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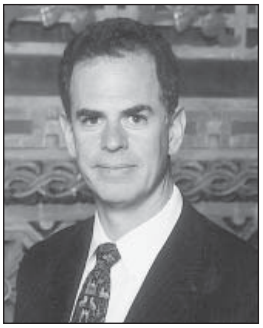
New York Dispute Resolution Lawyer

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

Message from the Chair



Simeon H. Baum

Welcome to the first publication of NYSBA's new Dispute Resolution Section. You hold a small piece of history in your hand.

On January 1, 1979, the New York State Bar Association formed a Special Committee on Alternative Dispute Resolution (ADR) to examine the developments and applicability for lawyers of this odd, new field. Arbitration had been around for years, and, although informally in use for centuries and formally already in use in a number of areas, including labor and employment, mediation was seen as a relative newcomer on the scene. Like the air that we breathe, negotiation was all-pervasive, but not clearly recognized as a core process that could, also, fall into conscious consideration for students, representatives, and practitioners in the ADR field.

About 17 years ago, seeing that ADR's presence persisted, the NYSBA, at the recommendation of then Committee Chair Hal Abramson, changed the ADR Committee's status from Special Committee to a permanent, Standing Committee, with membership capped at fewer than 100 members. Since then, under the guidance of Chair Steve Younger, the ADR Committee issued a substantial report on the state of ADR in the state of New York, and under subsequent chairs studied key potential legislation, e.g., the Revised Uniform Arbitration Act and the Uniform Mediation Act, and regularly held engaging CLE programs, particularly at NYSBA's January Annual Meeting.

Several years ago, led by Chair Elayne Greenberg, the ADR Committee recognized that it was bursting at the seams. ADR was here to stay. By that time the ABA had an existing Section on Dispute Resolution, which was 6,000 members strong after its first year (and now has about 17,000 members). ADR programs were pervasive in the courts. The S.D.N.Y. and E.D.N.Y. pilot programs from the early 1990s were a permanent fixture; the Commercial Division of Supreme Court, New York and Westchester counties, had ADR panels; there were panels of mediators for bankruptcy, family, landlord-tenant, small claims, matrimonial, attorney-client fee disputes, and a host of referrals from courts to the Community Dispute Referral Centers (CDRCs) throughout the state. Within the Office of Court Administration, there was growth beyond a single statewide ADR Coordinator to an ADR department. SROs, like the National Association of Securities Dealers (NASD, now FINRA), governmental agencies like the Equal Employment Opportunity Commission (EEOC), and quasi-governmental entities like the United States Postal Service, had exuberant mediation programs.

(continued on page 4)

Inside

PREMIERE ISSUE!

TO JOIN THIS NEW NYSBA SECTION, SEE PAGE 12 OR GO TO WWW.NYSBA.ORG/DRS

Dispute Resolution Section

Past Chairs of the Alternative Dispute Committee

William S. Greenawalt (1982-1985)
McCarthy Fingar LLP
11 Martine Avenue, 12th Floor
White Plains, NY 10606
wgreenawalt@mccarthyfingar.com

Dr. Sylvan J. Schaffer (1985-1988)
Jackson Lewis LLP
59 Maiden Lane
New York, NY 10038
poelhadin@aol.com

Wendy J. Parmet (1988-1990)
Parmet & Zeif, PC
60 East 42nd Street
New York, NY 10165-0006
wparmet@parmetlaw.com

Jacqueline Nolan-Haley (1990-1993)
Fordham University School of Law
140 West 62nd Street
Lincoln Center
New York, NY 10023-7407
jnolan-haley@mail.lawnet.fordham.edu

Prof. Harold I. Abramson (1993-1997)
Touro College School of Law
225 Eastview Drive
Central Islip, NY 11722
habramson@tourolaw.edu

John H. Gross (1997-1998)
Ingerman Smith, LLP
150 Motor Parkway, Suite 400
Hauppauge, NY 11788-5108
jhgross@ingermansmith.com

Stephen P. Younger (1998-2000)
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
spyounger@pbwt.com

Gregory H. Hoffman (2000-2003)
Live Career
745 Fifth Avenue, Suite-902
New York, NY 10151
greg@livecareer.com

Elayne Greenberg (2003-2006)
St. John's University School of Law
8000 Utopia Parkway
Jamaica, NY 11432
elayneegreenberg@juno.com

James C. Moore (2006-2008)
Harter Secrest & Emery LLP
1600 Bausch and Lomb Place
Rochester, NY 14604
jmoore@hselaw.com

Dispute Resolution Section Liaisons

We would also like to take this opportunity to welcome the following Section Liaisons and to thank them for accepting this vital role in the development of our Section:

Business Law:	**Sam Abernethy**
Commercial and Federal Litigation:	**Debbie Masucci**
Corporate Counsel:	**Greg Hoffman**
Committee on CPLR:	**Hon. Steven Crane**
Elder Law:	**Robert Grey**
Entertainment, Arts and Sports Law:	**Judith B. Prowda**
Environmental Law:	**Rachel Deming**
Family Law:	**Chaim Steinbeger**
Food, Drug and Cosmetic Law:	**Charles Miller** and **Lou Bernstein**
General Practice:	**Harriet M. Steinberg**
Health Law:	**Norman Stein** and **Alan I. Appel**
Intellectual Property Law:	**Cheryl Agris** and **Vicki Cundiff**
International Law and Practice:	**Axel Heck** and **Lauren Rachlin**
Labor and Employment Law:	**Gene Ginsberg** and **Gary Glaser**
Torts Insurance and Compensation Law:	**Richard Newmark** and **Jeff Anderson**
Trial Lawyers:	**David S. Howe** and **Peter Overzat**
Young Lawyers:	**Justin D. Pfeiffer**

New York Dispute Resolution Lawyer

Editor-in-Chief

Edna Sussman
Hoguet Newman Regal & Kenney LLP
10 East 40th Street
New York, NY 10016
Esussman@hnrklaw.com

Board of Editors

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

Geraldine Reed Brown
The Reed-Brown Consulting Group
180 Union Street
Montclair, NJ 07042-2125
RBCG1@aol.com

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

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

Stefan Kalina
Lowenstein Sandler PC
1251 Avenue of the Americas
18th Floor
New York, NY 10020
skalina@lowenstein.com

Paul B. Marrow
11 Hunting Ridge Place
Chappaqua, NY 10514
pbmarrow@optonline.net

Norman Solovay
Hartman & Craven LLP
488 Madison Avenue
16th Floor
New York, NY 10022
nsolovay@hartmancraven.com

Table of Contents

Message from the Chair *(continued from page 1)*

Arbitration programs also flourished in state and federal courts, SROs, private arbitral forums, and ad hoc contexts, and continued to be a dispute resolution of choice for many disputes on the domestic front, and further showed tremendous growth in the international context. The Supreme Court issued decisions expanding the universe of substantive areas subject to arbitration, the range of remedies available in that forum, and the applicability of the forum to class actions.

Law schools, which 20 years ago offered no ADR courses, now uniformly had ADR departments specially ranked by *U.S. News & World Report*. Cardozo, e.g., whose Dispute Resolution program, led by the incoming ABA Dispute Resolution Section Chair Professor Lela Love, is routinely ranked 6th in the U.S., has courses on negotiation, mediation, processes of dispute resolution, family mediation, international ADR, securities arbitration, and more. ADR journals, online and otherwise were abundant, as were national and international competitions. And, pursuant to ADR clauses or through ad hoc agreements, lawyers and parties, at all stages of disputes, were routinely using the AAA, CPR, and JAMS, and a host of private providers of neutral dispute resolution services.

Thus, in this context, former NYSBA President and final ADR Committee Chair Jim Moore heard unanimous approval this year, first in January from NYSBA's Executive Committee and then in April from the entire House of Delegates, for the formation of a Section on Dispute Resolution. Even the deletion of "alternative" from the Section's name reflects the recognition that processes such as mediation, negotiation, and arbitration are not poor cousins or even second sisters to litigation. All options should be considered equally with an emphasis on, borrowing from Frank Sander's oft-quoted 1994 article, "fitting the forum to the fuss."

The response to the formation of the Dispute Resolution Section, effective June 1st of this year, has been phenomenal. From a 93-member Committee, in the space of two months it has grown to nearly 400 members, and rising.

So, what you hold in your hand is the first of what we hope will be a long line of publications with articles pertinent to those with an interest in dispute resolution, including reports on the activities of the Dispute Resolution Section. We expect that the Section will serve as a forum in which to address key issues, and to analyze and promote legislation, in areas of concern to practitioners in mediation, arbitration, neutral evaluation, negotiation, and related processes. With standing committees numbering 11 and growing, and with liaisons to the 23 other Sections of NYSBA, the Dispute Resolution Section offers its members a host of opportunities for leadership, learning, and service in the dispute resolution field.

We encourage you to read further for the Committee Chairs' descriptions of their activities. The Section will offer continuing legal education and training in dispute resolution process skills for both advocates and neutrals, and in the substantive law of arbitration; and can serve as a source of thoughtful consideration of, and comment on, ethical issues affecting practice in these areas. We expect to provide a venue for practitioners, law school faculty and students, and dispute resolution providers to network, exchange ideas, and provide access and information on dispute resolution to other members of the Bar and to the public.

On the immediate horizon, the Section anticipates holding a Fall Meeting, scheduled for November 13th at the Hotel Pennsylvania, featuring major speakers, informative and timely programs, and enjoyable social events. We are likely to turn to pending legislation on the RUAA and UMA. We anticipate hosting a significant Annual Meeting, and holding a major set of events in April, in conjunction with the ABA Dispute Resolution Section's Spring Meeting. During the Section's growth phase we have opened our monthly Executive Committee meetings to all members of the Section. So, we invite and welcome you to join, serve, explore, grow, and make history with us.

Simeon H. Baum

Message from the Editor

Invitation to Participate

Edna Sussman

With the formation of the Dispute Resolution Section and the launching of this publication, we can now provide a forum for New York State practitioners to share experiences, compare best practices, inform one another about legal and legislative developments, and help develop the fast-growing field of dispute resolution. In the spirit of the collaborative nature of our work, we look to interaction with our members to make this publication most successful and of greatest utility to our NYSBA membership. We invite you to be an active participant in what we hope will be a dialogue among members. We are interested in having all views and all interests expressed. Let us know what you would like us to cover. Contribute your articles; share your experiences, difficulties you have encountered and solutions you have crafted; raise your questions with us. Long and short submissions and letters to the editor, are invited. Please e-mail your submissions to me at esussman@hnrklaw.com

We will not all agree on the views expressed on these pages. That is as it should be. We can all learn from reading divergent views; we can react to views expressed with our own thoughts and continue the discourse. It is important to note that the views expressed in this publication, unless stated otherwise, are not the views of the NYSBA or of this Section, but reflect only the views of the author.

Information in This Issue

Please peruse this issue for more information about the Section. You will find a description of all of the committees, information about our upcoming CLE, how to join the Section, our upcoming executive committee meetings to which you are invited, a call for submissions on breaking impasse, a call for submissions to this publication, and a general call for ideas for the Section. Please get involved in our many activities or launch your own initiative.

A Year's Roundup

In this first issue we provide an overview of the prospect for growth in ADR and cover developments in dispute resolution during the past few months. The Supreme Court, the New York Court of Appeals and the Second Circuit have all rendered decisions relating to dispute resolution that raise important issues about the scope of review of arbitration awards and confidentiality in mediation and negotiation. Model mediation and arbitration statutes have been gaining passage in other states and are under consideration in New York. In the international arena, significant developments in dispute resolution merit our attention.

The Supreme Court decision in *Hall Street Associates* elicited numerous commentaries about the fate of "manifest disregard," a judicially created basis for challenging an arbitration award. We have included two thoughtful articles in which our authors consider what is left after *Hall Street*, how the subject may be approached under state law, and recommendations for the future.

Mediation confidentiality, an aspect of great significance in mediation, emerged as a paramount concern. The decisions of the New York Court of Appeals in the *Hauzinger* case, which, if read to be limited to the unique facts and nature of the case, may be of limited applicability, have nonetheless intensified the discussion of mediation confidentiality in New York State. A renewed focus on the Uniform Mediation Act (UMA) has followed the decision. We review the decision and explain the UMA and its import. The Second Circuit decision in the *PRL* case, which considers the use of statements made during settlement negotiations in subsequent litigation, is also discussed.

Discovery in arbitration is perceived by some practitioners to have become so broad as to cause arbitration to resemble litigation. We discuss what to expect in arbitration discovery and explain the new International Centre for Dispute Resolution rules on discovery for international arbitrations, which are intended to address the criticism in the international community of the perceived trend toward the expansion of American-style discovery in arbitration and to contain such expansive discovery.

Pushback against arbitration in certain categories of disputes, including consumer, employment and franchise matters, has led to a series of bills introduced in Congress to void pre-dispute arbitration clauses. Some of these bills have gained a significant number of sponsors and have emerged from subcommittee for consideration by the full House Judiciary Committee. We discuss two of the most significant bills introduced to illustrate the debate in Congress and the issues that may follow if the bills in their current forms are passed. We review a line of cases that have addressed similar concerns by finding arbitration clauses in certain agreements to be unconscionable and refusing therefore to enforce them.

With the continuing growth of the global nature of our economy, international ADR becomes increasingly significant. While mediation on the European continent has not yet exploded as it has in the United States, with the issuance this year of the EU mediation directive, which we explain, and the longstanding traditions in the Far East of harmony and dispute resolution, we can expect significant growth in mediation outside our borders. We examine the scholarly review conducted recently of the shortfalls of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention), precipitated by the 50th anniversary this year of that highly successful convention. The withdrawal this year of certain South American states from the International Centre for the Settlement of Investment Disputes (ICSID) Convention, which governs many investor state disputes, draws our attention to developments at ICSID.

Finally, we describe briefly a new pilot program at the Financial Industry Regulatory Authority (FINRA) calling for three public arbitrators to replace the previous practice of having one industry arbitrator on each panel, and report on the new rules for mediators and neutral evaluators issued for the New York State courts.

Much has transpired in recent months relevant to ADR and undoubtedly much will transpire next year that will affect our ADR world. We look to all of you to keep us current by contributing to this publication and by alerting us to subjects you think we should cover. Again, please e-mail me with your input at esussman@hnrklaw.com to make this publication a success.

Edna Sussman

Committee Reports

Arbitration Committee

Co-Chairs

Carroll Neesemann—cneesemann@mofo.com
Sherman Kahn—skahn@mofo.com

The Dispute Resolution Section Arbitration Committee will seek to work with the arbitration committees and subcommittees of various other ADR organizations—in consultation with the various specialty practice areas—to address issues in arbitration with a cross-practice focus. The Arbitration Committee will dedicate its efforts to promoting the efficient and effective use of arbitration in New York and ensuring New York's continuation as a center of both domestic and international arbitration. Some initial items that will form a part of the Committee's agenda will be efforts to win enactment of the Revised Uniform Arbitration Act in New York and development of a recommendation for discovery procedures appropriate for New York arbitration practice.

Diversity Committee

Co-Chairs

Barbara Antonello Mentz—bmentz@mentz.org
Irene C. Warshauer—icw@irenewarshauer.com

The Diversity Committee of the New York State Bar Association Dispute Resolution Section encourages, fosters and supports the development of diverse talent and its inclusion in all types of alternative dispute resolution, including mediation, arbitration, early neutral evaluation, and mini trials, both as neutrals and as representatives of parties in the processes.

Diversity of those participating in the dispute resolution process enables the presentation of many views and provides a greater perspective on how and in what way to use dispute resolution to resolve problems, leading to more options and fairer results. Encouraging a diverse and inclusive environment also promotes respect and fosters treating individuals of diverse backgrounds fairly. The Diversity Committee will encourage and provide an avenue for all members of our dispute resolution community to participate, provide a vehicle for their voices to be heard and for their views to be taken into consideration.

The Diversity Committee seeks the participation of all members of the dispute resolution community and believes that such involvement is critical to fully use the talent of all dispute resolvers and parties to achieve fair processes and results. To that end, the Committee will seek to include representatives of all sexes and sexual orientation, races, national origin, and persons with disabilities and to encourage them to participate as members of the Diversity Committee and have input into planning and participation in its activities.

The Diversity Committee will contact other Committees of the Dispute Resolution Section, as well as other Sections of the New York State Bar Association, to encourage diversity in membership, officers and activities. The Diversity Committee will encourage potential users of the alternative dispute resolution process to use diverse talent. The Diversity Committee anticipates holding meetings, planning networking and other activities, presenting programs and publishing articles that encourage diversity and inclusion in all areas of the alternative dispute resolution practice. The Diversity Committee will promote diversity in panels and speakers for programs presented by the New York State Bar Association Dispute Resolution Section. The Diversity Committee will work with the courts to establish mentoring programs for diverse talent new to the dispute resolution community to gain experience and exposure to the process through shadowing experienced mediators and arbitrators. "A diverse . . . population helps to broaden the worldview of everyone involved." (Tony Korec, Letter to the Editor, *New York Times*, July 13, 2008).

