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The Rise of Machine Learning in ADR

Think DSD, Not ADR

New Resources To Assist Arbitrators Navigating Information Security Obligations

PUBLICATIONS

Arbitration and Mediation

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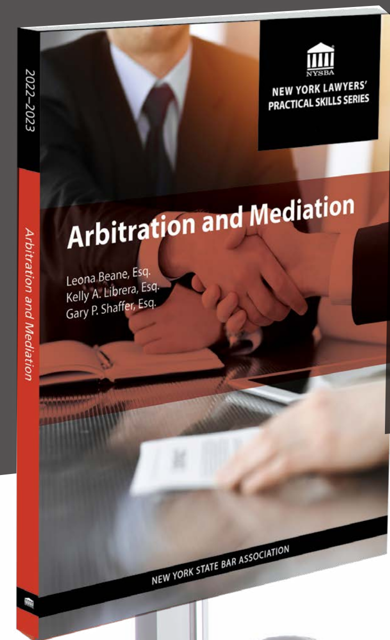

This practice guide examines the two most common forms of alternative dispute resolution. *Arbitration and Mediation* resolves the misconception that these two procedures are interchangeable by discussing their differences and providing examples of both procedures.

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Message From the Chair

It has truly been an honor to serve as Chair of the Dispute Resolution Section since June of last year. I continue to be amazed by the number and quality of the programs our Section has run. And this success comes from the extraordinary dedication, commitment, and intellect of so many in our Section. I am inspired by the spirit of volunteerism and the can-do attitude of our team.

Noah Hanft

I look back at what we have done with great pride. That begins in September with honoring our deceased friend and colleague Chuck Newman at a well-attended event at Bryant Park Grill where more than 100 guests honored Chuck and his legacy. Many of us spoke of the powerful impact Chuck had on us, and our memorable interactions with him. It was particularly meaningful because Chuck's wife and family were able to attend. A highlight was Chuck's wife, Libby, speaking about Chuck and, in particular, his devotion to alternative dispute resolution. At the event, we announced that the Section would honor Chuck by creating an annual Chuck Newman Award for an individual who embodies Chuck's qualities, "the ADR practitioner who exemplifies the qualities of Chuck Newman—a devotion to the profession, brilliance of mind, generosity of heart, community-oriented, creative, selfless, compassionate, a mentor to many and a teacher to all."

On Jan. 18, 2023, at our Annual Meeting at the New York Hilton, I had the privilege of presenting the inaugural Chuck Newman Award to Dr. Maria Volpe, who worked closely with Chuck over many years. Maria has spent decades advancing dispute resolution, working with students and practitioners in developing the skills and mindset needed to excel as dispute resolvers. As I said when I presented Maria with the award, among the many extraordinarily talented and dedicated nominees, Maria stood out. She has undertaken decades of incredible work in the field—teaching, practicing and researching. In accepting the award, Maria spoke eloquently about her years working with Chuck and the deep impact he had on her and the greater ADR community.

The Annual Meeting program was rich with compelling programs. Lorraine Mandel moderated a panel providing insights on what both general counsel and outside counsel look for in selecting mediators and arbitrators. Alfreida Kenny and Susan Salazar brought together a panel of former judges, with active ADR practices, who shared their experiences transitioning from the bench. Bill Crosby moderated a highly relevant panel that drilled deep into the benefits and challenges of hybrid arbitrations.

The Annual Meeting was only one of many great programs the Section has put on or has planned. I highlight just a few of the incredibly rich offerings, with apologies to all the other panels and chairs. In February there were three subjects of great import to our membership. Damali Peterman, noted lecturer, teacher, and mediator led a training on recognizing and, importantly, addressing our innate and implicit biases. This is a subject that directly impacts all of us, but particularly those who mediate or sit as arbitrators. Debra Reperowitz and Paul Gupta, co-chairs of our new Technology Committee, provided a program on cyber related issues. Cybersecurity not only impacts our day-to-day management of our practices but creates an increasing number of disputes in cyber-related areas. Myrna Barakat Friedman assembled a group of leaders in the world of dispute prevention to address the opportunity for organizational dialog. The panel discussed how we, as dispute professionals, can help think about processes for recognizing insipient issues and creating productive methods to address inevitable disagreements early, before they rise to the level of a full-blown dispute.

Many of our committees held substantive programs, both in live and virtual formats. Our Mediation Committee, chaired by Bart Eagle, Gary Shaffer and Emily Altman was extremely active with a host of programs focused on mediation skills, including a highly practical mentorship program which pairs newly trained with experienced mediators. The committee has a number of important subcommittees, addressing matters of vital importance, including outreach to counsel who select mediators and the thorny issue of mediator compensation through the court programs.

I am particularly excited by the Mediation Tournament, in which law students from a number of law schools compete. Thanks go to Leslie Berkoff, who created and built the tournament, and Chris McDonald and Michael Starr who, along with Leslie, are co-chairing the effort this year. The fi-

nal round of the tournament featured some of the leading judges in the state evaluating the final rounds of the student mediators.

Simeon Baum and Steve Hochman once again offered our highly acclaimed mediation training programs twice during my tenure. Both the 3-day Commercial Mediation Training and the Advanced Training in the spring were at Debevoise Plimpton's new offices at Hudson Yards.

Driving diversity in ADR continues to be a priority for our Section. Our diversity plan calls for gender and racial diversity on panels, leading to a conscious awareness of our role in introducing new presenters at Section events. Our Diversity Committee, co-chaired by Alfreida Kenny and Mary Austin, also has a wonderful mentorship program as well as a diversity scholarship program and is planning a diversity gala for later in the year.

Our Trusts and Estates Committee, under the leadership of Kera Reed and Amy Hsu, have put together an interesting and informative tour of mediation in Surrogate's Courts all over the state. And the committee is planning a program on the expansion of mediation in guardianship cases.

Under the leadership of Loretta Gastwirth and Bill Crosby, our Arbitration Committee is a compelling forum for new ideas and informative programs. The sheer number of high quality programs, with great content and speakers, is truly impressive. In January, the committee did an event at AAA on "Starting an ADR Practice" moderated by Jay Safer. The panel provided guidance and insights detailing the challenges and benefits of maintaining an ADR practice.

In April the Arbitration Committee served up "Discovery Practices for Construction Arbitration," moderated by Loretta Gastwirth and Michael Marra, delving into best practices in managing discovery issues in construction related arbitration.

The Insurance Disputes Committee, led by Diana Gliedman and Mark Bunim, has been quite active and has put on a number of excellent programs. In January Mark Morell and Mark Bunim moderated a highly informative program on the fast-growing area of representation and warranty insurance.

Our Membership Committee chairs, Susan Salazar and Marilyn Genoa, created and implemented a fabulous series, "Habits of Highly Effective Dispute Resolvers," highlighting the work of our many committees and focusing on the work of leaders in the ADR field.

Make sure you don't miss the wonderful programs our Section produces. Keep abreast of our rich calendar and enjoy the insights provided by our best-in-class journal, *New York Dispute Resolution Lawyer*, co-edited by three prior DR Section Chairs.

We are indebted to Jeff Zaino and the American Arbitration Association for hosting so many of our meetings and to Jeff for being a constant booster of the ADR community as a whole. Jeff's ongoing support for our Section, over many years, is deeply appreciated by all of us.

Finally, I want to thank all of the committee chairs for their leadership as well as my fellow officers. Jeff Anderson, Chair-Elect, Jill Pilgrim, Vice Chair, Evan Spelfogel, Secretary and Deborah Reperowitz, Treasurer.

With Jeff as the incoming Chair, Jill as the new Chair-Elect, Debbie staying on as Treasurer and Erica Levine Powers as the new Secretary, I have no doubt the Section will reach new heights. Special thanks to Evan Spelfogel, who has just been an extraordinary Secretary and contributor to the Section over many years.

I also want to thank our extraordinary liaison, Simone Smith, for the multitude of things she does to help our Section provide the services and programming we make available.

As we move back to in-person and hybrid gatherings, our Section makes available community and an abundance of great programs and the opportunity to work with wonderful, dedicated people on important matters. I encourage everyone to take advantage of the many opportunities out there and help us expand the utilization of alternative dispute resolution.

Message From the Co-Editors-in-Chief

Sherman Kahn

Edna Sussman

Laura A. Kaster

The declaration of a worldwide pandemic in 2020 led to many terrible events and extraordinary changes. The world of alternative dispute resolution shifted on its axis, adapting by adopting new approaches and technologies to processes geared to helping disputants resolve issues and get back to business. The changes made in the face of necessity would not have occurred so quickly without a push. However, their success highlights the fact that there is opportunity in change. Adaptation and innovation can improve processes, options, and approaches, and potentially decrease the expenses associated with resolution. What if we could examine potentials for change and improvement before they are thrust upon us in an emergency? Can we envision better processes and opportunities? Can we test them?

This journal has from the outset addressed practitioners in the field: arbitrators, mediators, negotiators and advocates in ADR. We try to focus on important developments and issues in a concise way that may whet your appetite for more or inform you of matters you would not necessarily encounter. In this issue, we are adding a section on the future of ADR. Here we hope to explore ideas about the broader goals, sources, methods, and models for the improvement of our field whether in a specific arena or more generally, whether homegrown or borrowed.

Our new exploration of possible futures matches well with Elayne Greenberg's column on ethics. We need always be mindful that change must align with the underlying ethical responsibilities under the various standards that apply to our work. In her column this month, Elayne addresses arbitrators and mediators changing hats in the same matter and opines that it is unlikely that it can be ethically done. This was also one of the topics we explored in our spring 2021 issue that discussed the work of the CCA/IMI Straus Institute Mixed Mode Task Force. In an article in that issue on switching hats, Thomas Stipanovich and Moti Mironi agreed that there were ethical challenges but also thought they could be met by skilled neutrals with both mediation and arbitration skills and pointed to the need for a widely accepted authoritative set of practice guidelines. Developments in this arena, prompted by the desires of the disputants themselves, may lead us to a changed future where more than a few arbitrators and mediators develop the competence, disclosures, and processes needed to meet a request initiated by disputants to serve in both roles. In addition, there is a widening exploration of techniques that can expand opportunities for dispute avoidance or early resolution in either mediation or arbitration, or provide a process design mixing and ordering processes with one or more neutrals that meets the specific needs of a dispute. What will be the tools and techniques of the future? How can we use the insights garnered from psychology and decision science? How can we improve the understanding of lawyers and disputants about the choices available to them? How can we better assure transparency and fairness? Are there strategies to improve acceptance and/or enforcement of outcomes? Let's broaden our vision to prepare for and anticipate change. Our first articles on the future of ADR are presented by John Lande and Colin Rule and we thank them for launching this effort.

Our journal is the journal of our Dispute Resolution Section. As always, we provide a message from the Chair on the Section's work and accomplishment, a reflection of our active membership, committee chairs, and board members. Thanks to all of you, our Section continues to thrive.

Our authors also bring you information to assist you in navigating information security obligations. Lea Haber Kuck, the author of this article, has joined our editorial board. Tim Warner discusses public and judicial hostility to arbitration and what to do about it. Giuseppe De Palo and Mary Trevor discuss the need and means for encouraging the use of mediation in areas of the world where uptake has lagged. F. Peter Phillips uses an Antarctic voyage and photographs to inspire his discussion on the unseen limits facing mediators. Richard Mattiaccio discusses the use of the UNIDROIT Principles of International Commercial contracts. Andrea Kupfer Schneider and Chris Honeyman inform us of new roles for advocates and neutrals in hybrid warfare. We also have a review by Dr. Lara M. Pair of Derek Roebuck last contribution: *More Disputes and Differences; Essays on the History of Arbitration and it Continuing Relevance.* Last and always awaited is our editorial board member, Alfred Feliu's Case Notes.

We are grateful for these important and timely contributions and hope you will enjoy the issue.

Laura A. Kaster, Edna Sussman, Sherman Kahn

Co-Editors-in-Chief

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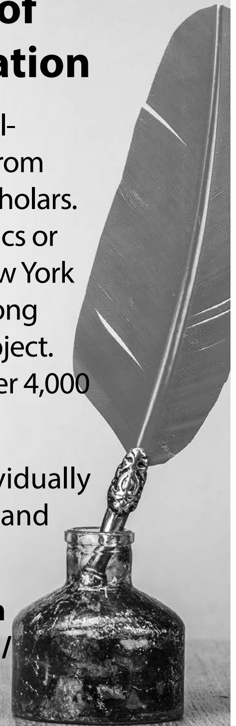
The editors would like to see well-written and researched articles from practicing attorneys and legal scholars. They should focus on timely topics or provide historical context for New York State law and demonstrate a strong voice and a command of the subject. Please keep all submissions under 4,000 words.

All articles are also posted individually on the website for easy linking and sharing.

Please review our submission guidelines at www.nysba.org/JournalSubmission.



NEW YORK STATE BAR ASSOCIATION

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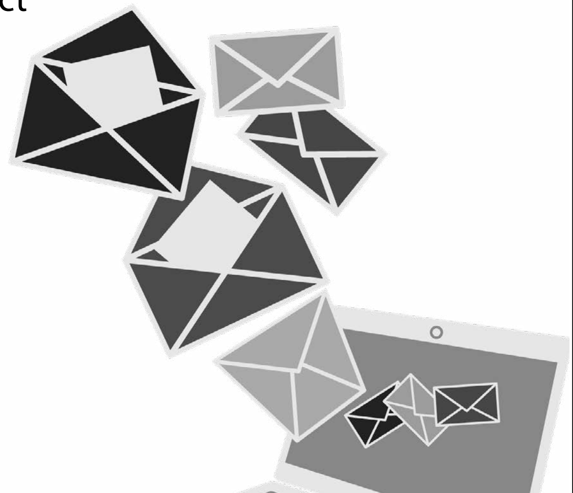
Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.



Hats for Sale: Efficiency, Economics, and Process Integrity

Professor Elayne E. Greenberg

Introduction

What are the ethical considerations for a mediator when a neutral is asked to be both the mediator and arbitrator on the same case? Some parties and their lawyers opt to select one neutral to serve as both the mediator and arbitrator on the same case, believing it will be a more efficient and cost-effective way to resolve their dispute. After all, the mediator already knows the facts of the case. Why waste time and money getting another neutral up to speed? This design choice, however, may collide with the mediator ethical mandates of party self-determination,[1] neutral impartiality,[2] confidentiality,[3] and process integrity,[4] and compromise the benefits of mediation. What makes this neutral selection even more challenging is that there is no consensus about the best way to ethically proceed.[5] This column highlights these issues.

Contexts

This ethical conundrum arises in multiple contexts where the neutral is asked to be the arbitrator and mediator in the same matter. This column will focus on two domestic contexts in which the neutral serves as the mediator first and then is asked to serve as the arbitrator on the same matter if a mediated agreement is not reached.[6]

Context one: there is no multi-step dispute resolution clause, and a dispute arises between the parties. Rather than litigate, the parties voluntarily opt to mediate their dispute. After working with the mediator, the parties conclude that they are unable to resolve the dispute in mediation. They decide to resolve the dispute in arbitration. Rather than selecting a different neutral to arbitrate the dispute, the parties would like the mediator on this dispute to now change hats and serve as the arbitrator. After all, the mediator is already up to speed on the issues.

Context two: the parties have reached a deal and are now drafting a multi-step dispute resolution clause to help resolve any disputes that may arise out of the agreement. The parties prioritize the cost and efficiency of achieving a resolution and select the same neutral to be both the mediator and the arbitrator to resolve each dispute.

Context one raises the procedural issues that should be observed when parties in mediation then decide they want the mediator to switch hats and arbitrate the dispute. AAA, CPR, and Jams acknowledge the ethical challenge this presents. Jeffrey T. Zaino Esq., Vice President of the American Arbitration Association contributes, "AAA is not 100% comfortable with having the mediator then become the arbitrator of the same dispute.[7] However, if the parties and the mediator agree to this, put it in a signed writing, then it's party self-determination."

Allen Waxman, president and CEO of the International Institute for Conflict Prevention & Resolution, opined, "It is challenging but not impossible. It's doable if certain guardrails and procedures are followed such as party consent and awareness of the other ethical issues."

Kim Taylor, JAMS president, concurs:

> While JAMS does not encourage the practice of a single neutral serving as both the mediator and the arbitrator in a 'Med-Arb' process, we recognize that parties sometimes include this process in their arbitration agreements, or mutually desire that the mediator change roles and issue a binding arbitration award in the absence of a mediated settlement. Our arbitration rules provide for such a process, with agreement by the parties.

The following real-life example of context raises two questions whether the appointment of the same neutral as both the mediator and arbitrator pursuant to a dispute resolution clause compromises the benefits of mediation as a party-directed dispute resolution process. When St. John's Law School Vice Dean Emeritus Andrew Simons was in private practice, he was appointed, pursuant to a multi-step dispute resolution clause, to serve as both the mediator and arbitrator to help resolve any disputes that might arise between the two compa-

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nies who were implementing the transfer terms of property ownership. In accordance with the multi-step dispute resolution clause, the parties first attempted to negotiate a resolution themselves before they were contractually obligated to mediate. In those instances where there the parties were unable to negotiate an agreement, they were contractually obligated to proceed to mediation. However, most of the presenting disputes were resolved in arbitration, not mediation. An unanswered question is whether the parties themselves were participating in mediation differently, merely checking mediation off as a contractual obligation, knowing that Vice Dean Emeritus Simons would be the ultimate decision maker in arbitration. Vice Dean Emeritus Simons opined, "It might have been more beneficial for the companies if they had a separate mediator."

