss-U.S. Privacy Shield program.

AAA Administration of State No-Fault Insurance Programs

Since 1974, the AAA has been designated by the New York State Insurance Department as the program administrator for resolution of disputed No-Fault, Uninsured Motorist, and SUM (Supplementary Uninsured Motorist) claims. These programs provide for specialized rules, specific qualifications for a roster of permanent arbitrators, extensive case statistic and financial reporting to the New York State Insurance Department, and dedicated Conciliators and Case Managers. In 2018, the AAA administered over 300,000 cases, handling all related logistics, documents, and financials on behalf of the State of New York under this program.³ Similarly, the AAA has been administering the Minnesota No-Fault arbitration system since 1975, and averages approximately 5,000 cases per year.⁴ The AAA had previously for a 20-year period administered a no-fault program for the State of New Jersey.

Federal Trade Commission FRAND Disputes

The Federal Trade Commission (FTC), in approving the merger of Google and Motorola Mobility, included an arbitration option for the resolution of potential disputes regarding Fair, Reasonable, and Non-Discriminatory (FRAND) pricing through the AAA.⁵

Pension Benefit Guaranty Corporation Multiemployer Pension Plan Arbitration

The Pension Benefit Guaranty Corporation (PBGC), a federal government agency, included a provision for the resolution through AAA arbitration of certain disputes. The AAA has administered these arbitrations under its Multiemployer Pension Plan Arbitration Rules for Withdrawal Liability Disputes since 1981.⁶

FIFRA Environmental Protection Agency Pesticide Disputes

The AAA, through an arrangement and regulation issued by the Federal Mediation and Conciliation Service, provides arbitrators to resolve disputes among pesticide producers under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The AAA also administers these cases under the specialized FIFRA Arbitration Rules, which govern these proceedings.⁷

New York and New Jersey Superstorm Sandy Mediation Programs

The AAA was designated by Governor Cuomo and the N.Y. Department of Financial Services in 2012 to administer a voluntary mediation program for disputes between New York homeowners and insurance companies for claims arising from Superstorm Sandy. The AAA administered over 6,000 mediations for New York homeowners. The AAA was also designated by the New Jersey Department of Banking and Insurance to administer a mediation program for disputes between policyholders and insurers for disputes arising from Storm Sandy involving claims against homeowners, automobile and commercial insurance policies.⁸

IRS International Tax Treaty Disputes

The Internal Revenue Service contracted the AAA's international division, the International Centre for Dispute Resolution (ICDR) for the administration of arbitration cases arising from international tax treaties with France, Germany, Belgium, and Canada. The ICDR also served as a financial intermediary, working with foreign governments on behalf of the IRS, to ensure fees, expenses, and arbitrator compensation are paid appropriately.

United States Olympic Committee Disputes

The AAA is designated to resolve disputes arising from United States Olympic Committee (USOC) decisions. Also, to be recognized by the USOC, amateur sports organizations must require the use of arbitration administered by the AAA. The Association also provides specialized arbitrators to resolve disputes arising at the various Olympic events throughout the world.⁹

Florida Residential Mortgage Foreclosure Mediation Program

In 2010, the AAA was chosen by Judicial Circuit Courts in Florida's 8th, 17th, and 18th Circuits as the official mediation administrator for the Residential Mortgage Foreclosure Mediation (RMFM) program. The RMFM program stipulates that all lawsuits involving a residential mortgage foreclosure of an owner-occupied homestead residence will be referred to the AAA. Once the homeowner has been notified, and if they agree to participate in the program, they will first undergo mortgage foreclosure counseling. The homeowner and the lender will then begin the mediation process with the objective of reaching an early and mutually agreeable settlement of their dispute.¹⁰

New York Worker's Compensation Health Insurer's Match Program (HIMP)

In 1993 the New York Worker's Compensation Board issued a regulation, which provided for arbitration of eligible disputed requests for reimbursement by health insurers or health benefits plans from workers compensation carriers for benefits paid for a qualified claimant's treatment. The AAA has since then administered the arbitration provisions of the regulation.¹¹

United States Anti-Doping Agency Disputes

The AAA administers a program to resolve disputes related to proceedings under the United States Anti-Doping Agency (USADA) Protocol for Olympic Movement Testing, under the AAA Olympic Sport Doping Disputes Supplementary Procedures.¹²

Post-Disaster Recovery Claims Programs

A number of state governments have for decades relied on the AAA to assist with post-disaster claims. The AAA was selected by the state governments of Louisiana and Mississippi to provide mediation and arbitration programs to assist in quickly, fairly, and efficiently resolving claims disputes arising from Hurricanes Katrina and Rita. Since 2006, the AAA has been designated by the North Carolina Department of Insurance to administer a statewide disaster mediation program. This program is mandatory for insurers, but participation is voluntary for policyholders.¹³ In the wake of Hurricane Andrew, the AAA worked with the Florida Department of Insurance (DOI) to implement an alternative dispute resolution program to help resolve disputes between homeowners and insurance carriers through mediation in a quick and cost-efficient manner.¹⁴

* * *

When a government entity mandates the use of the AAA and its rules, it is often to resolve disputes between private parties under governmental authority. The government has an interest in the impartial and efficient resolution of these disputes, and therefore specifies the use of the AAA through statute, regulation, order, or contract, in many cases at no cost to the government. In other situations, the government itself is a party to the dispute, and has sufficient confidence in the impartiality and integrity of the AAA to commit to an ADR process using our services. The AAA has a long history of assisting government organizations in the design, development, and implementation of effective, cost-efficient, and expeditious ADR systems and programs.

Endnotes

1. U.S. District Court for the District of Columbia, Modified Final Judgment, Case 1:11-cv-00106.
2. Consolidated Appropriations Act of 2010, Public Law 111-117, § 747.
3. New York State Insurance Law Section 5106; New York State Insurance Department Regulation No. 68 (11 NYCRR 65), Subpart 65-4.
4. Minnesota's No-Fault arbitration system was established under the Minnesota No-Fault Automobile Insurance Act, Section 65B.525, with oversight by the state Supreme Court.
5. FTC Decision and Order, Docket No. C-4410.
6. Regulation, 51 FR 22585.
7. Code of Federal Regulations, 29 CFR 1440(b), which reads "...For the purpose of compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (hereinafter "the Act"), the roster of arbitrators maintained by the Federal Mediation and Conciliation Service shall be the roster of commercial arbitrators maintained by the American Arbitration Association. Under this Act, arbitrators will be appointed from that roster. The fees of the American Arbitration Association shall apply, and the procedure and rules of the Federal Mediation and Conciliation Service, applicable to arbitration proceedings under the Act, shall be the FIFRA arbitration rules of the American Arbitration Association, which are hereby made a part of this regulation."
8. Fifteenth Amendment to New York Insurance Regulation 64. New Jersey Department of Banking and Insurance Order No. A13-106.
9. Federal statute, 36 USC 391(b)(3), which reads in part "...agrees to submit, upon demand of the Corporation, to binding arbitration conducted in accordance with the commercial rules of the American Arbitration Association in any controversy involving its recognition as a national governing body, as provided for in section 395 of this title, or involving the opportunity of any amateur athlete, coach, trainer, manager, administrator or official to participate in amateur athletic competition, as provided for in the Corporation's constitution and bylaws..." Also, federal statute 36 USC 395(c)(1), which reads in part "...The right to review by any party aggrieved by a determination of the Corporation under the requirements of this section or section 391(c) of this title shall be to any regional office of the American Arbitration Association. Such demand for arbitration shall be submitted within 30 days of the determination of the Corporation. Upon receipt of such a demand for arbitration, the Association shall serve notice on the parties to the arbitration and on the Corporation, and shall immediately proceed with arbitration according to the commercial rules of the Association in effect at the time of the filing of the demand..."
10. Pursuant to Administrative Order AOSC09-54 (12/28/09) of the Florida Supreme Court.
11. Subpart 325-6 of Title XII of the official compilation of codes of rules and regulations of the state of New York.
12. United States Anti-Doping Agency Protocol for Olympic and Paralympic Movement Testing.
13. North Carolina General Statute 58-44-70 (Senate Bill 277, Session Law 2006-145).
14. Emergency Rule 4-166.030 Alternative Procedures for Resolution of Disputed Claims Arising from Hurricane Andrew.

Judith S. Kaye: In Her Own Words: Reflections on Life and the Law, with Selected Judicial Opinions and Articles

By Judith S. Kaye; Edited by Henry M. Greenberg, Luisa M. Kaye, Marilyn Marcus, and Albert M. Rosenblatt
(SUNY Press, 2019)

Reviewed by Robert S. Smith

Judith Kaye completed the writing, but not the editing, of her autobiography before she died. She had begun, her daughter tells us in a prefatory note, to rearrange her narrative into chronological order, but had not finished the job. Her children, finding it presumptuous to finish it for her and “too weird” to publish the unedited and edited sections together, decided to go back to the original manuscript, in which, it seems, the sections appear in the order Judith felt like writing them. Chapter 9 is “The Afterlife” (about her life after retiring from the bench). Chapter 10 is “From Day One Through Law School.”

