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New York Dispute Resolution Lawyer

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

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Contents

Ethical Compass Revisited: In Memory of Elayne E. Greenberg

6 It's Not Just About the Money

8 The Power of Empathy

Arbitration

11 Arbitration Award of Attorneys' Fees Upheld in the Face of the 'American Rule': An Analysis of *American Zurich Insurance Co. v. Sun Holdings, Inc.*
Steven M. Bierman

15 Two Cheers for Americanization: Helping International Arbitration Reach Its Full Potential
Michael Paisner

19 Just Across the Border: The New Jersey Solution for International Disputes
Laura A. Kaster

Mediation

21 Why the New York City Bar Association Report on the State of Mediation Confidentiality in New York Is Required Reading
Cassandra Porsch and John Siffert

New York Dispute Resolution Lawyer

2024 | Vol. 17 | No. 2

3 Message From the Chair
Jill Pilgrim

4 Message From the Co-Editors-in-Chief
Edna Sussman, Laura A. Kaster and Sherman Kahn

24 Case Summaries
Alfred Feliu

28 Section Committees and Chairs

New York Dispute Resolution Lawyer

Co-Editors-in-Chief

Edna Sussman
SussmanADR
esussman@sussmanadr.com

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

Laura A. Kaster
Appropriate Dispute Solutions
laura.kaster@kasteradr.com

Board of Editors

Steven M. Bierman
Bierman ADR LLC
sbierman@biermanadr.com

Theo Cheng
ADR Office of Theo Cheng LLC
theo@theocheng.com

Al Feliu
Feliu Neutral Services
afeliu@feliuadr.com

Lea Haber Kuck
lea.kuck@skadden.com

Julie Hopkins
Julie.Hopkins@jghopkins.com

Lela Love
Cardozo School of Law
love@yu.edu

Jacqueline Nolan-Haley
Fordham University School of Law
jnolanhaley@fordham.edu

Kathleen Paisley
Ambos Nbgo Law
kathleen.paisley@amboslaw.be

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

Steven Skulnik
Practical Law/Thomson Reuters
sskulnik@stevenskulnik.com

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Dispute Resolution Section Officers

Chair
Jill Pilgrim
Pilgrim & Associates Arbitration, Law & Mediation LLC
New York, NY
jpesq@pilgrim-associateslaw.com

Chair-Elect
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Interpublic Group
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william.crosby@interpublic.com

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lgastwirth@meltzerlippe.com

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Deborah Reperowitz
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Anderson, Moschetti & Taffany PLLC
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anderson@amtinjurylaw.com

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Message From the Chair

As I assumed my role as the new chairperson of Dispute Resolution Section of the New York State Bar Association, on June 1, 2024, I was cognizant of standing on the shoulders of those predecessors who were prescient enough to foresee the important role dispute resolution would play in the U.S. legal ecosystem of the 21st century. My predecessors convinced NYSBA that dispute resolution was worthy of "sectionhood." They then built the infrastructure that has helped the section grow into a vibrant, active, and critically important source of education and training for the New York State legal and dispute resolution community. I have been fortunate to have been mentored and guided by prior Dispute Resolution Section chairs, from whom I have gained a tremendous wealth of knowledge and professional camaraderie.

Innovation, technological and social evolution and revolution in this century will disrupt the legal field as a whole and our dispute resolution world, creating an entirely new range of disputes for us to address in new ways. with new methodologies.

Almost 25 years into the 21st century – as the first Black chair of the Dispute Resolution Section – I also see an opportunity to modernize and innovate while continuing the tradition of excellence established by my section chair predecessors. Thus, during my 2024-25 term as chair, I will honor and support our traditions and practice of excellence and professionalism in all our educational and training efforts for dispute resolution practitioners. I will challenge the section to be inclusive and embrace diverse dispute resolution disciplines and practitioners. Our inclusiveness will be evidenced by encouraging experienced and knowledgeable section members to extend their hands, pull up the ladder and make room in our field for new and diverse dispute resolution practitioners. Mentorship and succession planning will be important tools for inclusiveness.

Finally, during my 2024-25 term, Dispute Resolution Section members will be called upon to empower each other in our pursuit and practice of excellence within the dispute resolution profession.

I am looking forward to working with all the hardworking dispute resolution professionals in New York to ensure that the worldwide legal community appreciates the many ways in which we can be of service to them and their clients.

Jill Pilgrim

Message From the Co-Editors in Chief

Sherman Kahn

Edna Sussman

Laura A. Kaster

Our effervescent and inspiring colleague, Elayne E. Greenberg, professor of legal practice and director of the Hugh L. Carey Center for Dispute Resolution at St. John's Law, recently passed away.[1] We are all saddened by our loss, but she leaves behind a remarkable legacy in our field and our community Alternative Dispute Resolution (ADR) community.[2]

Professor Greenberg was an early and tireless advocate for ADR, particularly mediation and party autonomy. Her contributions to the field were significant and far-reaching. As an experienced mediator and conflict management consultant, she dedicated her career to educating, writing, and presenting on dispute resolution processes, ethics, and advocacy.[3]

One of Professor Greenberg's notable achievements was the development of the Bankruptcy Mediation Training Program in collaboration with the American Bankruptcy Institute.[4] This innovative program helped bridge the gap between bankruptcy law and ADR, providing valuable skills to practitioners in both fields.

Throughout her career, Professor Greenberg maintained a strong commitment to ethical practice in dispute resolution. This commitment was exemplified right here in New York Dispute Resolution Lawyer in our only recurring column, "Ethical Compass." In this column, she shared insights gained from her research, teaching, and practice, and helped to guide professionals in navigating the complex ethical landscape of ADR.

Professor Greenberg's approach to dispute resolution was both innovative and interdisciplinary. She focused on exploring the source of conflict to design more pragmatic interventions, incorporating this approach in her recent works on the intersection of implicit bias and dispute resolution, as well as informed consent.[5] Her holistic perspective allowed her to address the broader implications of ADR in various contexts, including those raising social justice issues.

Her dedication to the field was widely recognized. For nearly 20 consecutive years, she was named one of the top New York lawyers in ADR by Best Lawyers in America. She also received the ABI's Annual Service Award and was considered one of the top three Women in Dispute Resolution and Women of Influence in New York.[6]

Perhaps most important, Professor Greenberg was deeply committed to her students and to nurturing the next generation of ADR practitioners. She derived deep meaning from teaching and advising students, including those in the law school's Dispute Resolution Society.[7] Her impact extended beyond the classroom because she maintained close ties with former students who went on to use dispute resolution processes in their legal careers.

Professor Greenberg's passing is an enormous loss to our community. We republish here some of her columns and will, from time to time, include her evergreen thoughts in our issues. We are proud to include these materials with another rich issue of our journal.

Sherman Kahn, Laura Kaster, Edna Sussman

Endnotes

1. *St. John's Law Mourns the Loss of Professor Elayne E. Greenberg*, St. John's University, https://www.stjohns.edu/news-media/news/2024-04-22/st-johns-law-mourns-loss-professor-elayne-e-greenberg.
2. Christine Charnosky *St. John's Law Professor Elayne Greenberg, an 'Irrepressibly Positive Force,' Dies*. Law.com. 22 April 2024, https://www.law.com/newyorklawjournal/2024/04/22/st-johns-law-professor-elayne-greenberg-an-irrepressibly-positive-force-dies/.
3. *Elayne Greenberg*, 21 April 2024, Indisputably. http://indisputably.org/2024/04/elayne-greenberg/.
4. *Supra* note 2.
5. *In Memoriam: Elayne E. Greenberg*, St. John's University, 29 April 2024. https://www.stjohns.edu/news-media/announcements/memoriam-elayne-e-greenberg.
6. James Melamed, *Remembering Elayne Greenberg*, 22 April 2024, https://mediate.com/elayne-greenberg/
7. *Supra* note 1.

...because it's not just about money

By Professor Elayne E. Greenberg

REPRINT. This article originally appeared in NY Dispute Resolution Lawyer, vol. 9, no. 2, 2016.

Is Settlement Just About Money?

In our professional lives, we often observe myopic lawyers and mediators who misperceive that most disputes are just about money. According to this skewed view, justice is measured by dollar signs. From the vantage point of these shortsighted colleagues, the negotiation metaphor "expanding the pie," in which negotiating parties make low-cost high-benefit trades that actually enhance the value of a their settlement, is misinterpreted to be just an academic smokescreen that obscures the real issue: money. Furthermore, the metaphorical settlement pie is incorrectly seen to be a fixed dollar amount whose apportionment is about how much of the fixed pie the winner will get and how much of the fixed settlement pie the payor will lose. After all, clients are just concerned about money. Right?

Offering a more enlightened perspective, the recent negotiated settlement reached between the family of Samuel DuBose and the University of Cincinnati reinforces the message that it is not all about money.[1] For those unfamiliar with the case, let me share the undisputed facts that were captured on a body-cam. In July 2015, a University of Cincinnati officer stopped Samuel DuBose, an unarmed black male, because the car DuBose was driving was missing its front license plate. When DuBose turned on his car, the officer reached into the car and fatally shot DuBose in the head.

A comprehensive settlement between the DuBose family and the University of Cincinnati was reached in January 2016. As part of the negotiated settlement the University of Cincinnati agreed to pay the DuBose family $4.85 million cash settlement.[2] Recognizing their culpability, the University apologized for this tragic occurrence. The University also agreed to provide a free college education for each of DuBose's twelve children. In addition, the University will establish a memorial for DuBose. Of importance to the family, the DuBose family will participate in the retraining of officers to help prevent this from ever happening to others in the future.

Al Gerhardstein, the civil rights lawyer who represented the DuBose family, talked about the value of non-monetary compensation to wronged parties in helping to restore their dignity:

> Well, I've been doing civil rights cases for 39 years, and I learned very early that these families who lose a loved one want more than money. Sure, they want fair compensation, but they want dignity for their loved one. So we have done apologies. We've done new-officer training and policies. We've done monuments and plaques. We've done shared experiences, where the victim can confront the perpetrator. And we do these things in order to meet this broader goal of restoring dignity to the family after such a horrible event.[3]

The President of the University of Cincinnati, Santa J. Ono also acknowledged that this comprehensive settlement that included more than a monetary settlement is "part of the healing process not only for the family but also for our university and Cincinnati communities."[4]

Even though many of you might agree that the compelling facts in this case warranted a settlement that was not just about money, you may still distinguish this case from the other cases such as those involving commercial, bankruptcy, sports,[5] divorce, intellectual property and personal injury disputes that you vehemently believe are just about money. You may even try to justify your point of view by pointing to the sophisticated and dispassionate business person or insurance representative, for whom you are convinced the settlement of a dispute is just about money, the cost of doing business.