Continuing Legal Education Committee

Chair

Rona G. Shamoon—rona.shamoon@skadden.com

The CLE Committee is planning three exciting programs over the next year. In the Fall, there will be a full-day program, beginning with an interactive panel on mediation designed to assist both mediators and counsel with achieving effective results in mediation. Following lunch with a guest speaker, there will be stimulating presentations on discovery in arbitration and the Uniform Mediation Act. In January, we contemplate a full-day program in conjunction with the New York Bar Association's Annual Meeting, which will include, among others, a program we hope to present on an annual basis—an update on recent developments in arbitration law. In the Spring, we are planning a number of programs to be held

in conjunction with the ABA's Dispute Resolution Section Annual Meeting, which is scheduled to be held in New York City. Overall, we hope to present a variety of programs on timely topics that are relevant to mediators, arbitrators, advocates and end-users of dispute resolution.

ADR in the Courts Committee

Chair

S. Robert Schrager—rschrager@hodgsonruss.com

The mission of the Committee on Alternative Dispute Resolution in the Courts is to contribute to the development of law and practice in the areas of mandatory and voluntary mediation and arbitration, as implemented by state and federal courts, by providing a forum where views on issues, court rules and legislation in this area can be exchanged and by helping to develop the expertise of practitioners through providing CLE programs. The ADR in the Courts Committee will also endeavor to work with the judiciary and court staff to encourage the implementation of court procedures and rules that will assist litigants and their counsel to resolve their conflicts expeditiously and at reduced expense.

Initially, the Committee plans to review the new New York State court requirements for judicially appointed mediators and the new Commercial Division procedures for mediations.

ADR within Governmental Agencies Committee

Co-Chairs

Commissioner Robert E. Curry, Jr.—Robert_curry@dps.state.ny.us

Administrative Law Judge Jeffrey E. Stockholm—jeffrey_stockholm@dps.state.ny.us

This review and introduction to our Committee is being prepared by its co-chairs because we have not yet had an opportunity to complete our Committee membership or to consult with members about it. Nevertheless, and subject to the more formal deliberations of the Committee, the co-chairs offer the following as possible approaches to the Committee's focus and mission, programming and articles, goals, and other opportunities the Committee could offer to ADR practitioners, both experienced and those new to the field, as well as the general body of attorneys who, sooner or later, are likely to find themselves representing clients in an ADR setting involving a government agency.

Our mission is to foster the expanded use of ADR approaches for disputes pending before governmental agencies; stay abreast of legislative and case law changes as they impact ADR practices; and encourage the broadest possible understanding of ADR among the attorneys within and practicing before such agencies, including the staffs of such agencies and the parties with business before them. For example, a few areas the Committee might pursue:

- educating attorneys about the ADR assistance available at government agencies;
- expanding and institutionalizing the use of ADR at government agencies;
- establishing standards and best practices for agency-managed ADR, and
- considering legislation and regulations to foster the use of ADR at government agencies.

The Committee may address these and other substantive issues and will likely provide continuing legal education programs, speakers regarding ADR matters, and ADR articles and reports. An organizational meeting for the Committee will be scheduled in the next few months, and, accordingly, we urge you to contact the NYSBA to join the Committee on ADR Within Governmental Agencies as soon as possible. It's a unique opportunity to create an organization from the ground up and we need your help. Please join us for what promises to be an awesome ADR adventure.

Collaborative Law Committee

Co-Chairs

Norman Solovay—nsolovay@hartmancraven.com
Chaim Steinberger—csteinberger@mindspring.com

Collaborative Law (CL) has been described as a "cousin" to mediation. Its practitioners typically help the parties reach a resolution by agreement, using interest-based negotiation rather than positional bargaining. It differs from mediation in that each party has an attorney who helps the party develop and crystalize the party's interests, positions, objectives, and concerns; points out the relevant and helpful practical and legal facts and arguments; and ensures that each party makes a well-informed decision. The most striking feature of CL is the parties' and attorneys' agreement that *both* parties' attorneys withdraw if either party proceeds to litigation. The parties and attorneys thereby display their commitment to resolving the dispute through a negotiated settlement.

The Collaborative Law Committee of the Dispute Resolution Section will help promote and expand the use of CL in appropriate circumstances and carefully consider the concerns and criticisms raised about it. It will promote professionalism, excellence and "best practices" in the field, expand interest and awareness of CL, and seek and develop ways in which CL can be improved and concerns about it addressed or eliminated.

The Committee will remain informed of, and involved in, the efforts of other CL organizations such as the Collaborative Law Committee of the ABA Dispute Resolution Section, the New York City Bar Association ADR Committee; the New York Association for Collaborative Professionals (NYACP), and the International Association of Collaborative Professionals (IACP). In addition, the Committee will keep itself informed, advise its members, and take part as appropriate in CL developments around the state and nation, and particularly about the New York State Unified Court System's Collaborative Family Law Center program and the Uniform Law Commission's efforts to draft and promote a Uniform Collaborative Law Act. The Committee will review developments in these and other areas and help promote best practices in the CL arena, as well as propose additional legislation or rules as needed and appropriate.

The Committee will host or sponsor, itself or with others, classes and seminars to expose members of the ADR Section, members of the NYSBA, attorneys at large, and members of the public, to the advantages and challenges of CL. Programs will look to increase awareness of CL generally, to teach the necessary skills for CL practice to attorneys who wish to become involved in it, and to increase the skills and professionalism of those already practicing CL. The Committee will also explore timely issues important or relevant to the practice of CL, such as investigating the feasibility of CL in general civil and commercial (non-family law) contexts and why it hasn't gained as much widespread use as it has in the family law arena; the relationship of CL and "cooperative law" (CL without the withdrawal provision); the relationship of CL and mediation; and other unresolved issues raised about CL.

Many of the initial challenges to CL have been overcome thanks to the efforts of the organized bar and dedicated CL practitioners. CL is gaining more and more acceptance in New York State, nationally and internationally. Our Committee will help spread the use of this highly effective way of resolving disputes while at the same time enhancing the relationship of the litigants, the attorneys and members of the bar.

Ethical Issues and Ethical Standards Committee

Chair

Elayne E. Greenberg—elayneegreenberg@juno.com

The Committee on Ethics is our "conscience" on ethical practice for our Section. Increasing numbers of attorneys are foraying into dispute resolution as neutrals, as advocates representing clients in dispute resolution processes, or as collaborators with other professionals in dispute resolution processes. Many of us are questioning what constitutes good ethical practice as we grapple with such challenging issues as confidentiality, conflicts of interest, party self-determination, ethics of collaboration, multijurisdictional practice, the unauthorized practice of law and moral awareness. After all, we are not only bound by our ethical obligations as attorneys, but we also may be bound by the relevant ethical codes on dispute resolution. What are the relevant ethical codes? Which is the ethical path we should follow? What direction should we go when just "follow the yellow brick road" is not an option? Are good intentions enough to steer us away from the road many of us would prefer to avoid? How should we respond to those emerging ethical conundrums that were not even contemplated by the existing ethical codes when these codes were first created? Help!

Yes, ethics in ADR is more than an opportunity to satisfy your CLE ethics requirement. Ethics defines us, guides how we conduct ourselves as practitioners and furthers the integrity of our dispute resolution field. The Committee on Ethics invites the committees within our Section, NYSBA's Committee on Professional Ethics, the other committees and Sections in NYSBA, interested ADR colleagues and you to work with us. Help identify existing and potential ethical dilemmas confronting dispute resolution practitioners so that together we may construct a more easily navigable road to ethical success for neutrals, attorneys, and collaborative professionals who practice dispute resolution.

Please send me your ethical issues. Thank you.

Legislation Committee

Co-Chairs

Charles J. Moxley, Jr.—cmoxley@kaplanfox.com
William J.T. Brown—wbrown@dl.com

In the coming year the Legislation Committee will monitor the progress of two major legislative initiatives in the New York State Legislature that have been strongly endorsed and approved by the NYSBA: enactment of the Uniform Mediation Act (UMA) and enactment of the Revised Uniform Arbitration Act (RUAA). These two pending bills go to the heart of the mission of our Dispute Resolution Section as a whole.

The Legislation Committee will also consider and report on other legislative initiatives affecting dispute resolution and make recommendations to the Section. Our effort here is particularly focused on initiatives in Congress to render invalid or unenforceable agreements to arbitrate in various contexts, such as consumer transactions, employment agreements, or other relationships where parties may have unequal bargaining power.

We invite participation by all others in the Section who may wish to offer ideas or insights into legislative issues. We also seek input from other committees of the Section, notably the Mediation and Arbitration committees, as regards enactment of the UMA and the RUAA, as

well as other committees. We look forward to full discussion and debate regarding legislative issues.

Mediation Committee

Co-Chairs

John Wilkinson—johnhwilkinson@msn.com
Abigail J. Pessen—abigail@pessenadr.com

The initial task of the Mediation Committee will be to assess the vast array of topics it might beneficially address and to select from those the much more limited number on which the Committee might best focus at the outset. While this is a critically important decision that has not yet been finally made by the Committee as a whole, some subjects under consideration are:

1. The Uniform Mediation Act. This might include issuing a report describing the UMA and the current status of efforts to achieve its adoption in New York and making recommendations for assisting in those efforts if the Committee favors doing so (presumably in conjunction with the Legislative Committee).
2. Ways to increase the overall competence of mediators. This could include efforts to draft standards of competence, as well as training programs organized and sponsored by the Committee. This topic may well become intertwined with the debate over various certification and licensing proposals.
3. Ways to increase the use of mediation and increase an understanding among litigators concerning how best to represent clients in mediation. Again, this could involve training sessions or even individualized programs at particular law firms.
4. How to increase diversity among mediators. This could well be a joint project involving the Section's Diversity Committee and the Mediation Committee.
5. Ways to facilitate entry into the profession by aspiring new mediators. This could well include establishing a panel of accomplished mediators who would be willing to serve as mentors.
6. A close look at ethics in mediation. This would involve an in-depth analysis of the many ethical quandaries in which a mediator can find him/herself and could ultimately lead to an article or to a Committee-sponsored program on the subject.
7. A study of the more prominent reasons mediations fail and what can be done to lessen the impact of such factors.
8. A look at whether the Committee's work should be broadly applicable to mediation in general or whether it should be broken down by types of mediation (family, consumer, complex commercial, etc.).
9. Ongoing reporting of important developments in the law of mediation.

The foregoing are just examples of the kinds of topics the Committee is currently considering. There is much to be done, much to be accomplished, and we relish the challenge.

Membership Committee—"Spread the Word"

Co-Chairs

Louis B. Bernstein—louisbernsteinatty@gmail.com
Gail R. Davis—gdavis@resolutionsny.com

The mission of the Membership Committee is to encourage members of the dispute resolution community and members of the bar interested in or utilizing ADR in their practices to join our Dispute Resolution Section in order to help promote, develop and inform the usage and profession of dispute resolution in New York State and around the country. We believe it is important to attract a wide diversity of members to our Section so that all the varying practices and viewpoints can be represented and have input as the field develops. Not only do we want to attract many members, but we also would like to see all our members actively participate in the work of the various committees of the Section to enhance the professionalism and practice of ADR today and in the years to come.

In order to achieve our mission, we have developed a multi-pronged approach:

(1) We will continue to reach out to various ADR organizations and other bar sections and ask them to inform their members and encourage them to join our Section;

(2) we will reach out to ADR law professors and students to let them know about the opportunities available in our Section for further training, meeting, networking, interning and mentoring with professionals in the ADR field, and

(3) we will continue to be present at events and conferences (and, if possible, co-sponsor them) in New York State (such as the annual conference of the Association for Conflict Resolution of Greater New York held in late June 2008, the American Bar Association Meeting in August 2008 in New York City, and Mediation Settlement/Conflict Resolution Day in October 2008) to inform the ADR community and the bar about our new Section and encourage them to partner with us in developing the

profession. We also will solicit experienced attorneys who might be interested in developing their Dispute Resolution skills to enhance and modify their practices.

Although our Committee consists of only six members at this time (Daniel Baum, Louis Bernstein, Gail R. Davis, Steven Krause, Fran Halligan and Joan S. Johnson), we invite and encourage all members of our Section to help us build its membership. We need all of you to help grow the Section at this early stage in order to enhance the recognition, use and professionalism of ADR in New York State. So spread the word and join us in informing your friends and colleagues about the Dispute Resolution Section and encouraging them to take advantage of this unique and exciting opportunity to get in on its ground floor.

Our Section Chair, Simeon Baum, has challenged us with the goal of "2009 in 2009"—achieving Section membership of 2,009 in calendar year 2009—and we hope you will help us achieve this goal. Just think, if each of our 300-plus current Section members were to recruit just 7 new members, we'd achieve this 2009 goal and more! Please join us in helping to build our Section into an influential force in New York State.

Also, please let us know if you have information about upcoming events so we can inform potential members of our new Section, and also whether you might be available to help us at these events. We welcome all additional thoughts or ideas to help fulfill our mission. Please contact us.

Publications Committee

Chair

Edna Sussman—esussman@hnrklaw.com

We think of our Committee as the eyes, ears and voice of our newly created Section in spreading its important message as to how disputes can and should be resolved without litigation. Publication is, of course, the most visible result of our efforts. But there is so much more that we can and intend to do along the way to serve and benefit the Section and all its committees.

To launch our efforts, we have already begun to liaison and work with the Section's officers and its various substantive committees to further their aims and to enhance our organization's reputation. As you can see, this initial publication carries introductory messages from all of them to our entire Section. We invite you to read them with care and join in the efforts of the committees of greatest interest to you. We have also provided in this first publication an overview of developments in ADR over the past few months. We will continue to keep you informed of developments, both domestic and international, as they relate to ADR in the courts, in the legislature and in practice.

We believe we have a significant role to play in informing other Sections about ADR and will utilize our liaisons with other NYSBA Sections to develop articles connecting ADR to the interests of other Sections, e.g., bankruptcy and tax issues in mediation, ADR and municipalities, mediation of class actions, labor arbitration, deal mediation, and collaborative law. We hope our articles will be useful to a broad audience and that many will be reprinted in the newsletters of our sister Sections as well as in other venues that will find them of interest.

Nor should our work be thought of as limited to generating articles for publication. In this issue we make preliminary inquiries with respect to ADR books of interest. We hope to be a useful and widely consulted resource for our Section and our entire NYSBA membership and invite all members of the NYSBA to help us make this publication a success.

Please contact me with your ideas for future articles of interest, submit articles already written that you feel would be of interest and share your thoughts as to subjects this publication should cover.

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Helping the Supreme Court Help Arbitration: Narrowing the Grounds for Review of Awards in *Hall Street* and Beyond

By Carroll Neesemann, with assistance from Sherman Kahn and Benjamin Smiley

The Roberts Court appears to be paying attention to arbitration—looking for cases in which it can make a difference and addressing problems with the arbitration process.

One problem has been the extensive litigation in court that often accompanies arbitration, converting a potentially cheaper and faster alternative to litigation into something worse. One issue in such litigation has been whether parties can effectively agree to standards of judicial review of arbitration awards more rigorous than the standards set forth in the Federal Arbitration Act (FAA). Moreover, the disparate results of such litigation have caused uncertainty for the drafters of contracts who cannot be sure what will happen if they agree to a non-traditional kind of review.

Limitation of Review to FAA Sections 10 and 11

In March 2008 the U.S. Supreme Court decided *Hall Street Assocs. v. Mattel, Inc.*,[1] clarifying—but only in part—what standards are available for judicial review of arbitral awards in the U.S. In doing so it resolved a split in the Circuits and eliminated in part—but only in part—the justification for litigation about arbitration-review standards.

The parties in *Hall Street* had agreed on their own standard:

> The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.[2]

The Supreme Court found the agreement unenforceable under the FAA. It held that the plain language of FAA § 9 requires that review under the FAA of arbitration awards be limited to the specific grounds set forth in Sections 10 (grounds for vacatur) and 11 (grounds for modification). It pointed out the rationale for the limitation: the national policy favoring not all arbitration, but only arbitration "with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[3] Finally, the Court noted that the alternative would "open[] the door to the full-bore legal and evidentiary appeals that can rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process . . . and bring arbitration theory to grief in post-arbitration process."[4]

Elimination of "Manifest Disregard" as a Separate Ground for Review

In recent years the most prevalent ground used as a standard for vacatur—at least in the Second Circuit—has been a judicially created ground known as "manifest disregard of the law."[5] In *Hall Street* the Court noted that, like the standards agreed to by the parties, manifest disregard was a non-statutory ground. As such it was apparently another casualty eliminated by the Court's holding—although it might have a continuing role in the review of awards as discussed below.

"[T]he rationale for the limitation: the national policy favoring not all arbitration, but only arbitration 'with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway.'"

