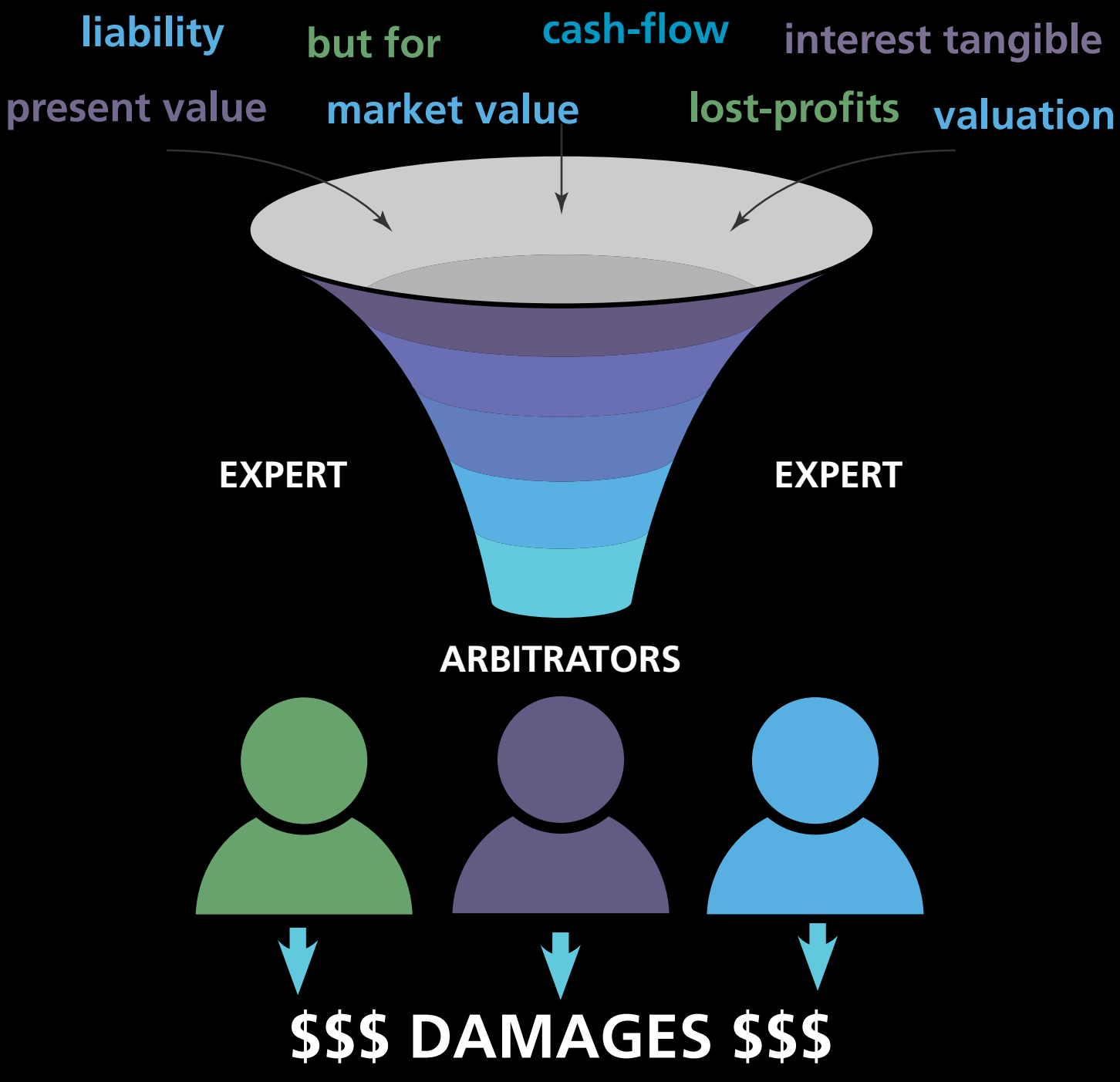
2022 | VOL. 15 | NO. 1

NYSBA

New York Dispute Resolution Lawyer

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



Membership Drops Take Place This Month, So Renew Today!

NYSBA

YOUR *Membership Matters*

It's not too late to renew your NYSBA membership for 2022!

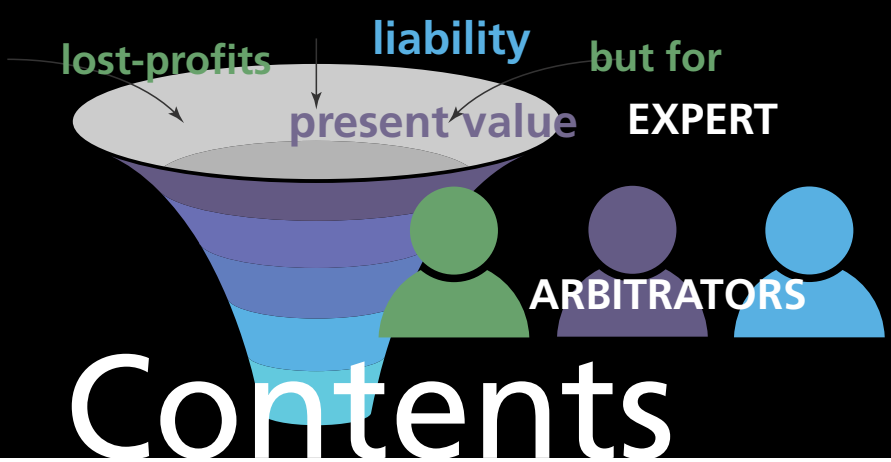
Drops occur in March, so don't lose out on continuing to receive the following benefits....and more.

- Complimentary CLE credits with select packages
- 25%+ discount on all additional CLE programs offered
- 25%+ discount on all NYSBA published books & forms
- Access to Section membership perks: Section-specific publications, leadership opportunities, networking and more!
- Complimentary copies of the *Bar Journal*, *State Bar News*, *CasePrepPlus* and *NY Law Digest*

Renew online at

NYSBA.ORG/RENEW2022

or through our Member Resource Center at 800.582.2452



Contents

New York Dispute Resolution Lawyer

2022 | Vol. 15 | No. 1

Features

Special Section: Damages in Arbitration

Arbitration

Mediation

Presumptive ADR

Regulars

Case Notes

New York Dispute Resolution Lawyer

The *New York Dispute Resolution Lawyer* is distributed to members of the New York State Bar Association's Dispute Resolution Section without charge. The views expressed in articles in this publication represent only the author's viewpoint and not necessarily the views of the Association, the Section or its Officers.

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at 518-463-3200.

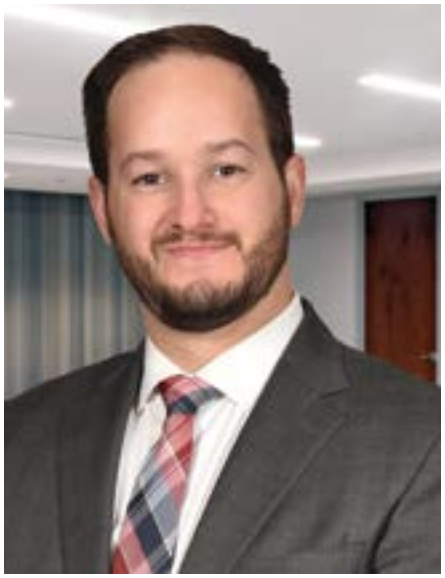
Publication Date: March 2022

ISSN 1945-6522 (print) ISSN 1945-6530 (online)
This edition is only available online and by pdf.

Dispute Resolution Section Officers

NYSBA.ORG/DISPUTE

Message From the Chair



Ross Kartez

It has been one of my most distinguished honors to serve as chair of the Dispute Resolution Section—a true labor of love. When I joined the Section over a decade ago, I was a law student interested in learning from brilliant neutrals who were the most experienced, distinguished, creative, and thoughtful practitioners in the field. You have not disappointed me. I have learned so much and continue to learn during almost every interaction with our membership. Our group is phenomenally skilled at listening to one another, which has led to better programs, more rewarding initiatives and real progress in tackling our goals.

Now, as an experienced attorney, a father of three, a law firm partner, and an independent mediator and arbitrator, I look back at my journey and credit the Dispute Resolution Section for so much of my growth, individually and professionally. Thank you for supporting me and thank you for giving me this opportunity to lead you.

This will be my final message at the end of a very eventful year. While we had hoped that the pandemic challenges would have eased by now, it has been another difficult year with the COVID resurgence, and we are surprised to be caught up yet again in worry and disruption. It has been challenging for people across the board—whether you are managing the situation with young children, trying to re-enter society with a compromised immune system, or navigating the latest CDC guidelines wondering if you should be leaving your home. And while we may have been surprised by the pandemic's continuing impact, the dispute resolution community did not falter in its drive to assist the community in tackling their hard-fought disputes. The leap in technological proficiency we participated in at the beginning of the pandemic has become an important tool for the present and the future. We continue to negotiate, mediate, and arbitrate through platforms like Zoom and Microsoft Teams, where the parties prefer remote options over in-person forums, and embrace the convenience and safety the virtual platforms provide. We continue to focus on helping one another, improving the dispute-resolving culture, and creating opportunities for collaboration. Congratulations for another productive year in the face of ongoing unprecedented obstacles.

Let's turn to some of our accomplishments over the past year…

In September, we hosted a jam-packed fall meeting. Mansi Karol, Noah Hanft, and Lauren Jones knocked it out of the park with six panels on cutting-edge topics. Chief Judge Janet DiFiore gave opening remarks and Timothy Murphy, general counsel at MasterCard, sat down with Noah Hanft for a riveting fireside chat. We capped off the evening with our first in-person reception in nearly two years. We look forward to having similar programs when it is safe to do so.

In December, we launched the first ever 16-hour Personal Injury Advanced Mediation Training. For many years, the court system has been plagued by an insurmountable number of personal injury cases lingering throughout the State of New York. Delays from the COVID shutdowns and the lack of useable courtrooms has exacerbated the problem, leaving thousands of trial-ready cases without visible finish lines. The Section worked closely with various court personnel, including Lisa Denig, Joel Kullas, Lisa Courtney, Bridget O'Connell, and Glen Parker, to organize a training that could help address the mounting backlog of cases. We had an excellent organizing committee led by Jess Bunshaft and Jeff Anderson, and consisting of Angelicque Moreno (who took a significant leadership role despite being a new Section member), Timothy Murphy, Kathryn FitzGerald, Halina Radchenko, Anthony Emanuel, Karen Saab-Dominguez, Marc Pillinger, Jeff Miller, Jeff Lichtman, Michele Kern-Rappy, and Lauren Jones. Deputy Chief Administrative Judge Deborah Kaplan kicked off the three-day program with powerful welcoming remarks, and Deputy Chief Administrative Judge Norman St. George concluded the program with optimistic words of wisdom and "thank yous" to all who participated. This program is only the beginning of the Section's dedicated efforts in assisting the courts in addressing the massive backlog of personal injury cases. Many of our mediators have already joined the court rosters, settling numerous personal injury cases that would otherwise be consuming court resources. Thank you to all who organized and participated, especially Jess and Jeff. We look forward to this training as a regular Section offering.

Simeon Baum and Stephen Hochman continue to sell out seats for their Commercial Mediation Trainings (basic and advanced), which are now offered twice a year. These trainings have become some of the Section's most important initiatives for training neutrals and recruiting active

members. Many of our Section members are coaches and presenters, and we thank you for your dedication.

Charlie Moxley, Edna Sussman, and Lea Haber Kuck held their Comprehensive Commercial Arbitration Training for arbitrators and counsel. This program has been a standout over the years, with many of our members serving on the program faculty.

By the time you read this, the Annual Meeting will have already happened. I know it will have been a remarkable success. Our cutting-edge panelists include some of the most prestigious speakers in the industry. Our panel topics include: 1) Blockchain and Cryptocurrency Disputes; 2) Tales from the Frontline: Mediation Users' Lessons, Stories, and Feedback; 3) Presumptive ADR: Where We've Been and Where We're Going (with Court of Appeals Judge Cannataro); and 4) What Judges and Arbitrators Are Looking for in Your Real Estate Case. Special thanks to our program chairs, who have worked tirelessly to make this phenomenal program happen: Jess Bunshaft, Shashi Dholandas, Krista Gottlieb, and Dani Schwartz. We were forced to postpone the in-person reception, but we will relish seeing each other all the more.

We also developed a new diversity series, a series of in-person programs geared toward strengthening our ties and relationships with diverse practitioners and fostering opportunities to improve the culture of dispute resolution for everyone. We hope to improve our membership, programming, and initiatives, with the help of our colleagues of diverse backgrounds. This initiative goes hand-in-hand with the work of our Diversity and Inclusion Committee, under the leadership of Iyana Titus and Stephen Marshall. The accomplishments of that committee include organizing successful mentorship programs for aspiring neutrals of diverse backgrounds, running various well-attended diversity-focused programs, and acting on behalf of the Section to help establish the New York Diversity Equity & Inclusion (NY DEI) Neutral Directory. The NY DEI Neutral Directory represents a huge leap forward, providing a means to increase visibility and selection of ADR professionals from historically underrepresented communities. We thank Robyn Weinstein for her extraordinary leadership in bringing the NY DEI Neutral Directory to fruition.

The Section's Annual Mediation Tournament was back on the calendar for March 2022! The organizers have done an extraordinary job working on this program for the students and the community. This is an excellent opportunity for law students to enhance their mediation skills and get feedback from distinguished neutrals, while navigating very realistic hypothetical fact patterns. Of course, the $6,000 in cash prizes doesn't hurt. Thank you Leslie Berkoff, Bart Eagle, and Gary Shaffer for your leadership, and to our numerous Section members who participate year after year.

Our journal's new editorial board, including Steven Bierman, Theo Cheng, Al Feliu, Julie Hopkins, Lela Love, Jacqueline Nolan-Haley, Kathleen Paisley, Rekha Rangachari, and Steven Skulnik, have worked extremely well with Co-Editors-in-Chief Edna Sussman, Sherman Kahn, and Laura Kaster. *NY Dispute Resolution Lawyer*, the best publication in the industry, has kept us apprised of cutting-edge thinking and developments in ADR around the country and the world.

I want to emphasize the constant work, leadership, and dedication of our committee chairs. You have been unbelievable and have made my job easy. It would be difficult to cite all of your contributions, but having attended many of your regular meetings and programs, I can attest to the constant work you do and its critical importance to the Section and the ADR community. Our committees are the lifeblood of the Section, and provide a pathway to opportunities for member participation. I invite our members to dive in and join a committee—I promise you will be welcomed with open arms.

I also want to thank our NYSBA liaison, Catherine Carl, and our ever-devoted Continuing Legal Education coordinator, Simone Smith. Catherine and Simone go above and beyond to turn our ideas into programs, and to shift our goals into achievements. We cannot thank you enough.

During these challenging times, our Section and its members have maintained a strong sense of collegiality. We needed it and we appreciated it. The progress of our collegial community has been astounding. Thank you for everything you've done, everything you're doing, and everything you will do to promote dispute resolution in our community and to further the Dispute Resolution Section's initiatives.

In closing my chairmanship year, I want to recognize the critical work and the future promise of our incoming officers. I extend a warm welcome to our 2022-2023 officers:

Chair: Noah Hanft

Chair-Elect: Jeffrey Anderson

Vice-Chair: Jill Pilgrim

Treasurer: Deborah Reperowitz

Secretary: Evan Spelfogel

We look forward to your contributions.

Our Section has been particularly fortunate to have a cadre of leaders who continue to devote themselves to the work for the Section well after their official duties have ended, and I intend to join their ranks at the end of my term. I hope to see you all soon, perhaps at an in-person event!

Ross Kartez

Message From the Co-Editors-in-Chief

Sherman Kahn

Edna Sussman

Laura A. Kaster

In our last issue, we introduced our new Editorial Board. With this issue, we are pleased to announce that they are already in full swing, bringing valuable contributions to *New York Dispute Resolution Lawyer*.

Through the efforts of our Editorial Board, this issue includes a special section on damages in arbitration. Editorial Board member Kathleen Paisley brings us a detailed discussion of the new Damages in International Arbitration Application (DIA), a free interactive tool to assist arbitrators, experts, and practitioners with the analysis and quantification of damages in international arbitration that was launched in November 2021 by the International Council for Commercial Arbitration (ICCA). Alexis Maniatis, Florin Dorobantu, and Fabricio Nunez address the subject of interest on amounts awarded with further reference to the DIA. We expect to the DIA to be useful not just for international arbitration but for United States domestic arbitration as well.

In addition, Editorial Board members Rekha Rangachari and Steven Skulnik interviewed several prominent damages experts to regarding issues they often face when providing expert witness services in arbitration. Finally, Rachel Howie, Joanne Luu and Richa Bagrath provide additional insight on working with damages experts from the perspective of counsel, the arbitrator and the expert.

This issue includes a wealth of additional materials that we believe will be useful to the ADR practitioner including: discussions of recent case law from our Editorial Board members Al Feliu and Steve Bierman (writing with his colleague Gaëlle Tribié); a look behind the scenes of presumptive ADR in New York State courts from Lisa Courtney and Glen Parker; a discussion of the effect of affiliation and affinity biases on arbitrator decision-making from our own Edna Sussman; two book reviews and much more.

We are looking forward eagerly to when we can all get together again in person. In the meantime, we hope that this issue will advance our remote conversations about issues in our field.

Sherman Kahn

Laura Kaster

Edna Sussman

The Unintended Consequence of Settlement Fever and the Rule of Law

Elayne E. Greenberg

One of the great mistakes is to judge policies and programs by their intentions rather than their results.

—Milton Freedman[1]

Introduction

Welcome to the final column of a three-part series about how settlement fever has influenced our justice system as it evolves into settlement-centric culture.[2] This column will focus on how the rule of law, once touted as the primary benchmark of justice, has now taken a secondary role to private ordering when shaping some negotiated and mediated settlements.

This settlement-centric justice focus has not occurred in a justice vacuum. Rather, three factors have influenced this change. First, courts have been increasingly overwhelmed with swelling case dockets and shrinking court budgets, making them more receptive to processes that efficiently resolve cases and spare judicial resources. Second, litigants themselves have been demanding efficient and affordable paths to achieving justice. Third, our broader society in which our legal system is embedded reflects a culture where efficiency has become a priority. *How have these changes affected the role of the rule of law in our settlement-centric justice system?*

Since our country's birth, the rule of law has been extolled as the jewel of our democracy and the foundational pillar of our legal system. As an iconic warranty of our justice system's integrity, the rule of law promises *predictable, objective, and stable* enforcement of our laws, free from the whims of any one despot. The rule of law has withstood the tests of time as our courts, serving as a benchmark, reinforce our Constitution's promises and re-interpret those promises to meet the legal challenges of our changing times. Enshrined in a network of procedural protections and case law precedent, the rule of law is the basis of all adjudicated decisions.

Today, however, only 2% of all cases filed in court are adjudicated to decision. Paradoxically, the very procedural protections that have safeguarded the rule of law have over time multiplied and make litigation a costly, time-consuming and inaccessible process for growing numbers of litigants who sought to enforce their justice rights in court. Furthermore, the permissible legal remedies provided by adjudicated decisions are purely binary, frustrating the justice desires of those litigants who prefer a more nuanced resolution that incorporates expanded remedies not available in court.

This column questions whether this settlement-focus shift diminishes the importance of the rule of law and jeopardizes the stability of our justice system. Though conspiracy theorists might allege that this erosion of the rule of law is part of a broader Machiavellian plan to undermine our country, this author disagrees. Rather, this author posits, this diminution of the rule of law is an unintended consequence of the inclusion of more efficient and more responsive justice resolutions to promote settlement.[3]

Looking Back

When the ADR movement first introduced the value of using party-directed processes such as negotiation and mediation into our justice system approximately 50 years ago, our justice community was divided on whether increased reliance on such party-directed processes was an advancement or a threat to our justice system. ADR supporters of these party-directed resolutions extolled their many benefits: personalized justice, expedient resolutions, and affordable access to justice as the top priorities. In their acclaimed article, "Bargaining in the Shadow of the Law: the Case of Divorce," respected dispute resolution scholars Robert Mnookin and Lewis Kornhauser previewed how private ordering could expand negotiating options and yield more responsive settlements by highlighting how divorcing couples might rely on the rule of law or opt for their own private ordering when settling their divorce issues.[4] ADR supporters of party-directed processes buttressed their argument that privatized agreements were a more appealing option than relying on stale law when in 2004, when Marc Galanter reported on the steady decline of trials in "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts."[5]

Yet, naysayers warned that increased use of such party-directed ADR processes was actually a foreboding that the sky was falling and the power of the rule of law eroding. For example, Own Fiss cautioned against romanticizing ADR's settlement benefits and not heeding concerns about ADR in his seminal piece "Against Settlement."[6] Ironically, he goes on to romanticize the court process by extolling how the court process can help equalize power imbalances and disparate resources that may coerce the disputing parties to settle.[7] According to Fiss, ADR proponents discount the value that adjudication brings "to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them."[8] Other scholars such as Richard Delgado[9] and Tina Grillo[10] raised concerns

about how informal processes such as mediation could actually reinforce racial, ethnic and domestic violence biases without the protections provided by the rule of law. What happened to these voiced concerns?

Where We Are Today

Fast forward 50 years, and our justice system has become a settlement-centric culture. ADR, especially party-directed processes such as negotiation and mediation, has become institutionalized in our justice system. And, private ordering, rather than reliance on the rule of law, has become a valued and frequently used justice measure. In 2021, Bob Mnookin, reflecting back on his "Shadow of the Law," noted how there is now widespread reliance on social norms as a preferred measure of justice in negotiated agreements across the board including commercial, plea bargains and family disputes.[11]

Moreover, many lawyers and mediators, the primary facilitators of negotiated agreements, are given discretion to use the rule of law as a measure of fairness. Given this choice, many opt to use social norms as a justice measure in their agreements. For example, he ABA Model Rule of Professional Responsibility 2.1 Advisor explicitly allows lawyers to consider other factors beyond the rule of law when rendering advice:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.[12]

Moreover, those mediators, who adopt a broad approach to mediation might discuss a private ordering approach as compared to those mediators who adopt a narrow approach to mediation that focuses primarily on the law.[13]

Professors of dispute resolution like this author also educate their students about the different role the rule of law plays in party-directed processes such as negations and mediation. We teach our students how the strength of their legal arguments in a negotiation or mediation might provide leverage in shaping the settlement, but it is not a benchmark of justice.[14] Rather, negotiations and mediations are emotional and economic decisions that rely on the parties' personal values.

Taking the ADR pulse today regarding party-directed processes, we see that many of the process concerns about bias are being addressed. For example, the ADR profession is finally actively ensuring that mediators reflect the diverse public it serves. Furthermore, the profession has fortified its training and supervision requirements to ensure that there are qualified mediators. However, an unanswered question remains, and the focus of this column remains: *How might we also preserve the role of the rule of law in our settlement-centric justice system?*

Going Forward

This column began with the following quote from Milton Friedman:

> One of the great mistakes is to judge policies and programs by their intentions rather than their results.

I, along with other ADR supporters of party-directed processes, believed that the increased use of party-directed process such as negotiation and mediation would strengthen our justice system by expanding parties' access to justice and offering more personalized, efficient, and affordable justice options than adjudication, and it has. The *choice* of justice options to resolve a case—private ordering or the rule of law—was never intended to devalue the importance of the rule of law. It was always about providing parties to choose their preferred justice options. However, this may have had the unintended consequence of diminishing the importance of the rule of law in our justice system.

We must not forget that the strength of a settlement-focused justice system is supported, in large part, by strength of the rule of law. Our esteemed colleague Michael Moffitt reminds us that the rule of law provides parties some contours of their " legitimate expectations" and a vehicle to enforce their party-directed agreements.[15] Therefore, I have been horrified by the ongoing domestic attacks on and attempts to dismantle our rule of law and weaken our democracy. It has incentivized me to reflect on how our support of a settlement-centric justice system may unintentionally be ignoring the importance of the rule of law to the integrity of our justice system. *How do we continue to support parties' choice between privatized ordering and the rule of law as integral and compatible components of our justice system?* Now is the time for us to step back and re-examine how to also preserve the importance of the rule of law in the midst of our growing settlement-focused justice culture. I welcome your thoughts.

Professor Elayne E. Greenberg is Assistant Dean of Dispute Resolution, Faculty Director of the Carey Center for Dispute Resolution, and Professor of Legal Practice at St. John's School of Law. Please send her your thoughts at greenbee@stjohns.edu.

Endnotes

1. From a December1975 interview with economist Milton Friedman on PBS's "The Open Mind," at https://www.wsj.com/articles/notable-quotable-milton-friedman-1444169267#:~:text=Friedman%3A%20One%20of%20the%20great,is%20paved%20with%20good%20intentions.
2. *See Ethical Compass: Three Different Judicial Treatments for Settlement Fever*, NYSBA New York Dispute Resolution Lawyer, 2021 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3864284 (discussing how individual judges assess settlement means); and *Ethical Compass: Settlement Fever: Lawyers, Have Your Updated Your Philosophical Map*, NYSBA New York Dispute Resolution Lawyer, Vol.14, No.2, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3931520 (prescribing an expanded lawyer's philosophical map.
3. This author acknowledges that there are other reasons that there is a diminution of reliance on the rule of law that warrant exploration. However, that discussion is beyond the scope of this column.
4. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. (1979), at: https://digitalcommons.law.yale.edu/ylj/vol88/iss5/4.
5. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, Journal of Empirical Legal Studies 1.3 (2004): 459-570.
6. Owen Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984), at https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6871&context=ylj.
7. *Id.* at 1076.
8. *Id*. at 1085.
9. Richard Delgado, Chriss Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*,1985 Wis. L. Rev. 1359 (198%).
10. Tina Grillo, *The Mediation Alternative: Process : Dangers for Women*, Yale L. J. 100, 1545 (1990).
11. *See* Discussions in *Dispute Resolution: The Origin Stories* with Professor Bob Mnookin at https://www.youtube.com/watch?v=WfKyuVk6md4 at 28.19.
12. https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/.
13. Riskin, Leonard, *Narrow vs. Broad Problem Definition*, Mediate.com, May 2010), at https://www.mediate.com/Mediation2020/article.cfm?zfn=riskindvd06.cfm.
14. Astute lawyers appreciate that a court determination as a BATNA is a pipe dream with little weight. *See* Elayne E. Greenberg, , *Ethical Compass: The Changed BATNA*, NY Dispute Resolution Lawyer (Spring 2019), at https://nysba.org/app/uploads/2020/03/DisputeResolutionLawyer-Spring2019.pdf.
15. Michael Moffitt, *Which Is Better, Food or Water? The Rule of Law or ADR?*, at 13, ABA Disp. Resol. Mag.Vol 16 No. 4 (Summer 2010).

