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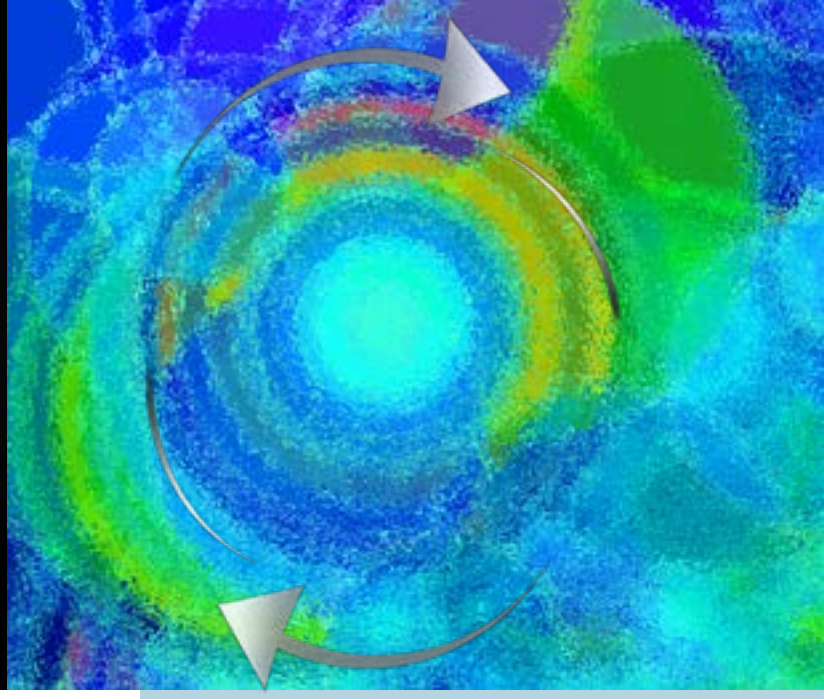

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Message From the Chair: Transitions, Change, Disruption and Tradition

Jill Pilgrim

Having served one-year terms as the vice-chair and chair-elect of the Dispute Resolution Section (DRS) of the New York State Bar Association, I thought I knew what to expect when I became the chair on June 1, 2024. However, until one is actually sitting on the "throne," one does not appreciate how different the view is from "on high." I put the words "throne" and "on high" in quotes, because despite what those terms portend, a DRS chair assumes the responsibility of *service* to the DRS membership. It has been my honor and privilege to serve the DRS membership over the past year, and to seek to make DRS a more welcoming, inclusive, self-sustaining, and efficiently operating subset of the larger NYSBA family.

A summary of the goals I articulated at the outset of my term are:

- Honor and support DRS traditions of excellence and professionalism:
  - ✓Improving and streamlining DRS event planning and execution.
  - ✓Continued engagement with upstate New York DRS practitioners.
  - ✓ Continued outreach to law student and young DR professionals.
- Foster DRS growth and enhancement by mentorship of the next leaders, combined with succession planning:
  - ✓Extending hands to pull up the ladder and make room for new and diverse dispute resolution practitioners.
  - ✓Encouraging DRS members to empower each other in our pursuit and practice of excellence and inclusiveness.
  - ✓Continue prioritizing Diversity, Equity & Inclusion in DR practice.

I'm happy to report that I was able to deliver on many of these objectives, and I have to admit I ran out of time to achieve a few of them.

Before I pat myself on the back and confess my missed opportunities, I must acknowledge the incredible DRS officers, committee co-chairs, executive committee members, DRS members, and other professional colleagues who were, and are, essential to the support and success of any DRS chair, including me.

First, I acknowledge Deborah Reperowitz, who served several terms as DRS treasurer, and regrettably was unable to complete the term that coincided with my stint as DRS chair. Despite taking on a volunteer role that most professionals shy away from, Deborah took her treasurer duties seriously, and mostly worked behind the scenes doing what was necessary. Significantly, Deborah sounded the alarm when she noticed some anomalies with our monthly financial reports from NYSBA. The concerns she raised led directly to reforms of how DRS budgets for in-person events. Consistent with my goal of ensuring succession and providing opportunities for others to serve, Deborah recruited and trained Gregory Classon as an assistant treasurer. He was able to step into her shoes.

Second, many thanks to Erica Levine Powers, who took on the other volunteer role that most professionals shy away from, DRS secretary. Erica is dedicated, task-oriented, and stellar in her attention to detail. Like Deborah, Erica recruited and trained Michael Schoenberg as assistant secretary to provide support, which he did with aplomb.

The chair-elect, William (Bill) Crosby, has been a solid, ever-present, quiet, thoughtful contributor, and supporter. He will be an outstanding DRS chair next term.

Loretta Gastwirth brought positive energy, great ideas, a determined spirit, and excitement to the role of DRS vice-chair. No matter how busy she was, Loretta was always willing to set aside minutes or hours to roll up her sleeves and execute a task on the never-ending DRS "to do" list. She and Greg

Classon created a DRS Annual Meeting sponsor package, and recruited sponsors on short notice.

Transitions are hard, especially when they happen unexpectedly during the term of a DRS chair. Greg Classon made seamless what could have been a chaotic mid-term transition to treasurer, and made Deborah's recruitment of him as assistant treasurer appear to be a planned relay hand-off.

Our DRS meetings and events reflected our long tradition of excellence and professionalism by consistently presenting educational programing about key issues relevant to the practice of dispute resolution, conflict resolution and negotiation. This included Chair-Elect Crosby's leadership of the DRS Fall Meeting, held at the law offices of Davis Polk. The Fall Meeting CLE panels were: "Practice Tips on Mediating Complex and Emotionally Charged Disputes," "Global Reflections: Critical Issues in International Arbitration," "A Discussion With the Providers: Adapting to AI and Other Changes," and "Is Domestic Arbitration Too Much Like Court Litigation: If So, Is There Anything That Needs To Change?"

The DRS Annual Meeting bore the theme "Dispute Resolution in the 21st Century: Tradition of Excellence Meets Statewide Trial Court Programs," and featured a keynote address by the Honorable Justice Doris M. Gonzalez, State of New York, Ninth Judicial District, Supreme Court, Civil Term, and an emotional acceptance speech by the awardee of the Chuck Newman Award, Rebecca Price, director, ADR Programs, U.S. District Court, Southern District of New York. The CLE panels included: "ADR in the Courts – A Thriving Enterprise," "Employment Mediation: Challenges for Neutrals," and "Tech Tango in ADR: Debating the Benefits and Pitfalls of Using Technology in Dispute Resolution."

This year again DRS executed an outstanding Mediation Tournament, featuring teams from 16 law schools in seven states, led by Leslie Berkoff and her team of DRS members.

Continuing the DRS tradition of important diversity and membership recruitment programs, DRS partnered with Blank Rome and several affinity bar associations to execute a unique and impactful program entitled "Ancient & Traditional Approaches to Dispute Resolution: What Modern Practitioners Can Learn**."** This program featured panel presentations discussing the lifestyles of pre-colonial ethnic groups and cultures around the world, and the traditional ways in which they performed pre-colonial dispute and conflict resolution. The speakers brought their expertise to shine a light on Native American, African (Egyptian, Kenyan and Nigerian), Chinese, Japanese, Caribbean, and East Indian dispute resolution traditions. As of the writing of this article, the affinity bar co-sponsors of this program were: the Asian American Bar Association of New York, Caribbean Attorneys Network, Metropolitan Black Bar Association, New York Women's Bar Association, and Puerto Rican Bar Association.

Throughout the year, DRS committees delivered dozens and dozens of outstanding educational videos and in-person presentations on mainstream and niche topics relevant to dispute and conflict resolution, and negotiation. The most longstanding and comprehensive of these programs was DRS's Part 146 Mediation Training and the Advanced Mediation Training, delivered by Simeon Baum and numerous of DRS's most experienced members.

The section's journal*, New York Dispute Resolution Lawyer,* continues to be a jewel of dispute resolution thought-leadership and professional advice, and is expertly edited by DRS legends Edna Susman, Laura Kaster and Sherman Kahn. I am delighted to report that Steven Bierman recently joined the editorial team for the publication.

As the first Black chair of the DRS, I am proud to have contributed my unique personal and professional perspectives and ideas, as well as my international experience to encourage innovative approaches to DRS leadership that aligned with DRS's existing traditions of excellence and professionalism. In addition, we were focused on the goal of being more inclusive by extending a hand to lift up and provide opportunities for service to an expanded cohort of DRS members, mentoring and empowering new and existing DRS members, while remaining mindful of succession planning.

My first initiative as DRS chair was to ensure that DRS follows its bylaw mandate that committee chairs serve terms of office of one year, commencing June 1. To this end, I sought to move away from the practice of retaining the previously long-serving committee co-chairs (and not appointing new committee co-chairs), by appointing a diverse array of new committee co-chairs from among the active DRS membership. This move achieved the goal of extending a hand and lifting up along the succession ladder new DRS members who were enthusiastically supporting DRS activities, but who had not previously been given a path to contribute their fresh ideas, knowledge and perspectives. Appointing new committee co-chairs with diverse backgrounds enabled these individuals to explore their leadership abilities and enhance their visibility within DRS and the wider dispute resolution community. The new committee co-chairs were a diverse group by gender, geographic location, length of legal career, and professional background. Significantly, I also chose to retain some of the previously serving DRS committee co-chairs.

The most heralded of the new leadership approaches was the "Member Spotlight" video presentations of DRS committee co-chairs. During executive committee meetings, the Spotlight subjects talked about their upbringing, their path to a career in dispute resolution, and their perception of the best

and most challenging aspects of being a neutral. Through the Spotlight features, we have learned about the previously unappreciated life experiences that influenced our peer DRS members, as well as each of their unique paths to careers in dispute resolution.

The Executive Committee meeting in Long Island, hosted at the beautiful offices of Ruskin Moscou Faltischek, P.C, in Uniondale, N.Y., achieved the goal of celebrating the geographic diversity of the DRS membership. The meeting was followed by a membership recruitment "beach event," at Gatsby on the Ocean**,** overlooking Jones Beach.

During my term, I put into action an oft-discussed but inchoate initiative to record the history of DRS. To this end, I created the Task Force on the History of DRS and appoint co-chairs Simeon Baum and Stephen Younger.The task force was charged with developing a framework for recording of the history of the DRS, and has a membership consisting of all the past DRS chairpersons.

As chair, I continued the task force exploring updates to the DRS bylaws, appointing two new co-chairs to join Ross Kartez: Lorraine Mandel and Evan Spelfogel. This task force was given the additional objective of first soliciting the opinions to DRS members before determining the plan for changes.

In my view, one of the least heralded but very important initiatives was the introduction of a more structured approach to event planning that required submission of carefully thought-out event planning forms, and more committee-focused, self-help communication through use of the NYSBA online communities. This initiative was carried over from a plan first introduced by DRS's outstanding liaison, Simone Smith, during Jeff Anderson's term as DRS chair. As the key point person for the scheduling and details of the numerous committee meetings, CLE panels and in-person events, Simone was the correct person to suggest a more efficient and streamlined approach to executing DRS programs.

The saddest moment of my term as DRS chair was learning of the death of St. John's University Law School Professor Elayne Greenberg, an elite neutral, beloved educator, the ethics columnist in our journal since its inception, and a founding member of our section. Elayne's early death left a hole in our hearts. The second personal and DRS privation was learning that Simone Smith would depart from NYSBA and DRS. She became the dedicated, thoughtful, hardworking backbone of our section, providing invaluable support. She will be sorely missed and we wish her great success ahead.

This past year, we have made new strides into the disruptive 21st century, which has seen the expansion of alternatives to court litigated dispute resolution, the devasting impact of the COVID-19 pandemic, the expansion of LGBT+ rights and recognition, and the revolutionary force and influence of AI. Unfortunately, this era has also recently experienced the retrenchment of a female's right to control her body, vitriolic and gratuitous attacks on trans people, and the rollback of civil rights for the people of diverse gender, ethnicity, family status, disability, and nationality.

I'm comforted in knowing that I live in a state, and am a member of a bar association, that will not roll back the clock on diversity, equity, inclusion and civil rights, because those are the attributes that have made New York and America the great, ever-evolving experiment in democracy that it is. For this reason, during my term, I have encouraged the members of disparate affinity bar associations who practice in the dispute resolution space to join, participate in, and further diversify the DRS membership with their talent and fresh ideas. I believe that there is strength in unity.

Although I did not achieve every objective I set for myself as DRS chair, I pass the baton, salute, and throw my full support behind the amazingly talented, very accomplished and competent incoming 2025-26 DRS leadership team comprised of Chair William (Bill) Crosby, Chair-Elect Loretta Gastwirth, Vice-Chair Jennifer Lupo, Treasurer Gregory Classon, and Secretary Marilyn Genoa.

Jill Pilgrim

Message from the Co-Editors in Chief

Sherman Kahn

Edna Sussman

Laura A. Kaster

Steven Bierman

The 2008 vol. 1, no. 1 issue of this journal features a welcome by our first chair, Simeon Baum and a message from our first editor in chief, Edna Sussman. In the spring of 2010 (vol. 3), Laura Kaster became a co-editor. And in the spring of 2014 (vol. 7, no. 1), Sherman Kahn joined as one of three co-editors in chief. Edna created this journal and has been instrumental in all these years in attracting a wonderful cadre of contributors and nurturing our wide-ranging appetite for interesting developments, not only in negotiation, mediation, collaboration and arbitration in the United States, but also in innovations and mixed processes throughout the world. Over the years, we have expanded into the developments in technology used by ADR practitioners as well as the developments in law and practice. Each of us has brought interests and we have all been and remain active members of the Dispute Resolution Section.

We are very pleased to presage progress and changes in the journal by adding Steven Bierman as a co-editor in chief. We welcome Steve, who has recently chaired the American Bar Association's Advanced Mediation and Advocacy Skills Institute for 2023 and 2024, is the founder of Bierman ADR LLC, and the former co-head of the Sidley Austin LLP New York Litigation Group. There are transitions ahead. We will be recognizing with gratitude the contributions of our founders in coming issues.

Meanwhile, a note on the vitality of this publication and of the section as a whole. This particular issue is a rich combination of materials on early developments in addressing the use of AI, the application to ADR of concepts like due process and *res judicata*, the duty of lawyers to make peace, case developments, confidentiality, and more. The articles here reflect a burgeoning field that deserves its increased participation and has received the recognition by bar examiners that ADR knowledge is a must for graduating lawyers for whom arbitration and mediation often provide the first avenues for representing clients in dispute resolution.

This journal is an outgrowth of our dynamic section, which transcends mere professional networking, embodying the essence of a learned community dedicated to supporting one another, providing public service, and fostering continuous growth. The unique support and camaraderie provided here by dispute resolvers is incapsulated in our Chuck Newman Award, which honors an extraordinary spirit of professional collaboration and mentorship, recognizing individuals who embody the profound qualities that Chuck Newman represented: a brilliant mind, a warm heart, and generous community engagement. This year Rebecca Price, director of the SDNY ADR Program, was honored. Our section values your participation and enthusiasm for resolution.

Laura Kaster
Edna Sussman
Sherman Kahn
Steven Bierman

What ADR Professionals Should Know About the Regulation of AI in Insurance Underwriting

By Margarita Echevarria

As artificial intelligence (AI) continues to draw our attention, imagination and concern, this article focuses on the laws and regulations that have been adopted to begin to regulate the use of this technology in the insurance industry. These initiatives identify the current concerns of regulators in connection with AI and insurance. This article offers ADR practitioners a framework for understanding some of the issues likely to arise in insurance disputes when the use of AI is a material element.