The concept of manifest disregard originated in dicta in *Wilko v. Swan*,[6] in which the Supreme Court stated that "the interpretations of the law by the arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation." In the present case the Court pointed out that "Hall Street reads this statement as recognizing 'manifest disregard of the law' as a further ground for vacatur on top of those listed in § 10. . . ." The Court disagreed, however, saying: "[W]e see no reason to accord it the significance that Hall Street urges."[7]

Thus, the Court appears to have eliminated "manifest disregard of the law" as a separate, free-standing standard of review.[8]

Continuing Role for "Manifest Disregard"

As noted, however, the Court did not foreclose a continuing role for manifest disregard. It stated:

> [M]aybe it [the manifest disregard reference in *Wilko*] merely referred to the § 10 grounds collectively, rather than adding to them. . . . Or, as some courts have thought, "manifest disregard" may have been shorthand for § 10(a)(3) or

> § 10(a)(4), the subsections authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers."[9]

Thus, manifest disregard may still be viable after *Hall Street* as a formula for determining whether an award should be vacated under one or more of the grounds enumerated in Section 10.[10] In that role manifest disregard should not pose a substantial threat of adding litigation to the arbitration process because it has become well defined and, like the statutory grounds in Section 10, it represents an example of "extreme arbitral conduct" and an "egregious departure from the parties' agreed-upon arbitration."[11]

"The Hall Street *case is not over, and, in any case, there is work left to be done in the elimination of litigation about arbitration."*

Unfinished Business: Standards of Review After *Hall Street I*

The *Hall Street* case is not over, and, in any case, there is work left to be done in the elimination of litigation about arbitration. The Supreme Court stressed that its decision was made only under the FAA, which applies to arbitration of disputes over transactions in interstate commerce. The Court remanded for further proceedings consistent with its opinion, leaving to the parties and the lower courts (1) whether the case might merit special treatment in view of the fact that the standard of review had been contained in a court-ordered stipulation entered during pending litigation, or (2) whether avenues other than the FAA might be open to the parties to effectively adopt a standard not enumerated in FAA §§ 10 and 11. The Court stated:

> In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude *more searching review* based on authority outside the statute as well. The FAA *is not the only way into court for parties wanting review of arbitration awards*: they may contemplate enforcement under *state statutory or common law*, for example, where judicial review of different scope is *arguable*. But here we speak only to the scope of the *expeditious judicial review* under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.[12]

State Arbitral Law for Intrastate Commerce

For the arbitration of disputes about transactions *not in interstate commerce*, state arbitral law chosen by the parties or, in the absence of agreement to the contrary, the arbitral law of the state in which the arbitration is located, would generally apply. And such state law could include specific standards of review, as the arbitral laws of all of the states do today.

State law could also contain authority for the parties to agree to their own standards of review. This is the approach taken by New Jersey. When it enacted its version of the Revised Uniform Arbitration Act (RUAA) in 2003, New Jersey added a proviso to Section 4(c), which states:

> Provided however, that nothing in this act shall preclude the parties from expanding the scope of judicial review of an award by expressly providing for such expansion in a [written or electronic] record.

Conversely, state arbitral law could prohibit non-statutory standards. This is the approach taken by the proposed RUAA as originally adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and as enacted by 11 states that have accepted its provisions for review of awards substantially intact. The RUAA grounds for vacatur are contained in Section 23(a)[13] and are similar to those of Section 10 of the FAA. [14] The prohibition of additional review standards is contained in Section 4(c), which states: "A party to an agreement to arbitrate or arbitration proceeding may not waive, or the parties may not vary the effect of, the requirements of . . . Section . . . 23. . . ." [15]

State Arbitral Law for Interstate Commerce

For disputes involving transactions *in interstate commerce*, however, state arbitral law may be selected by the parties as a means of confirming an award instead of FAA § 9. The election to use state law may be made under FAA § 2,[16] which makes agreements to arbitrate enforceable in accordance with their terms. In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,[17] the Supreme Court held that the FAA permits parties to choose to have state arbitral law, different from the FAA, apply to such disputes. The specific question of whether Section 2 requires enforcement of party agreements to follow standards for judicial review that are embodied in state arbitral law when the parties disavow reliance on the streamlined enforcement procedures offered in Section 9 of the FAA is an issue left open by *Hall Street* and characterized there as "arguable."[18]

As the Court pointed out, while "the FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law," that fact does not override the limiting language of Sections 9-11. And, while the FAA may let parties apply a state rule, application of state law is permitted only if the rule does not "undermine the goals and policies of the FAA."[19] While there is a federal policy to enforce arbitral agreements in accordance with their terms, there is also one to favor only arbitration with limited, expeditious review.[20] It would be anomalous for the FAA to be found to favor expeditious arbitration to the exclusion of party choice of a more "searching review,"[21] where the parties proceed directly under the FAA, but permit the very same result indirectly should the parties invoke state law, also under the FAA. Finally, it does not necessarily follow that the "contract . . . to settle by arbitration a controversy. . . ." that is to be enforceable under Section 2 like any other contract includes not only agreements about the arbitration process itself, but also agreements about the process of enforcement of awards in the courts *after arbitration has been completed*.[22]

Parties to agreements contemplating use of arbitration may differ in their priorities. Some may favor finality, others correctness.[23] But no one, rationally, would voluntarily choose to endure, on top of the burden and expense of arbitration, protracted, expensive litigation about the standard to be applied to the review of an award.

The time has come to put a stop to needless litigation concerning the standard for review. Let us try to bring finality to the question and either find a way to limit review to specific grounds or make clear that parties may change the grounds to suit themselves, within reasonable limits. We favor limiting the available grounds for review.

The vehicle for making such an improvement in arbitration appears to be at hand[24]—the enactment of RUAA § 23(a), with its non-waiver provision in § 4(c). Given the similarities between RUAA Section 23(a)[25] and FAA § 10, enacting such a provision for state arbitral law would appear to make the standard of arbitration review nearly homogeneous in both intra- and inter-state commerce, under both the FAA and state arbitral law.

As noted, the alternative is to provide for party choice as a matter of state law, assuming it is permissible to do so under Section 2 of the FAA. Selecting that direction will certainly engender further litigation about arbitration. Bill Brown, who supports that approach in another article in this publication, admits that "such review may prolong the decision-making process," and that "the use of this novel procedure could furnish ample ground for challenge and delay."[26] Bill's suggested clause to effectuate party agreement to heightened standards of review is long and complicated, and not all parties will get it right.[27] The litigation spawned by such an approach will not only concern the authority of parties to agree to expanded review but also whether in the individual case they have sufficiently expressed their desire to do so.

"With the heightened scrutiny being given to the issue of expanded review by the Hall Street *case, the time is ripe to jump in and resolve the matter and take the drain of litigation away from arbitration."*

The Supreme Court might apply FAA § 2 to permit state law forbidding party expansion of review to be overridden by party agreement. It would be advantageous to find out which way the Court will rule as soon as possible. With the heightened scrutiny being given to the issue of expanded review by the *Hall Street* case, the time is ripe to jump in and resolve the matter and take the drain of litigation away from arbitration.

The matter merits further thought and serious consideration of a rule of state law streamlining the process of arbitration and minimizing the opportunity for a winning party to be denied the fruits of its victory by litigation over the standard of review. Let us devote our efforts to making the arbitration process in New York so good that parties need not be concerned about the aftermath. Let us choose in favor of serving the needs of those who use the process frequently and need an expeditious system that brings prompt finality—not the fears of those who mistrust the arbitration process.

Endnotes

1. 128 S. Ct. 1396 (2008).
2. 128 S. Ct. at 1400-01.
3. 128 S. Ct. at 1405.
4. *Id*.
5. Manifest disregard of the law occurs when an arbitrator intentionally ignores a clear and clearly applicable principle of law known by the arbitrator to be such. *See, e.g., D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 111 (2d Cir. 2006).
6. 346 U.S. 427, 436-37 (1953).
7. 128 S. Ct. at 1403-04.
8. *See Ramos-Santiago v. UPS*, 524 F.3d 120, 124 n. 3 (1st Cir. 2008) (dicta); *Rogers v. KBR*, 2008 U.S. App. Lexis 12320 at *5-6 (5th Cir.) (continued viability questioned but not decided); *Prime Therapeutics LLC v. Omnicare, Inc.*, 2008 U.S. Dist. Lexis 41306 at *12, 15 (D. Minn.); *Supreme Oil Co. v. Abondolo*, 2008 U.S. Lexis 58029

at *8 (S.D.N.Y.); *Robert Lewis Rosen Assocs v. Webb*, 2008 U.S. Lexis 51446 (S.D.N.Y.); *but see ALS & Assocs. v. AGM Marine Constructors, Inc.*, 2008 U.S. Dist. Lexis 42641 at *14 (D. Mass.) (notes split of authority); *Fitzgerald v. H&R Block*, 2008 U.S. Dist. Lexis 45472 at *9-10 (E.D. Mich.) (post *Hall Street*; dicta that may apply manifest disregard).

9. 128 S. Ct. at 1404 (citing *Kyocera v. Prudential*, 341 F.3d 987, 997 (9th Cir. 2003)).

10. *See Kashner Davidson Securities Corp. v. Mscisz*, 2008 U.S. App. LEXIS 13562, at *23 n.7 (1st Cir. June 27, 2008) (post . . . *Hall Street* decision vacating award for manifest disregard but noting that "if an arbitration panel has acted in contravention of the clear, unambiguous language of the arbitration contract, it has arguably both manifestly disregarded the applicable law and exceeded its power as arbitrators"); *Mastec North Amer., Inc. v. MSE Power Systems, Inc.*, 2008 U.S. Dist. Lexis 52205 (N.D.N.Y.) (manifest disregard now limited to application of § 10; case law developed under concept still good law), *Lapine v. Kyocera*, 2008 U.S. Dist. Lexis 41172 at *18 (N.D. Cal.) (post *Hall Street*); *Chase Bank USA v. Hale*, 19 Misc. 3d 975, 982 (Sup. Ct., N.Y. Co.) (same as *Mastec*); *Joseph Stevens & Co. v. Cikanek*, 2008 U.S. Lexis 52611 *11 (N.D. Ill) (post *Hall Street*; Seventh Circuit "has specified that the 'manifest disregard' standard is cabined entirely within 9 U.S.C. Section 10(a)(4).").

11. *Hall Street*, 128 S. Ct. at 1404.

12. *Id*. at 1406 (emphasis added).

13. RUAA § 23(a) is set forth in the Appendix to this article (see page 17).

14. Bills are pending in both houses of the legislature in Albany (A07820 and S4148) to enact the RUAA with the originally proposed language of Section 23(a) but with a modified standard of review for punitive damages.

15. The Comment to Section 23 seems to indicate an intention by the RUAA drafters to permit party approval of a more rigorous standard of review; however, the final language of the text of Section 23(a) appears not to permit any additional standard.

16. FAA § 2 is set forth in the Appendix to this article (see page 17).

17. 489 U.S. 468 (1989).

18. 128 S. Ct. at 1406.

19. *Volt*, 489 U.S. at 478.

20. *Hall Street*, 128 S. Ct. at 1405.

21. *Id.* at 1406.

22. *See UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997-98 (8th Cir. 1998).

23. *See Hall Street*, 128 S. Ct. at 1406.

24. There are many aspects of the RUAA that make it an attractive alternative to New York's current arbitration law under Article 75 of the CPLR. However, that matter is beyond the scope of this article.

25. The bills pending in the legislature in Albany (A07820 and S4148) would have to be changed because they contain a special standard of review for punitive damages fashioned for New York.

26. *See* Brown, W.J.T., "Heightened Review of Arbitration Awards Under State Law After the Supreme Court's Decision in *Hall Street Associates v. Mattel*," page 18 in this issue.

27. *Id.*

Messrs. Neesemann and Kahn are attorneys with the New York Office of Morrison & Foerster LLP. Mr. Smiley is a third-year student at Harvard Law School. Messrs. Neesemann and Kahn are co-chairs of the Arbitration Committee of the Dispute Resolution Section of the New York State Bar Association. They can be reached at cneesemann@mofo.com and skahn@mofo.com. Morrison & Foerster's Washington D.C., and Los Angeles Offices represent Mattel in the *Hall Street* litigation. The views expressed in this article are the authors' own.

APPENDIX

FAA Section 2:

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in . . . a *contract* evidencing a transaction involving commerce *to settle by arbitration* a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.* (emphasis added)

* * *

FAA Section 10(a):

[Award of arbitrators]; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

(1) where the award was procured by corruption, fraud or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced, or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made.

* * *

RUAA Section 23(a):

Vacating award

(a) Upon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) the award was procured by corruption, fraud or undue means;

(2) there was:

(A) evident partiality by an arbitrator appointed as a neutral arbitrator;

(B) corruption by an arbitrator; or

(C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 15, so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) an arbitrator exceeded the arbitrator's powers;

(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 15(c) not later than the beginning of the arbitration hearing; or

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

Heightened Review of Arbitration Awards Under State Law After the Supreme Court's Decision in *Hall Street Associates v. Mattel*

By William J.T. Brown

In *Hall Street*[1] the U.S. Supreme Court held that the grounds for vacating an arbitration award established by Sections 10 and 11 of the Federal Arbitration Act (FAA) law are exclusive. Thus, a prior agreement of the parties to expand these grounds—for example, by stipulating that a reviewing court should vacate the award if it is based on legal error or unsupported by substantial evidence—cannot be enforced under the FAA. The result is to frustrate the wishes of parties who want to arbitrate under the FAA, but do not trust the arbitrator to apply the law correctly and thus want to reserve a right of judicial review to correct legal error. However, the case leaves open the question whether parties can obtain heightened judicial review by agreeing to arbitrate, not under the FAA, but under state arbitration law. As the Supreme Court pointed out in *Hall Street:*

> [t]he FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of a different scope is arguable. But here we speak only to the scope of the expeditious judicial review under Sections 9, 10 and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.[2]

A. What Difference Does It Make if State Standards Are Applied?

The federal grounds for vacatur of an arbitration award as expressed in Sections 10 and 11 of the FAA are quite similar to the usual state grounds as expressed, for example, in Section 12 of the Uniform Arbitration Act, Section 23 of the Revised Uniform Arbitration Act (RUAA), or Section 7511 of New York's CPLR: all invoke corruption, partiality, fraud, misconduct, or action of the arbitrators in excess of their powers. Review of arbitration awards under those state criteria will not overturn an arbitration award on the basis of mere legal error. However, the arbitration law of at least two states, New York and New Jersey, would allow the parties to agree to expand the grounds for vacatur of an arbitration award. Thus Section 4(c) of the RUAA as enacted in New Jersey in 2003 provides explicitly that "nothing in this act shall preclude the parties from expanding the scope of judicial review of an award by expressly providing for such expansion. . . . "

In New York, the Court of Appeals held in 1990, in response to a question certified by the Second Circuit, that parties are free to agree that an officer or employee of one of the parties shall act as decision maker and that his award shall be reviewed under the broad terms of CPLR Article 78, the statute used to review the lawfulness of actions by public officials, rather than CPLR 7511, the provision usually employed to review arbitration awards. As the Court of Appeals noted in that case, "[article 78] allows broader review than the usual and stricter standards of arbitration award review in article 75."[3] Indeed, Section 7803 allows the decision of a public official or a tribunal to be set aside if "arbitrary and capricious," affected by "error of law," an "abuse of discretion," or if unsupported by substantial evidence. Moreover the case law indicates that in choosing review under Article 78 the parties need not opt for the full scope of permitted review, but may limit it to only certain of the enumerated grounds, calling for vacatur of the award if a reviewing court finds it to be affected by error of law, for example, but not if arbitrary or merely unsupported by substantial evidence.[4] Thus, in agreeing to arbitrate under New York law or New Jersey law, the parties could also agree to the very type of heightened review of the award that the Supreme Court rejected in *Hall Street*.

B. Would the Agreement for Heightened Review Under State Law Be Given Effect and Result in a Fully Enforceable Award?

In addressing this question we must first recall some basic jurisdictional underpinnings of arbitration in the United States. First of all, the FAA, originally enacted in 1925, applies only to arbitrations which arise from transactions involving interstate or foreign commerce. It was once believed that this Act, with its some 16 procedural provisions, applied to all arbitration cases that were taken before the federal courts, but the Supreme Court established in 1956 that since Congress had derived its power to enact the FAA only from the commerce clause, the FAA is inapplicable in the federal courts in arbitration cases arising from disputes that do not involve interstate commerce.[5] While holding staunchly to that principle, the Supreme Court has more recently emphasized that in regulating arbitration under the FAA, Congress has exercised the full scope of its authority over interstate commerce; if the commercial transactions giving rise to the dispute in arbitration were transactions that Congress would have had authority to regulate, then the arbitra-

tion itself is within the ambit of the FAA.[6] However, the fact that the arbitration is linked to interstate commerce and thus subject to the FAA does not in itself give federal courts jurisdiction over the arbitration.[7] In order for the federal court to take jurisdiction of an arbitration case there must be some independent ground for federal jurisdiction, such as diversity of citizenship, or the international or "nondomestic" nature of the dispute, which would permit the federal court to take jurisdiction under the FAA's Chapter 2, enacted in 1970 to implement the New York Convention relating to international arbitrations, including those taking place in the United States.[8] If the federal court does have jurisdiction of the arbitration dispute, then all 16 provisions of Chapter 1 of the FAA are normally applicable.