Tips and Traps on Working With Your Damages Expert

By Rachel Howie, Joanne Luu, and Richa Bhagrath

For many counsel, the task of putting together the damages portion of their case is a source of great consternation. Some procrastinate, preferring instead to focus on liability, leaving damages to be dealt with "later." Yet, dealing with damages early on is usually the better approach. This article draws on our combined experience to offer three perspectives—counsel, expert and arbitrator—on how best to work with damages experts.

1. When in the case should counsel start thinking about engaging a quantum expert?

Expert Perspective: Generally speaking, it is usually best to engage your expert as soon as possible. Your expert can assist in the document collection and exchange process by identifying key pieces of information they will need for completing their analysis. In some cases, your expert can also help identify areas and lines of questioning for the direct evidence of your fact witnesses or for the opposing side during questioning. In addition, the expert can help provide a high-level assessment of potential damages, which may help in the decision to advance a case.

Counsel Perspective: It is helpful to have an expert engaged as soon as possible. That said, if acting for a re-

Rachel Howie, FCIArb (rachel.howie@dentons.com) is a partner at Dentons Canada LLP and the deputy national lead for the litigation and dispute resolution group. She is a member of the NextGen Roster of Arbitrators at Arbitration Place and has been recognized for her practice in arbitration by Chambers Canada, the Global Arbitration Review's Who's Who Legal, and Lexpert.

Joanne Luu, FCIArb (jluu@bdplaw.com) is a partner at Burnet, Duckworth & Palmer LLP in Calgary, where she acts as both counsel and arbitrator. Joanne is a recognized leader in her field by the Global Arbitration Review's Who's Who Legal, the Legal 500 Canada, and Best Lawyers in Canada. She has been named to the Arbitration Place Next Gen Roster, the ICC Canada Roster, and the Vancouver International Arbitration Centre Roster.

Richa Bhagrath, CBV (rbhagrath@deloitte.ca) is a director at Deloitte LLP, where she advises clients on valuation and related matters. She also provides damage quantification and litigation support services in both litigation and arbitration contexts. Richa focuses on the energy and resources sector within Canada and globally, but has experience covering numerous industries.

spondent and there is some time available, you may want to have a short list of potential experts lined up but wait to retain one until you see the case advanced by the claimant.

2. What should counsel look for in a quantum expert?

Arbitrator's Perspective: Effective experts understand and respect their role in the process. From this basic premise flows three qualities that counsel should look for:

- First, effective experts should be retained because they possess a necessary expertise that the tribunal does not. Thus, as a prerequisite, they must actually have this particular expertise and experience.
- Second, they are there to *assist* the tribunal. As such, it is critical that they are also strong written and oral communicators, with an ability to speak simply and break down complex ideas into bite-sized pieces. In other words, effective experts are good teachers.
- Finally, although experts have been retained by one of the parties, their roles are not to act as advocates. Leave that for the lawyers. Instead, experts should jealously guard their independence. This means that they should give sensible assessments and be willing to work with alternative assumptions rather than become entrenched in their client's legal or factual positions.

Counsel Perspective: There isn't much to add to the arbitrator perspective. It really is important for a quantum expert to be an expert in the specific subjects or issues for which they are needed. It can take a bit of sleuthing to find that exact expertise and it might lie in a person who has not previously acted as an expert. Another practical consideration is finding an expert that is able to deliver the report(s) required on the scheduled timelines.

Expert Perspective: To elaborate on the above, an excellent expert can distill complex topics down to their fundamental components and explain the analysis to anyone regardless of that person's background. If the expert cannot explain the work in a manner that someone with no background in the subject can understand, they likely do not understand the material well enough themselves.

3. In an ideal world, what role, if any, should the quantum expert have with document collection and exchange?

Expert Perspective: Ideally the expert is involved in this process so they can help identify information required for their analysis. What can be difficult as an expert is when you are brought in post document collection/exchange and key pieces of information are unavailable. In those cases, you may have to make additional assumptions or have a longer instruction list from counsel to cover those gaps.

Counsel Perspective: Agreed, it would be ideal to have an expert engaged in advance, but in reality, every situation is unique in some way. It may not be evident that a certain type of expertise is required until later in the proceeding, or it may take time to locate the exact expertise, thus delaying an engagement.

4. When should counsel consider retaining a "shadow" or advisory expert?

Counsel Perspective: A "shadow" or advisory expert can be extremely helpful in a few situations. First, where the case requires a few or even many testifying experts and there is a need for some level of expert coordination. Second, where the expert issues are extremely technical, complex and/or novel and the matter is one that can benefit from having additional expertise to assist counsel on the issues without fear of "tainting" the expert. Third, where the party's first choice in expert cannot be the testifying expert because they lack the independence and/or impartiality required but that party wants the benefit of the expert's views.

Expert Perspective: As with everything, it depends on the situation. Be aware that there are risks to this approach. The advisory expert may form an opinion that your testifying expert either disagrees with or is not qualified to testify to. It is also important to consider whether and, if so, to what extent the advisory expert and testifying expert interact. Where the two are not interacting, is the testifying expert then missing out on key pieces of information that the advisory expert learned that may be beneficial? Care should be taken to mitigate against some of these risks.

5. What are the top tips and traps in preparing an expert report?

Expert Perspective: Use clear calculations that are easy to step through and follow. If you need to have more schedules or lines of information for someone to be able to understand your analysis, do that. Ensure that you explain things in simple language. Avoid sounding like an advocate. Remember, as an expert, you are not hired to prove counsel's case but rather to provide your opinion to assist the tribunal in its decision. Another trap can be undertaking too many revisions of the expert's report, resulting in the expert's voice being "lost" or straying off of "expert island."

Counsel Perspective: Agreed with all of the expert's tips and traps. Keep the report as simple as possible. Be clear, consistent on defined terms, write in plain language, and use headings. Where there are tables or figures, or entire spreadsheets, make use of footnotes or explanatory notes so that the reader will always be able to follow the data or math involved. In addition, some top traps are dense, overly technical writing, using diagrams that do not explain the formulas used or sources of data, and, of course, using data from unidentified sources.

Arbitrator's Perspective: What does an effective expert report look like? Concise, with sufficient detail such that the conclusions can be properly tested. This typically

includes an executive summary and a report that identifies the key assumptions, along with the nuts and bolts of the methodology and supporting rationale. Importantly, it should also directly respond to the key points of disagreement raised by the other side. Counsel should consider using comparative charts that set out the differing expert views on various points.

Easy-to-follow expert reports are not necessarily hundreds of pages long. Instead, they are layered, where the "back-up" is included in footnotes, summary appendices, and detailed appendices. Effective expert reports also employ thoughtful use of graphics such as flow charts for alternative scenarios and graphs.

6. What's the best way to prepare your expert for the hearing?

Expert Perspective: Practice, practice, practice. Ensure you spend time with your expert preparing for direct, or their presentation, and cross examination. For direct examination, your experts should know what questions you plan on asking them and why, so that they can prepare. If the expert does not follow what counsel is asking, that will open the door for a poor response or explanation or for the expert to "run away," explaining something not relevant. Work with your experts to understand where they are likely to be cross examined. Help your experts identify the types of open-ended questions they may come across during cross examination. Give them examples of questions that may be traps and how to deal with them.

Counsel Perspective: Usually the answer here is "a lot of practice." This can depend on the nature of the hearing, the level of familiarity of the expert with the process and the dynamics of the dispute. If travelling to attend the hearing in-person, or if able to meet when there is a hybrid hearing, plan for in-person practice sessions. If it is likely the experts will be appearing via video conference, then practice in that format so that the process starts to become normalized, including how they will refer to the materials. It is also extremely important for international arbitrations to ensure that this common law style preparation is permissible under the applicable rules, procedures and law.

7. What should counsel consider in relation to the qualification of experts?

Counsel Perspective: If you have a genuine concern that an expert is truly unqualified, and the entire report is impacted, raise that as soon as possible. Unlike litigation, it is rare to see these types of challenges at an arbitration hearing. It is much more likely that only one or a few points stray outside of the expert's exact area of expertise. If this happens, those points used in cross-examination may be the basis of a challenge to the expert's credibility and the weight the opinion ought to be given, or if critical, a basis for a challenge to portions of the report.

Arbitrator's Perspective: It is not often that a Tribunal will refuse to qualify an expert or completely dismiss their report. Thus, it is usually not a good use of time to challenge outright an expert's qualifications. It is often more useful for counsel to focus on discrete instances where an expert has reached outside the bounds of their expertise. When successfully employed, this can lead to the Tribunal declining to rely on those portions of the expert report. It may also erode the Tribunal's trust in the expert and, in some cases, lead to questions about the expert's independence.

8. It has become more commonplace for experts to be given an opportunity to present a high-level summary of their report before being subject to cross-examination. What type of information should this presentation contain? How should it be presented?

Counsel Perspective: It is important to make use of what is usually limited time for these presentations by highlighting points in issue, and why the opinions differ. Counsel should clarify in advance if there will be any limitations or directions on how to present this information. Usually PowerPoint, or a similar program, is acceptable for presentations as it can be easily circulated in advance, incorporated into the record, and pulled up later by the Tribunal.

Arbitrator's Perspective: The expert presentation should provide a high-level summary of their report (i.e., the main conclusions), with pinpoints for the Tribunal to follow along. In addition, the presentation should highlight the main points of contention between the experts, with a brief explanation as to what the disagreement is, why the expert's approach should be preferred, and if accepted, how it impacts the damages calculation.

Expert Perspective: Agreed. The summary should be succinct and to the point but still provide the Tribunal with enough information to understand the process and analysis. The use of charts and graphs to convey ideas is beneficial here. As the saying goes, "a picture is worth a thousand words."

9. What's your experience with "hot tubbing" experts? Does it work?

Expert Perspective: Hot tubbing can be an effective way for experts from both sides to discuss and agree on certain items. As an example, if both reports are based on the same forecasts with the same revenue and cost assumptions, and both agree on the amount of capital expenditures required for a project etc., those items can be "taken off the table" so that what is left for the Tribunal are the key areas of difference. In some cases, the experts may arrive at an agreed conclusion on areas of difference as well. This process can help reduce the length of a hearing and may even lead to a settlement. A negative aspect of hot tubbing can be that one expert may be more assertive than the other in pushing his or her views and opinion, and counsel cannot protect their expert from this.

Counsel Perspective: Agreed with the expert perspective points. To add some cautions on hot tubbing, if one of

the experts in the group is not an expert in the area discussed, it may not be effective for that individual to be part of a joint discussion. It is also important to consider the experts' own views and whether they are comfortable with giving evidence in that fashion.

Arbitrator's Perspective: Hot tubbing tends to take the experts "off-script" and gives the Tribunal the opportunity to ask consecutive questions. This creates a dialogue between the Tribunal and experts, allowing real-time clarifications and responses. Under such a procedure, experts tend to be less willing to take unreasonable positions when they know that their counterpart will be ready and be given an immediate opportunity to challenge them. In this way, seeing both experts together allows the Tribunal to really test the weaknesses of the positions taken.

10. What is the one thing you have seen counsel do in respect to working with damages experts that you find ineffective?

Expert Perspective: Counsel trying to have the expert opine on something that they are uncomfortable with or that is outside the realm of their expertise. The expert may be able to make a general statement on the topic and not specifically opine on what is being asked. However, they may feel pressured into doing so because they feel like they will "disappoint" counsel. It is the expert's role to tell counsel when what they are asking is pushing them "off expert island."

Arbitrator's Perspective: Some counsel love the fight and that includes taking every opportunity to try to discredit an expert in cross-examination, however minor or irrelevant the point. More often than not, these non-material points do not "land" and counsel can end up looking petty.

11. What is the one thing you have seen an expert do that you find ineffective?

Counsel Perspective: Refusing to admit an error, where obvious, is usually ineffective and can cast a shadow over other areas of an expert's opinion. Mistakes happen. People accidentally use outdated tables or an older version of a data sheet or make a computational error in and amongst hundreds of data points. It is best to admit and move on.

Arbitrator's Perspective: When an expert is too partisan and refuses to concede points they clearly ought to, this comes across very poorly. This is because they have demonstrated that they cannot discharge one of the basic tenets of their engagement: to act as an objective and independent expert.

12. What's your top tip for counsel working with quantum experts?

Counsel Perspective: Communicate with your expert on the deliverables, expectations and deadlines, and continually update the expert if the situation changes. Arbitrations can become all-consuming, in particular before a hearing or if being run on an aggressive timeline. Issues requiring experts are often complex and it is not something that should be rushed or given short shrift in the process.

Expert Perspective: Spend time preparing your expert. Even the most seasoned experts need the appropriate amount of preparation before they are in the spotlight presenting their opinion and being cross examined. This goes the other way too. Counsel should spend time with the expert to truly understand the expert's evidence and the issues. This helps counsel cross examine the other side, focus on what truly are the issues, and write the brief after hearings.

Arbitrator Perspective: Inevitably, there will be points of fact or law that the parties cannot agree on. However, this does not mean it's a good idea to ignore the other side's arguments all together. Instead, it is helpful when experts can agree to, or at least offer, figures based on alternative assumptions or scenarios. In some cases, it may be appropriate to offer an agreed damages model (in the form of a native Excel spreadsheet) for the Tribunal to enter certain inputs that arise from its findings on which assumptions ought to apply.

Any opinions expressed herein are those of the authors for the purposes of this article and do not reflect the views of their respective firms or employers.

Interview With the Experts on Damages Quantification

By Rekha Rangachari and Steven Skulnik

New York Dispute Resolution Lawyer Editorial Board members Rekha Rangachari and Steven Skulnik interviewed top expert witnesses on issues they often face when providing expert witness service.

These are:

Andrea Cardani is a managing director of Berkeley Research Group, LLC. He has over 15 years of experience in consulting and assisting clients in complex economic and financial analyses. His expertise spans U.S. antitrust, damages, contractual disputes, and international arbitration cases.

Carla Chavich is an executive vice president and the head of the international arbitration practice in North America for Compass Lexecon. Her work is focused on international arbitration matters, where she performs economic, regulatory, and financial analyses in the context of international treaty and commercial disputes.

Gigi D'Souza is an associate director in the damages and forensic investigations practice with Secretariat Advisors, LLC and is based in New York. She is a Chartered Professional Accountant (CPA, CA) and a Chartered Business Valuator (CBV), and she focuses on the quantification of damages and the valuation of businesses and securities in the context of commercial and investment disputes.

Colin Johnson is a partner with HKA. He has over 30 years of experience including acting as a lender, equity investor, developer, and legal and financial adviser. He has been appointed as an expert witness on more than 50 occasions.

What follows is an edited and condensed write-up of those conversations.

Q. How do you choose a valuation methodology? For example, looking at a discounted cash flow (DCF) method as opposed to looking at comparable transactions.

Andrea Cardani (AC): At a minimum we will consider the following factors: the business characteristics or the rights at issue; the industry and location in which the business operates or the contracted services which are rendered; the time period in which the valuation is performed; the facts of the case at issue; and the availability of reliable information. Damages assessments are often undertaken retroactively or under specific performance instructions and assumptions, which makes the analysis more complex and often requires adaptation to account for special circumstances, assumptions, or counterfactual situations. It is also crucial to evaluate the reliability of the data available for the business or contract being valued as of the date in which the value is determined. For example, the DCF method and its reliability depends on the availability, quality, and reasonableness of business planning data. This could include price projections, cost projections, growth rate expectations, capital investment requirements, and other factors. In selecting and implementing a market approach, the availability and quality of market data measuring the value of comparable companies or comparable market transactions to both the asset and situation at hand is paramount.

Carla Chavich (CC): We analyze as many valuation methodologies as possible, so long as they are appropriate for the case at hand. Relying on different methodologies builds a more robust assessment. In general, a forward-looking valuation method, such as the DCF, is appropriate to assess fair market value because it mirrors how investors assess the value of income-producing assets. The DCF approach is one of the most fundamental tools of financial valuation and is based on key principles of economics and finance (i.e., an asset has value as/if it is expected to generate positive cash flows in the future, and the DCF assesses value is the present value of those expected cash flows). There are variations to the general DCF approach, and techniques such as scenario analysis and simulations that can be explored. Additionally, we can rely on the stock market approach when the shares of the asset in question or its parent company are traded. The liquidity and quality of the stock and the market on which it is traded should be analyzed. We can also rely on valuation methodologies based on comparables. The relative market multiples approach estimates the value of an asset or company by examining the value of comparable assets. Ensuring a large enough sample of comparable assets and being able to assess their comparability to the asset in question are key to the reliability of this approach.

Gigi D'Souza (GD): An income approach (e.g., DCF) is commonly used where the business is expected to generate positive annual cash flows in the future and where reliable management forecasts of these cash flows exist. The market approach (e.g., comparable transactions) is applicable in instances where sufficiently comparable transactions exist and depending upon the industry and how participants determine value therein. Valuators consider market transactions occurring within a reasonable time frame prior to the valuation date, which can be determined based on the circumstances of the case and involving businesses that are as similar as possible to the subject business being valued. However, it can be challenging to find sufficiently compa-

rable transaction in certain industries or geographic locations, and therefore its use depends upon the availability of information in this regard. Generally, the more methodologies considered and applied that corroborate the valuation conclusion, the stronger the valuation opinion being rendered.

Colin Johnson (CJ): There are three main valuation approaches, income, market ,or asset/cost based. The latter is rarely used for operating businesses. The choice between the other two depends mainly on the available data. DCF is the method that gives the intrinsic value of a business so tends to be most commonly used in the cases I work on as it allows the differences in cash flows caused by the alleged breaches to be set out explicitly, with comparables (market approach) used in some cases as an alternative to act as a cross check on value.

Q. When using an income approach, is the multiple of earnings approach a valid alternative to the DCF method? Why or why not?

CJ: A multiple of earnings approach can in principle be used instead of a DCF but I see that used normally as part of the market approach, determining the multiplier by reference to comparable listed companies or transactions in comparable companies. For an income approach I typically see a DCF with occasionally a dividend growth model used. The multiple of earnings approach is in any event based on assumptions as to the future income of the company and the timing thereof, which only a DCF allows to be truly tested (by explicitly setting out the assumptions). It is important to remember that as they can be seen as completely separate but ultimately the value of any company is based on the profits or cash flows it can generate in the future.

AC: The market approach may be a valid alternative to the DCF method when certain factors are met—for example, (i) when sufficient market data exists and can be obtained for comparable companies in the same or similar industries in which the company being valued operates, (ii) the comparable companies have characteristics similar to the company being valued (*e.g.* the stage of development, product or service mix, cost structure, and future growth expectations), and (iii) when the comparable companies are exposed to similar risk factors originating from the industry and geographical markets in which the subject company operates or is located. The market approach can also be used as a corroboration or "sanity check" for the results of an income approach valuation, rather than strictly as an "alternative." This is because while it may not be possible to find a direct comparable, the market information may provide valuable insight into the market's perception of value in a particular sector.

CC: Market multiples is a standard valuation technique that can be used to benchmark a DCF or as an alternative (depending on the information available). A relative multiple is an expression of the value of an asset or company relative to a key statistic that is assumed to drive that value, such as EBITDA or the size of reserves and resources [in like companies?]. Multiples can be derived from companies that trade in public markets (trading multiples), or from information about contemporaneous transactions of comparable assets or companies (transaction multiples). Now, the identification of a key statistic that drives the value of the asset is central to this approach, as multiples are relatively simplistic and static (they distill vast information into a single number that represents a snapshot of the value of an asset at a particular point in time). If several variables impact the value of the asset, the method might not be useful or additional statistical analysis and adjustments might be needed. Also key is to be able to reliably measure the multiple; for example, a multiple based on earnings (such as price to earnings ratio) will be affected by the accounting rules followed by the companies and this can potentially introduce bias in the calculation. The relevance of this approach will also depend on ensuring a large enough sample of "comparable" companies and being able to assess their comparability to the asset in question.

GD: Companies that expect fluctuating or growing future cash flows are best suited for the DCF methodology, which calculates the future value of annual cash flows and can account for differences in year-over-year future cash flow expectations. By contrast, mature companies that have a significant history of profitable operations and expect similar annual cash flows going forward are better suited for a multiple of earnings approach, whereby a capitalization rate – or multiple – based upon industry and macroeconomic factors is applied to a "normalized" or steady level of annual earnings. Practitioners also look to industry practice when determining which valuation methodology is appropriate. In some cases, for example, in investment banking or private equity valuations, a multiple of earnings approach is commonplace in addition to the DCF. The methodology selected – whether a DCF, CCF or CE – may also be driven by the availability of informa-

Rekha Rangachari is executive director of the New York International Arbitration Center (NYIAC). She co-chairs the International Dispute Resolution Committee of the Dispute Resolution Section and sits on its Executive Committee and also co-chairs the International Contracts and Commercial Law Committee of the International Section and sits on its Executive Committee.

Steven Skulnik is a senior legal editor in the litigation and arbitration services of Thomson Reuters' Practical Law. He is also on the roster of arbitrators for the AAA/ICDR, CPR, SIAC, and other major providers and is a fellow of the Chartered Institute of Arbitrators (FCIArb). He has co-chaired the Arbitration Committee of the Dispute Resolution Section and is the immediate past chair of the New York City Bar Association's Arbitration Committee.

tion, such as reliable management forecasts of future cash flows or industry data.

Q. Have you engaged with the other side's expert to narrow disagreements in advance of testifying?

GD: Yes, in a recent arbitration that required the valuation of an infrastructure project in Russia, the experts engaged in two distinct rounds of discussions with a goal to producing "joint expert reports" following each round. There were several fundamental valuation issues in discussion, some related to the overarching factual assumptions used in the valuation on which the two sides disagreed simply based on the nature of their instructions, while others related to technical valuation-related points where we were able to adopt certain approaches of the other side's expert (*e.g.* presentation of cash flows in nominal dollars instead of real) in order to reduce the sources of differences where these sources were not in dispute between us. Similarly, the other side's expert – following discussion with us – was able to adopt some of our points or correct errors noted, all with the view to narrowing differences down to the main issues of disagreement or legal instruction. This allowed for a significant reduction in areas of disagreement prior to the engagement of the tribunal, rendering the actual hearing a more efficient and effective use of the tribunal's time.

CJ: In a number of my cases there has been instruction to have a joint expert report which is intended to narrow disagreements. Sometimes it does do so but too often it ends up simply being an opportunity to restate arguments, with at times strong evidence of legal teams seeking to restate their pleadings via their expert. What it does usually do at least though is to distill down the key points of difference for a court/tribunal to see.

AC: I have, and I have noticed that this situation is becoming more and more commonplace. We are not always authorized to do so, but tribunals have increasingly shown interest in experts communicating among themselves to find some common ground pre-hearing. This takes the form of joint reports, reports of areas of agreement and disagreement, and joint statements prior to testimony. In one case, my team and I were asked to prepare and submit a joint report discussing the main inputs and assumptions of the opposition's damages frameworks submitted in previously filed reports and to highlight the areas of agreement and disagreement that remained after multiple interactions. While not always productive, it is often a fruitful exercise for tribunals when the experts' opinions are divergent on a limited set of assumptions, or when the divergences are guided by instructions, which the tribunal can ask to be removed as hypothetical. For instance, if the experts agree on the valuation methodology and the assets or contract being valued (e.g., they both agree the DCF is the reliable method to determine the value of the assets or contract) but disagree on certain specific inputs to the valuation methodology (e.g., price forecasts, cost forecasts, capital expenditures, discount rate, etc.), a joint report is a useful exercise to focus on the reasons, assumptions, and support behind the specific inputs in question. Conversely, if the experts have fundamental disagreements around the valuation methodology (e.g., the use of the DCF method versus a market approach versus a cost approach), a joint statement or expert report tends to have a broader scope, and, in turn, becomes less informative.

CC: When we receive the other side's expert report, we review and consider in detail the other expert's opinion and try to narrow disagreements whenever possible. What is central as experts (and in our duty to assist the tribunal) is to clearly identify the disagreements between the experts and the impact of each of them. While there might be several disagreements between the experts and each of them should be addressed, experts should clearly identify (in their written and oral testimonies) the areas of disagreement and highlight the ones that have the most impact on the analysis. In some cases, the tribunal might request a joint damages assessment between both experts, where we engage directly with the other side's expert to narrow disagreements. The tribunal might ask the experts to narrow certain areas of disagreement (if feasible) and to submit a joint valuation model in which the tribunal can assess the impact of each position. It is important to define the scope and objective of the joint analysis, and to allow experts to discuss among themselves focusing on the relevant quantum issues, to avoid converting the joint model or report into a new round of pleadings.

Q. Have you been appointed as an expert by the arbitral tribunal?

CC: I have not. In general, I believe that the adversarial nature of arbitration increases the quality of work. That being said, the party-appointed experts should aim to assist and educate the tribunal, in particular when the dispute centers around technical issues. The written and oral testimony should communicate in a simple and concrete manner the relevant arguments, avoiding unnecessary complexity so as to be useful to the tribunal. In some cases, a tutorial on the technical issues of the case might be helpful and can be shared with the tribunal before the hearing or even before they read the expert reports.