The View from the Top

The impact that AI can have on insurance has been broadly considered by both national and international supervisors in the financial services industry.[1] Given the global importance of the sector and the quickly evolving use of AI within it, regulators are naturally interested in its impact on solvency risks, insurance products, data security, and consumers. In the United States, despite the existence of federal oversight of insurance through the Federal Insurance Office,[2] the insurance industry is directly regulated at the state level. Accordingly, the National Association of Insurance Commissioners (NAIC), established in 1871, is the body created by state regulators to set standards and regulatory best practices for the industry. Following its publication of AI Principles in 2020,[3] the NAIC finalized its guidance with "The Use of AI Systems by Insurers" in 2023 and soon thereafter 19 states adopted state bulletins or specific guidance like New York.[4]

The model adopted by the states generally applies to *all* insurers – from title insurers to health insurers and across all stages of the insurance lifecycle from product development to claims management.[5] Executing its role to serve the public interest, the NAIC's model guidance is centered on protecting consumers against inaccurate processes, unfair discrimination, data vulnerability, and other potential uncontrolled risks. In establishing its risk control framework, the model starts by setting out some basic definitions. Significant among its definitions are "Artificial Intelligence" (AI) and "Predictive Models." AI is defined by the NAIC model as a "branch

of computer science that uses data processing systems" to perform functions "normally associated with human intelligence such as reasoning, learning and self-improvement" and includes "machine learning . . . that focuses on the ability of computers to learn from provided data without being programmed." The model goes on to include in its definitions predictive models that are based on the "mining of historic data using. . . . algorithms/and or machine learning to identify patterns or predict outcomes that can be used to support or make decisions." Interestingly, the model does not make any reference or draw any distinction to the predictive models the industry has used for decades, a concern raised in an industry response to a federal survey on the use of AI by insurers.[6]

Regulatory Focus on AI in Insurance

The definition of AI within the AI system is an important starting point because it is the capability of the system to "train" itself based on large datasets that raises concerns. The self-learning capability of AI warrants oversight. Most of the states regulating AI address these concerns by imposing guardrails to minimize potential inaccuracies, unfair discrimination, data vulnerability, lack of transparency and the risk of reliance on third party vendors. New York's Circular Letter No. 7 expresses similar concerns focusing directly on underwriting and pricing and the potential for perpetuating historic or systemic biases arising from the use of external consumer data and information sources (ECDIS).[7] New York's Circular Letter No. 7 builds on earlier pronouncements concerning the use by insurers of external data sources ("geographical data, educational attainment, homeownership data, licensures, civil judgments and court records which have the potential to reflect disguised and illegal race-based underwriting that violate" existing statutory protections) that are not supported by valid actuarial standards.[8] Valid actuarial standards, for example, distinguish between individuals in underwriting and rating based on factors related to expected costs associated with the transfer of risk. Insurers have long relied upon these standards of practice because they demonstrate a clear relationship between the variables used and the insured risk. A related concern is that this data may be collected by external vendors that are not regulated by the New York Department of Financial Services (DFS).

The guardrails articulated by the NAIC model allow adopting states to tailor consumer protections to the AI systems used. In summary, the guardrails prescribe the adoption of (1) governance and risk management controls that include oversight by senior management, an independent or enterprise integrated risk management program[9] and the adoption of documented policies and procedures; (2) oversight of third-party vendors for compliance with existing insurance laws, adoption of policies and procedures respecting the acquisition of data, auditing of data, and remediation of incorrect data and cooperation with regulatory investigations and (3) preparation for regulatory exams entailing maintenance of records respecting the source of data, the testing of data, bias analysis, model drift, including notice and disclosure of adverse underwriting decisions.

The Potential for Insurance Disputes Triggered by AI

It is still too early to identify specific policy changes resulting from the integration of AI technology in the insurance industry. Considering the limited body of insurance litigation, litigators must at times extend their focus beyond traditional insurance law when pursuing insurer liability. With this in mind, we should examine existing cases to anticipate how the evolving use of AI may shape future litigation. The first class actions involved the AI technology "nH Predict." The technology is an AI predictive model used by the defendant carriers in coverage determinations for medically necessary care. In both the *Lokken* and *Humana* cases, plaintiffs rely on established insurance law protections to assert that the carriers claims personnel overrelied on this "faulty technology" and disregarded human judgment to the detriment of Medicare Advantage policyholders.[10] The *Huskey* class action, meanwhile, highlights the concerns relating to algorithms that can disparately impact policyholders based on their protected class status.[11] In *Huskey*, plaintiffs allege that profiling algorithm models used for fraud screening and claims automation delayed or denied homeowners' insurance claims

"Insurers must remain aware that AI creates a new realm of potential claims both in B2B and B2C transactions as the highlights here make clear. At this early stage, the most prominent exposures seem to be data security and bias concerns."

based on race discrimination in violation of the Fair Housing Act. In the *Huskey* case the plaintiffs argued disparate impact as policyholders of homeowners insurance policies under three sections of the Fair Housing Act (FHA), 42 U.S.C. §§ 3604(a) and (b), and § 3605. The plaintiffs survived State Farm's motion to dismiss under 3604(b) based on showing (1) a statistical disparity, (2) a specific policy, i.e. the insurer's "decision to use algorithmic decision-making tools to automate claims processing" and (3) a causal connection between the policy and the statistical disparity. These early cases, filed in most instances prior to the adoption of state guidance for the use of AI by insurers, forecast the very issues – bias, data inaccuracy, oversight of third-party vendors – that are now reflected in the regulatory guardrails being imposed on the industry.

Identifying Specific Legal Risks

What can ADR professionals anticipate in a world where arbitration clauses and protecting trade secrets are industry norms? Anything can happen, but there are several key factors that point to a potential for complex disputes. These factors include: (1) reliance on third-party vendors for the large datasets needed to train AI systems, (2) the likelihood of dependency on third-party vendors for the development of AI systems, especially by smaller insurers, (3) the inherent need to share sensitive information across platforms in these processes and (4) the fact that insurers are ultimately liable under the control regime articulated by the NAIC for AI.

Therefore, contractual obligations and due diligence are needed for privacy protections and data security including consideration of technical capabilities, system reliability and system explainability. These concerns will also warrant related representations, warranties and indemnifications regarding the respective parties ongoing need to monitor and assess the AI system to assure regulatory compliance, including oversight of bias and incident reporting. These terms may serve as fertile ground for disputes. And, as the *Huskey* case demonstrates, determining liability may not be confined to insurance law. Claims may also arise out of state privacy, data protection, bias and other enacted AI protection laws.[12]

Insurers must remain aware that AI creates a new realm of potential claims both in B2B and B2C transactions as the highlights here make clear. At this early stage, the most prominent exposures seem to be data security and bias concerns. Even just the issues around cybersecurity of databases holding personal financial information made richer by external consumer data raise enormous risks. In fact, as I was finalizing this article New York enhanced its previously mandated cybersecurity regulation, 23 N.Y.C.R.R. Part 500 (Mar.1, 2017), by providing further guidance on cybersecurity in connection with the use of AI.[13] The guidance pointedly reflects a concern for the "vast amounts of non-public information" that will be at risk and create a greater incentive for bad actors to target.

In addition, depending on the use of ECDIS or the AI system, the potential for disparate outcomes the regulators prefer the industry avoids may nevertheless result from mo del drift,[14] the use of "problematic" proxy variables, defective bias analysis techniques or any other number of inadvertent glitches.[15] The NAIC model, while guiding the development and deployment of AI technology, also impose upon insurers the duty to disclose the basis for their recommendations to all stakeholders, including consumers.[16] This transparency requirement acknowledges that the technology may outpace human understanding of its mechanics, the so called "black box."[17] Consequently, insurers may be challenged in providing clear and adequate explanations to insureds regarding their automated decisions.

These are early days in the use of AI by insurers in an increasingly regulated environment. Currently, only one-third of the states have adopted the NAIC model. Staying abreast of these technological advancements and their evolution is crucial to our role as ADR professionals. This emerging technology will undoubtedly become a focal point of disputes in an industry that is central to both national and global economies.

Margarita Echevarria, Esq., is an NADN arbitrator and mediator serving on the AAA Commercial and Insurance Panels, ARIAS-U.S. Certified Arbitrators, NAM, FINRA and NY/NJ federal and state courts arbitration and mediation panels. She is a former in-house counsel and chief compliance officer for major insurers and a former adjunct professor of insurance law.

Endnotes

1. Treasury Department RFI, 50048 Federal Register Notice/Vol.89, No.114 (June 12, 2024); International Association of Insurance Supervisors Newsletter, Sept. 2024, Issue 135; EU-US Insurance Dialogue Report, 10/31/2018, "Big Data Issue Paper."
2. The Federal Office of Insurance reports to the Dept. of U.S. Treasury pursuant to the Dodd-Frank Act of 2010. Pub. L. 111–203 (text) (PDF); 124 Stat. 1376–2223.
3. NAIC Principles on Artificial Intelligence (AI) adopted by the Executive Committee, Aug. 14, 2020. https://content.naic.org/sites/default/files/call_materials/Attachment_A_AI_Principles.pdf.

(continued on next page)

4. *NAIC Model Bulletin: Use of Artificial Intelligence Systems by Insurers*, adopted Dec.4, 2023, has been adopted by Alaska, Arkansas, Connecticut, Illinois, Iowa, Kentucky, Maryland, Michigan, Nebraska, Nevada, New Hampshire, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Washington, D.C., and West Virginia. Insurance specific regulation/guidance adopted by New York, California, Colorado and Texas [Google "Go to URL for Implementation of NAIC Model Bulletin on AI as of December 1, 2024"]. Colorado has not adopted the model but *see*, SB21-169(Jul 2021). https://doi.colorado.gov/for-consumers/sb21-169; Co. Rev. Stat. 10-3-1104.9; https://casetext.com/statute/colorado-revised-statutes/title-10-insurance/regulation-of-insurance-companies/article-3-regulation-of-insurance-companies/part-11-unfair-competition-deceptive-practices/section-10-3-11049-insurers-use-of-external-consumer-data-and-information-sources-algorithms-and-predictive-models-unfair-discrimination-prohibited-rules-stakeholder-process-required-investigations-definitions-repeal & CO Privacy Act (Jul 2023) Co. Rev.Stat.6-1-1302; https://codes.findlaw.com/co/title-6-consumer-and-commercial-affairs/co-rev-st-sect-6-1302/#:~:text=Colorado%20Revised%20Statutes%20Title%206,Legislative%20declaration&text=(C)%20Empowers%20the%20attorney%20general,and%20to%20prevent%20future%20violat & 4CCR904-3; https://www.coloradosos.gov/CCR/GenerateRulePdf.do?ruleVersionId=10872&fileName=4%20CCR%20904-3 & CO. Consumer Protection for AI (May 2024) SB24-205 https://leg.colorado.gov/bills/sb24-205.

5. A notable distinction is N.Y. Circular Letter No.7(Jul.2024), https://www.dfs.ny.gov/industry-guidance/circular-letters/cl2024-07_which focuses on pricing and underwriting.

6. *See*, p. 5, Comments to the Treasury Dept.'s RFI (50048 Federal Register/Vol. 89, No. 114/June 12, 2024) submitted by the American Property Casualty Insurance Association, dated August 12, 2024 (Comment ID: TREAS-DO-2024-0011-0041).

7. *DFS Superintendent Harris Adopts Guidance To Combat Discrimination in Artificial Intelligence,* Press Release, July 11, 2024. https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202407112241. *See also* CO SB21-169, effective June 2024 regulating ECIDS, https://doi.colorado.gov/for-consumers/sb21-169-protecting-consumers-from-unfair-discrimination-in-insurance-practices.

8. N.Y. Circular Letter No.1, *Use of External Consumer Data and Information Sources in Underwriting for Life Insurance*, Jan. 18, 2019, https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2019_01. The statutory protections of Chapter 28 Article 26, *see,* § § 2607-2608 prohibiting discrimination; and Article 42, *see*, § 4224 prohibiting discrimination, are specifically mentioned by the DFS. https://casetext.com/statute/consolidated-laws-of-new-york/chapter-insurance/article-26-unfair-claim-settlement-practices-other-misconduct-discrimination; https://casetext.com/statute/consolidated-laws-of-new-york/chapter-insurance/article-42-life-insurance-companies-and-accident-and-health-insurance-companies-and-legal-services-insurance-companies.

9. Reference is made to the Risk Management Framework adopted by the National Institute of Standards and Technology (NIST) for AI._NIST-AI-100 -1, Artificial Intelligence Risk Management Framework (AI RMF 1.0). https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.600-1.pdf.

10. Claims were made under the Unfair Claim Settlement Practices Act, Unfair Deceptive Insurance Practices Acts, and additional claims included those relating to breach of contract and insurer bad faith. *The Estate of Lokken v. United Health Group*, 23cv03514, USDC-Minnesota, filed 11/14/23 https://casetext.com/case/the-estate-of-lokken-v-unitedhealth-grp; *Barrows v. Humana*, 23cv00654, USDC-NC, amended file 4/22/24 https://litigationtracker.law.georgetown.edu/wp-content/uploads/2023/12/Barrows-et-al-v.-Humana-Inc.-Docket-No.-3-23-cv-00654-W.D.-Ky.-Dec-12-2023-Court-Docket.pdf.

11. *Huskey v. State Farm Fire & Cas.Co*., USDC-N.D. Illinois, 22 C 7014, filed Sept. 11, 2023, op, at 8-9. https://casetext.com/case/huskey-v-state-farm-fire-cas-co.

12. CA. Consumer Privacy Act of 2018 (updated Jan.2023) CA. Civil Code § 1798.192 (2023), https://cppa.ca.gov/regulations/pdf/cppa_act.pdf; VA. Consumer Data Protection Act (Jan.2023) Va. Code § 59.1-578 https://law.lis.virginia.gov/vacode/title59.1/chapter53/; NJ Omnibus Privacy Law (Jan.2025), SB 332, https://www.njleg.state.nj.us/bill-search/2022/S332/bill-text?f=S0500&n=332_R6; Consumer Protection for AI, Co. SB 24-205 (May 2024); Rhode Island Data Transparency & Privacy Protection Act (June 2024) 2024-H 7787A, 2024-S 2500, https://webserver.rilegislature.gov/BillText/BillText24/HouseText24/H7787A.pdf.

13. Industry Letter, *Cybersecurity Risks Arising from Artificial Intelligence and Strategies to Combat Related Risks*, Oct.16, 2024, https://www.dfs.ny.gov/industry-guidance/industry-letters/il20241016-cyber-risks-ai-and-strategies-combat-related-risks.

14. "Model drift" refers to the decay of a model's performance over time arising from underlying changes such as the definitions, distributions, and/or statistical properties between the data used to train the model and the data on which it is deployed; § 2, NAIC Model Bulletin, https://content.naic.org/sites/default/files/inline-files/2023-12-4%20Model%20Bulletin_Adopted_0.pdf.

15. N.Y. Circular Letter No. 7 (Jul.2024), § IV E; *The American Academy of Actuaries, Discrimination: Considerations for Machine Learning, AI Models and Underlying Data* (Feb. 2024), § C. https://www.actuary.org/sites/default/files/2023-08/risk-brief-discrimination.pdf.

16. *See* endnote 3, specifically "Transparent" and "Safe, Secure, & Robust Systems" sections; and endnote 13.

17. NIST, *Towards a Standard for Identifying and Managing Bias in Artificial Intelligence, 'AI Systems as Magic,'* Publication No. 1270 (March 2022) https://doi.org/10.6028/NIST.SP.1270; Citigroup Report on AI, *AI in Finance, Bot, Bank, & Beyond*, (June2024), p.64, https://www.citigroup.com/global/insights/ai-in-finance.

An Arbitration Award Can Be *Res Judicata* in Subsequent Litigation

By Lorenzo Rovini

Introduction

In New York, CPLR 7510[1] enables a party to seek confirmation of an arbitration award, thereby converting the award into a judgment.[2] Once confirmed, the prevailing party gains access to the judgment enforcement mechanisms outlined in CPLR Art. 52, allowing them to utilize the full range of legal tools available to enforce the judgment.[3]

The doctrine of *res judicata* (Latin for "a matter judged") prevents a party from re-litigating a claim that has already been resolved by a final judgment on the merits in an earlier action.[4] This principle serves two primary purposes: it ensures the finality of judgments and promotes judicial efficiency by conserving resources (public policy purpose[5]), while also protecting parties from the injustice of repetitive and oppressive litigation (private benefit purpose).[6]

The doctrine of *res judicata* applies in New York courts to arbitration awards with the same force and effect as it applies to judgments of a court.[7]

This article examines the application of claim preclusion in a litigated matter based on an arbitration award. It also examines how a breach of contract claim that was raised but not adjudicated by the arbitration panel may be barred from future litigation, particularly where the tribunal declared that one party's performance was excused under the doctrine of frustration of purpose.[8]

The case of *Gulf LNG Energy, LLC v. ENI SpA*[9] raises interesting issues about the interplay of arbitration and litigation with respect to *res judicata*.

Background and Facts

In March 2016, Eni USA initiated arbitration against Gulf seeking to terminate their Terminal Use Agreement. Eni USA advanced two arguments – that the contract was terminated due to frustration of purpose and that Gulf had breached, justifying termination. The breaches alleged were that Gulf had pursued a gas liquefaction and export project in contravention of the contract terms, which limited the purpose of the facility to the importation and regasification of liquified natural gas.

In June 2018, the tribunal issued a final arbitral award, stating that the contract was terminated due to frustration of purpose as of March 1, 2016. The tribunal concluded that "[c]onsidering [its] finding on the frustration of [the contract's] purpose, the question as to whether [Gulf has] breached the warranties and covenants [. . .] has become academic and deserves no further consideration."[10]

Shortly after the award was rendered, Eni USA applied for a correction of the award under the controlling arbitration rules. Although permitted to do so, Eni USA did not seek to have the tribunal consider and determine its contract breach claims or its entitlement to a setoff to Gulf's substantial damage award.

Thereafter, Gulf and Eni USA separately sought confirmation of the award in the Delaware Chancery Court. Notably, Eni USA did not petition the court to vacate the award on the ground that "a mutual, final, and definite award upon the subject matter submitted was not made." Instead, Eni USA stated to the court that "[n]either party has raised any grounds for challenging the confirmation of the Final Award, and none exists." The court confirmed the award, entering a final consent judgment, which Eni USA paid on February 20, 2019.