Beyond Cost and Efficiency—Ethical Consideration

As indicated by the contexts above, the practical and ethical considerations may differ depending on how the issue of changing hats arises. Mediators who are considering serving as both the mediator and the arbitrator on the same matter should consider how their ethical obligations as mediators might impact their decision. One consideration, how might wearing two hats affects a mediator's ethical mandate to conduct a quality mediation process? Proponents of having a neutral assume two hats on the same matter defend that this is just party self-determination. However, the Model Standards clarify that party self-determination is not an unfettered right. It has limitations. Standard I Self-Determination A(1) provides:

> Although party self-determination for process design is a fundamental principle of mediation practice, *a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these standards.*[8]

There is no consensus on what is a quality mediation process,[9] adding to the complexity of the issue.

Depending on your understanding of what constitutes a quality mediation process, might a mediator's impartiality may be compromised if the mediator opts to wear two hats: one as the mediator and one as the arbitrator? Model Standard II B(1) Impartiality provides:

> A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality
>
> > 1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or **performance at a mediation,** or for any other reason.[10]

The unconscious influence on the mediation has to be recognized independent of the parties' knowledge and desires. If the neutral knows that they will serve as both mediator and arbitrator pursuant to a multi-step dispute resolution clause, I question if that neutral can maintain their impartiality. Might the mediator also observe the mediation behavior of the parties through the selective perception lens of an arbitrator, assessing which party violated the law? Even if the mediator does not agree to serve as the arbitrator on the same case until the conclusion of the mediation, might the mediator have formed opinions about the performance of the disputing parties that carries over into the arbitration? Adding to this conundrum, skilled advocates have boasted how they "spin the mediator" so that the mediator views their side more favorably whether their case will be resolved in mediation or in arbitration.[11] Experience supported by behavioral research has shown us that impartiality is an aspirational goal that ethical mediators strive to maintain throughout their mediations However, when neutrals take on the roles of both mediator and arbitrator, mediator impartiality is likely to be seriously challenged.

Another ethical challenge presented when a neutral is wearing two hats, is the risk that the mediator might violate their ethical mandate of confidentiality, a foundational principle of candid discourse in mediation. Might the confidential information that parties share with the mediator during mediation caucuses or mediation written submissions challenge mediator impartiality, violate mediation confidentiality, and shape the mediator turned arbitrator's decision making? If caucuses have been held, how will confidential exchanges be handled—will the parties agree that full disclosures must be made? Is the neutral capable of keeping track of all potential disclosures?

Some mediators have declined to take on the role of arbitrator for the same case, while others have agreed to assume the additional role. In those cases where the mediator has also agreed to arbitrate the same matter, the Model Standards Standard VI Quality of the Process instruct how the mediator should ethically proceed if the take on an additional dispute resolution role such as that of arbitrator.

Standard VI Quality of the Process provides:

> A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes

such role assumes different duties and responsibilities that may be governed by other standards.[12]

As presented earlier in this column, AAA, CPR, and JAMS reinforce the importance of obtaining parties' consent if a mediator is going to switch to an arbitrator's hat. Yet, even sophisticated parties may not fully appreciate the full import of what they are consenting to if they agree to a mediator switching to an arbitrator's hat.

. . . Parties, you don't have to abandon your desire for cost-effective and efficient processes

Yes, parties and their lawyers want cost-effective and efficient dispute resolution processes.

And, dispute resolution providers such as AAA offer variations of concurrent dispute resolution processes in which the parties participate concurrently in both arbitration and mediation with separate neutrals.[13]

Beyond cost-effectiveness and efficiency, let's not forget that parties also value a dispute resolution process like mediation, irrespective of the outcome, where the neutral is impartial and provides the parties an opportunity to be heard.[14] Yes, even sophisticated business people are human beings who universally want to have the emotional issues that are part of the impasses to settlement finally addressed.[15] And, mediation provides that opportunity.

So . . .

I can't help but wonder if this mediator "two hats issue" is actually a continuation of the quantitative-efficiency versus qualitative-justice debate that began in the 1970's, challenging whether mediation is even a valued process choice.[16] I question if those that support the mediator "two hats" approach, base their support on misinterpretations of mediator ethics mandates of party self-determination, quality of process, confidential and mediator impartiality. Moreover, I question the faulty assumption that neutrals can be skilled at both mediation and arbitration, ignoring the distinct philosophical maps and skills each professional role requires.

From the mediator's perspective, sequentially wearing two different hats increases the likelihood that a mediator might compromise their ethical mandates and diminish the benefits of mediation. As a party-directed process, mediation offers parties an unparalleled dispute resolution process choice. It is here that the parties, with the support of the mediator, can have candid conversations with each other, take control of how their dispute is resolved, and collaborate with their counterparts to resolve their dispute in ways that make economic and emotional sense to the parties.

I agree that parties are looking for cost-effective and efficient dispute resolution processes.[17] However, I don't believe that the "two hat" option is the solution. In fact, Professor Jacqueline Nolan Haley and Professor Thomas Stipanowich have opined how some attorneys, more accustomed to advocating in a litigation model, are misusing mediation and arbitration, so that neither process has become efficient or cost-effective.[18]

Dispute resolution processes such as mediation, a party-directed process, and arbitration, a third-party directed process, expand parties' justice options. Each process offers parties and their attorneys distinct benefits and remedies. As influencers of our justice options, ADR providers, neutrals, and advocates need to diligently preserve the ethics and process integrity that are fundamental to each process. The "two hat" option challenges neutrals' ethics and process integrity. Your thoughts?

Endnotes

1. Model Standards of Conduct for Mediators (2005), Standard I Self-Determination at https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf
2. Model Standards of Conduct for Mediators (2005) Standard II Impartiality at https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf.
3. Model Standards of Conduct for Mediators (2005), Standard V Confidentiality at https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf.
4. Model Standards of Conduct for Mediators (2005), Standard VI Quality of the Process at https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf.
5. *See, e.g.* Thomas Stipanowich & Mordehai Mironi, *"Switching Hats": Developing International Practice Guidance for Single-Neutral Med-Arb, Arb-Med, and Arb-Med- Arb* (May 2021) at https://imimediation.org/2021/05/04/switching-hats-developing-international-practice-guidance-for-single-neutral-med-arb-arb-med-and-arb-med-arb/; Yijia Lu, *Med-Arb and Arb-Med: A Law and Economic Analysis*, 27 Harv. Negot. L Rev. 253 (Spring 2022).
6. There may be instances where the arbitrator on a matter is asked to then serve as the mediator on the matter before the arbitrator issues their award. That context also implicates arbitrator ethics issues. That discussion is beyond the scope of this column.
7. *See* https://go.adr.org/910mediationrule.html. (Both R. 9 and R. 10 "Unless agreed to by all parties and the mediator, the mediator shall not be appointed as the arbitrator on the case.")
8. Model Standards of Conduct for Mediators (2005), Standard I Self-Determination at https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf

9. *See e.g* Elayne E. Greenberg, *What They Really Want . . . Bringing Objective Evaluation into Mediation*, chapter in Bankruptcy Mediation (ABI 2016)
10. Model Standards of Conduct for Mediators (2005) Standard II Impartiality at https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf.
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15. Roger Fisher & Daniel Shapiro, Beyond Reason: Using Emotions as You Negotiate, Viking Adult, 2005.
16. *See, e.g.* Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR",* 19 Florida State L. Rev. 1 (1991); Elayne E. Greenberg, *ADR's Place at the Justice Table* in *Discussion in Dispute Resolution,* Edited by Art Hinshaw, Andrea Kupfer Schneider, and Sarah Rudolph Cole, Oxford Univ. Pr., 2021.
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AWARD RECIPIENTS

The Section recognized Leslie Berkoff, Evan Spelfogel, and Simeon Baum for their contributions to the Section at the April Executive Committee meeting.

Noah Hanft (left), DRS Section Chair, presents award to Leslie Berkoff, Executive Director of the DRS Mediation Tournament.

Evan Spelfogel, Secretary of the DRS, who is retiring from his post.

Simeon Baum (left), founder of the Dispute Resolution Section.

The Rise of Machine Learning in Dispute Resolution

By Colin Rule

As someone who has worked in the online dispute resolution (ODR) field for more than two decades, I can't count the number of times someone has asked me if I was working on the creation of a robot mediator or arbitrator. Ninety-nine percent of my time in ODR has focused on how to use technology to better facilitate human-to-human communication, but whenever the Q&A session starts after one of my presentations on ODR, it becomes clear once again that the possibility of robot arbitrators is far more compelling to the average person than discussing more effective online meeting rooms or blind bidding algorithms.

Maybe the fascination stems from all the science fiction movies and TV shows we had in the '70s and '80s where robots would become commonplace and do whatever humans told them to do. I think back to those episodes of "Lost in Space" where Robby the Robot would carry around firewood and indicate when danger was approaching, even though it was clearly just a clunky metal costume with a person inside. The robots got a little more believable with R2D2 and C3PO in Star Wars, but they still felt like George Lucas' fantasy more than reality.

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But as the years have gone by, we've seen technology deliver on many imagined possibilities from our childhoods, from Dick Tracy's wrist radio (the iWatch gets pretty close) to "Knight Rider"'s talking car (now named Siri or Alexa). As the saying goes, most advanced technologies are indistinguishable from magic, and we've gotten inured to the release of seemingly magical new technologies on a regular basis.

There was a series of commercials from AT&T in the early 1990s entitled "You Will," narrated by Tom Selleck. In each installment he would show mock-ups of people in the future doing incredible things, like sending a fax off a tablet while sitting on the beach, or putting your kids to bed from the other side of the world via videoconference on a pay phone. Now some of the projections were a little off (no more faxes or

payphones) but most of the predictions were on the money, and those futuristic commercials would now be viewed by Gen Z as unremarkable.

What is slightly different from those AT&T commercials is the edge of potential malice that now comes hand in glove with technological innovation. The fear in the '70s and '80s was that technology would dehumanize us, and maybe turn us into unemotional robots (see the movie "2001")—but that hasn't really come to pass. In fact, the most dominant dynamic is the opposite: we have humanized technology, and it has magnified many of our all-too-human weaknesses. Now social media pushes conspiracy theories and hateful sentiments around the world at the speed of light over fiber optic cables at the bottom of the sea before (as Jonathan Swift put it) the truth comes limping after.

That might be another reason why the robot mediator and arbitrator idea has gotten so much traction: we're worried about the ramifications for us. If the robots do a better job than we can do, does that mean we will become useless? Will we be obsolete relics, just waiting to be upgraded to a better model? This concern isn't unique to dispute resolvers, of course; similar fears are being expressed by others in well paid professions like finance, medicine, and law.

"Artificial Intelligence (or AI) has become something of a Rorschach test: what you see when you look at it says more about you than about what you're looking at."

And the logical next question: if the robots do in fact replace us, who is going to ensure that the people programming the robots aren't putting their fingers on the scales? We've put a lot of time and energy into developing ethical rules for dispute resolution practice, and we have systems to ensure that human mediators and arbitrators are playing by those rules. It is much harder to look into the "eyes" of a robot (webcams?) to see whether it's planning to respect rules around confidentiality, neutrality, and privacy.

Artificial Intelligence (or AI) has become something of a Rorschach test: what you see when you look at it says more about you than about what you're looking at. Some people think of the "Terminator" movies when AI is brought up, with the rogue SKYNET AI deciding humans are the problem and starting a process of eradication. Others think more of the movie "WALL-E", where the AI runs everything and just keeps the useless humans happy in their floating chairs by playing them silly videos and bringing them milkshakes. But in the process the specifics of AI are being overshadowed by all the paranoia and hagiography. AI is seen as either a savior or a catastrophe, with little possibility in between.

This may be why we in the ODR field we have largely eschewed the language of AI to describe the roles technology can play in a dispute resolution process. We have instead opted for the concept of the "fourth party." In this paradigm the disputants are party one and party two, the human neutral (the mediator or arbitrator) is party three, and technology (in all of its forms) is party four. This conceptualization emphasizes the collaboration between human neutrals and the technology because there are some tasks the third party can do better and some tasks the fourth party can do better. The primary question instead becomes how to optimize the partnership to achieve our shared objective, which is finding a fast and fair resolution to the dispute at hand.

We already rely on the fourth party's help in myriad ways. Maybe it's providing an intake form on our website, or scheduling a conference call, or processing payments, or collecting and organizing documents, or sending calendar reminders. Many of these more mundane administrative tasks were human jobs before, but now we give them over to the fourth party without a moment's hesitation. In fact, we'd be annoyed if we had to go back to handling them manually.

But the rise of machine learning is making the fourth party smarter every day, and that is expanding the capabilities of our technological partner. Now the fourth party can read and understand natural language, making it newly relevant in other parts of the dispute resolution process, from coaching to research and evaluating BATNAs and WATNAs. And as computer processors get more powerful and we are able to store more and more information, the power of machine learning will continue to grow.

You might have heard of the Turing Test, devised by Alan Turing in 1950, which focuses on "a machine's ability to exhibit intelligent behavior equivalent to, or indistinguishable from, that of a human." If you sit down at a computer and communicate with a machine learning algorithm through text message, and you can't tell whether you're speaking to a machine or a person, then that machine learning algorithm has passed the Turing Test. Expanding computing power has made it much harder tell what is generated by a fourth party and what is generated by a third party.

But the real question is, what do these improvements in machine learning mean for the future practice of dispute resolution? Several opportunities jump to mind.

1. Predictive analytics: Machine learning algorithms can analyze data from past disputes to identify patterns and predict the likelihood of future disputes. This can help mediators, arbitrators, and other dispute resolution professionals anticipate and prevent disputes before they arise.

2. Decision support: Machine learning algorithms can help dispute resolution professionals make more informed decisions by providing them with insights and recommendations based on data analysis. For example, an algorithm could analyze data from past disputes to identify common factors that led to successful resolutions and suggest strategies for resolving similar disputes in the future.

3. Automated dispute resolution: Machine learning algorithms can be used to automate certain aspects of the dispute resolution process, such as document analysis and contract interpretation. This can help to speed up the process and reduce the workload for dispute resolution professionals.

4. Enhanced collaboration: Machine learning algorithms can facilitate collaboration between dispute resolution professionals by providing them with real-time data and analytics that can help them make more informed decisions.

Overall, the use of machine learning in dispute resolution has the potential to improve the efficiency and effectiveness of the process, helping to resolve disputes more quickly and accurately.

If you'd like an example of how an algorithm can pass the Turing Test, consider that I didn't write the points above. Starting with "Predictive analytics…" and ending with "…resolve disputes more quickly and accurately," that passage was written by a new algorithm called GPTchat in response to my question, "how will machine learning change the practice of dispute resolution?"

There are a few indications in the GPTchat passage that it's not me generating the content. In point four, saying that machine learning can "facilitate collaboration between dispute resolution professionals" to "help them make better decisions" represents a slight misunderstanding of the role of mediators, for instance. The sentiments expressed, and the language used, is a little insipid and devoid of voice. But that is probably by design—quirky results would undermine the circumspect tone the programmers aimed to integrate into GPTchat's "voice." But it is clearly within the bounds of the kind of writing we see every day on the internet, in blogs, in student papers, and even in newspapers.

It is not a stretch to contemplate the creation of similar machine-learning powered tools that are trained to help parties find a solution by mutual agreement, or trained to listen to the arguments of both parties and render a decision. They can provide responses 24x7, only asking for a penny's worth of energy, and they never take a break. Such tools will likely be imperfect and inaccurate at the beginning, but with each case they will learn more, and they will improve over time as the technologies they leverage underneath the hood become more powerful.

From my perspective, those of us in the dispute resolution field should not fear these developments. Yes, there are risks in the disruptions they will introduce, but there are many opportunities as well. AI and machine learning are just tools, and as with all tools, we need to set rules and guidelines to minimize the risk of harm. We must always ensure that the fourth parties we work with are under human control, that they are constantly reviewed and reviewable, and that they are monitored in a transparent way to ensure their compliance with the ethical guidelines that govern our field.

Used correctly, these tools will expand the reach of our field into dispute types and geographies that we were previously unable to service. They could result in a major expansion in access to justice around the world, with more peaceful resolutions and more fairness and justice. Yes, many questions still need to be answered, and many best practices and ethical rules are yet to be devised. But from my perspective the promise outweighs the pitfalls, and we should work together to build and refine these machine learning mechanisms to devise the optimal fourth party partner that can best assist us in helping our parties find resolution.

Think DSD, Not ADR

By John Lande

Everyone knows that the term "ADR" makes no sense. But we stick with it because there's no general consensus for a preferable alternative. This article argues that dispute system design (DSD) is a better paradigm that should succeed ADR.