CJ: Yes, I have had such an appointment. I recognize the concern at times about being "the fourth arbitrator" but where there is a strong tribunal that should not be an issue as they can still take their own course. It is also necessary at times either because only one side has an expert or because the two experts are disputing technical issues where the tribunal needs additional support. There is also a role now starting to develop more in some quarters of assisting a tribunal, short of an expert appointment. I do consider that tribunals would benefit from greater ability to at least test understanding and ideas with an expert.

"Witness conferencing needs to be organized to allow each expert to put forward their views but at the same time not to simply be allowing the loudest voice to dominate."

Q. When taking on an assignment for an arbitration, as opposed to a court litigation, do you do anything differently?

AC: When assessing damages or performing economic and financial analyses to support a reliable and credible economic expert opinion, there are no fundamental distinctions in the techniques I would use in an arbitration or court litigation. As consulting or testifying experts, we implement widely accepted financial and economic principles and rely on highly reputable academic sources alongside industry data and sources. On the other hand, assignments in arbitrations and court litigations may require specific and different areas of focus, which include (i) discovery processes, document and data production and availability and (ii) specific legal requirements, legal instructions or precedents. With respect to the first point, arbitration cases tend to have a limited discovery process, which may restrict the amount of available information from the parties. As a result, experts have limited opportunities to obtain exhaustive supporting materials. To mitigate and overcome this limitation, the experts and their research team are often subject to how counsel manages document production schedules to obtain desired information from the opposing side. In U.S. court disputes, the available document and data record is typically extensive and more complete; therefore, the crucial issue is to research and select the key materials to perform the damages assessment. Arbitrations and court cases may differ in legal requirements, which can have implications for the assessment of damages. For example, in certain jurisdictions pre- and post- award interest rates and the interest regime (i.e., simple interest or compound interest) are specified by the laws or precedents in a specific state or country.

GD: The nature of the procedures performed, standards adhered to, and opinions rendered generally do not differ, whether in the context of an arbitration or a court litigation. In arbitral hearings, our reports can take the place of a direct examination. Arbitration may allow for a brief presentation by the expert at the outset of their testimony, however, the emphasis is generally on cross examination. Therefore, the language in our reports is tailored to suit the purposes of arbitration where the tribunal relies on the reports in place of direct examination. Given the procedural flexibility that accompanies an arbitration, joint expert reports are increasingly part of the process in arbitration as compared to court litigation. We are also able to maintain more of a dialogue with the opposing expert throughout the process in an arbitration. Lastly, an arbitration can have a much more condensed timeline than a litigation. We ensure that our teams are staffed to maintain availability to meet key reporting and hearing deadlines, and work with counsel more collaboratively than is sometimes possible in a court litigation in order to ensure that key procedures and deliverables are completed in the most effective manner.

CJ: My litigation experience is non-U.S. and does not change the fundamental approaches to a case. It does change some of the procedure with greater disclosure and greater ability to ask questions of an expert after a report in litigation. Also, in arbitration there are more specific requirements to set out links to parties, counsel, and tribunal (beyond a general duty to confirm no conflict).

Q. What is your experience with witness conferencing (hot-tubbing)? Do you think it's an effective way to explain the issues to the tribunal?

CJ: I have had witness conferencing in a number of cases and I have found it helpful. Similarly, I have had several cases where, looking back, it should have been used to help bring to light better whether the foundation for each expert opinion is sound. Its effectiveness I find depends very much on how prepared the tribunal is and how well it controls events. Witness conferencing needs to be organized to allow each expert to put forward their views but at the same time not to simply be allowing the loudest voice to dominate. When I have seen it at its most effective is when a tribunal member has prepared specific questions to put to both experts that draw out the principles underlying their calculations, so that the tribunal can decide to what extent it accepts those views.

AC: While I have personally not been "hot-tubbed" as an expert witness, my colleagues and I are seeing a growing number of cases in which this procedure is used. Ultimately, the value of this procedure is driven by how the tribunal uses it, with the main issue being: are they in a position, given the information and analyses on record, to ask the specific questions to the opposing parties' experts so that they can help identify the core differences and generate consensus? On one side hot-tubbing provides experts the opportunity to explain and support their conclusions in

comparison with the conclusions of the opposing experts while removing the effect of instructions, if applicable. In this process, the rigor, objectivity, and support brought forward by the expert becomes clear and unambiguous before the tribunal. On the other side, hot-tubbing provides the tribunal a unique opportunity to test the strength and credibility of specific issues, assumptions, and inputs that are critical to the damages assessment.

CC: Hot-tubbing can be useful as a complement to the traditional direct testimony and cross examination. It is an opportunity for the tribunal to get the position of each expert more directly on the areas of disagreement and identify the rationale/assumptions behind the differences. The tribunal is central to make the hot-tubbing as effective as possible. A prepared tribunal will focus on the relevant questions and be able to deal with the experts if the responses are not clear, direct, or relevant.

GD: In my view, witness conferencing can provide an effective and efficient means by which to provide information to the arbitral tribunal if used appropriately and within set guidelines, mutually agreed-upon by the parties. Witness conferencing is generally conducted after the cross-examination of witnesses and can be used as a forum to narrow the scope of disagreement between experts, or at the least to determine the source(s) of such differences. Members of the tribunal have the opportunity to ask questions directly of the witnesses, with both parties' witnesses given the opportunity to respond and highlight areas of agreement and disagreement between them. This also affords the tribunal a means of comparison of the two witnesses, in terms of responsiveness, reasonability, and independence. Importantly, while an arbitrator may have the opportunity to engage in dialogue with the witness during their individual examination, the practice of witness conferencing allows for – and can even encourage – dialogue directly between the witnesses that may make clearer the precise nature of the disagreement, which may be based on a specific instruction or assumption requiring a decision by the tribunal in any event. In this example, the tribunal's ruling on this specific assumption would resolve the source of the disagreement between the experts, providing a path forward in resolving that specific divergence between the experts.

The conclusion that the interviewers reached is that arbitrators would benefit greatly from further discussion with experts on how to best use their services and digest their testimony in arbitral proceedings.

The opinions expressed here are only of these individuals and do not necessarily reflect the views of the firms with which they are affiliated

The New ICCA-ASIL Damages in International Arbitration Application (DIA): Introduction and Practical Uses

By Kathleen Paisley

After more than four years of work by global legal and economics experts, the ICCA-ASIL Task Force on Damages in International Arbitration (the Task Force) launched the "Damages in International Arbitration Application" (the DIA) in November 2021 as part of ICCA's 60th anniversary celebration.

The Task Force, chaired by Catherine Amirfar of Debevoise & Plimpton in New York and Gabrielle Nater-Bass of Homberger in Zurich, was formed by ICCA and ASIL to promote consistency and rigor in the approach to damages in international arbitration.

From the outset, the Task Force decided to create a practical tool to assist in analysis of damages issues. The DIA is made available as an application and on a website co-hosted by ICCA and ASIL to be used freely across the globe at https://icca-asil-damages.com. The Task Force's goal was to raise the practical understanding of damages issues by all involved in the arbitration process, improve the quality of damage awards in both commercial and investor-state cases, and ultimately to create a more level playing field for bringing or defending damages claims.

This article provides insight into the DIA and how it may be used to facilitate the analysis and quantification of damages during the arbitral process.

How Is the DIA Set Up?

The DIA is set up in a decision-style format with interlinking topics to guide users through the key (i) procedural (ii) legal and (iii) quantitative issues implicated when analyzing and quantifying a damages claim in commercial and investor-state arbitration. The legal section of the application is further divided into three sections focusing on the issues required to make out a claim under the (i) common law, (ii) civil law, or (iii) international law.

Each module is divided into parts and each part is made up of a number of "buttons" providing content on the topic covered. Each button is composed of text explaining in a brief, practical way the topic covered by the button, followed by a checklist of the relevant issues in addressing the topic and then by relevant reference sources. For ease of use, the buttons link to related topics in other parts of the application, and many of the substantive buttons link to the quantification buttons and vice versa.

The issues checklists guide the user when exploring the subject covered by the button in an arbitration setting. For example, when arbitrators address damages quantification, they can review the checklists of issues posed by the various valuation methods presented by parties and their experts to confirm that they have been covered during the hearing. The Task Force hopes that if parties and experts come to expect that arbitrators will employ the tool in their cases, they will be more thorough and transparent in their submissions to the benefit of ultimate award.

DIA Overview

Procedure

In most commercial arbitrations and many investor-State cases, the amount of damages awarded is the most important issue to the parties. The monetary award hinges on the quantification of the damages, which may require the valuation of assets. The parties must provide, and the tribunal must elicit, the fact and expert evidence required to properly address and decide the quantum of damages.

The procedure for the presentation of independent quantum evidence should be designed to assist the tribunal in quantifying the damages in line with its decision on the merits. The procedure employed to extract the expert evidence will depend on the nature and complexity of the quantification exercise. Particularly with forward-looking damages claims, providing the tribunal with a robust understanding of quantum in complex cases often turns on creating a process intended specifically to foster such an understanding.

Creating an effective procedure is, of course, case specific, but some key considerations that a tribunal may take into consideration in creating an efficient process for the presentation of damages and quantum expert evidence (with the needed input of counsel) are set forth below:

- What issues related to the procedure for damages quantification should be raised at the initial case management conference (CMC)?
- Should the parties or the tribunal propose specific procedures related to the taking of the damages evidence, and, if so, when?
- When should the experts' reports be served, including whether by way of exchange or sequential and is there need for reply reports and when these should be presented?
- Should the parties prepare a list of quantification issues, agreed to the extent possible, so the experts can address them, preferably in the same order in their report? Should other requirements in relation to the experts' reports be specified?

- Should the parties establish common data rooms containing the documentation that has been provided to their respective experts?
- Should the parties undertake a robust early case presentation or Kaplan hearing including the damages case (with or without expert reports)?
- Should the experts meet on a without prejudice basis with or without the presence of lawyers to see where there is common ground and, if so, should it be at the outset before any expert reports and/or after the first or second round of reports?
- Following any meeting of the experts, should a joint report or schedule be prepared (perhaps by way of a Scott schedule) and, where appropriate, any updated joint report and the schedule?
- Should the experts cross-check each expert report, which may be useful in narrowing the issues?
- Should the tribunal consider appointing, or at least providing for the appointment of, its own damages expert?

Legal

The legal section of the tool addresses the main legal issues raised by the principle national laws systems (common law and civil law), and by international law. Each module has buttons related to the standard for making out a damages claim under the applicable law (common law, civil law, and international law), and each element of the damages claim under each standard.

National Laws

The national law modules address the following issues based on the underlying damages principles under the relevant law (common/civil law):

- Legal Causation
- Limiting Principles
- Proof
- Valuation Date
- Categories of Remedies
- Applicable Law

This analysis is high level and based on the commonalities among the civil and common approaches to damages.

By addressing the same issues under the common and civil law, the DIA allows all those involved (parties, counsel, experts, and arbitrators) to better understand the elements of an effective damages claim under the applicable national legal regime and how that might differ were the claim to be decided under another national legal regime. For example, in a contract case, the DIA can provide an overview of the requirements to establish (i) legal causation; (ii) burden of proof; and (iii) the categories of damages, among other things, under both the civil and common law.

Furthermore, in cases where the parties, counsel, experts, and/or arbitrators are from different national legal regimes, having each element addressed in a way that allows comparison, permits the user of the DIA to understand the different assumptions that may influence different approaches.

International Law

The international law section addresses the following issues under international legal principles, including treaties and customary international law:

- Limiting Principles: Covering the injury requirement for injury and breach, contributory conduct, double recovery, reasonable certainty and mitigation.
- Proof: Covering burden of proof and standard of proof.
- Valuation Date: Covering date of breach and date of award.
- Categories of remedies: Covering compensation, satisfaction, restitution, and interest.
- Legal Standard: Covering full reparation and adequate compensation.
- Nature of Claim: Covering expropriation and other breaches of international law.

Each of these international law sections of the DIA contain links to other related legal and quantification topics and a list of key issues and sources.

Quantification

The quantification or valuation of damages claims starts with identifying and articulating the underlying legal basis for the damage claimed. The DIA uses the term "valuation" broadly to the refer to the process of quantifying the monetary value of a damages claim, whether it arise from contract breach, tort, or a treaty or international law violation. Therefore, the terms "valuation" and "quantification" are broadly synonymous as employed in the DIA.

Kathleen Paisley is an international arbitrator who is triple qualified in law (JD Yale), finance (MBA Finance), and accounting (CPA exam Florida). Her legal, economic and accounting expertise covers complex damage issues raised in both commercial and investor-State arbitrations. Ms. Paisley is a member of the Task Force and the only lawyer on the quantification team, and with permission this article draws heavily on the work and language of the DIA.

The language of contract or the treaty and its legal effects will typically be the starting point for the quantification or valuation of damages. Depending on the facts around the breach and the language of the contract or treaty, quantification of damages may be as simple as determining the amount of unpaid invoices, or it may require a more complex "but-for" analysis of a contract claim or illegal act. For example, a present-value analysis valuing a specified set of cash flows arising as the result of the legal violation or contract breach may need to be compared to what actually occurred. In practice this type of "but for" analysis of a contract or treaty claim, requires determining issues similar to those required for a going-forward valuation of an asset or business (for example using the discounted cash flow (DCF) method). The valuation of a claim for contract breach therefore may not differ significantly from the forward-looking valuation of an income producing asset.

Quantifying damages requires a clear identification of the damage being assessed or the asset being valued, including what it is, the legal basis for the claim, the relevant dates, and the standard to be applied. The DIA has a button covering each of these issues. The appropriate quantification/valuation method(s) can then be applied.

Quantifications/valuations in a typical international arbitration may cover:

- All assets of a business (known as "enterprise value") (and the DIA has a button considering the difference between valuing an asset versus an enterprise)
- A specific asset (for example, a plant, a contract, or a patent) (and the DIA has a button addressing the valuation of intangible assets)
- Impact of illegal anti-competitive practices)
- Loss of a specific opportunity (e.g., loss of ability to launch a new venture)
- The violation of a legal or contract right (and the DIA has a button covering contract damages and but-for analyses of contract and treaty claims)
- Loss of a specified set of cash flows lost as a result of allegedly illegal conduct or contract breach (and the DIA has a button covering lost profits)
- A security (e.g., debt or equity)
- A non-material damage, (and the DIA has a button specifically addressing the valuation of non-material damages (like mental pain and suffering))

Principles for Valuing Assets

When the claim requires a valuation as such, it will typically concern the market value of either an asset or a liability of a corporation, an interest in the corporation, or the company itself (the DIA has a button covering the concept of a going concern and the impact this has on the damages valuation).

The valuation of income-producing assets relies on the determination of the present economic value of the net cash flows that an asset is expected to generate in the future, which is the amount that a hypothetical willing buyer and a hypothetical willing seller would agree to if both had full information and the parties each acted knowledgeably, prudently, and without compulsion. This value may be can sometimes be observed (for example, for publicly traded companies) or, alternatively, may be determined directly through application of an income method or indirectly through a market method (and the DIA has a button covering market value principles generally).

A key component of any valuation of an income-producing asset is the evaluation of risk, and it is important to be consistent and to understand the impact of the various aspects of the valuation on each other (and the DIA has buttons specifically covering the concept of risk and the importance of consistency to any valuation exercise). Furthermore, particularly in the context of treaty claims, the impact of country risk on the valuation can be significant (and the DIA has a button expressly addressing country risk).

Methods of Valuing Assets

The DIA has modules addressing the three main approaches to valuing assets, namely the income approach, the market approach, and cost-related approaches, with buttons addressing the building blocks underlying each methodology.

Income approach. The income approach is based on the underlying principle of financial economics that the market value of an asset is determined by its ability to generate cash flows in the future. Income-based valuations include the discounted case flow (DCF) method, which relies on projecting an asset's expected cash flows into the future and calculating the present value of the asset by summing all future projected cash flows, adjusted for timing and uncertainty through the application of an appropriate discount rate, as well as options or other income-based valuation techniques. Similarly, as discussed above, damages might be calculated as the difference between the value of an asset or a business with and without ("but for") the disputed conduct, or equivalently, as the value of the set of cash flows lost as a result of that conduct, which requires a similar analysis.

The DIA has a module devoted to the income approach to valuing assets. This module has separate buttons addressing each aspect of a DCF analysis, as well as the adjusted DCF method, capitalization of earnings, real options, and the modern DCF analysis.

Market approach. The market approach, also referred to as "comparables" or "relative valuation," assesses the market value of an asset relative to, or in comparison with,

the observed market values of similar (ideally identical) assets for which information is available, sometimes including other transactions in the same asset.

The DIA has a module covering the market approach to valuing assets. This module has separate buttons addressing different aspects of a market approach to valuation, including comparable sales, prior transactions, events studies, and valuation multiples.

Cost-based approaches. In certain cases, one of the parties may advocate for a cost-based method of valuation, such as book value or amounts invested. These concepts do not typically reflect market values (except by chance) and, as such, are generally inappropriate when a market valuation standard is being applied.

The DIA has a module covering cost-based approaches to valuing assets, including separate buttons addressing asset-based valuations, replacement costs, and book value.

Multiple methods. Parties often present quantification analyses based on multiple valuation methods either as the basis of, or support for, their primary valuation of damages. Multiple methods may be presented when quantifying the value of an asset, lost profits, or other rights stemming from contracts or treaties. The DIA has a module devoted to the use of multiple methods to value assets, which are best used as support for a valuation under the primary valuation method relied upon.

Sensitivity analysis. It may be appropriate to incorporate a sensitivity analysis (also referred to as a scenario analysis) into the valuation that considers alternative values of key variables with uncertain values, such as discount or inflation rates or cash flow trajectories under different market expectations. A sensitivity analysis provides arbitrators with an understanding of the underlying factors most likely to have a major impact on the valuation and a realistic range of asset values in the face of uncertainty.

Ex ante or ex post. Whether the valuation is performed ex post or ex ante can have a significant impact on the value of a claim (and the DIA has a module covering the use of ex ante or ex post damage valuations). In an ex-ante analysis, the valuation is performed at the time that the damage was incurred based on information known at the time of the breach, and considers the full range of possible outcomes, accounting for risk and interest from the date of the claim until the date of the payment of the award. In an ex-post analysis, on the other hand, a valuation is performed at the time of the hearing or the award, and damages are quantified based on past damages and future expected losses from that date forward. The analysis makes full use of hindsight and reflects actual past outcomes.

The DIA also recognizes the importance of currency, tax and interest in valuing arbitration claims, and has buttons addressing each of these issues separately. Interest is a good example of the role of the DIA can play understanding the importance of quantification issues in establishing the ultimate amount of the award in ways that counsel (and arbitrators) may not recognize. In "The Underappreciated Importance of Interest: *DIA and Vale S.A. v. BSG Resources Limited*," in this issue, the authors discuss the DIA's approach to the conceptual underpinnings of pre- and post-award interest claims, how they are calculated, and how and when an economic framework for interest can be useful, as exemplified by the approach to risk and return in pre-award interest calculations in the recent award in *Vale v. BSG*, which fails to match risk and return in the interest calculation.

The remainder of this article will consider how the DIA will be used by counsel and arbitrators to improve their understanding and treatment of damages claims.

How May the DIA Be Used by Counsel?

Counsel may use the DIA to become familiar with foreign legal issues, assist in establishing an effective damages procedure, and to better understand and explain the quantification of complex damage claims.

Understanding foreign legal issues. It is not uncommon for the law potentially applicable to the damages claims to be different from the laws under which counsel practices. Given that the amount of damages awarded is almost always the most important issue to the parties, understanding how this could be impacted by the application of one law or the other is important. For example, if the principal counsel is from the United Kingdom and there is a dispute as to whether French or English law applies to the case, there may be important differences between French and English law that could impact the damages analysis, and counsel should understand these differences early in the process.

Guidance in structuring damages procedure. Given the importance of procedure to ensuring the damages case is properly heard, the DIA has an entire section devoted to damages procedure. Although in many cases the damages issues will be relatively straightforward, in cases where complex forward-looking damages are involved (like lost profits and DCF valuations of income producing assets), it is essential for counsel and the tribunal to carefully consider from the outset of the arbitration the best way for the damages case to be presented from the procedural perspective.

Understanding the quantification issues. A common joke among lawyers is that if they could do math, they would not be lawyers. Although this is obviously not universally true, and there is trend towards lawyers becoming increasingly literate about damages issues and quantification, there remains a certain hesitancy among many lawyers to dig too deep into the details of the quantification analysis.

However, the legal and damages cases must align fully to maximize the chances of success. This is especially true when complex forward-looking damages are at stake. In larger or more complex cases, the damages case will be supported by quantification experts. The DIA may be used as a shared resource for experts and counsel to better understand the issues at stake and to ensure from the outset they both understand the legal basis for the damages claim and how this impacts the damages analysis and the expert report. Equally on the quantum side, the DIA provides a useful resource for counsel to better understand the quantification issues and help bridge the potential gap between counsel and experts.

The DIA therefore can be used both to assist counsel and the experts in preparing the damages case, and in explaining these concepts to each other and the tribunal.

The DIA is drafted to be easily understood yet generally comprehensive, and to provide a shared source of even-handed damages information to all those involved in the arbitral process, including issues checklist to ensure the subject is considered carefully and thoroughly. The following sections of this article address how the DIA may be used in practice by counsel and arbitrators.

How May the DIA Be Used by Arbitrators?

Arbitrators may use the DIA to craft the damages and quantification procedure, as a shared resource for better understanding the quantification issues, and as a source of checklists to ensure all damages and quantification issues have been addressed and fully understood before the record is closed.

Building the damages procedure. The purpose of the quantification exercise is to ensure that the tribunal has sufficient information and expertise to decide the quantification claims. The DIA recognizes that the procedure adopted to address damages can be determinative of their outcome, and, the more complex the damages calculation, the more likely this is to be true. This process can be improved when the arbitral tribunal understands the quantification process and creates a procedure designed to fit that purpose.

When the case involves party-appointed quantum experts, it is important to fashion an approach that allows the arbitrator to understand the details of the necessary quantum evidence and how a decision on liability impacts the quantification of damages. A good process is likely to improve the quantification decision without creating undue delays or significantly increased costs.

Early tribunal engagement on these issues can help it create a procedure that is fit for purpose. For example, if complex damage issues are raised, the proper procedure for the consideration of quantum evidence generally should be raised at the CMC, so that it can be factored into the overall process. This does not mean that the procedural issues related to damages will necessarily be decided based on the CMC, but they may be placed on both the tribunal and counsel's radar screens when considering the overall procedure. Focusing on these issues will help the tribunal decide whether: to decide on a preliminary basis certain issues that impact the damages assessment; to schedule an early case presentation or Kaplan hearing; to bifurcate proceedings; or even to appoint a tribunal expert.

The procedural module of the DIA provides the tribunal with a tool to assist in developing a damages process geared at eliciting and understanding the quantification evidence presented by both parties. The goal is to avoid the ships passing in the night and give the tribunal a robust basis for resolving damages claims.

Shared background source for quantification issues. The quantification of claims requires arbitrators to have sufficient background and expertise, even though these are often complex issues and the arbitrator may have no training in finance, accounting, or economics. The DIA provides a useful shared source for arbitrators and counsel to consult to provide a neutral background understanding on how to quantify damages. For example, valuing income producing assets, lost profits and other forward-looking damages requires arbitrators to understand the time value of money and to value risk and the other components of a forward-looking damages claim. This is a complex exercise, and the DIA provides a useful structured, decision-tree type organization to assist in understanding these issues.

Checklists. To assist the tribunal, each of the buttons includes a list of the issues that need to be decided. These checklists are intended to assist the tribunal, as well as others involved in the process, to ensure that the key issues are covered and understood. The issues lists can be put together and used by the tribunal to prepare for all proceedings impacting the damages case to ensure it has the necessary information to decide the case.

Conclusion

The ICCA-ASIL Task Force on Damages in International Arbitration, and its co-chairs, Catherine Amirfar and Gabrielle Nater-Bass, spent thousands of hours creating the DIA to assist counsel, experts and arbitrators to better understand and quantify damages in commercial and investor-State arbitrations to promote consistency and rigor in the approach to damages in international arbitration. It will be used proactively to assist in understanding and quantifying damages claims and valuing assets in international arbitration. It is an important contribution to the field.

Endnote

1. Task force members include Olufunke Adekoya, Sarah Grimmer, Hilary Heilbron, Mark Kantor, Alexis Maniatis, Irmgard Marboe, Chudozie Okongwu, Kathleen Paisley, Patrick Pearsall, Adriana San Román Rivera, Guido Santiago Tawil, Thierry J. Senechal, Jennifer Hall Vanderhart, Swee Yen Koh, and Karim A. Youssef. Task Force Rapporteurs are Aasiya Glover, Stefanie Pfisterer, Justin R. Rassi, and Christel Tham.

The Underappreciated Importance of Interest: *DIA and Vale S.A. v. BSG Resources Limited*

By Alexis Maniatis, Florin Dorobantu, Fabricio Nunez

Interest compensates injured parties for the financial loss suffered due to the delay between the time of the loss and the subsequent payment of an award. Interest awards make the injured party whole by compensating them not only for the injury or loss suffered, but also for the passage of time between the date of injury or loss and the date of payment of the award.

Importance of Interest as Explained by DIA

In "The New ICCA-ASIL Damages in International Arbitration Application (DIA): Introduction and Practical Uses" in this issue, the author provides an introduction to the DIA and provides insights into its practical uses by counsel and arbitrators. As recognized in that article, one of the many important contributions the DIA makes to the field is to address the importance of interest in making injured parties' whole in international arbitrations, and that it often does not get the attention it deserves, given the amounts at stake.