The Kaye children made the right decision. It produces a funny combination of order and spontaneity that, to my mind, is characteristic of Judith herself, who did her demanding jobs (including autobiography-writing) with businesslike efficiency and spontaneous human warmth.

The book consists of a memoir of about a hundred pages, followed by a 350-page collection of her writings—judicial opinions, articles and speeches. Probably few readers will go through the whole thing in order from beginning to end, and many may prefer to read even the memoir in the way Judith wrote it, by going haphazardly to whatever appeals them at the moment. The readers will include many who loved and admired Judith (a group of which I am a proud member) and many who agree with most of her views on law and other subjects (that’s not me). It will include friends and co-workers from various times and places, and among those will be the dozen or so still living, of whom I am one, who were her colleagues on the New York Court of Appeals.

For us and for many others, the best thing about the book is that it brings so much of Judith back. There she is, in the distinctive, graceful written prose of which she was quietly but intensely proud. Her preface begins: “By nature, I am first and foremost a writer.” She began her career as a journalist and went to law school, she tells us, only because she thought it might get her a decent job with some newspaper or magazine. As a judge she had a talented staff to draft writings for her, but I’m sure none ever left her desk without her personal touch. She kept an eye on her colleagues’ writing too, because she thought

part of the Chief Judge’s job (as though she didn’t have enough else to do) was to make sure that everything that came out of the Court—not just what we said, but how we said it—was of at least respectable quality. The first time I drafted an opinion for the Court, she was gracious with compliments, as she always was, but she suggested that I change the first sentence to the active voice. That moment came back to me as I sat down to write this review, first beginning “The writing, but not the editing... was completed,” then changing to the form Judith would, rightly, have preferred.

Another bit of Judith that comes back in reading her memoir is the depth of her feelings, both of joy and sadness, and her willingness to share them. She makes her readers understand how much she adored three things—her family, her career on the Court, and life itself—and how painful it was for her, in her last decade, to lose Stephen, her beloved husband of more than 40 years (“While I cannot swear that our marriage was absolute perfection...it came pretty close”), to face mandatory retirement after a quarter-century on the Court (“Then the curtain came down. Thud.”) and to receive a devastating diagnosis (“The statistics on stage four lung cancer are grim”). But the memoir is more joyful than sad, and even when it is sad it is not depressed or depressing. She survived Stephen by nine years, her retirement by seven and her diagnosis by five, and I doubt there was a moment when she

ROBERT S. SMITH is head of the appellate practice at Friedman Kaplan Seiler & Adelman, LLP, in New York City. From 2004 to 2014 he served as an Associate Judge of the New York State Court of Appeals.

This review was originally published as “Remembering Judith: A Colleague Responds to Judith S. Kaye: In Her Own Words” in the November 2019 issue of the New York State Bar Association Journal (vol. 91, no. 8).

even thought about lying down, literally or figuratively, to wait for the end. Writing of her first five years back in private life, as a partner at a high-powered law firm, she says that she is “enormously busy and productive,” and everyone who knew her in those years knows it is true. “I can honestly say,” she writes of those same years, that she has “passions, purposes, projects...that could happily make up the last day of my life.” In her eulogy for her mother, Luisa Kaye described finding her mother’s remains in bed on that last day: “She was sitting up.”

But nothing comes back more strongly, nothing seems more a part of Judith to me, than the kindness of her heart. Her unfailing warmth to her colleagues—including those, like me, who sometimes took an unworthy delight in thwarting her powerful will—was more than professional courtesy, or even a sense of a common calling. She went out of her way to be kind to, and she truly cared about, everyone she came in contact with, including the courthouse employees whose job it was to drive cars or empty wastebaskets, clerks in stores and waiters in restaurants, and a person of borderline sanity who loved her and followed her everywhere. In this memoir, her strongest feelings of pride seem to be attached not to her extraordinary professional achievements, but to the

actual good she has done for human beings: jurors whose service she labored, through her Jury Project, to make pleasant and rewarding; sufferers from mental illness and drug addiction who were given a second chance by the “problem-solving courts” she fostered; the children cared for at the “children’s centers” established in the state’s courthouses for kids of people who had to be in courtrooms.

She was a tough woman, but she was a soft touch, for children especially. I remember her calling me to agonize about a termination of parental rights case in which I was writing an opinion: she wanted to know which result would give the child involved, a girl called Annette, a better chance at happiness (an unanswerable question). The Adoption Now Program she established reduced by 50% the number of children awaiting adoption in New York. It was this that led Judith’s and my colleague Judge Victoria Graffeo to say (I am quoting, from memory, remarks made at one of the many tributes to our Chief when she retired): “Her real legacy is not in the New York Reports. It is in the children who have parents today because of Judith Kaye.” Certainly, that is not Judith’s only legacy. But reading this memoir did not shake my feeling that none better reflects the finest qualities of this great judge.

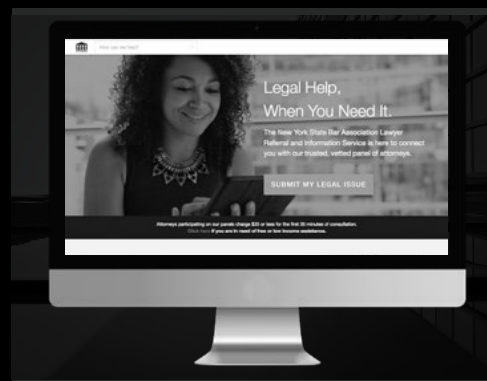
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Rose QC: The Remarkable Story of Rose Heilbron, Trailblazer and Legal Icon

By Hilary Heilbron

(Hart, 2013; re-released 2019)

Reviewed by John Fellas

In February 1952, a woman barrister published an article called “Wake Up Women” in an English magazine, *Sunday Graphic*. In the article, she wrote:

I hope we shall see more and more women combining marriage AND a career. But the happy management of home and career can and IS being achieved . . .

. . . the name of Miss ROSE HEILBRON Q.C., whose moving advocacy in recent trials has been so widely praised, is known throughout the land.

Unless Britain, in the new age to come, can produce more Rose Heilbrons—not only in the field of law, of course, we shall have betrayed the tremendous work of those who fought for equal rights against misguided opposition.

The woman who wrote those words will be familiar to all readers. It was Margaret Thatcher, who 27 years later was to become the first woman British Prime Minister. By contrast, the woman about whom she was writing, Rose Heilbron, a barrister and later a judge, is likely to be known only to a few.

Rose* was born in Liverpool in 1914, and, like Margaret Thatcher, was a trailblazer. She was the first woman awarded first class honors (the equivalent of *summa cum laude*) at Liverpool University (and only the second woman in the country to receive such honors). She was the first woman to receive a scholarship to study at Gray’s Inn. (Aspiring barristers are required to join one of four Inns of Courts in order to pursue their professional careers, and Rose would have been unable to do so without a scholarship). In 1949, she was the first of two women to become a King’s Counsel (when George V was King) and later Queen’s Counsel (after Elizabeth II acceded to the

throne in 1952). (Becoming a QC or “taking silk,” as it is known colloquially, is a mark of distinction for a barrister). She was hailed as the first woman judge in England, something that was reported across the world when she was appointed on January 6, 1957, including in the *New York Times*, which ran a story about her appointment on January 8. She was the first woman to sit as a judge in the Old Bailey. She was the second woman High Court Judge.

By all accounts, Rose was charming, brilliant and beautiful, and in her heyday, was famous across the Britain. Newspapers regularly reported on her cases, bestowing on her the nickname “Portia” from *The Merchant of Venice*. People would flock to see her when she was arguing in court. When, in 1950, Rose was asked to deliver a speech on human rights at a conference of 1,500 delegates, Eleanor Roosevelt asked Rose (who had attended a dinner in her honor the evening before the speech) to deliver a personal message at the conference. When Queen Elizabeth and her husband were on a royal tour of Liverpool in 1954, the queen specifically asked to meet with Rose—the first of many such meetings. After Rose successfully represented dock workers from Liverpool, one “Mersey Mike” wrote a poem about her called *The Epic of the Old Bailey*. Films and television shows were modeled on Rose’s career, including the show *Justice*, which starred Margaret Lockwood, famous for her role in Alfred Hitchcock’s *The Lady Vanishes*.

During her lifetime, famous publishers, authors and literary agents expressed an interest in writing Rose’s life story. Ever-ethical, she declined on the ground that any biography would violate the bar’s professional rules prohibiting advertising by lawyers. But finally, in 2013, a magnificent biography finally published, *Rose QC - The Remarkable Story of Rose Heilbron: Trailblazer and Legal Icon*. It has been recently re-issued in paperback to mark

JOHN FELLAS is partner at Hughes Hubbard and Reed in New York.