Thomas S. Kuhn's classic book, *The Structure of Scientific Revolutions*, describes the process of the famous "paradigm shift." Scientists develop theoretical paradigms that are generally accepted in their scientific community. Over time, some scientists find "anomalies" that cannot be solved within the existing paradigms. Eventually, anomalies accumulate, and innovative scientists develop new theories to explain the anomalies. If a critical mass of scientists agrees on a new paradigm, there is a paradigm shift to the next generally-accepted paradigm.[1]

This article argues that it is time for a paradigm shift in the way we define our field and engage with our stakeholders. Using DSD integrates the entire dispute resolution universe in a way that makes more sense than ADR.

What's the Problem with "ADR"?

Originally, "ADR" meant "alternative" dispute resolution. Over time, people in our field didn't want to identify it as simply *not* being litigation, and some people have used the term "appropriate" dispute resolution, for example. Some generally prefer the unqualified term "dispute resolution." But even that term doesn't have a good definition because there is no essential characteristic of the field, especially a characteristic that other fields cannot claim as well. For example, not all dispute resolution processes involve neutral third parties, focus on parties' interests, promote party self-determination, provide high-quality procedures, promise privacy or confidentiality, or are innovative.[2] The lack of consensus about the name and definition of the field reflects deeper conceptual problems for the field.

"You already do DSD whether you know it or not."

Academics and practitioners generally consider ADR to be a collection of distinct dispute resolution procedures—other than litigation. However, Marc Galanter's concept of "litigotiation" reflects a fundamental reality of civil litigation inconsistent with this traditional conception of dispute resolution. He defines it as "the strategic pursuit of a settlement through mobilizing the court process." He writes, "On the contemporary American legal scene[,] the negotiation of disputes is not an alternative to litigation. It is only a slight exaggeration to say that it *is* litigation. There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals." This reflects the reality that in many—probably most—contested lawsuits, negotiation and litigation are "inseparably entwined."[3]

A similar dynamic occurs in what I called "liti-mediation" cultures, where mediation is routinely integrated in the litigation process. As a result, lawyers expect cases to be resolved in mediation, develop pretrial litigation strategies accordingly, and cause mediators to modify their procedures.[4]

What Is DSD?

Dispute system design is the "applied art and science of designing the means to prevent, manage, and resolve streams of disputes or conflict" instead of handling individual disputes on an ad hoc basis. DSD is well established in dispute resolution theory and practice.[5]

In DSD processes, designers' goals may include providing fairness and justice, efficiency, engagement of stakeholders in system design and implementation, dispute prevention, flexibility and choice of multiple process options, matching of design with available resources, training of stakeholders, and accountability. DSD processes involve identifying stakeholders' dispute system goals; understanding the context and culture affecting the system; consideration of appropriate dispute prevention, management, and resolution processes; and development of appropriate incentives and disincentives for using the system.[6]

In essence, DSD is tailoring dispute systems to the needs of stakeholders, especially disputing parties. Good designs fit the stakeholders' context and culture so that the dispute processes produce as much satisfaction of the parties' procedural and substantive goals as reasonably possible.

DSD is not limited to initial design of dispute systems as it includes potential monitoring of operation, evaluation,

and periodic revision. Nor does it necessarily deal with the entire system, as designers can focus on parts of the system. Nor does it require a large-scale, self-conscious design effort or someone entitled a "system designer." For example, courts frequently engage in dispute system design as they develop and revise elements of their mediation programs such as deadlines and reporting requirements – even though they do not think of this as DSD.

"Judge DiFiore is a member of the DSD field but not ADR."

DSD in Organizations

People use DSD in a wide range of organizational contexts including court and community programs; mass claims facilities; labor and employment systems, commercial, consumer, environmental, and international disputes; transitional justice processes for dealing with the aftermath of wars; and systems for collaborative governance.[7]

The development of New York State's presumptive mediation system is a good example of a DSD process. Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence K. Marks initiated a process to develop the system, which involved a wide range of stakeholders including judges, court staff, local bar associations, and an advisory committee. In developing this initiative, the courts relied on empirical research, issued uniform rules, and encouraged development of local protocols, guidelines, and best practices in different jurisdictions. The initiative included plans to collect data for program evaluation and improvements.[8]

Court-connected mediation programs can (re)design specific elements of their programs reflecting the values of key stakeholders. In my article, *Charting a Middle Course for Court-Connected Mediation*, I identified two general perspectives about such programs, which I called "voluntary mediation" and "liti-mediation" perspectives. The voluntary perspective emphasizes parties' decision-making in mediation. Whereas litigation is designed to produce binding adjudications, mediation is designed to help parties voluntarily communicate, negotiate, and settle cases. A liti-mediation perspective emphasizes the values of parties reaching appropriate settlements and avoiding courts' expenditure of limited resources on cases that might be settled in mediation. From this perspective, courts must regulate mediation and enforce rules to promote these goals.[9]

I recommended that courts use DSD processes to accommodate both perspectives in adopting rules about any desired policies regarding attendance in mediation, opt-out procedures, duty to negotiate, "good faith" requirements, obligations to bring sufficient settlement authority, parties' right to leave mediation, and confidentiality.[10]

You Already Do DSD Whether You Know It or Not

Readers of this article probably don't have the job title "dispute system designer," but DSD almost certainly is part of your work. People often think of DSD as being used only in large organizations, but individuals and small practice groups also handle streams of cases and can use these principles and techniques to improve their case management and dispute resolution procedures.

Rather than deciding from scratch how to mediate for every new case, mediators develop systems of default procedures that they adapt to fit the parties, issues, and circumstances of each case. In practice, mediation systems consist of the combination of mediators' actions before, during, and after mediation sessions. (For simplicity, this discussion focuses on mediators. These ideas can apply to practitioners providing services as neutrals, such as arbitrators and neutral evaluators, and representing clients in those processes.)

For example, many mediators use regular pre-session procedures to design and tailor the mediation process for each case. These may include educating parties about the process, soliciting submission of documents, and discussing specific aspects of disputes. During mediation sessions, mediators have default techniques about joint opening sessions or caucuses, the focus of their questions (such as about expected court results and/or parties' intangible interests), parties' participation, use of technological tools, seating arrangements, and even lunch breaks, among many other things. In addition to developing routine procedures, mediators identify categories of challenging situations they regularly encounter and develop strategies for dealing with them.

Mediators generally don't call their regular approaches "systems," but that is what they are. Their systems evolve over time based on their practice experiences, reading, training, education, and/or mentoring. Thus, novice mediators use simple systems whereas experienced mediators develop elaborate repertoires of techniques.

Similarly, lawyers representing clients in "ADR" processes also use dispute resolution systems. Lawyers develop default procedures for selecting mediators, preparing clients, engaging with mediators before mediation sessions, using routine negotiation gambits, and managing difficult situations.

How Can Using DSD Help Our Field?

Using a DSD frame avoids the illogical and counterproductive exclusion of lawyers and judges from "our" field. They perform many of the same tasks as "ADR" professionals. For example, lawyers-as-advocates use similar skill sets as many

mediators when communicating with clients, giving advice about dispute resolution options, preparing to participate in dispute resolution processes, helping assess cases, giving opinions or advice about substantive issues, and predicting outcomes.[11]

Identifying our field as DSD would result in a general role conception of dispute resolution practitioner for some practitioners. In the legal context, we now think of practitioners who primarily perform a single function such as being a mediator or litigator. Yet many practitioners act in different roles in various cases. For example, a lawyer may serve as a negotiator, advocate in mediation, litigator, trial lawyer, mediator, arbitrator, and many other possible roles.

Obviously, judges adjudicate disputes—but so do arbitrators, who we universally recognize as part of our field. Judges regularly adjudicate issues related to mediation and arbitration. Judges frequently conduct settlement conferences, similar to mediation. Judges and court administrators manage court-connected dispute resolution programs and are some of the biggest boosters of ADR.

The big difference between judges and practitioners who are universally recognized as part of "our" field is that judges are public employees. But so are court-employed mediators.

Consider this. Judge DiFiore is a member of the DSD field but not ADR.

DSD also provides a logical integration of the entire dispute resolution universe. ADR is an ever-expanding collection of disparate processes, including many mixed-mode variations as well as specialized procedures like standing neutrals, parent coordination, collaborative law, and many more. By contrast, DSD offers a relatively fixed set of concepts and procedures that can be applied in virtually any context.

Conclusion

"ADR" is a name without a valid conceptual meaning that we continue to use because there is no general consensus for an alternative. Switching to a DSD paradigm for the field would require overcoming our status quo bias. I believe that the benefits would be worth the effort. Using a DSD paradigm would help everyone better understand, plan, and use the full range of dispute prevention and resolution processes.

Endnotes

1. Thomas S. Kuhn, The Structure of Scientific Revolutions 52-91(4th ed. 2012).
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5. Lisa Blomgren Amsler, Janet K. Martinez & Stephanie E. Smith, Dispute System Design: Preventing, Managing, and Resolving Conflict 7-12 (2020).
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7. *Id.* at 111-324.
8. Hon. Lawrence K. Marks, *Court System to Implement Presumptive, Early Alternative Dispute Resolution for Civil Cases,* May 14, 2019, http://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf.
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10. *Id.* at 68-82.
11. John Lande, *Concepts That Can Help Practitioners Help Parties Make Decisions in Disputes*, Indisputably Blog (Dec. 8, 2020), https://indisputably.classcaster.net/2020/12/concepts-that-can-help-practitioners-help-parties-make-decisions-in-disputes/; John Lande, *The Legal Profession, Judiciary, and Dispute Resolution*, Indisputably Blog (Feb. 28, 2022), https://indisputably.classcaster.net/2022/02/the-legal-profession-judiciary-and-dispute-resolution/.

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This article is adapted from John Lande, *Real Mediation Systems to Help Parties and Mediators Achieve Their Goals*, 24 Cardozo J. Conf. Resol. (forthcoming 2023).

New Resources To Assist Arbitrators Navigating Information Security Obligations

Lea Haber Kuck

Efforts have been made within the arbitration community over the last several years to convince arbitrators that basic competence in technology, including an awareness of information security,[1] is not only important to the credibility of arbitration as a system, but also an ethical and professional obligation.[2] The global pandemic heightened and accelerated attention to this issue. Today, an arbitrator's obligation to be competent in technology and issues of information security can no longer be disputed or ignored.

Recognizing that an attorney's ethical responsibility includes protecting client information, New York recently became the first state to impose a CLE requirement for all New York attorneys in the cybersecurity, privacy and data protection category.[3] In addition, recent data protection regulations, enacted both in and outside the United States, impose legal obligations for the handling of certain sensitive information. Arbitral institutions also now increasingly require technological competence and information security awareness for arbitrators.[4]

This article highlights issues that arise at various phases of the arbitration that trigger arbitrator vigilance, although the specific steps actions that an arbitrator is required to take will depend on the nature of an arbitrator's practice and will evolve as technology develops and cyber threats become more sophisticated.

As discussed below, several recently released resources are available to help arbitrators navigate these issues.[5] These resources include a revised edition of the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (the "Protocol") released in September 2022.[6] The Protocol has been updated to "reflect that the cybersecurity and data protection environment in which the Protocol operates has matured in the nearly three years since the Protocol was launched . . . ."[7] It "provides a recommended framework to guide tribunals, parties, and administering institutions in their considerations of what information security measures are reasonable to apply to a particular arbitration matter."[8] Although the Protocol was drafted with international commercial arbitration in mind, it is also a useful for domestic arbitration matters and mediations.[9]

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"Today, an arbitrator's obligation to be competent in technology and issues of information security can no longer be disputed or ignored."

New York's new CLE requirement will also likely lead to the proliferation of programs and additional guidance relating to information security issues that will enable arbitrators to tap into the current thinking on these issues and maintain best practices as they evolve.

Individual Information Security Practices

Arbitrators have a twofold responsibility concerning information security. They have the obligation to ensure that the information that they receive in connection with their arbitration practice is adequately protected and remains confidential, and they must also be prepared to address information security as they manage arbitration proceedings, which will include digitally interdependent parties, as well as, potentially, third party vendors, witnesses and administering arbitral institutions.

With respect to the first obligation, irrespective of the nature of any particular arbitration, arbitrators should have in place a secure information infrastructure and must be aware of how their individual conduct can impact information security. Most data breaches are the result of phishing schemes

and the loss of devices such as laptops, hard drives and USB sticks.[10] For example, clicking on a link in a phishing email could not only compromise the arbitrator's personal information, but also, without proper safeguards in place, information relating to the arbitrations the arbitrator is overseeing.

Schedule A to the Protocol, Baseline Security Measures, provides a "non-exhaustive checklist of general cybersecurity measures that all custodians of arbitration-related information should consider implementing in their day-to-day use of technology in arbitration-related activities." Schedule C builds on Schedule A with Sample Information Security Measures, suggesting measures that can be implemented not only in a particular arbitration, but also as part of regular business practices. Such measures include not only setting up a secure information infrastructure in which to work, but also personal practices, such as avoiding or mitigating the use of public networks, being alert to phishing attempts, managing passwords, enabling remote locations tracking and data wiping functions to be used in the event devices are lost or stolen, and minimizing travel-related risk.[11] Schedule E to the Protocol lists selected references which can be consulted for guidance on cybersecurity for lawyers and arbitrators, data protection laws and regulations, incident response/data breach, password guidance, and technology reviews and recommendations.

As the Protocol recognizes,[12] information security and data protection issues are closely connected. Regulations governing the processing of personal data have been increasing around the globe, including for example, the New York SHIELD Act, the California Consumer Protection Act and the European Union General Data Protection Regulation (GDPR). Arbitrators need to be aware of what is required by the regulations that may be applicable to their work. Arbitrators who focus on highly regulated industries, such as healthcare and financial services, or cross-border arbitrations will need to familiarize themselves with the specific data protection regulations that are likely to impact their cases. The ICCA-IBA Roadmap to Data Protection in International Arbitration (the "Roadmap"), also released in September 2022, provides helpful guidance on addressing of data protection laws during an arbitration.[13]

The acceleration of the use technology during the pandemic has also led to the creation of several resources providing more general guidance on the use of technology in arbitration while addressing cybersecurity and data protection considerations.[14] These resources can be helpful to arbitrators considering how to effectively use technology in their practices.

Establishing Information Security Procedures at the Outset of the Arbitration

Once an arbitration has been commenced, information security should be raised as early as practicable in the proceeding, but no later than the first case management conference or preliminary hearing.[15] The Protocol provides a framework for parties and arbitrators to consider what information security measures are reasonable in the circumstance of a particular arbitration. These factors include the risk profile of the arbitration;[16] the existing information security practices, infrastructure, and capabilities of the parties, arbitrators and any administering institution, as well as the burdens, costs and relative resources of these arbitral participants; proportionality relative to the size, value, and risk profile of the dispute; the impact of any data protection laws or regulations; and the efficiency of the arbitral process.[17]

"While technology and information security issues may at first seem daunting, many practical resources exist to help arbitrators become comfortable addressing these issues and developing the required technological competence."

The Protocol provides examples of sample language for procedural orders, including for an agenda for the initial case management conference or preliminary hearing, that can be tailored to particular case.[18] Sample procedural language relating to technology tools and solutions is also provided in the ICC Commission Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings ("ICC Report");[19] the Roadmap provides a sample Data Protection Protocol that can be adapted to the needs of a particular arbitration.[20]

Information Security Issues During the Proceedings

In formulating the information security measures to be put in place at the outset of the arbitration, procedures should be considered for each stage of the arbitration. Information security will be particularly relevant during the ex-

change of information among the arbitrators and between the arbitrators and the parties; the storage of arbitration-related information; and hearings and conferences, including videoconferences.[21]

Procedures should also be put in place at the outset to address any breach of information security that may occur during the arbitration. Such procedures should specify what data is covered, describe what constitutes a data breach, specify what notification may be required in the event of a breach, and set forth what obligations the arbitral participants have to each other in the event they become aware of a breach.[22] Schedule D-1 to the Protocol provides sample language for how to prepare for the possibility of a data breach, and Principle 13 addresses the power of the arbitrators to order costs or sanctions in the event of such a breach.

Several resources were developed during the pandemic to provide guidance on the conduct of virtual hearings,[23] but even where hearings and conferences are to take place in person, consideration of appropriate information security measures will be necessary. Issues to be considered may include handling transcripts, recordings or videos of the proceedings; what electronic devise attendees may bring to and use and hearings; and security at the hearing site.[24] To the extent that travel is involved, the parties and arbitrators should take appropriate measures to safeguard information while in transit.[25]

At the Conclusion of the Matter

Procedures should also be put in place at the outset of the arbitration to address what to do with information obtained during the arbitration once the proceeding concludes. It is important that during the proceeding, exchanges of, and access to, information is limited to individuals "need to know basis."[26] Not only does this practice limit the damage in the event of a data breach, it also simplifies document retention and destruction at the end of the proceeding.

In establishing post-arbitration procedures, issues that should be considered include whether information be returned to the parties or safely disposed of; whether a certification of compliance should be required; and what should the timing be for such disposal. The answers to these questions will need to take into account applicable legal and ethical obligations, rules relating to the correction of awards, and award recognition enforcement proceedings.[27]

Conclusion

While technology and information security issues may at first seem daunting, many practical resources exist to help arbitrators become comfortable addressing these issues and developing the required technological competence. The new CLE requirement in New York provides a new opportunity to develop skills in this area.