If there is no independent ground of federal jurisdiction, then the case must be decided in state court, but the state court will still be required to apply the major substantive provision of the FAA, § 2 of Chapter 1, which provides that agreements to arbitrate linked to commerce are valid, irrevocable and enforceable. The Supreme Court has pointed out on three occasions—most recently in the 2006 decision in *Buckeye Check Cashing, Inc. v. Cardegna*[9]—that its opinions have required state courts to apply and enforce only Section 2 of the FAA (and the related definitional Section, FAA § 1). Other provisions of the FAA have been viewed by the Supreme Court as procedural directives addressed to the federal courts, and there is no Supreme Court precedent requiring state courts to adopt or implement them.

Nonetheless, some state courts, and most notably the courts of New York, have volunteered to adopt and apply other provisions of the FAA when they decide commerce-related arbitration cases. Thus, New York courts have long applied provisions of the FAA in securities cases, in apparent deference to the close connection between these cases and the federal statutes regulating securities transactions.[10] More recently the New York Court of Appeals has held that the federal standards for review of arbitration awards must be applied by New York courts in all arbitration cases that are linked to interstate commerce,[11] but not, however, in cases where the parties have agreed or are deemed to have agreed to arbitrate under New York arbitration law.[12]

1. State Arbitration Law in State and Federal Courts

The Supreme Court has recognized that federal arbitration law does not occupy the entire field of commerce-related arbitration and that Section 2 of the FAA leaves parties free to agree to arbitrate their disputes under state arbitration law, even when those disputes arise from commerce-related transactions. In the *Volt* case in 1989, the Supreme Court held that if the parties have agreed to arbitrate a commerce-related dispute under procedures of state law, the FAA requires enforcement of their decision to place the arbitration under state law.[13] State arbitration law is thus made applicable in such cases, but it is not just the private agreement of the parties, but the federal law of FAA § 2 that makes it applicable. The case law evidences some cases in which the parties have very explicitly placed their arbitration under the aegis of state law,[14] and other cases in which courts have struggled with ambiguous contractual language to determine whether parties should be deemed to have agreed to arbitrate under state law.[15] Many of the latter cases arise because the commercial agreement containing an arbitration clause will also contain a choice-of-law clause specifying the state whose law is to govern interpretation of the contract, and the question posed is whether the law of the chosen state is to govern arbitration under the commercial agreement, as well as other aspects of the commercial agreement. *Volt* upheld a California state court's determination that the parties, by means of their commercial contract's choice-of-law clause, had indeed agreed to arbitrate under California law. In the subsequent *Mastrobuono* case, involving a New York choice-of-law clause, the Supreme Court went the other way, holding that a New York choice-of-law clause was applicable to interpretation of the contract, but not to arbitration under the contract, thus precluding application of a restrictive feature of New York arbitration law: its prohibition of the award of punitive damages by arbitrators.[16] Subsequent cases have gone in varying directions, some holding that there is a presumption that choice-of-law clauses are not intended to apply state law to arbitration and that more explicit indication of the parties' intent is required for state arbitration statutes to displace the analogous provisions of the FAA.[17] The Second Circuit has held that mere use of a California choice-of-law clause in a commercial agreement *does* subject arbitration under that agreement to California law on the theory that California courts would conclude that choice-of-law clauses must be given very broad application. [18] In contrast, the New York courts have been reluctant in commerce-related cases to allow application of the restrictive features of New York arbitration law, such as that law's denial of authority for the arbitrator to decide statute of limitations issues or award punitive damages; they hold that use of a New York choice-of-law clause normally will not subject arbitration under the contract to the restrictive features of New York arbitration law.[19] However, New York courts hold that the statement in the contract's choice-of-law clause that the contract *and its enforcement* shall be subject to New York law will indeed place any arbitration under New York arbitration law because arbitration is considered an aspect of enforcement.[20] The case law discussed above suggests that under the law of FAA § 2, as interpreted by *Volt* and *Mastrobuono*, parties should be allowed to opt for arbitration and review of arbitration awards under state law criteria. *Hall Street* is consistent with this conclusion as leaving the matter entirely open, so long as the parties who are seeking to vacate or confirm the arbitration award are invoking state arbitration law, and not Sections 9, 10 and 11 of the FAA.

2. Drafting the Arbitration Clause for Heightened Review

Leaving questions of New Jersey law aside, what should the parties say in their arbitration clause if they are prepared to arbitrate under New York state law and, like the *Hall Street* parties, wish to reserve the right to seek judicial review of legal and factual errors occurring in the arbitration award, but also wish to achieve an award which, if free from such errors, will be fully enforceable throughout the United States and also in foreign countries under the New York Convention? Possibly the following:

> Any dispute arising under or in connection with this contract or its enforcement shall be subject to final and binding arbitration in New York City under rules of the American Arbitration Association and under the laws of the State of New York, and in such arbitration the arbitrators shall be without power or authority to decide the issues in a manner contrary to law or to make any finding of fact which is not supported by substantial evidence, and any award issuing in such arbitration shall be subject to review under standards of New York law in a proceeding to be brought in the courts of the state of New York (or in a federal court in such state having jurisdiction of such proceeding) and may be vacated or modified in accordance with the criteria set forth in CPLR § 7511 and shall also be vacated if based on error of law or if not supported by substantial evidence as contemplated by CPLR §§ 7803 (3) and (4) respectively. If not so vacated, judgment shall be entered upon such award by the courts of the state of New York, or any federal court in such state having jurisdiction, pursuant to CPLR § 7510 and not pursuant to 9 U.S.C. Section 9.

In deference to language in the *Hall Street* opinion, we might also add:

> In seeking to enforce or challenge the arbitration award, the parties agree that they shall not have recourse to procedures of Sections 9, 10, and 11 of the Federal Arbitration Act.

If an arbitration takes place under such a clause and confirmation or vacatur of the resulting award is sought before a New York state court, and the case is not removed to federal court, we would venture to say that the clause should be implemented and enforced. True, it combines the standard grounds for vacatur set forth in CPLR 7511 with two of those set forth in Section 7803, a novel statutory combination that has not been sanctioned by precedent. However, the New York Court of Appeals has allowed the parties to pick and choose among the grounds for vacatur set forth in Section 7803 as an agreed mechanism for reviewing the decision of an arbitrator, and there should be no public policy reason for refusing to combine such chosen grounds with those set forth in Section 7511. In one case in the Third Department, where parties had sought to supplement the grounds for vacatur of Section 7511 by providing that vacatur should also take place if the award was infected by error of law, the Appellate Division held that while Section 7511 provides the "exclusive grounds for vacating an award," the effect of the addition of such a supplemental ground for vacatur of an award was to deny the arbitrator the authority to decide the case in a manner contrary to law and therefore the award did have to be vacated for error of law, since the arbitrator had exceeded his authority in deciding the case contrary to law.[21] While such reasoning may not be wholly satisfactory, it is quite consistent with the New York Court of Appeals' admonition in *Westinghouse Electric Co. v. N.Y.C. Transit*[22] that "the public policy of New York State favors and encourages arbitration and alternative dispute resolution" and "it has long been the policy of New York Courts to interfere as little as possible with the freedom of consenting parties." In any case, addition of language requiring the arbitrator to apply the law seems necessary to overcome the presumption in New York arbitration law that, as the Court of Appeals held in the *Silverman* case, "absent provision in the arbitration clause itself, an arbitrator is not bound by principles of substantive law."[23]

3. The Suggested Clause in Federal Courts

Assuming that the suggested arbitration clause is acceptable to New York courts, how will it fare if, on grounds of diversity of citizenship or international nature of the dispute, the challenge to the award is removed to federal court or confirmation proceedings are commenced there in the first instance? *Hall Street* said that FAA §§ 9, 10 and 11 provide the only grounds for setting aside an award if "the expedited procedures" of those FAA provisions are invoked. Our suggested arbitration clause stipulated that the parties would not seek to employ those procedures and that judgment on the award would be entered pursuant to state law, CPLR 7510, and not FAA § 9. In this context the FAA clearly recognizes the authority of the parties to consent or not consent to the entry of judgment. There are numerous cases holding that if the parties have not consented to such entry of judgment, then such judgment will not be entered.[24] Thus, an agreement that judgment should *not* be entered under FAA § 9 would seem fully enforceable, i.e., no judgment of confirmation will be entered under that Section. But does that leave the award unenforceable and worthless? In a notable case, Judge Kaplan of the Southern District of New York pointed out that if confirmation of the award

was not available under the FAA due to absence of a specific consent to judgment, the prevailing party could nonetheless seek judgment in federal court in a diversity case by asserting a claim under the analogous provision of New York State arbitration law, CPLR 7510, which calls for judicial confirmation of the award whether or not the parties have specifically so agreed in their arbitration clause.[25] Thus, in acting upon a request to enter judgment on the award pursuant to New York State arbitration law, the federal court would be deciding a case arising under state law. There might indeed be inconvenience. The decision to forgo expedited procedures of the FAA could mean that the party seeking confirmation of award might have to proceed by petition and answer, rather than by motion as under 9 U.S.C. § 9. There would be a potential for delay, if, for example, the party challenging the award were to seek discovery to bolster its claim that the award was based on error of law or was not supported by substantial evidence. However, such delay is inherent in the choice of the parties to require the award to be set aside if it fails to meet the standards they have agreed to.

Assuming that the award is at last confirmed and money judgment entered thereon, that judgment (unless reversed by the federal court of appeals) should be a valid federal judgment subject to registration and enforcement in federal courts throughout the United States pursuant to 28 U.S.C. § 1963.

4. International Enforcement

If the dispute in arbitration is international in character, the New York Convention should not prevent parties from agreeing to arbitrate under state law and to have the resulting award reviewed by the courts under standards of that law. Article II, Section 1 of the Convention provides that:

> each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined relationship, whether contractual or not, covering a subject matter capable of settlement by arbitration.

The undertaking to "recognize" the parties' agreement would seem to comprehend an obligation to recognize the terms of such an agreement calling for judicial review by courts of the country of arbitration under standards chosen by the parties. Here there is no question of enlarging the criteria set by the Convention itself under which foreign signatory states may decline to enforce an arbitration award rendered in the United States, another treaty country. Rather, a foreign contracting nation would be asked to deny enforcement to a vacated New York State award on grounds recognized by the treaty itself, that it "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Article V, Section 1(e).

There should also be little doubt that, in the circumstances described, the New York Convention should be no bar to setting aside the award for error of law. This is because cases such as the Second Circuit's decision in *Yussuf Ahmed Al Ghanim & Sons, W.L.L. v. Toys "R" Us*[26] hold that awards issuing in international arbitrations taking place in the United States may be vacated on the same grounds that would be applied in domestic arbitrations, and that for a reviewing court in the United States, such grounds are not limited to those enumerated in the Convention itself, but are expanded for such arbitrations to include additional grounds permitted under United States law, such as manifest disregard of law. True, the New York Convention leaves foreign countries the option of enforcing awards that have been vacated by the court having jurisdiction at the site of arbitration, but such enforcement would appear contrary to the treaty obligation to "recognize" the parties' agreement where the award has been vacated pursuant to that agreement. Similarly, if such an award arising from international arbitration is confirmed under criteria of New York state law, then it is indeed an award rendered within the territory of a state (the United States) which is a signatory of the New York Convention. Such an award should thus be enforced in any other state which is also a signatory of the Convention.

Conclusion

There are, of course, practical reasons why it may be unwise for parties to agree to subject their projected arbitration award to heightened judicial review under state law. Such review may prolong the decision-making process, and the use of this novel procedure could furnish ample ground for challenge and delay. Nonetheless, parties may wish to combine arbitration with heightened judicial review. In enforcing parties' agreement to arbitrate under state law and in reviewing the resulting arbitration awards under criteria of such law, federal courts would be doing what they have done since passage of the Rules of Decision Act of 1789,[27] namely, applying criteria of state law where state law is properly applicable. New York State's policy of minimizing interference in party agreements for arbitration or alternative dispute resolution in no way offends federal policy or international convention favoring enforcement of agreements to arbitrate.

Endnotes

1. *Hall Street Associates v. Mattel, Inc.*, 128 S . Ct. 1396 (2008).
2. *Id.* at 1406.
3. *Westinghouse Electric Corp. v. New York City Transit Authority*, 82 N.Y. 2d 47, 55 (1993). The Court observed that "[i]t is firmly established that the public policy of New York favors and encourages arbitration and alternative dispute resolution" and "it

has long been the policy of New York courts to interfere as little as possible with the freedom of consenting parties. . . . "*Id.* at 53.

4. *NAB Construction Corp. v. The Metropolitan Transportation Authority*, 180 A.D.2d 436 (1st Dep't 1992) ("arbitrary, capricious or so grossly erroneous as to evidence bad faith"); *see Tufano Contracting Corp. v. Port of New York Authority*, 18 A.D.2d 1001 (2d Dep't 1963) ("fraud, bad faith or palpable mistake").
5. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956).
6. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003).
7. *E.g., Hall Street, supra*, note 1 at 1402.
8. 9 U.S.C. §§ 203, 205. Availability of federal question jurisdiction is more doubtful. If the dispute that the parties take before the federal court is simply the question whether they have agreed to arbitrate and should be required to do so, the presence of a federal question in the underlying dispute may or may not be sufficient to give the federal court jurisdiction to order arbitration. *See Discover Bank v. Vaden*, 489 F.3d 366 (4th Cir. 2006), *cert. granted*, 128 U.S. 1651 (2008).
9. 546 U.S. 440, 447 (2006); *see also Volt Information Sciences, Inc. v. Board of Trustees, Leland Stanford Junior University*, 489 U.S. 468, 477 n.6, *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10 (1984).
10. *See Salvano v. Merrill Lynch, Pierce, Fenner & Smith*, 85 N.Y. 2d 173, 180 (1995).
11. *Wien & Malkin, LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471, *petition for cert. dismissed*, 127 S. Ct. 34 (2006).
12. See discussion, *Diamond Waterproofing Sys. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 253 (2005).
13. *Volt*, *supra* note 9, 489 U.S. 468, 476.
14. *E.g., Hackett v. Milbank Tweed, Hadley & McCloy*, 86 N.Y.2d 146, 154 (1995).
15. *E.g., Coleman & Co. Giaquinto Family Trust*, 2000 U.S. Dist. LEXIS no. 16215 (S.D.N.Y. 2000) (both FAA and New York arbitration law to apply).
16. *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995).
17. *E.g., P.R. Tel. Co. v. US Phone Mfg, Corp.*, 427 F.3d 21, 31 (1st Cir. 2005); *U.H.C. Mgmt. Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997 (8th Cir. 1998).
18. *Security Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322 (2d Cir. 2004). Application of California law to this arbitration taking place in New York meant, as in *Volt*, that arbitration had to be stayed in deference to California rules calling for completion of court litigation of issues common to the court proceeding and the arbitration before arbitration could proceed.
19. *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39 (1997).
20. *Id.*; *see also Diamond Waterproofing*, *supra* n.12.
21. *In re Arbitration between County of Chemung and Civil Service Employees Association, Inc.*, 277 A.D.2d 792 (3d Dep't 2000).
22. *See supra*, note 3.
23. *In re Arbitration between Silverman and Benmor Coats, Inc.*, 61 N.Y.2d 299, 308 (1984).
24. *E.g., Kaystar Tarim Urunleri Sanayi Ve Ticaaret Ltd. v. Spring Tree Corp.*, 1997 U.S. Dist LEXIS 4228 (S.D.N.Y. 1997).
25. *Home Ins. Co. v. RHA/Pennsylvania Nursing Homes*, 113 F. Supp. 2d 633 (S.D.N.Y. 2000). In a subsequent decision, after the petitioner had amended its petition to seek confirmation under both state and federal arbitration law, Judge Kaplan held that judgment under the FAA was indeed available in the circumstances of that case. *Id.*, 127 F. Supp.2d 482 (S.D.N.Y. 2001).
26. 126 F.3d 12 (2d Cir. 2004). But see the contrary holding in *Woodchem Europe S.A. v. D.B.W. Inc.*, 2001 U.S. Dist. LEXIS 25290 (D. Ore. 2001).
27. *See* 28 U.S.C. § 1652.