*Because Hilary Heilbron, the author of the biography, is the daughter of the subject of the biography, Rose Heilbron, in most cases I will refer to mother and daughter by their first names alone to avoid confusion.

the centenary of women's entrance into law. The author is Rose's daughter, Hilary Heilbron QC, a distinguished and highly accomplished barrister in her own right. Drawing on her own diaries and personal experience, as well as Rose's diaries, correspondence, transcripts of cases, and newspaper articles, Hilary has written an elegant and absorbing chronicle of her mother's extraordinary life.

Rose's success is remarkable given that, when she was born in 1914, women could neither vote nor practice law in Britain. When, in 1904, Christabel Pankhurst, one of the leading suffragists, applied to become a barrister, her application was denied. And while the prohibition on women practicing law in Britain was lifted in 1919, chauvinist attitudes remained, and still do. In 1939, when Rose first tried to get a pupillage—a form of apprenticeship that newly qualified barristers are required to undertake—one of her applications was rejected for the following reason: "I have a definite feeling that the other men in these chambers and the clerk would not welcome a woman pupil." And while this type of bigotry continues to this day, it was far more common then than now to openly invoke stereotypes about women's "natural" differences from men—views that, these days, would make most of us cringe.

In 1958, for example, a London newspaper, *The Evening Standard*, noted that legal experts had concluded that women have a "natural handicap in court: having less voice power, they have difficulty in making their cases heard." The article then went on to note: "A few women barristers achieve great success, notably Miss Rose Heilbron QC." The same nonsense appeared in *The Times* in August 1966 in an article by Lord Mancroft. He wrote that women suffer certain "natural disadvantages . . . [E]ven though they may be absolutely brilliant academically, in court women can often be difficult to hear because their voices are light and high-pitched. Of course there are those who have triumphed like Rose Heilbron." And even articles that sought to praise Rose invoked traditional stereotypes about the role of women. Thus, an article in *Tid-Bits* in 1955, by one Joanne Heal, who had just met Rose at an event, noted that "[t]he surprise was to find her attractive and smart in such a 'wifely' way. Very much there with her doctor husband and not the other way about, and for all her fame and brain anxious to talk not of famous legal struggles, but of the thrill of owning a new dish-washing machine."

That Rose was able to succeed in the law in the face of such prevailing attitudes about the role of women shows just how remarkable she must have been. But, as a sign of how far we still have to go, Rose was the first of two female QCs in 1949. When Hilary became a QC 38 years later in 1987, she was only the 29th. And, while by 2018, there were 275 women QCs, that was out of a total of 1,695—only 16%.

Rose QC is about more, however, than Rose the lawyer or Rose as trailblazer. It is also about how her life unfolded within the history she lived through—including two world wars, her Jewish faith, her marriage, and, of course, her relationship with her daughter Hilary. For example, we learn the advice that Rose gave to Hilary when she went to study at Oxford during the height of the swinging sixties: "do not get pregnant, do not take drugs and watch the traffic."

Rose QC is an absorbing and engaging read, especially so because it chronicles Rose's life against the background of the events of her day. When Rose became a High Court judge in 1974, a colleague wrote to her that a newspaper he had just read "contained a reference to your appointment and at the same time I learned of President Nixon's resignation. Somehow my faith in justice was restored." Given that Rose was from Liverpool, it would be odd if the Beatles did not figure in some way in the book. Thus, we learn that Nat, Rose's husband, was best man at the wedding of Harry Epstein, the father of Brian Epstein, the manager of the Beatles. Later when Hilary was a teenager at the height of the Beatles' fame, she was able to get her hands on tickets both to concerts and to a reception held in Liverpool in honor of the Fab Four.

Rose never set out to be a trailblazer; rather, she wanted to be a successful lawyer and later a successful judge. But she became a role model and an inspiration for women lawyers in the generations that followed. Cherie Blair QC, wife of former Prime Minister Tony Blair, wrote the foreword to *Rose QC*. Cherie Blair is herself a successful barrister from Liverpool. She writes that, growing up in her grandmother's house, "there was one name that always made my grandmother excited: Rose Heilbron QC," and that the two of them would avidly watch the television show *Justice*, which was based on Rose. "[I]t was no surprise that I reckoned the law was a good place for a girl from Liverpool."

Children always come into their parents' lives *in medias res*, and, as Hilary notes, she learned during her research that "the most interesting period of [Rose's] life was before I was born and when I was a small child and thus too young to understand the implications of her career and fame." While researching and writing *Rose QC* must have been a labor of love, it was nonetheless labor. Hilary's diligence is evident on every page of her meticulously researched and gracefully written book that provides a window into the world of a trailblazing woman lawyer who changed the landscape for all those who followed her.

English Arbitration and Mediation in the Long Eighteenth Century

By Derek Roebuck, Francis Boorman and Rhiannon Markless

(HOLO Books, The Arbitration Press, 2019)

Reviewed by Karyl Nairn

English Arbitration and Mediation in the Long Eighteenth Century is the latest instalment in an important series of books by Professor Derek Roebuck charting the development of arbitration in England. Readers will already be familiar with *Early English Arbitration*,¹ *Mediation and Arbitration in the Middle Ages*,² *The Golden Age of Arbitration*³ (addressing dispute resolution in the reign of Queen Elizabeth I) and *Arbitration and Mediation in Seventeenth Century England*.⁴ This latest work is co-written by two colleagues who were researchers for Professor Roebuck on earlier books: Dr Francis Calvert Boorman and Dr Rhiannon Markless. The collaboration has clearly been a happy and fruitful one. This latest volume is rich with detail about the role played by arbitrators and mediators during this most fascinating and tumultuous period in English history.

The authors introduce their book by reference to two arbitrations which framed the century: In 1701, a committee of arbitrators was established to resolve by merger the bitter rivalry between the London Company and the New India Company over their competing trade interests in India. The outcome of the seven-year arbitral process (which included the appointment of two leading politicians of the time⁵ as arbitrators) consolidated the power and influence of the East India Company (and indeed Britain itself) in India. The arbitral remit encompassed not only matters of empire but “*national debt, party politics, the role of Parliament, trade and monopoly*.”⁶

The close of the century witnessed what some consider to be the “beginning of the modern era of international arbitration.”⁷ The Treaty of Amity, Commerce and Navigation made between Britain and the United States in 1794 established commissions of arbitrators to resolve various conflicts arising from the American War of Independence Revolution including compensation claims brought by British merchants.

Although the details of these two famous arbitrations are not addressed in this book,⁸ they set its tone: arbitration *mattered* in the 18th century. The authors draw on a wealth of source materials, including reported cases, judges’ manuscripts and notebooks, personal letters and diaries and newspaper articles, to show that arbitrations and mediations were taking place across the entire breadth of English society in the 18th century over matters as diverse as family inheritance, labour, rights to new inventions, slights to reputation, building and engineering works, sport, gambling, entertainment, religion and

even criminal matters. The book also reveals the extent to which judges and officers across the legal system actively promoted arbitration and saw it as an integral part of the usual business of their Courts.

Such material thoroughly debunks the popular misconception of the 19th and 20th century that the English Courts were traditionally hostile to arbitration. The case against Lord Campbell as the main culprit peddling that myth is compellingly laid out.⁹ Indeed, it never made sense to accept Lord Campbell’s mischaracterisations nor Viscount Hailsham LC’s later assertion that arbitration was once regarded in England with “jealousy and aversion.”¹⁰ The 18th century was, after all, a perfect environment for arbitration to flourish. While King and State were dealing with civil unrest, the battle of Culloden, the revolution of 13 American colonies, the fallout from the French revolution, and conflicts with Spain and the Netherlands (to name but a few dramatic events of the time), ordinary citizens were coping with the upheavals of the Industrial Revolution. The cumbersome court system struggled to keep pace with the rapid urbanisation and changing times. For many there was simply no court within physical or economic access.

The research and scholarship underpinning this book is admirable but the real contribution is the way that the authors draw on existing specialised research on 18th-century subjects and weld them with perspectives gleaned from additional materials to shed new light on how arbitration formed part of daily commercial and domestic life at this time.

Keepers of the Peace

One area in which existing research is given a fresh perspective is the fascinating role of the Justices of the Peace. As well as discharging their official duties addressing criminal and other formal complaints, these officers of the state regularly assisted parties across the country to resolve their disputes informally. A few surviving diaries and notebooks, such as those of the clergyman Edmund

KARYL NAIRN, QC (knairn@skadden.com) is partner and global co-head of international arbitration at Skadden Arps Slate Meagher & Flom (UK) LLP.