Endnotes

1. Information security includes "security for all types and forms of electronic and non-electronic information, including both commercial and personal data." ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration, Schedule F.
2. *See, e.g.*, Stephanie Cohen & Mark Morrill, *A Call to Cyber Arms: The International Arbitrators Duty to Avoid Intrusion*, 40 Fordham Int'l L.J. 980 (2017); Steven A. Certilman & Eric Wiechman, *ADR in the Age of Cybersecruity*, 12 New York Dispute Resolution Lawyer 14 (Spring 2019).
3. Effective July 1, 2023, attorneys must complete one credit hour in the category of cybersecurity, privacy and data protection as part of their total CLE requirement. For the complete details of the new requirement, see https:www.nycourts.gov/attorneys/cle.
4. *See, e.g.*, ICDR International Dispute Resolution Procedures, Article 22(3) (2021); London Court of International Arbitration, Arbitration Rules, Article 30A (2020); ICC Note to Parties and Arbitral Tribunal on the Conduct of the Arbitration Under the ICC Rules of Arbitration, Article VII.E (2021), https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf; AAA-ICDR Best Practices Guide for Maintaining Cybersecurity and Privacy, https://www.adr.org/sites/default/files/document_repository/AAA258_Best_Practices_Cybersecurity_Privacy.pdf.
5. A survey conducted in connection with the preparation of the ICC Commission Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings found that there was not widespread awareness of these resources. *See id.* at Appendix A, Section 2.
6. The Protocol is available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-reports-no-6-icca-nyc-bar-cpr-protocol-cybersecurity-international-arbitration-2022-edition.pdf.
7. Forward to Protocol, at xii.
8. Protocol, Principle 1.
9. Forward to the Protocol, at xi.
10. *See, e.g.,* Christine Simmons & Xuimei Dong, *As Hackers Get Smarter Can Law Firms Keep Up*?, The American Lawyer (Oct. 28, 2019).
11. The AAA-ICDR has also issued a helpful checklist to help guide arbitrators in their daily activities. AAA-ICDR Cybersecurity Checklist, available at https://www.adr.org/sites/default/files/document_repository/AAA259_AAA_ICDR_Cybersecurity_Checklist.pdf.
12. *See* Forward to Protocol, at xi-xii.
13. The Roadmap is available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA_Reports_No_7_ICCA-IBA_Joint_Task_Force_on_Data_Protection_in_International_Arbitration.pdf.
14. *See, e,g*, ICC Commission Report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings (2022), available at https://iccwbo.org/content/uploads/sites/3/2022/02/icc-arbitration-and-adr-commission-report-on-leveraging-technology-for-fair-effective-and-efficient-international-arbitration-proceedings.pdf; CIARB Framework Guideline on the Use of Technology in International Arbitration (2021), available at https://www.ciarb.org/media/17507/ciarb-framework-guideline-on-the-use-of-technology-in-international-arbitration.pdf; IBA Technology Resources for Arbitration Practioners (2019), available at https://www.ibanet.org/technology-resources-for-arbitration-practitioners.
15. *See* Protocol, Principle 10.
16. Schedule B to the Protocol recommends factors to be taken into account in making this determination
17. *See* Protocol, Principle 6 and accompanying commentary.
18. *See* Protocol, Schedules D, D-1.
19. ICC Report, App. B.
20. *See* Roadmap, Annex 8.
21. *See* Protocol, Principles 7, 8 & Schedule C.
22. *See* Protocol, Principle 8(c) and accompanying commentary; Schedule A, section VIII; Schedule C, section VII. Schedule D-1 provides sample language to address these issues.
23. *See, e.g.,* AAA-ICDR Virtual Hearing Guide for Arbitrators and Parties, https://go.adr.org/rs/294-SFS-516/images/AAA268_AAA%20Virtual%20Hearing%20Guide%20for%20Arbitrators%20and%20Parties.pdf; CPR Annotated Model Procedural Order for Remote Video Arbitration Proceedings, https://www.cpradr.org/resource-center/protocols-guidelines/model-procedure-order-remote-video-arbitration-proceedings
24. *See* Protocol, Principle 8 and accompanying commentary.
25. *Id.*
26. *See* Protocol, Schedule C.
27. *See* Protocol Principle 8, commentary (f).

Arbitration Under Attack

By Timothy Warner

On May 23, 2022, the United States Supreme Court decided the case of *Morgan v. Sundance, Inc.*[1] In *Morgan*, the plaintiff argued that the defendant had waived its ability to demand arbitration. In deciding the issue, the U.S. Court of Appeals for the Eighth Circuit looked to whether the plaintiff was prejudiced by defendant's actions. The Supreme Court, however, held that the appellate court had erred in considering the issue of prejudice. In making its ruling, the Supreme Court noted that arbitration provisions should be treated the same as any other contractual clause, and "a court may not devise novel rules to favor arbitration over litigation." While not stating it directly, the Supreme Court's ruling calls into question the longstanding presumption in favor of arbitration that the Supreme Court itself created in the 1980's and has promoted ever since.[2] The Court appears to have backtracked on its almost half-century promotion of arbitration.

Indeed, the Court's action is but one front in shifting attitudes related to arbitration as a method of dispute resolution. On March 3, 2022, President Joe Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. The act amended the Federal Arbitration Act (FAA) to allow plaintiffs asserting sexual assault or sexual harassment cases the option to bring those cases in court even if they had previously agreed to arbitrate such disputes. The act also allows class or collective actions related to those claims. The new law essentially carves out sexual assault and sexual harassment claims from mandatory arbitration provisions at the option of the alleged aggrieved party.

On March 17, 2022, the U.S. House of Representatives passed H.R. 963, the Forced Arbitration Injustice Repeal (FAIR) Act. This bill broadly carves out employment, consumer, antitrust and civil rights claims from mandatory arbitration provisions. The FAIR Act also allows class or collective action related to those claims. The FAIR Act is currently being considered by the Senate Judiciary committee, but it should be noted that it has repeatedly failed to gain traction.

"Perhaps this article is best considered as a clarion call for more consideration, research and discussion before arbitration hostility continues and grows."

Nevertheless, when viewed together, the actions of all three branches of the Federal Government reveal a level of hostility towards arbitration. Although the FAA was passed in the 1920s, largely to eliminate the common law hostility to arbitration, the wide use of arbitration blossomed in the 1980s, with the Supreme Court announcement that questions of arbitrability must be addressed with a healthy regard for the "liberal federal policy favoring arbitration." Recent activity reveals a revival of old hostilities. A significant process question must therefore be addressed if there is a real move to curtail arbitration—what happens to already overwhelmed federal and state court systems should arbitration be severely reduced or eliminated even in a wider variety of cases?

The litigation model in the United States was teetering even before COVID-19 pushed it over the edge. Before the pandemic, in the United States, fewer than 1% of federal court cases went to trial. Recent federal court data reveals that it takes about two and a half years after the filing of a case to get to trial and a growing number of federal cases are over three years old. While state court information is harder to come by, it is undisputed that state courts, where the vast majority of cases are processed, are in even worse shape.

Despite heroic efforts by courts and court personnel, data for 2020 reveals that the number of trials has dropped by more than 50% as compared to 2019. An article published in the ABA Journal recently reported that court backlogs have increased by an average of one-third during the pandemic. This all occurred while the pandemic pushed down the number of cases being filed because some courts responded to the pandemic by limiting the filing of cases. The Courts Statistics Project (CSP) is a joint project of the Conference of State Court Administrators and the National Center for State Courts. Its web address is https://www.courtstatistics.org. The CSP collects and publishes state court caseload data from the courts of the fifty states, the District of Columbia, Puerto Rico, Northern Mariana Islands, and Guam. The CSP reports that courts will experience an increase in case filings

and caseloads as activities return to pre-pandemic levels. This exacerbation of a major pre-existing efficiency problem perhaps cannot be fixed. Ours is a society moving ever faster, stuck in an ever-slower judicial systems.

Jury trials and even bench trials are becoming an anomaly and the trend will continue. Case backlogs have increased and will continue to do so. The time that it takes to conclude cases has increased and this will continue with the impending deluge of new filings. This amounts to a perfect storm for our nation's court systems.

Accordingly, at the same time that courts are stressed possibly beyond repair, the federal government appears to be souring on arbitration, perhaps the best adjudicative alternative to litigation. It does not take much extrapolation to surmise that if arbitration is curtailed, the more litigation cases will be filed, creating additional pressure on the courts.

Some may argue that it is not arbitration that is being called into question but so-called "forced arbitration." Advocates often cite to the use of arbitration clauses in consumer contracts but, as noted above, governmental action in this area goes well beyond the mere protection of consumers. Further, the "forced arbitration" argument is perhaps a distinction without a difference. All arbitration is a by-product of an agreement and all agreements are "forced" based upon the benefit of the bargain and the bargaining power of the parties.

If the consensus becomes that agreements to arbitrate will be limited or not enforced, this suggests that those limiting arbitration believe there is something wrong with arbitration as a dispute resolution alternative. Otherwise, why would you limit its use. Further study is necessary to determine why arbitration has, at least to some extent, lost its luster in the 2020's.

If the argument is that arbitration clauses limit the right to a jury trial, then we must revisit the demise of jury trials referenced earlier in this article. As noted, less than one percent of cases go to trial, and even fewer go to a jury. With these facts, are we ready to say that a lengthy court-based litigation with almost no chance of a trial is actually better than arbitration? If so, why?

If the argument is that arbitration clauses limit the use of class actions to resolve disputes, then we must ask whether class action disputes actually benefit the class. A 2019 study of the Federal Trade Commission found "low participation rates in class action settlements." With these and other facts, the question must be asked, is a class action process seldom understood by the collective plaintiffs with extremely low participation rates actually better than arbitration? Again, if so, why?

A March 2022 study released by the United States Chamber of Commerce Institute for Legal Reform found "that both consumers and employees win more money, more often, and more quickly through arbitration than in litigation." One might question the source, but the findings and the basis for the findings deserve further examination. Further scrutiny may also be needed to adequately determine who is actually benefiting from these changes.

Perhaps this article is best considered as a clarion call for more consideration, research and discussion before arbitration hostility continues and grows. Both the trend and its underlying rationales must be fully vetted in light of ongoing court issues, with a keen eye to where these trends will ultimately take us. A future with limited arbitration and little to no chance of a trial after many years of litigation threatens the efficient resolution of disputes and, ultimately, our collective understanding of justice.

Tim Warner serves on the AAA's National Roster of Mediators and Arbitrators for Commercial, Employment, and Consumer disputes; on the Northern District of Ohio's ADR Court Panel; as FINRA arbitrator and an EEOC mediator. Tim is a member of the Ohio Chapter of NADN.

Endnotes

1. ___U.S.__, 142 S.Ct. 1708, 2022 WL 1611788 (2022
2. Kaster, *What a Development This Is:* Morgan v. Sundance, Inc. , NY Disp. Res. Law. 2022, v. 15 no. 2, 38

How Can the World Encourage the Use of Mediation?

By Giuseppe De Palo and Mary Trevor

There is no real dispute that when court cases are moved from litigation to mediation substantial benefits inure to all concerned. From the perspective of the court system, mediation and resulting settlements in a significant percentage of cases (or claims) help to ease burdens on dockets and court budgets, as well as to winnow out cases, or at least aspects of cases, that do not really belong in litigation. As for the parties, they have the chance to resolve their dispute using a method that is typically more party-directed, much faster, far less expensive, and less stressful overall than litigation—in a confidential setting very unlike that of open court. And from the perspective of the parties' advocates, it allows them to provide their clients a more efficient and cost-effective resolution that can be the hallmark of the best counselors.

"Early referral of civil disputes to opt-out mediation is trending at both the national and inter-governmental levels."

Paradoxically, despite its value, and despite concerns about court congestion and access to justice, governments and courts around the globe historically have struggled to increase mediation use. A major multi-state effort to promote mediation in the European Union, for example, the 2008 Mediation Directive,[1] had, as subsequently demonstrated by a study of its impact, only very limited success in increasing mediation use.[2] The Directive left the decision about how to promote mediation to the individual Member States, and it did not mandate any aspect of mediation. When EU mediation experts involved in the subsequent study of the Directive were asked what measures they would recommend to increase the use of mediation, the largest proportion of responses suggested some mandatory aspect.[3]

In contrast, one very successful recent initiative is New York's presumptive ADR program, announced in mid-May of 2019 as part of Chief Judge Fiore's Excellence Initiative. It aims to bring ADR "into the mainstream," by "offering a far broader range of options to conventional litigation."[4] It further aims to "streamline the case management process and better serve the justice needs of New Yorkers."[5] To do so, New York has appointed administrators in civil, small claims, probate and estate matters who refer the parties to mediation or another form of ADR as the initial step in the case's resolution. The program was adopted, in part, due to recognition that the state's historical reliance on an opt-in model for mediation had resulted in underutilization of mediation. While the program does require some participation in mediation or another form of ADR, the parties may continue to pursue litigation should the initial process prove ineffective, or not fully effective, for resolving the issues involved in their dispute.

In developing the presumptive program, the New York state court system has recognized both 1) that mediation can be an effective means of promoting the interests of all parties concerned in dispute resolution and 2) that some mandate is necessary to overcome mediation's underutilization. Recognizing and acting on both of these aspects of mediation brings New York into the vanguard of those seeking to promote the use of mediation.

Mediation has been repeatedly acknowledged as an efficient and lower-cost alternative to litigation. Used in many societies and in a variety of forms for centuries, it offers the opportunity for parties in dispute to come together with the

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help of a neutral facilitator, talk through their disagreement in a confidential setting, and consider possible ways to resolve it and maintain party control of the outcome. Mediating parties can choose their own resolution. That resolution may not require a forensic accounting of past wrongs: it can be built on a forward-looking solution. Parties are free to pursue other options once mediation has helped them understand their situation and options better. Even with the ability to reject a resolution, parties often do reach some resolution of their issues, in full or in part, through the mediation process.[6]

But many commentators and participants are uncomfortable with any mandatory component of a mediation project. They have believed that the *sine qua non* of mediation, after all, is a voluntary decision to engage in the process. How can parties be required to participate in a voluntary process? The answer, the approach that finds common ground with all concerns—and mediates the dispute about whether to mandate, if you will—is what New York has recently recognized: presumptive mediation. The voluntariness of the outcome is preserved; the mandate is simply to give it a try. This model is also known as "easy opt-out" mediation. While approaches vary somewhat, with easy opt-out mediation, disputing parties must attend an initial session designed to educate them about mediation and demonstrate its application to their situation. Hence, the easy opt-out model requires more than a mere information session: the parties must get together and begin the process. But the resolution itself remains voluntary. And, rather than rejecting mediation out of hand due to lack of information about how it works, the belief that initiating it demonstrates weakness, or the perceived challenges of opting into it, the parties have a real opportunity—set up for them—to learn about how it might work for their dispute. As it turns out, there are many reports that incorporating a mandatory aspect into mediation is as effective as voluntary mediation.[7]

Early referral of civil disputes to opt-out mediation is trending at both the national and inter-governmental levels. Italy's legislature adopted a version of the opt-out model in 2013 for specified civil and commercial disputes; the legislation also provided for court-ordered mediation in cases exhibiting certain factors. Despite some initial stumbles, the legislation has seen significant success in promoting mediation. Statistics now show that Italy has many more civil and commercial mediations than any other EU Member State. Italy has also recently enacted legislation expanding the types of cases to which the opt-out model applies.

In recent years, Turkey has adopted the Italian opt-out mediation model for labor disputes, commercial matters, and certain consumer disputes. It has seen an impressive increase in mediation use. Greece and Azerbaijan have also followed Italy's lead and adopted versions of the easy opt-out model.

Examples of mandatory mediation in the United States vary widely, although many courts have adopted some form of it, including opt-out models.[8] In any event, the use of mediation in some form is increasingly being encouraged.

"[I]ncreasing mediation use will, among other things, contribute to the goals of ensuring universal access to justice and achieving peaceful and inclusive societies, goals put forth by the United Nations in its Sustainable Development Goals, which are to be achieved by 2030."

At the international organizations level, the general notion that mediation should be used as a primary dispute resolution method wherever possible has been affirmed multiple times by the United Nations General Assembly.[9] Recently, in 2021, five of the largest United Nations agencies signed a Mediation Pledge, committing to "an initial discussion on the suitability of Mediation" for any internal disputes between their organizations and personnel, with the option for either party to withdraw should mediation not appear viable.[10]

The World Bank has also embraced an opt-out model of mediation after having only limited success with a purely opt-in model. Now, if a party requests mediation, the non-requesting party is obligated to participate in mediation from intake through the first mediation session. At that point, the parties will decide whether, and how, they wish to proceed with mediation.[11]

Recent months have seen some exciting developments that aim to provide further support to the promotion of mediation world-wide as an effective dispute resolution process. In late 2022, one of the authors (GDP) and Professor Lela Love of Cardozo Law School initiated the Mediation—Sleeping Beauty Conference Series (SBCS). The SBCS title

commemorates a 2014 symposium of the *Cardozo Journal of Conflict Resolution* that posed the question: “Is Mediation a Sleeping Beauty?”[12] The question suggests that, despite its attractions, mediation has remained comatose while arbitration and litigation have dominated dispute resolution. The SBCS will hold conferences around the world to do comparative assessments of various mediation models and their results. It will wrap up in New York City in 2024, with its final conference marking the 10th anniversary of the Cardozo symposium.