Four months later, Eni USA commenced a second arbitration seeking to pursue the breach of contract claim it asserted in the first arbitration. Eni USA described its damages as including "the amounts that Eni has had to pay Gulf" pursuant to the award. Gulf sought and obtained an injunction in Delaware state court, which ruled the second arbitration was an impermissible collateral attack on the first arbitration.

In September 2018, Gulf commenced a third action in New York against Eni S.p.A., which holds 100% ownership interest in Eni USA, under the guaranty, which Eni S.p.A. executed in favor of Gulf in connection with the contract, seeking to enforce the guarantees. In its answer and counterclaim, Eni S.p.A. argued that Gulf's breaches "caused substantial injury and damages to Eni USA and/or Eni S.p.A." because "Gulf would not have been awarded tens of millions of dollars" in the arbitration had it been found liable for breach.

In July 2022, Eni S.p.A. commenced a fourth action against Gulf Port for damages under a Parent Direct Agreement, making virtually the same allegations as it did in the previous answer and counterclaim.

Res Judicata and Transactional Analysis: Barriers to Re-Litigation in Contractual Disputes

The Appellate Division of the Supreme Court of New York, First Department, began its analysis with the concept of privity, finding that Eni S.p.A. indirectly owns 100% of Eni USA, and both share a common purpose in the oil and gas industry. Furthermore, Eni S.p.A. in the New York litigation claimed injury to both "Eni USA and/or Eni S.p.A." The same legal counsel represented both Eni USA in the arbitration and Eni S.p.A. in the New York litigation. Additionally, the same key witness, an executive from Eni S.p.A., testified in both the arbitration and the guaranty action, referring to Eni S.p.A. and Eni USA collectively as the "Eni organization." Based on these connections, the Appellate Division determined that Eni S.p.A. is in privity with Eni USA.

Next, the Appellate Division examined whether Eni S.p.A. is barred from litigating the breach of contract claim in the New York litigation under the principles of *res judicata*. Under *res judicata*, a valid final judgment bars re-litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or a series of transactions that either were raised or could have been raised in the prior proceeding.[11] Specifically, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy."[12] In essence, "claim preclusion may foreclose litigation of a matter that never has been litigated because of a determination that it should have been interposed in a prior action."[13]

The court found that the arbitration award constituted a final judgment on the merits, which was confirmed by the Delaware Court upon Eni USA's and Gulf's petitions. Upon termination of the contract for frustration of purpose, the breach of contract claims basis for termination ceased to exist, leading the tribunal to deem the claims "academic" and not warranting "further consideration." Thus, *there was a final judgment on the merits* of Eni USA's breach of contract claims.

The Appellate Division applied the transactional analysis to determine whether Eni S.p.A. should be precluded from asserting its claims. This approach is similar to the "could have brought a claim" scenario, where an unasserted claim – one in which a litigant had no opportunity to be heard – is precluded. Under the transactional analysis, the focus is on whether a claim should be precluded by viewing a claim or cause of action as coterminous with the transaction, regardless of the number of substantive theories or variant forms of relief available to a litigant.[14] In other words, a final judgment on the merits of a claim or claims will bar future claims or causes of action arising from "all or any part of the transaction, or series of connected transactions, out of which the [prior] action arose."

"[A] breach of contract claim that was raised but not adjudicated by the arbitration panel may be barred from future litigation."

Here, the claims for breach of the underlying contract and the other two related agreements are all contractually intertwined with one another.[15] Additionally, Eni USA sought to arbitrate the breach of contract claims in a subsequent arbitration. The Delaware Supreme Court enjoined that arbitration, finding that it was a collateral attack of the arbitration award, and noting that Eni USA failed to timely avail itself of the procedural opportunities to challenge that award.

Accordingly, the Appellate Division dismissed Eni S.p.A.'s breach of contract counterclaim and cause of action, affirming that the transactional analysis and *res judicata* principles precluded further litigation of these claims.

Legal Implications and Impact of Applying the Transactional Theory of Claim Preclusion to an Arbitral Award

The transactional theory adopted by the Appellate Division has significant implications for claim preclusion in the context of arbitral awards.

First, it promotes a broad view of claim preclusion, barring future claims arising from the same transaction, even if those claims are based on different legal theories or seek different forms of relief than those originally asserted. As a consequence, a party would be required to bring all claims arising from a particular transaction in a single action.

Second, the transactional theory shifts the focus from the specific cause of action to the underlying transaction. Under this theory, a party is precluded from raising related but unasserted claims to the same transaction that could have been brought in the original arbitration.

Third, the theory precludes unasserted claims that a litigant could have raised but chose not to, assuming those claims arise from the same transactional facts. The reason is that the litigant had a full opportunity to assert all claims arising from the transaction but failed to do so, and thus should not be allowed to pursue them later.

Finally, the theory has an impact on legal strategy when filing an arbitration claim. The claimant must identify and assert all potentially viable claims within the context of a transaction or series of related transactions. In other words, the theory encourages more holistic arbitration strategies, compelling parties to consider and pursue a broader set of claims than they may have initially intended.

Conclusion

By focusing on the transactional nature of the underlying contractual dispute rather than the substantive theories or variant forms of relief available to a litigant, the court reinforced that *res judicata* extends to claims that could have been raised in a prior action but were not.

Whether in arbitration or the judicial forum, the full consequences of selecting claims must be vetted. This is especially crucial when dealing with interconnected agreements, as the transactional theory can bar unasserted claims arising from the same transaction – claims that a litigant had the opportunity to raise but chose not to in the original litigation.

The decision also highlights the importance of timely challenging arbitration awards and taking advantage of all the available procedural options to appeal them. Failing to do so can have significant preclusive effects, barring the assertion of related claims arising from the same transaction.

Finally, it strengthens the principle that arbitration, when properly conducted and confirmed, serves as a conclusive resolution to the issues at hand, ensuring that parties cannot bypass or undermine such resolutions through collateral attacks in different forums.

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Endnotes

1. CPLR § 7510 provides a one-year period within which a party may obtain confirmation of an arbitration award, which runs from the date that the award is delivered to the party.
2. Judicial review of an arbitration proceeding is extremely limited. "Even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice." *See New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 N.Y.2d 321, 326 (N.Y. 1999).
3. This includes the ability to freeze a judgment debtor's assets, garnish wages, foreclose on real property, and seize personal property.
4. *What Is Res Judicata?* Thompson Reuters, Nov. 11, 2022, https://legal.thomsonreuters.com/blog/what-is-res-judicata/.
5. Von Moschzisker Robert, *Res Judicata*, The Yale Law Journal Company, Inc., 299 (Jan. 1929).
6. *Id.*
7. *See Mahler v. Campagna*, 60 A.D. 3d 1009, 1011 (2nd Dept. 2009).
8. *See Gulf LNG Energy, LLC v. ENI Spa*, 2024 N.Y. Slip Op 4517 (1st Dept. 2024).
9. *Id.*
10. *Id.*
11. *See Landau, P.C. v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 12 (2008).
12. *See Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d at 347.
13. *See Paramount Pictures Corp. v. Allianz Risk Transfer AG*, 31 N.Y.3d 64, 73 (2018).
14. *See Smith v. Russell Sage Coll.*, 54 N.Y.2d 185, 192 (1981).
15. The three contracts were executed nearly simultaneously and pertain to the same subject matter. As a result, they constitute a single, integrated transaction and must be interpreted collectively. *See TVT Records v. The Island Def Jam Music Group*, 412 F.3d 82, 89 (2d Cir 2005).

Reasons in Arbitration Awards: Not Too Little, Not Too Much

By Edna Sussman and Sarah Chojecki

There has been increasing attention in recent years to what is required for a reasoned award. Several decisions that have drawn considerable comment have refused to enforce awards due to insufficient reasoning, highlighting the importance of the issue. An examination of what is required for a reasoned award seems timely.

The reasoning of an award is a cornerstone of international arbitration. Reasoned awards promote fairness, transparency, and enforceability, while safeguarding the integrity of the arbitration process. By providing clear reasons for their decisions, arbitrators help parties understand the outcome, prevent arbitrariness, and enable judicial oversight. This article examines the role of reasoned awards, explores what constitutes sufficient reasoning, and considers how arbitrators can balance the need for clarity with efficiency.

I. The Purpose of Reasons

Reasoned awards serve a critical function in arbitration. In 1987, Lord Justice Thomas Bingham identified five key purposes for judicial reasoning, which apply equally to international arbitration awards. First, reasons ensure that parties understand the basis for the decision. Second, they protect against arbitrary rulings and irrational compromises by the arbitrators. Third, they guide parties and others on future conduct. Fourth, reasons facilitate judicial review by enabling courts to ascertain whether an arbitral tribunal has considered the parties' pleadings and the basis of its decision. Finally, the reasoning process disciplines arbitrators, encouraging logical and robust conclusions.[1]

Moreover, reasoned awards enhance the credibility, fairness, and enforceability of the arbitral process, by providing clear guidance and reducing the likelihood of disputes over the award's validity. Arbitrators responding to a survey have emphasized the importance of writing the award with the losing party in mind, ensuring they understand the reasoning, so they feel that they have received a fair hearing.[2] As Aeschylus noted in the fifth century BC: "the word pacifies the anger."[3]

II. Defining a Reasoned Award

What constitutes a "reasoned" award varies across jurisdictions, but its core purpose remains the same: to provide the arbitral tribunal's reasoning on the issues raised. Lord Bingham described the essential requirements of a reasoned award in the following terms:[4]

> 1. A recital of formal and not so formal matters such as the particulars of the contract from which the dispute arose, the arbitration agreement, that the dispute falls within the arbitration agreement, the manner in which the arbitrators were appointed, and the manner of presentation of the evidence; and
>
> 2. The substantive portion of the award explaining what, in the arbitrators' view of the evidence, did or did not happen and explaining succinctly why, in the light of what happened, the arbitrators have reached their decision and what the decision is.

A. The U.S. Approach

The FAA does not define a "reasoned award," leaving its interpretation to the courts.[5] U.S. federal courts adopt a flexible and less demanding standard as they are generally very deferential when reviewing arbitral awards. As the Eleventh Circuit explained in *Cat Charter, LLC v. Schurtenberger*, courts view reasoned awards as existing on a "spectrum of increasingly reasoned awards," requiring more than a "standard award" that merely states the outcome but less than full "findings of fact and conclusions of law."[6]

The Second Circuit, in *Leeward Constr. Co. v. Am. Univ. of Antigua*, also clarified that "a reasoned award is something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel."[7] Similarly, in *Rain CII Carbon, LLC v. ConocoPhillips Co.*, the Fifth Circuit noted that "if Conoco wanted a more thorough discussion of why the arbitrator reached the decision he did, it could have contracted for an award to include findings of fact and conclusions of law. Instead, the parties agreed to a reasoned award, which, according to our case law, is more than a simple result."[8]

Given the importance of assuring enforcement of awards abroad, in international arbitrations seated in the United States arbitrators would be well advised to follow the international approach.

B. The International Approach

The international practice differs and, unlike the United States, in many countries a reasoned award is required for enforcement. International frameworks such as the UNCITRAL Model Law, and the rules of institutions like the ICDR, ICC, and LCIA, require reasoned awards unless the parties agree otherwise.[9]

The New Zealand Court of Appeal's decision in *Ngāti Hurungaterangi & Ors v. Ngāti Wahiao* underscores the importance of providing sufficient reasoning in international arbitration awards.[10] This case arose from a dispute over ancestral Māori lands, where the arbitral tribunal delivered a brief, inadequately reasoned award. The Court of Appeal criticized the panel for failing to identify key issues, disregarding significant evidence, and relying on conclusory reasoning.[11] It described the award as an "irrational splitting of the difference,"[12] echoing Lord Bingham's critique of arbitrariness. It ultimately set aside the award,[13] emphasizing that sufficient reasoning is integral to due process and justice.

Although rare, recent successful challenges to the adequacy of reasons provided in arbitral awards on the ground of breach of natural justice in Hong Kong and Singapore are also instructive. In *A v. B and Others* [2024] HKCFI 751, the Hong Kong Court of First Instance refused to enforce an award. The arbitrator recited facts and announced conclusions but provided no substantive analysis to explain the reasoning behind the award. The court held that:[14]

> [O]bjectively read and in the context of the issues raised and submissions and arguments made before the tribunal, the arbitrator failed to adequately explain in the Award the reasons for her conclusions made on the key issues raised in the Arbitration, of the applicable governing law of the Agreements, on the effective date of termination of the Agreements, and on the enforceability or the reasonableness of the Non-Compete Covenant, all of which were disputed by the parties.

The court stressed that "a party reading the award should understand why a central issue in the arbitration was decided against him. In this case, it cannot be said that the Respondents would so understand."[15]

In *BZW and another v. BZV* [2022] SGCA,[1] the Singapore Court of Appeal addressed the issue of incoherent reasoning by an arbitral tribunal under § 24(b) of the International Arbitration Act. The respondent argued that the tribunal's reasoning lacked a clear nexus to the parties' submissions, amounting in a breach of the fair hearing rule. The court agreed, finding that the tribunal did little "to connect the proverbial dots."[16] It held that:[17]

"Clear reasoning from arbitrators helps parties understand the outcome, protect against arbitrary decisions, and enable effective judicial oversight."

> To the extent that the second argument propounds the well-known principle that a setting aside application is not an appeal and therefore, the court will not interfere even if it considers that, in reaching its decision, the tribunal has made mistakes of facts or law or both, we of course accept it. But that is not what is in issue in this case. The appellants' argument went far beyond that principle and it was, in fact, quite shocking that the appellants supported the right of a tribunal to be manifestly incoherent in making its decision. The fair hearing principle requires that a tribunal pays attention to what is put before it and gives its reasoned decision on the arguments and evidence presented. If its decision is manifestly incoherent, this requirement would not be met.

III. So How Long and Comprehensive Should the Award Be?

There is no easy answer to the question of how long and comprehensive an award should be. Like so many matters in arbitration, it depends and requires consideration of a variety of factors. As the court aptly put it in the *Ngāti* decision, the level of reasoning required in an arbitration depends heavily on the "context."[18] While detailed reasoning can promote transparency and fairness, it is not always necessary or efficient. Drafting comprehensive awards requires significant time, and excessively detailed awards can undermine arbitration's often touted advantages of speed, and cost-efficiency, which users say they want. Conversely, awards that are too sparse risk enforceability challenges. Arbitrators must ensure that the parties feel that their arguments have been heard and addressed while preserving the efficiency of the process and the enforceability of the award.

A checklist of factors to consider in deciding how long and detailed the award may be helpful in providing the guiding context:

1. Terms of the Arbitration Agreement. The agreement may dictate the level of detail expected in the award.

2. Parties' Expectations and Needs. This includes cultural considerations, the complexity of the arguments, and due process concerns. The reasoning should ensure that the parties feel heard and that their needs—whether for detailed explanations or succinct conclusions—are met.

3. Confidentiality Requirements. Confidentiality clauses may necessitate redactions or supplementary explanations separate from the main award.

4. Court Expectations. Consideration must be given to the standards for court review at the seat.

5. Enforcement Considerations. If the award is likely to be enforced in multiple jurisdictions, it must withstand scrutiny under diverse legal standards.

6. Institutional Expectations and Rules. Institutional rules and guidelines, such as those of the ICDR, ICC or LCIA, often create expectations for the level of detail required of a reasoned award.

7. Significance of the Case. This includes the monetary value of the claims, the nature and complexity of the performance required, and the potential precedential impact of the decision, especially in industries with high market concentration or significant regulatory oversight.

8. Number and Complexity of Issues. The more complex the issues, the more detailed the reasoning should be.

9. Nature of the Evidence. This includes addressing the reliability of the evidence, such as AI-generated data, or evidence of questionable credibility.

10. Consensus in Multi-Member Panels. Reaching unanimity or accommodating dissenting or concurring opinions may influence the level of reasoning.

11. Type of Arbitration. Investor-state arbitrations often require more detailed reasoning due to their public interest implications compared to commercial arbitrations.

12. Industry Norms. What are the expectations in particular industries. For instance, in financial arbitration under FINRA rules, concise awards that avoid elaborate legal analysis are favored.

How one balances these, and any other factors that may be relevant in a particular case, requires the exercise of good judgment.

IV. Conclusion

The reasoning of awards lies at the heart of international arbitration, promoting fairness, transparency, and enforceability. Clear reasoning from arbitrators helps parties understand the outcome, protect against arbitrary decisions, and enable effective judicial oversight. Striking the right balance between thoroughness and efficiency is critical. Awards that are too sparse risk enforceability challenges, while excessively detailed explanations can unnecessarily prolong the issuance of the award and escalate arbitration costs. Arbitrators must draft awards that preserve the integrity of the process while addressing the needs of parties, institutions, and courts. By doing so, reasoned awards uphold arbitration as a legitimate and reliable method for resolving disputes in an increasingly complex global landscape.