William J.T. Brown is a lawyer and arbitrator working in New York City. His practice includes litigation in federal and state courts, as well as international transactions and disputes. From 1976 to 1998 he was a partner of Donovan Leisure Newton & Irvine LLP, in charge of that firm's Paris office from 1983 to 1990. From 1998 to 2007 he was a partner of LeBoeuf, Lamb, Greene & MacRae LLP. He is currently of counsel to Dewey & LeBoeuf LLP and can be reached at WBrown@deweyleboeuf.com.

Bulletin

In *Cable Connection, Inc., et al. v. DirecTV, Inc.*, 44 Cal. 4th 1334, 190 P.3d 586 (2008), the California Supreme Court held on August 25 that, even though under *Hall Street* the Federal Arbitration Act does not permit the parties to expand the grounds for vacating an award, the California Arbitration Act *does* permit such expansion for arbitrations conducted in California, and such expansion is not preempted by *Hall Street*. Whether or not the clause directing vacatur on expanded grounds would be enforced in California would seem to depend on whether the parties sought vacatur in California state court or federal court. If there were jurisdictional grounds, such as diversity of citizenship, permitting the party who opposed vacatur to remove to federal court, presumably the federal court would follow *Hall Street* and refuse to vacate on the expanded grounds agreed to by the parties. However, if there were no basis for federal court jurisdiction, the case for vacatur would remain in California state court, which would apply state arbitration law permitting vacatur on the expanded grounds. Note that the situation is different in New York, where in cases seeking vacatur of arbitration awards arising from interstate commerce, New York state courts apply federal law relating to vacatur, not state law, unless the parties have agreed on application of state law.

After the New York State Court of Appeals Decision in *Hauzinger*: What Next?

By Robert S. Thaler

The decision by the Appellate Division, Fourth Department, in *Richard M. Hauzinger v. Aurela G. Hauzinger,*[1] provoked considerable discussion in the mediation and legal communities and was seen by many as a substantial incursion into the ability of mediators to maintain confidentiality in the mediation process.[2] Confidentiality is considered by many to be the *sine qua non* of mediation,[3] and it is an ethical imperative under most standards of mediator conduct.[4]

The *Hauzinger* case involves a divorce action (currently pending) in the Supreme Court, Cattaraugus County. Mrs. Hauzinger, by her counsel, seeks to set aside the marital separation agreement, made following mediation, claiming the agreement was the product of duress and undue coercion in the course of mediation. Mr. Hauzinger seeks to enforce the Separation Agreement, as accepted at the time of execution.

"Confidentiality is considered by many to be the sine qua non *of mediation, and it is an ethical imperative under most standards of mediator conduct."*

The issues relating to mediation confidentiality arose following Mrs. Hauzinger's subpoena to the mediator, Carl R. Vahl, Esq. Mr. Vahl, an attorney and mediator in private practice in Olean, N.Y., was the mediator/attorney-draftsman of the marital separation agreement, and moved to quash the subpoena, asserting mediation confidentiality as agreed to by the parties in the pre-mediation agreement. Mr. Vahl then appealed to the Fourth Department when the Supreme Court, Cattaraugus County, denied his motion to quash.

The Fourth Department affirmed the trial court's decision in *Hauzinger.* The court rested its decision upon the general proposition that where, as in this case, a party to a post-marital separation agreement challenges the terms of the agreement, NYS Domestic Relations Law § 236(B)(3) requires the court to inquire into the facts and circumstances surrounding the execution of the agreement, notwithstanding the parties' stipulation to confidentiality in the pre-mediation agreement. The Appellate Division rejected the mediator's public policy argument favoring mediation confidentiality out of hand.

In the wake of the Fourth Department's decision in *Hauzinger*, substantial discussions were held online, principally through the NYC-DR Listserve maintained by Prof. Maria Volpe at CUNY John Jay College.[5] The assumption of many in the mediation community was that in the absence of case law to the contrary, the decision in *Hauzinger* undermined mediation (especially divorce mediation) in New York State and essentially eviscerated the foundational principle of confidentiality for mediation. Many worried about the viability of mediation practice in New York State after this decision, and the tone of some of the submissions to the NYC-DR Listserve seemed nearly hysterical.[6]

Following the exchanges on the NYC-DR Listserve, several members of the legal and mediation communities[7] joined in teleconferences[8] with the mediator, Mr. Vahl, and collaborated on a motion for reargument to the Fourth Department, asking it to reconsider its decision, explain its reasoning further, or to grant leave to the Court of Appeals. The appellant's brief argued for a qualified privilege of mediation confidentiality, accepting that although case law and statute do indeed create a need for judicial oversight—particularly in situations in which a party to a post-marital separation agreement seeks to set aside the agreement on grounds of fraud, coercion or undue influence—such incursions into mediation must be determined on a case-by-case basis. Appellant further argued that Mrs. Hauzinger had failed to set forth sufficient basis to warrant any inquiry into the details of the mediation, and as such the subpoena to the mediator should have been quashed. On March 14, 2008, the Fourth Department denied the motion for reargument but granted leave to appeal to the Court of Appeals.

On June 26, 2008, the New York Court of Appeals issued its ruling in the case of *Hauzinger v. Hauzinger.*[9] Although the Court of Appeals affirmed the decision to deny the motion to quash the subpoena to the mediator, it used different reasoning than that articulated by the Fourth Department and relied upon a narrow set of facts unique to the case. Of particular note, the Court of Appeals specifically refrained from addressing the broader question of confidentiality in mediation under CPLR 3101.

In its decision, the Court Appeals relied upon the mediation agreement used by the mediator, which included a confidentiality "opt out" provision. This "opt out" provided that if both parties to the mediation consented to waive confidentiality, the mediator could communicate with an attorney for either party and release documents to third parties. As a factual matter, the husband in the case had executed a waiver releasing the mediator from

confidentiality prior to withdrawing consent and joining the mediator's motion to quash the wife's subpoena for the mediator's testimony. Implicit in the wife's subpoena was a waiver of her confidentiality. The Court of Appeals therefore ruled that where both the parties to mediation had effectively waived confidentiality, and the mediation agreement allowed for such waiver, then the mediator's assertion of confidentiality was without merit. There was, therefore, no reason to address the tension between the DRL and the asserted qualified privilege of mediation confidentiality.

Although the nature of a mediation confidentiality privilege remains undetermined in New York, either statutorily[10] or by case law[11] (particularly in the context of divorce mediations), the Court of Appeals decision in *Hauzinger* may be seen as mitigating—but not eliminating—the concerns raised by the Fourth Department's reasoning that DRL § 236(B)(3) overrides mediation confidentiality.

The Court of Appeals decision raises many questions about its broader implications for mediation practice in New York State. It also raises many questions for the organizations involved in ADR policy. What are the next steps for those who advocate for mediation?

In terms of the immediate impact on New York mediators, practitioners must be especially careful to consider their use and phrasing of pre-mediation "Agreement to Mediate" forms. If mediators wish to hold an independent privilege of confidentiality, or at least assert a right to such a privilege, then they must explicitly do so in the pre-mediation agreements signed by their clients. Any provision that allows parties to waive the privilege of confidentiality without the express consent of the mediator, as a co-equal holder of the privilege of confidentiality, will leave the mediator particularly susceptible to subpoena.

Mediators may also wish to add explicit provisions to their pre-mediation agreement forms that the parties agree to cover the mediator's costs and expenses associated with opposing and/or testifying subject to any subpoena they may issue, in addition to the mediator's usual and customary hourly fee.

Mediators must also re-think how they will explain confidentiality to their clients during the opening statement. Despite the fact that confidentiality is considered by most mediators to be a bedrock principle of their practice, confidentiality is not assured under New York State law (except in cases mediated by Community Dispute Resolution Center Programs, established pursuant to NYS Judiciary Law Article 21-A). Explaining confidentiality is a difficult proposition for most mediators, but mediators must not speed through such explanations for the sake of "getting to the meat" of the mediation session. Mediators should prepare themselves to answer all questions about what confidentiality means, and that there may be limits to confidentiality if a judge orders him/her to testify under subpoena.

In sum, the Court of Appeals decision in *Hauzinger* returns us to an open discussion about the limits of confidentiality in New York State. The "harm" perceived by many in the mediation community from the Appellate Division's decision has been addressed by the Court of Appeals in a way that limits the outcome to the specific facts of the case.

Although *Hauzinger* may well be a harbinger of future litigation regarding the nature of confidentiality in mediation, particularly divorce mediation, this case should also serve as a clarion call to the New York mediation community to attend to this vitally important issue. The only way to ensure that mediation remains confidential in New York State rests on future legislative action and/or court rules. The New York mediation communities need to convene to discuss what they want to do about the issue of mediation confidentiality, and how they wish to proceed, whether by adopting the Uniform Mediation Act (UMA) or some other statutory scheme.

Finally, a word of advice: If you are a mediator subpoenaed to testify, and you need advice or wish to assert a privilege of confidentiality, speak up! There are many dedicated ADR organizations that are willing to help you, including: New York State Bar Association Dispute Resolution Section (nysba.org); New York State Dispute Resolution Association (nysdra.org); New York State Council on Divorce Mediation (nysmediate.org); and Family and Divorce Mediation Council of Greater New York (fdmcgny.org).

To borrow a phrase from the New York City transit system, "If you see something, say something!"

Endnotes

1. 43 A.D.3d 1289, 842 N.Y.S.2d 646 (Sept. 28, 2007).
2. *See, e.g.,* Tolchinsky and Wertheim, "Hauzinger Calls Into Doubt Confidentiality Agreements" (N.Y.L.J., Nov. 13, 2007, p.3, col. 1); Siegel, "Is Mediator Subject To Disclosure?" (192 Siegel's Practice Review 3); Inman, "Mediators and Separating Couples, Beware!" New York Family Law Monthly, Nov. 2007, Vol. 9, No. 3; and, Linn, "Confidentiality in Private Mediation: *Hauzinger v. Hauzinger*" NYSBA *L&E Newsletter*, Fall/Winter 2007, Vol. 32, No. 3.
3. *See, e.g.,* John D. Feerick, "Towards Uniform Standards of Conduct for Mediators," 38 S. Tex. L. Rev. 455 (1997); Robert A. Baruch Bush, "The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications," 1994 J. Disp. Resol. 1; Ellen E. Deason, "Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality," 35 U.C. Davis L. Rev. 33 (2001–2002); and, Michael L. Prigoff, "Towards Candor or Chaos: The Case of Confidentiality in Mediation," 12 Seton Hall Legis. J. 1 (1988-1989). *See also* Ellen E. Deason, "The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach," 54 U. Kan. L. Rev. 1387 (2005–2006); Alan Kirtley, "The Mediation Privilege's Transition From Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest," 1995 J. Disp. Resol. 1 (1995).

4. *See, e.g.*, Standard V(A)(3) of the AAA/ABA/ACR Model Standards of Conduct for Mediators (2005). *See also* Standards of Conduct for New York State Community Dispute Resolution Center Mediators, Oct. 24, 2005, issued by the NYS Office of Court Administration, Office for ADR and Court Improvement Programs.
5. nyc-dr@listserver.jjay.cuny.edu.
6. Texts from the discussion thread are available on the NYC-DR archives, which are available at http://listserver.jjay.cuny.edu/archives/nyc-dr.html.
7. Steven L. Abel, Esq., of Abel & Brustein-Kampel, P.C. in New City, NY, and Robert S. Thaler, Esq., of counsel, co-authored the appellant's brief. Eli Uncyk, Esq. of Uncyk, Borenkind & Nadler, LLP in New York, NY was the principal author of the *amici curiae* briefs submitted on behalf of the Association for Conflict Resolution (ACR), the New York State Dispute Resolution Association (NYSDRA), the New York State Council on Divorce Mediation (NYSCDM), and the Family and Divorce Mediation Council of Greater New York (FDMCGNY).
8. Rod Wells, President of NYSCDM, actively planned and participated in the discussions.
9. 10 N.Y.3d 923, 862 N.Y.S.2d 456 (2008).
10. N.Y. Jud. L. § 849-b specifically addresses confidentiality in mediations conducted by official Community Dispute Resolution Center Programs (CDRCP), and grants an absolute privilege against discovery.
11. *See People v. Snyde*r, 129 Misc. 2d 137, 492 N.Y.S.2d 890 (1985), and *Wright v. Brockett*, 150 Misc. 2d 1031, 1036 (N.Y. Misc. 1991), upholding confidentiality of CDRCP mediations. *See also NYP Holdings, Inc. v McClier Corp.*, 2007 WL 519272 (Sup. Ct., New York Co., Jan. 10, 2007), upholding confidentiality in a commercial mediation based upon local court rules.

Robert S. Thaler, JD, MA, is an attorney and mediator in New York City and co-authored the Appellant-Mediator's Brief for Reconsideration in the Appellate Division, Fourth Department, and the Letter Brief for the Court of Appeals in *Hauzinger v. Hauzinger*. Mr. Thaler is a member of the Board of Directors for the New York State Dispute Resolution Association and an Adjunct Professor at CUNY John Jay College of Criminal Justice in the Dispute Resolution Program. He can be reached at rsthaler@gmail.com.

What Is the Extent of Confidentiality in Mediation After *Hauzinger*?

By Leona Beane

Before the *Hauzinger*[1] decision, most mediators probably would be able to explain confidentiality in mediation. After the *Hauzinger*[2] Appellate Division decision, most of us were puzzled and not sure; after the Court of Appeals decision,[3] we're still not sure how a court will interpret confidentiality in a mediation. The Court of Appeals, in its brief decision, ends with the following:

> We do not address what, if any, mediation confidentiality privilege exists under CPLR §3101(b).[4]

Thus, what is the answer?

In the *Hauzinger* decision,[5] the parties had appeared before a mediator (without attorneys); the mediator assisted them in the preparation of a separation agreement, which was signed by both parties. The parties had signed an agreement with the mediator, in advance, agreeing to confidentiality. In the later divorce action in Supreme Court, the wife moved to have the separation agreement set aside, claiming it was obtained by undue influence. The wife's attorney proceeded to have a subpoena served upon the mediator for the mediator's appearance at a deposition and for the mediator's records in connection with the mediation. The mediator moved to quash the subpoena, which was denied. The mediator then appealed the decision to the Appellate Division, claiming the judge had abused his discretion in refusing to enforce the confidentiality agreement of the parties as part of the mediation process. The mediator also requested the Appellate Court to follow the confidentiality provisions of the Uniform Mediation Act (UMA) as a matter of public policy. The decision provides very little guidance and very little explanation; it merely concludes the judge did not abuse his discretion, and also states that New York has not adopted the UMA, and the Appellate Division refused to follow it.

That decision (decided September 28, 2007) has been very problematic for the entire mediation community. The mediation community always believed mediation is a confidential process, and that whatever is said or occurs during the mediation is confidential and inadmissible.[6] Thus, how can a mediator be directed to testify in court as to what had occurred during the mediation? It was unheard of, particularly since the parties and mediator had executed a confidentiality agreement. Pursuant to the *Hauzinger* decision, the mediator was required to comply with the subpoena.

Many believe the decision was meant to apply only to matrimonial matters because of the Appellate Division's reference to Domestic Relations Law § 236(B)(3), indicating that the court must determine whether the terms of the separation agreement were "fair and reasonable at the time of the making of the agreement." Some believe the decision was rendered because both parties appeared at the mediation without attorneys, and evidently there was *no* attorney review of the agreement before it was signed. Nobody knew for sure if the decision applies only to matrimonial matters. The way the decision is worded, it could easily be applied by other courts to commercial matters, employment disputes, and all other mediations as well.

As the decision was being appealed, all mediators were anxiously awaiting word from the Court of Appeals that would hopefully provide clarification and guidance, and the correct answer. The Court of Appeals affirmed on June 26, 2008, but unfortunately there still isn't clarification and guidance. The Court of Appeals decision states that both the husband and wife had executed waivers.[7]

The mediator claimed CPLR 3101(b) provides a qualified privilege. The Court of Appeals stated that CPLR 3101(b) does not apply where the privilege has been waived by both sides. Thus, the Court of Appeals, in effect, is stating the privilege belongs to the parties, and not to the mediator (similar to the attorney-client privilege, where the privilege belongs to the client).

At present the only statute in New York State providing for confidentiality in mediation is afforded to the Community Dispute Resolution programs.[8] The various court-annexed programs providing for mediation contain rules for confidentiality in mediation. But those are court rules, not statutes. Virtually all the provider organizations provide rules of confidentiality for mediation, many adopting or following the Model Standards of Conduct for Mediators.[9] The standards do *not* have the effect of a statute or force of law. Thus, we don't know for sure how a court will interpret standards relating to confidentiality.

Unfortunately, the Court of Appeals has not provided any explanation and guidance relating to mediation and confidentiality and whether the mediator can be required to testify (where there is no waiver of confidentiality) as to what occurred at the mediation. That issue has still not been resolved by any court decision in New York.