However, astute attorneys and mediators appreciate that all people, including sophisticated business people and seemingly detached insurance representatives, are also human beings. Attorneys and mediators who understand that their clients are also human beings also appreciate that from their clients' perspectives, justice may take many forms based on each client's personal values and individual sense of fairness. Clients measure justice, not by money alone, but by the quality of the settlement that they hope to achieve. Moreover, for some defendants and plaintiffs, money might not be a responsive remedy for the wrong that they seek to be righted.

Offering further justification that settlement is not just about money, Fisher and Shapiro, in their groundbreaking

book *Beyond Reason: Using Emotions as You Negotiate* remind us that there are five core concerns that each human being in a negotiation needs to have addressed to help preserve clients' dignity and help them get the justice they seek.[6] The five core concerns are: the need to appreciate each person's contribution, the need for affiliation that recognizes the group's commonality, the need to be respected for each participant's autonomy, the need to select a fulfilling role, and the need to be acknowledged for each participant's status.[7]

Skillful negotiators understand that these core concerns are an integral, albeit sometimes unspoken, part of a comprehensive settlement.

The Ethical Mandates Reinforce That It Is Not Just About Money

The New York Rules of Professional Conduct reinforce that it is the client's decision to seek settlements that are not just about money. Moreover, when advising her client, a lawyer may consider the client's other interests beyond just a monetary resolution.

Specifically, Rule 1.2 (a) provides:

> Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation.[8]

Rule 2.1 provides:

> . . . In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.[9]

The Model Standards of Conduct for Mediators also emphasize a client's right to determine the dimensions of a settlement beyond just money. Standard IA states in relevant part:

> A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to…outcome. Parties may exercise self-determination at any stage of the mediation process including . . . outcomes.[10]

However, many lawyers and mediators may find it challenging to enforce these client-centered mandates when their own long-held beliefs remain that settlement is just about money. If you are among the group of lawyers and mediators whose beliefs collide with your client's more comprehensive view of settlement,[11] relax, you are still entitled to hold onto your beliefs. Yet, despite your personally held beliefs, you still have to advocate for your client's interest in a more comprehensive settlement.

Rule 1.2 (b) reassures that:

> A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.[12]

Thus, the ethical rules reinforce that representing your client's interest in a comprehensive settlement does not mean you personally adopt that point of view. Nevertheless, putting personal views aside, ethical lawyers still need to understand and advocate for the interests that the client values.

Conclusion

When lawyers represent their clients in party-decided dispute resolution processes such as negotiation or mediation, lawyers have a unique opportunity to work with their clients to help shape a comprehensive settlement beyond just a monetary settlement. This is an opportunity to address the client's human and core concerns and to help their client secure their personalized sense of justice. However, lawyers and mediators who myopically seek to resolve every legal conflict by just monetary resolution are akin to the carpenter who sees everything as a nail because the only tool available is a hammer. This column invites you to expand your perspective to help your clients achieve the interests they value most, not just the money.

Stephen DiMaria, St. John's Law '17, assisted with this column.

Endnotes

1. *See* http://www.npr.org/2016/01/20/463740319/university-of-cincinnati-reaches-settlement-with-family-of-samuel-dubose.
2. *Id.*
3. *Id.*
4. *Id.*
5. *But, c.f.*, In January, 2016 the Mets left fielder Yoenis Cespedes renewed his playing contract with the Mets even though it was a less lucrative monetary offer than other offers, because Cespedes felt loyal to the team and wanted to remain in New York.
6. Roger Fisher and Daniel Shapiro, Beyond Reason: Using Emotions as You Negotiate (2005).
7. *Id.*
8. NY ST RPC Rule 1.2(a) (McKinney) (2015).
9. NY ST RPC Rule 2.1 (McKinney) (2015).
10. Model Standards of Conduct for Mediators, SM090 ALI-ABA 1759, 1762.
11. *See, e.g.* Elayne E. Greenberg, *What Sally Soprano Teaches Lawyers About Hitting the Right Ethical Note in ADR Advocacy*, 6 NYSBA New York Dispute Resolution Lawyer (Fall 2013) 18.
12. NY ST RPC Rule 1.2(b) (McKinney) (2015).

The Power of Empathy

By Professor Elayne E. Greenberg

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As colleagues in the dispute resolution field, we have likely participated in the ongoing, often heated debate about the role, if any, of empathy in dispute resolution. There are those colleagues who believe that empathy will only muck up what is really important, the bottom-line number and your evaluation about how to get there. On the other side of this controversy, there are seasoned colleagues who regularly use empathy as dispute resolution currency, often at the risk of being marginalized as "touchy feely" by those who don't understand its value. To help us get past each other's anecdotal justifications and shift to a more objective focus, I offer this column, highlighting objective research about the value of empathy in dispute resolution.

The research illuminates that empathy in dispute resolution offers three primary values. First, even- handed empathy for both parties enhances the ethical objectivity of mediators, arbitrators and advocates. Second, empathy helps satisfy participants' procedural justice needs for fair and just dispute resolution processes. Third, empathy in dispute resolution enhances the perceived integrity of our broader legal system. Our discussion begins with an explanation of empathy as a conflict resolution resource before continuing with highlights from research that validate empathy's benefits.

Empathy Is a Conflict Resolution Resource[1]

Empathy as a conflict resolution resource has traditionally been shorthand for "putting yourself in the other's shoes." However, empathy is actually comprised of three components: cognitive, emotional and behavioral. The cognitive component of empathy is the recognition of the emotions and thoughts the other is feeling.[2] The affective or emotional component of empathy is actually the *emotional response* to the thoughts and the feelings of the other so that the other feels "got" and "understood." Put together, the cognitive and emotional components are familiar to many as "perspective taking."

What distinguishes perspective taking from empathy is the third component, the behavioral component. The behavioral component of empathy is the integration of both the cognitive and emotional components into an action that indicates to the other that the other's experience is fully understood.[3] As a conflict resolution resource, empathy can be viewed as perspective taking on steroids. Empathy not only includes an understanding of the other person, but it also includes the affirmative actions, be it verbal or gestures, that demonstrate an understanding of the other's experience.

Mediators' interventions provide us rich examples of empathy in action. As one illustration of the value of empathy in a mediation, an otherwise sophisticated business investor is livid that he was sold cases of wine that weren't what they were purported to be. Although the lawyer representing the wine dealer who sold the fraudulent wine kept talking about the restitution number that would resolve this dispute, the sophisticated business investor instead kept expressing with increasing volume his rage at being duped. The mediator intervened at appropriate times with an empathic support to each side. To the wine dealer, the mediator empathized, *"You are confused and frustrated, because you don't know what this customer wants. You keep offering to make him financially whole, and he keeps getting angrier and angrier."* To the disgruntled investor, the mediator empathized, *"You are livid that the wine distributor thought it could sell you fraudulent bottles of wine and get away with it. You are saying that, for you, this is not just about the money, but it is about them taking responsibility for what you view as a reprehensible action."* The mediator's empathetic support helped each of the parties' feelings and perspectives be heard and understood by the other. It also allowed the wine dealer to begin to more effectively respond to the businessperson's true interests and the investor to begin listening to what the wine dealer was offering. Yes, empathy used properly is a powerful conflict resolution resource.

The good news is that we all have empathy in varying degrees. The better news is that we can always expand our capacity to empathize. Mediation training, which focuses on expanding our perspective-taking ability, has been shown to increase our empathic abilities.[4] Even reading books about stigmatized groups such as *One Flew Over the Cuckoo's Nest* can also help us expand our range of empathic responses.[5] And for those who need a quick empathy fix, there is even an empathy app to guide those empathically challenged into offering more empathic responses.[6]

Empathy Assists Arbitrators, Mediators, and Advocates To Maintain Their Objectivity

Empathic responses are one way for arbitrators, mediators and advocates to maintain their ethical obligation to remain objective. At a time when arbitrators,[7] mediators[8] or advocates[9] in dispute resolution are reminded by our respective ethical codes about the importance of objectivity, at the same time we are also provided with conflicting and oft times dizzying messages that remind us that it is impossible to be objective because we are all influenced by our cognitive distortions and implicit biases, whether we like it or not. Help! In the midst of our angst, the research on empathy offers a life preserver,

showing how empathy might actually help us maintain our objectivity by allowing us to fully understand each party's perspective.

In Rebecca K. Lee's research, she explains how expressing empathy for each side, also known as evenly applied empathy, can actually help reinforce objectivity.[10] By empathizing for each side, an arbitrator or lawyer can develop a deeper understanding of the presenting problem, an appreciation of what each party has experienced and bring greater objectivity in their decision making about how to resolve the matter at hand. In the area of arbitration, arbitrators could demonstrate their objectivity in their decision making by including in their reasoned awards an empathetic description of each party's perspective about the case.

In another example, my esteemed colleagues Frenkel and Stark conducted in-depth social research about the value of Consider the Opposite prompts (hereinafter CTO), also known as perspective-taking, as a tool to train lawyers. Frenkel and Stark extol the value of CTO prompts to help lawyers maintain a more objective perspective, be more effective advocates and achieve better outcomes.[11] For example, CTO prompts can help advocates overcome such cognitive biases as optimistic overconfidence and instead allow the advocate to make a more balanced assessment of his or her case.[12] Moreover, CTO prompts also help advocates weaken the pulls of an opponent who tries to gain an advantage by anchoring with a first number, by in turn responding with more reasonable alternate numbers and accompanying rationales that were considered because of their broader perspective.[13] Finally, CTO prompts can minimize the partisan viewpoint that blinds some advocates to see only evidence that confirms their point of view and can instead broaden the lawyer's information processing.[14]

In another series of experiments, a team of researchers showed how assisting a party to take perspective can actually de-bias the biased individual and allow him or her to feel empathy for the previously implicitly discriminated against person.[15] In these experiments, perspective takers where asked to write a variety of perspective-taking essays such as a day-in-the-life of a targeted outgroup such as blacks or Latinos.[16] These perspective-taking activities resulted in whites having less bias and more relatedness to the targeted groups.[17] Applying these findings to dispute resolution processes, we may mitigate some of the influences of our implicit biases or assist the parties by engaging in perspective taking.

Empathy Enhances Parties' Perception of Procedural Justice in Dispute Resolution Processes[18]

An important by-product of including empathic responses in dispute resolution is that it enhances participants' perception that they have received procedural justice in that dispute resolution process. When parties opt for a dispute resolution process, they expect and deserve a fair and just process. In fact, even when the outcome does not go the way a party had wished, they are more likely to be satisfied with the process if they perceive they have received their procedural justice. Participants in dispute resolution use four criteria to assess if the dispute resolution process is a fair and just one. First, parties want an opportunity to tell their story and be heard.[19] Second, parties want to know that the neutral is making decisions in a fair and impartial way.[20] Third, parties want to know that their neutral is trustworthy and desires to do the right thing.[21] Fourth, parties want to be treated with respect by the neutral and all who administer the dispute resolution process.[22]

Therefore, when advocates and neutrals empathize, participants are more likely to satisfactorily experience all four components that contribute to their assessment of procedural justice.