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Endnotes

1. Lord Justice Bingham, *Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award*, 4 Arb. Int'l, 141, 141-3, 145 (1988).
2. *See* Edna Sussman, *The Arbitrator Survey – Practices, Preferences and Changes on the Horizon*, 26 Am. Rev. Int'l Arb. 517 (2015).
3. Quoted in Teresa Giovannini, *Philosophy Can Help Tribunals Draft Awards that Parties Will Accept as Legitimate*, 66 Disp. Resol. J. 78, 90 (May-July 2011).
4. Odean Volker, *What Is a 'Reasoned Award' In International Arbitration?,* Law360 (Mar. 5, 2018) (citing inter alia Lord Justice Bingham, *supra* note 1, at 149-50; Lord Justice Bingham, *Differences Between a Judgment and a Reasoned Award*, J. L. Soc'y N. Territory 8 (1997)).
5. Section 10(a)(4) of the FAA merely states that a district court may vacate an award if, by not providing a reasoned award, "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." For an overview of reasoned awards in the United States *see* John Burritt McArthur, The Reasoned Arbitration Award in the United States: Its Promise, Problems, Preparation, and Preservation (JurisNet LLC 2022).
6. *Cat Charter, LLC v. Schurtenberger*, 646 F.3d 836, 844 (11th Cir. 2011).
7. *Leeward Construction Co., Ltd. v. American University of Antigua-College of Medicine*, 826 F.3d 634, 640 (2d Cir. 2016).
8. *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 474 (5th Cir. 2012).
9. UNCITRAL Model Law, art. 31(2) ("the award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given."); ICDR International Dispute Resolution Procedures, art. 33(1) ("The tribunal shall state the reasons upon which an award is based, unless the parties have agreed that no reasons need be given.") (2021); ICC Rules of Arbitration, art. 32(2) (2021) ("The award shall state the reasons upon which it is based."); LCIA Arbitration Rules, art. 26.2 (2020) ("The Arbitral Tribunal shall make any award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which such award is based."). By contrast, Rule R-48(b) of the AAA Commercial Rules and Mediation Procedure (2022) provides that "The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate." Although for international arbitrations governed by the AAA rules, arbitrators typically provide a reasoned award to meet the requirements in other jurisdictions.
10. *Ngāti Hurungaterangi v. Ngāti Wahiao* [2017] NZCA 429 (26 September 2017).
11. *Id.* ¶¶78-103.
12. *Id*. ¶103.
13. *Id.* ¶¶104-10.
14. *A v. B and Others* [2024] HKCFI 751, ¶12.
15. *Id.* ¶20.
16. *BZW and another v. BZV* [2022] SGCA 1, ¶58.
17. *Id.* ¶56.
18. *See Ngāti Hurungaterangi v. Ngāti Wahiao, supra* note 10, ¶63.

Protecting the Confidentiality of an Arbitration Award in New York

By Matthew Iverson

Is your unfavorable arbitration award confidential? Probably, but only if you comply with it. Unfortunately, some parties use the Federal Arbitration Act's (FAA) confirmation process to make an end-run around arbitral confidentiality clauses. The trick works like this – the prevailing party seeks to confirm the confidential award (whether it has been satisfied or not), files that award under seal as an attachment to its confirmation motion, and then argues to the court that the award should be unsealed because a court docket's contents are presumptively public. Because the reasoning that underlies a court decision must be made available, documents the court relies upon are accessible to the public:

> The dispositive documents in any litigation enter the public record notwithstanding any earlier agreement. How else are observers to know what the suit is about or assess the judges' disposition of it? [1]

The Second Circuit has made clear that parties to a confidentiality agreement also cannot bar non-parties from discovery of underlying "confidential" arbitral information.[2]

Therefore, established case law creates a high bar for a sealing request.[3] In the Southern District of New York, for example, even parties who immediately paid their awards in full had those awards unsealed when claimants brought post-payment confirmation requests. The Second Circuit Court of Appeals recently put a limit on the practice of one of the parties to a confidentiality agreement seeking to expose the arbitration award to the public eye in *Stafford v. International Business Machines Corporation*.[4] The Second Circuit held in *Stafford* that arbitration awards submitted with confirmation requests must remain under seal when they are both satisfied and subject to a confidentiality clause. The Second Circuit reasoned that, although a presumption of public access does attach to awards filed along with FAA confirmation requests, that interest is minimal where the award has been satisfied, and no Article III case or controversy exists for a federal court to resolve through confirmation. In contrast, the public has a strong countervailing interest, based on "the FAA's strong policy in favor of confidentiality,"[5] in keeping satisfied awards private. This strong interest in arbitral confidentiality, the Second Circuit held, outweighs the public's weak interest in seeing the contents of a satisfied award.

This is good news for arbitration parties who want to keep unfavorable awards confidential, but it is not a panacea. To shelter in *Stafford*'s safe harbor, a party seeking to stop an opponent from using the FAA's confirmation process to publicize an arbitration award must show the opponent's confirmation request is moot, i.e., "no live controversy remains" about the award.[6]

But what, exactly, does that mean? Under *Stafford*, "a petition to confirm an arbitration award is moot when there is no longer any issue over payment or ongoing compliance with a prospective award."[7] When an award provides only monetary relief, mooting a confirmation request is straightforward – the unsuccessful party must pay the award in full. As *Stafford* makes clear, the point of FAA confirmation is enforcement, as confirmation allows a prevailing arbitration party to use the court's contempt machinery to force the losing party to satisfy the award. Absent confirmation, a prevailing arbitration party can't force the losing party to do anything. But enforcement only matters if the award is not satisfied. Once the losing party pays in full, there is nothing left for a court to enforce, and the winning party's confirmation request becomes moot.

But what happens if the arbitration award requires the losing party do more than just pay the winner? Although *Stafford* holds there is a live controversy over a confirmation request so long as there is an "issue over . . . ongoing compliance with a prospective award," *Stafford* provides little guidance about what an "issue over . . . ongoing compliance" might look like.[8]

The Second Circuit explored this question in *Billie v. Coverall N. Am., Inc.*[9] *Billie*, like *Stafford*, involved an arbitration award paid in full shortly after confirmation proceedings began. Like the *Stafford* plaintiff, *Billie* sought to confirm the satisfied award to force its publication in the court's docket. But *Billie* faced the additional hurdle of distinguishing *Stafford*, which *Billie* tried to do by arguing that the legal conclusions in the arbitrator's summary judgment decision (which preceded the final award) were a "prospective award" sufficient to create an "issue over . . . ongoing compliance" under *Stafford*.[10] The Second Circuit rejected this argument, for two reasons. First, it ruled these legal determinations merely assigned liability and thus were "not a declaration of the parties' ongoing legal rights and responsibilities." Second, it held that even if the arbitrator had issued a declaration, Billie had failed to allege the defendant had or would violate it.[11] Accordingly, *Billie* stands for the proposition that a plaintiff seeking to confirm what appears to be a satisfied award can only proceed by showing the award declares or enjoins "ongoing legal rights and responsibilities" and that an actual or threatened dispute exists over those rights and responsibilities.[12] Otherwise, the confirmation request is moot and should be dismissed.

A Southern District of New York court also showed what an ongoing dispute over rights and responsibilities might look like in *LXA Aviation Leasing 3 Ltd., Petitioner*.[13] *LXA Aviation* emerged from an arbitration in which the petitioner claimed the respondent had breached a sales contract by selling incomplete products. The petitioner prevailed and received an award requiring the respondent to both pay damages and complete the products it had sold. And although the respondent paid the damages, it did not immediately complete the products.

"In short, *Stafford* strongly suggests that an arbitral party who contests an award, either by seeking to vacate it or otherwise refusing to satisfy it, cannot keep that award confidential if its opponent seeks confirmation."

When the petitioner sought to confirm the award in court, the respondent argued confirmation was moot because it had already paid the award's financial component. The court was not persuaded. It held, essentially, that while the respondent had complied with half the award, the other half – the portion requiring the respondent to complete its products – remained unsatisfied. The court also rejected the respondent's contention that its willingness to pay damages demonstrated its intent to later comply with the rest of the award. In a decision that aligns with *Billie* (which issued a few days later), *LXA Aviation* held that "prior compliance is not a ground for refusal to confirm an arbitration award where outstanding tasks remain."[14]

Although *LXA Aviation* did not involve a controversy over confidentiality, it provides a lesson for parties seeking to keep their confidential arbitration awards confidential. Anyone who wants to avoid having their unfavorable award published during the confirmation process by mooting the confirmation request *must* make sure to fully satisfy the *entire* award – including any non-monetary components - before the confirming court acts. Any unsatisfied award component creates a controversy sufficient to take the dispute out of *Stafford*'s safe harbor.

Unsuccessful arbitration parties should also recognize an important corollary of this rule. Under *Stafford*'s logic, it is impossible for a party to both contest an arbitration award and keep it confidential. If a party disputes an award's enforceability, there is, by definition, a controversy about that award. And if a controversy exists about an award, then under *Stafford* a federal court has jurisdiction to both resolve that

controversy and publicize the disputed award on its docket. So unsuccessful arbitration parties should be wary – they must choose between contesting an unfavorable award or keeping it confidential. They cannot do both. In short, *Stafford* strongly suggests that an arbitral party who contests an award, either by seeking to vacate it or otherwise refusing to satisfy it, cannot keep that award confidential if its opponent seeks confirmation.

Of course, *Stafford*, *Billie*, and *LXA Aviation* are all federal decisions. Would a New York state court reach the same conclusions? Maybe not. In general, New York state courts address sealing requests in the same manner as federal courts. For example, in *Matter of Arb. Between Cyprium Therapeutics, Inc. & Curia Glob., Inc.*[15] the Appellate Division upheld a trial court's refusal to seal docket entries concerning a motion to stay pending arbitration. The Appellate Division ruled it would be improper to seal the docket because the public has a presumptive right to see court documents, and "there was no question that the matter belonged in court because petitioner was pursuing a stay pending arbitration, a judicial remedy expressly authorized by law. . . . "[16] Although *Cyprium Therapeutics* did not involve an award, the Appellate Division's sealing logic in that case tracked the Second Circuit's logic in *Stafford* – in both *Cyprium Therapeutics* and *Stafford* the propriety of sealing turned on whether the parties' dispute belonged in court. In *Cyprium Therapeutics* (which upheld a decision to unseal), the plaintiff's stay request belonged in court, while in *Stafford* (which reversed a decision to unseal) the plaintiff's confirmation request should have been dismissed as moot. Although that parallel logic suggests New York courts might follow *Stafford*'s lead, there is a material difference in how federal courts and New York state courts address the propriety of confirming a satisfied award. New York's confirmation statute, CPLR 7510, states that a "court *shall* confirm an award upon application of a party . . . unless the award is vacated or modified. . . . "[17] In *Bernstein Fam. Ltd. P'ship v. Sovereign Partners, L.P.,* the First Department Appellate Division held this language *requires* a court to confirm an arbitration award, even if the award is fully satisfied.[18] So, while a federal court will dismiss a motion to confirm a satisfied award, a New York state court will not. And, as discussed above, absent special circumstances, courts typically do not seal documents material to proceedings before them.

But does that mean a party can publicize a satisfied arbitration award just by confirming it in state court? That answer is not clear. Although *Bernstein Fam. Ltd. P'ship* holds that courts must confirm satisfied awards, it also makes clear that courts are "*not* exercising the quintessentially judicial power to resolve disputes" when they do so.[19] Instead, courts confirming satisfied awards are merely "exercis[ing] a ministerial function at the behest of the Legislature."[20] This impacts the sealing equation, as the public's right of access to a court docket typically diminishes when a court acts in a ministerial capacity.[21] Accordingly, the question of whether a New York state court would agree to seal a satisfied arbitration award during and after confirmation remains open.

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Endnotes

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4. 78 F.4th 62 (2nd Cir. 2023).
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7. *Id.* at 68.
8. *Id.*
9. No. 23-672-CV, 2024 WL 4380618, at *3 (2d Cir. Oct. 3, 2024).
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14. *Id.* at *2.
15. 223 A.D.3d 1042 (2024).
16. *Id.* at 1044.
17. Emphasis added.
18. 66 A.D.3d 1, 7 (2009) ("In short, it is irrelevant in a proceeding to confirm an award whether there is a dispute about whether the award has been fully satisfied. If there is no such dispute, the court simply confirms the award.").
19. *Id.* (emphasis added).
20. *Id.*
21. *See Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 142 (2d Cir. 2016) (holding presumption of public access to judicial documents diminishes where documents play little role in court's exercise of judicial power).

Informal Discovery in Early Employment Law Mediations

By Darren P. B. Rumack

As attorneys representing parties in employment cases in New York federal court are aware, odds are good that the case will wind up at mediation, often very early in the litigation (whether by choice or not). The most recent data from two of the busiest federal courts is clear: mediation of employment law claims is growing rapidly.

Since 2011, the Southern District of New York (SDNY) has automatically referred all employment discrimination cases to mediation.[1] A report from October 2023 demonstrates an increasing use of mediation in SDNY employment cases. For example, in 2021, 1483 cases were referred to the SDNY's mediation program, nearly half (44%) of which were FLSA, employment discrimination and § 1983 claims. In 2022, 1,550 cases were referred to the SDNY's mediation program, 36% of which were FLSA, employment, and § 1983 claims.[2]

Similarly, in the Eastern District of New York (E.D.N.Y.) in 2023, cases filed under the FLSA constituted about 8% of the total civil filings in that district.[3] In 2023, 59% of all FLSA cases filed were referred to mediation. FLSA referrals made up 52% of the mediation referrals in 2023 and 65% of the FLSA matters referred to mediation during the period of this report were resolved before or as a result of a mediation session. Employment discrimination cases were the second most common type of case referred to the EDNY mediation program; 60 cases referred to the mediation program were employment discrimination matters. From January 1, 2023, through December 31, 2023, 63% of employment discrimination matters referred to mediation were resolved before or as a result of a mediation session.

When asked why mediation was unsuccessful, one of the most common reasons mediators cite is insufficient information exchanged by the parties ahead of the mediation. Without sufficient information exchange, it is difficult for parties to properly assess their litigation risks and be able or willing to move toward genuine compromise. For example, in a discrimination case, how can employee's attorney advise their client that the employer has well documented reasons for their termination if the employer does not produce write ups ahead of the mediation? Conversely, how can an employer's attorney advise their client that the employee has a high backpay claim if the employee does not disclose whether they found new employment?

In reality, the parties have many tools at their disposal to procure sufficient information ahead of the mediation session. Though not a guarantee that the parties will reach settlement, sufficient information exchange gives the parties more information and greater likelihood of a better decision-making process. There are a number of practical steps parties can follow to guide their document production even before the mediator in directly involved in early mediation.

1. Follow the Protocols

Attorneys often defend their lack of production by pointing out that the mediation was scheduled before the start of discovery. Not only is this approach self-defeating, it is also incorrect. The easiest way for counsel to avail themselves of proper discovery is to follow the protocols of the court. For example, the SDNY has discovery protocols for employment cases already in place, which set out exactly what documents must be produced ahead of the mediation.[4] Moreover, some judges also maintain specific discovery protocols for FLSA cases.[5]

Court-mandated discovery protocols are designed to help the parties evaluate their case and consequently facilitate settlement. Counsel can rely on these protocols to have their clients produce sufficient information for their adversaries and vice versa. It is worth keeping in mind and reminding clients that the documents required for production will come out during the course of discovery anyway should the mediation not succeed, so the parties may as well produce them prior to the mediation.

2. Use the Mediator

To be clear, the mediator is not a discovery referee and does not have the authority to resolve discovery disputes. It is always helpful for the attorneys to communicate directly with

each other if there are specific documents that they are seeking ahead of the mediation. However, if there is uncertainty as to what documents to produce, a conversation with the mediator may be useful – especially ahead of the mediation. The mediator can also ask whether counsel have looked at the protocols and say that the purpose of the exchange now is to assure a productive mediation.

Separately, during the mediation, one party may not wish for the other party to view a specific document for whatever reason. Although the other party may be skeptical as to the secrecy, one option is to show the document to the mediator and let him or her paraphrase the contents in caucus to the other side.

I have served as a mediator in several cases with this scenario, where one side did not want to produce specific documents (such as bank statements or medical records) for their adversary's review during the course of the mediation. Putting the wisdom of this approach aside, I was able to paraphrase the contents of the documents to the other side to facilitate discussion. Obviously, the opposing party may draw their own conclusions when a document is specifically withheld, but this is another option to prevent the mediation from getting stuck on a specific piece of information.

3. Share Portions of the Mediation Statement

One option for parties to consider is agreeing to share portions of their mediation statement with opposing counsel. While most mediation statements are confidential, sometimes sharing your mediation statement may be beneficial and may narrow points of contention or clarify areas of disagreement. It may also highlight issues that can be clarified with clients ahead of the mediation, leading to a more productive session.