After the *Hauzinger* decision, consideration of, and interest in, the Uniform Mediation Act (UMA),[10] are being revived in New York. The Uniform Mediation Act (UMA) provides for mediation privileges that prevent the use of mediation communications in other proceedings, including civil and criminal trials, arbitrations and administra-

tive hearings. Attorneys and Mediators in New Jersey have pointed out that pursuant to the UMA in New Jersey, a privilege belongs to the mediator:

> 4(b) In a proceeding, the following privileges shall apply:
>
> * * *
>
> (2) a mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.[11]

An additional section of the New Jersey UMA provides "a mediator may *not* be compelled to provide evidence of a mediation communication . . ."[12] (emphasis added) that may be sought to prove or disprove a claim "based on conduct occurring during a mediation,"[13] or in "a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation."[14]

The UMA is currently before the New York State Legislature.[15] If it is enacted, it will become Article 74 of the CPLR, and the above provision from the New Jersey Uniform Mediation Act is proposed as CPLR 7403(B)(2).[16] The adoption of the UMA would clarify the issue and codify the confidentiality that the parties and mediators expect in mediation.

Endnotes

1. *Hauzinger v. Hauzinger*, 43 A.D.3d 1289, 842 N.Y.S.2d 646 (4th Dep't 2007).
2. *Id*.
3. *Hauzinger v. Hauzinger*, __ N.Y.2d __ (N.Y. Slip Op. 5781) (June 26, 2008).
4. *Id*. CPLR 3101 relates to Scope of Disclosure. CPLR 3101(b) provides:

   > *Privileged matter*. Upon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable.

5. *See supra* note 1.
6. CPLR 4547 (based on Federal Rule 408) provides that any evidence of compromise and offers to compromise, as well as statements made and conduct during compromise negotiations, is inadmissible as proof of liability or the amount of damages. Courts have treated discussions at a mediation as the equivalent of settlement and compromise negotiations and discussions, and thus have treated same as confidential.

   See, e.g., *NYP Holdings v. McClier Corp*. (2007 N.Y. Slip Op. 50275U) (Sup. Ct., N.Y. Co., Justice H. Cahn, January 10, 2007), holding that "it is the policy of this court, and specifically of the Commercial Division, to maintain the confidentiality of submissions and statements made during mediation proceedings."
7. This additional information was not included in the Appellate Division decision, but evidently was included in the Record on appeal.
8. See Judiciary Law Article 21-A, Section 849-b(6), enacted in 1981.
9. Joint collaborative effort of the American Bar Association, American Arbitration Association, and the Association for Conflict Resolution, Amended 2005. Standard V provides for confidentiality.
10. The Uniform Mediation Act (UMA) was proposed by the National Conference of Commissioners on Uniform State Laws in 2001, and approved by the American Bar Association in 2002. So far 10 states and the District of Columbia have adopted the UMA. New Jersey adopted the UMA on November 22, 2004.
11. *See* C.2A: 23C-4 Privilege against Disclosure; Admissibility; Discovery. (UMA in New Jersey).
12. *See* C.2A:23C-6(c) (New Jersey UMA).
13. *See* C.2A:23C-6(a)(6) (New Jersey UMA).
14. *See* C.2A:23C-6(b)(2) (New Jersey UMA).
15. Senate Bill 1967 (proposed January 29, 2007).
16. The additional provisions referred to are proposed as CPLR 7405(c), CPLR 7405(A)(6), and CPLR 7405(B)(2).

Leona Beane is an attorney, arbitrator and mediator. She is currently Vice Chair of the Dispute Resolution Section of the NYSBA and served as Chair of the ADR Committee at New York County Lawyers Association the past four years. She has lectured at several mediation and ADR CLE programs and has written articles relating to mediation. She can be reached at LBeaneLaw@aol.com

Rule 408 of the Federal Rules of Evidence and Confidentiality in Mediation

By John Michael Richardson

Introduction

The recent decision by the Second Circuit Court of Appeals, which affirmed the District Court in *PRL USA Holdings, Inc. v. United States Polo Association, Inc. et al.*,[1] is a timely reminder that the exclusion of evidence from compromise or settlement negotiations under Rule 408 of the Federal Rules of Evidence is based on the "without prejudice" rule in the common law—similarly for Section 4547 of the New York Civil Practice Law & Rules (CPLR), modeled after Rule 408.[2] While the decision dealt with an unmediated negotiation, with no agreement between the parties limiting the use of statements made in the course of the negotiations (which is a common term in agreements to mediate), it presents important issues for consideration. It provides a cautionary tale for practitioners negotiating a settlement and raises questions for mediation as well.

The pros and cons of Rule 408 are relevant in the context of any proposed mediation statute. Models for mediation legislation include the strong protection for mediation adopted in 1998 in California[3] or the California-like protection proposed by the National Conference of Commissioners on Uniform State Laws in the Uniform Mediation Act (UMA) [4] or the minimalist, building-block approach of the UNCITRAL Model Law on International Commercial Conciliation (MLICC).[5]

The Impact of PRL on Mediation Confidentiality

Mediation has been usefully characterized by a leading common law court as "assisted 'without prejudice' negotiation."[6] Whether Rule 408 is sufficient, or could be made sufficient, to protect mediation confidentiality,[7] or whether specialized legislation such as the UMA is better, is an important question requiring careful balancing of the role of private parties seeking autonomy and self-determination outside of legal proceedings, and the traditional role of the courts in finding the truth through disclosure and transparency in litigation. Mediation and settlement rest on both public policy and express or implied party agreement. [8]

PRL was a dispute between the Polo Ralph Lauren apparel business ("Lauren"), owner of a horseman logo known as "Polo Player Symbol Mark," registered in 21 variations,[9] and the United States Polo Association (USPA), which sought to use horseman logos with its apparel licensee, Jordache, starting in the late 1990s.

Following a loss against Lauren in 1984, USPA needed to avoid any likelihood of confusion with the Lauren mark. Negotiations between Lauren and USPA were held from about 1996, but a lawsuit was filed by Lauren in 2000. A settlement in 2003 excluded the issue of four "double horseman" logos, which was tried to a jury. USPA was permitted to present, over the objection of Lauren, evidence from the compromise discussions back to 1996 for the purpose of proving an alleged estoppel through acquiescence by Lauren as to USPA's use of the logo marks. The USPA lawyer gave detailed testimony about discussions during the settlement negotiations with the PRL lawyer, during which he claimed that Lauren consented to the use and registration of a double horseman mark by USPA. USPA contended that it had relied on these discussions in using the logo. The jury found that one logo infringed but three did not, and the District Court entered judgment and denied Lauren's motion for a new trial.[10]

Under Rule 408 (the version in effect in 2005) evidence of conduct or statements made in "compromise negotiations" was "not admissible to prove liability for or invalidity of a [claim] or its amount," but "does not require exclusion when the evidence is offered for another purpose." Lauren argued on appeal that USPA was using the estoppel argument as a pretext to fit into the "another purpose" exception in order to introduce the statements for the real purpose of suggesting that Lauren did not object to the use of the double horseman logo because it did not believe it was confusingly similar. The Second Circuit found that while the evidence could be confusing to the jury, the evidence was necessary to prove the estoppel defense and affirmed.

Rule 408 and CPLR 4547 are codifications of the "without prejudice" rule, making compromise negotiations nonadmissible as evidence in litigation.[11] The "without prejudice" rule is itself an exception to an important exception to the hearsay rule providing for admissibility of admissions against interest.[12] Codification was designed to eliminate some of the "legal niceties" that gave rise to uncertainties at common law such as:

- Did a party literally have to say or write "without prejudice" before starting settlement negotiations?;[13]
- If an offer to compromise was protected as such, was a statement of fact admissible for its truth unless expressly labeled "entirely hypothetical" and/or "without prejudice"?; [14] and
- Even if an offer to compromise and factual admissions are subsequently inadmissible, are underlying "facts " themselves otherwise admissible or discoverable outside of a settlement negotiation or a mediation? [15] Curiously, while both California and CPLR 4547 specifically provide for discovery and/or admissibility of evidence "otherwise admissible," Rule 408 does not so provide but the courts find that it does so in practice.[16]

Rule 408 (and the CPLR) maintain an important exception to the "without privilege" rule to permit admission of evidence offered for a purpose *other than* the truth or not of facts alleged to have been admitted. The principal examples are:[17]

- Did the negotiations lead to a settlement agreement?[18]
- Did misrepresentation, fraud or undue influence require that a settlement agreement be set aside?[19]
- Did one party make such a clear statement to the other, and on which the other intended to rely and did rely, as to give rise to an estoppel (the issue in *PRL)*?[20]
- Was there a clear abuse of a privileged negotiation such that evidence should be admitted to prevent perjury, blackmail, threats or other "unambiguous" impropriety?[21]
- Did the negotiations relate to delay in commencing or prosecuting litigation or explain apparent acquiescence?[22]
- Did a claimant act reasonably to mitigate loss in settling a claim against it (for example, where an insurer compromises a claim and then makes a claim to its reinsurer)?[23]
- Was an offer on a claim and/or costs and attorney fees understood to be for discussion purpose only (inadmissible), or was a formal offer refused by a party who ultimately recovered less in litigation than it was offered in settlement (admissible)?

The evidence in *PRL* from the settlement negotiations raised important questions as to what the respective parties intended and who was telling the truth. The sharply conflicting testimony as to who said what to whom, and the exchange of legal arguments about whether the evidence was offered to prove an estoppel (admissible) or to show an infringement claim to be invalid (inadmissible), suggests that the contest was ferocious and testing the limits of the litigation process.

PRL should stimulate some reflection and debate:

- Does public policy require that there should be sufficient leeway for the courts to override privileged negotiations or private agreements, however "sacred," which get in the way of the truth finding process?
- Will *PRL*'s application of Rule 408 cause parties to say less or be quiet, thus going against the policy of encouraging settlement negotiations, or will parties only make statements if the other party expressly agrees not to rely on them and that they are not binding and strictly hypothetical until merged into a complete, binding agreement, thus getting us back to the common law niceties which the Rule sought to avoid?
- Does the flexibility of Rule 408 reflect a better way to get the balance right? Under the California or UMA mediation privilege rules there might not have been the same balancing because the default rule of non-admissibility has far fewer exceptions.

Conclusion

It is at least a serious option to consider making small changes to Rule 408, and/or its New York counterpart to satisfy both private and public interests because the only vital distinguishing feature of specialty mediation legislation is, in the last analysis, the protection given to the mediator. For example the following points might be addressed:

- Discovery is not dealt with directly by Rule 408. Although "non admissible" evidence may make discovery of it unavailable on relevance grounds, it is not always clear what is discoverable or not discoverable, as opposed to admissible or inadmissible, because the two concepts are not necessarily co-extensive given the basis for discovery in the Federal Rules of Civil Procedure Rule 26(b)(1) ["appears reasonably calculated to lead to the discovery of admissible evidence"] and Section 3101(a) of the CPLR ["material and necessary"].
- There should be some privilege given to the mediator, who was not in contemplation when the codification of the common law "without prejudice" rule was undertaken. The recent *Hauzinger v. Hauzinger* case decided, in summary manner by the New York Court of Appeals,[24] involved evident waiver of confidentiality by the parties, so the mediator was subpoenaed and the Court expressly did not decide whether any privilege was available to the mediator under CPLR 3101(a).
- As previously mentioned, California's mediation law extends to arbitration, administrative adjudication, civil action, or other non-criminal proceedings. To the extent that Rule 408 and its state law counterparts can cover this range of proceedings, it would be easy to say so.

Endnotes

1. 520 F.3d 109 (2d Cir. 2008).
2. *2 Weinsteins's Federal Evidence* (2d Edition) Chapter 408, §§ 408 *et seq*. (McLaughlin ed. 2006); *McKinney's New York Civil Practice Law and Rules*, Evidence § 4547 (practice commentaries by Vincent C. Alexander at 842–845); *McKinney's 1998 Session Laws of New York*, Ch. 317, *Civil Practice Law And Rules-Settlement Negotiations-Inadmissibility*, Memorandum In Support, New York State Senate, at 1745–1746.
3. California Evidence Code §§ 1115–1128 and § 703.5(a), (b), (c), (d). *See* § 1119:

   > Except as otherwise provided in this chapter: (a) No evidence of anything said or any admission made

> for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given. [subsection (b) is similar as to writings].

4. The text and commentary for the UMA are available at http://www.nccusl.org—adopted in 2001 for enactment in all the states and amended in 2003. Enacted without the provisions of Article 11 as to international commercial mediation [UNCITRAL Model Law on International Commercial Conciliation] by Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Vermont, Washington, and with Article 11 by Utah and the District of Columbia; reintroduced in New York in 2007-8 as SB 1967 (Senate Judiciary Committee).
5. The MLICC and an excellent *Guide to Enactment and Use* (2002) are available at http://www.uncitral.org; *see* http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/ml-conc-e.pdf. The Uniform Law Conference of Canada adopted most of the MLICC in 2005 as a model, uniform law for the Provinces (with enactment so far in Nova Scotia). The EU Directive of 21 May 2008 on mediation, OJ L136 24 May 2008, is based on the MLICC but severely restricted in its scope for reasons of EU versus Member State sovereignty.
6. May, L.J., in the English Court of Appeal, *Aird v. Prime Meridian Ltd* [2006] EWCA Civ 1866: [available through the British and Irish Legal Information Institute at http://www.bailii.org]

> [i]t is well-known and uncontentious in this case that mediation takes the form of assisted "without prejudice" negotiation and that, with some exceptions not relevant to this appeal, what goes on in the course of mediation is privileged, so that it cannot be referred to or relied on in subsequent court proceedings if the mediation is unsuccessful. In the present case the parties reinforced this by including a provision in their mediation agreement that they would "keep confidential all information, whether oral or written or otherwise produced for or at the mediation." This cannot of course be taken absolutely literally, since it obviously would not apply to documents obviously produced for other purposes which were needed for and produced at the mediation; for example, their building contract or the antecedent pleadings in the proceedings. There was also a note in the agreement to the effect that evidence otherwise admissible would not become inadmissible simply because it was used in mediation. . . .

7. Mediation "confidentiality" has three elements as set out in the MLICC: private disclosures to the mediator in a mediation (Art. 8), disclosures to third parties generally such as the media or family or business associates (Art 9), and use and admissibility in legal proceedings (Art. 10). Agreements and/or mediation rules usually cover the first two elements.
8. See the excellent discussion of the common law background in the case note by then President of the Chartered Institute of Arbitrators, Hew R. Dundas, in the Institute's journal *Arbitration* (August 2007) Volume 73 Number 3 at 335, entitled, *When Does Confidential Mean Confidential? An Important Development in the Law of Mediation and the Without Prejudice Rule*.
9. *PRL* brief at 10.
10. Not reported in F. Supp. 2d but available at 2006 WL 1881744 (S.D.N.Y. 2006) No. 99 CV 10199 (GBD).
11. *See supra* note 2.
12. *See supra* note 8.
13. *See supra* note 2. *See also West v. Smith*, 101 U.S. 263, 25 L.Ed 809 (1879) at 270–71*:* "Admissions by a party or by an authorized agent, either in court or out, may in general be given in evidence . . ." at 273 (internal citations omitted):

> Offers of compromise to pay a sum of money by the way of compromise, as a general rule, are not admissible against the party making the offer; but if admitted, it is clear that the offer is open to explanation, no matter whether it was by letter or by oral communication. By all or nearly all the cases the rule as established is not that an admission made during or in consequence of an effort to compromise is admissible, but that an offer to do something by the way of compromise, as to pay sums of money, allow certain prices, deliver certain property, or make certain deductions, and the like, shall be excluded. These cannot be called admissions, as they were made to avoid controversy and to save the expenses of vexatious litigation. Decided cases may be found where it is said that the evidence is admissible unless the offer made was stated to be without prejudice; but the rule in general, both in England and the United States, is that the offer will be presumed to have been made without prejudice if it was plainly an offer of compromise.

14. *See supra* note 2.
15. *Rojas v. Superior Court of Los Angles County*, 33 Cal 4th 407, 423 fn. 8 (Supreme Ct. Cal. 2004).
16. California Evidence Code § 1120(a): "Evidence otherwise admissible or subject to discovery outside of a mediation . . . shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation . . . "; New York CPLR 4547: "[t]he provisions of this section shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations . . . "; District Court Order in *PRL,* 2006 WL 1881744 at 6, fn 13 "[t]his rule [408] does note require the exclusion of any evidence otherwise admissible merely because it is presented in the course of compromise negotiations. . . ."
17. Most of the examples are taken or adapted from those listed in a leading British decision and the cases and authorities cited therein: *Unilever plc v. The Proctor & Gamble Company*, [1999] EWCA Civ 3027 (English Court of Appeal) [available at *http://www.bailii.org*].
18. California permits introduction of a written settlement agreement which by its terms is enforceable or binding [§ 1123(b)] or to show fraud, duress, or illegality relevant to an issue in dispute [§ 1123(d)].
19. *Id*.
20. *See Starter Corp. v. Converse, Inc*., 170 F.3d 286, 294 (2d Cir. 1999) [evidence from settlement negotiations "virtually essential"' to proving estoppel].
21. *See* Rule 408 . . . Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.
22. *Id*.
23. *See American Re-Insurance Co. v. United States Fidelity & Guarantee Co*., 2005 N.Y. Slip Op. 04453 (A.D. 1st Dep't 2005) and *NYP Holdings, Inc. v. McClier Corporation et al*, Index No. 601404/04, Supreme Court, N.Y. Co., Cahn, J. (Jan. 18, 2007).
24. 2008 N.Y. Slip Op. 05781 (June 26, 2008).