Empathy Enhances Participants' Perceived Legitimacy of the Rest of the Legal System

Another important by-product of including empathy in dispute resolution processes is that it enhances the perceived legitimacy of our entire legal system.[23] Yes, our dispute resolution programs are actually adjuncts to our legal system. Participants' satisfaction with the quality of dispute resolution programs affects their perception of our legal system. Thus, if empathic supports cause greater participant satisfaction with dispute resolution processes, participants are also likely to have greater confidence in our legal system.

Conclusion

Returning to where we began, arbitrators, mediators and advocates cannot ignore the research that demonstrates the importance of empathy in our work. To those who question the role of empathy in dispute resolution, *You are concerned that empathy will detract from participants' real reason for using dispute resolution: to resolve the case at the right number. Besides, you're not a psychologist and don't think it is your role to deal with emotions.* To those who already include empathy in their dispute resolution processes, *You do not want to be marginalized because you include empathy in dispute resolution. You regularly see the benefits of empathy and want to see those benefits legitimized.*

Empathy is a powerful conflict resource that has a positive ripple effect on the neutrals, advocates and participants. For advocates, arbitrators and mediators who strive to ethically achieve that ofttimes elusive goal of objectivity, even-handed empathy toward both parties is an effective de-biasing tool. As a de-biasing tool, empathy helps us make better deals because we can[24] then garner quality information less shackled by cognitive biases. For participants in dispute resolution processes, empathy enhances their perception of procedural justice, their perception of the legitimacy of the process and their esteem for our legal system as a whole. Now that the value of empathy is undisputed, let's go forward and include

this conflict resolution resource in our work, our trainings and our professional education.

Nicolas Berg (St. John's Law '17) assisted with the completion of this column.

Endnotes

1. Simon Baron-Cohen, The Science of Evil 183 (Basic Books, 2011).
2. *Id.* at 16.
3. *Id.*
4. *See, e.g.*, Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgement: Is Mediation Training De-Biasing,* 21 Harv. Negot. L. Rev. 1 (2016); *see also* Leslie Jamison, The Empathy Exams (Graywolf Press, 2014).
5. *Id.*
6. iTunes Preview, https://itunes.apple.com/us/app/peace-process/id572130315?mt=8 (last visited June 12, 2016).
7. *See, e.g.*, The Code of Ethics for Arbitrators in Commercial Disputes Canon 1 (2004), available at http://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf ("Canon I: An arbitrator should uphold the integrity and fairness of the arbitration process.").
8. *See, e.g.*, Model Standards of Conduct for Mediators Standard 2 (2005), available at https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_010409&revision=latestreleased ("A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.").
9. *See, e.g.*, N.Y. Rules of Prof'l Conduct: Conflict of Interest: Current Client Rule 1.7; N.Y. Rules of Prof'l Conduct: Advisor Rule 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.").
10. Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality,* 82 U. Cin. L. Rev. 145, 167–170 (2013).
11. Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing,* 21 Harv. Negot. L. Rev. 1, 34 (2015) (explaining that although they say the terms empathy and perspective-taking are used interchangeably, they consider empathy is more heartfelt and perspective-taking is more cognitive).
12. *Id.* at 21.
13. *Id.* at 40.
14. *Id.* at 33.
15. *See generally* Andrew R. Todd, Galen V. Bodenhausen & Adam D. Galinsky, *Perspective taking combats the denial of intergroup discrimination,* 48 J. of Experimental Soc. Psych. 738 (2012).
16. *Id.*
17. *Id.* at 723.
18. *See generally* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution,* 2011 J. Disp. Resol. 1 (2011).
19. *Id.* at 5.
20. *Id.* at 5.
21. *Id.* at 5.
22. *Id.* at 6.
23. *See, e.g.* Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 Wash U. Q. 787 (2001).

Arbitration Award of Attorneys' Fees Upheld in the Face of the 'American Rule': An Analysis of *American Zurich Insurance Co. v. Sun Holdings, Inc.*

By Steven M. Bierman

Will a court enforce an arbitral award of attorneys' fees when the parties' contract contains an arbitration clause requiring each party to bear its own counsel fees, and where the contract is governed by New York law and the arbitration is to be administered under the American Arbitration Association's rules? In an important recent decision authored by Hon. Frank Easterbrook applying New York law, *American Zurich Insurance Co. v. Sun Holdings, Inc.*,[1] a panel of the Seventh Circuit answered "yes."

And can the party ordered to pay attorneys' fees in the arbitration possibly make matters worse on its appeal from the district court's order confirming the award? Again, the court in *American Zurich* answered "yes," finding the appeal itself frivolous. At all levels – arbitration, judicial confirmation, and appeal therefrom – the *American Zurich* decision is instructive for arbitrators, counsel, and parties alike.

Background

Sun Holdings contracted with American Zurich to obtain workers' compensation insurance. Under their paid deductible agreement, the parties agreed that Sun Holdings would share in the insurance risk by paying a $250,000 deductible on each claim – American Zurich would pay each claim, and then Sun Holdings would reimburse it for the first $250,000. American Zurich made good on a series of claims by paying in full, but Sun Holdings failed to pay the deductible amounts.

The paid deductible agreement included a provision requiring all disputes related to the contract's performance, interpretation, or alleged breach to be resolved by binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules. The agreement provided that each party would pay its own cost of counsel, and it prohibited arbitrators from awarding punitive damages or any damages in excess of compensatory damages. Any arbitration was required to take place in Illinois but would be determined based on the law of the State of New York, the law governing the contract.

The Arbitral Tribunal's Award of Attorneys' Fees

In October 2021, American Zurich commenced arbitration to recover deductible amounts that Sun Holdings refused to pay. After the arbitration panel determined that Sun Holdings was obligated to pay the amounts sought, American Zurich applied to the panel for an award of attorneys' fees against Sun Holdings, which the tribunal granted. In February 2023, the arbitrators entered a final award in which they awarded American Zurich $1,078,674.52 for principal amounts due, 9% interest accruing from the date each unpaid invoice became due, and $174,929.39 in attorneys' fees.

In considering whether to award attorneys' fees, the arbitration panel addressed whether it had the power to make such an award, whether an award was justified in law and fact, and the appropriate amount to be granted. Relying on *ReliaStar Life Insurance Co. of New York v. EMC National Life Co.*,[2] the panel concluded that the parties' agreement to bear their own costs of counsel did not preclude granting attorneys' fees when a party has arbitrated in bad faith. The panel then determined that Sun Holdings in fact had arbitrated in bad faith, reflecting on the "Whac-a-Mole character of this arbitration" and the "bad faith imposition of unnecessary expense on Zurich."

Judicial Confirmation of the Final Award

American Zurich petitioned the U.S. District Court for the Northern District of Illinois to confirm the final award under Section 9 of the Federal Arbitration Act.[3] Sun Holdings opposed and moved to partially vacate or modify the arbitration award under Section 10(a)(4) of the Act. On Oct. 3, 2023, U.S. District Judge Matthew F. Kennelly confirmed the final award and denied Sun Holdings' motion to vacate or modify the award.[4]

Where a party properly applies to a court to confirm an arbitration award, Section 9 of the FAA mandates that "the court must grant such an order unless the award is vacated, modified, or corrected." Section 10(a)(4) authorizes a court to vacate an award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual final and definite award upon the subject matter submitted was not made."

As the Supreme Court has held, a "party seeking relief under [Section 10(a)(4)] bears a heavy burden," because "the parties bargained for the arbitrator's construction of their agreement."[5] Judge Kennelly thus found that the dispositive question before him was "whether the arbitrator interpreted

the law or contract submitted by the parties," not whether the arbitrator interpreted it correctly, relying on the Supreme Court's *Oxford Health* pronouncement that an arbitrator's factual or legal error, "even his grave error," is insufficient to justify court intervention as long as the arbitrator was "arguably construing" the contract.[6] As the Supreme Court remarked, "The potential for those mistakes is the price of agreeing to arbitration."[7]

Sun Holdings opposed confirmation of the final award, contending that (1) the fee award was in derogation of the contractual provisions requiring each party to pay its own attorneys' fees and limiting available relief to compensatory damages, (2) the panel's finding of bad faith was based on pre-arbitration conduct, and (3) the panel required judicial authority before it could award fees. Judge Kennelly rejected all three arguments.

Regarding the provision that "[e]ach party shall pay its own costs of counsel," Judge Kennelly found that this restatement of the American rule requiring parties to bear their own attorneys' fees does not end the inquiry here. Rather, the court noted that the arbitration provision also incorporates the American Arbitration Association's Commercial Arbitration Rules, Rule 49(d)(ii) of which authorizes arbitrators to award attorneys' fees if "authorized by law or the parties' arbitration agreement."

The arbitration panel accordingly looked to the law of New York, which the parties had agreed would govern, and determined that "*ReliaStar*, and cases following it, tell us that the American Rule does not preclude an award of attorneys' fees when a party has arbitrated in bad faith" and that the parties' agreement thus did not preclude the panel from awarding attorneys' fees on that basis. Such was the case in *ReliaStar* itself, even when the underlying agreement said each side would bear its own fees.[8]

Judge Kennelly concluded that the arbitration panel's decision to award attorneys' fees was indeed an interpretation of the contract, the American Arbitration Association's Commercial Arbitration Rules incorporated into the contract, and the appropriate governing law of the State of New York.

Appeal From Confirmation of the Final Award

Sun Holdings appealed from the order confirming the final award and denying its own motion to vacate or modify. The Seventh Circuit did not mince words regarding the underlying dispute under the paid deductible agreement ("American Zurich kept its part of this arrangement, but Sun did not. When Sun received bills, it ignored them. Sun didn't explain or try to justify nonpayment."), or regarding the ensuing arbitration ("During the arbitration, Sun offered one feeble excuse after another; as soon as each had been dispatched, Sun presented a new one. The arbitrators deemed this whac-a-mole approach to be a waste of everyone's time.") Characterizing the arbitrators' award of $174,929.39 in attorneys' fees as "a sanction for defending frivolously," the court noted, "True to form, Sun did not pay," and American Zurich had to seek judicial enforcement.

Sun Holdings argued that the arbitrators had exceeded their authority by directing it to pay American Zurich's legal fees, relying on the arbitration provision's dictates that "[e]ach party shall pay its own costs of counsel," and that "[t]he arbitrators shall not limit, expand or modify the terms of this agreement nor award damages in excess of compensatory damages under this Agreement." Sun Holdings contended that the $174,929.39 awarded in attorneys' fees violated the rule that each party bear its own fees and resulted in damages in excess of the compensatory amount.

The court observed, "Sun seems to think that the $175,000 is a form of punitive damages, but it is not. This is a compensatory award, designed to put American Zurich in the position it would have occupied had Sun refrained from frivolous tactics." As for the provision that each party bear its own attorneys' fees, the court acknowledged that "the arbitrators found this to be a restatement of the American Rule on legal fees, under which each side pays its own lawyers. But the American Rule is not understood to forbid sanctions for frivolous litigation." The court found that both New York law (the Second Circuit's *ReliaStar* decision) and the American Arbitration Association's Commercial Arbitration Rules (Rule 49(d)(ii)) allow awards of legal fees as sanctions even when the American rule governs.