Another exciting development is the launch of the Dialogue Through Conflict (DTC) Foundation.[13] Devoted to “Empowering People, Organizations and Governments to Reach Their Full Potential Through More Constructive Interaction,” the DTC Foundation brings together renowned scholars and practitioners, experienced within international organizations, who know how to solve complex problems in constructive ways.

One of the projects in the DTC Foundation action plan is the Sustainable Conflict Global Initiative (SCGI), which will advocate for international consensus on the legal principle that mediation should be seriously attempted in at least a minimum percentage of all suitable litigated cases. The SCGI recognizes that increasing mediation use will, among other things, contribute to the goals of ensuring universal access to justice and achieving peaceful and inclusive societies, goals put forth by the United Nations in its Sustainable Development Goals, which are to be achieved by 2030.[14] The SCGI emphasizes that none of the U.N. agenda’s goals can be achieved, or as easily achieved, when conflicts around the globe are not managed as effectively and efficiently as possible.

Overall, while exact models may vary from country to country and state to state, litigators—not only in New York but around the world—can expect mediation and, depending on their location, easy opt-out or presumptive mediation, to play an increasing role in their practices.

Endnotes

1. https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1539262656162&uri=CELEX:32008L0052. See also https://www.europarl.europa.eu/cmsdata/226405/EPRS_ATAG_627135_Mediation_Directive-FINAL.pdf.
2. Giuseppe De Palo et al., *Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU* (2014), https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf [hereinafter *Rebooting*] 3. *See* Giuseppe De Palo, *Mediating Mediation Itself: The Easy Opt-Out Model Settles the Perennial Dispute between Voluntary and Mandatory Mediation*, 22 Cardozo J. Conflict Resol. 543, 557 (2021).
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5. *Id.*
6. While the percentage varies greatly by country, worldwide, mediation is reported to be successful in about 70% of the cases, as detailed in. S*ee Rebooting*, *supra* note 2.
7. https://www.bramsdonandchilds.com/is-mandatory-mediation-the-futureaece2ad7#_ftn13.
8. For more detail on the types of variations, see Nancy Welsh, *Mandatory Mediation and Its Variations* 108 (Susan D. Franck & Anna Joubin-Bret eds. 2011), https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1974&context=facscholar.
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13. www.dialoguethroughconflict.org
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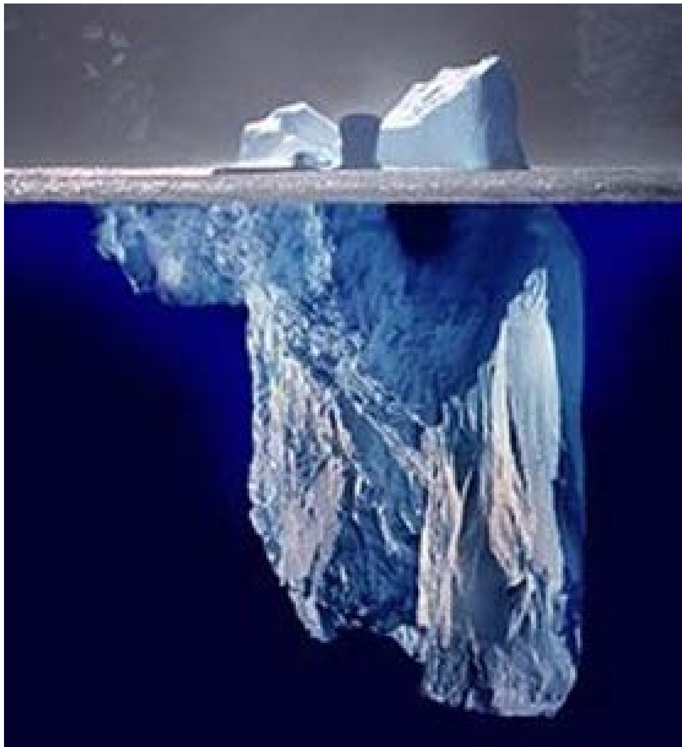
Icebergs, Disputants, and the Limitations of Mediators

By F. Peter Phillips

Partnered by the excellent Danielle Shalov, I spent quite a bit of time during the pandemic training lawyers, including New York State Court staff, basic and advanced mediation skills. And part of that training was always to show them the iceberg—the same iceberg that Peter Robinson used when training me in Pepperdine in 2008.



Look, Danielle and I would say. Look at the part we see and the part we don't. The part we see in a dispute is the "positions" that the disputants are taking. The part we don't see is the "interests" that the disputant is trying either to advance or to protect, and that give rise, imperfectly to the positions being taken. The dispute will resolve only when those interests are satisfied. So our job as mediators is to go below the surface—to identify and articulate what each party really needs out of this conflict. Find out what they want or need, find out the obstacles to their getting it, and work on collaboratively getting rid of those obstacles. Don't concentrate on satisfying the positional demand; concentrate on satisfying the underlying interest, seeking methods in addition to those stated.

I recently visited Antarctica and got to know a few hundred icebergs. The iceberg cartoon that we use in our training resounded in many ways, and I saw in these magnificent objects many of the parties I have met in many of my hundreds of mediations. Taking an inflatable Zodiac among fields of Antarctic icebergs reminded me of the variations of the image I have encountered among real disputants.

Two observations to start with. The first is that the cartoon shows an untenable perspective—seen only by someone in the water with an iceberg, able to accurately observe both the air and the water simultaneously. Having spent a few days layered-up for Zodiac rides among these things, I can attest that in any water in which icebergs may be found, one thing that will not be found is me. Indeed, it is a fundamental tenet of mediator neutrality: Where the party is, there the mediator is not.

Also, the underwater part of icebergs is entirely unpredictable. Sometimes a small flat visible part is supported by a spiky or jagged base. Sometimes a modest piece of visible ice has a broad and unevenly shaped hidden part. The look of the presenting iceberg has no relationship to the look, size, shape, texture or volume of the underwater part.

Also, the underwater part is, as a practical matter, unobservable. You can see some of it, and then you can see some other of it, but you can never see the whole thing at once. Looking at the top, you can draw conclusions about the height and area of the bottom. But there is no perspective

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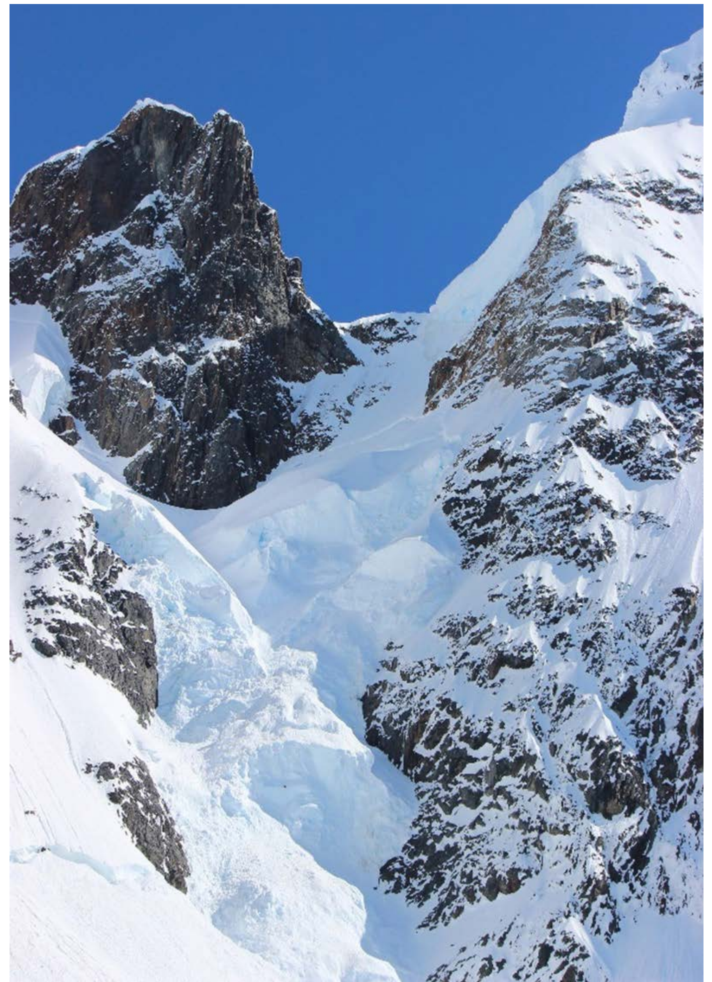
from which you can observe the entire bottom and determine its shape or size. And here you are, in the mediation room, giving yourself exactly that assignment. Is there any wonder that we err?

Sometimes, for example, you see two white bits out there, two positions that the party is insistent upon. Then after a while you notice that they refer to each other. They bob together—when one goes up, the other bobs down.

Getting closer, you see that the underwater base connects them. This is a single piece of ice with two points sticking up and visible. If you want to deal with either of the white parts you have to recognize, and deal with, the other as well, and of course the only way to get at that is to acknowledge and address the massive wonk of ice that is under the surface of them both—that, indeed, is the reason we're here in the first place.

The cartoon entirely ignores a critical question that real icebergs raise all the time: How did this get here in the first place? Most disputants would much rather be back at work than spending all day in a mediation wrestling with someone who they think betrayed them, just as most pieces of ice would rather be on land than in the water. What caused them to be here against their will?

In general terms, there are two ways a piece of ice gets in the water: by avalanche or by glacial pressure. The mountains are covered by depths of snow, the accumulations formed by wind and packed by the weight of the snow above it.



The force of gravity, combined with the angle of the slope of the mountain, the temperature of the air and land, and the contours of the surface, gradually cause instability and the material begins to weaken its hold to the mountain.

Eventually the sheet slides down the mountain, falling into the sea in pieces large and small.

Some massive chunks sit at the foot of the mountain, many feet deep, and wait there until they are undermined and fall into the water.

By contrast, some walls of ice and snow reach the water because they are the face of a glacier, a slow-moving river of frozen matter that extends into the valley behind it. The face of the glacier is pushed by the pressure of the slowly moving mass so that it meets the water, and is forced into it, by virtue of the power behind it.

So you ask yourself: How did this party come to be here? Did it fall, or was it pushed? Or is it here because it split off of a larger bit of floating ice and now is abandoned, alone against its wishes? Or, are we dealing with a claimant—a party who, in some fit of irrationality or desperation, came to the conclusion that cold water is the right environment for it, unaware—or defiant—of the fact that time, temperature, and the other elements will inevitably reduce it to nothing? It happens a lot in a mediation room, but is unknown in nature.

Icebergs experience an erosion of their underwater "interests." The parts exposed to the liquid water necessarily melt and erode, and their mass gently dissolves. Not so the part above the surface, which in fact might grow because of the deposit of more snow and ice. As the "position" part of the iceberg grows, it loses support from its "interest." Yet it remains there, asserting itself over empty air.

It's only a matter of time before these icebergs look down to discover what everyone looking at them knew from the moment they walked in the room: Nothing supports your position.

The position itself degenerates over time. As the position is exposed to the sun and wind, small cracks become large. Holes appear and widen. Eventually entire huge chunks will fall off the side and float away on their own.

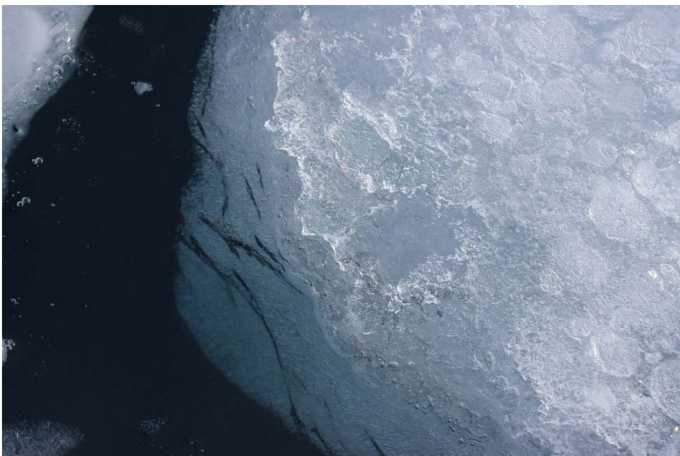
Sometimes the "interest" that holds up the "position" erodes unevenly. It becomes lopsided on the top, or unevenly supported on the bottom, and the iceberg tilts. When that happens, the nose goes underwater and the feet pop up. But the original line demarcating the part above and the part below remains visible, like a scar of past experience that the newly adjusted object can't be denied.

Everyone in the room sees what has happened, but the party herself refuses to acknowledge the "shift" in logic, insisting on her original demand. If anything, the original interest and position is flaunted.

While many icebergs are white, some glow with a radiant blue/green tone. This means it's old ice—packed over the years on the mountain or in the glacier. It has held its "position" for a long, long time, and is loathe to give it up.

Indeed, one wonders whether it can—whether, by now, its position is so hardened that it has become part and parcel of the party's very identity.

There are the icebergs whose color tells you that this is not their first rodeo. Instead of being white or blue, they are clear.



This is crystal ice, sometimes appearing as "black ice." It was thawed but then refroze, and is back in the water a second time. Veterans.

Sometimes a mediator can self-deceive in an effort to identify the underlying "interest" of a party. One is so sure that the "interest" is there, that one can confuse a true interest with a mere reflection of the "position" the client is working to convey to the mediator. What is the underlying concern, and what is merely the reflection of the position?

Has the mediator seen the truth, or instead only seen what she wanted to find?

Then there are "rolled" icebergs. When the underwater "interest" erodes to the point that the "position" is heavier than the "interest" supporting it, the entire mass just rolls over, like a World Cup player taking a flop. The "position" goes underwater entirely, the visible part now being the hitherto invisible "interest." This iceberg presents as smooth, rounded, and showing publicly the part it used to hide.

When this happens in mediation, one realizes that all that great and important stuff, that intricate and hard-fought position that the party has been protecting for all these hours, is not only no longer being asserted, but indeed has been abandoned entirely and is now dumped into the water. What we're hearing now is the need, naked and unadorned. When it happens in a dispute of some scale, it can be pretty impressive.

The ultimate lesson I took from my brief but intense encounter with icebergs is the need, when I mediate, to accept as inevitable my incapacity. I cannot, as a mediator, fully understand a party. Often I am not able to understand a party even adequately. All I can do, on a good day, might be to prompt a party to understand herself and her private and intimately held goals in this conflict.

The cartoon seeks to teach us that, once we acknowledge that the visible is only 15% of what's in the room, then the 85% is what our job is to identify and satisfy. Well, no. The visible is the only thing we can identify. The 85% is important to accept as present, but it is necessarily unknown and unknowable to us. Moreover, frequently even the party herself is unaware of it, and incapable of accurately assessing it. And, too often, the party's being advised by counsel whom they trust, and who may be either obstinately ignorant of the underwater part, or if aware of it, is denying it, or is mischaracterizing it.

So the mediation takes place in a state of shared ignorance and mystery, characterized by no one attribute as much as unavoidable obstacles to clarity. The party is the only one positioned actually to address the shape, volume and contour of the interests that support the demands she is making. As mediators, all we can do is acknowledge and respect our own necessary ignorance, and in that state help the party to assess their current condition, how they got here, and what options they have to get out.

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The UNIDROIT Principles of International Commercial Contracts: When Arbitrators Can Look to UPICC as a Source of 'Rules of Law'

By Richard Mattiaccio

The UNIDROIT Principles of International Commercial Contracts (UPICC),[1] a private codification of international rules of law drawing from legal traditions and political systems around the globe, represents a decades-long effort to articulate a consensus rule or, in some instances, a compromise or better rule approach to issues that arise in commercial disputes. UPICC has been the subject of extensive scholarly work[2] as well as a recent IBA task force[3] and numerous legal conferences and seminars in New York and around the world.[4]

UPICC consists of black letter rules ("Articles") supplemented by commentary ("Comments") that sometimes include illustrations. Readers of the ALI Restatement should find the format accessible. The Articles are available to the public online in five official languages (English, French, German, Italian and Spanish) and in seven other languages (Chinese, Japanese, Korean, Portuguese, Romanian, Russian and Turkish).[5]

The UPICC Preamble sets forth several circumstances when arbitrators or courts shall or may use UPICC:

1. They shall be applied when the parties have agreed that their contract be governed by them.
2. They may be applied when the parties have agreed that their contract should be governed by general principles of law, the *lex mercatoria* or the like.
3. They may be applied when the parties have not chosen any law to govern their contract.
4. They may be used to interpret or supplement international uniform law instruments.
5. They may be used to interpret or supplement domestic law.

The sixth circumstance listed in the Preamble relates to legislative action. Although not the focus here, UPICC's influence has been felt in the development of law codes in former Soviet bloc nations, in the modernization of highly developed Western law codes in the development of commercial law in emerging markets, as well as in negotiating and drafting commercial contracts in many languages.