4. Ability To Pay Documents

A frequent barrier to settlement is the "ability to pay" issue. During mediation, it is not uncommon for defense counsel to assert that their client simply does not have the money to fund a large settlement. This is more frequent in FLSA cases where insurance coverage is rare.

When inability to pay is raised, plaintiff's counsel will naturally want to see documents supporting that assertion. Supporting documents run the gamut from tax returns to bank account statements and beyond. However, the time to produce and review these documents is not at the mediation itself.

First, parties are rarely able to secure these documents during the mediation. Frantic calls to accountants rarely lead to tax filings being sent over in time. Second, opposing counsel is unlikely to take the documents at face value without having adequate time to review them and discuss with their client. This holds up the mediation and often requires a follow-up session.

It is worth noting that plaintiff attorneys are generally not persuaded by tax returns alone, especially in mainly cash businesses, and may require other documents to support an inability to pay claim. Again, in this situation, the attorneys should discuss the matter ahead of the mediation, not during the mediation itself.

Conclusion

Employment law mediations can be difficult and drawn-out negotiations, especially if the parties do not have sufficient discovery to evaluate the case. Effective information exchange can lead to a more productive and efficient mediation process for parties, their counsel and the mediator.

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Endnotes

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How To Be a Good Mentee

By Rajeev Ananda

Legal mentorship has long played a pivotal role in the professional development of junior attorneys. While much has been written about the mentor's role in this relationship, far less has been written about the role of the mentee and, specifically, the attitudes and behaviors that contribute to a successful mentee experience. This article attempts provide a framework to help mentees in ADR get the most out of what can be an invaluable relationship.

Mentorship is a particularly useful tool for the next generation of practitioners to find opportunities to enter the rapidly growing and evolving ADR field. This is especially true in mediation where the significant increase in the number of mediated disputes over the last 30 years has been accompanied by an even greater increase in the number of mediators over that time.[1] The presumptive mediation program in the New York court system has increased the need for mediators. However, there are relatively low barriers to entry and no licensing requirement in New York for mediators. The supply of potential mediators may outpace demand, making it more difficult than ever for aspiring mediators to gain experience and establish a regular mediation practice. Therefore, mentorship in the field is arguably more crucial than ever.

The Higginbotham Fellows Program

After litigating commercial cases for 20 years, I began to wonder whether it would be more personally and professionally satisfying to help parties resolve their problems as a neutral. Consequently, I completed my Part 146 40-hour mediation training and applied for and was accepted into the American Arbitration Association's Higginbotham Fellows Program. The Higginbotham Fellows program aims to "provide training, mentorship, and networking opportunities to up-and-coming alternative dispute resolution professionals who historically have been excluded from meaningful participation in the field."[2] The Fellows Program brought together 15 Fellows with diverse personal backgrounds and professional experiences for a week of intensive training in mediation and arbitration from industry trainers, thought leaders, and specialists.

Upon completing the training, I was paired with a mentor. In a stroke of incredible good fortune, my mentor was

Laura Kaster, former co-chair of the NYSBA Dispute Resolution Section and one of the co-editors in chief of this *New York Dispute Resolution Lawyer*. One of the successes of the Higginbotham Fellows Program is not only the diversity of the Fellows as mentees, but also the diversity of the mentors. Research indicates that 71% of corporate mentees have mentors of the same gender or race.[3] While this approach may certainly have its benefits, "bridge mentoring," i.e., mentorships that intentionally connect diverse individuals, can also provide significant benefits. Such mentorships, like Laura's and mine, bridge social capital across individuals with dissimilar backgrounds and personal identities. These are the types of mentorships that can be challenging to form on one's own, since people with such different backgrounds and experiences may not organically cross paths. Through the Higginbotham Fellows Program, I have received enormous benefit from Laura's mentorship both in the form of her specific guidance forged from a long career in ADR, as well as access to people and opportunities I would not otherwise have.

"Say Yes to Everything"

Say Yes to Everything and the Growth Mindset

Perhaps the best advice I received as I began my journey into ADR was from AAA arbitrator and NYSBA Dispute Resolution Section Chair-Elect William Crosby, and it was quite simple: "Say yes to everything." He explained that whenever he was asked to do anything, from a speaking engagement to chairing a committee to taking on new work, even if he did not think he possessed the ability to accomplish the work at that moment, if there was even any possibility he could develop the skills and/or expertise to perform the task in the future, he would say yes. He would accept the request and figure out the details of how he would do it later. That philosophy has clearly served him fantastically over the course of his distinguished and impactful career. As someone who has historically had a different inclination – a predisposition to caution and reluctance to agree to work unless I knew for certain that I could deliver – Bill's advice resonated with me as an approach I wanted to embrace in order to expand my abilities and maximize my opportunities.

The mindset the mentee brings to their relationship with the mentor is paramount in determining just what and how much the mentee will get out the mentorship. The "Say Yes to Everything" approach is a manifestation and expression of a growth mindset. The growth mindset is the attitude that an individual's talents and skills are adaptable and can be improved over time through effort and practice. Research has found a link between having a growth mindset and higher student test scores and greater student well-being.[4] Supervisors in growth-mindset companies expressed significantly more positive views about their employees than supervisors in fixed-mindset companies, rating them as more innovative, collaborative, and committed to learning and growing.[5] People with a growth mindset have been found to have an ability to improve without incentives, have increased motivation, reach higher levels of academic achievement, and possess better coping skills.[6]

During my first conversation with Laura as my mentor, she invited me on a panel she was forming for the American Bar Association 2024 Advanced Mediation & Advocacy Skills Institute. I had never spoken on a panel before, and I did not feel I was an expert in the subject matter, ethical considerations and the Rules of Professional Conduct with respect to mediation. I was also intimidated by the pedigrees of the other panelists, Marjorie Aaron and Ellen Waldman, both leading figures in mediation. Nevertheless, committed to the "Say Yes to Everything" approach, I said yes. Ultimately, what perhaps should have been obvious to me at the time, it was an incredible experience. I learned a great deal substantively, but more importantly, I gained a great deal of confidence from being a part of a successful presentation and made meaningful connections with practitioners I respect and admire. I overcame my trepidation and am now less worried about potential failure. It was also – and I think this is an underappreciated benefit of the growth mindset – a great deal of fun. When Laura subsequently asked me to write this article for the *New York Dispute Resolution Lawyer*, while I can't say my response flowed instinctively from my lips just yet, the "Say Yes to Everything" approach prevailed.

Understand and Communicate What You Need

Mentorship can take on different forms to achieve specific goals depending on the needs of the mentee. The mentee should formulate their needs and goals and clearly communicate those needs/goals to the mentor to get the most out of the relationship. The mentor might also help with a discussion of the goals. Some mentees need a coach in order to improve performance at a particular skill, for example, an experienced mediator who will allow the mentee to observe a mediation and instruct them on particular techniques and strategies. Others may require a sponsor, a senior practitioner who has garnered substantial social and political capital. Sponsors can use their cachet to help high-potential individuals join prestigious committees, working groups, or professional organizations. While other mentees may benefit from a connector, a seasoned guide with a vast professional network. Connectors can provide growth opportunities for mentees, connecting

them to experts in areas of particular interest to mentees or to other accomplished professionals to widen their network.

There are other forms mentorship can take, and mentees may be looking for a mentor that can provide guidance in a combination of roles. It is important for the mentee to understand what it is they are looking for and to clarify and communicate those needs to the mentor. A mentee who is communicative and curious is more likely to find success than one who is reserved and demonstrates limited communication. Research indicates that personality can play an important part in a mentorship, such that shyness and limited initiation by a mentee are inversely correlated with mentoring success.[7]

Engagement, Commitment, and Gratitude

One of the best ways for a mentee to get the most out of a mentor is to have fun and be easy to work with. Mentors largely provide their services to mentees out of altruism and service to the profession. While the mentor may also receive tangible benefits from the relationship, the majority of the value added flows to the mentee. The mentee should think about ways to make the arrangement as enjoyable and easy as possible for the mentor. This requires being engaged, energetic, and enthusiastic in interactions with the mentor. Being proactive – for example, in setting up times to meet or communicate. Having a positive attitude generally makes people want to engage more often. Accordingly, the mentee would do well to avoid a negative mindset if problems arise. Viewing negative events as an opportunity for growth can only help cement the relationship with a mentor.

As with almost anything in life, hard work and commitment are perquisites for achieving meaningful success. The mentee, at a minimum, must be respectful of the mentor's time. That means being on time for meetings, staying focused in conversations, and if the mentee undertakes a task, he or she delivers it on time and with the appropriate amount of care and quality. Not only should mentees not waste their own time by delivering subpar work, but they absolutely cannot waste the mentor's time. ADR is an increasingly crowded field, and there are no shortcuts to being able to carve out a career within it; professionalism is the watchword, which means in this context, be an excellent mentee.

Finally, mentors devote significant time, energy, and opportunity cost to provide their mentorship. Mentees should make sure they express their gratitude and respect to their mentors for their efforts. A mentor who feels appreciated may be more likely to devote more to the relationship.

Conclusion

Having a mentor can be a significant step for those attempting to break into ADR. The mentee should enter the mentorship with a growth mindset unafraid to take on new, uncomfortable challenges, understand and communicate his/her needs to the mentor, and bring an abundance of energy, commitment, and gratitude to the relationship.

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Endnotes

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Co-Mediation: Two Heads May Be Better Than One

By Rachel Gupta

Co-mediation can be a terrific opportunity for parties and mediators alike. It can enhance the effectiveness and efficiency of the mediation process, leading to better outcomes for all parties involved. It can also help mediators learn and refine their skills. However, co-mediation is not appropriate for all cases, and without proper preparation by the mediators, co-mediation has the potential to add unnecessary complexity to a case. This article discusses the benefits of co-mediation to both the parties and mediators, how co-mediation works, and common pitfalls that co-mediators should avoid to ensure that co-mediation adds value to the process and not unnecessary distraction or complication to the parties' negotiations.

What Is Co-Mediation and What Are the Benefits?

Co-mediation involves two or more mediators working with the parties and counsel to help facilitate a negotiated resolution. Co-mediation offers several benefits.

Specialized Skills: One of the most common reasons to utilize co-mediation is where the parties are not able to identify a single mediator who possesses the requisite skills and expertise for a particular dispute. Due to some technical, cultural, legal or psychological aspect to the dispute, there is a need to engage a mediator with specialized expertise, but this requirement may be secondary to the need for general mediation skills and training. The parties therefore engage an experienced mediator with process expertise and a second mediator who may have expertise in a niche industry, be a trained psychologist, or familiarity with a particular culture. For example, in a case that involves intricate tax issues, a lead mediator may enlist a co-mediator with tax expertise who may be better positioned to offer constructive feedback on the parties' respective positions or brainstorm creative solutions and settlement structures.

Diverse Perspectives and Increasing Diversity in ADR: Co-mediation enables parties to simultaneously work with mediators who bring to the table varied experiences, backgrounds, and skills. This potentially enhances problem-solving and creativity in finding solutions and overcoming impasse. There may be benefits to the parties in having two mediators from different professional or cultural backgrounds, ages, or genders. For example, consider an employment discrimination suit involving allegations of sexual harassment and assault, where the court-appointed mediator and attorneys for both parties are all male, and the plaintiff is female. There may be a benefit in having a female co-mediator to allow the plaintiff to feel more comfortable. Similarly, in a business dispute involving companies from foreign countries where the representatives are from different cultures, the parties may recognize the value in having two mediators, at least one of whom has familiarity with a particular culture's customs to ensure that the communications and negotiations take into account cultural sensitivities.

Co-mediation is also an opportunity to increase diversity in the alternative dispute resolution (ADR) field. Often, parties repeatedly use the same mediators and are hesitant to take a chance on someone they haven't worked with before because they perceive risk in doing so. In addition, while it is no secret that the legal field is not as diverse as the population it serves, the ADR field is even more homogeneous. Co-mediation provides clients with the opportunity to add to their roster of mediators, including those from historically underrepresented populations, but at the same time, minimize the perceived risk by simultaneously engaging a mediator with whom they are already comfortable.

Shared Workload and Continued Momentum: Co-mediation allows for the distribution of tasks, making the process more efficient and manageable, especially in complex disputes. For example, in large multi-party mediations, multiple mediators may help streamline the process, accelerate the timeline, and keep the momentum going. Where prominent mediators are often booked many months in advance, for those cases that require multiple mediation sessions and ongoing communications with the mediator over a period of months (or in some cases, years), having two or more mediators on the case helps retain momentum and prevent delay that could be caused by a single mediator's schedule. If there are multiple issues to resolve, the co-mediators may split their time and speak separately with the various parties, enabling them to proceed on parallel paths. This can help prevent impasse and encourage progress.

Increased Neutrality and Broader Appeal and Reach: Having multiple mediators can help to reinforce the perception of neutrality. Not only may multiple mediators reduce the risk of the unconscious biases of a single mediator having a direct impact on the negotiations, two or more mediators with varied backgrounds, personalities, and perspectives help maximize the potential for individual participants to relate to, and build trust and rapport with, at least one of the mediators. For example, there may be instances where, because

of the varying personalities, cultural backgrounds, or other attributes of the parties, there may be a benefit to having multiple mediators who can each more effectively work with specific participants. With more mediators, there can be a greater outreach to different stakeholders, improving engagement and the likelihood of a satisfactory resolution.

Professional Development, Support and Backup: Mediation is a very isolating profession. Co-mediators can support each other during the mediation process and provide one another with emotional and professional backup, which can be particularly helpful in high-conflict situations. Co-mediation also provides mediators opportunities to learn from one another, expand or build their practice areas, and broaden their impasse-breaking skills. It can be a valuable opportunity for mediators to get additional immediate feedback, "on the job" training, and refine their skills.

How Does Co-Mediation Work?

Who selects the co-mediators, do they work together or independently, and how does this impact the cost of the mediation? It depends.

Co-mediation is most effective when the mediators are involved in the selection process. There is more likely to be fluidity, and less likely to be competing styles. Often when the mediators choose their co-mediators, they already have familiarity with the other's mediation style and have already established a productive rapport. This contributes to a smoother and more organic co-mediation.

That does not mean co-mediation cannot work when the parties select the co-mediators on their own. It can. In choosing the co-mediators, parties should be mindful of the specific benefits they are intending to address by having multiple mediators, while at the same time, consider the personality, temperament, and other attributes of the mediators to ensure that the partnership will be collaborative and productive, as opposed to competing or disjointed.

The parties want to avoid selecting mediators who must build trust and rapport with one another, while they are simultaneously trying to gain the trust and buy-in of the participants. The mediators should have sufficient familiarity with one another – or at a minimum, one another's reputations – to have a solid foundation of trust with which to work. No mediation is the same, and the unexpected always arises. The mediators' focus must be on the parties' needs, and not on figuring out how to manage the mediator dynamic.

If the appointed mediators are not familiar with one another, it is recommended that they spend additional time among themselves preparing their co-mediation strategy and building rapport in advance of the mediation to avoid the pitfalls discussed below.

As for the mediation itself, depending on the needs and issues of the case, the co-mediators may choose to work entirely together or may work separately and report back to one another. In large, complex, multi-party disputes, the mediators may divide and conquer. In other words, they may split up and caucus with parties separately to avoid delays and minimize downtime. In some instances, there may be certain issues to resolve that involve some, but not all, of the parties. The mediators may divide the issues and address them on parallel paths. On the other hand, for cases with fewer parties and simpler issues, the mediators may decide to work in tandem and jointly handle caucuses with the parties.

"Co-mediation enables parties to simultaneously work with mediators who bring to the table varied experiences, backgrounds, and skills."

Co-mediation works as effectively for remote mediations as it does for in-person mediations. In remote mediations, however, the ability to have certain private conversations do not arise organically, and mediators must sometimes find ways to manage certain dynamics without raising antennas. For example, if the mediator wants to find an opportunity to speak privately to counsel outside the presence of the clients, with in-person mediations, the mediator may pass the attorney in the hallway or while getting coffee. Similar opportunities won't arise in remote mediations and the mediator must find creative ways to speak privately with counsel. This is also true in co-mediations. An added complexity, however, is that in remote co-mediations, the co-mediators must also determine in advance how they will privately communicate with one another during the session. They need to have pre-established methods to signal to the other when one of the mediators wants to privately discuss something, without alarming, or otherwise highlighting a potential issue to the participants.

A natural question about co-mediation is whether it doubles the cost to the parties. Once again, it depends. Oftentimes, if a selected mediator raises the need to retain an additional mediator, the initial mediator may agree to either split her fee or negotiate an arrangement that does not double the parties' expense. In other instances, for example in multi-party disputes or where the parties require specialized expertise, the parties may be responsible for paying multiple mediator fees. However, this should not deter parties from utilizing co-mediation. Typically, mediator's compensation is

a small percentage in the scheme of total litigation costs. In complex arbitrations, it is not unusual to have three arbitrators. Ultimately, whether the incremental cost is worthwhile depends on the particulars of the case with respect to subject matter, complexity, and the amount in dispute. The same rationale applies to co-mediation.