Conceptually, interest can be seen to serve one or more purposes:

- To compensate the injured party for the delay in payment;
- To prevent unjust enrichment by the responding party;
- To promote efficiency and avoid incentives to delay the proceedings (or payment) for either party.

Interest awards are typically based on a number of factors, namely, (i) start and end date of the interest period, (ii) a base interest rate, (iii) a spread above the base rate, and (iv) frequency of compounding (or whether compounding applies at all). Pre-award interest applies between the date at which damages are evaluated and the date of the award, whereas post-award interest applies between the date of the award and the date of payment.

The legal instrument or law governing the dispute (contract, treaty, or the applicable law) may specify the applicable interest rate, however, when that is not the case, an economic framework is useful. After providing a brief overview of the DIA's approach to interest, we discuss the recent *Vale v. BSG* award's approach to risk and return in pre-award interest calculations.

Interest Period

1. Pre-Award Interest

Pre-award interest starts on the date that the damages amount is due under the legal reasoning of the award and runs until the date of the award. In some jurisdictions, including the European Union (EU), where the Late Payments Directive[1] applies to all payments made as remuneration for commercial transactions, the interest date is established as a matter of law.

2. Post-Award Interest

Post-award interest runs between the date of the award until the date of payment. Tribunals often allow for a grace period after the award date before post-award interest starts accruing in order to allow the losing party time to pay.

Compounding

Compound interest differs from simple interest in that the principal balance grows by the amount of interest earned in past periods. Compounding interest compared to simple interest can have a significant impact on the amount of the award. All other things being equal, compound interest also has a larger effect as the time period increases and as the interest rate increases.

Since compounding is an inherent characteristic of commercial interest rates, awarding simple interest based on commercial rates risks undercompensating claimants. One possible approach is to match the compounding frequency with that of the underlying instrument from which the interest rate is taken. For example, if the award for interest is based on a risk-free rate for one-month U.S. Treasury bills, interest should compound monthly.

In cases where interest is granted based on the respondent's borrowing rate, one may either match the compounding frequency to the instrument used as a com-

Alex Maniatis, Florin Dorobantu and **Fabricio Nunez** are principals of The Brattle Group, acting as quantification experts in commercial and investor-state arbitrations. Mr. Maniatis was part of the ICCA-ASIL Task Force on Damages in International Arbitration that developed and published the DIA.

parator or determine a reasonable compounding basis (for example, monthly).

In the EU, the Late Payments Directive provides expressly that simple interest shall be applied without compounding but purposefully applies a higher than market rate.

Currency

Interest rates are currency-specific because they reflect inflation and exchange rate expectations that are currency specific. It is therefore important to select interest rates that are defined for the same currency as the award. However, if the interest rate being applied is the respondent's cost of borrowing, it would need to be for loans in the currency of the award. If this is not available, then that rate would have to be estimated.

Interest Rate

1. Pre-Award Interest

Pre-award interest compensates a claimant for the delay in receiving the quantum of damages established at the valuation date but not paid until sometime after the date of award. Economists and tribunals often have focused on two theories of interest that reflect different legal assumptions: the "forced loan" theory and the "risk-free rate" theory. Each approach looks at markets to determine the rate that corresponds to the risk and return consistent with the legal assumption or instruction, and provides the claimant with "fair compensation," meaning it preserves the Fair Market Value (FMV) of the amount determined at the valuation date.[2] The forced loan theory would apply interest at the respondent's borrowing rate, in effect treating the claimant as a "forced creditor" of the respondent.

The basis for this approach is that the obligation to pay compensation arose at the date of the breach. Since compensation was due, but not paid, at that date, the claimant bore the risk of the respondent's default, just like other creditors who may have extended loans on a voluntary commercial basis to the respondent on the date of the breach. This approach has the significant advantage that it matches the interest rate to the actual risk incurred by the claimant (namely nonpayment by the respondent).

The alternative theory applies a "risk-free" rate to compensate only for the time value of money, on the view that the liability does not arise until a tribunal issues an award. After the award is issued, post-award interest should compensate for the credit risk of the respondent going forward. Under the risk-free rate approach, the risks that a claimant faces between the date of the breach and the date of the award represent general litigation risks and not financial risks.

A less common approach views pre-award interest as related to the claimant's cost of capital. According to this theory, pre-award interest should compensate the claimant for its cost of funding during the period that it lacked access to the amounts at issue because of the delay in payment from the respondent. That is, according to this view, this cost of funding and the delay are no different from a lost reinvestment opportunity in the project, asset, or business at issue, which has a funding cost equal to the cost of capital.

The argument is then that the principle of full compensation or full reparation requires pre-award interest based on the claimant's weighted average cost of capital (WACC) to make up for that alleged lack of opportunity, without considering whether that opportunity in fact existed or was lost. The WACC represents the return investors expect to achieve for investing in the claimant's business. Tribunals have occasionally relied on this approach,[3] and the recent decision in *Vale v. BSG*, discussed below, provides an opportunity to explore the flaws in the economic foundation of pre-award interest based on claimant's WACC.[4]

2. Post-Award Interest

For post-award interest, there is no question of whether liability for the amount has been established. Different interest rates may apply depending on, among other things, the applicable law, the financial circumstances of each party, and the nature of the loss incurred.

Law. Many jurisdictions provide for post-judgment interest rates that may apply to arbitral awards, but this should be carefully considered under the applicable law, as it is not at all clear that post judgment interest rates applicable to court proceedings are applicable to arbitration awards.

Respondent's cost of borrowing. Under this view, as noted above, interest accrues at a rate that reflects respondent's cost of borrowing, commensurate with the market terms on which respondent would borrow the award amount. This approach has the benefit from an economic perspective of matching the actual risk incurred with the interest amount awarded. As discussed throughout the DIA, consistent matching of risk and reward is a key component of an accurate approach to damages quantification.

Claimant's loss of opportunity. As discussed above, some financial experts may take the view that the award of interest should be based on what the claimant "lost" in terms of what it could have obtained if it had invested the money during the time it was deprived of it due to the breach or other unlawful act. This is based on the notion that the claimant has lost the opportunity to earn a return on the damages amount. While claimant's investment opportunities vary from case to case, the benchmarks typically proposed are claimant's WACC, claimant's cost of borrowing, or the average return on market investments.

The next section addresses *Vale v. BSG*, a recent arbitration where the tribunal awarded pre-award interest based on the WACC. We explain that from an economic perspective, this approach fails to align risk and return and

therefore deviates from the fair market value principle. Although in most cases the use of the WACC will overcompensate the claimant, there are circumstances in which it may undercompensate them, in particular when the risk of the respondent's default in the pre-award period was high.

Vale v. BSG: Risk and Return in Pre-award Interest Calculations

Vale v. BSG involves a claim that BSG fraudulently induced Vale to invest in the Simandou iron ore project in Guinea. The tribunal ruled in favor of Vale and awarded reliance damages, so as "to place the innocent party in the same position as he was prior to the execution of the contract."[5] With respect to pre-award interest, the tribunal noted that:

> As regards damages for the *loss of the use of money*, any interest on damages would be to reflect *the loss of capital income and any amounts invested which could have been earned in the absence of the contract*. The Tribunal considers that Vale would likely have invested such amounts in its business and that simple interest is to be preferred for that reason. Absent further information as to *Vale's cost of capital*, the Tribunal considers that simple interest at LIBOR USD 3-month rates plus 7% is an appropriate pre-award interest rate. . . . [6]

That is, the tribunal reasoned that pre-award interest should reflect what the claimant could have earned absent the contract at issue. It then found that in that counterfactual scenario, Vale would likely have invested such amounts in its business and therefore interest should be at Vale's cost of capital.

A firm's cost of capital is determined by the risk of its overall business. It represents the expected rate of return that an investor earns in exchange for bearing the risk of earning more or less than a particular target. The cost of capital is by no means a certain return. Investing in a business offers the possibility of higher returns than a riskless investment, such as a Treasury bond, but also puts the investor's funds at risk of loss. The average of an investment's possible outcomes divided by its price yields its expected rate of return – in the case of a firm, this equates with its cost of capital or WACC. The WACC is determined in the capital market by the price at which investors purchase the firm's equity and debt securities.

From an economic perspective, however, awarding pre-award interest at the cost of capital allows the claimant to earn a return without bearing the corresponding risk—in the case of Vale, the risk of its business activities. However, in the case of pre-award interest, the relevant risk is the risk of not being able to collect the award from the respondent, not the risks of Vale's business activities as a whole. As a result, pre-award compensation based on the WACC does not place the claimant in the same economic position in which it would have been absent the contract—where, if it had invested in Vale's business, it would have faced a risk of loss equal to Vale's overall portfolio of risks, not just the risk of nonpayment by the respondent.

The tribunal found that, absent the contract, the claimant would have had the cash corresponding to the award amount, and by investing it in its own business, would have had the opportunity to earn, on average, Vale's cost of capital, which is consistent with the risk Vale bears with its investments. But being paid its cost of capital in the form of pre-award interest frees the claimant from bearing that investment risk and replaces it with the risk of not being able to collect the award from the respondent, which differs significantly from Vale's overall business risk.

To see why receiving interest at its cost of capital can overcompensate (or in some cases undercompensate) the claimant from an FMV perspective, imagine that the respondent is certain to pay the award (that is, the rate of default is nil), for example because the amount has been placed in escrow for payment of any award. In this situation, the claimant would earn compensation consistent with bearing investment risk (the risk of Vale's business) while in reality it bears no such risk, nor any other risk because there is no possibility of default. It is also possible that the risk of non-payment by respondent is higher than the risk of Vale's business activities, in which case WACC would undercompensate the claimant, because the real risk is higher. In short, the key flaw in the approach is that it disconnects risk and return.

An alternative way to see the same flaw is to note that if, in a counterfactual hypothetical scenario, the claimant had actually invested in Vale's business, bearing Vale's business risk means that it might have earned more or less than Vale's cost of capital, but almost certainly not exactly the cost of capital. In the Vale case, between the breach date in 2010 and the award date in 2019, for example, Vale's stock price actually lost approximately 37%,[7] rather than the over 60% positive return that simple annual interest at LIBOR + 7% would yield over the same period. In other words, if the claimant had instead invested the funds in other assets that performed similarly to Vale's business over this period on the stock market, it would have suffered a very significant loss, rather than earning a profit. Under this hypothetical, the LIBOR + 7% rate awarded by the tribunal would reward Vale with a return that compensates for the risk of its business, but has insulated it against this downside risk. Of course, Vale could also have performed better and its stock could have generated a return higher than its cost of capital.

However, pre-award interest at a predetermined rate cannot replicate the variation in possible outcomes, which is inherent in a risky investment. Hence, applying a pre-award interest rate at the claimant's cost of capital does not fulfill the purpose of compensation in international arbi-

"The Damages in International Arbitration Application (DIA) addresses interest in a manner enabling parties and the tribunal to approach interest with the intellectual and economic rigor it deserves. The *Vale v. BSG* award illustrates the importance of matching risk and return in awarding interest in international arbitration."

tration because it does not put the claimant in the same position in which it had been absent the contract even if it had invested in its own business because it does not match risk to reward.

Under an FMV framework, one can think of a fair interest rate as the rate that would make the market value of a debt to be repaid in the future (with interest) equal to its principal value. Unless the claimant's cost of capital happens to coincide with the fair market compensation for bearing the risk of lending to the respondent, the FMV of the award inclusive of interest at Vale's WACC will be higher or lower than the FMV of becoming a creditor to respondent between breach and payment of the award. For example, suppose $100 was taken from the claimant and an award would be issued one year later. If investors could be assured the respondent would not default and the risk-free rate was 4%, the market value of the award would be $100 at the breach date and $104 at the award date. This would provide the respondent with the same return that markets offered for similar risk. If the respondent's borrowing rate was 10%, because lenders needed compensation for the risk of default, that rate would be needed to preserve the $100 at the breach date, and the award would be worth $110 at the award date (if the tribunal finds it appropriate to compensate the claimant for credit risk under the forced loan theory).

More generally, from an economic perspective, placing the claimant in the same economic position in which it would have been but for the breach requires careful consideration and understanding of risk, which is another issue addressed in depth in the DIA. An interest award on fair market terms would match the risk premium embedded in the pre-award interest rate with the corresponding risk actually borne by the claimant in a consistent manner (the importance of which is also stressed in the DIA).[8] Of course, whether it is appropriate to compensate claimant for bearing the risk of non-payment of the award by respondent is a legal matter. But should the tribunal decide that such risk is compensable, the fair market compensation is determined by the respondent's cost of debt, not by the claimant's cost of capital.

Conclusion

Interest can be a significant amount of the award, especially in cases where the award is issued after a significant delay from the date of the underlying legal claim on which it is based. Yet interest is often addressed as an afterthought in the submissions especially in commercial cases. The DIA addresses interest in a manner enabling parties and the tribunal to approach interest with the intellectual and economic rigor it deserves. The *Vale v. BSG* award illustrates the importance of matching risk and return in awarding interest in international arbitration.

Endnotes

1. Directive 2011/7/EU on combating late payment in commercial transactions.
2. *See* M. Alexis Maniatis, Florin Dorobantu, and Fabricio Nunez, *A Framework for Interest Awards in International Arbitration*, Fordham Intl. L.J., 2018, Volume 41, Issue 4, pp. 821-840 at p. 826.
3. Dow, James, *Pre-Award Interest in Trenor, John A.* The Guide to Damages in International Arbitration, 4th edition, London: Global Arbitration Review, 2020.
4. *In the Matter of an Arbitration between Vale S.A. and BSG Resources Limited*, LCIA Arbitration No. 142683, Award dated 4 April 2019.
5. *Vale v. BSG Award*, ¶ 986.
6. *Vale v. BSG Award*, ¶ 986.
7. Return calculated between 30 April 2010, the date when most of Vale's investment (*see Vale v. BSG Award* at ¶ 986), and 4 April 2019, the date of the award. Share price data in U.S. dollars from Yahoo Finance.
8. *See* M. Alexis Maniatis, Florin Dorobantu, and Fabricio Nunez, *A Framework for Interest Awards in International Arbitration*, Fordham Int'l L.J., 2018, Volume 41, Issue 4, pp. 821-840.

Affiliation and Affinity: Unconscious Drivers of Arbitrator Decision-Making

By Edna Sussman

A great deal has been written in recent years about the impact of the unconscious on decision-making by arbitrators with a focus on heuristics and informational biases.[1] Since arbitrators are people, they like all people, have cultural, social and legal backgrounds and their own experiences and predilections which they bring to the arbitration. These predispositions form affiliation and affinity biases which can influence decision-making. This aspect of the unconscious has commanded less attention in recent years. This article endeavors to provide additional insights relating to these neglected biases.

A. Empirical Studies

Study 1. Puig and Strezhnev explored whether party appointed arbitrators suffer from an affiliation effect that their selection and appointment might create, i.e., a cognitive predisposition to favor their appointing party. The authors used what they described as a novel experimental approach to filter out differences that might be explained by other affiliation effects in order to isolate the causal effect of affiliation with the appointing party. They found that on average arbitrators were about 18 percentage points more likely to award all costs to the winning party when they were appointed by the winner rather than the loser. Similarly, on average arbitrators appointed by the claimant were about 15 percentage points more likely to choose the claimant's damages proposal compared with the arbitrators appointed by the respondent. The authors conclude that their results show that "being appointed by one of the parties in the dispute directly changes the behavior of arbitrators."[2]

Study 2. Drawing on Geert Hofstede's seminal work which identified value differences across cultures, a study was conducted to examine how an argument is evaluated in the context of different values relating to the large/small power distance value identified by Hofstede.[3] As defined by Hofstede, power distance is the extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally. Comparing studies of subjects from a country with a high power distance where people accept that some people have more power than others with those from a country with a lower power distance where an equal distribution of power is important, the study showed that expert testimony was more persuasive in the high power culture than it was in the low power culture. A subsequent study bore this out, showing that subjects from lower-power cultures were less likely than subjects from high-power cultures to accept expert testimony from as expert with lesser expertise in the area in question because it was of lesser quality.[4]

Studies 3-6. Several studies have been conducted to examine outcomes in investment treaty cases. One study that examined over 400 investor-state arbitration cases before the International Center for the Settlement of Investment Disputes (ICSID) found that arbitrators who are pro-investor tend to find in favor of investors and arbitrators who are pro-state tend to find in favor of the host state, concluding that the "empirical analysis shows that arbitrators appear to be influenced, in some cases, by their policy views and do not simply apply the law as it stands when deciding investment cases." The study was based on a personnel data set of over 350 arbitrators (including coding for gender, age, nationality, legal origin, specialization, academic versus practitioner, elite educational institution, elite ICSID arbitrator) and an analysis by five external experts in investment arbitration of the decisions rendered.[5] Another study that explored systemic bias, examined 140 investment treaty cases for trends in legal interpretation of jurisdiction and admissibility, rather than case outcomes. It found that (1) arbitrators favor the position of claimants over respondent states and (2) the position of claimants from major Western capital exporting states over claimants from other states.[6] Contrary to these conclusions, a study reviewed three investment treaty awards arising out of virtually the same facts relating to the text of the U.S.-Argentine bilateral investment treaty which came to conflicting determinations and concluded that no decision-making pattern could be discerned based on the arbitrator's personal backgrounds or by which party they were appointed.[7] Another examination of investment treaty decisions concluded that the "statistical analyses consistently showed that, at a general level, the outcome of investment treaty arbitration was not reliably associated with the development status of the respondent state, the development status of the presiding arbitrator, or some interaction between those two variables."[8] The lack of consistency in these findings has been noted by scholars.[9]

Edna Sussman, esussman@sussmanadr.com, is a full-time arbitrator of complex international and domestic commercial disputes. She was formerly the chair of the New York International Arbitration Center, the AAA ICDR Foundation, the Dispute Resolution Section of New York State Bar Association and president of the College of Commercial Arbitrators.

B. Implications for Arbitration: Social Culture

Arbitrators are people and like all people have their own frames of reference, experiences and societal inputs that guide their thinking and their decision-making processes. Each arbitrator, like each judge, is uniquely influenced by his or her lifetime experiences and cultural influences.

As Justice Holmes said, "[t]he life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[10]

His comment was echoed by Justice Cardozo who said, "[i]f you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge, just as the legislator gets it, from experience and study and reflection; in brief, from life itself."[11] English judges similarly acknowledge that a judge's individual circumstances can predispose a judge. As Lord Phillips noted, "[b]ias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge toward a particular view of the evidence or issue before him."[12]

International arbitration by its very nature draws parties, counsel and arbitrators from across the globe, all products of their own culture. Over the decades significant harmonization of international arbitration has been achieved but no degree of harmonization can neutralize the predispositions that are the natural consequence of one's background and experiences.

Speaking of this aspect of human nature in the context of arbitrator decision-making, Shari Diamond referenced psychological influences at the 2002 ICCA Congress. The "affinity effect' occurs when "decision-makers are influenced by their cultural backgrounds, their prior experiences, and their personal associations in formulating their understanding of and judging the behaviour they must consider in reaching their decisions." And the "expectancy effect" causes "beliefs about the world and preconceived notions about the likely credibility of particular types of witnesses [to] affect how decision-makers evaluate evidence" and causes decision-makers to be more "likely to reject information that is inconsistent with their beliefs and expectations."[13]

Thus, how arbitrators view the arguments and the evidence presented can be heavily influenced by their affinity and expectancy. Sociologists have long studied these differences across cultures. As noted earlier, Geert Hofstede and later Edward Hall identified a variety of cultural values that varied across the globe.[14] Sensitivity to these different values is important for fully appreciating presentations by parties and counsel from different countries and understanding the context of their business relationships.

Scholars have discussed cultural differences in perceptions of arguments. Hornikx references the distinction typically made with respect to culture and argumentation comparing Greek (Western) and Chinese (Eastern) reasoning. He reports on the theories that "Westerners prefer analytic reasoning, and are believed to focus on attributes of the object to assign it to categories, and a preference for using rules about the categories to explain and predict the object's behaviour. Easterners, influenced by Taoism and located in Asia, are believed to prefer holistic thinking, a type of thinking that involves an orientation to the context or field as a whole, including attention to relationships between a focal object in the field, and a preference for explaining and predicting events on the basis of such relationships."[15]

Speaking of a cultural influence that echoes Hofstede's value difference of individualism versus collectivism (the relationship between the individual and the group) Stavros Brekoulakis states: "For example, a decision-maker that values altruism, as opposed to individualism, will be more likely to rate society over commercial activities or individual rights. His or her values may therefore critically affect his or her decisions in a number of legal disputes, such as whether to rate mandatory rules over contractual freedom, consumer and environmental protection over business transactions, or host state regulatory autonomy over investment protection."[16]

The high-context versus low-context value across cultures is also of particular significance in arbitrations. In high-context cultures the spoken word is just a part of the message and may be muted with non-verbal communication an essential element, while in low-context cultures people speak directly and speak their mind. In high-context cultures, there may be a reluctance to say no directly or to making disparaging comments about others, while in low-context cultures more direct communication is expected and more confrontational language is not taken amiss. Witnesses will generally testify in accordance with their own cultural orientation. Thus, witnesses and often counsel from high-context countries may be misunderstood by arbitrators from low context cultures while witnesses from low-context cultures might be found to be offensive to arbitrators from high-context cultures. As Karen Mills observes based on proceedings she has witnessed, the arbitrator's failure to appreciate and take into account such cultural differences in witness testimony and counsel presentation has led to miscarriages of justice.[17]

C. Implications for Arbitration: Legal Culture

Legal culture may also influence how arbitrators fulfil their roles. Not only are there major differences in procedural practices stemming from different legal cultures,[18] but arbitrators may approach their role very differently on

"Like other unconscious biases our tendency to be influenced by affiliation and affinity is unknown and possibly denied by our conscious minds. It is, by definition, hiding in plain sight."

important legal issues that impact the merits directly regardless of the choice of law specified in the contract. A few examples serve to illustrate the point.

Courts in civil law jurisdictions approach their role quite differently than those in common law jurisdictions. Civil law jurisdictions conduct their proceedings pursuant to the principles of *iura novit curia*, the court knows the law, while in the adversarial common law system the courts rely heavily on the parties' submissions concerning both the facts and the law.[19] There appears to be general agreement that, as a matter of due process, if an entirely new approach will be pursued by the arbitrators, the parties must be given an opportunity to comment. However, the extent to which arbitrators may feel that they are permitted or even obligated to pursue independent lines of reasoning may well depend on the legal culture in which the arbitrators were trained.[20]

Jurisdictions diverge as to whether supervening developments and considerations of fairness permit the decision-maker to vary contract terms to accord with current realities. The difference between deference to the terms of the contract in the United Kingdom and in New York and willingness to vary those terms based on subsequent developments in many civil law jurisdictions can make all the difference in the outcome.[21] Differences in the application of the legal duty of good faith vary significantly across jurisdictions and may well influence decision-makers.[22] Arbitrators' training may cause them to view the matter from the perspective of their own legal background. While crafting the award to pay lip service to the choice of law provision consistent with the dictates of the parties' agreement, arbitrators may find a way to achieve a result consistent with the unconscious influence of their own legal culture. As Justice Scalia pointed out, quoting Chancellor James Kent, "I most always found [legal] principles suited to my views of the case."[23]

Jurisdictions also diverge on when and to what extent extrinsic evidence can be considered in interpreting the contract. While most contracts have a choice of law provision to govern the merits of the dispute and counsel might expect the arbitrators to honor that choice of law, attitudinal influences based on the arbitrators' legal training may impact contract interpretation. J. Karton, in his study of the evolution of contract law in arbitration, concluded that the civil law perspective on contract interpretation is becoming dominant in international commercial law with arbitrators seeking the true intention of the parties and considering a range of extrinsic evidence. He cited examples in which tribunals considered extrinsic evidence where they were charged with applying the law of a common law jurisdiction even though a common law court would likely have excluded such evidence.[24] Karton does not identify the legal background of those arbitrators, but it is significantly more likely that arbitrators accustomed to looking beyond the written word will do so even where the applicable law would not permit it.

D. Conclusion

That arbitrators are people and thus subject to these attitudinal blinders is self-evident. Yet, people feel that they are free of prejudice or bias, which gives them the illusion of objectivity.[25] Arbitrators must consciously endeavour to overcome these blinders to offer the parties a truly impartial proceeding. Arbitrators can minimize the impact of cultural differences by acquainting themselves with the presentation and speaking styles of the culture of the witnesses and lawyers appearing before them. While arbitrators are often selected because of their backgrounds and experience, arbitrators should take care to assess the case that is presented before them, and to consciously endeavour to overcome any affinity they might have for any of the parties as a result of their background.

In light of the human condition, Jan Paulsson acknowledged that "skilled advocates need to be attuned to the culture of the arbitrators they face is self-evident; it is an obvious and essential element of the internationally active advocate's credibility and persuasiveness."[26] Counsel will in the first instance consider whether their choice should be governed by the appointment of an arbitrator with an affinity resembling that of their client. That is not always the overriding consideration but in arbitrations in which cultural differences are significant care should be taken in the selection of arbitrators to appoint arbitrators accustomed to assessing witnesses from different cultural backgrounds and who have a reputation for independence and impartiality in their decision-making. Counsel may also consider legal culture in deciding which legal tradition would be most advantageous to their client in the case before them in the selection of the arbitrator.[27]

Like other unconscious biases our tendency to be influenced by affiliation and affinity is unknown and possibly denied by our conscious minds. It is, by definition, hiding in plain sight. We must all bring it into the open to combat its unintended influence.