Rejecting Sun Holdings' assertion that the contract provision is broader than the American rule and prohibits all sanctions measured by the adversary's legal expenses, the court observed, "Perhaps so – but the word 'perhaps' is vital. An arbitration clause delegates interpretive power to the arbitrators. We do not ask whether they read the contract language *correctly*; it is enough that they tried to apply the contract that the parties signed." The court quoted its oft-cited 1987 decision in *Hill v. Norfolk & Western Ry.*, in which "[w]e put it this way":

> As we have said too many times to want to repeat again, the question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly interpreted the contract; it is whether they interpreted the contract. If they did, their interpretation is conclusive.

> By making a contract with an arbitration clause the parties agree to be bound by the arbitrators' interpretation of the contract . . . . [O]nce the court is satisfied that they were interpreting the contract, judicial review is at an end, provided there is no fraud or corruption and the arbitrators haven't ordered anyone to do an illegal act.[9]

The court noted that the Supreme Court "has said the same thing," citing *Oxford Health Plans, LLC v. Sutter*,[10] and *Major League Baseball Players Association v. Garvey*.[11]

The court thereupon concluded, "Like the district court, we are satisfied that the arbitrators interpreted this contract when they concluded that its reference to legal fees did no more than adopt the American Rule. Whether the arbitrators were right or wrong is none of our business."

But *American Zurich* did not end there, as the court determined that "Sun has followed up a frivolous defense during the arbitration with a frivolous strategy in court. Instead of acknowledging *Hill* and similar decisions, . . . Sun wants us to ignore the fact that the arbitrators took the language seriously and interpreted it in a way different from the reading Sun prefers." The court continued, "And, as if to highlight the fact that it disdains the limits on judicial review of arbitral awards, Sun wants us to reexamine the arbitrators' conclusion that it engaged in frivolous conduct (it was just 'putting on a defense,' Sun insists) and wants us to say that the arbitrators overestimated the amount of excess fees that American Zurich was compelled to incur."

The court condemned this approach, finding, "These arguments are unrelated to contractual meaning. They are unabashed requests to contradict the arbitrators' findings, something the Federal Arbitration Act forbids. See 9 U.S.C. § 9." Observing that many decisions hold that "woebegone" contests to arbitrators' awards are sanctionable, and "[a]nything less makes a mockery" of arbitration's promise to expedite and cut the costs of resolving disputes, the court concluded, "Arbitration cannot expedite and reduce the cost of dispute resolution if the parties must litigate once before the arbitrators and again in court."

A Further Sanction – on the Appeal

Under these circumstances, pursuant to Fed. R. App. P. 38, the court gave Sun Holdings 14 days to show cause "why sanctions, including but not limited to an award of attorneys' fees, should not be imposed for this frivolous appeal." In its response, Sun Holdings acknowledged the basis for the court's show cause order and stated, "Having taken its medicine, Sun has no intention of quarreling with the Court's reasoning and inviting further rebuke." Instead, Sun Holdings sought "to demonstrate that it did not knowingly offer a futile contest or delay Zurich's collection of the District Court judgment."

In its July 3, 2024 order deciding the matter, the court observed, "Sun Holdings tells us that it did not litigate in bad faith because it was entitled to contest the Second Circuit's understanding of New York law" as represented in *ReliaStar.* The court continued, "But the dominant theme of its brief in this court was that we should review and reject the arbitrators' interpretation of its contract with American Zurich. That line of argument is incompatible with the agreement to ar-

bitrate," reiterating that Sun Holdings' arguments had been "unabashed requests to contradict the arbitrators' findings, something the Federal Arbitration Act forbids." The court noted that Sun Holdings' response to the order to show cause did not address "that baseless aspect of its appellant argument."

Accordingly, the court concluded that Sun Holdings "must compensate American Zurich for the legal fees and other costs that it was unnecessarily forced to incur by Sun's unnecessary appeal," and directed submissions on the amount to be paid.

Conclusion

The lessons of *American Zurich* for arbitrators, counsel, and parties are significant and many – perhaps confirmatory for some while cautionary for others. Above all, *American Zurich* underscores the importance of understanding the limits of judicial review of arbitral awards, the respective roles of arbitrators and the courts, and the consequences when a court perceives disrespect for the boundary between them.

Steven M. Bierman is an independent arbitrator, mediator, and principal of Bierman ADR LLC, and previously was a partner at Sidley Austin LLP, where he headed or co-headed the New York Litigation Group. He is a fellow of the Chartered Institute of Arbitrators and a member of the National Roster of Arbitrators and Mediators of the American Arbitration Association, the Panel of Distinguished Neutrals of the International Institute for Conflict Prevention and Resolution, and the mediator panels of the U.S. District Courts for the Southern and Eastern Districts of New York and New York State courts.

Endnotes

1. No. 23-3134, __F.4th__(7th Cir. June 3, 2024).
3. 9 U.S.C. § 9.
4. *American Zurich Insurance Co. v. Sun Holdings, Inc.*, 2023 WL 6443581, 2023 U.S. Dist. Lexis 177969 (N.D. III. Oct. 3, 2023).
5. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013).
6. 569 U.S. at 572.
7. *Id.* at 572-73.
8. 564 F.3d at 84.
9. 814 F.2d 1192, 1194-95 (7th Cir. 1987) (citations omitted).
10. 569 U.S. 564, 571-73 (2013)
11. 532 U.S. 504, 509-10 (2001).

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Two Cheers for Americanization: Helping International Arbitration Reach Its Full Potential

By Michael Paisner

International commercial arbitration has long been touted as the most efficient method of dispute resolution for cross-border business disputes. Yet, for decades, businesses and commentators have criticized the process as too slow and expensive and for sharing many of the downsides of litigation in formal court systems. These criticisms often take the form of laments about the "Americanization" of international arbitration – a term that, in the world of international arbitration, is rarely intended as a compliment. But this article (*pace* Marc Antony) comes to praise Americanization (at least partially), not to bury it. And that is because expanded adoption of several aspects of the American litigation system could help international arbitration reach its full potential as a better, faster and more efficient alternative for cross-border business dispute resolution.

At the heart of any dispute resolution process lies an inherent tension between the conflicting imperatives of speed and thoroughness, efficiency and comprehensiveness. Litigants always say they want their disputes to be resolved efficiently, and many litigants want their disputes to be resolved quickly. At the same time, at the end of the day, all litigants – especially those on the losing side – want to feel that their arguments have received a full airing and thorough consideration. Those who believe they have not received the process that is their "due" will complain, sometimes vociferously. And in the international arbitration context, they may seek to use the available mechanisms for raising challenges through national courts. This tension creates a conundrum for those seeking to reform the current international arbitration process.

Blame for the inefficiency of international arbitration is often placed on the parties. This is fair, but only to a certain extent. Criticizing businesses engaged in major commercial disputes for failing to live up to an ideal of efficient and restrained advocacy is like criticizing the scorpion for stinging the frog in the old Russian fable. It ignores that it is in their nature to do the opposite. Rare indeed is the party or counsel in a multimillion dollar commercial dispute that is willing to sacrifice even a marginally greater chance of prevailing for the benefit of more efficient procedures – which can often seem abstract and of second-order importance. Simply put, while parties may in some respects be willing to tie themselves to procedural restraint *ex ante*, before a dispute has arisen, they are unlikely to do so afterward. Indeed, once dispute proceedings begin, the imperatives will inherently drive them toward seeking more process, more submissions and more time for the presentation of their case.

This is a complex coordination problem, and it cannot be solved by any one party alone. The coordination challenge stems from the reality that no party will want to take actions that could be viewed as unilateral disarmament, thereby potentially compromising that party's chances of success, when there is no guarantee that its opponent will be similarly restrained. Another aspect of the challenge comes from the in-

herent divergence in interests between even those principals and agents on the same side of the "v," i.e., between clients and their outside counsel. One does not have to be a pure cynic to note that, in the typical hourly fee arrangement, outside counsel has very little financial disincentive to pursue more process in the hopes of marginally increasing the chance of prevailing.

The only viable solution to a coordination problem is a coordinated response, which means that it is up to arbitral institutions – and to arbitrators themselves – to take the lead in driving change. Some institutions have made significant strides in this regard through rule revisions and other reforms, as described in greater detail below. And there are many strong-willed, competent arbitrators who are prepared to maintain a firm hand on the tiller. For these arbitrators, ample tools are available to keep counsel in check and prevent the proceedings from spinning out of control. This article's plea to the international arbitration community is to expand use of these tools, and to treat them as the norm rather than the exception. Otherwise, unrestrained adherence to the principle of party control risks having the continuing perverse effect of eroding the very qualities that make international arbitration attractive to begin with.

Submissions

Submissions are too long and all too frequently address at length issues tangential to the ultimate outcome and not subject to serious contestation. The amount of paper filed in any arbitration of a reasonable size, let alone major cases with hundreds of millions and sometimes billions of dollars at stake, is staggering. Initial written submissions accompanying the constitution of the tribunal are sometimes followed by two or even three rounds of full written submissions, a skeleton, and two rounds of post-hearing briefs. These briefs can exceed a hundred pages – sometimes running to several hundred pages or more. It is hard to imagine that all of these dead trees do not result in severely diminishing marginal returns. And indeed, that is the view of at least some arbitrators themselves, one of whom recently noted with "guilt and shame" having participated in a tribunal that "issued a Final Award, upon what was essentially a dispositive question of law or contract interpretation, after the parties had expended probably more than $20 million to present to the Tribunal what turned out to be completely superfluous issues."[1] While perhaps somewhat on the extreme end, this is hardly an isolated occurrence.

Page Limits

Blaise Pascal once lamented that he had written a long letter because he "didn't have time" to write a short one. Parties in major arbitrations, however, typically have many months to prepare their briefing – more than enough time to craft shorter and tighter briefs, if there were a desire or impetus to do so.

Some have proposed that parties choose unilaterally to limit the length of their briefs, but isolated self-restraint will not solve a systemic problem. The only realistic solution, therefore, is for arbitrators to use the tools available to them to impose sensible page limits on briefing. To a U.S. litigator, the frequent absence of page limits in international arbitration is among the most jarring aspects of the process. Page limits are ubiquitous in U.S. litigation (and in the courts of many other jurisdictions), and they have bite. Summary judgment briefs in state and federal court in Seattle, Washington – where the author practices – are typically limited to 8,400 words, which is a little over 30 pages using standard font and double spacing. Requests to exceed the limit must be made in advance and are disfavored.