Common Pitfalls To Avoid

To work effectively, co-mediation requires advance preparation and candid communication between the mediators to ensure that there are not competing philosophies or disruption to the mediation process. The success of co-mediation heavily relies on the relationship and collaboration between the mediators. If they do not work well together, it could negatively impact the mediation. The mediators must have sufficient trust in one another – and have sufficiently prepared their strategy – to ensure that they cohesively manage the process and are on the same page with how they will improvise and handle the unexpected, which inevitably will arise in every mediation.

In addition to general strategy, the mediators need to specifically discuss how the mediation process will work and how they will communicate between themselves and with the parties. The mediator's preparation is critical to avoid the following:

Role Confusion: It is important to establish the roles of the co-mediators in advance. Do they have a shared role or are they retained for separate purposes? Is one of them retained due to specialized expertise or to manage certain aspects of the dispute? With multiple mediators, there may be uncertainty about each mediator's role, leading to mixed messages or conflicting guidance for the parties involved. Both the parties and the mediators need to know how the process will work.

Power Imbalance: Unless it is established that there is a "hierarchy" among the co-mediators – with one being a lead mediator, and one assisting – there should not be any perceived power imbalance among the co-mediators. In other words, the co-mediators must not let their egos enter the negotiation room. If one mediator dominates the process, or if the parties perceive an imbalance in influence, it can undermine the neutrality and effectiveness of the co-mediation. That said, there are instances where there is an express delineation of a "lead" mediator and a second mediator. This is not necessarily problematic – as long as all participants are on the same page as to the roles of the mediators, the process can work smoothly.

Communication Issues: The mediators need to agree at the outset how they will handle various issues that may arise in the mediation. This includes whether they will speak to parties without all mediators present, and if so, how they will keep one another apprised of those conversations and manage the confidentiality expectations of the parties. Advance preparation must also explore how they will deal with unexpected issues that may arise, and in what circumstances the mediators have the discretion and autonomy to implement strategies without consulting the other. Poor communication between co-mediators can lead to misunderstandings or inconsistent approaches, which may confuse the parties or derail the mediation. Getting out ahead of this potential pitfall is critical for any co-mediation.

Divergent Styles: Mediators must ensure their diverse perspectives bring value to the table, not additional confusion and conflict. While there are benefits to the co-mediators having different styles or philosophies, these differences, if not acknowledged and discussed at the outset, have the potential to create tension or confusion, affecting the overall mediation dynamic and process. For example, if one of the mediators is heavily evaluative in their mediation style, and the other is primarily facilitative, this can cause an imbalance and leave the parties hearing the views from only one mediator. This can lead to additional issues such as role confusion, power imbalances, or in some circumstances, an impression of mediator bias. Similarly, when co-mediators have differing opinions on how to handle certain issues, if they do not privately strategize and resolve these diverging views, they could create additional conflict, confuse the parties, and hinder the mediation process.

Increased Complexity: The presence of multiple mediators can complicate logistics, scheduling, and decision-making, potentially prolonging the process. If the parties retain multiple prominent mediators, this may be a real risk and defeat the efficiencies the parties are seeking with co-mediation.

Being aware of these risks and potential pitfalls helps mediators and parties take proactive steps to mitigate them and ensure a more effective co-mediation process. Under the right circumstances, co-mediation can be an opportunity to leverage the skills of two or more dispute resolution experts, enable clients to expand their roster of neutrals, and maximize the chances of reaching a settlement, proving the adage that two heads may be better than one.

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Evidentiary Traditions in Arbitration: Is Basic Fairness Always the Same? (Part 1)

By James E. McLandress

Parties choose arbitration as an alternative to the traditional court system. They want their disputes dealt with fairly, expeditiously, and with as little fuss and bother as possible. Therefore, absent agreement to the contrary, formal court procedures, including the strict rules of evidence, do not apply in an arbitration. The common law and the rules of most, if not all, major arbitral institutions clearly allow arbitrators to admit evidence that would normally be inadmissible in a courtroom. This is true regardless of the courtroom in question: American, Canadian, U.K., or other Commonwealth country.

That said, counsel and arbitrators are all sensitive to the fairness principles that underly those rules of evidence and cannot simply ignore them. Indeed, fairness is central to Article V (1)(b) of the New York Convention enabling a court to refuse recognition and enforcement where a party was "unable to present his case," 9 U.S.C. §§ 201-208. The rules of procedure and evidence used in each nation govern how a party can "present their case." But, while every nation's system strives to ensure a "fair" process, the methods to achieve "fairness" and the standards by which it's judged vary greatly. The stark procedural differences used in civil versus common law jurisdictions to achieve "fairness" are an obvious example.

Regardless of the legal system involved, it's clear an evidentiary issue that occurs during an arbitration *may* rise to the level of preventing a party from being "able to present their case." But international arbitral jurisprudence makes it equally clear we mustn't simply use national standards to assess fairness. Doing so would cut sharply against the Convention's pro-enforcement objectives. With 172 signatories covering widely different cultural, linguistic, legal, and commercial settings the Convention must accommodate a broad range of what "fairness" entails. Accordingly, national courts accept Article V(1)(b) challenges only in the most serious cases of procedural unfairness, where the alleged unfairness had a demonstrable, material impact on the process or the award.[1] To put that in a specifically U.S. context, the international standard of procedural fairness is similar to, but still distinct from the "due process" requirements of the U.S. Constitution.[2]

The myriad ways in which an inability to present one's case may arise is well beyond the scope of this article. However, the case discussed here offers a chance to consider the issue in the context of two competing common law traditions.

The decision in *Vento Motorcycles, Inc. v. United Mexican States* ("*Vento*"),[3] deals with a Commonwealth evidence "rule" applied in the context of an international arbitration. The "Rule in *Browne v. Dunn*" or the requirement to "put the case," as it's sometimes called ("the Rule") is directed toward procedural fairness. It's a rule of cross-examination with which all Commonwealth litigators are familiar.[4] The Rule limits the scope of impeachment of a witness and so, can trip up the unprepared litigator.

The Rule at first seems anathema to the American lawyer. But on deeper examination, I submit it illustrates a concept of fairness recognized in both common law traditions and one worth reviewing in the context of arbitration.

In Part 1 of this article, I'll provide some background on the Rule and review the *Vento* case. In Part 2 I'll delve further into concepts of the American law of evidence that I believe land us in a space that's remarkably like that occupied by the Rule.

Understanding the Background for *Vento*: The Rule in *Browne v. Dunn*

The Rule as normally presented comes from an 1893 English House of Lords decision in a defamation case. The plaintiff, James Browne, and the defendant, Cecil Dunn, were residents in "The Vale of Health," a quaint but isolated enclave accessible by a single road located on a former bog in Hampstead Heath. Messrs. Browne and Dunn were "not on friendly terms." Dunn, a solicitor, had drawn a document whereby several local residents retained him to have Browne "bound over to keep the peace" because of a "serious annoyance" Browne had allegedly caused to those residents. Browne later learned about the document and sued Dunn for defamation.[5]

Browne's position at trial was that the document was a sham to injure Browne.

One of the nine signatories to the document testified in support of Browne. Six gave evidence on Dunn's behalf, testifying they had "suffered from such annoyances," had consulted with Dunn, and gave him instructions that led to their signing the document. *On cross-examination, Browne's counsel made no suggestion to any of these witnesses that this was not the case*. Browne's counsel later submitted to the jury the retainer was not genuine, and the jury should not believe the six signatories who had testified it was.

The jury sided with Browne, and he won. Dunn appealed successfully to the Court of Appeal and Browne further appealed (unsuccessfully) to the House of Lords.

The most cited statement from *Browne v. Dunn* is in Lord Herschell's speech which reads in part:

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, . . . argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

Each of the three concurring judgments formulated their comments slightly differently and with different qualifications as to the limits of its application.

The Rule has generated considerable controversy over the years with challenges to its formulation, its scope, and even whether it can properly be considered a "rule."[6] Nonetheless, the Rule remains alive and well. A current leading English text, *Phipson on Evidence,* sets out this formulation:

> In general, a party is required to challenge in cross examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point... This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected.[7]

This statement was recently approved by the UK Supreme Court (formerly the Appellate Committee of the House of Lords).[8] Within the Commonwealth the Rule is fully in effect in at least the UK, Australia, Canada, South Africa, New Zealand, and Hong Kong.[9]

Vento Motorcycles, Inc. v. United Mexican States

In Vento, a U.S.-based manufacturer of motorcycles, entered a joint venture agreement with a Mexican company to sell and market motorcycles in Mexico (JV). In 2017, Vento brought a NAFTA Chapter 11 claim against Mexico saying its actions destroyed Vento's business under the JV. A three-person tribunal, seated in Toronto, heard the arbitration under the ICSID Arbitration (Additional Facility) Rules.

Early in the process the tribunal issued a procedural order addressing, among other things, the process for: (1) direct examination (through witness statements and expert reports), (2) pleadings (two rounds with nothing further unless the tribunal found exceptional circumstances to exist), and (3) cross-examination (any witness who had provided written evidence had to be available for cross-examination).

In its memorial, Vento argued (among other things) that Mexican officials, acting under express "marching orders," specifically targeted Vento and the JV operations to reach a predetermined outcome intended to drive Vento out of the Mexican motorcycle market. Mexico denied this in its counter-memorial.

In its teply, Vento included a witness statement from a Mr. O., a Mexican government official, in which he testified to being under "undue and unusual pressure" from his superiors to resolve the case against Vento. He also referred to his interactions with the Mexican government after the arbitration had commenced.

Mexico's rejoinder included a witness statement from another Mexican government official, Ms. M., attaching a recording of a telephone conversation Mexican officials (including Ms. M.) had with Mr. O. regarding the arbitration. Mexico argued the recording undermined Mr. O.'s credibility.

Vento moved to strike the recording from the record arguing it: (1) was obtained without Mr. O.'s consent, (2) was incomplete, (3) violated Mr. O.'s right to privacy, and (4) principles of procedural fairness at least required Mr. O. be allowed to respond to Mexico's allegations.

The tribunal declined to strike the evidence and did not allow Mr. O to provide further evidence in response to the recording. It did so because Ms. M had participated in the conversation and because it was neither prohibited nor illegal in Mexico for a participant in a conversation to record that conversation even if the recording was made without other participating parties' knowledge.

At the hearing Vento elected not to cross-examine Ms. M. and Mexico chose not to cross-examine Mr. O.

The tribunal ultimately dismissed Vento's claim.

Pursuant to Article 34 of the UNCITRAL Model Law, Vento applied to the Ontario Superior Court to have the award set aside. In summary, Vento argued:

> 1. It was unable to present its case because the Tribunal refused to allow Mr. O to testify in response to the recording used to impeach his credibility*;* and
>
> 2. There was a reasonable apprehension of bias on the part of one of the arbitrators.

The Court refused to set aside the award on either ground.

Only the first ground engages the Rule so my comments will not address the issue of bias. On appeal, the Ontario Court of Appeal allowed Vento's appeal on the bias issue but expressly declined to address the procedural fairness ground.[10]

In *Vento,* the Court described the test to set aside an award under UNCITRAL Article 34(2)(a)(ii) [NYC V(1)(b)] in two different ways:

> 1. "The conduct of the Tribunal must be sufficiently serious to offend our most basic notions of morality and justice. Judicial intervention for alleged violations of the due process requirements of the Model Law will be warranted only when the arbitral tribunal's conduct is so serious that it cannot be condoned under [Ontario] law."[11]
>
> 2. There must be "proof of fundamental unfairness that went to the essence of the right to be heard." The standard of due process must be "capable of application to any international arbitration whatever the procedural law applicable and the nationality of the participants" and "the court should be seeking to identify and apply basic minimum requirements that would generally, even if not universally, be regarded throughout the international legal order as essential to a fair hearing."[12]

The Court concluded the two approaches are consistent.

It then examined the Rule, following the approach taken in a criminal case decided by the Ontario Court of Appeal in 2015.[13] That case summarized the Rule as follows:

> 1. *Browne v. Dunn* "is not some ossified, inflexible rule of universal and unremitting application that condemns a cross-examiner who defaults to an evidentiary abyss. The rule is grounded in fairness, its application confined to matters of substance and very much dependent on the circumstances of the case being tried."
>
> 2. It is not a fixed rule. The extent of its application "lies within the sound discretion of the trial judge" and depends on the circumstances of each case.
>
> 3. Compliance with the Rule requires the cross-examiner to confront the witness with matters of substance where:
>
> > a. The party seeks to impeach the witness' credibility; and
> >
> > b. The witness hasn't had an opportunity to offer an explanation because there's been no suggestion whatever the witness' credibility is in doubt.
>
> 4. Whether the Rule was offended by failure to cross-examine on a specific matter can't be determined in the abstract, e.g.,
>
> > a. Where the subjects not touched in cross-examination but later contradicted are of little significance in the conduct of the case and the resolution of critical issues of fact, the failure to cross-examine is likely to be of little significance.
> >
> > b. Where it's clear the cross-examiner intends to impeach the witness' story.

Applying those propositions, the Court concluded Vento failed to establish the tribunal's conduct was "so serious that it could not be condoned under Ontario law" or that "the basic requirements that would generally be regarded throughout the international legal order as essential to a fair hearing were not met." More specifically:

> 1. Vento was able to adduce substantial evidence and make arguments in support of its position on all the issues on which the tribunal ruled. Moreover, the challenge to Mr. O'.s credibility was of little significance because the tribunal: "made no reference to the recording or the conversation with Ms. M." and
>
> 2. Gave significant weight to Mr. O.'s evidence and did not make any adverse credibility findings against him. Therefore, without creating unfairness, it was open to the tribunal to decline Vento's request to allow Mr. O. to testify, allow the recording into evidence, and take

into account Mr. O.'s inability to address the recording when assessing the reliability of the evidence.

To put it in the vernacular, the Court concluded, "No harm. No foul."

It's certainly fair to ask why so much time was spent discussing a Commonwealth rule of evidence in the context of an international arbitration involving parties from the U.S. and Mexico, jurisdictions which do not recognize the Rule as part of its law. Presumably the Rule was offered merely as being illustrative of the idea of procedural fairness. Regardless, I submit the Court's decision on this ground makes perfect sense.

When looked at through the lens of "the basic requirements that would generally be regarded throughout the international legal order as essential to a fair hearing," the Court was right in finding that, as a whole, the tribunal's process met that standard. And that's as it should be. Irrespective of the legal traditions from which the litigants and the tribunal come, the overarching question is whether the parties received procedural fairness in the most basic sense.

From a New York perspective when dealing with international arbitrations, *Vento* should be a reminder that when it comes to procedural fairness, the focus must remain on the big picture. The minutiae of national procedural laws have no place except to the extent they inform a broad understanding of what "fair" means.