Endnotes

1. E. Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 24 (3) Am. Rev. Int'l Arb. 437 (2013); S. Puchkov, *Subconscious Bias as a Factor Influencing Arbitral Decision-Making*, 84 Arbitration, Issue 1, 52 (2018); N. Allen, L. Diaz Cordova, N. Hall, *If Everyone Is Thinking Alike, Then No One Is Thinking: The Importance of Cognitive Diversity in Arbitral Tribunals To Enhance the Quality of Arbitral Decision Making*, Journal of International Arbitration 38, no. 5, 601 (2021).
2. S. Puig and A. Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach*, Journal of Legal Studies vol. 46, 371, 393-394 (June 2017); *see also*, the U.K. Supreme Court decision in Halliburton Company v Chubb Bermuda Insurance Ltd (2020) UKSC 48, 2020 WL 06996429 discussion of arbitrator unconscious bias that may be caused by arbitral appointments.
3. G. Hofstede, Culture's Consequences: Comparing Values, Behaviors, Institutions, and Organizations Across Nations, 2nd ed. (Sage Publications, 2001); for a web site that provides value statistics for multiple countries, *see* https://www.hofstede-insights.com/product/compare-countries/(last accessed January 24 2022). For example, the USA is reflected at 26 for long term orientation while China is reflected at 87; China is reflected at 20 for individualism while the United States is reflected at 91.
4. J. Hornikx, *Cultural Differences in Perceptions of Strong and Weak Arguments*, in Cole (ed.), Psychology in Arbitration (2017), 85-6.
5. M. Waibel and Y. Wu, Are Arbitrators Political?, at 39, available at www.researchgate.net/publication/256023521_AreArbitrators_Politic_al (last accessed Jan. 24, 2022).
6. G.Van Harten, *Arbitrator Behavior and Asymmetrical Adjudication: Empirical Study of Investment Treaty Arbitration*, Osgoode Hall Law Journal, 50(1) (2012), 211.
7. D. Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, NorthWestern Journal of International Law and Business, 30 (2010), 383.
8. S. Franck, *Development and Outcomes of Investment Treaty Arbitration*, Harvard International Law Journal, 50(2) (2009), 435; *see also* S. Franck and L. Wylie, *Predicting Outcomes in Investor Treaty Arbitration*, Duke Law Journal, 65 (2015), 459; S. Franck, *Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes*, Virginia Journal of International Law, 55(1) (2014), 13.
9. S. Brekoulakis, *Systemic Bias, and the Institution of International Arbitration,* Journal of International Dispute Settlement, 4 (2013), 553.
10. O. Wendell Holmes Jr, The Common Law 1 (Dover Publications, 1991) (originally published 1881); *see also* R. A. Posner, How Judges Think (Harvard University Press, 2008) (discussion of political and personal elements in judging}; E. Braman, Law, Politics, and Perception: How Policy Preferences Influence Legal Reasoning (University of Virginia Press, 2009).
11. B. Cardozo, The Nature of the Judicial Process (2010), 71.
12. *Re Medicaments and Related Classes of Goods* (No. 2), [2001] 1 WLR 700, 711, para. 37.
13. S. Seidman Diamond, *The Psychological Aspects of Dispute Resolution*, in A. J. van den Berg (ed.), International Commercial Arbitration: Important Contemporary Questions, ICCA Congress Series No. 11, 631-633 (2002).
14. G. Hofstede, Culture's Consequences (2001); E. Hall, Beyond Culture (Anchor Publications, 1976) (other values not discussed in the text of this chapter include truthfulness, uncertainty avoidance, long term versus short term orientation and face saving).
15. J. Hornikx, *Cultural Differences in Perceptions of Strong and Weak Arguments* in Cole (ed.), Psychology in Arbitration (2017), 85-6.
16. S. Brekoulakis, *Systemic Bias, and the Institution of International Arbitration*, Journal of International Dispute Settlement, 4 (2013), 348.
17. K. Mills, *Cultural Differences and Ethnic Bias in International Dispute Resolution, An Arbitrators/Mediators Perspective*, Transnational Dispute Management, 4 (2008).
18. J. Gaffney and A. Ndong, *Procedural Approaches: Civil Law Versus Common Law*, Transnational Dispute Management, 6 (2015).
19. M. A. Wahab, *Iura Novit Arbiter in International Commercial Arbitration: The Known Unknown*, in M. A. Raouf and P. Leboulanger (eds.), Festschrift Ahmed Sadek El Kosheri, From the Arab World to the Globalization of International Law and Arbitration (2015), 3; T. Giovannini, *International Arbitration and Jura Novit Curia–Towards Harmonization*, Transnational Dispute Management, 3 (2012).
20. *See* D. Bazeau and F. Spoorenberg (eds.), The Arbitrator's Initiative: When, Why, and How it Should be Used, ASA Special Series No. 45, (2016).
21. G. Cordero-Moss, T*he Importance of Legal Culture for Contract Construction: Norwegian Law, English Law and International Arbitration*, New York Dispute Resolution Lawyer, Vol. 10 No. 1 (2017), 39; K.-P. Berger, *The International Arbitrators Dilemma: Transnational Procedure Versus Home Jurisdiction,* Arbitration International, 25 (2009), 229-34; *see also* W. Park, T*he Predictability Paradox, Arbitrators and Applicable Law*, Transnational Dispute Management, 6 (2015).
22. B. Cremades, *Good Faith in International Arbitration*, American University International Law Review, 27(4) (2012), 761; K.-P. Berger, *Good Faith as a General Organizing Principle of the Common Law*, Arbitration International, 32(1) (2016), 167.
23. Scalia, "Introduction" (2008), 27.
24. J. Karton, Culture of International Arbitration (2013), 232 (based on a very small sample size).
25. M. R. Banaji et al., *How (Un)Ethical Are You?*, Harvard Business Review, 12 (2003), 56.
26. J. Paulsson, *Cultural Differences and Advocacy in International Arbitration*, in Bishop and Kehoe (eds.), The Art of Advocacy in International Arbitration (2010), 16.
27. *See* P. Hodges, *Does the Applicable Law Influence Arbitrator Selections?*, in Bazeau and Spoorenberg (eds.), The Arbitrator's Initiative (2016), 61.

Conducting Part 137 Fee Dispute Arbitrations: A Primer

By Nelson Edward Timken

Introduction

You want to gain experience as an arbitrator in matters that are important to the parties, concerning meaningful sums of money, involving prestigious law firms, using procedural rules that are similar, if not identical, to those used by major institutional providers such as the AAA. You also want to accumulate experience in working on a panel with other arbitrators, collaborating on an outcome, and executing an award that may be binding on the parties. How can you do that without being invited to join the panel of a major arbitral institution? Simple. Attend the training sponsored by the ADR Committee of the New York County Lawyers' Association (NYCLA) and get approved by the Office of Court Administration (OCA) to conduct fee dispute arbitrations between attorneys and clients which are run pursuant to Part 137 of the Rules of the Chief Administrative Judge. The purpose of this primer is to provide selective information pursuant to the Local Program Rules that govern the program, which is administered by the NYCLA. All references in the parentheses in this article are to those rules. Only those provisions considered imperative to understanding the process and conduct of the arbitration are covered here. The purpose of this article to let you understand the value of this training and experience for beginning a wider career as an arbitrator and for making a contribution to the bar.

Authority

The conduct of Bronx and New York County Part 137 fee dispute resolution is under the auspices of the Joint Committee on Fee Disputes and Conciliation, which is a collaboration of the New York City Bar Association, Bronx County Bar Association, and New York County Lawyers' Association. The program functions under the Standards and Guidelines promulgated by the Board of Governors of the New York State Attorney-Client Fee Dispute Resolution Program. Local Program Rules provide guidelines for the day-to-day operation of the program.

Since January 1, 2002, Part 137 has applied to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter. It does not apply to representation in criminal matters or where amounts in dispute involve a sum of less than $1,000 or more than $50,000, except that an arbitral body may hear disputes involving other amounts if the parties have consented. It also does not apply to claims of professional malpractice or misconduct or claims for damages, other than an adjustment of a fee. Other exceptions relate to time and parties. An attorney who, without good cause, fails to participate in the arbitration process must be referred to the appropriate grievance committee of the Appellate Division for appropriate action (27 [A]).

The Panel or Sole Arbitrator

A Part 137 arbitration will have one attorney arbitrator assigned where a dispute involves less than $10,000 (7 [A] [2] [A]), and a panel of three arbitrators, including one arbitrator who is not an attorney, if the dispute involves in excess of $10,000 (7 [A] [2] [b]). This may be changed by written agreement of the parties (7 [A] [2] [c]). For new arbitrators, participating as a wing in a panel of three arbitrators will afford the opportunity to observe how the chair conducts the arbitration. Having this opportunity at least three times will prepare you to serve as a solo arbitrator.

A party may participate in the arbitration hearing by submitting testimony and exhibits by written declaration under penalty of perjury (14). If the party does not submit a declaration and the party or their representative is absent from the hearing without good cause, the hearing will proceed as scheduled as long as notice was received, or the appearance waived (14). Decision on the fee dispute will be made on the basis of the evidence presented. A party may arrange for a record of the proceedings at the parties' expense and must provide a copy of the transcript that is produced to the arbitrator (15). As a practical matter, arbitrators are likely to give more weight to live testimony that is subject to cross-examination or questioning then to prepared written statements.

Proceedings and hearings conducted under Part 137, including all documents submitted at the arbitration, are kept confidential, except to the extent necessary to take related legal action with respect to a fee matter (24).

Nelson Timken is a Part 137 Mediator/Arbitrator, LLM student, Int. Disp. Resolution, Fordham Law School, Vice Chair, NYCLA ADR Committee, member FINRA Arbitration Panel, AAA Mediation and Consumer Panels, CPR mediator and arbitrator.

Disclosure, Venue, and Adjournments

Fee dispute hearings are currently conducted virtually using Zoom. (11 [A]). The parties must receive written notice of the date and time of the hearing 15 days prior to the hearing (11 [B]). An arbitrator may postpone a hearing if the parties agree, if a party demonstrates good cause, or at the arbitrator's discretion (13).

Pre-Hearing Technology Check

The 137 proceedings have been conducted by videoconference during the pandemic. This process may continue or may be hybrid in the future. Parties participating in the virtual hearing must have access to a computer, laptop, tablet, or smart phone with a camera, microphone and speakers or headset. Participants should be in a quiet, private place rather than a public Internet connection. The technology check is a pre-hearing call, using Zoom in order to familiarize the parties with the online platform and various methods of presenting their evidence at the hearing. It is also to establish a failsafe in terms of a substitute platform, should the Zoom platform fail. There should also be a brief description of the hearing, including the order of testimony and other procedural matters, to familiarize the parties with the process. The technology check is scheduled prior to the hearing on the same day. The technology check offers those who are not familiar with virtual hearings an opportunity to acquaint themselves with the technology.

The Hearing

Before the arbitration begins, it is customary to ask the parties if they would like private time to speak in order to make a final attempt to settle the matter. If so, the parties may meet in a breakout room so that the arbitrators do not hear the discussion.

The hearing begins with the oath administered to the witnesses. The attorney presents his or her case first. The burden of proving the reasonableness of the fee by a preponderance of the evidence is on the attorney, who must present documentation of the work performed and billing history to support his or her fees (16 – F[1]. After the attorney presents, the attorney and his or her witnesses can be questioned by the client (16 – f). The client then makes a presentation after which the client and the client's witnesses, if any, can be questioned by the lawyer. The client has the right of final reply (16 – F [2]).

The arbitrators decide only the reasonableness of the fees for professional services, including costs, under the relevant facts and circumstances (Preamble).

Quite often in these proceedings the client will wish to tell the arbitrators about the inappropriate legal strategy or misconduct of the attorney. However, these matters are outside the scope of the fee dispute arbitration. Generally, the arbitrators listen for a short period, and then advise the client that this issue is outside the scope of this hearing.

The arbitrator will order production of books and records by subpoena, administer oaths and affirmations, and hear evidence (16 – a [1 – 3]). The hearings are private, attended as a matter of right only by persons with a direct interest in the outcome (16 – B [2]). The arbitrator may decide whether a person other than the party or its representatives may attend the hearing (16 – B [3]). Any party may be represented by counsel at his or her expense (16 – C). The rules of evidence need not be followed, and the arbitrators decide what evidence will be admitted, or if additional evidence is required to facilitate his or her decision (16 – D [1 – 3]). These decisions are made by the panel when the party first mentions it to the administrator, or right there at the hearing, contemporaneous with the proffer. There is usually no preliminary process. The arbitrator must apply applicable legal principles of privilege, the parties may agree or the arbitrator may direct that additional evidence be provided after the hearing, and each party must be given a chance to examine the additional submissions and respond to them (16 – 6 [B]).

One interesting aspect of the fee dispute arbitration is the specific reference in the rules to "common sense." For example, Rule 30 confers upon the arbitrators the authority to decide the parties disputes in consideration of equity, justice and common sense (30).

The best practice is to permit the parties uninterrupted time to tell their stories and present the evidence they feel establishes their case without questioning or interrupting. After both parties have rested, there is ample time for the panelists to ask questions. In this way, both sides feel that they have had the opportunity to tell their story, and to be heard. The questioning by the parties and their representatives should be completed before the arbitrators ask questions. The parties seem most satisfied when they perceive that they have been heard.

Closing the Hearing

The arbitrators must close the hearing after expressly asking the appearing parties whether they have additional evidence (18 [a] [1 – 2]). If the parties are going to file written submissions after the hearing, the hearing is closed on the last date whether submissions are due to be filed with the administrator (18 [B]). The arbitrators may reopen the hearing before issuing an award on their own initiative or if at least one of the parties requests reopening (19[a][1 – 2]).

The Award

The arbitration award must be issued no later than 30 days after the close of the hearing (21 [A]). If a hearing is reopened, the time to issue the award will be 30 days after the reopened hearing is closed (19 [C]). The awards must be written, executed and approved by a majority of the arbitrators, and must specify in a concise statement the basis for the determination (21 [A]). In practice, there is a statewide form used for when arbitrators issue their award. The award typically will mention that "based upon a prepon-

"The Part 137 fee dispute arbitration experience is one answer to the 'chicken and egg' situation where everyone wants an experienced arbitrator to join their panel, but no one seems willing to provide that experience."

derance of the evidence" the attorney either has or has not sustained his or her burden of proof as to the reasonableness of the fee or has sustained that burden to the extent of the award or refund indicated. The administrator is required to mail a copy of the award to the parties.

Trial *De Novo*

Pursuant to § 137.8, a party may file a lawsuit seeking *de novo* review of the merits of the fee dispute within 30 days from the date the administrator mails the award to the parties. This provision may be waived in the retainer agreement. If no action is commenced within 30 days of the mailing of the arbitration award, the award becomes final and binding. Any party who fails to participate in the arbitration hearing is not entitled to a trial *de novo* absent good cause for such failure to participate. Arbitrators may not be called as witnesses, and neither the record of the proceedings nor the award may be admitted in evidence at the trial *de novo*.

Expenses

Without any action by the arbitrators allocating expenses (20 [c] [1-2]), each party is responsible for its own expenses, including the expenses of its witnesses (20 [A – B]). The parties share all other expenses equally unless they agree otherwise or the arbitrators rule otherwise.

Arbitrator Immunity

Immunity is a very important safeguard for arbitrators participating in the program. The rules state that "neither the associations, nor the committee, its chair or members are liable for any act or omission relating to any dispute in connection with any arbitration conducted under these Rules."(29). This provision prohibits the arbitrators from being hauled into court in any action regarding an arbitration conducted under these rules.

Practical Note

Each member of the panel is independently required to reach a determination and must be part of the collaborative resolution of the case.

Conclusion

The Part 137 fee dispute arbitration experience is one answer to the "chicken and egg" situation where everyone wants an experienced arbitrator to join their panel, but no one seems willing to provide that experience. Training sessions are sponsored by the ADR Committee of NYCLA, and have been two-day trainings, which more than satisfy the six-hour requirement for training for neutrals under the program. These trainings have incorporated not only discussion of arbitration but mediation, insofar as the NYCLA program is one of the very few fee dispute resolution programs that has a mediation component. Any fee charged is typically affordable and generally refunded to those who volunteer for the program and conduct at least two arbitrations or mediations. The trainings are an excellent investment for those seeking to acquire training and actual arbitration experience, all while performing a valuable and needed public service. For more information on when the next training is scheduled or for questions about NYCLA's program, contact the program administrator, Federica Romanelli at FRomanelli@nycla.org.

Judge Daniel Weinstein's Selective Insights on Mediation

By Norman Feit

For many decades, top plaintiffs and defense law firms have looked to Hon. Daniel H. Weinstein to mediate complex and high-stakes disputes. The author first encountered Judge Weinstein as a party representative in the context of a massive securities class action involving virtually every IPO issuer and underwriter during the dotcom era. The mediation sessions required four banquet-sized conference rooms to accommodate hundreds of lawyers representing plaintiff firms, defense firms and insurance carriers. Judge Weinstein deftly maneuvered among the legal armies, worked relentlessly over time as the legal rulings and dynamics shaped the dispute, and ultimately forged a settlement.

Those firms have turned to Judge Weinstein often because he embodies the critical qualities of many successful mediators: a track record of settlement success, the intellect and acumen to grapple with thorny legal issues, the ability to listen, patience, empathy, creativity to forge settlements, boldness, persistence, confidentiality and integrity, and a keen sense of humor that can defuse tense situations.[1] Indeed, Judge Weinstein has contributed heavily to the growth of mediation itself by helping to found leading ADR platform JAMS and training generations of international mediators including through the Weinstein Fellows program. He has frequently lectured and written on the subject. His mediations have touched virtually every facet of the law and transcended U.S. borders and foreign states.

Meanwhile, when not making peace among litigants, he has devoted his time and resources generously to youth organizations and foundations (still near to his heart after heading the Juvenile Court in San Francisco), and environmental causes (including the Environmental Law Institute and the Baja Coastal Institute). He shares the distinction with several former U.S. presidents of receiving the *Cardozo Journal of Conflict Resolution*'s International Advocate for Peace Award, and with Archbishop Tutu of being honored with Pepperdine Caruso School of Law's Peacemaker Award.

So it seemed fitting to sit down with Judge Weinstein to enable us all to benefit from his perspective and observations on a number of issues faced by countless accomplished and aspiring mediators. What follows is a recent interview with him on some of these important and evolving topics.[2]

Q. In selecting a mediator, attention is often given to the mediator's philosophy and approach—facilitative, evaluative or transformative. Are those mutually exclusive buckets, or can an effective mediator draw from all disciplines?

A. Beware of placing too much weight on academic theories of mediation or nomenclatures that define precise and mutually exclusive mediation methods. The reality is that a good mediator is all of those things and knows when to call on which modality or combinations to address different situations. At the more facilitative end of the spectrum, I sometimes function as a high-priced courier, keeping negotiations open and the parties interested while transmitting their bids and offers back and forth. In other situations, the parties want and need a trusted neutral to weigh in with judgment and evaluation. There are also times when some sort of transformation is needed to foster a more constructive dynamic. All good mediators are good listeners, can switch modalities to accommodate the dispute, the parties, the context, and other factors which may evolve over the course of the mediation. A generally facilitative mediator may introduce evaluation through gentle observations on the parties' positions or questions about weaknesses a party may not have considered. Conversely, an evaluative mediator knows when to let the views resonate and step back into a more facilitative role. Good mediators tailor the dynamics and process to the parties in the situation at hand, subject to ensuring that the process is safe and confidential, and that the parties ultimately control their own destiny.

Q. Parties and their lawyers often come to a mediation with one-sided views of their case and extreme settlement ranges. How do you make them more realistic and find common ground?

A. Mediators spend far too much time and effort grappling with disruptive and unproductive high- or low-ball negotiating tactics. A stratospheric demand inevitably invites a miniscule offer, and vice-versa. Unfortunately, there is no secret formula to obviate that type of game playing.

Norman Feit provides various consulting and ADR services, including as a neutral on many panels and rosters (see www.feitservices.com). He is an adjunct professor at Fordham University School of Law and prior global head of Litigation and Regulatory Proceedings at Goldman Sachs after a decade practicing litigation with Sullivan & Cromwell.

But I try to spend time at beginning to preempt unrealistic negotiating tactics by reassuring the parties that being reasonable won't be held against them. Often, I conduct private sessions with the parties to ferret out their true appetites and establish a mutually reasonable good faith range. Ultimately, the key is to avoid the tyranny of talismanic midpoints and find a workable range. That doesn't mean the ground within the brackets is easy, but the process becomes smoother and a resolution is more achievable by avoiding the early wasted time in which so much damage is done.

diators dispose of submissions altogether. But a thoughtful submission that is civilized in tone, explores the party's strengths and weaknesses, and offers creative settlement structures and ranges can educate the mediator on fertile ground and set a positive tone for progress. That is especially true if the submission is candid and realistic—possibly in a separate submission for the mediator's eyes only to avoid showing a party's hand to the adversary. Most important, the submission should have the client's buy-in to ensure that lawyer and client are on the same page.

"Beware of placing too much weight on academic theories of mediation or nomenclatures that define precise and mutually exclusive mediation methods. The reality is that a good mediator is all of those things, and knows when to call on which modality or combinations to address different situations."

Q. Are opening statements useful to kick off a mediation, and how do you manage statements that inflame the other side or are really directed at a lawyer's own client?

A. Opening statements can be an enormous asset when used properly. They are an art form in mediation as much as at trial. Yet, many lawyers who would spend days preparing an opening statement for a courtroom don't spend 30 minutes preparing one for mediation. To be effective, they require a much different language than in a litigation venue. To be sure, a good opening does not surrender or give in, but at the same time it extends an invitation for constructive, thoughtful, and creative negotiations, opens up avenues, eliminates flotsam and jetsam, and calms down emotionally evocative issues. Done the right way—with the right tone, body language, and eye contact, and addressed to right people (perhaps the head of the business or injured person)—a good opening sets the tone for effective negotiations.

Conversely, an ill-prepared or inflammatory opening can torpedo or truncate the mediation altogether. So often, litigators declare victory, castigate the opponent, and signal that anything other than nuisance value is a futile hope. Those approaches invite the adversary to abort the mediation or become entrenched, not to engage meaningfully in exploring common ground.

Q. The same basic question as to mediation submissions. Is there a set formula and are mediation submissions even useful?

A. Your recent article on mediation submissions[3] provides a great overview. Mediation submissions that simply declare victory and replicate litigation positions are not very helpful. That happens so frequently that some me-

Q. Mediations can get quite heated, whether because of the embedded emotions in the dispute, a clash of personalities, or a reaction to the other side's positions and aggressive tactics. How do you keep the participants cool and manage through the emotions?

A. Some people are more gifted at managing emotions than others: how do you calm people down and reset the tone? The great overlooked techniques are pause, break, and silence. If counsel is the source of the heat, maybe pull them aside together (to avoid singling out either of them) and explain the destructive impact of what they are doing. If a client is the issue, taking a break can help, either to spend some cool-down time with the lawyer or even with the mediator one-on-one letting off stream. Finding the safe space to calm waters is an art form every mediator has to learn.

Q. Have mediations been more challenging in a virtual environment since the pandemic's onset, do you see virtual mediations continuing, and do you have any tips for effective virtual mediations?

A. Because successful mediations depend on a lot on human interactions and body language, many of us were worried that the remote environment would render the process ineffective. To my surprise, virtual mediation has been a lot better than expected. That doesn't mean that in some mediations I haven't hungered to be there, to look someone in the eye and take a walk down the hallway. We all need to be wary of "Zoom fatigue" and the potential for becoming too impersonal. But with modernization and virtual technology, people can look at each other when they talk, and it is possible to reach people in far-off places to get participation never before available—whether the busy executive, insurance agent, or family member call-

ing all the shots from home. In recent mediations, virtual technology has enabled participation by village leaders in an underdeveloped country, police commissioners, and school board members. And mediations that might not have happened at all due to logistics or expense are now feasible. The visual technology also facilitates more personalized follow-up than sterile phone calls. To make up for the loss of in-person interaction, I rely a lot on relaxing and acclimating people at the onset through a series of ex parte introductory sessions to get to know each party before mediation, so we don't walk into the mediation gallery as strangers. In a way, with the right investment, the process can be far more intimate than everyone entering a big conference room.[4]

Q. Many mediations at some point hit an impasse. How do you get past that sticking point and keep things moving?

A. The measure of many mediators—whether they are good versus very good—is how effective they are at employing modalities and techniques to break impasse. I am still waiting for the case in which both parties waltz to a number without impasse. The mediator's arsenal includes adding new components, brackets and counter-brackets, orchestrating moves contingent on moves by the other side, time out (even overnight or weekend), and of course the mediator's proposal. When and how to use those and other tactics comes through experience and timing, but the most important thing is not to give up. When none of the normal techniques work, review with the parties all that has been accomplished and how far they have come to the goal line. Maybe they need to retreat for a while to consider the alternative risks and costs of continued litigation. Sometimes, the pause may occasion a change in dynamics due to legal rulings or business and market developments.

Q. Do you have any guideposts for when and how to formulate a mediator's proposal?

A. The mediator's proposal is also an art form in and of itself, and can be a very effective but dangerous tool. I spend days on mediator's proposals in my course at Pepperdine—including when to make one, what it should contain, and its timing. I also spend a long time thinking about the potential pitfalls of a mediator's proposals and how long parties have to consider it. Where appropriate, I may include a deal point memo tailored to each side explaining why they should give it careful consideration and laying out risks from a neutral's perspective. But my overarching protocol before making a proposal is to vet the range with each side and give them a question to ferret out whether the proposal will be dead on arrival: will you give a proposal in that range careful consideration? Generally, the mediator's proposal can be used only once, so if I don't have a commitment to consider it carefully from both sides, I save it for a more opportune juncture. Proposals are particularly effective close to the finish line when a party may not want to bid against itself and the proposal coming from the mediator instead provides safety and cover.