UPICC was first published in 1994. Subsequent editions in 2004, 2010 and 2016 expanded the topics addressed so that the current, 2016 version offers a comprehensive treatment of commercial contract law issues. Topics include (a) general principles, including freedom of contract, good faith and fair dealing, and practice and usage, (b) contract formation, (c) contract validity, grounds for avoidance, and illegality, (d) contract interpretation, (e) express and implied obligations, third party rights, and conditions, (f) performance, including partial performance and hardship, (g) non-performance, including force majeure, termination, and damages, (e) set off, (f) assignment of rights and transfer of obligations, (g) limitations periods, and (g) multiple obligors and obligees.

UPICC represents an influential statement of general principles of commercial law sometimes referred to as "the law merchant" or "lex mercatoria." UPICC's influence in the development of case law and in arbitral awards around the world is reflected in a database available at www.unilex.info.

UPICC may assist arbitrators in cases seated in the United States in the circumstances described in the UPICC Preamble and in at least one other circumstance noted in commentary on UPICC.

1. When the parties have agreed that their contract shall be governed by UPICC.

It is axiomatic that arbitrators are bound to respect the parties' choice of substantive law or rules of law with only rarely applicable exceptions for public policy or mandatory law. Party autonomy, a bedrock of arbitration, applies when the parties' choice of law includes UPICC just as it does as when the parties expressly choose some other law or rules of law.

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2. **When the parties agree that their contract is governed by general principles of law.**

Since time immemorial, merchants in international commerce have used phrases such as "general principles of law," "the law merchant," or "lex mercatoria" to signal their intention to have arbitrators (and contracting parties) interpret their contracts in accordance with commercial practices. The great challenge has been in determining the content of the law merchant or lex mercatoria. UPICC represents the fruit of a global effort over three decades to fill in the meaning of the broad dictate.

3. **When the parties have not chosen any law to govern their contract.**

Article 31(1) of the AAA/ICDR International Arbitration Rules (2014) ("ICDR Rules" provides that, in the absence of party agreement on choice of law, the "tribunal shall apply such law(s) *or rules of law* as it determines to be appropriate" (emphasis provided.) Article 21(1) of the ICC Rules of Arbitration (2022) ("ICC Rules") similarly provides that, in the absence of party agreement, "the arbitral tribunal shall apply the rules of law which it determines to be appropriate." Rule 10.1 of 2019 CPR Rules for Administered Arbitration of International Disputes ("CPR Rules") provides that, "[f]ailing such a designation by the parties, the Tribunal shall apply such law(s) or rules of law as it determines to be appropriate." Article 18.1 of the JAMS International Arbitration Rules (2021) ("JAMS Rules") provides that, if the parties do not agree on the rules of law to be applied, the tribunal will apply "the law or rules of law" that it determines to be most appropriate.

The phrase "the law" generally is understood as a reference to a national or state system of law. The phrase "rules of law," by contrast, is generally interpreted to extend to soft law systems such as UPICC. When arbitration rules empower arbitrators to apply "rules of law," arbitrators charged with choosing the applicable substantive rules of law may look to UPICC if they consider it appropriate in the specific case.

There are arbitration rules, however, that do not provide such broad arbitral authority. The UNCITRAL Arbitration Rules (2021) ("UNCITRAL Rules"), for example, are more restrictive. UNCITRAL Rules Article 35.1 provides that, if the parties fail to designate "rules of law" to be applied, then the tribunal shall apply "the law" the arbitrators determine to be appropriate.

The application of a choice of law analysis typically used in the American legal tradition sometimes may lead to a result that arbitrators consider to be not exactly what the parties intended. This is one circumstance in which UPICC can offer an attractive alternative to the choice of a national law system. For example, in an arbitration seated in New York between a multinational organization and a local contractor that performed services to a peacekeeping mission entirely in Somalia, the arbitrators were faced with a choice between applying general principles of international commercial law or applying the law of the clans of Somalia.[6]

"[A] great challenge has been in determining the content of the law merchant or lex mercatoria. UPICC represents the fruit of a global effort over three decades to fill in the meaning of the broad dictate."

4. **When governing uniform law instruments require interpretation or gap-fillers.**

UPICC is used as a gap-filler for uniform law instruments, including, perhaps most notably, as a gap-filler for the Convention on the International Sale of Goods (CISG). CISG is a uniform commercial law treaty that applies automatically and displaces the UCC in contracts involving parties of different states that are signatories to the convention unless the contracting parties effectively opt out of CISG. CISG is sparse compared with the UCC or other national or state commercial codes, so it often needs a gap-filler.

The widespread American practice of opting out of CISG in favor of the UCC as the substantive law in international sales contracts may account for the relative scarcity of reported cases in the United States in which UPICC receives any consideration.[7] However, not all contract drafters understand that merely selecting the substantive law of a specific state in a choice of law clause will not effectively eliminate the applicability of CISG. (To opt out, one needs language such as "New York law including its UCC" or "New York law but not CISG.") As a result of ineffective opt-out language, reported decisions in which CISG is applied may increase gradually

over time and, with that increase, a body of American case law may develop in which UPICC serves as a gap-filler for CISG.

5. When the arbitrators apply domestic law in an international context.

When the arbitrators need to choose "the law or rules of law," they are not limited to a binary choice between UPICC and some national or state domestic law.

For example, when a choice-of-law analysis presents the arbitrators with viable choices, arbitrators may use UPICC to evaluate whether a particular domestic substantive law being considered for use in a case is more or less in line with international commercial expectations and practices as reflected in UPICC.

Assuming arbitrators do select a national or state domestic substantive law, they still may look to UPICC to fill gaps in that law or to provide overview and context, not unlike the way arbitrators may look to an ALI Restatement in comparable circumstances in a domestic U.S. case.

6. As an aid in deciding cases ex equo et bono or as *amiable compositeur.*

As reflected in many institutional arbitration rules, arbitrators may not decide international cases ex equo et bono or as *amiable compositeur* unless the arbitration agreement expressly authorizes the arbitrators to do so. ICDR Rules Art. 31(3); ICC Rules Art. 21(3); CPR Rules R. 10.3; JAMS Rules Art. 30.1; UNCITRAL Rules R. 35.2. When arbitrators are authorized to decide a case ex equo et bono or as *amiable compositeur*, they are free to look to UPICC for a statement of general principles of international commercial contract law.

Conclusion

Arbitrators responsible for choosing the substantive law or rules of law to determine the merits of a dispute may look to UPICC for a comprehensive and clearly articulated set of rules designed to reflect and be consistent with international norms and practices. UPICC can provide clear and concise substantive rules of law as well as valuable insight into the expectations of commercial parties engaged in cross-border transactions.

Endnotes

1. https://www.unidroit.org/instruments/commercial-contracts/.
2. http://www.unilex.info/principles/bibliography/area/82.
3. https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/iba-working-group/.
4. https://www.unidroit.org/instruments/commercial-contracts/conferences-and-seminars/.
5. https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/.
6. http://www.unilex.info/principles/case/678.
7. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1127382.

Advocates' and Neutrals' Roles in a New Type of Conflict—the Private and Public Crises of Hybrid Warfare

By Andrea Kupfer Schneider and Chris Honeyman

In the last two-plus years we, along with colleagues from a variety of fields, have enlisted a number of lawyers in a very unusual project—how to engage in a type of conflict often called grey zone conflict or hybrid warfare. Our conflict management experts have come from a wide array of legal settings ranging from Europe to Australia. But in every case, they have started our conversations with the same question: What on earth does this subject have to do with me, and my practice (or for the academic lawyers, my scholarship)?

Our answer has been, a lot—because lawyers, (everywhere in the West but particularly in the U.S.) are among the first people to get a call when a crisis meets a client. In the situations we are working with, that crisis itself often generates further disputes with partners, suppliers, and customers. And in these types of conflicts, crises are routine. The threat to clients is starting to be better understood, and in November 2022 a symposium on this theme at New York's Cardozo Law School, organized by the *Cardozo Journal of Conflict Resolution*, drew speakers from IBM, Credit Suisse and other large companies as well as the U.S. Department of Justice, along with security experts and law professors from around the country and beyond. The deliberately provocative title was "Negotiation Strategies for War by Other Means."

Grey Zone Conflict, Hybrid Warfare, and Deliberate Confusion

"Grey zone conflict" and "hybrid warfare" are just two of multiple terms now in circulation to describe the same phenomenon—attacks against a country and its private businesses and public sector that may or may not have any military element, by actors who may or may not appear to be connected with another country's national security apparatus.

In recent years this unfamiliar form of extreme international competition has become more evident. Some of its aspects are by now well known, such as interference in elections, or the arrival in 2014 of heavily armed but unidentified "little green men" on the disputed Ukrainian border. More recently, the most widely discussed element was the rise of ransomware and other cyberattacks. In 2022 Russia's fresh invasion of Ukraine and the ensuing open warfare have become a focus of attention worldwide; but hybrid attacks by a variety of actors are still under way, and by some measures are even more numerous.

Less conspicuous has been a whole array of gambits that take place in the private sector. Many of these appear to operate by perverting what to Western parties may look like ordinary commercial dealings in supply chains, licensing and the like. There is increasing evidence that these attacks have become widespread, and that Western military, intelligence, police, and other security agencies are not (yet) well-structured to respond to such private sector actions in any strategic or coherent way. Furthermore, grey zone conflict / hybrid warfare campaigns change tactics frequently, and coordinate direct government actions with activity by private and nonprofit entities, as well as by using cyber tools, public and commercial corruption, transnational organized crime, and disinformation campaigns, along with a host of other methods. Deception, and denial that any such attack is underway, are standard elements of this type of conflict as well.

When such an attack is even perceived, there are at least four common reactions to which different people may be drawn. Some incline toward threatening (or carrying out) acts of direct retaliation. Some may deny the fact of an attack, particularly when it is obscure, or seems too trivial to warrant a response, or when admitting its existence could expose embarrassing structural weaknesses. Some see beefing up general defense expenditures as the answer. Still others believe the U.S. and other Western countries should simply avoid dealings with any country suspected of mounting such attacks. And we note that for many people, these reactions tend to differ when the attack is by country A (perceived as an enemy) versus by country B (perceived as an ally.)

We believe that although each of the above four responses to hybrid warfare has its value in limited situations, none of them will work as a general rule. It is necessary to develop an overall approach, such that grey zone conflicts will be better understood as a class and *managed* on an overall level. There is a strong precedent for this view: Our group, known as Project Seshat, is inspired by Cold War negotiation / conflict management studies of how the West and the Soviet Union, over decades, could and did maintain something approximating a working relationship (including avoiding a nuclear war) even at the height of their conflict. The project therefore uses a negotiation / conflict management perspective as its organizing principle. And lawyers are at the center of the necessary responses. In the next section we will explain why.

Negotiation in the Grey Zone

There are ongoing efforts at responding to hybrid warfare at the national strategic level, and recent events (particularly the Russian invasion of Ukraine) have raised their profile. But many who are unknowingly involved in grey zone conflict have little or no understanding of it, and even those who know of an attack are often badly informed as to what they can do. Our project seeks to help with that. Lawyers interested in opportunities for dispute prevention, as well as resolution design and counseling, may have special reason to pay attention to this work.

There is compelling evidence that the private and nonprofit sectors are major target areas in grey zone conflict. And so the critically important tactical and operational levels of responses to these attacks tend to take place in highly dispersed corporate boardrooms, law offices, municipal governments, university offices, etc. However, they are even less well prepared for this than the federal government. Our project's central focus is therefore on dealings of all kinds between Western firms (and nonprofits) and ostensibly private entities that may be controlled by hostile governments. Lawyers have traditionally had multiple roles in all of these dealings, and often benefit from a more rounded view of what's going on than other participants. Neutrals too are likely to be involved, so they ought to become conversant with the disputes that can arise. That way, they can help in dispute *prevention*, as well as in managing the disputes that can arise within the responding side as a result of these conflicts.

At the same time, the aspect of negotiation most directly relevant here is not what most people think of first, i.e. what happens directly at a bargaining table between "the parties." In grey zone conflict, direct negotiation between the attacker and the respondent is unlikely, with limited exceptions such as in ransomware attacks. But the kind of *preparation* that skilled negotiators engage in for any such encounter is, if anything, more relevant than ever, and needs to be addressed on a much broader level. A company's lawyers are well placed to expand their traditional work in this area as now seems necessary.

In addition, it is becoming increasingly evident that the "behind the table" negotiations, (i.e. the negotiations between the numerous individuals making up "one side" in a typical corporate matter, such as the general counsel's office, IT or the chief cybersecurity officer, the company's insurers, the board of directors and the CEO) are incredibly important in averting, preparing for, or responding to a hybrid warfare attack, whether the target is a company, a hospital, a university, an NGO, a municipality, or something else. A hybrid warfare attack on a company can create an atmosphere of defensiveness and mutual recrimination up and down the senior corporate ranks—and it may well fall to the company's lawyer to get everybody back on track and doing something productive.

Too often ignored or short-circuited, preparation for these types of crises includes a lawyer's careful analysis of parties with whom a client firm or nonprofit should even consider dealing. And because the real parties, goals and strategies in hybrid warfare are routinely disguised, that analysis is no simple matter. We believe that in future, law firms serving domestic companies, nonprofits, universities, hospitals, municipalities and other bodies can and should develop partnership roles (for smaller firms, perhaps indirectly via the Bar) with groups with which in the past they may have had little contact, such as the military and national intelligence services—an additional challenge, to say the least.

Finally, the New York bar has just passed a CLE requirement that lawyers must now have regular training in cybersecurity, privacy and data protection—a reminder that lawyers are expected to have a level of technical competence in this area. This understanding, coupled with process and negotiation expertise, gives lawyers and neutrals yet another arena in which to engage disputants and clients about hybrid and gray zone conflict.

How Project Seshat Works

Project Seshat was organized starting in 2020 as a group of scholars and practitioners, for two main purposes: first, to *increase understanding* of a type of activity that is carefully designed to be as obscure as the attackers can make it; and then, to use that understanding to *help create methods* for averting attacks, and for mitigating harm when they occur.

Participants in the project are invited specialists in either negotiation / conflict management or security. The project is led by a steering committee of five, of which one member (Honeyman) serves as principal investigator. The initial working group of some fifty people come from nine allied countries, and a larger array of subject fields, though more are trained in law than in any other single field.

In a globalized economy, business and NGO executives, and critically, their lawyers, are routinely engaged in negotiations of all kinds, with suppliers, customers, municipalities, potential merger partners and more. These dealings do not have to be visibly cross-border transactions to have hybrid warfare connotations. For example, if an apparently domestic company a city government is contracting with—for water or other utilities, transport, its communication networks or a thousand other things—is in some hidden way influenced by an adversary government, the city might find itself on the wrong end of an attack without ever realizing the opponent's intention, or even its existence. A known example is a hacker's 2021 attack on the Oldsmar, Florida water utility, which in-

creased the concentration of lye in the water 100-fold before it was caught. This attack obviously triggered widespread concern because ". . . about 52,000 community water systems operate in the United States, providing water to more than 286 million people year round. Most systems are run by local governments; many are very small" (Bergal 2022) and have no consistent training or expertise in how to respond. In this instance the known target was a single water utility and the hacker's identity and intention are unknown; in the widely-covered SolarWinds cyberattack, by contrast, the supply chain consequences affected thousands of companies as well as government agencies at all levels, and that attack has been generally ascribed to the Russian foreign intelligence service. (Leslie 2023, forthcoming.) And these are examples just of cyber attacks, which in some ways are *better* understood than attacks such as those which employ bribery or blackmail of a key company official, kidnapping-to-order performed by a transnational criminal network, or any of a host of deliberately obscure gambits.

Preparing professionals for this unfamiliar environment will not be simple. And as potential remedies begin to emerge, some will undoubtedly require governmental action. If the public at large can develop a better understanding of what is going on and what can be done about it, better public policy approaches are more likely. Again, lawyers and neutrals can play an influential role in understanding the problem and developing the necessary responses.

What Can We Do?

We think we, as a project, can help set up parallel groups within some of society's main constituencies (including bar associations), specifically chartered to make collaboration across silos easier. "Silos" crop up even within a single corporation—think about the cultures in engineering vs marketing, for example—and proliferate without number across society in general, so that (for example) it often becomes difficult even to share expertise between a federal agency and a state agency that theoretically has the same kind of role and strong shared interests, and even more so between government agencies and the companies who might need that support. We think we can help create structures that will foster continuing interchange among them. We think we can help to validate that effort in the eyes of key groups such as corporate clients. And we can develop feedback loops so that everyone involved, including us, has the best opportunity to learn from others' experiences (including difficulties) across such a network. If you would like more background as to why we think we can do this, please see references to our previous large-scale projects, at www.project-seshat.org/publications.

And with the above steps in place, we think such a network can, in turn:

- Provide lawyers, business executives and other practitioners with the *tools* needed to recognize when one is dealing—even indirectly—with a supplier, a customer, a possible merger partner or any of a lengthy list of other parties that may be, perhaps unknowingly, influenced by a hybrid warfare gambit.
- Help both advocates and neutrals develop improved conflict analysis *skills* such that they can better predict which situations are likely to expose them to hybrid warfare risks.
- Help academics develop both formal and "crash" courses to make such knowledge, understanding and competence *widely available* to all interested constituencies.
- Provide military and other security people with the access necessary to *use* their expertise in the broader society.
- Develop a support network of civil and military *partner organizations*, helping to build their capacity to address related needs in their membership and communities.
- Build and distribute *a knowledge base* of publications and available presentations, not just in writing but in a variety of media, to share the emerging knowledge and skills as widely as possible.