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Endnotes

1. *See generally*, Born *International Commercial Arbitration*, Third Ed. (2020), Kluwer Law Int'l @ pp 48-55.
2. *See, e.g.*, *Restatement of the US Law of International Commercial and Investor-State Arbitration,* "In the United States, the relevant principles are generally referred to as 'due process' standards, but use of this term does not imply that domestic constitutional due process protections directly apply in arbitration. The procedural protections that assure fundamental fairness in a consensual arbitral process, particularly ones involving parties from different legal cultures and procedural traditions, are distinct from those that would be required in judicial proceedings in which the Due Process Clauses of the Fifth and Fourteenth Amendments of the US Constitution apply."
3. *Vento Motorcycles, Inc. v. United Mexican States* 2023 ONSC 5964.
4. "Commonwealth" refers here to all current and former members of the "Commonwealth of Nations" (aka, "the Commonwealth" or the "British Commonwealth") that adopted the British common law. Since handover in 1997, Hong Kong is no longer a purely common law system; however, for the purposes of this article the Rule in *Browne v. Dunn* is still respected. There are also some members which are not "purely" common law countries but, rather apply the common law in parallel or conjunction with other legal systems such as civil law, customary law, and Shariah. Canada, with the Province of Quebec operating under the *Code civil du Québec*, is one such.
5. Sensibilities have clearly changed over the years. One of the signatories described the "serious annoyance" as follows: "*Ever since the year 1888 he has constantly annoyed and insulted me, but only when there were no witnesses by – when I have been walking quietly out. He has sneered, grunted, sputtered, and occasionally burst into a brutal guffaw.*"
6. For example, *R. v. MacKinnon: Has the Rule Requiring Notice of Future Impeachment Been Undunn*, 51 Advocate (Vancouver) 86 (1993); *The Rule in Browne v. Dunn: Should It Be Undone*, 6 Gonz. J. Int'l L. 1 (2002-2003); *Browne v. Dunn and Similar Fact Evidence - Isles of Change in a Calm Civil Evidence Sea* (2003) LSUC Special Lectures: Evidence; *Putting the Case Against the Duty to Put the Case*, 2004 N.Z. L. Rev. 313; *The Rule in Browne v. Dunn- Essential or Anachronistic?* supremecourt.nsw.gov.au/documents/Publications/Speeches/2019-Speeches.pdf; *Why Are We Still Not Done with the Rule in Browne v. Dunn*? kluwerarbitration.com/2019/09/09: *Browne, Dunn and Done? When Old Rules Are New Again,* https://criminallawyers.ca/wp-content/uploads/2022/11/CLA-2022-Browne-and-Dunn-FRIEDMAN-AND-ALFORD-FINAL.pdf.
7. 20th Ed. (2022) at para. 12-12.
8. *TUI UK Ltd. v. Griffiths* [2023] UKSC 48 https://www.supremecourt.uk/cases/uksc-2021-0208 ("*TUI UK*").
9. **U.K.:** *TUI UK*. **Australia**: *See, e.g.*, Chapter 4 of the Criminal Charge Bench Book issued by the Judicial College of Victoria, https://resources.judicialcollege.vic.edu.au/article/1053858/section/1370309. **Canada**: Most recently, *R. v. Doonanco*, [2020] 1 SCR 9, https://canlii.ca/t/j5cf7 & the decision appealed from *R v. Doonanco*, 2019 ABCA 118 (CanLII), https://canlii.ca/t/hzhxp. **South Africa**: most recently, *Bosch Munitech (Pty) Ltd v. Govan Mbeki Municipality* https://www.saflii.org/za/cases/ZAGPPHC/2024/531.pdf. **New Zealand**: Most recently, *Wallace v. Attorney-General* [2022] NZCA 375, https://nz.vlex.com/vid/raewyn-wallace-v-attorney-910532676. **Hong Kong**: *HKSAR v. Chan Hing Kai* [2019] HKCA 172https://www.hklii.hk/en/cases/hkca/2019/172. **Elsewhere**: I haven't undertaken a review of *all* Commonwealth jurisdictions, however, I believe the Rule remains alive in most, if not all of them.
10. *Vento Motorcycles, Inc. v. Mexico*, 2025 ONCA 82 (CanLII), https://canlii.ca/t/k994t.
11. *Consolidated Contractors Group S.A.L. v. Ambatovy Minerals S.A.*, 2017 ONCA 939, https://canlii.ca/t/hp34f.
12. *Gol Linhas v. Matlin Patterson Global* https://jcpc.uk/uploads/jcpc_2020_0086_judgment_f2bcad44b1.pdf.
13. *R. v. Quansah*, 2015 ONCA 237 (CanLII), https://canlii.ca/t/gh4jw.

The Role of Lawyers in Peacemaking

By Jacqueline Nolan-Haley

What obligations do members of the legal profession owe to a society in crisis and conflict? Specifically, do lawyers have an ethical duty to deploy their skills to encourage and advance peacemaking? My response to this normative question is yes. Not only is there a peacemaking role for lawyers, but we should be more intentional in acknowledging and engaging in it, particularly during times of crisis or heightened need. In this article, I endorse a theory of peacemaking that calls for harnessing our peace-related skills including facilitation, negotiation, collaboration, consensus building, problem solving, de-escalating conflict, conciliation, and mediation, and then consciously gesturing towards peacemaking in whatever legal space we find ourselves.

The foundation for a lawyer's peacemaking role can be found in the preamble to the Model Rules of Professional Conduct, which recognizes three distinct roles which attorneys may exercise in civil society: (1) a representative of clients; (2) an officer of the legal system; and (3) a public citizen having special responsibility for the quality of justice. The role of lawyer as peacemaker flows naturally from the third category – the lawyer as a public citizen with a special responsibility for the quality of justice can be considered a peacemaker when exercising this responsibility whether through restorative practices, repairing harm caused by conflict or attempting to heal divisions.

Never in recent history has there been a more appropriate time to reflect on a peacemaking role for lawyers who are, in the first instance, dispute resolution professionals. Increased polarization of our communities, on-going threats to democracy and to the rule of law, inadequate access to the justice system, and a leadership crisis throughout the world, all urge us to confront challenges that threaten peaceful co-existence in civil society. The language of the Preamble to the Rules of Professional Conduct speaks clearly to this duty – ". . . a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. . . . "

I am not the first person to argue for a vision of lawyering that includes peacemaking activities, or that peacemakers join counselors and advocates in the practice of law.[1] Abraham Lincoln, in his second inaugural address, viewed peace, along with truth, justice and mercy, as the foundation for the future and "more perfect" union.[2] He is famously noted for his comment that "as a peacemaker the lawyer has superior opportunity of being a good [person]. There will still be business enough."[3] Lincoln's transformative vision of the lawyer as peacemaker needs to be ours at this time in our history.

Peacemaking

Writing in the fifth century, Saint Augustine defined peace as the "tranquility of order. . . . The peace of all things is the tranquility of order. Order is the distribution which allots things equal and unequal, each to its own place."[4] In public international law and in private domestic law, peacemaking is a broad term that includes multiple understandings. Essentially, it consists of a process or processes that focuses on managing and resolving conflicts in a collaborative or cooperative manner. While international law separates three distinct activities – peacemaking, peacebuilding and peacekeeping, all these activities can be included in the role of the lawyer who brings peace into the room.[5]

There is nothing new about lawyer peacemaking in the international space where mediation is frequently identified as a peacemaker's tool. One of the most well-known examples of the lawyer acting as peacemaker is Senator George Mitchel and his work in Northern Ireland.[6] Acting as a mediator, he helped to negotiate the Good Friday/Belfast Agreement that brought an end in Northern Ireland to 30 years of horrendous conflict known as the "Troubles," a period during which 3,600 lives were lost.[7] Another example of lawyers acting as peacemakers is reflected in the work of the Public International Law & Policy Group, a global pro bono law firm in Washington, D.C. that provides free legal assistance to parties involved in peace negotiations.[8]

But peacemaking practice is not confined to international space or limited to use of the mediation and negotiation processes. In the realm of family law, for example, Forest Mosten has proposed the idea of the unbundled (also referred to as limited scope representation) lawyer as peacemaker.[9] Others have offered the idea of the peacemaking role of the lawyer representing a party in mediation.[10] Beyond individual examples, multiple problem-solving movements have emerged in recent years that can be located under the umbrella of a lawyer's peacemaking role. Examples include collaborative

law, restorative justice, therapeutic jurisprudence, integrative law, and holistic law. These movements suggest a thirst by many lawyers for more holistic ways to practice law. A brief description of some of the movements suggests commonalities to lawyer peacemaking.

Collaborative Law*:* Process in which lawyers and clients agree to resolve their differences through a collaborative negotiation process. The parties sign a participation agreement in which, among other things, they acknowledge an attempt to resolve their dispute without involving the courts.

Restorative Justice*:* In the criminal law context, instead of a retributive justice perspective that emphasizes guilt and punishment for criminal offenders, restorative justice focuses on a collaborative process of healing and reconciliation for the offender, the victim of crime and the community. Restorative justice processes include victim-offender dialogue and truth and reconciliation commissions. In the tort field, restorative justice introduces concepts of forgiveness and apologies.

Therapeutic Jurisprudence (TJ)*:* TJ focuses on the effects of law and the legal system on parties' emotional and psychological well-being. Its initial use was in the mental health field, but it now is widely applied in other areas including criminal, tort and commercial law. TJ has provided the theoretical foundation for the many problem-solving courts that have been developed in response to community concerns with issues such as domestic violence and juvenile crime. It offers a vision of lawyering that is infused with an ethic of care and problem-solving approaches.

Holistic Law: Holistic is a broad term that includes many transformative practices including peaceful advocacy, reconciliation, forgiveness and healing. For some lawyers, it is spiritual practice. Under the umbrella of holistic law, some lawyers might adopt other peacemaking practices such as collaborative law.[11]

Lawyers' Peacemaking Begins With Interior Peace

You cannot give what you do not have. Authentic peacemaking requires that lawyers be at peace with themselves, so that they have a sense of interior peace to begin with.[12] Unfortunately, this is not the case with many in our profession. Research on lawyer distress reports on a faulty legal system where both lawyers and clients are unhappy.[13] Sandra Day O'Connor observed several years ago that "Lawyers as a group, [are]a profoundly unhappy lot. . . . Attorneys are more than three times as likely as non-lawyers to suffer from depression."[14]

Apart from its salutary effects on the legal system, the functioning of civil society and encouraging civil discourse, embracing the role of peacemaker might alleviate lawyer dissatisfaction and give more meaning to work. Far from engaging in a radical role change, the lawyer acting as a peacemaker can be thoughtfully understood as a public citizen exercising special responsibility for the quality of justice in accordance with the preamble to the Model Rules.

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3. Mark Steiner, *The Lawyer as Peacemaker: Law and Community in Abraham Lincoln's Slander Cases*, 16 Abraham Lincoln Association Issue 2, at 2 (Summer 1995).
4. City of God, Book 19, Chapter 13.
5. D. Bowling & D. Hoffman (Eds.) Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution (2003).
6. J. Feerick, *The Peace-Making Role of a Mediator*, 19 Ohio St. J. Disp. Es. 1 (2003).
7. D. McKittrick, S. Kelters, B. Feeney C. Thornton, Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the Northern Ireland Troubles 3 (1999).
8. P. Williams, Lawyering Peace, (2021 Cambridge U Press.).
9. Kim Wright, Lawyers as Peacemakers: Practicing Holistic Law, Problem-Solving Law at 78 (ABA 2010).
10. Kim Wright, at 82.
11. Kim Wright, p. 23, 24.
12. J. Nolan-Haley, *Finding Interior Peace in the Ordinary Practice of Law: Wisdom from the Spiritual Tradition of St. Teresa of Avila*, 46 J. Cath. L. Stud. 29 (2007).
13. Kim Wright p. 2-3.
14. Sandra Day O'Connor, *Professionalism*, Speech at the Dedication of the William Knight Law Center, in 78 Or. L. Rev., 385, 386 (1999).

Recent Cases Relating to the ADR Field

Alfred G. Feliu

Clickwrap Agreement To Arbitrate Enforced

An Uber passenger, Wu, brought a personal injury action against the company. Months later, Uber updated its terms of service for all of its users in the United States, which included the requirement that all disputes and claims against it were to be subject to arbitration. The terms of use, including the arbitration agreement, "were accessible through several hyperlinks, including a large black button at the very top of the email specifically labeled 'Review terms,' and the text 'Terms of Use' in the first line of the first paragraph, which was distinguished from the black text surrounding it by the signature blue font indicating a hyperlink." While it was unclear whether Wu clicked on any of the "several prominently-placed hyperlinks," the New York Court of Appeals concluded that Uber placed Wu on inquiry notice of her obligation to arbitrate. Wu argued in response that the obligation to arbitrate should not apply to her complaint, which was filed before the terms of use were amended. The majority rejected this contention, finding "Uber's clickwrap process satisfied the contract-formation requirements of offer and acceptance." The majority also declined to rule on Wu's unconscionability claims, finding that such claims may not be categorized as relating to contract formation, but rather were for the arbitrator to decide based on the clear delegation provision in the arbitration agreement. For these reasons, the Court ruled that Wu's personal injury claims were subject to arbitration and that her unconscionability claims were for the arbitrator to decide. *Wu v. Uber Technologies, Inc*., 2024 WL 4874383 (N.Y.).

Evident Partiality Claim Against Law Firm Partner Rejected

HBC and Zurich Insurance Company arbitrated a COVID-related dispute and each selected a party arbitrator. The party arbitrators designated an umpire who, after being selected, joined the Pillsbury Winthrop firm. That firm was adverse to Zurich in a number of COVID-related disputes. Zurich brought an order to show cause seeking to disqualify the umpire, arguing that as a partner in the Pillsbury firm he was inherently conflicted. The umpire declined to withdraw, noting that he had no knowledge of Pillsbury's various litigations with Zurich, that an ethical wall had been established, and that his compensation was not tied to Pillsbury's litigations with Zurich. The trial court denied the application, finding that the FAA applied and that the application was both premature and failed to demonstrate anything other than an appearance of a conflict rather than an actual conflict of interest. *Zurich American Insurance Company v. HBC U.S. Holdings*, 2021 WL 2787720 (N.Y. Sup. Ct.). The arbitration proceeded and an award in favor of HBC was issued. Zurich sought to vacate the award. The trial court denied the application, and the appellate court here affirmed, holding that "Zurich failed to establish, by clear and convincing evidence, evident partiality of one of the arbitrators." The court explained that a claim of evident partiality required that a reasonable person would have to conclude that the arbitrator favored one side. The court observed that in evident partiality cases the "mere failure to disclose a potential relationship to one of the parties does not, in itself, constitute evident partiality, and the question for the court is whether the facts that were not disclosed suggest a material conflict of interest." The court concluded that "the evidence presented by Zurich does not establish that the arbitrator had a material conflict of interest, and we see no basis to find that a reasonable person would have to conclude that this arbitrator would be partial." *Zurich American Insurance Company v. HBC U.S. Holdings, Inc.*, 2025 WL 36873 (1st Dep't).

EFAA Bars Sex Harassment Claims That Accrue After Effective Date

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA) bars the arbitration of sexual harassment and sex assault cases that accrue after its effective date, March 3, 2022. In this case, the alleged sexual harassment and ensuing retaliation extended continuously from 2018 until July 2022. The district court ruled that plaintiff's hostile work environment claim constituted ongoing claims subject to the continuing violation theory and, therefore, was not subject to arbitration as having accrued after the effective date of EFAA. The Second Circuit affirmed. The court focused on the application of the term "accrue." According to the court, a right accrues when it comes into existence and is actionable, that is, on the date that the statute of limitation begins to run. The court acknowledged that when an action accrues depends on the claim to be asserted and that some "causes of action accrue serially; they accrue (and reaccrue) pursuant to the continuing violation theory." Because a hostile environment claim does not occur on any one day, such claims do not accrue until the last discriminatory act occurs.

The court rejected defendant's argument that the court was improperly applying EFAA retroactively given the ongoing nature of a hostile environmental claim. The court concluded that as plaintiff alleged that defendant "engaged in acts that are part of the same course of conduct underlying her hostile work environment claims [some of which occurred after March 3, 2022], those claims have accrued after the EFAA's effective date" and therefore are not subject to arbitration. *Olivieri v Stifel, Nicolaus & Co.*, 112 F.4th 74 (2d Cir. 2024).

Arbitration of Sex Discrimination Claims Not Barred by EFAA

The Ending Forced Arbitration Act (EFAA) excludes from arbitration claims of sexual harassment and sex assault. Are sex discrimination claims similarly barred? The court in this case confronted this issue under New York City's liberal Human Rights Law. The court began by noting that "state and federal courts have yet to draw a clear line between what constitutes 'sexual harassment' and what constitutes 'gender discrimination.'" This is so, the court noted, because until EFAA there was not much of a concern because both were protected by the applicable statutes. The court observed that although sexual harassment was not defined under the City Human Right Law, successful plaintiffs bringing claims under the Human Rights Law generally alleged conduct of a romantic, sexual, or lewd nature. Here, plaintiff alleged that her supervisor: mistreated her by giving male colleague's credit for her accomplishments; ignored her contributions; assigned projects unfairly to male coworkers; interrupted her during meetings; inappropriately questioned whether her pregnancy would impact her commitment to the job, and gave her baseless performance criticisms. While acknowledging that these allegations clearly stated a claim for sex discrimination, the court concluded that plaintiff did not allege "harassing conduct or the kind of inappropriate comments that would rise to what the courts have determined constitutes 'sexual harassment' under the [City Human Rights Law]. Holding otherwise would collapse the difference between 'gender discrimination' and 'sexual harassment,' a step too far for this Court absent contrary guidance from the state courts." For these reasons, the court granted defendant's motion to compel arbitration. *Singh v. Meetup, LLC*, 2024 WL 3904799 (S.D.N.Y.), *reconsideration denied*, 2024 WL 4635482 (S.D.N.Y.).

AAA Rules Not Sufficient To Require Delegation

The arbitration agreements in this dispute between merchants and major credit card companies incorporated the AAA's Commercial Arbitration Rules. The defendant credit card companies argued that the incorporation of the AAA Rules, which empower arbitrators to decide questions of arbitrability, constituted clear and unmistakable evidence that the parties agreed to delegate arbitrability disputes to the arbitrator to decide. The district court here disagreed. The court cited Second Circuit precedent for the proposition that the AAA Rules are not per se sufficient to delegate arbitrability disputes to the arbitrator where, as here, the agreement excludes certain types of claims from arbitration. In particular, the relevant contract language here excluded chargeback claims. As no further evidence was provided on the delegation issue, the court concluded that it was for the court to decide whether the claims raised were covered by the arbitration agreement. *B & R Supermarket, Inc. v. Visa, Inc., et al,* 2024 WL 3823096 (E.D.N.Y.). *Cf. Work v. Intertek Resource Solutions*, 102 F.4th 769 (5th Cir. 2024) (incorporation of JAMS Employment Arbitration Rules constituted clear delegation to arbitrator to rule on question whether parties authorized class arbitration); *Illinois Casualty Co. v. B&S of Fort Wayne, Inc.*, 235 N.E.3d 827 (Ind. 2024) (AAA's rule providing "broad grant of power gives arbitrators absolute power to decide arbitrability").