In a complex case, summarizing the law and facts relevant to summary judgment in 30 pages (or somewhat more if an exception is granted) is a huge challenge, but litigants routinely do it. And page limits bring many advantages – including for the quality and effectiveness of advocacy. As Judge Richard Posner, a legendary jurist of the U.S. Court of Appeals for the Seventh Circuit, once explained:

> Page limitations are important, not merely to regulate the Court's workload . . . but also to encourage litigants to hone their arguments. . . The fifty-page limit induces the advocate to write tight prose, which helps his client's cause. . . . [L]itigants frequently assert the necessity of additional pages to represent their clients adequately. Overly long briefs, however, may actually hurt a party's case, making it far more likely that meritorious arguments will be lost amid the mass of detail.[2]

The same is true of submissions in international arbitration. And imposing page limits in arbitration would similarly benefit the process.

This article is hardly the first to note the desirability of page limits. And those voices have been heard by the arbitration community, at least to some extent. As one prominent treatise notes, "[i]ncreasingly . . . arbitral tribunals (empowered by certain institutional rules) are now considering the imposition of page limits on the parties' written submissions."[3] Thus, for example, the International Chamber of Commerce Arbitration Rules provide that "[t]he arbitral tribunal shall have discretion to adopt such procedural measures as it considers appropriate," and may in particular, "after consultation with the parties, decide . . . to limit the number, length and scope of written submissions and written witness evidence (both

fact witnesses and experts).”[4] And while the rules of many major institutions are not quite as express, the imposition – or at least strong encouragement – of page limits would appear to lie within the tribunal's general discretion to manage the conduct of proceedings. Some have suggested that due process concerns may be holding back arbitrators from imposing more rigorous page limits. But if so, the concerns are misguided. Any due process objection to the imposition of anything but the most unreasonable page limits would be borderline frivolous, and so should pose no obstacle to the more widespread adoption of this simple improvement.

Summary Disposition

In conjunction with imposing page limits, arbitral tribunals should also consider the more expansive use of their authority to identify significant issues early in the proceedings for potential summary disposition. Summary disposition procedures include mechanisms “for the resolution and disposition of claims, defenses or other issues at a preliminary stage before a full merits hearing.”[5] While these measures are a key feature of U.S. litigation, the appropriateness of summary disposition is a subject of long-standing debate in international arbitration circles.

The great benefit of summary disposition mechanisms, of course, is that they can enable the early disposition of meritless claims and defenses, thus reducing – in some circumstances significantly – the length and cost of the arbitration process. Skeptics of such tools generally express concern about the risk of their misuse for harassment and delay. But that risk – while certainly present – can be mitigated through appropriate case management and the imposition of strict deadlines for briefing and resolution, as borne out by the limited available empirical evidence.[6] Skepticism about summary disposition may also be a function of the typical absence of an appellate right in international arbitration, which raises the stakes for such pre-hearing, case-dispositive determinations, especially given the limited evidentiary record in the early stages of most arbitrations.

In light of these various countervailing considerations, the international arbitration community has approached the topic of summary disposition with a measure of trepidation. “Until 2006, no major set of international arbitration rules provided an early disposition procedure.”[7] Even today, summary resolution, especially of major and potentially case-dispositive issues, remains rare.[8] That is unlike the situation in U.S. litigation, where many if not most cases are resolved – or at least positioned for settlement – at the motion to dismiss and motion for summary judgment phases. Thus, as one prominent treatise notes, “the time it takes to dispose of a meritless claim or defense in international arbitration is one way in which the process compares badly to litigation in the courts, where early disposition is often readily available.”[9]

While the frequency of early disposition in international arbitration is low, for a party keen to seek early narrowing or dismissal of an opponent's case, tools are available – if not exactly encouraged – under the rules of most arbitral institutions. The spread of such summary disposition mechanisms is a fairly recent development: according to one study, between 2016 and 2021 seven major arbitral institutions added summary disposition rules.[10] Yet still, most rules authorizing summary disposition remain “cautious and restrictive.”[11]

The International Chamber of Commerce Arbitration Rules are fairly typical in both the process they establish and the ambivalence it reflects. ICC Rule 22(2) provides that, “[i]n order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.” Appendix IV of the Rules goes on to specify that “rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case,” is among the case management techniques that the tribunal may adopt. And in 2021, the ICC issued a Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration clarifying that “[a]ny party may apply to the arbitral tribunal for the expeditious determination of one or more claims or defenses, on grounds that such claims or defenses are manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction.”[12]

A more direct and expansive approach can be found in the new framework for early disposition under the 2021 amended rules of the American Arbitration Association's International Centre for Dispute Resolution. This new Article 23 establishes a two-step process. The tribunal first determines whether to allow an early disposition application to proceed, based on a showing that the application “(a) has a reasonable possibility of succeeding, (b) will dispose of, or narrow, one or more issues in the case, and (c) that consideration of the application is likely to be more efficient or economical than leaving the issue to be determined with the merits.” If permission is given, the tribunal then has broad authority to “make any order or award in connection with the early disposition of any issue presented by any claim or counterclaim that the tribunal deems necessary or appropriate.” This authorization would seem to call for a straight determination on the merits of an application, rather than applying the higher “manifestly devoid of merit” standard set forth in the ICC Note.

The 2020 IBA Rules on Taking Evidence in International Commercial Arbitration – a widely accepted source of guidance on evidentiary procedure in international arbitration – go a step further in promoting the use of summary disposition. Article 2, paragraph 3 of the IBA Rules “encourage[s]” the tribunal “to identify to the Parties, as soon as it considers

it to be appropriate, any issues: (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or (b) for which a preliminary determination may be appropriate." To be sure, the commentary to the Rules cautions that the goal is "not . . . to encourage litigation-style motion practice." But the IBA Rules do make clear that, where "certain issues may resolve all or part of a case," "the arbitral tribunal has the authority to address such matters first, so as to avoid potentially unnecessary work."

What is hindering greater reliance on summary disposition mechanisms by tribunals in practice? Consider the perspectives of each of the major actors. Arbitrators have little incentive to invite a potential post-award challenge by short-changing the normal evidentiary process, especially over the objection of one of the parties.[13] Litigants, for their part, may be reluctant to provoke arbitrator suspicion by invoking a little-used mechanism that is viewed negatively in some quarters as an overly aggressive U.S. export. Litigants may also be dissuaded by the onerous standard typically applied in deciding summary disposition requests, with many institutional rules authorizing relief only based on a showing of "manifest" lack of merit.[14] The principal-agent dynamic discussed above may come into play as well, with outside counsel having little obvious incentive to pursue a chancy summary disposition application when counsel does not shoulder the cost of additional process.

These dynamics unquestionably pose obstacles. But for willing arbitrators, plenty of authority supports their use of summary disposition tools to realize the potential for large gains in speed, efficiency, and earlier case resolution.

* * *

Parties, counsel, institutions, arbitrators, and commentators all have a role to play in driving the change needed for international arbitration to reach its full potential as an alternative mechanism for resolving large, complex cross-border business disputes. Reform can take many forms and derive from many different sources and models. For too long, those seeking to make arbitration speedier and more efficient have reflexively treated the notion of "Americanization" as an epithet, and the spread of procedures modeled on those employed in U.S. litigation as part of the problem rather than the solution. But as this article has argued, those advocating for reform – or simply seeking to take advantage of the flexibility inherently available within the present rules governing arbitration – might well benefit from considering how international arbitration can more productively integrate and embrace positive features of the U.S. litigation system.

Michael Paisner is a partner in Perkins Coie's Seattle office and handles a broad range of litigation, arbitration, and investigation matters.

Endnotes

1. Marc J. Goldstein, *Efficiency With Dignity: Early Dispositions and the Beleaguered Arbitrator,* at 1 (unpublished manuscript in draft May 16, 2018), https://torontocommercialarbitrationsociety.com/wp-content/uploads/2017/06/Preliminary-Issues-Article.pdf.
2. *Fleming v. County of Kane, State of Illinois*, 855 F.2d 496, 497 (7th Cir. 1988).
3. *See* Nigel Blackaby, Constantine Partasides, Alan Redfern, & J. Martin Hunter, *Redfern and Hunter on International Arbitration* ¶ 6.73 (7th ed. 2022) [hereinafter Redfern & Hunter].
4. ICC Rules, App'x VI, Art. 3.4; *see also* Redfern & Hunter, *supra* note 3, at ¶ 6.73 n.73.
5. David L. Wallach, *The Emergence of Early Disposition Procedures in International Arbitration*, in Arbitration International (William W. Park (ed.), Oxford University Press 2021, vol. 37, issue 4), at 836.
6. *See, e.g.*, B. Ted Howes & Allison Stowel, *The Impact of Summary Disposition on International Arbitration: A Quantitative Analysis*, at 1, NYSBA New York Dispute Resolution Lawyer, Spring 2020, Vol. 13, No. 1 (finding that the summary disposition process under the summary disposition rules of the International Centre for Settlement of Investment Disputes (ICSID) lasted an average of less than three and one-half months from start to finish, and that ICSID arbitrations in which summary disposition applications were made resolved, on average, over a year earlier than the average ICSID arbitration – regardless whether the applications were successful).
7. Wallach, *supra* note 5, at 835.
8. *See* Blackaby et al, *supra* note 3, at ¶ 6.37 (noting that the use of summary determination procedures in international arbitration "has been limited"). For example, a recent study found that the ICSID's summary disposition process was invoked in only 6.1% of arbitrations. *See* Howes & Stowell, *supra* note 6, at 1.
9. Blackaby et al, *supra* note 3, at ¶ 6.37.
10. *See* Wallach, *supra* note 5, at 836. Those seven institutions were SIAC, JAMS, SCC, HKIAC, LCIA, ICC and ICDR. The ICSID adopted an early disposition procedure in 2006.
11. *Id*. at 849.
12. ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration (Jan. 1, 2021), https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf.
13. Michael M Collins, *Summary Disposition in International Arbitration*, in 50 Years of the New York Convention: ICCA International Arbitration Conference (Albert Jan Van den Berg (ed.), ICCA Conference Series, Volume 14 (Kluwer Law International 2009)), at 533-34.
14. ICSID Rules of Procedure for Arbitration Proceedings 41(5) and (6) (permitting a party to "file an objection that a claim is manifestly without legal merit" within 30 days after the arbitral tribunal is constituted and before the tribunal's "first session"); Singapore International Arbitration Centre (SIAC) Rule 29, "Early Dismissal of Claims and Defenses" (permitting a party to apply for early dismissal of a claim or defense in the basis that it is "manifestly without legal merit").

Just Across the Border: The New Jersey Solution for International Disputes

By Laura A. Kaster

The enormous increase in international transactions in goods and services has had a substantial impact on the need for dispute resolution mechanisms around the world. Cross-border transactions have grown significantly in recent years. Regarding business-to-business (B2B) transactions, encompassing goods and services, in the three months ending in May of 2024 compared to the *three months* ending in May 2023:

- Average exports increased $9.3 billion from May 2023.
- Average imports increased $15.6 billion from May 2023.[1]

Total exports were $261.7 billion, and imports were $336.7 million.[2] The U.S. trade-to-GDP ratio, which measures the total value of imports and exports of goods and services as a percentage of GDP, was 27.36% in 2022, showing a 1.81% increase from 2021.[3] And this percentage is lower in the U.S than in many other industrialized countries. This trend, and the potential for even greater international commerce, has important implications for dispute resolution mechanisms in international commerce.