To conclude: Among many groups across our society with whom we hope to develop ongoing partnerships to address grey zone conflicts, lawyers and legal organizations are high on our list. If you are interested in exploring this subject further, we would like to hear from you. You can reach us at andrea.schneider@yu.edu and honeyman@convenor.com respectively.

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Tait, S. 2019. Hybrid warfare: The new face of global competition. Financial Times, October 14. https://amp.ft. com/content/ffe7771e-e5bb-11e9-9743-db5a370481bc. "[T]he New York bar has just passed a CLE requirement that lawyers must now have regular training in cybersecurity, privacy and data protection—a reminder that lawyers are expected to have a level of technical competence in this area. This understanding, coupled with process and negotiation expertise, gives lawyers and neutrals yet another platform with which to engage disputants and clients about hybrid and gray zone conflict."

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Chris Honeyman is managing partner of Convenor Conflict Management, a consulting firm based in Washington, D.C. He is co-editor of *The Negotiator's Desk Reference* and six other books, and author of over 100 published articles, book chapters and monographs. He has led or co-directed a 30-year series of research-and-development programs, advised many academic and practice organizations, and served as a mediator, arbitrator and in other neutral capacities in more than 2,000 disputes.

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Book Review

Disputes and Differences: Essays on the History of Arbitration and Its Continuing Relevance

By Derek Roebuck, edited by Susanna Hoe
Reviewed by Dr. Lara M. Pair

Disputes and Differences is a collection of essays by Derek Roebuck, edited for publication posthumously by Susanna Hoe. It reflects two topics Derek Roebuck was so fascinated by: the history of arbitration and the continued relevance of that history today. This important collection adds to our understanding through articles and lectures; some reprinted here and some not previously published. It is a treasure trove of essays the editor had to explore and discover and select in the electronic and physical archive of the great professor and prolific writer.

The editor expended much effort and thought on organizing the material and making it accessible to even inexperienced readers of Derek Roebucks work. The resulting book is divided into three parts, first "The Past," which forms the largest part of the collection, second the meaning of the past for the future titled "Past, Present and Future"; and third, essays that contextualize the practice of arbitration within interdisciplinary scholarly pursuits. The 25 essays comprise this 366-page book.

The texts and anecdotes are both diverting and thought provoking.

Part One: The Past

Part One contains the bulk of the work, 18 articles. These articles are like a stroll through history. They span pre-history, cross Egypt and Rome and finally treat medieval and early modern England to medieval Jewish, Maltese and Italian arbitrations as far as the American colonial period. This part one is an altogether interesting stroll through the ages, illustrating that many of the practice tips, uses and issues prevalent as early as Cleopatra's Egypt are recognizable to today's practitioner and may sometimes viable solutions for the future. The flexibility and continuity of alternative dispute mechanisms shines bright throughout these works and is made more vivid by Derek Roebuck's use of anecdotal historical sources.

The first article establishes Derek Roebuck's idea that mediation and arbitration are much older than is generally believed. He propounds the theory that methods of dispute resolution must have existed even in prehistoric times. Relying on archeological rather than written evidence as well as deduction, Derek Roebuck shows that the seed of formalized dispute resolution existed as early as the first societies.

"These articles are like a stroll through history."

The second article, a lecture originally published in 2008, focuses not on a prehistoric society, but on Egypt in the 1st century B.C. This article paints the picture of frequent use of arbitration and mediation in private and public affairs in this time. A broad range of sources is used in this chapter to establish evidence of a sophisticated and widely used dispute settlement system.

The third piece is an unpublished lecture. It uses disputes recorded in Rome from Britannia and other written evidence to illustrate the proliferation of Roman law in Britain.

The fourth chapter show that civil law and practice have influenced common law and arbitration. It fits into this narrative string, as it describes the development and decline of the compromissum in Roman law, in France and for centuries in England, the compromussium being a tool of dispute resolution and used around 100 A.D. This is followed by the fifth and unpublished work concerning the English compromissium, which continues the analysis of the previous article.

In the same context as the first work, work six enters an even deeper analysis of the meaning of arbitration and the existence of mediation in England in the Middle Ages and its advantages in comparison to the courts. The same period, but a separate group of persons using arbitration and mediation is discussed in work seven. It shows how religious groups within the group and between the groups, used the same instrument differently.

Chapter eight relates to the practical questions of arbitration and dispute resolution—the "how to." It concerns the still-present question of the number of arbitrators, and how this issue was viewed historically. To my surprise, for 200 years in England, the number of arbitrators was even, rather than odd. The same period and the same general topic—how to—is

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treated in previously unpublished article nine. It deals with arbitration clauses in England between 1258 and 1600 A.D.

Article10 switches to a different, but related, jurisdiction: Malta. This article shows that mediations and arbitrations were quite commonplace in Malta. The 11th article returns to England under the rule of Elizabeth I. Article 12 treats the same period but with a specified group of arbitrators: Italians.

Article 13 describes how colonists in the new Americas used the dispute resolution methods they had learned in England in the new world. Article 14 jumps back over the pond to England and uses the accounts of an actual 18th-century practitioner of arbitration and mediation to illustrate the practice in the slightly later stage than we have seen in the previous articles and texts, showing the evolving methods and usages of mediation and arbitration. Article 15 describes the same rough period through the lens of a Scottish law man.

Article 16 focuses on the period 1600 to 1800 A.D. and the question of how arbitrators were appointed by parties.

While this part contains many more articles on medieval and early modern arbitration than ancient arbitration, the evolution of this legal field becomes clear. Not only is the history of alternative dispute resolution discussed, but the author also addresses the practical issues practitioners faced. This has the merit of connecting the problems to the evolution and making the discussion more accessible and more memorable.

Part Two: Past, Present and Future

The second part of this book summarizes Derek Roebuck's desire to keep modern dispute resolution flexible and affordable, while promoting resolution of the merits of the disputes.

Part Two contains only three articles: "The Future of Arbitration," "Time to Think: Understanding Dispute Management," and "Keeping an Eye on Fundamentals." The first article expresses Derek Roebuck's view on the future of arbitration. He looks to Elizabeth I and demands: "If Elizabeth I could insist on disputes being resolved on the merits, providing a universal scheme to do it, apparently without too much fuss or cost, why can't we?"

The second chapter in this section of the book is a lecture concerning dispute management, which advocates clear procedural law to make mediation and arbitration function better, Along the same lines, the final article in this section calls for a return to the core of what individual dispute resolution mechanisms are supposed to do, criticizing the tendency to render mediation too rigid. He ends by asking: "Is not the purpose of dispute resolution to end a dispute to the maximum satisfaction of both sides with the least cost to each?"

Part Three: Language, Research and Comparison

Part Three, the final part of the book, contains four chapters, which vary in their topics from the pitfalls of prescription to a suggestion of topics for research in ADR. At its core, this section summarizes articles and texts that reflect Derek Roebuck's intense belief in and advocacy for interdisciplinary research. All texts express that only by using the skills and knowledge of other specializations, professions, and people can understanding be reached and true progress be made.

The first chapter in this section represents one of the finest illustrations of the problem of language not only in communication, but in the law. It also taught me two things,I will never again forget, that a stout is a summer ermine, and that restoring peace can be—but maybe should not be—the domain of lawyers.

The second chapter in this final part of the book also concerns communication, specifically instructions for lawyers on how to communicate plainly. "Plain language is not a dialect of the standard language but a relationship between the text and its audience. Text that will be plain for one audience will not be plain for another."

"[S]o prevalent …is the presence and veneration of women and their role in law, mediation, communication, peacekeeping and history."

The third and fourth chapters in this section continue to promote the idea of interdisciplinary communication and research.

Conclusion

This book showcases Derek Roebuck's understanding of the topic of dispute resolution as deeply rooted in history. Methods of dispute resolution—whatever terminology used—were needed and used throughout the ages and across cultures. The issues facing the parties and arbitrators have largely remained the same. Using Derek Roebuck's work as a guide, we can research the past to find clues for solutions in the future.

What I do not want to leave unremarked, as it is so prevalent throughout all the articles assembled here and in all the works written by Derek Roebuck, is the presence and veneration of women and their role in law, mediation, communication, peacekeeping and history. In no writing have I felt equality and respect as strongly as in the work of Derek Roebuck. I have here stressed the merits of this book and his work, and this pervasive sense of equality is one of them.

Remand to Arbitrator To Add Reasoning Does Not Violate *Functus Officio* Doctrine

***Smarter Tools Inc. v. Chongqing Senci Import & Export Trade Co., Ltd.* (2d Cir. No. 21-724, January 17, 2023)**

By Mark Kantor

The doctrine of *functus officio* has frustrated many for years, as it may prevent an arbitrator from correcting a mistake in a final award even though the arbitrator recognizes the mistake.

In mid-January 2023, the US Court of Appeals for the Second Circuit issued an opinion in *Smarter Tools Inc. v. Chongqing Senci Import & Export Trade Co., Ltd.* (2d Cir. No. 21-724, January 17, 2023) that concluded a U.S. District Court had appropriately remanded an international arbitration award to the original arbitrator to supply reasoning notwithstanding the *functus officio* doctrine. This appellate opinion is useful for its explanations of (1) why the doctrine did not prevent the remand and (2) why remand was appropriate rather than vacatur of the award.

In *Smarter Tools*, an arbitrator for the International Centre for Dispute Resolution (ICDR) had issued an award in favor of Chongqing Senci. Considering competing motions for confirmation and vacatur of the Award, the U.S. District Court for the Southern District of New York determined that the arbitrator had exceeded his authority because he had failed to issue a reasoned award as requested by both sides. Rather than vacating the award as Smarter Tools (STI) requested, the District Court remanded to the arbitrator for "clarification of [the arbitrator's] findings." The District Court stated that vacatur "must be strictly limited in order to facilitate the purpose underlying arbitration: to provide parties with efficient dispute resolution, thereby obviating the need for protracted litigation." (internal quotation marks omitted).

After the remand, the arbitrator added reasoning to the award and the District Court then confirmed the amended award over the objections of STI. Among STI's arguments for vacating the revised award, was the argument that the remand to the arbitrator had been improper because the arbitrator had been rendered *functus officio* upon issuing the initial final award. STI also asserted that remanding the award to the arbitrator rather than vacating the award for an excess of authority was contrary to the Federal Arbitration Act (FAA).

The District Court rejected STI's arguments and confirmed the revised ICDR award. Petitioner STI then appealed that decision to the Court of Appeals.

The Appeals Court explained that STI's primary appellate argument was that the district court erred in remanding for the arbitrator to issue a reasoned award, in contravention of the doctrine of *functus officio* and the Federal Arbitration Act (FAA). Absent a finding of ambiguity, or a minor clerical error, STI argued, vacatur was the only remedy once the district court determined that the arbitrator exceeded its authority by failing to issue a reasoned award.

The Court of Appeals applied the customary deferential standard of review to the arbitrator's findings, but reviewed the District Court remand ruling as a matter of law.

The appeals panel stated that the Second Circuit recognizes several exceptions to the determination that a final award renders the arbitral tribunal *functus*, including ambiguity, indefiniteness, failure to address a later arising contingency, clarification and to assist the reviewing court to determine if the arbitrator had manifestly disregarded the law.

> While the issue of whether a court may remand for an arbitrator to produce a reasoned award is an open question in our Circuit, several of our cases contain dicta indicating that, in similar circumstances, remand is the proper remedy. In *Landy Michaels Realty Corp. v. Local 32B-32J, Service Employees International Union, AFL-CIO*, the panel found itself without jurisdiction to review the appeal of a district court order remanding to the arbitrator to correct a miscalcula-

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tion of damages. See 954 F.2d 794, 797 (2d Cir. 1992). The parties agreed that the arbitrator miscalculated the damages, and the district court remanded to the arbitrator to reconsider the damages award. In dismissing for lack of jurisdiction, we noted that:

> If this case were within our appellate jurisdiction at this time, we would face the substantial question whether the district court's remand order exceeded the limited scope of review available to a court asked to enforce or vacate an arbitration award. Though some narrow authority to return a matter to an arbitrator may exist where the arbitration task has not been fully performed or where the uncertainty of an award requires clarification, that authority does not extend to obliging the arbitrator to revisit an issue because of a court's disagreement with its resolution. *Id.* (emphasis added).

Similarly, in *Siegel v. Titan Industrial Corp.*, we observed that district courts have the power to remand to the arbitrator "to clarify the meaning or effect of an award." 779 F.2d 891, 894 (2d Cir. 1985). Thus:

> Where, as here, an arbitrator's award appears to have been reached on the basis of a precise mathematical calculation, it is desirable, and in some cases may be necessary, to know the basis for the calculations underlying the award. A remand for clarification in such circumstances would not improperly require arbitrators to reveal their reasons, but would instead simply require them to fulfill their obligation to explain the award sufficiently to permit effective judicial review. *Id.*
>
> In *Hardy v. Walsh Manning Securities, L.L.C.*, we recognized that we may "remand to the [arbitrator] for purposes broader than a clarification of the terms of a specific remedy. That is, we have the authority to seek a clarification of whether an arbitration panel's intent in making an award evidences a manifest disregard of the law." 341 F.3d 126, 134 (2d Cir. 2003) (internal quotation marks and alterations omitted); *see also Tully Constr. Co./A.J. Pegno Constr. Co., J.V. v. Canam Steel Corp.*, No. 13 Civ. 3037, 2015 WL 906128, at *20 (S.D.N.Y. Mar. 2, 2015) (remanding to the arbitrator for the "purposes of issuing a 'reasoned award'" and concluding "the doctrine of functus officio presents no impediment to that approach").

Applying these principles to the facts of the *Smarter Tools* dispute, the Court of Appeals concluded that common sense and the policy underpinning the *functus officio* doctrine support the District Court's decision to remand to the arbitrator rather than vacating the ICDR award.

> Where, as here, a district court determines that the arbitrator failed to produce an award in the form agreed to by the parties, remand for a properly conformed order is a permissible choice. It simply makes no sense to redo an entire arbitration proceeding over an error in the form of the award issued after the hearing. See *Gen. Re Life Corp.*, 909 F.3d at 549 (finding exception to the functus officio doctrine to promote "the twin objectives of arbitration: settling disputes efficiently and avoiding long and expensive litigation"). Nor does a remand in such circumstances undermine the functus officio doctrine's purpose, which is to prevent arbitrators from changing their rulings after issuance due to outside influence by an interested party. See, e.g.,*Colonial Penn*, 943 F.2d at 331-32 ("The policy underlying this general rule is an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion." (internal quotation marks omitted)); *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO, CLC, Loc. 182B v. Excelsior Foundry Co.*, 56 F.3d 844, 847 (7th Cir. 1995) ("Once they return to private life, arbitrators are less sheltered than sitting judges, and it is feared that disappointed parties will bombard them with ex parte communications and that the arbitrators, not being professional judges or subject to the constraints of judicial ethics, will yield . . . .").

The appeals judges also contended that remand was, in this situation, consistent with the exception to the *functus officio* doctrine for clarification of an ambiguous award. The judges recalled that, in the Second Circuit, "[a]n arbitrator may issue a clarification of an ambiguous award if: "(1) the final award is ambiguous; (2) the clarification merely clarifies

the award rather than substantively modifying it; and (3) the clarification comports with the parties' intent as set forth in the agreement that gave rise to arbitration."

For the appeals panel, that "align[ed] with what occurred here: the original award was found not to provide the reasoned award the parties bargained for; in its amended award, the arbitrator clarified the original award by including a rationale for rejecting STI's counterclaims; and this clarification is consistent with the parties' intent that the arbitrator issue a reasoned award.

The Court of Appeals also declined to accept petitioner STI's argument that vacatur was the only option available to the District Court under the FAA. STI argued that § 10 of the FAA contained the grounds for vacatur of an award, while § 11 of the FAA contained the grounds for modification or correction of an award. Section 10, contended the petitioner, required vacatur because the District Court had found the arbitrator exceeded his authority by failing to include reasons in the initial final award.

The Court rejected this argument, applying the presumption in favor of enforcing an award and concluding that the absence of reasoning in the initial final award fit more closely within the authority of FAA § 11 to require modification or correction of the award.

> Rather, the failure to provide a reasoned award best fits under Section 11 of the FAA, which allows a court to "make an order modifying or correcting the award . . . [w]here the award is imperfect in matter of form not affecting the merits of the controversy." 9 U.S.C. § 11(c) . . . .
>
> Where, as here, the parties agree that the arbitrator will produce a reasoned award, the failure to provide one renders the award "imperfect in matter of form not affecting the merits of the controversy." 9 U.S.C. § 11(c). Remand for the arbitrator to produce an award in a form consistent with the parties' agreement both "effect[s] the intent" of the parties and "promote[s] justice" between them, consistent with § 11. *See id.* § 11. We thus find no error in the district court's decision to remand for the production of a reasoned award, rather than vacating the original award and forcing the parties to begin anew.

Interestingly, the Court of Appeals did not address whether the power of the courts under FAA § 11 to modify or correct an award included the power to order the underlying arbitral tribunal to make those modifications or corrections, rather than the court doing so itself. The Appeals Court was apparently satisfied that existing precedent made that course of action clear.