Q. What are the biggest mistakes made by mediation participants?

A. The mistakes made by mediation parties and advocates are too numerous to summarize in a paragraph and are grist for a separate article.[5] Most important, mediation advocates have to be trustworthy, and their handshake has to be golden. But beyond their integrity, advocates stumble most often where they fail to prepare. They should come to a mediation with the same amount of thought and energy as a trial. More lawyers are learning how to practice their advocacy skills in the context of mediation than a decade ago, but not enough.

Q. You and other successful mediators attract repeat assignments from the same litigants and law firms. How do you maintain your impartiality and credibility despite the relationships that develop?

A. Mediators attract repeat business precisely because they are effective at getting disputes settled at ranges all parties find reasonable. Rather than giving rise to some sort of conflict, the relationships that develop are assets by building credibility and trust in the mediator. At the same time, a mediator's ethical responsibilities are sacrosanct. If a relationship might interfere with neutrality, the mediator should decline the assignment. And relationships can never invite a breach of confidence or overstepping of authorization.

Q. What advice do you have for aspiring mediators at the start of their career?

A. The mediator's "fix" from early and creative resolutions is a high, and brings satisfaction not available in many other professions. To get there, however, mediators must often walk into the room, absorb all the stress and dissension as a lightning rod, prepare to be shot as the messenger, and spin things back with the poison and thorns taken out. To maintain poise and sanity, a mediator needs to find ways to expunge all of that angst and stress, whether through exercise, yoga or other techniques. The mediation process is intense, and the mediator will wear down absent training like an athlete.

Endnotes

1. For a discussion of these mediator qualities, *see* Norman Feit, *Critical Mediator Qualities Viewed from the Advocacy Trenches*, NY Dispute Resolution Lawyer, Vol. 12, No. 2 (Fall 2019).
2. Mr. Feit acknowledges and appreciates the helpful suggestions of Laura Kaster and Professor Jacqueline Nolan-Haley as to the topics for the interview.
3. Norman Feit, *Drafting Effective Mediation Submissions*, AAA Dispute Resolution Journal, Vol. 75, No. 3 (August 2021).
4. For a discussion of the benefits of pre-mediation triage, s*ee* Norman Feit, *To Triage or Not To Triage,* CPR Alternatives Vol. 39, No. 3 (March 2021).
5. *See* Daniel Weinstein, *Reflections of a Leading Neutral on Mediation Advocacy* in Robert Haig, Business and Commercial Litigation in Federal Courts, 5th ed (Thomson Reuters, 2021)..

The Singapore Convention on Mediated Settlements and New York's CPLR: What Do—or Should—They Have in Common?

By Michael Lampert

Should New York Civil Practice Law and Rules (CPLR) 3213, Summary Judgment in Lieu of Complaint, be amended to allow mediated commercial settlement agreements to be eligible for its expedited treatment? Using the principles of the new Singapore Convention on Mediation ("the Convention") to define eligible mediated settlement agreements, such an amendment seems in order. It will meet client's expectations and support New York's leadership as a commercial center. But before looking at the solution, let's first turn to the problem and then get some context about CPLR 3213 and the Convention.

What's the Problem?

Most clients are surprised to learn that if another party to a settlement agreement doesn't live up to its terms, the standard way to enforce the settlement is to sue for breach of contract. To clients, this approach seems like the movie *Groundhog Day*—starting from the beginning all over again—especially when the first dispute was itself about a contract.

Strategies to expedite remedying a potential breach of a settlement agreement are limited. If the original dispute was already in litigation and the court allows it, the settlement agreement can include a provision that the court retains jurisdiction to hear a motion to enforce and be "so ordered." This allows the non-breaching party to avoid starting an entirely new breach of contract action. But courts may not always accept this continued responsibility. Likewise, when settling a dispute in arbitration, the arbitrators will rarely agree to retain jurisdiction Indeed, arbitrators will not always agree to an agreed award from a settlement in the first place, although they generally are willing to do so. Even if they do, while recent case law in the United States holds that consent awards should be enforced, it is not clear that all courts around the world will do so. For disputes resolved before formal proceedings start—for instance after letter-writing or mediation—there is no court or arbitral panel available to retain jurisdiction.

Sometimes confession of judgment under CPLR 3218 will be available, but amendments adopted by the 2019 legislature limit this section's usefulness. It now requires the confessor be resident in New York at the time of confession or time of default.

As a result, careful counsel may not always be able to expedite enforcement of a settlement agreement after a breach; there are some situations where no expedited process is available.

Some Context: CPLR 3213 and the Singapore Convention

A. CPLR 3213—Summary Judgment in Lieu of Complaint

The CPLR creates a mechanism in New York believed to be unique in the U.S., if not the world. It provides for starting a case not with a complaint or statement of claim, but rather with a motion for summary judgment. The key to using this expedited procedure is that the "action is based upon an instrument for the payment of money only or upon any judgment." CPLR 3213.

The paradigmatic examples of instruments for the payment of money only are promissory notes or (dishonored) checks. But lawyers being lawyers, the case law is rife with attempts to squeeze other things into the expedited procedure. For present purposes we simply note that settlement agreements sometimes qualify and sometimes don't, largely depending on whether they contain an *unconditional* promise to pay. Many settlement agreements do not qualify because both sides have obligations.

B. The Singapore Convention on Mediation

Starting in 2014 the United Nations Commission on International Trade Law (UNCITRAL) (and its Working Group II) discussed what became the Singapore Convention. The goal was a uniform framework for speedy and simple enforcement of international settlement agreements resulting from mediation of commercial disputes by the parties. The results achieved under the 1958 New York Convention on enforcement of arbitral awards provided a goal, and to some degree, a model.

Michael Lampert, FCIArb and CEDR accredited mediator, is an arbitrator, mediator, and professor. For seven years before turning to full-time dispute resolution he was deputy general counsel of a major financial services company. For 30 years before going in-house, he was a full-time commercial litigator. (LampertADR.com).

In July 2018 UNCITRAL approved the proposed text. In December the General Assembly proposed the Convention for adoption by countries. At a ceremony in Singapore in August 2019, 46 countries (including the U.S.) signed the Convention; another 24 sent delegates to the ceremony. Even though the U.S. has signed, until the Senate ratifies (and other formalisms take place) it is not yet a party to the Convention. Other countries have similar processes. As of mid-December 2021, the Convention had eight parties and 55 signatories.

The Singapore Convention aims to facilitate *international* trade and commerce by enabling disputing parties to easily enforce settlement agreements across borders. It does not apply to all settlement agreements—only those that are mediated. The presence of a neutral mediator who meets certain standards set out in the Convention was seen as an appropriate requirement.

The Proposed Solution—Can These Two Threads Be Woven Into a Fabric?

My proposal is that CPLR 3213 be amended to add "mediated settlement agreements" to the list of predicates for its use. Specifically, the current text with this amendment would become subsection (a). A new subsection (b) is proposed to be added defining "mediated settlement agreement," "mediation," and "mediator" using principles (and in some cases words) from the Convention.

The scope of the Convention is international. The proposed CPLR amendment is not even national, but is limited to New York. Yet striving for consistency, where possible, has two possible benefits. First, as described above the Convention has been through an extensive vetting process that may yield important insights. Second, to the extent the texts are consistent, caselaw under one may be considered persuasive authority in the interpretation and understanding of the other.

Here is the proposed new 3213 marked to show changes from the version of text that becomes effective on May 7, 2022 (proposed additions in bold):

> 3213. Motion for summary judgment in lieu of complaint.
>
> (a) When an action is based upon an instrument for the payment of money only**, upon a mediated settlement agreement** or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint. The summons served with such motion papers shall require the defendant to submit answering papers on the motion within the time provided in the notice of motion. The minimum time such motion shall be noticed to be heard shall be as provided by subdivision (a) of rule 320 for making an appearance, depending upon the method of service. If the plaintiff sets the hearing date of the motion later than the minimum time therefor, he may require the defendant to serve a copy of his answering papers upon him within such extended period of time, not exceeding ten days, prior to such hearing date. No default judgment may be entered pursuant to subdivision (a) of section 3215 prior to the hearing date of the motion. If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise. The additional notice required by subdivision (j) of rule 3212 shall be applicable to a motion made pursuant to this section in any action to collect a debt arising out of a consumer credit transaction where a consumer is a defendant.
>
> **(b) "Mediated settlement agreement" means an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute. "Mediation" means resulting from a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator"). "Mediator" means a person or persons lacking the authority to impose a solution upon the parties to the dispute, who is impartial or independent of the parties, and who has acted in accord with any applicable professional standards.**

The proposed section is not a panacea. It is meant to be another tool of New York, as a global commercial capital, to achieve the goal of settling parties—to reach a final resolution by settlement and one that, if violated, does not require all of the expensive and time-consuming steps of ordinary litigation.

Behind the Scenes in Presumptive ADR

By Lisa Courtney and Glen Parker

Chief Judge DiFiore's Presumptive Alternative Dispute Resolution Initiative in the New York State Unified Court System (NYS UCS)[1] relies on the guidance, participation, and engagement of state and local bar associations and their members throughout New York State. These groups, along with judicial and non-judicial court staff, community dispute resolution center (CDRC) staff and volunteers, law schools, legal services providers, and domestic violence advocates, have given tirelessly of their time and energy to further ADR in New York State in myriad ways, including:

- training mediators and court staff;
- serving in stakeholder groups to support roster development
- writing and publishing scholarly work;
- mentoring junior practitioners;
- promoting ADR to litigators and other end users; and
- volunteering in the courts and CDRCs.

Indeed, court-annexed ADR in New York State is a group effort, with the ultimate beneficiaries being court users. The fruits of this partnership include more individually-tailored and meaningful resolutions, reduced backlogs, increased awareness of, access to, and use of ADR services, and a heightened interest in the field.

The COVID pandemic has only strengthened the need for these partnerships, as more court users are open to

Lisa Courtney is New York State UCS Statewide ADR Coordinator, Office of Alternative Dispute Resolution. **Glen Parker i**s New York State UCS Associate Counsel, Office of Alternative Dispute Resolution.

"The center of gravity has shifted, from creating demand (i.e., educating stakeholders) to meeting demand (i.e., making ADR more widely available and accessible)"

mediation and other forms of dispute resolution, and our courts are forced to ensure we are congregating safely in public spaces.

The advent of Presumptive ADR (PADR) in 2019 [2] has not only deepened our collaborations, but also changed the approach to court-annexed ADR in general. The center of gravity has shifted, from creating demand (i.e., educating stakeholders) to meeting demand (i.e., making ADR more widely available and accessible).

Below is a list of ways to increase access and meet the growing demand for ADR. As always, we rely on our bar partners to join us in our efforts.

See something, say something. The NYSBA Dispute Resolution Section has been a reliable partner in the development of ADR in the courts. As a blanket request, we invite members, and everyone else, to continue to offer perspectives on what's working and what could work better and where. Questions that we are curious about include: Where else can PADR help, both geographically and in specific case types? What are the obstacles and how do we overcome them? What trainings are needed? All input is welcome and may be emailed to Statewide-ADR@nycourts.gov.

Quality assurance. Perhaps also falling under the see-something-say-something heading is a specific request for feedback on ADR services provided by roster neutrals. The principal method for feedback is the Post-Mediation Evaluation Form, an important tool to survey mediation participants and ensure they receive quality services in connection with their cases and to assure that information on successful resolutions and progress is collected. For cases with roster mediators, each participant should complete an evaluation, which takes about three minutes. If you are a participant, please complete the evaluation provided to you by the mediator or ADR coordinator for your court. If you haven't received the form, you may request one that is specific to your court or complete the generic form that is on our website.[3] Mediators can help by providing participants with the evaluation before the end of their final session. To have reliable feedback. it is critical to collect the evaluations from as many participants as possible, even when cases do not result in agreements.

Diversity. The NYS UCS serves a wide variety of litigants including persons of varying age, race, ethnicity, national origin, gender, sexual orientation, physical or mental ability, religion, socioeconomic status, and family status. There is a great need for mediators who come from the communities of the litigants we serve. We need mediators who speak languages other than English. Specifically, we need mediators who speak Spanish and Mandarin in family, commercial, and personal injury cases, especially in New York City and Long Island courts. Qualified mediators[4] who are bilingual can apply to these rosters using the online mediator application[5] or reach out to their local ADR coordinator[6]. Other bilingual individuals can reach out to our office for guidance on how to become qualified to mediate for the courts by emailing us at Statewide-ADR@nycourts.gov.

Building ADR capacity in areas of need. Volunteer in areas where you have expertise and where the court has need. There are labor law cases, wage and hour cases, products liability and professional malpractice cases that require time and attention from skilled mediators. We need mediators who offer sliding fee scales in matrimonial cases, and in lower dollar amount cases, under the Commercial Division threshold. The areas of need are geographic as well. Although PADR is a statewide initiative, it is necessarily unfolding locally, allowing each area—whether it be on the judicial district, county or court level—to implement ADR in a way that is responsive to local communities and stakeholders. NYSBA can play a key role here by offering support to local bar associations and mobilizing members of the Dispute Resolution Section who are situated outside of the New York City-metropolitan area.

Mentorship. The increase in mediation trainings has meant an increased demand for trainees to gain the experience they need to mediate cases successfully. Providing a new mediator an opportunity to work alongside someone more experienced is a great way to build mediator capacity and grow our field. Mentorship can occur informally, with an experienced mediator-practitioner offering guidance to a less experienced co-mediator on a case. In these arrangements, it is useful to invite mentees to take part at the point of earliest contact between the mediators and the parties/their counsel. In this way, new mediators can learn the invaluable lesson of how to build trust starting at the point of first client contact. Of course, more formal programs like

the one offered by NYSBA's Dispute Resolution Section[7] or a CDRC-offered apprenticeship are excellent options. Because interest in these opportunities has grown, we encourage the development of new mentorship and apprenticeship programs. We particularly recommend mentoring mediators from underrepresented groups and mediators who speak other languages. Guidance for program development can be found on our website, and we are available to explore ways to make this happen.[8]

Ambassadorship. Though our focus is on meeting demand, promoting the benefits of ADR and the high-quality options that exist is a perennial need. Perhaps the best advertisement for mediation is the work itself, as provided by the experienced and successful mediators who serve our court users. This work shows that mediation is effective and makes judges more likely to continue to make referrals and attorneys to ask to be referred. Additionally, we invite mediators and other ADR practitioners to seize opportunities to educate others, either through informal conversations or more structured programs like panels and less formal "lunch & learn" events. We are aware that many such trainings, formal and informal are available through the Dispute Resolution Section.

Litigators. Attorneys who represent clients can also play a significant role in promoting ADR, mostly by actively exploring the possibility of ADR for their cases. Options for promoting ADR include:

- Come to court with a mediator already selected[9];
- Request a referral to mediation or choose mediation in cases where you are representing a client;
- Propose mediation to the other attorneys in a case, framing the proposal as facing the inevitable in a Presumptive ADR regime;
- Respond affirmatively to letters from the courts asking if you will opt in to have your case go to an ADR process and
- Re-engage with ADR options later in the process if you declined mediation earlier in the case or even if an early mediation was unsuccessful.

Training. Trainings are available to qualify both aspiring and experienced mediators to join new rosters. Mediators who are currently serving on rosters can expand their service by taking additional trainings that will qualify them for more case types, like surrogate's or personal injury mediation training, which NYSBA offered for the first time in December 2021.

Join stakeholder groups. The growth of court ADR will continue to develop on a statewide level through promulgation of rules, standards of conduct, complaint procedures, ethical advisory committees, program development, and refinement of case management systems, and more. There remains a need to assist with ADR program development at the local level. Such program development relies on the involvement of local bar members who have subject matter expertise to serve as stakeholders. As potential programs are discussed and piloted, we invite local practitioners to support this work. Interested individuals can reach out by contacting us.[10]

Perhaps most importantly, we encourage everyone to persevere! As much as we have come a long way, we are still in the growing stages, and fighting and recovering from a pandemic to boot. We need our allies to keep educating the public, supporting new mediators, instilling confidence in ADR in litigators and judges, and offering accessible services to the courts. We are committed to supporting our ADR friends and colleagues. Indeed, as always, we're in this together.

Endnotes

1. Please see http://ww2.nycourts.gov/presumptive-adr for more information.
2. http://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf.
3. A link to the online Post-Mediation Evaluation form may be found at http://ww2.nycourts.gov/ip/adr/contactus.shtml.
4. "Qualified mediator" refers to individuals who meet the qualifications set forth in Part 146 of the Rules of the Chief Administrative Judge. For more info, please visit http://ww2.nycourts.gov/ip/adr/NeutralQualifications.
5. http://ww2.nycourts.gov/ip/adr/Application.shtml.
6. http://ww2.nycourts.gov/ip/adr/contactus.shtml.
7. *See* https://nysba.org/dispute-resolution-section-diversity-mentorship-program/ for more information.
8. Please see http://ww2.nycourts.gov/ip/adr/Part146.shtml#146_apprenticeship.
9. A list of mediators approved to mediate court cases can be found in the Statewide Mediator Directory on our website at http://ww2.nycourts.gov/ip/adr/MedDirectory.shtml.
10. Please see http://ww2.nycourts.gov/ip/adr/contactus.shtml.

Reimagining Access to Justice: Should We Shift to Virtual Mediation Programs Beyond the COVID-19 Pandemic, Especially for Small Claims?

By Donna Erez-Navot

Two roads diverged in a wood, and I—
I took the one less traveled by,
And that has made all the difference.

—Robert Frost

Since March 2020, and the start of the COVID-19 pandemic, courts around the country have grappled with the dramatic changes in how they function. Most courts in the United States were not prepared for such a sudden and extreme shift and many were stalled for months without any progress on the filings within their jurisdiction. Some courts were more successful if they had previously integrated automated systems before the pandemic, such as e-filing, video hearings, and other technologically supported protocols.[1] Jurisdictions that already had Online Dispute Resolution (ODR) and video conferencing mediation and arbitration in place were able to continue to function.[2] Other jurisdictions, particularly those that were ill-prepared, were stalled once the pandemic began.[3] New York City's Small Claims Court was completely halted in the beginning of March 2020. But in August 2020, under an Administrative Order by New York City Court Administrative Judge Anthony Cannataro, the courts initiated a new Presumptive Virtual Mediation Program in New York City Small Claims.[4] The courts partnered with various law schools, bar associations, and community dispute resolution centers (CDRCs), and immediately began mediating small claims cases on virtual platforms.

The umbrella term ODR is a broad term that includes all uses of information and communications technologies to help parties resolve their disputes. It includes the online replication of ADR processes, including mediation, arbitration, or other ADR processes conducted wholly or primarily online.[5] Some examples include: (1) cases assigned to a court mediator, who facilitates interaction between parties via asynchronous text-based exchanges through a dedicated court-provided system[6]; (2) a judge reviewing court papers from litigants and making a decision based on the papers; or (3) video conferencing mediation, where mediators synchronously work with parties live on Zoom to facilitate a conversation, as seen in the Presumptive Virtual Mediation Program in New York City Small Claims.

ODR is growing, and there are those who argue that it advances access to justice, in part because of its low cost and convenience.[7] Those championing the ODR movement argue that "[f]or minor disputes, the time, money, and real or perceived risks involved with going to court are often not worth the cost or hassle. It is simply more cost-effective and convenient for most people to use ODR for small claims, traffic, landlord-tenant, and similarly smaller or less complex disputes."[8] Especially for Self-Represented Litigants (SRLs), it may allow for more self-help options for consumers and efficient and effective avenues for proceeding in the court system.[9] However, it may not be a panacea. We need to be mindful of those left out of the "ODR party," such as the elderly or those who are not as experienced with online processes, as well as individuals who lack access to broadband connections, smartphones, and computers.[10]

This article will focus on a small subset of the ODR landscape, specifically on virtual mediation in New York City Small Claims Court. With wide access to vaccines and a reduction in deaths, the COVID-19 pandemic will slowly recede, and the courts will be able to return to more traditional ways of functioning. The primary question that must be considered is whether the continuation of virtual mediation, post-COVID, will be a positive step towards access to justice for litigants, specifically the most vulnerable populations. On the first level, does virtual mediation allow litigants to have better access to the justice system? Meaning, can these litigants *literally* participate and show up for their court hearings? On a deeper level, we need to ask questions around whether their participation is "better," or whether it is achieving more procedural justice? Do litigants have more of a voice in the process? Do they feel more respected by the process? This article will set the stage for how to achieve voice, but more research needs to be done to answer some of these important questions.

NYC's Presumptive Virtual Small Claims Program

Since 2019, New York has been moving to greatly expand its ADR initiatives. Chief Judge Janet DiFiore updated the New York Excellence Initiative on May 14, 2019 to include "presumptive ADR."[11] Under this initiative, some civil actions were automatically directed to an ADR forum, in an attempt to resolve disputes more efficiently and effectively. Less than one year later, beginning in March 2020, COVID-19 hit New York City with such devastation and force that the courts had to shut down completely for a few

months. In August 2020, under an Administrative Order by New York City Court Administrative Judge Anthony Cannataro, NYC Small Claims Courts initiated a new presumptive video conferencing mediation program that vigorously continues today.[12] "In less than one year, the truly presumptive model has allowed more than 800 cases to be mediated, and newly trained mediators have been able to utilize these opportunities to meet the requirements for other court rosters."[13] Over 53% of mediated cases have resulted in settlements.[14] According to the leaders of the New York City Small Claims Mediation Program, there is no intention to return to in-person mediations, and virtual mediations will be the current format for the near future, if not longer.

Key Highlights of the NYC Small Claims Presumptive Virtual Mediation Program

- **Partnership between courts and bar association lawyers, law schools, and CDRCs:** Since its inception, the New York City Small Claims Court has partnered with all the local law schools, CDRCs, and bar associations. There are virtual meetings with the ADR Coordinator to update on protocols and triage any issues. Cases are assigned to particular mediators or organizations through an initial email, where the litigants are also copied. Mediators are expected to quickly contact the parties via email and/or phone to set up the virtual mediation session. Mediation sessions can occur during the weekday hours (if a court-assigned interpreter is necessary), or whenever is convenient for the parties and the individual mediator. After-hours time slots and weekends are also available in order to accommodate the litigants' work schedules and/or child care needs. In light of the fact that the mediations are conducted on virtual platforms and litigants do not appear in court, the scheduling is extremely flexible to meet the needs of the litigants.
- **Court interpreters assigned to interpret every mediation**: The Court assigns a formal court interpreter to every mediation session when language access is an issue. While this is a huge investment by the Court, it ensures that the parties are able to understand and participate in the mediation process and it allows the mediator to focus on his or her task of being the neutral third party. Some jurisdictions disallow mediators to also serve as interpreters, in order to ensure the impartiality of the mediator.[15] New York's ethical codes may allow the dual role, but in order to ensure neutrality of the mediator and high-quality interpretation, it is vital to have a court-assigned interpreter present.[16]
- **Pre-mediation development work and technological support by mediators to prepare SRLs:** One of the hallmarks of the NYC Virtual Mediation Program is the pre-mediation case development work of the

Donna Erez-Navot is the Assistant Director of the Kukin Program for Conflict Resolution at Cardozo Law School, where she also directs the Cardozo Mediation Clinic. Prior to joining the faculty at Cardozo, Donna was the founding Director of the Mediation Clinic at University of Wisconsin Law School. **The author is grateful for the research assistance for this article provided by wonderful Cardozo Law student Elan Kirshenbaum ('22).**

mediators, which ensures that parties are able to access the technology and understand the mediation process before they enter into the virtual mediation session. For example, the Cardozo Law School Mediation Clinic requires every student to call and/or email the parties before the session and offer a tech-prep session. Many of the SRLs take us up on this offer. In the Small Claims Mediation Program, before COVID, parties would show up for their first court appearance and be offered a free mediation session out in the hallway. Now, the parties are given an opportunity to talk to the mediators on the phone, prepare themselves emotionally and legally for their session, schedule the session for a convenient time for them, and feel comfortable with the technology before they have to join the first mediation session.

Lessons Learned From Other Jurisdictions

Research, including conversations with several ADR court administrators, CDRCs, and ODR leaders about the virtual mediation processes, and with program directors in Nebraska, Oklahoma, Texas, Michigan, and others revealed that some programs were already prepared for the pandemic and were using virtual platforms for years, especially in the rural parts of the U.S.[17] However, over the past two years, many courts and programs have found that their appearance rate has skyrocketed when they moved hearings and mediations to a virtual platform.[18]

Indeed, many programs were proceeding similarly to our NYC Small Claims Mediation Program. Some were using court interpreters, while others were not. Some were using the mediators to help prepare litigants for the challenges of online virtual mediation, while others were using court staff, such as clerks and others, to ensure proper access to technology. The biggest difference and highlight was the use of online systems and pro bono lawyers for SRLs for informed decision-making, as seen with the Michigan and Oklahoma programs, among others.[19] States are looking to begin utilizing ODR platforms, such as those developed by Matterhorn and others, to also help fill the information gaps for SRLs.[20]

Best Practices for Dispute System Design of Virtual Small Claims Mediation (DSD)

Some older research suggests poorer outcomes for individuals on virtual platforms in legal bail hearings[21] and recent studies about virtual platforms and their effectiveness are still being conducted.[22] Nevertheless, there are best practices for dispute system design for virtual mediation that should be implemented for all litigants, but especially the vulnerable, unrepresented parties who are very likely to appear in virtual small claims mediation in New York City.

Key Points for Dispute System Design To Ensure Access to Justice

- **Ensuring procedural justice and party voice through both pre-mediation work and specific session design.** Research shows that specific, targeted outreach can improve online court use, especially for disadvantaged communities.[23] Continuing the great work of the current cadre of volunteer mediators and supporting their pre-mediation work with litigants is key. We also know that particular design choices made in online platforms could enhance—or diminish opportunities for full participation.[24] For example, if one party must use the telephone because they don't have sufficient broadband, as is often the case in NYC, it is best practice for all the parties to call in using the phone. Zoom has call-in options so that you can still use breakout rooms, or mediators can choose to use a simple conference call. Finally, quantitative and qualitative data in the form of exit surveys and case outcome statistics need to be gathered to ensure effective ADR processes. NYC Small Claims has begun this challenging data collection using a web-based exit survey link (that is used by many programs across the state) that can be placed into the Zoom chat or emailed to parties and attorneys after the mediation sessions.