Tew of County Durham and Thomas Horner, the squire of Mells in Somerset, reveal skilled dispute resolvers, moving seamlessly from a role of judge to mediator to settle private grievances. Tew's notebooks from 1750 to 1764 show him patiently considering all manner of disputes, including reputational skirmishes, unpaid wages claims and marital differences. A particular favourite is his entry from 23 April 1751: "Refused a warrant against widow Raby, publican, for opprobrious words etc against Alexander Knox's wife, 2 very touchy people."¹¹

Horner's meticulous entries from 1770-1777 include a noteworthy reference to Rev. John Wesley. The Methodist preacher brought a claim of forcible entry against certain individuals who had paid him an unwelcome "visit" at his lodgings (they objected to his preaching to the mining communities of Somerset). After proposing that the defendants make restitution, Horner recused himself from further consideration of the matter. He happened to own the freehold of the premises and was afraid of "incurring the censure of partiality."¹²

Arbitration-Friendly Courts

It was not just at the informal level of the Justices of the Peace and at the assizes, however, that arbitrations and mediations were prevalent. The authors present substantial evidence that matters were referred to arbitration by judges across the rest of the legal system of the time. Judges sitting in the four High Courts—Chancery, King's (or Queen's) Bench, Common Pleas and Exchequer as well as the High Court of Admiralty—actively *encouraged* arbitration. Drawing on unpublished reports and previous research undertaken by others such as Henry Horwitz and James Oldham,¹³ the book places rightful emphasis on Lord Mansfield's role as the great friend to commerce during his 32-year reign as Chief Justice of the King's Bench. That famous fashioner of the common law supported the developing capitalist economy and the growing arbitration community by dispatching hundreds of business disputes to expert arbitrators—artisans, engineers, surveyors, sea captains, builders—as well as to lawyers and jurymen. His successors, Lord Kenyon and Lord Ellenborough were similarly supportive. In the case of *Wilkinson v. Wilkinson*, brothers John and William fell out with each other after having invested nearly half a million pounds in ironworks around the country. When the matter came before Lord Kenyon in 1795, he advised placing all the disputes before an arbitrator, "the most unfettered Judge in the world."¹⁴

The authors provide ample evidence that many arbitrators appointed through court referrals were nominated by the parties themselves, especially in shipping disputes.¹⁵ Lawyers too were appointed by the Courts and some were much admired. Lawyers of today looking for 18th-century arbitrator role models need go no further than the polymath property lawyer, Charles Fearn, (1742-1794) of Bream's Buildings, Chancery Lane, whom

Lord Campbell later extravagantly praised as "a man of as acute understanding as Pascal or Sir Isaac Newton."¹⁶

Private Arbitrations in Every Sphere of Life

Perhaps the most revelatory part of the book lies in the many and varied accounts of the ad hoc arbitrations taking place in all walks of life through the initiative of the parties directly, often with the encouragement of their religious, family or trade community. Almost anything could be the subject of an arbitration at that time, including activities which were illegal such as gambling. Members of the working classes and the aristocracy were keen gamblers, betting on cards, dice and even matters such as which members of a gentlemen's club would die first and whether "...Buonaparte succeeds in his views upon Spain within 2 years."¹⁷ Bets typically included an arbitration clause. Although not legally binding, awards rendered were generally honoured for reputational reasons.

The sport arbitrations entertainingly described in the book readily demonstrate why this was not a field particularly suited to the courts. Disputes typically concerned the outcome of matches on which substantial wagers were made. The cover of the book is a scene of bare-knuckle fighters in an amphitheatre owned by boxing impresario Jack Broughton. In 1743, he promulgated a code for fighting contests which was used for the following 100 years. It included an arbitration process of two umpires chosen by the principals with a third to be selected by the first two, in the event there was no agreement as to the result. Cricket was another sport attracting the gambling public, with matches leading sometimes to riots and calls to make the sport illegal. An arbitration held to determine the outcome of a cricket match between Hadleigh and Ipswich in 1788 was a big news story of the day.¹⁸

At the other extreme, arbitration was strongly encouraged within many religious communities. The authors proclaim the Quakers as "the greatest advocates of arbitration in eighteenth century English society."¹⁹ A rich selection of material supports this thesis, including extracts and advices of the Yearly Meetings of Friends and the diary of one Isaac Fletcher of Underwood in Cumberland who sat regularly as an arbitrator within the Quaker community and even referred his own disputes to arbitration (although apparently not with much success).²⁰ Also of particular interest is the establishment by a group of Quakers of the Newcastle Upon Tyne Association for general arbitration in 1793 (initially opposed by local lawyers), which must be one of the earliest examples of a general arbitral institution. Referrals of disputes to arbitration by Quakers were often justified by reference to quotes from the scripture. Arbitration, it seems, is divinely endorsed.²¹ (Some modern arbitrators assume they are "God's gift"—this material suggests that they might be right after all.)

A chapter is devoted to showing the prevalence of ad hoc references to arbitration in many areas of business and commerce. Disputes between business partners were well suited to rapid resolution by industry peers, with many including arbitration clauses in their agreements.²² The financial stakes were often high. This century marked the birth of mass consumerism. Disputes over scientific inventions and new industrial techniques required specialist knowledge to resolve effectively. Patent disputes were frequent but were complex, slow and costly to resolve through the courts or Parliamentary system.

The book provides a fresh perspective on well-known 18th-century figures of the Industrial Revolution such as James Watt, Thomas Telford, Matthew Boulton, Samuel Crompton and Richard Arkwright. Private letters show Watt and Telford lending their technical expertise to help others resolve disputes while others appear in records as regular users of arbitration. One of Watt's arbitral awards, which was unearthed in the City of Birmingham archives, is enthusiastically reproduced and speaks across the centuries of his practical and fair-minded approach.²³

Private Arbitration: Fashionable and “Manly”

Reassuring for arbitration practitioners today who feel undervalued is the evidence presented of the high regard for the arbitral process and those taking part in it. According to the British *Evening Post* in 1792, arbitration represented “common sense and common honesty.”²⁴

Submitting to arbitration in the 18th century was seen as a way to end a quarrel while preserving the honour and reputation of the parties. Arbitration was a more fashionable and civilised way to show manliness than resorting to a duel.²⁵ A letter written to a newspaper by “Arcadius” in 1773 called duelling a “Gothic custom” and proposed arbitration as one means of addressing “many affronts and other intricate matters not cognizable by law.”²⁶ The owner of the daily newspaper *The World* challenged in the press his fellow disputant to accept his “just and manly offer of ARBITRATION—If he is not just and manly, I cannot help it. He must take the consequences.”²⁷

The status of lawyers in the 18th century was not particularly high, but the lawyers who arbitrated disputes enjoyed a welcome boost to their reputations. Particularly in the first part of the century, arbitrators did not traditionally charge for their services, so arbitration was community service rather than a remunerative activity.²⁸ Bishop Gilbert Burnet's posthumously published history of his lifetime, cited several times in the book, includes advice on the importance of being competent in the law in order that one could aspire to become an arbitrator: It “makes a Man very useful in his Country, both in conducting his own Affairs, and in giving good Advice to

those about him: It will enable him to be a good Justice of Peace, and to settle Matters by Arbitration.”²⁹

The accounts of the many arbitrations across daily life bring to mind the memorable observation of the art historian Kenneth Clark that “eighteenth century amateurism ran through everything: chemistry, philosophy, botany and natural history.” He noted “a freshness and freedom of mind in these men that is sometimes lost in the rigidly controlled classification of the professional.”³⁰ These words appear equally apposite to 18th century arbitration³¹ as revealed in this book. There are other occasional echoes of Clark in the bold conclusions of those confident in their command of the subject: in the chapter on theatre, for instance, the authors proclaim “there can hardly ever have been at any time or place a more disputatious lot than those involved in the English theatre in the 18th and early 19th century.”

The authors do not claim to have written the definitive work on arbitration in this period; they suggest that even their wide-ranging research has only just begun to reveal the importance of arbitration in daily 18th century life. They describe their book as a “call to action” for other researchers to follow them.³² But they are too modest about their achievements. Like the earlier works in the series, this is a book to which readers will happily return for inspiration.