At bottom, this decision arguably expands the "clarification" exception to the *functus officio* doctrine to encompass a failure to provide reasons in the award rather than require a complete redo of the arbitration by vacating the initial final award. That is not a wholesale rejection of the *functus* doctrine, but it does continue a path in some U.S. courts of minimizing the adverse effects of that doctrine by construing its exceptions broadly to avoid requiring an entirely redone arbitration.

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Case Summaries

By Alfred G. Feliu

Annulled Foreign Arbitration Award Partially Enforced

An arbitration award rendered in Nigeria was partially annulled by a Nigerian Court. The district court, applying applicable Second Circuit precedent, declined to enforce the award, including that portion of the award which was enforced by the Nigerian court. The Second Circuit reversed that part of the district court's ruling which failed to enforce what had been upheld on the ground that the Nigerian court's ruling was entitled to full comity. The Second Circuit explained that "a district court should enforce an award that was set aside in the primary jurisdiction—and thereby deny comity to the relevant foreign judgment—only if the judgment setting aside the award can be properly characterized as 'repugnant to fundamental notions of what is decent and just' in the United States, in which case reliance on the judgment would be contrary to U.S. public policy." The court reasoned that the district court was required to enforce those portions of the award which the Nigerian Court upheld. In doing so, the Second Circuit noted that

> questions may reasonably be raised regarding the correctness of the Nigerian appellate court's legal conclusions, as well as a practical effect of its judgments, but our role in secondary jurisdiction is not to second-guess the Nigerian court's substantive determinations made under Nigerian law. We assess that court's rulings only so far as required to ascertain whether they are plainly incompatible with U.S. notions of justice.

The Second Circuit observed that the parties had an adequate opportunity to be heard by the Nigerian court and could point to no glaring procedural irregularities. The court rejected the broad argument that Nigerian courts lack sufficient independence from government pressure to warrant deference, stating that "broad, non-specific evidence does not form an appropriate basis for a judicial conclusion in U.S. courts that a specific foreign judgment is necessarily repugnant to notions of justice in this country so as to require the abandonment of comity." For these reasons, the Second Circuit remanded the case to the district court to formulate a partial enforcement order based on its ruling. *Esso Exploration and Production Nigeria Ltd. v. Nigerian National Petroleum Corp.*, 40 F.4th 56 (2d Cir. 2022).

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Motion To Confirm Award Under Seal Rejected

Bristol-Myers Squibb (BMS) prevailed in an arbitration brought against it by Novartis. BMS moved to confirm the award under seal, but the motion was denied and its motion to confirm, without the award attached, was filed publicly. Novartis then moved to seal the award and added an alternative request to file a redacted version of the award. Novartis argued that the redactions, 11 of 30 pages, would prevent the disclosure of trade secrets and proprietary information. The court noted that "the proposed 'redacted' version of the award leaves the reader pretty much in the dark about the arbitration and the basis of the award, accomplishing essentially the same result as full sealing does." The court rejected Novartis's application. The court emphasized that under both the common law and the First Amendment there is a strong presumption of access to court filings to ensure the public confidence in the integrity of court proceedings. That presumption can only be overcome if sealing is deemed essential to preserve higher values and is narrowly framed. The court noted that arbitration is a "purely private proceeding to which no public right of access attaches." The court added that arbitration "has become the dispute resolution mechanism of choice for those who wish to keep the public from knowing about their business. As long as the parties confine themselves to their chosen private venue, they are free to conduct themselves under a veil of privacy." The court concluded, however, that "privacy considerations go by the board if a party comes to court in order to obtain an enforceable judgment on his award." The court characterized Novartis's claim that sealing was warranted because the parties have treated the proceeding as confidential as "just plain wrong." The court described the parties' confidentiality agreement as being "worth the paper on which it is written only as long as the matter remains a private matter—which is to say, only as long as no party seeks to involve the court, and through the court the Government and the people, in its resolution." The court also rejected Novartis's argument that the FAA clearly established a federal policy favoring confidentiality in arbitration. The court "emphatically disagreed" and noted that if parties abided by the arbitration award their concern for confidentiality would be

respected. The court opined, however, that "in this Court's experience, there are a lot of sore losers in arbitration—and because they have chosen arbitration, they have no right to appeal an adverse decision to a higher tribunal. So they simply do not comply with the award." The court also reminded the parties that it "is not a party to any confidentiality agreement they have made with themselves or the arbitrators" but rather is bound to comply with the law "even if courts have on occasion winked at the law and mistakenly allowed confirmation proceedings to be conducted under seal." For these reasons, the court rejected Novartis's motion to seal the award. *Bristol-Myers Squibb Co. v. Novartis Pharma AG*, 2022 WL 2133826 (S.D.N.Y.), *reconsideration denied,* 2022 WL 2274354 (S.D.N.Y. June 23, 2022).

Court Declines To Review Merits of Arbitrator Ruling on Subpoena

Under § 7 of the FAA, a court "may" issue an arbitration subpoena. CBS in this case refused to comply on privilege grounds with an arbitration subpoena which required the disclosure of an internal investigation of a sexual harassment complaint. Plaintiff labor union moved to compel enforcement of the subpoena under § 7. The court noted that the application raised the "novel legal issue of whether the Court is authorized to consider privilege objections to a subpoena" issued by an arbitrator. The court concluded that it has the discretion to consider privilege objections but declined to do so in this case. The court explained that "the rationale for deferring to an arbitrator's decisions on privilege issues is particularly strong where the objecting respondent is a party to the contract that gave rise to the underlying arbitration." The court found that the arbitrator had sound reasons for compelling production as it was persuaded that CBS placed the investigation at issue in the proceeding. Moreover, "CBS elected to have an arbitrator, rather than a court, resolve any discovery disputes that might ensue, including making decisions about CBS's assertions of legal privileges." The court did, however, require that the name of the employee alleging harassment along with non-managerial employee witnesses be made available to the unions on an "attorney-eyes only" basis. *Turner v. CBS Broadcasting Inc.*, 599 F. Supp. 3d 187 (S.D.N.Y. 2022).

ERISA Confers Federal Jurisdiction in Face of *Badgerow* Challenge

The court here confirmed an award which denied breach of fiduciary duty claims under ERISA. Two weeks later, the Supreme Court issued its decision in *Badgerow v. Walters* which rejected the "look through" approach to federal subject matter jurisdiction. The question for the court here was whether, following *Badgerow*, it had subject matter jurisdiction to issue its prior decision to confirm the award. The court concluded that in fact it did have such jurisdiction. The court emphasized that an arbitration award is no more than a contractual method for settling disputes. The issue before a court reviewing applications under § § 9 and 10 of the FAA for subject matter jurisdiction purposes is limited to the specific contract terms for settling disputes. The Court in *Badgerow* determined that since contractual rights are generally governed by state law and resolved in state courts, application of the contractual right to arbitrate generally belongs in state court. "Thus, whether a non-diverse Section 9 or 10 application states a federal question on its face is a question that looks to the governing law of the *contract*, not to the law of the underlying claims." For this reason, the Supreme Court in *Badgerow* concluded that since the employment agreement in that case was governed by state law, state law applied notwithstanding the substantial federal claims at issue. In this case, however, the applicable agreement was governed by ERISA and "questions of dispute resolution relating to an ERISA Plan including those concerning arbitration are governed exclusively by federal statutory and common law federal courts have developed for ERISA." As the narrow contractual rights at issue here related to the settlement of disputes in this case under an ERISA plan governed by federal law, the court concluded it had subject matter jurisdiction to rule under § § 9 and 10 of the FAA. *Trustees of the New York State Nurses Association Pension Plan v. White Oak Global Advisors*, 2022 WL 2209349 (S.D.N.Y.).

Court's Failure To View Actual Webpage Requires Remand

An account holder brought a putative class action against a credit union. The credit union moved to compel an individual arbitration on the basis that the plaintiff was bound by a mandatory arbitration clause and class action waiver. Plaintiff opposed the motion, claiming there was no arbitration clause or class action waiver in the agreement when she opened her account. The district court denied the motion to compel, and the credit union appealed. The preeminent issue on appeal was whether the parties agreed to arbitrate. Noting that the arbitration agreement was part of an online transaction, the Second Circuit explained: "In the context of web-based contracts, we look to the design and content of the relevant interface to determine if the contract terms were presented to the offeree in [a] way that would put her on inquiry notice of such terms." The court then found that the district court erred in undertaking the "inquiry notice" analysis because it reviewed a printed version of the agreement rather than screenshots of the web-based agreement, finding that the printed version "does not depict the content and design of the webpage as seen by users signing up for online banking." The court concluded that "the record was not sufficiently developed to indicate whether [plaintiff] knowingly agreed to the arbitration clause" and the matter was remanded to the district court to "consider the design and content of the [Banking Agreement]

as it was presented to users in determining whether [plaintiff] assented to its terms." *Zachman v. Hudson Valley Federal Credit Union*, 49 F.4th 95 (2d Cir. 2022).

Discovery Into Presumed Bias of Arbitration Process Rejected

Coach Brian Flores alleged that the NFL and a number of teams engaged in systemic racial discrimination. The NFL moved to compel arbitration under the league's policy, and Flores opposed the motion. In doing so, Flores sought "documents concerning the parties' agreement to arbitrate and applicable arbitration policies, the arbitrator's relationship with the NFL and its history of arbitration rulings, as well as the NFL's relationship with NFL Teams." The court rejected Flores's request regarding the applicable arbitration agreement as an "impermissible fishing expedition" since he offered no basis to challenge the validity of the agreement itself. The court also denied discovery related to the impartiality of the process without evidence "of clear substantive or procedural bias baked into the arbitration agreement." The court added that the FAA provided a remedy for arbitrator bias, namely, motions for vacatur. The court also declined to order discovery regarding the history of the arbitration decisions by the NFL commissioner, who would be the arbitrator here, as such evidence did not bear on the validity of the arbitration agreement itself. The court observed that Flores did not "cite a single case in which the court ordered discovery focused on the dealings and rulings of an individual arbitrator in the context of a motion to compel arbitration." Finally, the court noted that the requested discovery would not assist in determining whether the NFL, a non-signatory, may seek to enforce the arbitration agreement signed by the NFL Teams. *Flores v. National Football League*, 2022 WL 3098388 (S.D.N.Y.).

Failure To Hold Hearing Not Ground for Vacatur

The guaranty agreement between the parties included an expedited arbitration procedure that required each party to submit its position and materials to the arbitrator within seven business days following his or her appointment. The agreement also stated that the arbitration would be administered under the JAMS Streamlined Arbitration Rules and Procedures. The arbitrator was required to issue a final award within 30 days of the submissions. The arbitrator here complied with the timeliness mandates of the agreement and awarded $185,000,000 to claimant under the guaranty and respondent moved to vacate the award on the ground that the arbitrator's failure to grant its request for discovery and to hold an evidentiary hearing rendered the process fundamentally unfair. The court rejected respondent's argument and agreed with the arbitrator that the extremely expedited arbitration process that the parties agreed to did not contemplate time for discovery or hearing. "While the arbitrator in this case did not hold an evidentiary hearing, she considered extensive submissions by the parties in connection with both the scheduling decision and the final merits decision." The court also rejected respondent's contention that discovery was required because the agreement also incorporated the JAMS Rules which contemplate discovery being exchanged. "The arbitrator reasonably concluded that these contract terms conflict with, and displaced, the JAMS Rules providing for discovery and a hearing. The arbitrator noted that the JAMS Rules explicitly allow parties to waive an oral hearing and agree on procedures not contained in the JAMS Rules." The court concluded by noting that in further support of its conclusion "the parties are sophisticated commercial entities who operated with equal bargaining power" and that the arbitrator provided "more than a colorable justification for her interpretation of the arbitration agreement." *245 Park Member LLC v. HNA Group (International)*, 2022 WL 2916577 (S.D.N.Y.).

Bakery Workers Not Covered by FAA Transportation Exemption

Plaintiffs were independent contractors who delivered baked goods by truck to stores and restaurants within Connecticut. They sued their employer for wage and hour violations, and the employer moved to compel arbitration. The district court granted the motion, and a majority of a Second Circuit panel affirmed. The majority explained that to be entitled to the exemption the plaintiffs must work in the "transportation industry." The majority concluded that "those who work in the bakery industry are not transportation workers, even those who drive a truck from which they sell and deliver the breads and cakes." The majority reasoned "that an individual works in a transportation industry if the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant source of commercial revenue is generated by that movement." The court acknowledged, as pointed out by the dissent, that the plaintiffs spent significant time moving baked goods from place to place. "The decisive fact is that the stores and restaurants are not buying the movement of the baked goods, so long as they arrive. Customers pay for the baked goods themselves; the movement of those goods is at most a component of total price." The majority therefore concluded that the plaintiffs did not work in the transportation industry and the motion to compel was properly granted. *Bissonnette v. LePage Bakeries Park Street*, LLC, 49 F.4th 655 (2d Cir. 2022).

Order Resolving Independent Claim Final

A tribunal remained constituted to address several phases of a coverage dispute under an excess liability insurance policy. The tribunal issued two orders—one related to reimbursement of a payment prematurely made and the second setting procedures for future submission of claims. A mo-

tion to confirm was filed. The question for the court was whether the tribunal's order with respect to these two issues was "final" and therefore subject to confirmation. The court concluded that the first issue was in fact final as it resolved a separate and independent claim, namely, whether the premature payment was to be refunded. The court noted that "the repayment has no bearing on future claims and is, therefore, a severable issue." The court reached a different result with respect to the second issue. There, the court reasoned that the panel's interpretation of the insurance policy merely decided issues that would bear on future determinations to be made by the tribunal. The parties themselves acknowledged that the tribunal's rulings would establish a framework for future payments and the tribunal informed the parties that they could challenge its rulings and that those challenges would be addressed at the next phase of the proceedings. For these reasons, the court concluded that the tribunal's rulings on the second issue were not final but rather were interlocutory and not subject to confirmation. *HDI Global SE v. Phillips 66 Co.*, 2022 WL 3700153 (S.D.N.Y.).

Question of Fact Concerning Existence of 'Superseding' Arbitration Agreement Defeats Motion To Enjoin

Willow Run petitioned to enjoin SMS from arbitrating its breach of contract claims, arguing that an agreement dated April 7, 2003, replaced and superseded the 1998 Distribution Agreement that SMS was relying on. The alleged 2003 Agreement could not be located by either party and Willow Run argued that without the ability to resort to its terms, the parties could not be bound to arbitrate. Before denying Willow Run's petition, the federal district court observed that when "deciding a motion to enjoin arbitration, courts apply a standard similar to that used to evaluate a motion for summary judgment," noting that this is the appropriate standard to determine arbitrability "regardless of whether the relief sought is an order to compel arbitration or to prevent arbitration." Thus, when there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law" the arbitration will be enjoined. In opposition to the motion, SMS asserted that the alleged 2003 Agreement was born from a series of clerical errors made by the parties over the course of their business relationship. The parties amended the 1998 Distribution Agreement seven times, each time attaching a new "Exhibit A" extending the term of the agreement. Based on the parties' course of dealing, the court found that at minimum there were genuine issues of material fact present at to which agreement "was the operative agreement between SMS and Willow Run for the entirety of the parties' business relationship." Accordingly, Willow Run's motion to enjoin the arbitration was denied. *Willow Run Foods, Inc. v. Supply Management Services, Inc.*, 2022 WL 1813984 (N.D.N.Y.).

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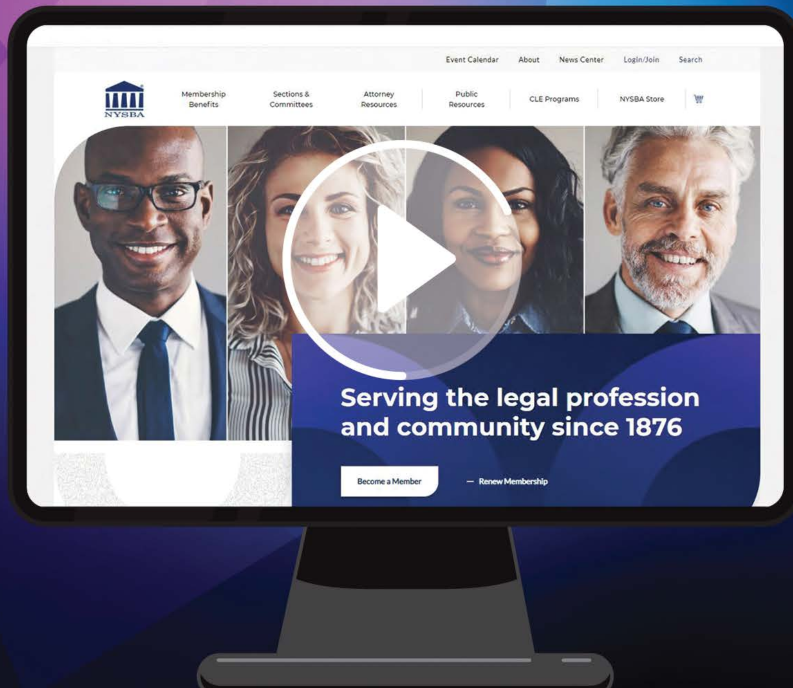

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