- **Must have procedural and legal information provided at the outset and throughout the process.**[25] Similar to the ODR Programs in Texas and Michigan, there should be access to legal information before and during the process.

- **Court-appointed interpreter services must be offered for Zoom mediations.** There are ethics opinions that require the mediator not to take on the dual role of mediator and interpreter.[26] In addition, family members fulfilling the role of interpreter is not best practice. Continuing in the New York manner—assigning court-appointed interpreters to the Zoom platform—would be best practice.

- **Providing access to broadband internet or kiosks for parties who lack basic access to internet.** Approximately 7% of individuals in the U.S. lack access to internet.[27] While there has been an increase in access because of low-cost smartphones, many low-income parties still lack access and struggle to participate in virtual mediation.[28] The NewYork State Unified Court System has begun to think about solutions to this issue, such as providing kiosks for use in court and other solutions.[29] This needs to be a priority for the future of the courts, if virtual presumptive programs are to continue as the norm.

The New York City Small Claims Virtual Mediation Program has been one of the biggest success stories of the past two years. Despite a global pandemic, local bar associations and attorneys, law schools, and the courts have been

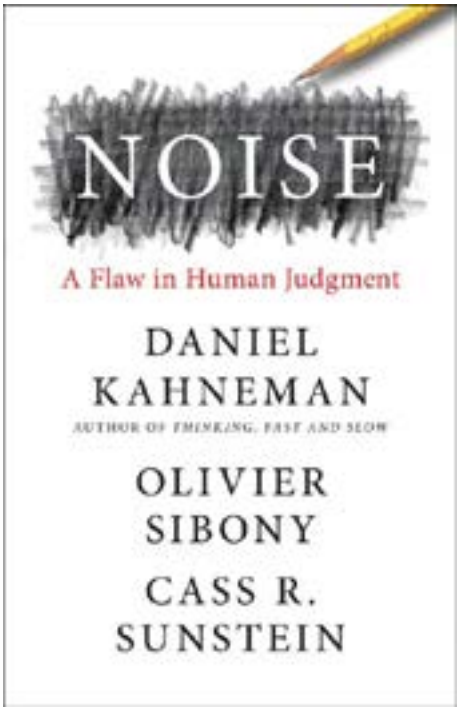
working together tirelessly to ensure access to justice for our most disadvantaged communities. Virtual mediation will be a permanent part of the legal practice in New York City, and if designed properly, it can provide litigants with a rich opportunity to be heard, expand access to justice, and support the overburdened courts through the pandemic and beyond.

Endnotes

1. Noam Ebner and Elayne E. Greenberg, *Strengthening Online Dispute Resolution Justice*, 63 Wash. Univ. J. L. & Pol'y 65, 69–70 (2020); *see also* Joint Tech. Comm., JTC Resource Bulletin: Case Studies in ODR for Courts 1 (Jan. 28, 2020), https://www.ncsc.org/__data/assets/pdf_file/0020/16517/2020-01-28-odr-case-studies-v2-final.pdf [https://perma.cc/V3DF-F74L]; Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 Cardozo J. Conflict Resol. 717, 718–19 (2017).
2. *See* MI-Resolve: Frequently Asked Questions, Resol. Ctr., https://cii2.courtinnovations.com/MITRC/faq [https://perma.cc/RE3Y-W3JP]; Utah Online Dispute Resolution Pilot Project: Final Report, Nat'l Ctr. State Cts. (Dec. 2017), https://cdm16501.contentdm.oclc.org/digital/api/collection/adr/id/63/page/0/inline/adr_63_0 [https://perma.cc/WN2X-G4PH].
3. Alan Zimmet, *A Primer on Virtual Court Proceedings in This Brave New World*, 39 No. 3 Trial Advoc. (FDLA) 38, 38 (2020).
4. Admin. Ord., Hon. Anthony Cannataro, Management of Small Claims Cases During the Coronavirus Pandemic, Civ. Ct. City N.Y. (Aug. 4, 2020), https://nycourts.gov/courts/nyc/SSI/directives/DRP/DRP212.pdf [https://perma.cc/J5JT-XDYJ].
5. Ebner & Greenberg, *supra* note 1.
6. Amy J. Schmitz, *Measuring "Access to Justice" in the Rush to Digitize*, 88 Fordham L. Rev. 2381, 2391, 2396–97. (2020); Condlin, supra note 1, at 738–44; Julianne Dardanes, *When Accessing Justice Requires Absence from the Courthouse: Utah's Online Dispute Resolution Program and the Impact It Will Have on Pro Se Litigants*, 21 Pepp. Disp. Resol. L. J. 141, 156 (2021) (quoting Utah Online Dispute Resolution Pilot Project: Final Report, *supra* note 2, at 10).
7. Avital Mentovich, J.J. Prescott, & Orna Rabinovich-Einy, *Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality*, 71 Ala. L. Rev. 893, 971–74 (2020); Schmitz, *supra* note 6, at 2386–87; Joint Tech. Comm., *supra* note 1, at 2; Brian Farkas, *Old Problem, New Medium: Deception in Computer-Facilitated Negotiation and Dispute Resolution*, 14 Cardozo J. Conflict Resol. 161, 172 (2012); Condlin, *supra* note 1, at 719–20; Scott J. Shackelford, & Anjanette H. Raymond, *Building the Virtual Courthouse: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR*, 2014 Wis. L. Rev. 615, 631–32 (2014); Jeff Trueman, Cecilia B. Paizs, & John Greer, *No Need to Panic: Online Dispute Resolution Works*, 2 Md. B.J. 140, 142–43 (2020).
8. Amy J. Schmitz, *Expanding Access to Remedies through E-Court Initiatives*, 67 Buff. L. Rev. 89, 93 (2019) (citing J.J. Prescott, I*mproving Access to Justice in State Courts with Platform Technology*, 70 Vand. L. Rev. 1993, 1994–96 (2017).
9. Schmitz, *supra* note 6, at 2384, 2388.
10. *Id.*; *see also* Heather Scheiwe Kulp & Amy J. Schmitz, *Real Feedback from Real People: Emphasizing User-Centric Designs for Court ODR*, 26 No. 2 Disp. Resol. Mag. 6, 10 (2020).
11. *See generally* Hon. Janet DiFiore, The State of Our Judiciary 2019, Unified Ct. Sys. N.Y. (Feb. 26, 2019), https://www.nycourts.gov/ctapps/news/19_SOJ-Speech.pdf [https://perma.cc/GTK9-P8LC]; Press Release, Hon. Lawrence K. Marks, Court System to Implement Presumptive, Early Alternative Dispute Resolution for Civil Cases, Unified Ct. Sys. N.Y. (May 14, 2019), https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf [https://perma.cc/3DWV-EU25].
12. Admin. Ord., *supra* note 4.
13. Cohl Love, T*he Pilot Episode of Presumptive Mediation: Will It See Primetime?*, 14 No. 2 N.Y. Disp. Resol. Law. 1, 30 (2021), https://nysba.org/new-york-dispute-resolution-lawyer-vol-14-no-2 [https://perma.cc/H888-8HF9].
14. Lisa M. Courtney & Glen L. Parker, P*resumptive ADR: Improving Options for Litigants in the New York State Unified Court System*, 14 No. 2 N.Y. Disp. Resol. Law. 1, 31 (2021), https://nysba.org/new-york-dispute-resolution-lawyer-vol-14-no-2 [https://perma.cc/H888-8HF9].
15. Mediator Ethics Advisory Comm. Op., Susan Dubow, Opinion Number: 2017-002, Fla. Sup. Ct. (Dec. 13, 2017), https://www.flcourts.org/content/download/216906/file/MEAC2017-002.pdf [https://perma.cc/ZF4R-KM67]; Mediator Ethics Advisory Comm. Op., Christy Foley, Opinion Number: 2021-002, Fla. Sup. Ct. (June 29, 2021), https://www.flcourts.org/content/download/763172/file/meac-opinion-2021-002.pdf [https://perma.cc/U8KQ-RSPZ]; *see also* Alexandra Carter & Shawn Watts, *The Role of Language Interpretation in Providing a Quality Mediation Process*, 9 Contemp. Asia Arb. J. 301, 311–12 (2016).
16. Committee on Professional Ethics, Opinion 1178, New York State Bar Association (Dec. 13, 2019), https://nysba.org/app/uploads/2019/12/Opn-1178.pdf [https://perma.cc/B9B6-CJDT]; see also Carter & Watts, supra note 15, at 311–12.
17. Video Conference Interview with Michelle Hilliker, Director of the Michigan Community Dispute Resolution Program (June 21, 2021) [hereinafter Hilliker Interview]; Video Conference Interview with Paul Embley, former CIO and Technology Division Director at the National Center for State Courts (Aug. 6, 2021).
18. Video Conference Interview with the Honorable Matthew G. Wright, Presiding Judge for the City of Little River-Academy, Texas (June 30, 2021)
19. Hilliker Interview, *supra* note 17; Video Conference Interview with Phil Johnson, State Director, Alternative Dispute Resolution System, Sup. Ct. of Oklahoma (July 6, 2021).
20. Hilliker Interview, *supra* note 17.
21. Schmitz, *supra* note 6, at 2384–85.
22. Timothy Hughes, *Promoting Witness Honesty in Virtual Hearings and the Lessons to be Learned from Social Science: A Conversation with Dr. Ula Cartwright-Finch*, 14 No. 2 N.Y. Disp. Resol. Law. 1, 12 (2021), https://nysba.org/new-york-dispute-resolution-lawyer-vol-14-no-2 [https://perma.cc/H888-8HF9].
23. Mentovich, Prescott & Rabinovich-Einy, *supra* note 7 at 974; *see also* Margaret Hagan, *The Justice Is in the Details: Evaluating Different Self-Help Designs for Legal Capability in Traffic Court*, 7 J. Open Access L. 1 (2019).
24. Mentovich, Prescott, & Rabinovich-Einy, *supra* note 7, at 971.
25. Ebner & Greenberg, *supra* note 1, at 86.
26. *See* Mediator Ethics Advisory Comm. Op., Susan Dubow, Opinion Number: 2017-002, *supra* note 15; *see also* Mediator Ethics Advisory Comm. Op., Christy Foley, Opinion Number: 2021-002, *supra* note 15.
27. Andrew Perrin & Sara Atske, *7% of Americans Don't Use the Internet. Who Are They?*, Pew Rsch. Ctr. (Apr. 2, 2021), https://www.pewresearch.org/fact-tank/2021/04/02/7-of-americans-dont-use-the-internet-who-are-they/ [https://perma.cc/GTE7-GAQQ].
28. Emily A. Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, Pew Rsch. Ctr. (June 22, 2021), https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/ [https://perma.cc/7NER-XSR3].
29. Cardozo Journal of Conflict Resolution, Panel 3: Assessment, Direction, and Vision for the Future, YouTube (Nov. 10, 2020), at 9:29–14:22,https://www.youtube.com/watch?v=U22kYbLYydM&ab_channel=CardozoJournalofConflictResolution [https://perma.cc/MFE5-AJK3] (remarks by Judge Edwina Richardson-Mendelson)

Noise: A Flaw in Human Judgment

By Daniel Kahneman, Olivier Sibony, and Cass R. Sunstein (Little Brown Spark, 2021)
Reviewed by Laura A. Kaster



Lawyers, and especially mediators and arbitrators, are in the business of good judgment. That is what we offer as our expertise in the context of giving advice, helping parties resolve disputes, and evaluating evidence and claims in order to arrive at an award—another word for a judgment. Daniel Kahneman's best-selling *Thinking Fast and Slow* has become part of the accepted thinking about judgment. From him and Amos Tsverky and their long-running studies of heuristics and biases, we learned that our decision-making is impacted by hidden shortcuts that our minds take unbeknownst to our conscious will. Although those issues infect all kinds of decision-making, for lawyers and neutrals their findings have most powerfully influenced the vocabulary and teachings that relate to the kind of implicit bias that can impair our mandate to improve diversity, equity, and inclusion.

We have moved a little bit toward expanding our understanding of judgment; moving from the belief in "reasonable man" and that the application of law to facts leads inevitably to a correct conclusion, to an appreciation that that is just not how the mind works. We still have work to do in learning how to "think slow" to minimize the impact of the gut on our judgments. Now comes Kahneman and his colleagues with another insight that suggests we have yet another layer of mental interference to remove if we hope to improve decision outcomes.

If unconscious bias leads to conclusions that are off-target in a specific direction, "noise"—a distinct and independent element (and multiplier) of decision error—leads to scattershot mistakes that contribute as much or more than bias does to decision errors. Noise might be dramatically different decisions about the same issue made by experts when they are expected to agree—such as insurance underwriters' decisions about setting premiums and claims adjusters' valuation of claims. This kind of noise results in real costs that are likely unanticipated by company executives. Noise might also be widely varied judgments of the same case by the same person or group on different occasions. The examples of noisy decisions examined in the book are particularly interesting to lawyers because they include bail decisions, asylum decisions, forensic science (yes!), insurance decisions, and sentencing decisions. We would surely all prefer consistency in decision-making in these arenas.

The final section of the book is devoted to practical ways of improving judgment and reducing noise that will also be of particular interest to lawyers and neutrals. One of the key takeaways is that rules (and checklists) do cabin judgment and tend to reduce noise. This is surely a paean to the rule of law. It also challenges some assumptions. For example, although there was something of a judicial rebellion to sentencing guidelines, *Noise* notes that the studies demonstrated that there was far less noise following the institution of the guidelines (which were struck by the Supreme Court in 2005). Studies after the guidelines became solely advisory showed that disparities doubled, and there was a return to law without order. There are also large disparities among judges in the sentences they recommend for identical cases.

Perspective taking, putting yourself in someone else's shoes, is one of the tools mediators use to help parties evaluate cases with less cognitive bias, but targeting any particular bias requires knowing what psychological biases are affecting a judgment (and there might be multiple biases). *Noise* suggests focusing on the decision process, as did Irving Janus, who first examined "group think" in the context of the Bay of Pigs invasion. For noise reduction,

Laura A. Kaster FCIArb, is one of the Co-Editors-in-Chief of this journal. She is a full-time neutral, former Chair of the NYSBA DR Section and a Fellow in the College of Commercial Arbitrators.

there is no directional error to detect or redirect; noise is inherently unpredictable. Therefore, what the authors call "decision hygiene" aimed at noise reduction is comprised of general techniques to cut mistakes off at the pass.

One of the intriguing hygiene practices is information sequencing to avoid contamination of the decision by irrelevant but sometimes potent information. In the case of fingerprints, for example, information about the suspect might taint the assessment of the comparable prints. There is far more delicacy to the judgment of identification than most of us understood, and the same expert may make different conclusions about the same comparisons. Where there is judgment, there is noise. To fight noise we have to admit it exists and develop decision hygiene. Keeping your mind open to reevaluation of old and consideration of new facts is also a good practice—*Noise* calls it "perpetual beta." Agreeing to an approach to decision-making, using scales (relative not absolute), checklists and rules, are all methods of reducing unwanted variability or noise.

This is an important and valuable book for all decision-makers and advisors, and it gives us a different perspective on the future use of algorithms that might reduce noise.

Mediating High Conflict Disputes: A Breakthrough Approach With Tips and Tools, and the New Ways for Mediation® Method

By Bill Eddy and Michael Lomax
(Unhooked Books 2021)
Reviewed by Susan E. Guthrie

When Bill Eddy reached out to me in 2020 and asked if I would read a pre-release copy of his highly anticipated new book, *Mediating High Conflict Disputes: A Breakthrough Approach with Tips and Tools, and the New Ways for Mediation® Method* (co-authored with Michael Lomax), with an eye to providing a testimonial, I was frankly thrilled. For years, Bill and his co-authors and trainers have been the go-to resource for judges, attorneys, mediators, dispute resolution professionals, HR department heads and the world of people experiencing high conflict in their lives to help them manage the never-ending cycle and bring a level of peace to their lives. In fact, as a divorce attorney and mediator myself, the day I discovered Bill, his books and his trainings was the day my practice and life changed forever.

So, when that email from Bill came, followed up by a publisher's pdf copy of the new book for review, I could not wait to dive in and discover the secrets of mediating those high conflict cases. I was not disappointed and, in fact, since that first reading of the book, I have read it again and taken Bill's New Ways for Mediators® Training, which expands upon the method in the book. Quite simply, the lessons learned are helpful to all dispute resolution professionals no matter their field or practice focus because high conflict manages to find its way into all our mediation rooms, and lives, at some point.

High conflict personalities and disputes are defined terms in the book. High conflict people "unnecessarily increase or prolong conflicts, rather than making good efforts to manage or resolve them"(Eddy at 260.) The authors make the point that although this book was written primarily for mediators, it can be used by anyone who finds themselves in the middle of a high conflict dispute even as a citizen of the world.

For all readers, but especially for trained mediators, the book requires taking a step back and suspending long-held professional beliefs and practices and committing to a "new way" of working with high conflict clients. The overarching premise of the book is that the long-held interest-based approach to conflict is not effective in the face of high conflict. Eddy and Lomax draw from their years of experience in working with high conflict individuals and couples in mediation and have concluded that the mediation process must be reworked from the ground up to effectively manage the conflict and to keep it from escalating to impasse when one or more high conflict individuals is participating. This applies to all kinds of disputes because it focuses not on the nature of the dispute, but on the nature of the disputants.

As an example, a strong message from the book is that considerably more structure in the process is needed than might be the norm when transformative or facilitative mediation has a real possibility of success. Using examples from actual case studies, as well as providing sample scripts designed to use structure to calm and focus the high conflict party, the authors illustrate the fundamental necessity of providing that structure to keep the mediation, and the High Conflict Person (HCP), focused and on task.

It is likely no coincidence that the book itself is well-structured in a relatively simple format with three sections as follows:

Susan Guthrie is cofounder of the Mosten Guthrie Academy for Mediators and Collaborative Professionals and a leading expert in online mediation and family law. She is a member of the Executive Council of the American Bar Association's Section of Dispute Resolution and a co-chair of the Section's Annual Advanced Mediation and Advocacy Skills Institute.

Part One explains the thinking and behavior of parties with high conflict personalities, emphasizing what should be avoided.

Part Two provides a detailed description of Eddy and Lomax' new method, describing Its similarities and differences with interest-based negotiations and transformative mediation methods and demonstrating several paradigm shifts.

Part Three provides examples describing cases with special issues in settings, including family, workplace, and disputes involving government agencies.

Part One

While there is certain to be conflict in almost any dispute that reaches the point of intervention, it is necessary to understand that matters involving high conflict are fundamentally different. The methods we have been trained in have less chance of success because "high conflict means essentially trying to turn a win-win situation into a win-lose situation. High Conflict People undermine efforts to find interest-based solutions to their disputes." (p. 12).[1] A key component of the New Ways for Mediation® Method involves simply understanding this fact and learning to identify situations that rise to the level of high conflict so that a mediator will be aware and able to shift to the more effective approach to managing that conflict provided in the book. Eddy and Lomax (p. 13) succinctly breakdown the high conflict indicators as:

- Preoccupation with blaming others (their targets of blame)
- All-or-nothing thinking or solutions
- Unmanaged or intense emotions
- Extreme behavior or threats

As with almost anything, awareness of whether or not you are dealing with high conflict and/or HCPs, is the first step in managing the situation. Essential to that awareness is understanding what not to do when dealing with an HCP. There are "Four Fuhgeddaboudits" provided in the book (pp 27-28) regarding the "What NOT to Do's" including:

- Fugheddaboud giving the parties insights into their own behaviors;
- Fuhgeddaoboud emphasizing the past. Focus on the future;
- Fuhgeddaboud emotional confrontations or opening up emotions; and
- Fuhgeddaboud telling them they have a high conflict personality.

Part Two

In Part Two, the authors delve into the real meat of their methodology starting with the need for structure in a high conflict mediation. With specific examples and reasoning, it becomes clear that HCPs are better able manage their emotions when focused on a task within a rigid and simple structure. This strict focus on structure flies in the face of many much more "free-form" approaches to a client-centered and client-determined process, but the need for a paradigm shift makes perfect sense as explained by Eddy and Lomax.

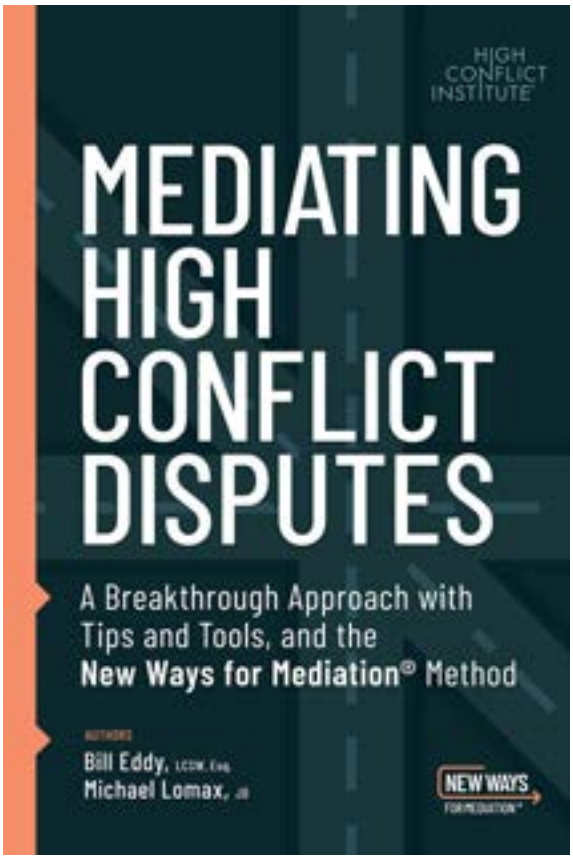
An additional example of the "paradigm shifts" required of mediators when mediating high conflict matters, involves turning the tables on the traditional process of having the mediator determine the agenda for the session and instead handing that task to the clients. This process change has the immediate effect of focusing participants on the task at hand and away from the difficult emotions of the moment.

Further to that point, the authors do not recommend a focus on unearthing the interests at the core of the parties' positions prior to transitioning to an exchange of proposals but instead to jump right in with eliciting proposals first. This juxtaposition allows a focus on the structure that high conflict personalities need prior to exploring those interests within the established structure of the proposal. Again, this blocks much of the HCP's ability to get lost in the underlying emotionality that so often derails the high conflict resolution.

These are just a few of the many tips and insights provided by the authors and importantly, they can be applied at any time during the mediation process. They are intended as additional tools for the professional toolbox and as with anything, will require practice and repetition.

Part Three

With a foundation laid in the identification of high conflict matters and people and shifts in process needed to manage them, the authors turn their focus to the practical application of the New Ways for Mediation® Method and provide a rich and varied discussion of the use of these concepts in real-life situations. Case studies from workplace, family, large group, and elder law matters are provided with real, practical insights that take the reader from theory to application. These studies are invaluable because they bring the reader into "the mediation room" with the experienced authors. Additionally, the importance of pre-mediation coaching and counseling, where appropriate, is discussed and examples given. Challenging long-held suppositions about mediation to learn what actually is effective is at the core of everything that Bill Eddy and Michael Lomax have done over their years of practice. They have generously shared their learning with us to dramatically improve high conflict resolution.



Appendix

In addition to the detailed and well-supported discussion of the necessary shifts in process when mediating a high conflict matter, the authors provide myriad incredibly helpful resources in the Appendix, including an outline of the New Ways for Mediation® Method with helpful tips, sample suggested scripts for many of the suggested paradigm shifts the in the book, a Client Pre-Mediation Handout for use in practice, copies of the slides from the New Ways for Mediation® Training and even suggested role play scenarios. Bill Eddy and Michael Lomax have been magnanimous in providing resources and insights to help any practitioner and to provide useful approaches to conflict in life.

Conclusion

For decades, the long-held belief of many legal and dispute resolution professionals has been that high conflict matters cannot be effectively handled in mediation and that they require litigation to bring order and control to the disorder and chaos that a high level of conflict occasions. With the principles and process shifts presented in *Mediation High Conflict Matters: A Breakthrough Approach with Tips and Tools, and the New Ways for Mediation® Method*, Bill Eddy and Michael Lomax provide practitioners the ability to offer a mediation process that can effectively manage, and resolve, conflict.

Hitting 'Send' May a Settlement Make: An Analysis of *Philadelphia Insurance Indem. Co. v. Kendall*

By Steven M. Bierman and Gaëlle E. Tribié

Litigators, like all lawyers, routinely utilize emails to communicate with opposing counsel on the full range of matters that may arise in a lawsuit. In this, the third decade of the 21st century, the notion of typed, signed, and mailed physical correspondence is a fading memory, if a memory at all, for most practitioners, in most circumstances. What, then, is the consequence of counsel exchanging emails with agreed settlement terms, when the emails contain at most an automatically pre-populated "signature" block, but no deliberate retyping of the attorney's name akin to a "signature?" Would an exchange of such emails constitute an enforceable settlement in accord with the requirement of Rule 2104 of the New York Civil Practice Law and Rules that a binding agreement in a case must be "subscribed" by counsel or the parties, if not made in open court or reduced to an order?

Notably, the New York Court of Appeals has not yet addressed whether emails satisfy the subscription requirement of CPLR 2104 for purposes of a binding settlement, but courts of the Appellate Division, First and Second Departments, have considered the question and, until recently, were in accord in their approach. However, the First Department recently announced a departure from its prior precedent, and that of the Second Department, in *Philadelphia Ins. Indem. Co. v. Kendall*,[1] an opinion authored by Justice Peter H. Moulton for a four-member panel.[2] In *Philadelphia Insurance*, the First Department clarified that the fact of the *transmission* of an email, and not whether it displays an email *"signature,"* is what determines that a settlement stipulation has been subscribed for purposes of CPLR 2104. The decision highlights yet another reason for care, forethought, and intentionality by counsel when hitting "send" for an email in the course of litigation.