Endnotes

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2. Derek Roebuck, *Mediation and Arbitration in the Middle Ages*, HOLO Books, the Arbitration Press, Oxford 2013.
3. Derek Roebuck, *The Golden Age of Arbitration*, HOLO Books, the Arbitration Press, Oxford 2015.
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5. Robert Harley, the Speaker of the House of Commons, and Sidney, the First Earl of Godolphin.
6. Roebuck, Boorman and Markless, *English Arbitration and Mediation in the Long 18th Century*, HOLO Books, the Arbitration Press, Oxford 2019 at page 4.
7. *Id.* citing Roger P Alford, The American Influence on International Arbitration (2002) 19:1 *Ohio State Journal on Dispute Resolution* 69-88.
8. For an account of the East India arbitration see, for example, William Foster, *The East India House, Its History and Associations*, London 1924, pp 104-105 and Roy A Sandstrom, “Godolphin, Sidney, first Earl of Godolphin,” *ODNB* 2011.
9. Roebuck et al, *supra* note 6 at pp 261-262, and *see also* Chapters 7-10.
10. *Id.* at page 47. See also Stavros Brekoulakis, “The Historical Treatment of Arbitration under English Law and the Development of the Policy Favouring Arbitration” (Spring 2019) 39:1 *Oxford Journal of Legal Studies* pp 124-50.
11. Roebuck et al, *supra* note 6, at page 74.
12. *Id.* at page 82.
13. Henry Horwitz and James Oldham, “John Locke, Lord Mansfield and Arbitration During the Eighteenth Century” (1993) 36:1 *Historical Journal* 137 and other publications cited at Roebuck et

- al, *supra* note 6 at pp 30-38. The authors also acknowledge the generous assistance of Sir John Baker regarding legal manuscripts.
14. *Telegraph*, 22 June 1795.
 15. Sea captains or salvage experts appointed by the Courts were typically nominated by the parties in shipping disputes. See Roebuck et al, *supra* note 6, Chapter 10, especially page 139.
 16. *Id.* at page 114 footnote 54.
 17. *Id.* at page 235 citing *The Betting Book of White's from 1743 to 1878*, London 1892 page 38.
 18. *Id.* at page 237.
 19. *Id.* at page 247.
 20. *Id.* at pp 250-252.
 21. *Id.* at page 248.
 22. James Watt and his factory-owner business partner Matthew Boulton included an arbitration clause in their partnership agreement. See *id.* at page 209
 23. *Id.* at page 210.
 24. *Id.* at page 42, footnote 36.
 25. Robert Shoemaker, "Male Honour and the Decline of Public Violence in Eighteenth-Century London," *Social History* (2001) and "The Taming of the Duel: Masculinity, Honour and Ritual Violence in London, 1660-1800," *Historical Journal* (2002).
 26. *London Chronicle or Universal Evening Post*, 14-16 September 1773.
 27. *Gazeteer and New Daily Advertiser*, 30 September 179.0
 28. The authors cite the observations of the Radical tailor and diarist, Francis Place: "I gained much knowledge in many ways and on many subjects by these interferences, for which I never made any charge, unless, the matter related to an association or large body of men, in some such cases I have accepted a sum of money equal to that which the other arbitrators were paid, in three or four instances where the parties were found to be rogues, or where the trouble was occasi[on]ed by bad feelings on both sides I have made charges, as I did not think that rogues and evil disposed persons had any claim on my time because they had misbehaved themselves." See page 285.
 29. Gilbert Burnet, *Bishop Burnet's History of his Own Time. From the Revolution to the Conclusion of the Treaty of Peace at Utrecht, in the Reign of Queen Anne* (Dublin, 1734) at page 390.
 30. Kenneth Clark, *Civilisation*, British Broadcasting Corporation and John Murray, 1969 at page 249.
 31. Chapter 21 is devoted to the move towards greater professionalisation of arbitration, largely due to the rise of the lawyer arbitrator. For merchants, at least, there remained a reluctance to charge fees.
 32. The publication of this book was made possible by the Access to Justice research project on the Development of Arbitration in England and Wales. Contributors to the project included the author of this review.

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The International Arbitration Rulebook: A Guide to Arbitral Regimes

By Arif Hyder Ali, Jane Wessel, Alexandre de Gramont and Ryan Mellske
(Wolters Kluwer, 2019)

Reviewed by Claire Stockford

The International Arbitration Rulebook (“the Rulebook”) represents a genuine attempt to plug a gap in the library of texts available to guide those active in the international arbitration field. The Rulebook sets out to provide a comparative analysis of the rules of major arbitration institutions governing many of the commercial and investment arbitration cases in which the arbitration community participates. The transatlantic author quartet, and the long list of additional contributors, indicates the scale of the task in putting together a work of this kind.

It would be an impossible task for any book to seek to analyze every set of arbitration rules in place around the world. As arbitration has become an increasingly popular method of resolving disputes, a plethora of institutions, each with its own rules, has sprung up. While this might present arbitration users with a welcome breadth of options, it presented the authors of the Rulebook with a challenging decision to make: from the “alphabet soup” of available options, which arbitration rules to include (and, by corollary, which to exclude)? The authors selected the following institutional rules for inclusion: the rules of the American Arbitration Association’s International Centre for Dispute Resolution (AAA-ICDR); the China International Economic and Trade Arbitration Commission (CIETAC); the Hong Kong International Arbitration Centre (HKIAC); the International Court of Arbitration of the International Chamber of Commerce (ICC); the International Centre for Settlement of Investment Disputes (ICSID); the London Court of International Arbitration (LCIA); the Arbitration Institute of the Stockholm Chamber of Commerce (SCC); and the Singapore International Arbitration Centre (SIAC). Although not a set of institutional rules, the authors also considered the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

The sets of rules selected indicates both how global the practice of international arbitration is in 2019, and one of the ways in which it sometimes draws criticism. The authors have included three Asian institutions, as well as the “usual suspects” from Europe and the United States. This reflects the increasing preference for arbitration by Asian parties. The selection also highlights the lack of a single prominent institution (or institutions) emerging in the Middle East-Africa region, despite the growing number of disputes that emanate from that part of the world.

Each of the chapters addresses a different aspect of the arbitration process, setting out in-depth analysis of the similarities and differences to be found among the



various rules. Helpfully, each chapter includes a table (or, in some cases, several tables), setting out the relevant sections of the arbitral rules considered by the authors. This is a really useful tool for visualizing where the differences lie.

This is not a light touch guide for the uninitiated. It is a serious and weighty examination of arbitration rules, running to almost 700 pages of commentary. As one might expect, it starts with an overview of arbitral institutions and regimes at Chapter 1. In this chapter, the authors examine the similarities and differences between the different institutions under examination, drawing out aspects that might influence a party’s choice of arbitral regime, such as case management arrangements, the methods by which arbitrators are selected and the level of scrutiny to which an award is subjected. Through the next eight chapters, it runs through the arbitration process stage by stage, from the agreement to arbitrate to costs, providing a detailed exposition and comparative analysis of the relevant rules. The extensive chapter on costs and fees, an area in which there can often be clear differences between the institutions, will be welcomed by many and will be particularly helpful to practitioners advising on

CLAIRE STOCKFORD(clairestockford@eversheds-sutherland.com) is a barrister and partner at Eversheds Sutherland (International) LLP, based in the London office, practising in international arbitration and litigation. She was a contributor to some early drafts of this work.

dispute resolution clauses. It includes tables comparing arbitrator fees and institutional costs across the different rules, showing up some stark differences. Chapter 10 is an examination of special procedures and procedural innovations, covering topics such as med-arb, expedition and recent “hot topics” such as claims consolidation and the joinder of parties. For arbitration aficionados there is a list of further reading at the end of the chapters.

In places, the book roams beyond the limits of the procedural rules of various institutions to consider the application of the IBA Rules of Evidence and the legal framework applicable to award recognition and enforcement, making it a comprehensive analysis.

The book does have its limitations. It does not, and practically could not, cover every set of rules a practitioner is likely to encounter. As arbitral institutions proliferate in jurisdictions across the world, this would have

been an impossible task. Nonetheless, as many of the institutions that are not explicitly covered by the book have modelled their arbitral rules on the UNCITRAL rules or on the rules of one of the key institutions, the book is still likely to be able to provide some insightful commentary even for the rules not examined. Nor is the book a philosophical commentary on what arbitration rules *should* be, or how they should evolve. It is more practical than that

The preface to the book suggests it is for contract negotiators, arbitrators, counsel, academics and also for the arbitral institutions themselves, as they continually work to innovate with the goal of improving the arbitral process for its community of users. In a world where the popularity of international arbitration as a means of resolving disputes shows no sign of abating, in this reviewer’s opinion, this book will be a useful addition to any arbitration practitioner’s library.