John Michael Richardson, an attorney and chartered accountant, serves as an arbitrator and mediator. He is a Fellow of the Chartered Institute of Arbitrators, a member of the AAA Commercial Panel, and of the mediation panels of the New York state and federal courts. He can be reached at lawsome@gmail.com.

Unconscionability—Should We Revisit This Backdoor Challenge to Arbitration?

By Laura A. Kaster

Consumer and employee arbitration has received overt challenges by commentators and a good deal of covert challenge as well in state court rulings dealing with the topic of unconscionability. Despite a well-established federal policy favoring arbitration and enforcing pre-dispute arbitration clauses, the belief that consumers are ill served by arbitration persists.[1] Should we reexamine that assumption?

The Federal Arbitration Act was enacted to eliminate a unique hostility to pre-dispute arbitration agreements that made them revocable and unenforceable, unlike all other contracts. The rationale for the change was to allow the parties to agree to a process that would reduce the cost of dispute resolution, reduce delay, and preserve relationships. The Act by its terms makes arbitration contracts equal to all other contracts. Under the Act, an agreement to arbitrate is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[2] Over time, that simple rule requiring equal legal treatment of these agreements morphed into a national policy favoring arbitration and resolving doubt in favor of arbitration.[3] As applied to business parties, that policy has been well received and is not generally challenged. That is not the case when it comes to contracts between businesses and consumers or employers and employees, where the state courts have evinced continuing hostility to arbitration by analyzing whether the clauses are "unconscionable."[4]

On the federal level, similar hostility to arbitration of consumer and employee disputes has led Senator Feingold and Representative Johnson to introduce the Arbitration Fairness Act, which is directed against pre-dispute arbitration clauses or what the sponsors have called "mandatory arbitration" in consumer and employment agreements.

The ability of the states to undercut a federal Act derives from the peculiar fact that despite the broad reach of the Federal Arbitration Act to all contractual relations that can be governed by the commerce clause, covering the vast majority of transactions between businesses and nationwide consumers, the Act provides no basis for federal jurisdiction. Therefore, when there is no independent basis for federal jurisdiction, the Act must be construed by state courts. Moreover, the Supreme Court has indicated that state law has a role in determining the validity of arbitration agreements—precisely in the way—and presumably applying the same rules—that state courts would apply to determine the validity of all contracts:

> In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). What States may not do is to decide that a contract is fair enough to enforce all of its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ''footing,'' directly contrary to the Act's language and Congress' intent.[5]

But the analytical framework for determining whether an arbitration agreement is unconscionable is often unique to an arbitration clause. Under the rubric of unconscionability, state courts examine these agreements for procedural and substantive unconscionability. Once it is determined that there is "procedural" unfairness—which some state courts treat as satisfied if there is a contract of adhesion—the courts look behind the arbitration agreement to establish its "substantive" fairness, e.g., whether the clause is unfair to one party, imposing costs or inconvenience, or impairing the ability to obtain an unbiased result. This is a kind of analysis rarely applied to the run-of-the-mill agreement. Singling out an arbitration clause for this heightened scrutiny ignores the dictates of the Federal Arbitration Act because the price and warrantee terms, the limitation of economic damages, and all provisions that have a very substantial impact on the consumer are not typically examined even in contracts of adhesion. Certainly gross impositions—such as requiring a consumer to arbitrate only in a single location far from the purchase, or requiring payment of fees substantially in excess of court fees, and extremely lopsided obligations to arbitrate—should raise concerns.[6] However, the Act precludes treating an arbitration clause as especially suspect. [7]

As neutrals and practitioners interested in dispute resolution processes, we should explore this hostility. In fact, lowered cost, reduced delay, informality, and improved relationships should be prized by the consumer

and employee as well as the businesses with which they deal. Often, reducing the cost of dispute resolution for the business also reduces the cost of goods and services to the benefit of consumers.[8] Arbitration that is fairly, appropriately, and flexibly conducted may be an ideal dispute-resolution mechanism for consumer disputes. The American Arbitration Association has Supplementary Procedures for Consumer-Related Disputes (effective Sept. 15, 2005),[9] which preserve the right of consumers to proceed to small claims court and limit the cost of a consumer dispute involving a claim of less than $10,000 to $125. These procedures permit submission in writing or a telephonic hearing. The World Intellectual Property Organization's domain name dispute arbitrations are all resolved online and have enjoyed a very positive reception. Moreover, there is no evidence that consumers have better outcomes or are more satisfied with the process when they proceed in court. The information that is available indicates that consumers and employees may on average fare better in arbitration.[10]

Is there a way to foster the actual fairness of the process and the satisfaction of consumers? Can the large providers, such as the American Arbitration Association, the Financial Industry Regulatory Authority (FINRA), and the Better Business Bureau develop a process of assessing and then promoting satisfaction? Should we not evaluate court processes for satisfaction and fairness on the same basis we are examining arbitration? The political forces involving an ideological dispute between plaintiff's class counsel and businesses desiring to control costs has had more to do with the discourse than the actual experiences of participants in the process and an analysis of whether the typical cases are even susceptible to class treatment.[11] Some neutrals are concerned that negative feelings about consumer arbitration may taint arbitration in general. But it may work the other way around. The satisfactory encounters that consumers may have—if they are actually heard and have disputes promptly and fairly resolved—may improve the reputation of arbitration in general and also provide an opportunity for developing innovative processes.

Endnotes

1. *See, e.g.*, Adam Klein and Nantiya Ruan, "Mandatory Arbitration of Employment Class Action Disputes: from the Perspective of Plaintiff's Counsel," 776 PLI/Lit 255 (PLI 2008); Mark E. Budnitz, "The High Cost of mandatory Consumer Arbitration," 67 Law & Contemp. Probs. 133 (2004); Paul D. Carrington, "Unconscionable Lawyers," 19 Ga. St. U. L. Rev. 361 (2003); Jean R. Sternlight, "Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial," 16 Ohio St. J. On Disp. Resoll. 669 (2001).
2. 9 U.S.C. § 2.
3. *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.*, 460 U.S. 1, 24–25 (1983).
4. *See, e.g., Tillman v. Commercial Credit Loans, Inc*, 655 S.E. 2d 362, 372–73 (N.C. 2008) (holding unconscionable, invalid and unenforceable arbitration clause in loan agreements that precluded class arbitration had loser paying provision and a *de novo* appeal provision and excluded certain claims); *Ontiveros v. DHL Exp. (USA), Inc.*, 08 Cal. Daily Op. serv. 8379 (Cal. App. 1st. Dist, 2008) (arbitration agreement in employment agreement was unconscionable because it was a contract of adhesion and was substantively unconscionable because it limited discovery and the employer would be a "repeat player," giving the arbitrator an interest in deciding the dispute was arbitrable); *Wigginton v. Dell, Inc.*, 2008 WL 2267173 (Ill. App. 5th Dist. 2008) (arbitration provision that barred class claims was unconscionable because cost of arbitration would likely exceed recovery).
5. *Allied Bruce v. Terminix*, 513 U.S. 265, 281 (1995).
6. *See Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 92 (2000) (discussing measures for determining adequacy of access in the context of redress of statutory rights and requiring individualized proof); *see also Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 556 (4th Cir. 2001) (noting that forum fees should be considered in the context of the total cost of arbitration versus litigation.)
7. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996).
8. *See* Stephen J. Ware, "The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees," 5 J. A. Arb. 251, 255 (2006).
9. *See* http://www.adr.org/sp.asp?id=22014.
10. *See* Ware, 5 J. Am. Arb. at 26 and n.19 (noting that recoveries may be more likely but may be smaller); Eric J. Mogilnicki and Kirk D. Jensen, "Arbitration and Unconscionability," 19 Ga. St. U. L. Rev. 761, 763–764 (2003) (citing an AAA study finding that employees won 73% of the cases they filed, a related study stating that 63% of employees won in arbitration while only 15% won in litigation, an NAF study showing that plaintiffs win 71% of claims brought against corporate entities before NAF and another survey revealing that 93% of parties believed that NASD arbitrators handled their cases "fairly and without bias").
11. *See* Twentieth Annual Corporate Law Symposium: Twenty Years after *Shearson/American Express v. McMahon*: Assessing Investors' Remedies, 76 U. Cin. L. Rev. 375 (2008).

Laura A. Kaster is an arbitrator and mediator and Adjunct Professor teaching Dispute Resolution Processes at Seton Hall Law School. She can be reached at laura.kaster@gmail.com.

The Status of the Revised Uniform Arbitration Act in New York

By William J.T. Brown

After much study and analysis over several years, the New York State Bar Association, the New York City Bar and the New York County Lawyers Association recommended that the New York State Legislature enact the Revised Uniform Arbitration Act (RUAA) as revised for New York by a joint working group from those organizations. Bills to effectuate their recommendation were submitted last year and are now pending in the Senate and the Assembly. With the enactment of the RUAA in New York, hopefully in the coming year, the state will replace its historic but antiquated arbitration statute, CPLR Article 75, with a modern, up-to-date, uniform act.

New York was the pioneer state in passing an arbitration statute—the predecessor of today's CPLR Article 75. In doing so in 1920, the state became the first to overcome the entrenched antipathy of the courts to private agreements to arbitrate. Congress followed in 1925 with the Federal Arbitration Act (FAA), modeled closely upon the New York statute but with enough differences to create problems of inconsistency and preemption. In 1955, the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the Uniform Arbitration Act, which was subsequently enacted with variations by 49 states, not including New York. In 2000, after considerable study, NCCUSL adopted a revised uniform law for arbitration, the RUAA, which has now been enacted by 12 states: Alaska, Colorado, Hawaii, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington.

To remove uncertainty that has detracted from the use of arbitration, the RUAA is substantially more detailed than the FAA or New York's CPLR Article 75. The RUAA provides a comprehensive set of statutory rules for arbitrators and for the courts ruling in arbitration matters, rules that are intended to be consistent with, and complementary to, the more bare-bones precepts of the FAA.

By adopting the RUAA, the state will gain from the improved quality of the new arbitration law that benefits from and codifies many years of experience under the older law. Moreover, the RUAA will bring additional benefits because the current statute, despite its venerable history, presents serious problems and weaknesses: inconsistency with federal law (e.g., the arbitrator is denied (or not clearly given) some of the powers that a court would have and that may be necessary to render effective justice in a particular case, such as the power to award punitive damages, to determine application of the statute of limitations, or to award interim relief). In addition, the present statute suffers from uncertainties of meaning that have sometimes led to litigation burdening the arbitration process.

Because the RUAA was crafted to complement the FAA, state and federal courts are expected to apply it to arbitrations in New York arising from commercial transactions, whether or not they involve interstate or foreign commerce, so long as the parties have not chosen the application of some other applicable arbitration law.

William J.T. Brown is a lawyer and arbitrator working in New York City. His practice includes litigation in federal and state courts, as well as international transactions and disputes. From 1976 to 1998 he was a partner of Donovan Leisure Newton & Irvine, LLP in charge of that firm's Paris office from 1983 to 1990. From 1998 to 2007 he was a partner of LeBoeuf, Lamb, Greene & MacRae. He is currently of counsel to Dewey & LeBoeuf LLP and Co-Chair of NYSBA's Dispute Resolution Section's Legislation Committee. He can be reached at WBrown@deweyleboeuf.com.

The Status of the Uniform Mediation Act in New York

By Charles J. Moxley, Jr.

The Uniform Mediation Act (UMA) is a uniform act that establishes a privilege for mediation communications, requires mediators to disclose conflicts of interest, and accords parties the right to be accompanied at a mediation by an attorney or other support person.

The UMA was drafted, with the input of interested parties and experts from around the country, by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Bar Association, acting through its Section on Dispute Resolution. The UMA was approved by NCCUSL in August 2001 and in August 2003 was supplemented to expand the UMA's coverage to international commercial cases by incorporating by reference the United Nations Model Law on International Commercial Conciliation, giving mediation parties a choice of the confidentiality provisions of either statute.

The UMA has been approved by leading professional organizations, including the American Bar Association, the NYSBA, and the New York City Bar, and endorsed by leading mediation providers, including the American Arbitration Association, the Federal Mediation and Conciliation Service, the Judicial Arbitration and Mediation Services, Inc. (JAMS), and the International Institute for Conflict Prevention and Resolution ("CPR"), as well as by the National Arbitration Forum. As of July 2008, the UMA has been adopted by 10 states—Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, Washington—and by the District of Columbia.

A detailed description of the provisions, background, and drafting history of the UMA is set forth in an article in this journal by Professor Richard C. Reuben, a reporter for the NCCUSL Drafting Committee on the UMA. The purpose of this article is to describe the status of the UMA in New York.

In February 2002, the Alternate Dispute Resolution Committee of the New York City Bar issued a report supporting passage of the UMA in New York. The New York City Bar thereafter took the lead in seeking enactment of the UMA in the New York State Legislature. Support for the UMA was initially contested in the NYSBA. Enactment in New York was supported by NYSBA's Commercial and Federal Litigation Section and opposed by the NYSBA Committees on Alternative Dispute Resolution and on the CPLR. These different views were resolved by the Executive Committee of the NYSBA, which voted to support the UMA.

Following the NYSBA's decision to support enactment of the UMA in New York, the UMA was introduced in the New York State Legislature and referred to the Codes Committee in the Senate and the Judiciary Committee in the Assembly. The practice in the New York Legislature is that bills that have not been enacted expire after two years, with the result that the presently pending bill to enact the UMA (S01967) will expire in January 2009. The Legislation Committee of the Dispute Resolution Section will be reviewing the status of the UMA and our Section's fall CLE program, scheduled for November 13, 2008, will focus, in part, on the UMA.

The Legislation Committee looks forward to whatever input members of the Dispute Resolution Section and the committees of the Section can give us on this matter.

Charles J. Moxley, Jr. is Of Counsel to Kaplan Fox & Kilsheimer LLP, focusing on complex litigation and arbitration, and an Adjunct Professor of Law at Fordham Law School. He is Co-Chair of the Legislation Committee of the NYSBA's Dispute Resolution Section and regularly serves as an arbitrator and mediator. He has served on the American Arbitration Association's Panel of Commercial Arbitrators for over 25 years. He can be reached at cmoxley@kaplanfox.com.

The UMA: A Good Fit for New York

By Richard C. Reuben

The recent *Hauzinger*[1] case has brought to light the precarious protection that New York provides to mediation communications.

In that case, the New York Court of Appeals not only upheld a trial court decision ordering a mediator to testify over his objection, but it also raised *sua sponte* the vital question of whether parties in mediation have a privilege to exclude mediation communications from evidence in subsequent proceedings.

"New York is one of the many states that do not have a general confidentiality statute that applies to all mediations."

In the wake of that ruling, it is time for the legislature to address the admissibility of mediation communications directly—and the Uniform Mediation Act (UMA) is the right alternative to consider. Promulgated by the National Conference of Commissioners on Uniform State Laws and the American Bar Association, the UMA provides strong confidentiality protections for mediation while also carefully balancing the need of the justice system for access to information in appropriate cases. Its adoption by New Jersey and nine other states[2] also offers New York lawyers the advantages of uniformity.

The UMA would bring both certainty and breadth to the law. New York is one of the many states that do not have a general confidentiality statute that applies to all mediations. Rather, confidentiality is scattered among subject-matter-specific statutes and court rules, such as ones covering family court[3] and community dispute resolution programs.[4] The lack of a comprehensive approach means that if one's mediation does not come within a subject-matter-specific statute or court rule providing for confidentiality—in commercial and tort cases, for example—then there is no protection for mediation confidentiality other than that which may be provided by a contractual agreement. While such agreements are fine for limiting disclosures to and by third persons, they are commonly ineffective in preventing the discovery and admissibility of mediation communications in formal legal proceedings, as *Hauzinger* attests.

I will briefly discuss the *Hauzinger* case before turning to the UMA and outlining its basic provisions and the process by which it was drafted.

The *Hauzinger* Case

Hauzinger should have been an unexceptional divorce mediation conducted by Carl R. Vahl, a New York attorney-mediator. The mediation resulted in a separation settlement agreement; thereafter, in order to obtain a divorce, the husband commenced the divorce proceeding, based on the separation agreement. At that time, the wife's attorney moved to set aside the separation agreement based on undue influence, and sought to depose Vahl (as to what had occurred during the mediation) and obtain his mediation records. Vahl resisted with a motion to quash, which the Supreme Court denied, in a decision affirmed by the Appellate Division's Fourth Department in 2007.