The "Subscription" Requirement of CPLR 2104

Under New York law, a settlement must comply with CPLR 2104, which provides in pertinent part:

> An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered.[3]

In the absence of a settlement agreement made in open court or reduced to the form of an order and entered, New York courts have strictly interpreted the requirement that the agreement be in writing and "subscribed" by the party or counsel. Although the New York Court of Appeals has yet to address the issue, courts of the Appellate Division have held over the years that email communications between counsel *can* constitute a binding settlement, where counsel physically subscribed or typed their name into the email.[4] In particular, in *Forcelli v. Gelco Corp.*, the Second Department held that

> where, as here, an email message contains all material terms of a settlement and a manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an intent that the name be treated as a signature ["Thanks Brenda Greene" typed at the end of the email], such an email message may be deemed a subscribed writing within the meaning of CPLR 2104 so as to constitute an enforceable agreement.[5]

The First Department's recent decision in *Philadelphia Insurance* marked a departure from that Court's earlier agreement with the Second Department's approach in *Forcelli*, and signaled instead that the key to whether an agreement is subscribed for purposes of CPLR 2104 in the case of email is the fact of the transmission and not whether counsel retyped her or his name.

Steven M. Bierman, FCIArb and CEDR-accredited, is a mediator, arbitrator, and dispute resolution advisor, and founder of Bierman ADR LLC (sbierman@biermanadr.com). Previously, he was a litigation partner and practice group leader at Sidley Austin LLP in New York. He is co-chair of the American Bar Association's Annual Advanced Mediation Skills & Advocacy Institute and co-chair of CPR Institute's Mediation Committee.

Gaëlle E. Tribié is a senior managing associate at Sidley Austin LLP in New York, where she focuses on commercial litigation and arbitration (gtribie@sidley.com).

The *Philadelphia Insurance* Decision

The Dispute: Timing Is Everything

The First Department's analysis stemmed from an automobile accident in 2014 involving Respondent Erika Kendall and non-party Khalilah T. Martin. Kendall was driving her employer's car during the collision. Martin's automobile liability insurance policy limits were lower than those in the insurance policy held by Kendall's employer, issued by the petitioner-appellant in the case, Philadelphia Insurance Indemnity Company. Kendall settled her personal injury claim against Martin for $25,000 (the maximum amount under Martin's policy) and then made a claim under the Supplementary Underinsured Motorist (SUM) benefit provision in the employer's automobile policy with Philadelphia Insurance.[6] Kendall and Philadelphia Insurance arbitrated their dispute in August 2019, before the American Arbitration Association.

The parties engaged in settlement discussions prior to, during, and after the arbitration hearing. On September 16, 2019, the arbitrator issued her decision and awarded Kendall $975,000. Although the arbitrator's decision was emailed to Kendall's attorneys and faxed to Philadelphia Insurance's attorneys, neither counsel received the decision. Instead, they continued settlement negotiations, agreeing to a settlement of $400,000 on September 19, 2019. To memorialize the agreement, Kendall's counsel emailed Philadelphia Insurance's counsel stating: "Confirmed—we are settled for 400K."T he email was signed "Sincerely," and followed by Kendall's email signature block with counsel's name and contact information. That same day, Philadelphia Insurance's counsel responded and attached a Release and Trust Agreement and stated: "Get it signed quickly before any decision comes in, wouldn't want your client reneging." Kendall's counsel replied: "Thank you. Will try to get her in asap." This was again followed by "Sincerely," and the counsel's email signature block.

Before signing the Release and Trust Agreement, Kendall's counsel, meanwhile, received the arbitrator's decision and demanded payment of the amount awarded, $975,000, and declined the $400,000 settlement amount. Philadelphia Insurance initiated special proceedings in the New York Supreme Court for New York County seeking enforcement of the settlement agreement and vacatur of the arbitration award.

The motion court (Hon. Lynn R. Kotler, J.) rejected Philadelphia Insurance's petition and denied enforcement of the settlement agreement, finding that failure to sign the release was a necessary occurrence to complete the settlement and that the email sent by Kendall's counsel was not "sufficient to satisfy CPLR 2104 as it does not appear to be subscribed . . . nor does it contain all the material terms of a settlement agreement between the parties[.]"[7] Relying on the Second Department's *Forcelli* analysis, which indeed was at that time consistent with the First Department's own precedent, the Supreme Court reasoned that

(i) the emails were "followed by prepopulated text" and, therefore, they were not subscribed by Kendall's attorney; and (ii) "the only term the parties seemed to agree upon was a sum of money" and the email from Philadelphia Insurance's counsel evidenced that further things were needed to finalize the settlement and "an understanding that the settlement may not be binding."[8]

Philadelphia Insurance appealed the trial court's rejection of the settlement agreement. The First Department held that the email exchange constituted an enforceable settlement under CPLR 2104, and thereupon reversed the Supreme Court's decision and directed that the insurer's petition to enforce the settlement and to vacate the arbitral award be granted.

The "Subscription" Requirement: What Really Matters

The First Department noted that although the Court of Appeals has not opined on whether emails can satisfy CPLR 2104, in 1996 the Court found in *Parma Tile Mosaic & Marble Co. v. Estate of Short* that a fax message with a prepopulated name did *not* satisfy CPLR 2104.[9] The First Department concluded that this 25-year old authority was not controlling, because "the *Parma* court wrote in a different era, when paper records were still an important modality . . . . Since that time, the electronic storage of records has become the norm, email has become ubiquitous, and statutes allowing for electronic signatures have become widespread."[10]

The First Department addressed head-on the Second Department's *Forcelli* holding that emails between counsel could constitute a binding settlement agreement under CPLR 2104 where the attorney's name was retyped, and the Court noted that "cases have found that an email in which a party's or its attorney's name is prepopulated in

the email is not sufficiently subscribed for purposes of CPLR 2104[.]"[11]

The First Department acknowledged that the motion court's finding that the retyping of a name was required for an email to be "subscribed" was "in accord with precedent of this Court." Reversing the motion court, the First Department took the opportunity to "write to clarify that the transmission of an email, and not whether an email 'signature' can be shown to be retyped, is what determines that a settlement stipulation has been subscribed for purposes of CPLR 2104," finding that the email communications at issue satisfied CPLR 2104. The court declared, "[w]e now hold that this distinction between prepopulated and retyped signatures in emails reflects a needless formality that does not reflect how law is commonly practiced today. It is not the signoff that indicates whether the parties intended to reach a settlement via email, but rather the fact that the email was sent."[12]

The Court also considered whether the email "signature" complied with § 304(2) of New York's Electronic Signatures and Records Act (ESRA), which provides: "unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand."[13] The Court looked to the statutory definition of "electronic signature," which it found to be "extremely broad": "an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record."[14]

Finally, the Court considered the ethical obligations of attorneys under New York's Rules of Professional Conduct and was persuaded that these "obligations help to ensure that an attorney considers their authority before communicating settlement offers and acceptances to opponents, whatever the mode of communication."[15]

For these reasons, the First Department concluded that "if an attorney hits 'send' with the intent of relaying a settlement offer or acceptance, and their email account is identified in some way as their own, then it is unnecessary for them to type their own signature."[16]

The Email Still Must Satisfy the Material Terms Requirement

The First Department made clear that "[w]hile we jettison the requirement that a party or a lawyer retype their name in email to show subscription, that does not mean that every email purporting to settle a dispute will be unassailable evidence of a binding settlement[,]" reminding in particular that "an email settlement must, like all enforceable settlements, set forth all material terms."[17] The Court found this requirement was satisfied because counsel's email set forth "the sum of money" that the insurer would pay Kendall, the only material term, and Kendall's execution of a general release was just further documentation of the agreement and "a ministerial condition precedent to payment[.]"[18]

Be Sure Before Hitting "Send" and Know What "Send" May Mean

In *Philadelphia Insurance*, the First Department has taken a pragmatic approach to the application of CPLR 2104 to settlement agreements made by emails. The Court looked to the parties' intent—as evidenced through their counsel's conduct rather than a formulaic prescription—to find a binding settlement. With changes in technology come changes in practice and practical consequences. Counsel engaging in settlement discussions by email must carefully consider their language and the consequences of hitting "send."

Endnotes

1. *Philadelphia Ins. Indem. Co. v. Kendall*, 151 N.Y.S.3d 392 (N.Y. App. Div. 1st Dep't, 2021).
2. Presiding Justice Rolando T. Acosta, Justice Sallie Manzanet-Daniels, and Justice Saliann Scarpulla concurred.
3. CPLR 2104.
4. *See, e.g., Herz v. Transamerica Life Ins. Co*., 99 N.Y.S.3d 664, 665 (N.Y. App. Div. 2d Dep't, 2019) ("Here, the emails were subscribed by counsel, set forth the material terms of the agreement—the acceptance by the plaintiff's counsel of an offer in the sum of $ 12,500 to settle the case in exchange for a release in favor of Transamerica—and contained an expression of mutual assent"); *Forcelli v. Gelco Corp*., 972 N.Y.S.2d. 570, 575-76 (N.Y. App. Div. 2d Dep't, 2013); W*illiamson v. Delsener*, 874 N.Y.S.2d 41, 41 (N.Y. App. Div. 1st Dep't, 2009) ("The e-mails exchanged between counsel, which contained their printed names at the end, constitute signed writings (CPLR 2104) within the meaning of the statute of frauds . . . and entitle plaintiff to judgment") (citation omitted).
5. *Forcelli v. Gelco Corp*., 972 N.Y.S.2d 570, 575-76 (N.Y. App. Div. 2d Dep't 2013).
6. *Philadelphia Ins. Indem. Co. v. Kendall*, 151 N.Y.S.3d 392, 394 (N.Y. App. Div. 1st Dep't, 2021).
7. *In the Matter of Philadelphia Ins. Indem. Co v. Kendall*, No. 657200/19, 2020 WL 2842551, at *1 (N.Y. Sup. Ct. May 27, 2020) (citations omitted).
8. *Id.* at *1-2; *see also Forcelli v. Geico Corp*., 972 N.Y.S.2d 570 (N.Y. App. Div. 2d Dep't 2013); *Jimenez v. Yanne,* 55 N.Y.S.3d 652 (N.Y. App. Div. 1st Dep't, 2017).
9. *See Philadelphia Ins. Indem. Co. v. Kendall*, 151 N.Y.S.3d 392, 395 (N.Y. App. Div. 1st Dep't, 2021) (*citing Parma Tile Mosaic & Marble Co. v. Estate of Short*, 663 N.E.2d 633 (N.Y. 1996)).
10. *Id.*
11. *Id.* at 396 (c*iting Bayerische Landesbank v. 45 John St. LLC*, 960 N.Y.S.2d 64 (N.Y. App. Div. 1st Dep't, 2013), *lv dismissed*, 22 N.Y.3d 926, (2013) and *LIF Indus., Inc. v. Fuller*, 2015 WL 1744814, at *6 (Sup. Ct., N.Y. County, Apr. 16, 2015)).
12. *Id.*
13. ESRA § 304(2).
14. N.Y. State Tech. Law § 302.
15. S*ee Philadelphia Ins. Indem. Co. v. Kendal*l, 151 N.Y.S.3d 392, 397 (N.Y. App. Div. 1st Dep't, 2021) (citing New York's Rules of Professional Conduct (22 NYCRR 1200.0) Rule 1.2(a) and Rule 1.4(a)(iii)).
16. *Id.* at 396.
17. *Id.* at 397.
18. *Id.; see also id. at 398* ("respondent's execution of a general release was essentially a ministerial condition precedent to payment").

Case Summaries

By Alfred G. Feliu

Professional Relationship With Counsel Insufficient to Warrant Vacatur

Respondent nominated Smit to serve on a three-person panel. Smit disclosed before the arbitration that he knew lead counsel for claimant, Shore, from arbitration conferences. During the arbitration Smit and Shore were appointed to a panel to arbitrate an ICC matter. Their appointments were publicly listed on multiple websites, but neither Smit nor Shore made a disclosure in the arbitration in which Shore was counsel. Claimant prevailed, and respondent moved to vacate, challenging Smit's impartiality. "Respondent argues that Smit's incomplete disclosures, and Shore and Petitioner's silence, constituted fraud because the disclosures did not give Respondent reason to do any further research into the professional contacts of the chosen arbitrators." The district court denied the motion. The court rejected defendant's claim of fraud based on the incomplete disclosure because with the exercise of due diligence it could have discovered the appointment of Smit and Shore to the ICC matter. The court also rejected defendant's claim that by working closely together Smit and Shore "had the opportunity for *ex parte* communications, collegial interactions, and collaborative decision-making." The court ruled that misconduct may be shown where there is an undisclosed pecuniary relationship or familial relationship between arbitrators and a party, but merely serving together in a second arbitration matter does not constitute a material relationship warranting vacatur. The court also emphasized that respondent failed to show any denial of fundamental fairness in the arbitration proceedings themselves sufficient to warrant vacatur. For these reasons, the motion to vacate was denied by the court. *Andes Petroleum Ecuador Ltd. v. Occidental Exploration and Production Co.*, 2021 WL 5303860 (S.D.N.Y.).

AAA Rules Alone Not Sufficient To Delegate Threshold Issues to Arbitrator

The joint venture agreement here contained an arbitration provision which incorporated the rules of the American Arbitration Association. A dispute arose between the parties regarding the application of a prevailing party provision in the agreement and a suit was filed in federal court. A motion to compel arbitration was made and the question for the court was who was to decide the question—the court or the arbitrator—whether the dispute was arbitrable. The Second Circuit made clear that incorporation of the AAA Rules by themselves may serve as clear and unmistakable evidence of the parties' intent to delegate the question of arbitrability to the arbitrator. However, the court added that "in evaluating the import of incorporation of the AAA Rules (or analogous rules) into an arbitration agreement, context matters. Incorporation of such rules into an arbitration agreement does not, per se, demonstrate clear and unmistakable evidence of the parties' intent to delegate threshold questions of arbitrability to the arbitrator where other aspects of the contract create ambiguity as to the parties' intent." The court reasoned that the coupling of a broad arbitration clause with incorporation of the AAA rules would "constitute[] clear and unmistakable evidence of the parties' intent to delegate the question of arbitrability to the arbitrator." In contrast, as in this case, where the arbitration clause is narrow or contains exclusionary language the requisite clear and unmistakable intent is not present. Consequently, the court reserved for itself the determination as to whether the underlying dispute was arbitrable. *DDK Hotels v. Williams Sonoma, Inc.*, 6 F.4th 308 (2d Cir. 2021). See also *Downing v. A&E Television Networks, LLC*, 2021 WL 4131652 (S.D.N.Y.) (incorporation of the JAMS Rules coupled with a broad arbitration clause constitutes clear an unmistakable delegation of arbitrability question to arbitrator).

Statute of Limitations Defense for Arbitrator To Decide

A customer brought a FINRA arbitration alleging his broker engaged in "egregious churning and excessive trading." The brokerage firm obtained a temporary restraining order in state court and the action was removed to federal court where the customer moved to dismiss the action alleging that the statute of limitations defense that had been asserted was for the arbitration panel and not the court to decide. The motion was granted. The court provided three grounds for submitting the statute of limitations defense to the arbitration panel. First, the arbitration provision was broad and committed "all controversies" to arbitration. Second, the fact that FINRA's rules were adopted provided,

Alfred G. Feliu is an arbitrator and mediator on various AAA and CPR panels. Mr. Feliu is a past Chair of the NYSBA Labor and Employment Law Section and a Fellow of the College of Commercial Arbitrators and the College of Labor and Employment lawyers. He is the author of *ADR in Employment Law,* published by Bloomberg/BNA.

in the court's view, "an additional clue as to the parties' intent to arbitrate timeliness issues." Third, the court noted that under traditional contract principles the brokerage firm drafted the arbitration provision and "should be held to its word and proscribed from evading the consequences of its own bargain." The court rejected the brokerage firm's argument that the choice of law provision argued for court review, noting that "choice of law provisions in arbitration agreements must be construed narrowly in light of the pro-arbitration federal policy reflected in the FAA." Finally, the court dismissed the brokerage firm's contention that the right of the parties to seek provisional relief in court argued in favor of judicial review of the statute of limitations question. In doing so, the court noted that the request here was for permanent and not provisional dismissal of the case. *Empire Asset Management v. Best*, 2021 WL 2650457 (S.D.N.Y.).

Arbitration Agreement Did Not Preclude Human Rights Agency Proceedings

Eric Jewett, who signed an arbitration agreement when he was hired, filed a harassment claim against Charter Communications with the New York State Division of Human Rights (DHR). The agency found probable cause and Jewett's claim was scheduled for a hearing before a DHR administrative law judge. Charter moved to enjoin the administrative proceeding, arguing that Jewett could only pursue his claim in arbitration. The court refused to enjoin the administrative proceeding. The court reviewed the duties and mandates of the DHR. The court noted that whether the complaint is filed by an individual or the DHR itself, "in pursuing that complaint through the investigation, conciliation, and public hearing stages, the [DHR] is acting in its prosecutorial capacity and working in the interest of the state." The court rejected Charter's contention that the agency is merely presenting Jewett's claims on his behalf. The court pointed to the agency's regulations which "explicitly state that there is no 'attorney-client relationship' between the [DHR] attorney and the complainant . . . and while the statute provides that a complainant's attorney may present the case in the support of the complaint, the attorney may only do so with the [DHR's] consent." The court concluded that Charter had failed to demonstrate that it was likely to succeed on the merits, as required for the issuance of an injunction, emphasizing that "the Arbitration Agreement between Charter and a Jewett, is unlikely to be a basis on which to effectively bar the [DHR], which is not a party to the Agreement, from acting in accordance with its statutory authority to prosecute the complaint Jewett filed through to a final determination by the Commissioner." *Charter Communications v. Jewett*, 2021 WL 5332121 (N.D.N.Y.).

DOL Found Not To Be Bound by Private Arbitration Agreement

A New York federal court recently ruled that private arbitration agreements will not prevent the federal Secretary of Labor from bringing suit against an employer for violation of the Fair Labor Standards Act. The case involved an action filed by the Secretary of Labor against an employer alleging FLSA violations on behalf of 292 individuals. The employer moved to compel arbitration, arguing that the existence of arbitration agreements with each of the individuals also binds the DOL because it was "act[ing] on behalf" of them. The court disagreed, finding that the DOL is not bound by individual agreements to which it is not a party. The court also observed that the DOL "may still have interests independent of the aggrieved employee when seeking employee-specific relief, including deterring other employers from violating the FLSA and protecting complying employers from unfair wage competition with noncomplying ones." *Scalia v. CE Security LLC*, 2021 WL 3774198 (E.D.N.Y.).

Award Confirmed but Final Judgment Not Entered Where Related Claims Pending

The court ordered to arbitration one counterclaim and stayed the plaintiff's claims and defendant's other counterclaims pending the issuance of the arbitration award. The arbitration panel found for defendant on the counterclaim and awarded damages with interest. Defendant moved to confirm the award and for entry of judgment. The court confirmed the award but declined to enter a final partial judgment. The court noted that the underlying contract here permitted plaintiff to withhold funds if defendant was found to have violated its terms. Plaintiff's claims arose out of the same facts and sought an offset for any monies owed defendant. The court noted that the record was insufficient before it to "reach a determination regarding the collateral estoppel effect of the Final Award." For these reasons, the court confirmed the award but declined to enter partial final judgment at this time. The court also decided to lift the stay it had imposed on the claims not subject to arbitration as the "conclusion of the arbitration eliminates the basis for the stay, and the remaining claims in this matter are now ready to proceed." *The Pike Company v. Tri-Krete Ltd.*, 2021 WL 5194688 (W.D.N.Y.).

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 in the Courts
Laura A. Kaster
Laura A. Kaster LLC
laura.kaster@kasteradr.com

Daniel F. Kolb
Davis Polk & Wardwell
daniel.kolb@davispolk.com

CLE and Education
Jacqueline Nolan-Hanley
Fordham U. School of Law
jnolanhanley@law.fordham.edu

Commercial Lending
Deborah A. Reperowitz
Stradley Ronon Stevens & Young,
dreperowitz@stradley.com

Jeffrey A. Wurst
Armstrong Teasdale LLP
jwurst@atllp.com

Diversity & Inclusion
Stephen Marshall
Dentons US LLP
stephen.marshall@dentons.com

Iyana Y. Titus
Assistant Commissioner,
EEO
NYC Parks & Recreation
iyana.titus@parks.nyc.gov

Domestic Arbitration
William Crosby
The Interpublic Group
william.crosby@interpublic.com

Loretta Mae Gastwirth
Meltzer, Lippe Goldstein & Breitstone, LLP
lgastwirth@meltzerlippe.com

Ethical Issues and Ethical Standards
Leslie Berkoff
Moritt Hock & Hamroff LLP
lberkoff@moritthock.com

David Singer
SingerADR Neutral Services
dsinger@singeradr.com

Health Care
Andrew T. Garbarino
Ruskin Moscou Faltischek PC
1agarbarino@rmfpc.com

Joan D. Hogarth
The Law Office of Joan D. Hogarth
jnnhogarth@aol.com

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

Dana Shafter Gliedman
Anderson Kill
1251 Avenue of the Americas
New York NY 10020
dgliedman@andersonkill.com

International Dispute Resolution
Rekha Rangachari
New York International
Arbitration Center
rrangachari@nyiac.org

Mohamed Fathy Metwally Sweify
msweify@fordham.edu

Legislation
Mark J. Bunin
Case Closure
bunim@caseclosure.com

Mediation
Bart J. Eagle
Scarola Zubatov Scharffzin PLLC
1700 Broadway Fl 41
New York, NY 10019-4613
bje@barteaglelaw.com

Gary P. Shaffer
gary@shaffermediation.com

Mediation of Wills, Trusts, Estates, Guardianship, & Elderly Disputes
Leona Beane
lbeanelaw@gmail.com

Alfrieda B. Kenny
Law Office of Alfrieda B. Kenny
abkenny@abkenny.com

Membership
Marilyn Genoa
Genoa & Associates PC
mkgenoa@genoaandassociates.com

Susan E. Salazar
CUNY School of Law
salazar@susansalazarlaw.com

Negotiations
Noah J. Hanft
AcumenADR LLC
nhanft@acumenadr.com

Richard I. Janvey
Diamond McCarthy LLP
rjanvey@diamondmccarthy.com

New Practitioners in ADR Law
Alexander Paul Bachuwa
alex@nomadresolutions.com

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

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

Edna Sussman
SussmanADR LLC
esussman@sussmanadr.com

Securities Disputes
Howard A. Fischer
Moses & Singer LLP
hfischer@mosessinger.com

Christine M. Lazaro
St. John's University School of Law
lazaroc@stjohns.edu

NYSBA CLE

All Access Pass

Maximize Your Time and Earn CLE Credits with On-Demand Learning

Access hundreds of programs online and satisfy your MCLE requirement for one low price.

> Gain access to all CLE Online video programs and course materials for one year

> New programs added each month

> Monthly billing option

$495 for NYSBA Members

For more information visit **NYSBA.ORG/ALLACCESSPASS**

Online only. Does not include live programs, CD or DVD products.
All Access Pass requires member login and cannot be transferred. Annual subscription required.

PUBLICATIONS

Attorney Professionalism Forum

Authors
Vincent J. Syracuse, Esq.
with Alyssa C. Goldrich, Esq. , Maryann C. Stallone, Esq., Carl F. Regelmann, Esq., their Colleagues and Members of the NYSBA Committee on Attorney Professionalism

Attorney professionalism requires poise, honesty, maturity, and reasoned judgment and embodies a heightened sense of responsibility and fair play, as well as a respect for others, even when zealously advocating on behalf of the client. NYSBA Members have come to rely upon the advice offered in the Attorney Professionalism Forum, included in each issue of the NYSBA *Journal*.

The Forum identifies ethical issues faced by members of the legal profession as they interact with judges, lawyers, clients and the public. It answers thought-provoking questions by blending analysis of applicable law and the Rules of Professional Conduct with practical guidance.

This title is a compendium of Forums published in the *Journal* between January 2012 and December 2020. For law professionals who pursue excellence in attorney professionalism, civility, and ethics, this resource is indispensable.

Book (407821)
eBook (407821E)

NYSBA Members $65.00
Non-Members $85.00

ORDER ONLINE: NYSBA.ORG/PUBS | ORDER BY PHONE: 800.582.2452

NEW YORK STATE BAR ASSOCIATION
DISPUTE RESOLUTION SECTION
One Elk Street, Albany, New York 12207-1002

Dispute Resolution Section

Events & Activities

For decades, volunteers have been developing and presenting seminars, preparing rich collections of written materials and raising the bar for legal practice in New York. We're happy to provide continuing education programming and events for our Section members, and hope you will join us as we continue to add more to our schedule.

Visit **NYSBA.ORG/DISPUTE** and click on "Upcoming Events" tab for more info.

Take a look at what's coming up next...

3-Day Commercial Mediation Training – Spring 2022
March 15-17, 2022 | 8:30 a.m. – 5:00 p.m.
24.0 MCLE Credit | Virtual

Advanced Commercial Mediation Training – Spring 2022
May 17-18, 2022 | 8:30 a.m. – 5:00 p.m.
16.0 MCLE Credit | Virtual

Dispute Resolution Section Annual Mediation Tournament 2022
March 18-19, 2022 | 8:00 a.m. – 7:30 p.m.
In-Person

Comprehensive Commercial Arbitration Training For Arbitrators And Counsel
July 11-13, 2022 | 9:00 a.m. – 5:00 p.m.
24.5 MCLE Credit | In-Person

NYSBA.ORG | 800.582.2452 | MRC@NYSBA.ORG