As cross-border transactions increase, so does the potential for disputes. Businesses recognize the need for risk management in the form of cost-effective methods to anticipate and address these disputes and to assure that solutions yield enforceable results across different jurisdictions. The Global Pound Conference series, which gathered data from stakeholders in the dispute resolution field across multiple countries, highlighted the growing importance of efficient dispute resolution mechanisms in international commerce. A report summarizing the findings of the series was published in 2018, finding that efficiency is the key priority of the parties when choosing dispute resolution processes and that the parties expect a more integrated process leading to solutions.[4] While advocates and neutrals may define and understand separate processes, parties are seeking resolution and do not necessarily understand the process distinctions. They want efficiency and binding resolution across methods and techniques.

In 2021, New York Dispute Resolution Lawyer published the findings of the Mixed Mode Task Force of the College of Commercial Arbitrators, the International Mediation Institute and the Straus Institute for Dispute Resolution, Pepperdine School of Law.[5] The term "mixed mode" refers to combinations of different dispute resolution processes (e.g., adjudicative processes, such as litigation and arbitration, with non-adjudicative processes, such as conciliation or mediation). Well known examples are MED-ARB (mediation followed by arbitration), ARB-MED (arbitration followed by mediation), dispute resolution boards and MEDOLOA (mediation followed by last-offer arbitration). The combinations and permutations of these mechanisms can help parties achieve a direct path to solving their disputes and respect the expressed desire for processes that include mediation.

The Singapore Convention on Mediation, which came into force in September 2020, is a significant development in this area. It provides a framework for the enforcement of mediated settlement agreements across borders, addressing a key concern in international dispute resolution. The convention aims to facilitate international trade by making it easier for businesses to enforce mediated settlements in signatory countries, thus providing a more cost-effective and efficient alternative to litigation or arbitration. As of July 7, 2024, the convention has 57 signatories and 14 parties.[6] Until it is more widely adopted, the Singapore Convention is not yet a viable solution for most parties.

As international commerce continues to evolve, the need for effective dispute resolution methods becomes even more critical. Lawyers and businesses alike must stay informed about these trends and the available tools for anticipating and resolving international commercial disputes efficiently and cost-effectively. International arbitration has been an enormous success but is not realistic for disputes that cannot justify the filing fees and arbitrator costs. All arbitral administrators are focused on new solutions through online dispute resolution and rule changes. One hybrid, mixed mode solution is just across the New York border in New Jersey. New Jersey has stepped up to address this need with a groundbreaking approach to international dispute resolution

New Jersey's International Mediation and Arbitration Act

Effective May 7, 2017, New Jersey enacted the International Mediation and Arbitration Act, offering a novel solution for resolving cross-border disputes. This innovative legislation allows counterparties to file a dispute as an arbitration and allows the same appointed arbitrator to change hats to become a mediator and then to mediate that dispute. If

mediation is successful, the mediator returns to the role of arbitrator and converts the mediated settlement agreements into consent arbitral awards, which can be enforced under the New York Convention in over 170 countries worldwide.[7]

The New Jersey Act applies to disputes involving: (a) at least one non-U.S. resident; (b) U.S. residents dealing with property located outside the United States; (c) contracts involving performance or enforcement outside the U.S.; and (d) disputes bearing some relation to foreign countries. It is important to note that the statute does not limit its coverage to residents of or businesses incorporated in New Jersey. Any U.S. residents can submit their cross-border dispute for resolution before GMXC Resolutions, the non-for-profit administrator of the statute.

Key Benefits of the New Jersey Statute

The New Jersey International Mediation and Arbitration Act offers several advantages for businesses involved in cross-border disputes:

1. Cost-effectiveness: Mediation is typically less expensive than traditional litigation or arbitration.

2, Efficiency: The process allows for quicker resolution of disputes compared to court proceedings or arbitration.

3. Flexibility: Parties have more control over the process and can tailor solutions to their specific needs.

4. Confidentiality: Unlike public court proceedings, mediation offers privacy for sensitive business matters.

5. Relationship preservation: The collaborative nature of mediation can help maintain business relationships.

6. Global enforceability: By converting mediated settlements into arbitral awards, the act ensures enforceability in countries that are signatories to the New York Convention.

The New Jersey statute responds to the evolving needs of business.

New Jersey's International Mediation and Arbitration Act represents a significant step forward in international dispute resolution. By offering a bridge between mediation and arbitration, it recognizes that the process should not impede but instead should foster resolution and provides businesses with a cost-effective, efficient and globally enforceable method to resolve cross-border disputes. As international trade continues to grow, particularly with neighboring countries like Canada and Mexico, this innovative approach positions New Jersey as a leader in addressing the complex challenges of global commerce.

The push for international mediation as a preferred method of dispute resolution extends beyond New Jersey's borders. The Global Pound Conference series of events highlighted the growing demand for mediation in international commercial disputes, while the United Nations Commission on International Trade Law Working Group II is developing uniform standards for international mediation. The U.S. Chamber of Commerce has also thrown its weight behind changes in dispute resolution practices to better serve global businesses, recognizing the need for more flexible and efficient conflict management tools. Global corporations are increasingly demanding mediation as a first-line approach to dispute resolution. As international trade continues to grow, particularly with neighboring countries under agreements such as the United States-Mexico-Canada Agreement, the need for innovative dispute resolution mechanisms becomes ever more pressing. New Jersey's act, in taking advantage of the widely accepted New York Convention, represents a significant step forward in addressing this need. New Jersey's innovative solution offers a glimpse into the future of international conflict management, promising a more streamlined and cooperative approach to resolving the inevitable disputes that arise in the course of global business.

Laura A. Kaster, FCIArb, is one of the co-editors in chief of New York Dispute Resolution Lawyer and a former chair of NYSBA's Dispute Resolution Section. She is a fellow in the College of Commercial Arbitrators and a master mediator for the American Arbitration Association.

Endnotes

1. *News Release: U.S. International Trade in Goods and Services, May 2024*, Bureau of Economic Analysis, U.S. Dep't of Comm., July 3, 2024, https://www.bea.gov/news/2024/us-international-trade-goods-and-services-may-2024.
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Why the New York City Bar Association Report on the State of Mediation Confidentiality in New York Is Required Reading

By Cassandra Porsch and John Siffert

In June 2024, the New York City Bar Association issued a report entitled "Mediation Confidentiality in New York State: Overview of the Current Regulatory and Institutional Landscape and Subcommittee Recommendations," which revealed the gaps in New York State's rules on mediation confidentiality.[1] Given the increased use of court-mandated and private mediation, the report contains significant findings for mediation participants, including mediators, counsel and parties. The report challenges the belief that communications and information shared at mediation sessions are confidential and can be protected from disclosure or later use. By revealing these weaknesses, the report paves the way for further consideration of ways to protect confidentiality as an essential pillar of mediation.

Background

Litigants increasingly find that courts are referring lawsuits to be mediated pursuant to a court-mandated mediation program. In 2022, the New York State court system reported referring 12,000 cases to mediation.[2] This does not account for disputes where the parties voluntarily engage a private mediator or are contractually required to mediate under the aegis of an institution such as the American Arbitration Association or JAMS. Indeed, mediation has become a preferred method for resolution of business differences, and it is often now mandated in contract provisions known as "step clauses" that call for a mediation before either side can commence an arbitration or lawsuit.[3]

Despite parties' preference for or willingness to mediate, and despite the increasing use of court-mandated mediation programs that reduce the courts' dockets, New York State has not adopted the Uniform Mediation Act that was promulgated over 20 years ago.[4] The Uniform Mediation Act establishes a "blocking privilege" which provides recourse for the parties, their lawyers, non-parties and mediators to protect "communications" exchanged during the course of a mediation session, against each other and other participants, including third-party witnesses.[5] The act also codifies the enforceability of parties' confidentiality agreements with respect to mediation.[6]

Even though New York has not adopted the Uniform Mediation Act, many mistakenly assume that New York court-ordered or private mediations assure the same level of confidentiality as a legislated mediation privilege would provide. Indeed, mediation training regularly includes teaching new mediators to give assurances that nothing that occurs during a mediation may be repeated.[7] Many attorneys may assume that communications made as part of settlement efforts are protected because evidentiary rules restrict the use of settlement discussions or offers.[8]

In fact, there are several degrees of daylight between the protection afforded by specific evidentiary rules, a general privilege, and a statutory recognition of confidentiality. Because New York has no statutorily granted mediation privilege or codified confidentiality protection pertaining to mediation-related communications, unless they take further action, those who participate in mediations governed by New York law are subject to the limited protection of evidentiary restrictions and a patchwork of different confidentiality rules depending on the forum in which they are mediating.

The Report

The need for the recommendations was animated by the realization that mediation practitioners were unaware that New York mediations were not subject to a comprehensive set of confidentiality rules. Consequently, members of several committees of the New York City Bar Association, including the ADR Committee, the Arbitration Committee, the International Commercial Disputes Committee, and the Litigation Committee formed a Mediation Confidentiality Subcommit-

tee to examine the misconceptions, research the protections that do exist, and explore potential approaches to supplement the existing rules and laws. The topics are addressed in the report.

Levels of Confidentiality

There are three levels of protection for mediation-related communications that exist in different jurisdictions. The most circumscribed level of protection is available under evidentiary rules concerning the admissibility of "compromise offers." In New York, these exist under Federal Rules of Evidence 408 and N.Y. Civil Practice Laws and Rules 4547. F.R.E. 408 provides that evidence of compromise of a claim and conduct or statements made during negotiations to compromise a claim, are "inadmissible to prove or disprove the validity or amount of a claim." CPLR 4547 provides similarly that offers to compromise or "evidence of any conduct or statement made during compromise negotiations" are "inadmissible as proof of liability for or invalidity of the claim or the amount of damages." Notably, these only protect settlement discussions to the extent that they are offered into evidence for the specific purpose of proving that a claim is valid and is worth a certain sum. Courts can, and have, allowed such information to be disclosed and used for other purposes.[9]

The second level of confidentiality afforded to mediation-related communications is a mediation privilege. As litigation practitioners know, information may be subject to discovery even if it may ultimately not be admissible as evidence.[10] A mediation privilege would apply in legal proceedings and would bar discovery of mediation-related communications, regardless of whether such communications otherwise would be admissible into evidence. The mediation privilege places mediation-related communications in the same protected category as the attorney-client privilege, the doctor-patient privilege and the spousal privilege, warranting withholding of such communications and requiring that they be addressed on a privilege log. The critical aspect of the mediation privilege is that it provides the potential to protect privileged communications to the parties, counsel, third-party participants, and the mediator. The problem is that New York has not adopted a statute or rule creating a mediation privilege, and no court decision has established a mediation privilege in New York.