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Case Summaries

By Alfred G. Feliu

Award Enforcing Trump Campaign NDA Vacated

Plaintiff, the Trump presidential campaign's Director of Hispanic Engagement, sued the campaign for sexual harassment. The campaign brought an arbitration alleging that plaintiff violated the non-disclosure agreement (NDA) that she had signed when she joined the campaign. Plaintiff did not participate in the arbitration other than submitting a letter to the arbitrator. The arbitrator ruled, in a standard award, that the NDA was enforceable, and that plaintiff violated it by making certain disparaging comments in the litigation and on her Twitter account thereafter. Plaintiff moved to vacate the award. The trial court denied the motion, but the First Department reversed and vacated the award. First, the appellate court ruled that the arbitrator violated New York public policy when he found that plaintiff breached the NDA "by making disparaging statements" about the campaign in the court action. The court emphasized that there is "a deep-rooted, long-standing public policy in favor of a person's right to make statements during the course of court proceedings without penalty." The arbitrator, by finding the statements made in the court action to be violative of the NDA, "improperly punished plaintiff for availing herself of a judicial forum. Defendant is hard-pressed to explain how plaintiff could have pursued her rights without setting forth necessary factual statements for the federal court to consider." The court also found that the arbitrator exceeded his authority in finding that tweets made after the Demand was filed also violated the NDA and "since the award takes into account events occurring after the Demand, which could not have been legitimately considered at arbitration, the award was made in excess of the arbitrator's enumerated authority." Seeing no basis to modify the award, the appellate court vacated it in its entirety. *Denson v. Donald J. Trump for President*, 180 A.D. 3d 446 (1st Dep't 2020).

Signatories to Employer Arbitration Program Included in Sex Bias Class Arbitration

The parties here submitted a sex bias class arbitration to an arbitrator who issued a class action determination certifying a class of 44,000 individuals, including those who did not opt into the proceeding. The Second Circuit, reversing the district court, ruled that the arbitrator was within her authority to do so. The Second Circuit reasoned that the absent class members consented to the arbitrator's authority to decide the threshold class arbitration question by agreeing to the employer's arbitration program. The court noted that the designated AAA arbi-

tration rules provide that they apply to class actions and the arbitrator had authority to rule on whether arbitration clauses permit class arbitration. The court added that the employer's program provided that the question of arbitrability was for the arbitrator to decide. Because absent class members bargained for the arbitrator's construction of the agreement "with respect to class arbitrability, the arbitrator acted within her authority in purporting to bind the absent class members to class procedures." As a result, the Second Circuit concluded that it was "not for us, as a court, to decide whether the arbitrator's class certification decision was correct on the merits of issues such as commonality and typicality. We merely decide that the arbitrator had the authority to reach such issues even with respect to the absent class members." The court further rejected the argument that the class members did not submit to this particular arbitrator's authority, noting that "[c]lass actions that bind absent class members as part of mandatory or opt-out classes are routinely adjudicated by arbitrators and in our courts." The court did, however, remand to the district court the question of whether the "the arbitrator exceeded her authority in certifying an opt-out, as opposed to a mandatory, class for injunctive and declaratory relief." *Jock v. Sterling Jewelers, Inc.*, 942 F. 3d 617 (2d Cir. 2019).

Delay in Paying Arbitration Fees Ruled Not Material Breach of Contract

Over 100 Lyft drivers initiated arbitrations with the AAA against the ride sharing service alleging that they were misclassified as independent contractors. The AAA split the claimants into five categories. Plaintiff here, Brunner, was in Group 3. Six months after Brunner's demand was filed, the AAA issued a revised invoice to Lyft for Group 3 cases which Lyft promptly paid. Brunner, however, withdrew his demand seven days before the AAA issued its revised invoice and filed a putative class action against Lyft. The court granted Lyft's motion to dismiss Brunner's action. The court found that Lyft was not in default and cited the AAA's issuance of a revised

ALFRED G. FELIU is an arbitrator and mediator on various AAA and CPR panels. Mr. Feliu is a past Chair of the NYSBA's Labor and Employment Law Section and a Fellow of the College of Commercial Arbitrators and the College of Labor & Employment Lawyers. The supplement to Mr. Feliu's fourth book, *ADR in Employment Law* (Bloomberg/BNA 2015), was published in 2017.

invoice and failure to suspend proceedings under its policies. The court noted “the arbitrator—or, in this case, the AAA itself—is well positioned to decide in the first instance whether the non-payment of fees justifies the termination of arbitral proceedings.” The court added that Lyft promptly paid the fees for Group 2 and yet by the time Brunner withdrew his arbitration claim, no preliminary hearing had been held in those cases and “Brunner thus did not suffer delay from the alleged breach.” In addition, Lyft was “actively cooperating” with the AAA and never refused to pay the requisite arbitration fees. The court, in rejecting Brunner’s material breach of contract claim, concluded that “the six-month delay between Brunner’s filing and withdrawal of his arbitral claim is attributable to the AAA’s administrative timeline for the 107 claims pending against Lyft, not to Lyft’s late payment of the fees for Group 3.” *Brunner v. Lyft*, 2019 WL 6001945 (N.D. Cal.).

Partiality Claim Rejected

The arbitrator disclosed that his law student son was seeking employment as a summer associate with law firms, including Respondent O’Melveny & Myers and its counsel, Gibson Dunn. Plaintiff objected and asked the arbitrator to recuse himself. O’Melveny and Gibson announced that they would not offer employment to the arbitrator’s son. Plaintiff then complained that the termination of the arbitrator’s son’s employment prospects “was a tactical maneuver to negatively inflame” the arbitrator’s passions against plaintiff. The arbitrator declined to recuse himself, finding that the law firms’ decision not to consider his son for employment mooted any basis for recusal. The arbitrator further confirmed that he did not hold a “grudge” against plaintiff for raising these issues. The arbitrator issued orders relating to various motions, including two summary disposition motions and a motion to disqualify the arbitrator because he and the expert witness were on a government commission together years before. The arbitrator also notified the parties that he had been selected in an unrelated arbitration in which Gibson Dunn represented a party. The arbitrator ruled in favor of O’Melveny and plaintiff moved to vacate the award on evident partiality grounds. The California district court denied the motion. The court rejected the argument that attacks challenging the arbitrator caused the arbitrator to be biased. Even had the arbitrator’s son been hired by one of the law firms, the court concluded that that was not enough for recusal. The court also ruled that plaintiff’s “mere allegation of bias, based on the selection of the Arbitrator as arbitrator in an unrelated matter involving Gibson Dunn, O’Melveny’s counsel, which the arbitrator disclosed, does not require vacatur.” The court concluded that the mere fact that the arbitrator issued a number of rulings against plaintiff was insufficient to establish bias. In doing so, the court noted that plaintiff “provided no evidence of improper motivation, and as identification of various adverse rulings, is insufficient to require vacatur.” Finally, the court declined

to second guess the arbitrator’s evidentiary rulings noting that arbitrators are afforded wide discretion in deciding whether to admit or exclude evidence. *Golden v. O’Melveny and Myers*, 2019 WL 5693760 (C.D. Cal.).

Evident Partiality Claim Rejected Based on Arbitrator’s Failure to Disclose

Claimant’s lawyers joined a new law firm just prior to the hearing commencing. At that time, the chair of the arbitration panel was counsel in a pending litigation against claimant’s counsel’s new firm. The chair failed to disclose this fact despite being actively engaged in the unrelated litigation. The panel made various rulings against claimant and issued an award in respondent’s favor. Claimant moved to vacate the award on evident partiality grounds based on the chair’s failure to disclose his ongoing representation of a party adverse to a party represented by claimant’s law firm. The court denied the motion and confirmed the award. Under applicable Fifth Circuit law, evident partiality in a failure to disclose case requires a showing that the undisclosed connection was a “significant compromising connection” that created a “concrete, not speculative, impression of bias.” Here, the “arbitrator had a professional relationship as an adversary with the firm representing one of the parties while the arbitration was ongoing.” The court emphasized that claimant’s “allegations of partiality are remote and speculative.” The court noted that the arbitrator updated his disclosures four times during the proceedings and that the panel issued a unanimous award against claimant. “The court cannot conclude that a reasonable person would *have to* conclude that the arbitration panel was partial. While a reasonable person *could* conclude that [the chair] was partial and that he somehow influenced the other two arbitrators, a reasonable person could also conclude that the fact that his adversary in a lawsuit that [the chair] had recently been pulled into was at the same firm that [claimant’s] counsel had recently joined is inconsequential, and the fact that the award was unanimous from all three arbitrators supports the opposite conclusion.” While the court found the “nondisclosure troubling,” it noted that “the standard for overturning an arbitral award for evident partiality is more stringent than appearance of bias” and that claimant has failed to meet that standard. *Credit Suisse Securities v. Carlson*, 2020 WL 32339 (S.D. Tex.).

Panel Did Not Exceed Authority in Ordering Divestiture of Interests in LLC

The arbitration panel ruled that Catic USA breached its agreement with Tang Energy that established an LLC, Soaring Wind Energy. The panel awarded lost profits of \$62.9 million and the divestiture of Catic’s interest in Soaring Wind Energy. Catic challenged the award, arguing that the panel’s order that it divest its membership interests constituted impermissible punitive damages which the contract expression precluded. The Fifth Circuit rejected this argument. “Although the panel did not have the authority to issue punitive damages, it did possess powers to grant court-enforced injunctive relief.” The court

concluded that the panel in fact exercised its authority to order injunctive relief. The court found that the panel's divestiture ruling was to prevent Catic "from receiving incidental benefits for breaching their duties, duties owed not only to the other members of the LLC but also to the LLC itself. Unlike punitive damages, which are based on a perceived reprehensibility of the breaching party's actions or flow from a desire to make examples of them . . . the divestiture operates to achieve what the panel considered a fair result." The court concluded that divestiture order was more equitable than punitive in nature and was entitled to deference and confirmed the award. *Soaring Wind Energy v. Catic USA, Inc.*, 946 F.3d 742 (5th Cir. 2020).