Discovery Ordered on Question of Proper Arbitration Forum

The parties here disagreed as to whether their dispute, which they both agreed was arbitrable, should be submitted to the National Arbitration and Mediation or the American Arbitration Association. The defendant initially included in its terms of use the requirement that arbitration be before the AAA but then updated its terms of use to provide for arbitration before NAM. Counsel for plaintiffs attempted to reject the modified terms of use and ultimately filed individual arbitration claims before the AAA. Once notified that the modified terms of use had designated NAM, the AAA declined to administer the arbitrations filed with it but indicated its willingness to do so if defendant consented or it was ordered by a court. Both parties sued. The court concluded that it could not determine on the record before it "whether the parties' agreement to arbitrate before the AAA was later supplanted by a subsequent agreement to arbitrate before the NAM." The court ordered further discovery on the question whether plaintiffs assented to the modified terms of use and whether the rejection letter from their counsel was effective. *Brooks v. WarnerMedia Direct, LLC*, 2024 WL 3330305 (S.D.N.Y.).

New Era Mass Arbitration Rules Held Unconscionable

Live Nation adopted the mass arbitration rules established by a new arbitration provider, New Era. The New Era rules provide, among other things, that: they can be revised with retroactive effect at any time by Live Nation; they apply to purchasers of tickets from Live Nation as well as to those who merely browse Live Nations's website; each side uploads its evidence with the parties having no right to discovery, although the arbitrator can allow additional evidence to be

exchanged; three bellwether cases are to be given precedential effect and are binding on cases batched with the bellwether cases even though the non-bellwether claimants had no right to participate in those proceedings, and a hearing could be held only in the arbitrator's discretion. The district court ruled that the delegation clause in the New Era rules was unconscionable, and the Ninth Circuit affirmed, finding both the delegation provision and the arbitration agreement as a whole unconscionable. The Ninth Circuit began by noting that the New Era rules "are so dense, convoluted and internally contradictory to be borderline unintelligible." The court found the rules to be both substantively and procedurally unconscionable. The court noted that claimants in non-bellwether cases are bound by rulings in which they may not participate and with no assurance of adequate representation or an opportunity to opt out. The court also found that the rules were "inadequate vehicles for vindication of plaintiff's claims," emphasizing the lack of discovery and noting that "New Era's restrictions on briefing border on the absurd." The court reasoned that the unconscionable nature of the rules permeated the entire arbitration process, which prevented the severance of the unconscionable terms. Finally, the court concluded that the FAA did not preempt California's unconscionability law that "relies on generally applicable principles that neither disfavor arbitration nor interfere with the objectives of the FAA." For these reasons, the Ninth Circuit affirmed the district court's ruling and denied Live Nation's motion to compel arbitration. *Heckman v. Live Nation Entertainment, Inc.*, 120 F 4th 670 (9th Cir. 2024).

Public Policy Does Not Require Vacatur of Reinstatement Involving Alleged Domestic Violence

Grievant, the director of student conduct at a state university, was terminated following disclosure of a domestic dispute with his wife. In particular, his wife informed police that he had grabbed her and attempted to strangle her while their children slept in the house. When the police came, the grievant disclosed that he had guns, but he would not hurt anybody. He was later arrested. All criminal charges were later dismissed. The university conducted its own investigation and concluded it had just cause to terminate grievant's employment. The union challenged the termination, and the arbitrator concluded that the university's investigation failed to establish by clear and convincing evidence that grievant's off-duty conduct warranted termination. The trial court granted the university's motion to vacate the award on public policy grounds. The Connecticut Supreme Court reversed. As framed by the Court, "the sole issue before us is whether public policy is violated by the arbitration award reinstating the grievant to employment after a court had dismissed his criminal charges stemming from off-duty conduct and he had successfully completed a six-month therapeutic domestic violence offender program." The Court recognized that the termination implicated "explicit, well-defined and dominant public policies of protecting victims of violence, including authorizing protective orders . . . , protecting children . . . , and preventing interference with or endangering the police." The Court pointed out that the university could not point to any law or regulation requiring the termination of the

grievant. "Similarly, although [applicable Connecticut law] manifests a public policy of protecting victims of domestic violence and is a very important tool to accomplish that purpose, there is nothing in that statute that recommends or mandates the termination of employment of an individual who is subject to a protective order." The Court emphasized that the issue before it was not whether grievant's off-duty behavior violated public policy, but rather whether the arbitrator's decision violated public policy. It concluded that it did not. While recognizing the strong public policy against domestic violence and in support of child safety, "those strong public policies do not provide explicit support for the narrower public policy that the state seeks to invoke here: a policy against reinstatement of a long-term employee with no disciplinary history following off-duty conduct leading to an arrest and charges that have been dismissed." For these reasons, the Court reversed the trial court and confirmed the arbitrator's award reinstating the grievant. *State of Connecticut v. Connecticut State University Organization of Administrative Faculty*, 314 A.3d 971 (Conn. 2024).

Arbitration Agreement Cannot Waive ERISA Group Remedies

Participants in 401(k) retirement plans covered by ERISA filed a putative class action on behalf of the plans, themselves, and all others similarly situated, claiming that the plan fiduciaries breached their fiduciary duties owed under ERISA. They sought all losses accruing to the plans, disgorgement of all profits, and other injunctive remedies. The district court denied the fiduciaries' motion to compel arbitration under the plans' mandatory individual arbitration provisions. The Sixth Circuit agreed, holding that the individual arbitration provisions contained in the plans were invalid as a prospective waiver of statutorily guaranteed rights and remedies. In so holding, the Sixth Circuit relied on the Supreme Court's reasoning in *Mitsubishi v. Soler Chrysler-Plymouth*, where it noted, in the context of Sherman Act claims, that an arbitration agreement may not serve as a prospective waiver of a party's right to seek statutory remedies. The Sixth Circuit also observed that "four circuits" have already adopted the *Mitsubishi* reasoning to "[strike] down arbitration provisions that barred 'effective vindication' of the statutory rights guaranteed by ERISA," and noted that the "mandatory individual arbitration provisions" at issue in those cases were strikingly similar to the provisions at issue here. For instance, the plans here required that: claims be brought in an "individual capacity and not in a representative capacity"; they limit relief to a claimant's "individual Plan account," and any other equitable or remedial relief could not "result in the provision of additional benefits or monetary relief." Finding that these individual arbitration provisions "operated to bar [plaintiff] from effectively vindicating her statutory rights under ERISA in the arbitral forum," the court held that it therefore functioned as a "prospective waiver of [her] substantive statutory remedies and is unenforceable." The court further held that because "the individual arbitration provision is non-severable" from the rest of the arbitration procedure set forth in the plans, the entire arbitration procedure was unenforceable. The district court order denying the fiduciaries' motion to compel arbitration was therefore affirmed. *Parker v. Tenneco, Inc.*, 114 F.4th 786 (6th Cir. 2024), *cert. denied*, 2025 WL 76490 (U.S. Jan.13, 2025).

AAA Termination of Mass Arbitration for Nonpayment Not Subject to Review

The district court directed that Samsung pay over $4 million dollars in arbitration fees, which it had refused to do, after the American Arbitration Association terminated the proceeding for over 35,000 consumers bringing individual claims against Samsung. The Seventh Circuit reversed, concluding that disputes regarding payment of fees were for the AAA to resolve where the AAA's Rules were adopted by the parties' arbitration agreement and its terms and conditions. The court explained that procedural issues, such as payment of fees, are for the AAA and the arbitrator to decide where threshold arbitrability issues are delegated to the AAA and the arbitrator. "The parties thus bargained for the AAA's discretion over the payment of administrative filing fees, including the consequences that would stem from a party's refusal to pay those fees." The court noted that the consumers here could have advanced the AAA's fees and avoided the dismissal of the arbitration proceedings but declined to do so. "At that point, arbitration was complete, and the district court did not have the authority to flout the parties' agreement and disturb the AAA's judgment." The court explained that the FAA does not "grant consumers an unfettered right to arbitration," only that the arbitration proceed according to the terms agreed to by the parties. "The agreement here delegated fee issues to the procedures and rules of the AAA. And the AAA, using those rules, denied a stay, terminated the arbitration, and sent the claims to federal court after Samsung refused to pay its fees. The parties therefore fully 'arbitrated' under their agreement." For these reasons, the court concluded that the arbitration was in fact complete even though a determination on the merits had not been reached. The court added that the consumers here were not now without recourse as they could pursue their claims in court if they chose. *Wallrich v. Samsung Electronics America, Inc.*, 106 F.4th 609 (7th Cir. 2024).

Mass Arbitration Filing Failed To Evidence Agreement To Arbitrate

Arbitration demands for over 35,000 consumers bringing claims against Samsung were filed, along with a spreadsheet containing the claimants' names and addresses, copies of the

applicable terms and conditions, and a determination by the AAA that its filing requirements had been met. When Samsung refused to pay the AAA's filing fees, the AAA terminated the proceedings, but the consumers successfully moved to compel arbitration, including an order requiring that Samsung pay the AAA's fees. Samsung appealed and the Seventh Circuit reversed. The court made clear that the party moving to arbitrate must first demonstrate the existence of an enforceable arbitration agreement. The court concluded that the consumers here failed to do so. The court explained that the arbitration demands "are nothing more than allegations" signed by counsel. "No claimant submitted any declaration or otherwise attested under the penalty of perjury to the facts alleged in the arbitration demands." Samsung's arbitration agreement and its terms and conditions, the court noted, "are simply copies found in any Samsung device or on Samsung's website, not terms and conditions reviewed and received by specific consumers. Without more, those copies do nothing to show that any of the consumers purchased a Samsung device." Finally, the court reasoned that the AAA's determination that its filing fees were met is not a substantive determination as to whether an enforceable agreement is present and "adds nothing to support the consumers' bare allegations that they purchased Samsung devices or otherwise entered into arbitration agreements with Samsung." The court observed that the consumers could have submitted sales receipts or purchase numbers or a declaration that might have sufficed to prove the existence of a valid arbitration agreement with Samsung, but they did not. As the consumers had the opportunity to but did not present their evidence of the existence of an arbitration agreement, the court concluded that it had no choice but to reverse and dismiss their claims. *Wallrich v. Samsung Electronics America, Inc.*, 106 F.4th 609 (7th Cir. 2024).

Incorporation of AAA Rules Allows for Mass Arbitration Proceeding

The relevant arbitration agreement provision here adopted the American Arbitration Association's Rules but made no mention of the AAA's Mass Arbitration rules. Ninety-one employees filed mass claims against a former employer and sought to compel arbitration; the former employer objected to the abrogation of the claims, arguing it did not agree to apply the Mass Arbitration Rules. The Delaware Chancery Court rejected the employer's contention and ordered the employees' claims to be arbitrated under the AAA rules. The court noted that the AAA instituted its multiple case filing rules in 2021 after the arbitration agreements in this case were entered into. The court reasoned that an "agreement's incorporation of AAA rules incorporates all future AAA amendments and supplements to those rules that would be in force and effect at the time the arbitration petition is submitted." The court pointed to the AAA rules that applied when the arbitration agreements were executed, which made clear that the rules, as they may be amended, are to be applied as they are in effect when the demand for arbitration is filed. As the claims were filed after adoption of the AAA's Mass Arbitration Rules, those rules are to be applied to the claims raised in this case, the court concluded. The court further ruled that the parties delegated arbitrability issues to the arbitrator and no special reference to mass arbitration needed to be made for the delegation designation to be enforceable. The court distinguished class arbitration that may have required a more specific delegation provision. "Mass claims arbitration is meaningfully different than class action arbitration and presents none of the traits of class action arbitration that have given courts pause in delegating class arbitrability" as mass claims arbitration "is not representative and so does not present these concerns." The court explained that the AAA uses "mass claims arbitration for procedural and administrative reasons only." The court pointed to the AAA's separate set of class action arbitration rules from mass arbitration rules. It highlighted that unlike a class arbitration, mass arbitration did not present concerns about class number nor "does it present the concerns of one arbitrator deciding substantive issues for multiple claimants, or of saddling an arbitrator with complex representative procedural questions." For these reasons, the court concluded that an "agreement to delegate substantive arbitrability includes a delegation of mass arbitrability to the extent that question is one of substantive arbitrability." *Buzzfeed Media Enterprises v. Anderson*, 2024 WL 2187054 (Del. Chanc. Ct.).

Partiality Argument Waived

The issue before the court was whether an insurer waived its objections to an appraiser's partiality by not objecting to the appraiser's disclosure until after the appraisal was issued. Westchester, the insurer here, issued a property-insurance policy to Biscayne Beach. After suffering storm-related damage to its property, Biscayne Beach demanded an appraisal of its losses. The district court abated Biscayne Beach's action, and the parties retained individual appraisers, who then selected an umpire to complete the panel. The day the panel met for final negotiations, Biscayne Beach's appraiser disclosed for the first time – 15 months after his retention – that he may have a financial stake in the award on account of a contingency-fee retainer. Westchester did not object, and the panel issued its award over a month later. Westchester later moved to reopen the action and to vacate the award on the ground that the appraiser had acted partially. The district court denied the motion, ruling in part that any objection to the appraiser's partiality was waived by not objecting sooner and therefore confirmed the award. The Eleventh Circuit affirmed. Likening the appraisal proceeding to an arbitration and noting that there is no basis to distinguish the two, the

court explained: "The 'general rule' is that a party who knows of an arbitrator's bias must object to his partiality before the award issues. When a party discovers an arbitrator's conflict, it must contest the partiality at that time or else waive the right to object in the future. The party may not sit idle, see whether the award is favorable, and then collaterally attack the proceedings on a ground that it declined to flag sooner." Here, the court found that Westchester's actions ran contrary to the general rule and found there were no "exceptional circumstances" justifying Westchester's delay in objecting to the appraiser's partiality. The court concluded that "Westchester had its chance to challenge [the appraiser's] partiality, chose to wait and see how the appraisal turned out, and now asks the court to restart the process—all while claiming that it would be wasteful to have objected any earlier." Holding that Westchester "waived the right to object," the denial of Westchester's motion to vacate and the trial court's confirmation of the award were affirmed. *Biscayne Beach Club Condominium Ass'n v. Westchester Surplus Lines Ins. Co.*, 111 F.4th 1182 (11th Cir. 2024).

Arbitrators' Decide Whether Computational Error Present

The ICC Rules allow arbitrators to "correct the clerical, computational or typographical error or any errors of similar nature contained in an award." The panel here issued an addendum reducing its partial final award by over $4 million on the ground that it had "miscalculate[d] the appropriate relief . . . by factoring two calculations that the claim did not encompass." In doing so, the panel concluded that under the broad language of the applicable ICC Rule, it had the authority to correct this computational error. The trial court vacated the panel's addendum, but the Fifth Circuit reversed. The court reasoned that "the Tribunal not only had the contractual authority to correct computational errors, but it also had the authority to determine what constituted a computational error in the first instance." The court explained that "the parties' agreements gave the tribunal authority to construe the meaning of the ICC Rules themselves – including [contrary] arguments, whether an error is truly 'computational' or not." It concluded that it did and for these reasons overturned the trial court's decision to vacate. *RSM Production v. Gaz du Nord Cameroun, S.A.*, 117 F. 4th 707 (5th Cir. 2024).

Award of Attorneys' Fees as Sanctions Upheld

According to the Seventh Circuit, defendant Sun Holdings had offered "one feeble excuse after another" during the arbitration hearing as it delayed the proceedings. It is no surprise that the panel ruled against Sun Holdings as a result. The panel went further and awarded $175,000 in attorneys' fees as sanctions for raising frivolous defenses. Sun Holdings challenged the sanctions as exceeding the arbitrators' authority. In particular, Sun Holdings referenced language in the arbitration agreement prohibiting the "award of damages in excess of compensatory damages" and argued that the panel violated that provision. The district court, and now the Seventh Circuit, disagreed. The Seventh Circuit held that the sanctions were a compensatory award designed to place the prevailing party in the position it would have been but for Sun Holdings' "frivolous tactics." While acknowledging that under the American Rule each party bears its own fees, the court emphasized that "the American Rule is not understood to forbid sanctions for frivolous litigation." The court was also not persuaded by the contract provision requiring each party to bear its own fees. "An arbitration clause delegates interpretive powers to the arbitrators. We do not ask whether they read the contractual language *correctly*; it is enough that they tried to apply the contract that the parties signed." The court added that "whether the arbitrators were right or wrong is none of our business." The court, clearly frustrated with Sun Holdings, concluded that it had "followed up a frivolous defense during the arbitration with a frivolous strategy in court" and added that arbitration "cannot expedite and reduce the cost of dispute resolution if the parties must litigate once before the arbitrators and again in court." The court directed Sun Holdings to show cause why sanctions against it should not be awarded for submitting this frivolous appeal to court. *American Zurich Insurance Co. v. Sun Holdings, Inc.*, 103 F.4th 475 (7th Cir. 2024).

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