The broadest level of confidentiality that may be granted with respect to mediation-related communications is the statutory recognition of the right of parties to contract for general confidentiality. Since evidentiary use restrictions and privileges are applicable only in legal proceedings and parties may wish to keep their communications confidential vis à vis the whole world, a statutory provision such as the one in the Uniform Mediation Act providing that "mediation communications are confidential to the extent agreed by the parties" creates the obligation for courts to honor and enforce private agreements to keep mediation communications confidential (subject, of course, to other statutory exceptions).[11]

The Report's Findings

The report finds that because New York has no statewide law granting a mediation privilege or governing mediation confidentiality, the confidentiality protections afforded to the participants in a mediation are highly fragmented depending on the forum of any given mediation. The evidentiary rules prohibiting the use of settlement discussions in certain contexts are the only statutory provisions affording some measure of confidentiality protections. Thus, mediators and mediation participants may not assume that all information shared during a mediation is *de facto* confidential.

Mediations conducted in the state and federal courts in New York are all governed by some set of confidentiality rules specific to their particular court-annexed program. Privately administered mediation forums such as AAA and JAMS also have rules requiring confidentiality to which participating parties agree to be bound. However, these rules may bind the participants to the mediation but not third parties who come into contact with mediation-related communications. Private mediations that are not part of a court program or conducted through an administered entity are not governed by any general confidentiality rule and/or standard mediation agreement covering the participants. The report suggests that in private mediations, the mediators and legal practitioners should consider entering into their own drafted confidentiality agreement. The report also notes that the rules in court-annexed mediations and administered mediations are not uniform; consequently, the report suggests that the participants should determine the advisability of entering into a confidentiality agreement to supplement whatever protections are offered by the respective rules.

The topics that participants should ensure are covered between applicable confidentiality rules and any supplemental agreements are (1) party disclosure of information shared with the opposing party; (2) party disclosure of information shared with the mediator; (3) mediator disclosure of information shared with the parties, their respective counsel and any other persons related to the mediation parties who attend a mediation session or are otherwise privy to sensitive information; and (4) disclosure by any persons attending or otherwise participating in the mediation process.

The report also suggests including additional provisions that broaden the confidentiality of the mediation. Among the report's recommendations are that the parties require other third parties who may be privy to mediation information

to sign a confidentiality agreement; that the parties address the liability and remedy for breach of confidentiality; and that the parties be notified in advance of any disclosure or third-party request that would entail disclosure, whether by subpoena or other compulsory process. Finally, the report recommends that mediators enter into their own confidentiality agreement with the parties that is specific to the mediator's role and tailored accordingly. For example, mediator confidentiality agreements may contain a provision that the parties agree not to call the mediator as a witness for any purpose or otherwise seek the mediator's work product in discovery, and further that the parties will indemnify the mediator if the mediator is required to respond to or formally resist information requests from third parties.

Conclusion

Mediation unquestionably has become an integral adjunct to our judicial system, and confidentiality is an essential ingredient to the successful conduct of mediations. The New York City Bar Association's "Mediation Confidentiality in New York State" provides an excellent survey of the state of confidentiality protections in mediations in New York and is an important guide for practitioners to consult before commencing a mediation.

Cassandra Porsch is a partner in the commercial litigation and dispute resolution practice of the New York City office of gunner*cooke*. She is the incoming chair of the Litigation Committee at the New York City Bar Association and actively serves on various bar initiatives, including having served on the Subcommittee on Mediation Confidentiality, which drafted the report addressed in this article.

John S. Siffert is a partner of Lankler Siffert & Wohl and special master in a Title VII action in the Southern District of New York. He is an FCIArb, a distinguished neutral for the CPR, and an arbitrator and mediator for the AAA. He is an adjunct professor at NYU Law School, a fellow of the ACTL, and co-author with Sand, "Modern Federal Jury Instructions."

Endnotes

1. The report is available at: https://www.nycbar.org/reports/mediation-confidentiality-in-new-york-state/.
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5. UMA § 5 and Comment.
6. UMA § 8.
7. 7 *See, e.g.,* CIArb Mediation Training & Assessment Virtual Training Materials 2021.
8. *See* Federal Rules of Evidence 408 and N.Y. Civil Practice Laws and Rules § 4547.
9. *See, e.g., Faulkner v. Arista Records LLC*, 797 F. Supp. 2d 299, 313 (S.D.N.Y. 2011) (settlement communications were deemed admissible evidence where they were offered to show that the defendant had made an offer to pay so as to restart the running of the statute of limitations on a breach of contract claim, with the court finding that the issue of whether the statute of limitations had run was separate from trying to prove the validity of the contractual obligation to begin with or what amount was owed).
10. *See* Fed. R. Civ. P. 26(b)(1) noting that "[i]nformation within [the] scope of discovery need not be admissible in evidence to be discoverable."
11. While one may query why this provision is needed given that courts are already tasked with enforcing contracts, as a public policy matter, parties generally may not contract to keep information from a court. This provision gives both parties and courts wishing to enforce private confidentiality agreements more support, rather than requiring them to fish for common law principles or general concepts of protecting the mediation process to promote settlements. As discussed in the report, in New York, where there is no statutory provision akin to Section 8 of the UMA, there is little case law on the enforceability of such private contracts, though the case law that does exist tends to support the enforcement of such agreements, with exceptions. Thus, even in jurisdictions such as New York, having such agreements is still better than not having them.

By Alfred G. Feliu

Courts Must Stay Actions When Granting Motion To Compel

A unanimous U.S. Supreme Court clarified that the FAA meant what it said when requiring a court to stay proceedings when a party requests a stay. The Ninth Circuit in this case had ruled that instead a court could dismiss the action once referred to arbitration. The Court emphasized that Section Three of the FAA is titled “Stay of Proceedings Where Issue Therein Referred to Arbitration” and provides that a court “shall” stay proceedings upon application of a party and that the term “shall” creates an obligation that is not subject to judicial discretion. The Court pointed out that if a matter is dismissed under the FAA, rather than stayed, “that dismissal triggers the right to an immediate appeal where Congress sought to forbid such an appeal.” The Supreme Court made the additional point that courts retain a “supervisory role” over arbitrations even after a matter is referred to arbitration. For example, courts may be required to appoint an arbitrator, enforce subpoenas, and facilitate recovery on an arbitration award. “Keeping the suit on the court’s docket makes good sense in light of this potential ongoing role, and it avoids costs and complications that might arise if a party were required to bring a new suit and pay a new filing fee to invoke the FAA’s procedural protections.” The Court concluded that a district court must stay proceedings upon a party’s request following referral of the matter to arbitration.” *Smith v. Spizzirri*, 601 U.S. 472 (2024).

Transportation Worker Exemption Not Limited to Transportation Industry

The U.S. Supreme Court in *Saxon v. Southwest Airlines* ruled that the exemption in the FAA for transportation workers focuses on the work the employees perform and not on what the employer generally does. Soon thereafter the Second Circuit ruled that the FAA transportation exemption did not apply in this case because the franchisees who distributed baked goods were in the bakery industry, and not in the transportation industry. The Supreme Court rejected the Second Circuit’s analysis and vacated its ruling, holding that the transportation exemption may apply to workers outside the transportation industry. The court noted that in *Saxon* it expressly declined to adopt an industry-wide approach and instead focused on the work performed by the employee. The court emphasized that the Second Circuit’s requirement of a tie-in to the transportation industry would result in “arcane riddles about the nature of a company’s services. Does a

pizza delivery company derive its revenue mainly from pizza or delivery?” The Court reasoned that the Second Circuit’s approach would require wasteful mini-trials on determining the transportation industry question. The Court noted that Congress, in framing the exemption, spoke in terms of seamen and railroad employees and not the industries in which they worked. As such, the Court concluded that a “transportation worker need not work in the transportation industry to fall within the exemption from the FAA provided by §1 of the Act.” *Bissonnette v. Le Page Bakeries Park St.,* 601 U.S. 246 (2024).

No Mutual Assent Where Customer Not Notified About Arbitration Term

Noting that “it is a basic tenet of contract law that, in order to be binding, a contract requires a meeting of the minds and a manifestation of mutual assent,” the Second Circuit affirmed a district court order denying Popular Bank’s motion to compel arbitration. The customer did not receive actual notice of the arbitration terms, but the court noted that the customer could “nevertheless [be] bound by such terms if he is on *inquiry* notice of them and assents to them through conduct that a reasonable person would understand to constitute assent.” Here, however, the court found that there were several modified versions of the agreement over a series of years containing contradictory language which rendered the agreement ambiguous as to whether the various versions were amendments to or replacements for the original. Because of this, the court concluded, “in light of the totality of the circumstances,” the customer never received notice about the contract terms in a “clear and conspicuous way” and a “reasonable customer would not be sufficiently aware of which of these opt-out provisions governs.” As such, the court concluded the arbitration agreement was invalid for lack of mutual assent. *Lipsett v. Popular Bank*, 2024 WL 111247 (2d Cir).

Panel's Application of AAA Rule Not Unfair

Minority shareholders sought to enforce their contractual right to force the sale of the company over the objection of the majority shareholders and a highly contentious arbitration followed. The arbitration was conducted in accordance with the Commercial Rules of the American Arbitration Association. The panel granted the minority shareholders' request for specific performance and ordered the sale of the company in a partial final award issued under Rule 47 of the Commercial Rules. The majority shareholders challenged the partial final award, arguing that New York law and not Rule 47 should apply. The district court rejected the argument, and the Second Circuit affirmed. The court emphasized that the parties were on notice that the AAA rules applied to this proceeding. The court acknowledged that the parties and the panel did at times focus on New York law but concluded that it was "not unfair to expect the parties to be prepared to address" Rule 47, which had been suggested by the panel as governing. The court noted that even after the panel averted to Rule 47 during oral argument, the majority shareholders still sought application of New York law relating to specific performance and continued to do so on appeal. The court observed that respondents "were not prejudiced by the alleged 'last-minute switch' because their litigation posture remained unchanged." The court added that in any event "the panel analyzed the specific performance issues under New York law in the alternative and arrived at the same conclusion." For these reasons, the Second Circuit affirmed the district court's refusal to vacate the panel's rulings. *Telecom Business Solution, LLC v. Terra Towers Corp.*, 2024 WL 446016 (2d Cir.).