Arbitrator Bias Claim Rejected

A California superior court granted defendant CTC's motion to vacate a \$2.2 million arbitration award issued in favor of IBU. The superior court found that the arbitrator's rulings were biased and allowed a potentially impartial witness to participate in the hearing. In particular, the arbitrator allowed a witness testifying as an expert on Mexican law to also serve as co-counsel with the party calling him as a witness. The California Court of Appeal reversed, finding that the credibility of expert witness testimony and the evidentiary weight given to it was within the arbitrator's discretion. The court held that the arbitrator's decisions limiting testimony and allowing "[e]ach party" to argue at the hearing "through one or more attorneys, including the one who acted as expert witness" were neutral on their face. Concluding that CTC failed to show any specific prejudice suffered by the rulings, the court reversed and instructed the Superior Court to enter judgment in favor of IBU. *Inmobiliaria Buenaventuras S.A. de C.V. v. Chicago Title Co.*, 2019 WL 6167404 (Cal. App. 2 Dist.).

Proposal to Have Arbitrator Rule on Class Action Attorney Fees Rejected

The parties moved for preliminary approval of a class action settlement. Included in the settlement terms was a proposal that an arbitrator rule on the fees to be awarded to plaintiffs' counsel. The court rejected that proposal as "contrary to law." The court noted that in analyzing the settlement agreement for final approval it would be reviewing the fees' application, taking into account the interests of the class. "That leaves this Court to wonder why the parties would go through the rigamarole of an arbitration to determine appropriate attorneys' fees when that responsibility rests with the court." The court added that the proposal had the arbitrator ruling on the fees to be awarded before the claims process was complete. The court questioned how "could an arbitrator decide the reasonableness of attorneys' fees without knowing the total recovery of the class?" The court concluded that "it makes little sense to engage an arbitrator to render a decision that will carry no weight" and rejected the parties' proposal that the class action attor-

neys' fees award be made by an arbitrator. *Hart v. BHH, LLC*, 2020 WL 254779 (S.D.N.Y.).

Imbalanced Arbitration Panel Not Improper

The limited liability company agreement allowed each of its members, which at the time of the dispute was seven members, to select an arbitrator when arbitrating a claim. A dispute arose in which five members who brought claims against two members. The minority members brought an action arguing that the arbitration panel was improperly constituted, noting that one side selected five arbitrators while they were only able to select only two arbitrators. The Fifth Circuit rejected the minority members' arguments that this result was "absurd." The court emphasized that "the risk of such an occurrence is precisely within the plain terms to which" the minority members agreed. The court explained that it was not in a position "to discard the plain text of the Agreement out of so-called fairness." While the court acknowledged that the minority members did not expect to be "outnumbered in any dispute falling under the agreement; that its expectations were frustrated does not render the agreement absurd or unfair." *Soaring Wind Energy v. Catic USA, Inc.*, 946 F.3d 742 (5th Cir. 2020).

New Arbitration Panel to Rule on Consolidation Question

An arbitration panel issued an award in a reinsurance dispute. A second dispute arose involving the same parties. One party argued that the new dispute was the same as the prior dispute and should be heard by the prior arbitration panel; the other party disagreed and argued that a new panel should be constituted to rule on the consolidation issue. The district court sent the dispute to a new arbitration panel, and the Third Circuit, in a non-precedential ruling, affirmed. The Third Circuit noted that to send the dispute to the prior arbitration panel would be to prejudge the issue, that is, to determine that the dispute is the same as the prior dispute. Further supporting the court's conclusion was the applicable agreement which only allowed consolidation if the disputes were the same and the prior panel was extant, a decision to be made by a newly constituted panel in the Third Circuit's view. *Pennsylvania National Mutual Casualty Insurance Co. v. New England Reinsurance Corp.*, 794 Fed App'x (3d Cir. 2019).

Refusal to Admit Hearsay Evidence Does Not Warrant Vacatur

In an attorneys' fee dispute, the arbitrator declined to admit hearsay testimony from a paralegal regarding the necessity and reasonableness of the fees. The arbitrator found in favor of the client and the New York trial court and appellate court upheld the award. The appellate court acknowledged that an arbitrator's unreasonable exclusion of relevant evidence may justify vacating an award. The court noted that while an arbitrator is not bound by the rules of evidence it is does not follow that "an arbitrator is precluded from excluding hearsay evidence . . ." Here, the court noted that the responding attorney could have

testified and there was no good reason to rely on hearsay evidence as the paralegal's testimony was not competent evidence in these circumstances. Further, "the hearsay nature of the evidence sought to be adduced would have been unfairly prejudicial to petitioner because it would have deprived her of effective cross examination." For these reasons, the appellate court found no abuse of discretion and confirmed the arbitration award. *Prasad v. Spodek*, 65 Misc. 3d 154(A) (N.Y. App. 1st Dep't 2019).

Award Vacated Where Arbitrator Added Contract Term

The collective bargaining agreement (CBA) in this case provided that vacation requests by employees were to be granted "so far as possible" as "most desired by employees" but the "final right to allow vacations . . . exclusively is reserved" to the employer's discretion. The union brought a grievance when a member's vacation request for Christmas week was denied because her manager also requested that week and both manager and employee could not be out at the same time. The arbitrator ruled in favor of the union and the district court vacated the award. The Third Circuit affirmed, finding that the award "in no rational way draws its essence from the CBA." The court found that the applicable CBA language was not susceptible to more than one reasonable

interpretation as the employer had the "final" and "exclusive" right to rule on vacation requests. The arbitrator's emphasis on the "so far as possible" language was at the expense of the clear language of the CBA leaving the decision in the hands of the employer. The court noted that the arbitrator determined that in the absence of "operating need" or "special circumstances," the employee's vacation requests prevailed. "Rather than acknowledge the CBA's rule that the [employer] makes the ultimate determination over vacation scheduling, this decision flips the CBA on its head and grants the Union a near-categorical preference. Accordingly, notwithstanding a standard of review tilted much in favor of arbitrators, we cannot affirm this award that manifestly disregards the plain language of the CBA." The court added that by inserting an "operating need" restriction into the CBA's vacation provision, the arbitrator exceeded his authority. "Where an arbitrator injects a restriction into a contract to which the [employer] did not agree and to which the bargaining unit employees are not entitled, he dispenses his own brand of industrial justice and should be overturned." The court concluded that while the bar is low for upholding an arbitrator's award, the courts "are not an amen corner for arbitrators' rulings." *Monongahela Valley Hospital v. United Steel Paper and Forestry*, 946 F.3d 195 (3rd Cir. 2019)

Dispute Resolution Section Officers

Chair

Theodore K. Cheng

ADR Office of Theo Cheng LLC
66 Cartwright Drive
Princeton Junction, NJ 08550
tcheng@theocheng.com

Chair-Elect

Laura A. Kaster

Laura A. Kaster LLC
84 Heather Lane
Princeton, NJ 08540
laura.kaster@gmail.com

Vice-Chair

Ross J. Kartez

Ruskin Moscou Fattischek P.C.
1425 RXR Plaza
East Tower, 15th floor
Uniondale, NY 11556
rkartez@rmfpc.com

Secretary

Alfreida B. Kenny

Law Office of Alfreida B. Kenny
111 John Street
Suite 800
New York, NY 10038
abkenny@abkenny.com

Treasurer

Krista Gottlieb

ADR Center & Law Office
43 Court Street
Suite 1100
Buffalo, NY 14202-3111
kg@kristagottlieb.com

Immediate Past Chair

Deborah Masucci

Masucci Dispute Management and
Resolution Services
20 Polhemus Place
Brooklyn, NY 11215
dm@debmasucciadr.com

Section Committees and Chairs

The Dispute Resolution Section encourages members to participate in its programs and to contact the Section Officers or Committee Chairs for information.

ADR within Governmental Agencies

Cheryl R. Howard
CUNY School of Law
2 Court Square
Long Island City
New York, NY 11101
howard@law.cuny.edu

Arbitration Moot

Ross J. Kartez
Ruskin Moscou Faltischek PC
1425 RXR Plaza
East Tower, 15th Floor
Uniondale, NY 11556
rkartez@rmfpc.com

John Wilkinson
Fulton, Rowe & Hart
One Rockefeller Plaza
Suite 301
New York, NY 10020
johnhwilkinson@msn.com

CLE and Programming

Joan D. Hogarth
The Law Office of
Joan D. Hogarth
43 West 43rd Street
New York, NY 10036
jnnhogarth@aol.com

Jacqueline Nolan-Hanley
Fordham Univ. School
of Law
140 West 62nd Street
Lincoln Center
New York, NY 10023
jnolanhanley@
law.fordham.edu

Diversity

Noah J. Hanft
AcumenADR LLC
16 Madison Square West
Suite 1200
New York, NY 10010
nhanft@acumenadr.com

M. Salman Ravala
Criscione Ravala, LLP
250 Park Avenue
7th Floor
New York, NY 10177
sravala@lawcrt.com

Iyana Y. Titus
Assistant Commissioner,
EEO
NYC Parks & Recreation
1234 5th Avenue
New York, NY 10029
iyana.titus@parks.nyc.gov

Domestic Arbitration

Mansi Karol
American Arbitration
Association
150 East 42nd St
17th Floor
New York, NY 10017
KarolM@adr.org

Dani Schwartz
Wachtel Missry LLP
885 Second Avenue
47th Floor
New York, NY 10017
DSchwartz@wmlp.com

Education

Jacqueline Nolan-Haley
Fordham Univ. School of Law
140 West 62nd Street
Lincoln Center
New York, NY 10023-7407
jnolanhaley@
law.fordham.edu

Ethical Issues and Ethical Standards

Steven Carl Bennett
Scarola Zubatov Schaffzin
1700 Broadway
41st Floor
New York, NY 10019
scb@szslaw.com

Arthur Rene Hollyer
A. Rene Hollyer, Esq.
185 Broad St.
Bloomfield, NJ 07003
arh-esq@hollyerlaw.com

Health Care

Andrew T. Garbarino
Ruskin Moscou Faltischek PC
1425 RXR Plaza
15th Floor East
Uniondale, NY 11556
agarbarino@rmfpc.com

Joan D. Hogarth
The Law Office of Joan D.
Hogarth
43 West 43rd Street
New York, NY 10036
jnnhogarth@aol.com

International Dispute Resolution

Rekha Rangachari
New York International
Arbitration Center
150 E. 42nd Street
Floor 17
New York, NY 10017
rrangachari@nyiac.org

M. Salman Ravala
Criscione Ravala, LLP
250 Park Avenue
7th Floor
New York, NY 10177
sravala@lawcrt.com

Legislation

Hon. Ariel E. Belen
JAMS
34th Floor
620 8th Avenue
New York, NY 10018-1664
abelen@jamsadr.com

Mark J. Bunim
Case Closure
155 East 44th St.
5th floor
10 Grand Central
New York, NY 10017
bunim@caseclosure.com

Mediation

Leslie Berkoff
Moritt Hock & Hamroff LLP
400 Garden City Plaza
Garden City, NY 11530
lberkoff@moriththock.com

Adam James Halper
33 Columbia Avenue
Hastings on Hudson, NY 10706
adam@newyorkadr.com

Membership

Marcia L. Adelson
61 High Street
Tarrytown, NY 10591
marcia@marciadelsonlaw.com

Mary K. Austin
mkaustin221@gmail.com

Negotiations

Richard I. Janvey
Diamond McCarthy LLP
295 Madison Avenue
27th Floor
New York, NY 10017
rjanvey@diamonddmccarthy.com.

Diane Rosen
Ortoli Rosenstadt LLP
366 Madison Ave.
3rd floor
New York, NY 10017
dr@orlip.legal

Norman Solovay
The Solovay Practice
260 Madison Avenue
15th Floor
New York, NY 10016
nsolovay@solovaypractice.com

New Lawyers and Law Students

Alexander Paul Bachuwa
2 Park Avenue
20th Floor
New York, NY 10016
alex@nomadresolutions.com

Evan Scott Rosenberg
111 John Street
Floor 22
New York, NY 10038
evan.rosenberg@nyedlaw.com

Nominating

Simeon H. Baum
Resolve Mediation Services Inc.
1211 Avenue of the Americas
40th Floor
New York, NY 10036
simeonhb@disputeresolve.com

Stephen A. Hochman
599 Lexington Avenue
Suite 1202
New York, NY 10022
shochman@prodigy.net

Publications

Sherman W. Kahn
Mauriel Kapouytian Woods LLP
15 W. 26th Street, 7th Floor
New York, NY 10010-1033
skahn@mkwllp.com

Laura A. Kaster
Laura A Kaster LLC
84 Heather Lane
Princeton, NJ 08540
laura.kaster@gmail.com

Edna Sussman
SussmanADR LLC
20 Oak Lane
Scarsdale, NY 10583
esussman@sussmanadr.com

Public Relations

Alexander Paul Bachuwa
2 Park Avenue, 20th Floor
New York, NY 10016
alex@nomadresolutions.com

Jeffrey T. Zaino
American Arbitration Association
150 East 42nd St. 17th Floor
New York, NY 10017
zainoj@adr.org

Wills, Trusts, Estates, Guardianship & Elderly

Leona Beane
Mediator, Arbitrator, Trusts, Estates, Guardianship Attorney
233 Broadway
Suite 2340
New York, NY 10279
lbeanelaw@gmail.com

Writing Competition

John Wilkinson
Fulton, Rowe & Hart
One Rockefeller Plaza
Suite 301
New York, NY 10020
johnhwilkinson@msn.com

New York Dispute Resolution Lawyer

Co-Editors-in-Chief

Edna Sussman
SussmanADR
20 Oak Lane
Scarsdale, NY 10583
esussman@sussmanadr.com

Sherman W. Kahn
Mauriel Kapouytian
Woods LLP
27 West 24th Street, Suite 302
New York, NY 10010
skahn@mkwllp.com

Laura A. Kaster
Laura A. Kaster LLC
84 Heather Lane
Princeton, NJ 08540
laura.kaster@gmail.com

Board of Editors

Leona Beane
11 Park Place, Suite 1100
New York, NY 10007
LBMediateADR@aol.com

Geraldine Reed Brown
The Reed-Brown Consulting Group
180 Union Street
Montclair, NJ 07042
RBCG1@aol.com

Gail R. Davis
Resolutions NY Inc.
120 East 30th Street
New York, NY 10016-7303
gdavis@resolutionsny.com

Erin M. Hickey
Fish & Richardson PC
Citigroup Center, 52nd Floor
153 East 53rd Street
New York, NY 10022
hickey@fr.com

Jae Soog Lee
26 Sutton Terrace
Jericho, NY 11753
jaesooglee@yahoo.com

Barbara Antonello Mentz
140 West 86th Street
New York, NY 10024
bmentz@mentz.org

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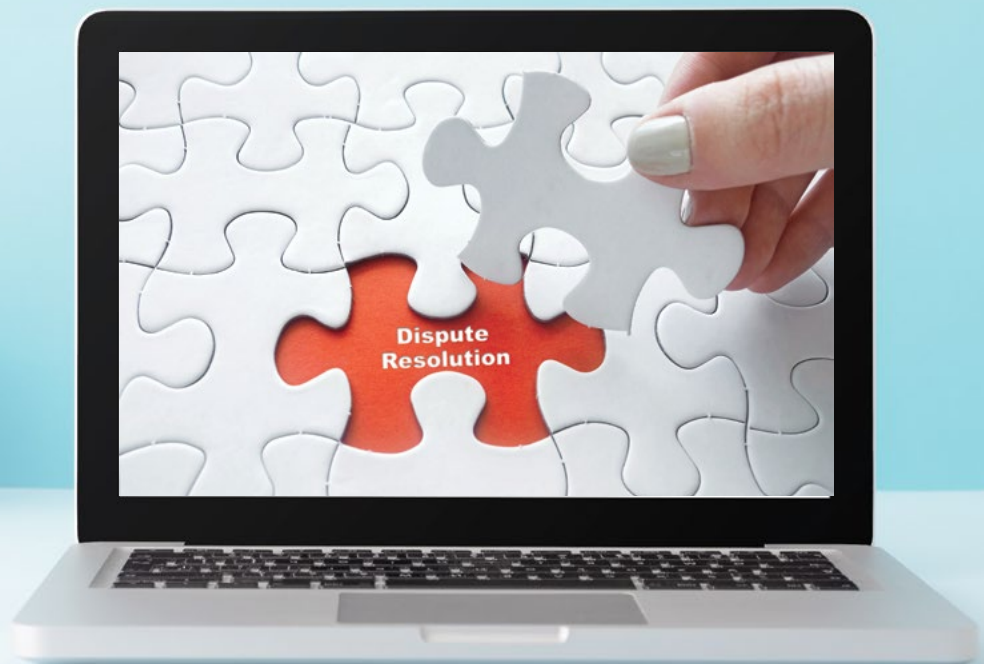
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