Arbitration Agreement Limiting ERISA Plan-Wide Relief Not Enforceable

Plaintiff here brought a class action under the Employee Retirement Income Security Act alleging that defendant's plan breached its fiduciary duties and sought plan-wide equitable relief. The plan moved to compel arbitration. The district court denied the motion to compel, and the Second Circuit, by a 2 to 1 vote, affirmed. The majority reasoned that because plaintiff's "avenue for relief under ERISA is to seek plan-wide relief, and the specific terms of the arbitration agreement seek to prevent [plaintiff] from doing so, the agreement is unenforceable." The majority relied on the Supreme Court's direction in *Mitsubishi v. Soler Chrysler-Plymouth* that an arbitration agreement may not serve as a prospective waiver of a party's right to seek statutory remedies. Responding to the argument that the Supreme Court had enforced class action waivers, the majority pointed out that the court has not taken a "one-size-fits-all" approach. "The Court has recognized the qualitative difference between waivers of collective-action procedures like class actions, and waivers that preclude a party from arbitrating in a representational capacity *on behalf of a single absent principal*, a point it recently drove home in *Viking River*." The majority explained that "there is a qualitative difference between arbitrating on behalf of an absent principal and arbitrating on behalf of a class of individuals . . . . The line of cases upholding the 'individualized arbitration' provisions all deal with the latter scenario. This case involves the former." For these reasons, the Second Circuit upheld the district court's denial of a motion to compel up. *Cedeno v. Sasson*, 100 F.4th 386 (2d Cir. 2024).

Award Remanded to Arbitrator for Clarification

The arbitrator awarded over $100 million in a contract dispute, including over $43 million in punitive damages based on a finding that an affiliate of the losing party, Levona Holdings, violated the injunction issued during the proceedings. The court, in an earlier ruling, concluded that the arbitrator had exceeded his authority because the "affiliate caused the commencement of a bondholder litigation against[Levona] and filed an involuntary bankruptcy petition" against it. The court, which found the award ambiguous, upon reconsideration directed his award to "specify the portion of the lump-sum punitive damages award that was based on the violations of the Status Quo Injunction, which the Court determined exceeded the ambit of the arbitrator's authority. . . . " The court acknowledged that in refining its remand direction it was attempting to ensure "that it does not violate the functus officio doctrine or require the Arbitrator to substantively modify the Award." *Eletson Holdings, Inc. v Levona Holdings Ltd.*, 2024 WL 2963719 (S.D.N.Y.).

Court Appoints Umpire Where Party Arbitrators Cannot Agree

Each party appointed an arbitrator, but the party-appointed arbitrators could not agree on an umpire for this insurance dispute. The agreement expressly provided that if the party-appointed arbitrators could not agree on an umpire, either party "may request the selection be made by a judge of a New York court." The request was made, and the federal district court selected a retired magistrate judge from New York. The defendant, a Texas school district, had proposed retired Texas State court judges. The court opined that the proposed umpires were all qualified but noted that New York law applied to the dispute and that this favored the selection of a New York-based umpire as that person "more likely would be expert in the issues of New York law that the agreement states is to apply." The court added that such an "umpire can travel more easily and presents lesser travel and lodging costs than an out-of-state umpire." The court pointed out that, with the defendant's "professed concern about cost, that the selected magistrate judge billed at a lower rate than other candidates.

The court concluded that the selected magistrate judge "is best suited to serve as umpire in this arbitration." *Certain Underwriters at Lloyd's London v. Edouch Elsa Independent School District*, 2024 WL 1514020 (S.D.N.Y.).

Interim Award Reviewable Where Proceeding Was Bifurcated

The parties here agreed to bifurcate liability and damages. The arbitrator then issued an interim award resolving liability issues. The losing party moved to vacate the award, which was opposed on the ground that an interim award is not final, and the court therefore lacked jurisdiction to rule on the motion. The court disagreed and concluded it had subject matter jurisdiction. The court acknowledged that generally an award may only be reviewed when all issues have been resolved by the arbitrator but recognized that an "exception to this general rule applies, however, when parties expressly agree to bifurcate the issues of liability and damages." In that case, the arbitrator has both the authority and responsibility to do so and to issue a "final partial award." The court concluded that since the parties agreed to bifurcate liability and damages and the interim award was consistent with that mandate the court had subject matter jurisdiction to rule on the motion to vacate. *Madryn Asset Management v. Trailmark*, 2024 WL 1348869 (S.D.N.Y.).

Damages Award Passes Barely Colorable Test

The arbitrator here, in awarding damages, was confronted with a "sparse record." In calculating the damages award, the arbitrator started with a market value estimate that both parties' experts endorsed. After applying a discount to that number, the arbitrator determined the final damages award but acknowledged that the amount was "no more than a guess." In resolving a motion to vacate, the court was confronted with the question of whether the arbitrator's damages award met Delaware's test of "reasonable certainty" for calculating lost profits. In upholding the damages award, the court noted that "the arbitrator relied on a figure that he understood to be acceptable to both sides' damages experts, which was the most accurate estimate offered (and indeed, the only one)." The court added that the arbitrator "was trying to faithfully apply Delaware law to a sparse record." Under these circumstances, the court concluded that "the absence of better estimates and the fact that the testimony of both sides' experts supported this figure suffices as a 'barely colorable' justification for the arbitrator's decision." *Mercantile Global Holdings v. Hamilton M&A Fund*, 2024 WL 1962314 (S.D.N.Y.), *app pending*, Case No. 24-1528 (2d Cir. June 6, 2024).

Alfred G. Feliu is an arbitrator and mediator on various AAA and CPR panels. Mr. Feliu is a past chair of the NYSBA Labor and Employment Law Section and a fellow of the College of Commercial Arbitrators and the College of Labor and Employment lawyers. Mr. Feliu is the editor of "ADR in Employment Law," published by Bloomberg/BNA in 2015 and later updated.

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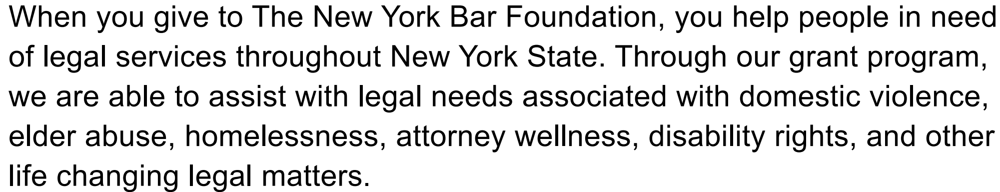

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ADR in the Courts
Daniel F. Kolb
Davis Polk & Wardwell
New York, NY
daniel.kolb@davispolk.com

Krista Gottlieb
ADR Center & Law Office
Buffalo, NY
kg@kristagottlieb.com

CLE and Education
Marilyn Genoa
Synergist Mediation
Garden City, NY
marilyn@synergistmediation.com

Ellen Waldman
CPR Institute for Dispute Resolution
New York, NY
ewaldman@cpradr.org

Dispute Prevention
Myrna Barakat Friedman
Myrna Barakat Friedman ADR
New York, NY
MBakarat@mb-cap.com

Erin E. Gleason Alvarez
Gleason Alvarez ADR
New York, NY
erin@gleasonalvarezadr.com

Diversity & Inclusion
Tong Wang
T. Wang Law
Ridge, NY
twang@awarenesslaw.com

Shakiya Wright-McDuffie
JAMS
New York, NY
swrightmcduffie@jamsadr.com

Domestic Arbitration
Rachel Gupta
Gupta Dipute Resolution
New York, NY
rachelguptaadr@gmail.com

Jennifer Lupo
Lupo Law, Arbitration & Mediation LLP
Staatsburg, NY
jlupo@lupolaw.com

Ethical Issues and Ethical Standards
Randall Tesser
Tesser, Ryan & Rochman LLP
White Plains, NY
rtesser@tesserryan.com

Kaylin Whittingham
Whittingham Law
New York, NY
klw@whittinghamlaw.com

Insurance Disputes
Margarita Echevarria
M. Echevarria ADR
New York, NY
margarita@echevarriaadr.com

Michele Kern-Rappy
Michele Kern Rappy Dispute Resolution
New York, NY
michele@michelekernrappy.com

International Dispute Resolution
Mohamed Fathy Metwally Sweify
Fordham U. School of Law
New York, NY
mfs@fordham.edu

Christopher Fladgate
GS2LAW
New York, NY
cf@gs2law.com

Legislation
Craig M. Atlas
Mediator/Arbitrator
Syracuse, NY
CraigAtlasADR@outlook.com

Alice Cunningham
Kenney Shelton Liptak Nowak LLP
Buffalo, NY
ajcunningham@ksln.com

Mediation
Sara Kula
Kula Law P.C.
Mount Kisco, NY
sara@sarakulalaw.com

Michael Starr
M. Starr ADR LLC
East Quogue, NY
ms@mstarrmediation.com

Negotiations
Courtney Chicvak
Courtney Anne Chicvak Mediation LLC
Kings Park, NY
chicvak.courtney@gmail.com

Paul Radvany
Fordham U. School of Law
New York, NY
radvany@law.fordham.edu

New DR Practitioners
Luwick Francois
LF Law PLLC
Brooklyn, NY
lfrancois@lflawpllc.com

Noel Hillman
Gibbons P.C.
Philadelphia, PA
nhillman@gibbonslaw.com

Nominations
Theo Cheng
ADR Office of Theo Cheng
West Windsor, NJ
theo@theocheng.com

Mark C. Morril
Morril ADR LLC
New York, NY
mark.morril@morriladr.com

Publications
Sherman W. Kahn
Mauriel Kapouytian Woods LLP
New York, NY
skahn@mkwllp.com

Laura A. Kaster
Appropriate Dispute Solutions
Princeton, NJ
laura.kaster@kasteradr.com

Edna Sussman
SussmanADR LLC
Scarsdale, NY
esussman@sussmanadr.com

Securities Disputes
Howard A. Fischer
Moses & Singer LLP
New York, NY
hfischer@mosessinger.com

Elissa Germaine
St. John's University School of Law
Jamaica, NY
germaine@stjohns.edu

Sports ADR
Danielle Menitove
Skadden Arps Slate Meagher & Flom
Scarsdale, NY
dmenitove@phillipsadr.com

Carla Varriale-Barker
Havkins Rosenfeld Ritzert & Varriale LLP
New York, NY
carla.varriale@hrrvlaw.com

Technology
Victoria Craft
Lippes Mathias LLP
Buffalo, NY
vmcraft42@gmail.com

Jenna Karadbil
Law Office of Jenna Karadbil
New York, NY
jenna@jfk-lawyer.com

Trusts & Estates
Kera Reed
Ruskin Moscou Faltischek PC
Uniondale NY
kreed@rmfpc.com
Suzanne Levy
Levy Law & Mediation P.C.
New York, NY
suzanne@levylawfirmny.com

Upstate DR Practitioners
Jeff Anderson
Anderson, Moschetti & Taffany, PLLC
Latham, NY
anderson@amtinjurylaw.com

Timothy P. Murphy
Hancock & Estabrook LLP
Syracuse, NY
tmurphy@hancocklaw.com

Arbitration and Mediation

Authors
Leona Beane, Esq.
Kelly A. Librera, Esq.
Gary P. Shaffer, Esq.

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.

Complete with valuable practice pointers, sample arbitration forms and appendices, this practice guide also includes a set of Downloadable Forms.

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