In a memorandum decision in June 2008, the New York Court of Appeals rejected arguments that the trial court abused its discretion, finding that the parties had waived any rights to mediation confidentiality under the mediation agreement. The court said the wife had subpoenaed the testimony, evidencing her waiver, while the husband had signed a waiver releasing Vahl to testify pursuant to a provision in the mediation agreement allowing the mediator to communicate with an attorney and provide documents with the consent of the parties.[5]

Critically, the New York Court of Appeals also rejected Vahl's claim that he had an independent qualified privilege under CPLR 3101(b),[6] which precludes the admissibility of privileged communications, saying the statutory claim was "without merit" since the parties had waived any privilege. The court further reserved the question of whether mediation is covered by the privilege statute, saying "We do not address what, if any, mediation confidentiality privilege exists under CPLR 3101(b)."

The latter point is particularly important because it suggests not only that the mediator does not have an independent privilege that survives party waiver, but also suggests that the parties themselves may not have a privilege under state law.

The result in *Hauzinger* would clearly have been different under the Uniform Mediation Act because the Act provides the mediator with an independent privilege that may not be waived by the parties, as discussed more fully below.

The UMA

The Uniform Mediation Act includes provisions that protect the confidentiality of mediation communications and protect the integrity of the mediation process. Unlike many mediation statutes, it applies to all mediations that are conducted within the state, not just court-related mediations or mediations that are about a particular subject matter.[7]

The most significant exception to this rule of general coverage is that the Act does not apply to the collective

bargaining context; the unique nature of the labor context mitigated the need for a uniform law. Other exceptions to general coverage include those for judicial mediations (because of separation of powers concerns), peer and youth prison mediations, and situations in which parties choose to opt out of the privilege.[8]

The heart of the UMA is a mediation privilege, Section 4, which is held by the parties, the mediator, and non-party participants, such as witnesses and support persons. This alone makes the UMA unique. While many states have mediation privileges of varying degrees of breadth, the privilege is typically held only by the parties. The UMA is the only mediation statute to provide separate, independent privileges for the mediator and non-party participants.

The UMA is also unparalleled in terms of its breadth of application. Most privileges apply only in judicial proceedings. However, Section 2(7) allows the UMA privilege to be asserted in all formal proceedings, including administrative, legislative, and arbitration proceedings. Similarly, the UMA privilege can be asserted in both civil and criminal proceedings, which is significant because mediation confidentiality protections are sometimes limited to civil cases, as in California.

The UMA privilege is limited in Section 6 by some narrow, common, and uncontroversial exceptions. There are two categories of exceptions in this section, which the drafters distinguished in terms of being "above the line" or "below the line." The "above the line" exceptions of Section 6(a) are automatic in that they do not require judicial balancing; if the exception fits, it applies mechanically. These include basic exceptions that permit the mediation agreement itself to be introduced into evidence, that allow reporting of the abuse of vulnerable parties, and that prohibit the mediation from being a pretext for criminal activities.

The "below the line exceptions" of Section 6(b) give judges guided discretion to decide whether to permit the admission of mediation communications in two types of cases: Ones involving criminal felonies (and if states desire, misdemeanors), and claims that the mediated settlement agreement was induced by fraud or is subject to some other contract-based defense. These are areas in which the decision on admissibility is likely to turn on specific facts, and the drafters wanted to give the courts the discretion to act in specific cases. Significantly, though, the statute sets a high standard for overcoming its presumption of confidentiality, providing that parties seeking to introduce mediation communications evidence under Section 6(b) prove that the sought-after evidence is otherwise unavailable and that the need for the evidence "significantly outweighs" the state's interest in protecting the confidentiality of mediation communications.

Section 7 provides a unique protection for mediators, especially those in court-connected mediations. When mediations fail, judges often want to find out what happened in the mediation, which party was being reasonable and which wasn't, what the final offers were, etc. This often puts the mediator in the awkward position of having to either breach her promise of confidentiality—to the potential detriment of one of the parties—or risk the wrath of an angry judge. The UMA resolves this problem by prohibiting mediators from disclosing what happened in the mediation to a judge or any other governmental officer. There are limited exceptions that allow the mediator to confirm attendance and whether the mediation was completed, and to report abuse of vulnerable parties to appropriate government agencies. This shield for mediators is another unique feature of the Uniform Mediation Act.

While the UMA confers significant benefits upon mediators, participants, and the process, it also imposes some obligations. Most significantly, it requires mediators to disclose conflicts of interest in a way that is consistent with their professional ethical obligations.[9] Mediators who fail to make such disclosures lose the ability to assert the privilege. This section of the Act also makes clear there is no specific professional background or orientation required for a person to qualify as a mediator under the Act, in recognition of the broad diversity in mediation practice. Similarly, Section 9 also includes an optional provision requiring mediators to be impartial that many states have elected to include in their mediation acts.

Another process integrity provision is that parties have a right under Section 10 of the statute to be accompanied by an attorney or some other support person.

The Drafting Process

The UMA has proven largely uncontroversial in the states where it has been adopted, in part because of the extensive process by which it was drafted.

The Act was the first joint drafting effort by the National Conference of Commissioners on Uniform State Laws and the American Bar Association, acting through its Section on Dispute Resolution. Each of the organizations had its own separate committee, which met simultaneously for four years to hammer out the act. They were actively assisted by a Faculty Advisory Committee drawn from three different law schools (Ohio State, Missouri, and Harvard) and more than a dozen "official observers," representing all of the major dispute resolution professional and provider organizations, as well as other constituencies that stood to be affected by the Act.[10] At one meeting, there were more than 60 observers participating, although it was more common to have between 20 to 30 observers at any given drafting session.

The drafters and the observers worked line by line, word by word, on a new draft for each drafting session. The committees met several times a year, and in all, there were more than a dozen published drafts that were circulated for comments. Twice drafts were sent to all American Bar Association sections, committees, and other entities to obtain specific feedback from the perspectives those entities would bring. Similarly, the Act was read word for word by the Uniform Law Commission acting as a Committee of the whole on two occasions.

To be sure, the drafting process was at times difficult, as the broad array of observers and drafters brought vastly different perspectives to the drafting process. Some drafters and observers, for example, didn't believe there should be a privilege at all, while others urged a simple rule stating that mediation is confidential, with no exceptions and without regard to the competing policy issues that are at stake in the drafting of such legislation.

The drafters steered a middle path that provided the strongest possible protection for the confidentiality of mediation communications, while at the same time respecting the interest that parties and the justice system might have on occasion in the receipt of mediation communications evidence.

In the end the Act was endorsed by every major dispute resolution provider organization[11] and the largest professional practice organizations.[12] More than a dozen ABA sections and other entities co-sponsored the Act when it was overwhelmingly endorsed by the ABA House of Delegates,[13] and another half dozen supported the Act but did not formally co-sponsor for a variety of reasons.[14]

New York deserves a comprehensive mediation confidentiality statute, and the Uniform Mediation Act provides that protection. It deserves the state's most serious consideration—especially now that we know the precariousness of the current state of the law.

Endnotes

1. 43 A.D.3d 1289, 842 N.Y.S.2d 646 (4th Dep't 2007), *aff'd by* Court of Appeals, June 26, 2008 (N.Y. Slip Op. 5781).
2. The UMA has been adopted in the District of Columbia, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington.
3. McKinney's Family Court Act § 915.
4. McKinney's Judiciary Law § 849(b)6.
5. *Richard M. Hauzinger v. Aurela G. Hauzinger and Carl R. Vahl*, no. 183 (Court of Appeals).

   Specifically, the relevant portions of the mediation participation agreement provide:

   > 1. We agree, that in the event mediation is terminated before completion, not to represent or to be a witness for or against either client in any court action regarding your dispute.
   > 2. We agree, not to communicate with an attorney for either client unless both clients consent.
   > 3. We agree, to release papers from our files to third parties, only with the consent of both clients.

6. CPLR 3101(b) provides: "(b) Privileged Matter. Upon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable."
7. *See* Section 2.
8. *See* Section 3.
9. *See* Section 9.
10. Official Observers are appointed by the president of NCCUSL at the recommendation of the chair of the relevant drafting committee. The UMA Official Observers included the Association for Conflict Resolution (formerly the Society of Professionals in Dispute Resolution, Academy of Family Mediators and CRE/Net), National Council of Dispute Resolution Organizations, American Arbitration Association, Federal Mediation and Conciliation Service, Judicial Arbitration and Mediation Services, Inc. (JAMS), CPR International Institute for Conflict Prevention and Resolution, International Academy of Mediators, National Association for Community Mediation, and the California Dispute Resolution Council.

    Other Official Observers included: the American Bar Association Section of Administrative Law and Regulatory Practice, American Bar Association Section of Litigation, American Bar Association Senior Lawyers Division, American Bar Association Section of Torts and Insurance Practice, American Trial Lawyers Association, Equal Employment Advisory Council, National Association of District Attorneys, and the Society of Professional Journalists.
11. The American Arbitration Association, JAMS/Endispute, CPR/International Institute for Conflict Prevention and Resolution, and the National Arbitration Forum.
12. The American Bar Association Section of Dispute Resolution, the Association for Conflict Resolution with slight qualification, and the Academy of Family and Conciliation Courts.
13. The Section of Dispute Resolution, Section of Business Law, Tort and Insurance Practice Section, Section of Labor and Employment Law, Section of Administrative Law and Regulatory Practice, ABA Commission on Mental and Physical Disability, Air and Space Law Forum, Real Property Probate and Trust Section, Senior Lawyers Division, Section of Family Law, Judicial Administration Division, State and Local Government Section, and the Government and Public Sector Lawyers Division.
14. The Section of Individual Rights and Responsibilities, Section of International Law and Practice, Criminal Law Section, Health Law Section, Antitrust Section, and the Young Lawyers Division.

Richard C. Reuben is the James Lewis Park Professor of Law at the University of Missouri School of Law, and was a reporter for the Uniform Mediation Act. He can be reached at ReubenR@missouri.edu.

Congress Considers Legislation That Could Significantly Alter Arbitration in the United States

By Mark Kantor

Arbitration in the United States has grown rapidly to encompass consumer and employment disputes. Many arbitration clauses in those fields now include waivers of U.S. class action rights, creating significant controversy. In response to these developments, Congress is now considering several legislative proposals that would, if adopted, fundamentally alter arbitration in the United States. The changes contemplated by those bills extend far beyond consumer and similar disputes, to cover business-to-business and international arbitration as well.

"[C]hanges in general U.S. arbitration law would affect consumer, securities, franchise, employment, commercial and international arbitration without differentiation."

The underlying pressure behind possible legislative action is the growth of arbitration in consumer disputes. Consumer, civil rights and employee rights advocacy groups have coordinated with others who oppose arbitration, particularly the plaintiffs' bar, securities law groups and franchisees, in an effort to restructure the role of arbitration in the U.S. Just this year, more than 30 Congressional bills have been proposed in response. Recently, a subcommittee of the House of Representatives Judiciary Committee approved three of those bills, passing them up to the full Committee for consideration. Even if broad legislation is not enacted in 2008, there is a real prospect that Congress will take up the issue of significantly modifying federal arbitration law once the elections are over and a new Congress and President are seated in January 2009.

The principal arbitration law in the U.S., the Federal Arbitration Act (FAA), does not draw a distinction between claims involving individuals, on the one hand, and business-to-business claims, on the other hand. The FAA also does not distinguish between domestic U.S. arbitration and international arbitration conducted in the U.S. As a result, changes in general U.S. arbitration law would affect consumer, securities, franchise, employment, commercial and international arbitration without differentiation.

Two recent legislative proposals by members of the opposing major U.S. political parties illustrate this situation—the Arbitration Fairness Act of 2007 and the Fair Arbitration Act of 2007. Senator Russell Feingold, a Democrat from Wisconsin, has introduced his proposed Arbitration Fairness Act of 2007, S. 1782 and H.R. 3010. Both the Senate and the House of Representatives held hearings on the bill in 2007. In mid-July 2008, the House Commercial and Administrative Law Subcommittee decided by a voice vote to report the Arbitration Fairness Act bill (H.R. 3010) favorably to the full House Judiciary Committee. While originally expected to be approved quickly by the full Committee, significant industry opposition has slowed the movement of that legislation through the Committee. Even if the proposed Act proves to be stalled now in Congress, observers expect the Act to be reintroduced in the new session of Congress beginning in January 2009.

The Congressional Research Service (CRS) official summary of the Arbitration Fairness Act describes the bill as follows:

> [The Act] Declares that no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of: (1) an employment, consumer, or franchise dispute, or (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.
>
> Declares, further, that the validity or enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.
>
> Exempts arbitration provisions in collective bargaining agreements from this Act.

Sen. Feingold's Arbitration Fairness Act does not draw any distinctions between international arbitration and domestic U.S. arbitration. Importantly, the second part of the Act (which overrides the core commercial arbitration doctrines of separability and competence-competence) does not distinguish between business-to-business disputes, on the one hand, and consumer disputes or other disputes involving contracts of adhesion, on the other hand. Moreover, the crucial phrase in the first part of the proposed Act extending its reach to "any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power" is not defined in the bill.

As the CRS summary points out, the Arbitration Fairness Act would prevent pre-dispute agreements to arbitrate employment, consumer and franchise disputes, as well as disputes arising under "any statute" intended to protect civil rights or regulate transactions between parties of unequal bargaining power. That legislative language is sufficiently vague that it is unclear which U.S. federal statutes are covered and which are not. Federal consumer protection laws would clearly be covered. However, for many other U.S. statutes (for example, U.S. securities laws, unfair trade practices laws and employment laws) one of many legislative motives for enactment was to protect against the consequences of unequal bargaining power. Additionally, federal and state securities laws are regularly asserted in commercial arbitration claims (for example, as part of an alleged "failure to disclose" in connection with a mergers & acquisitions deal where the buying and selling of securities is involved). The language of the proposed Arbitration Fairness Act does not specifically refer to U.S. securities laws. However, supporters of the bill are said to have stated privately that securities law claims are in fact intended to be covered under the Act. In addition to federal laws, of course, the 50 states (and the District of Columbia) have enacted numerous laws that may be covered as well. Thus, the impact of the phrase "dispute[s] arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power" in the Act may be quite extensive.

Other examples of the broad scope of the Arbitration Fairness Act are worth noting as well. To illustrate, the proposed Act would, at least as now written, prohibit pre-dispute arbitration agreements in highly negotiated employment contracts between CEOs and their corporate employers, not merely "take it or leave it" employment contracts with rank-and-file employees. Pre-dispute arbitration agreements also would be unenforceable in all franchise contracts, including not only the coffee franchise on the corner, but also the 1,500-room resort franchise in Las Vegas or the Bahamas.

Even more importantly for commercial and international arbitration, the second part of the proposed Arbitration Fairness Act would overturn the internationally accepted arbitration doctrines of competence-competence and separability for all arbitrations, not merely for specific areas such as consumer and employment arbitration. The doctrine of competence-competence enables arbitrators to rule on challenges to their own authority, rather than having such a challenge bring the arbitral proceeding to a halt. Such jurisdictional challenges are common in commercial arbitrations, especially when one party at the time the dispute crystallizes regrets the choice of an arbitral forum and prefers to have a court hear the dispute. So too the separability doctrine enables arbitrators to resolve contract disputes and related defenses, even if one of the alleged defenses is a claim that the entire contract is void by reason of incapacity or misconduct such as fraud, misrepresentation or corruption. If such doctrines did not exist, a party suffering from "buyer's remorse" could easily derail arbitration in favor of court proceedings merely by alleging that the contract containing the arbitration clause was invalid—the mere invocation of that allegation would take the dispute out of arbitration and into the courts.

Overturning the doctrines of competence-competence and separability would, of course, place the United States in opposition to decades of arbitration developments worldwide and arguably violate international obligations under a variety of international arbitration treaties. The focus of the Arbitration Fairness Act though is not international arbitration; it is consumer and similar disputes, where arbitration opponents strenuously prefer a judicial forum. The impact of the Act on commercial and international arbitrations would be "collateral damage." When the House and Senate held hearings on the proposed Arbitration Fairness Act last year, none of the testimony at those hearings even addressed the part of the proposed Act that would override separability and competence-competence. Instead, the testimony focused on the part of the legislation that would prohibit pre-dispute arbitration agreements for consumer, employment and franchise disputes and disputes arising under statutes intended to protect civil rights or to regulate transactions involving parties of unequal bargaining power. Speakers and legislators alike simply did not discuss at the hearings the consequences of overriding competence-competence and severability.

The topic did arise at the much more contentious July 15, 2008 "markup" of the legislation in the House Commercial and Administrative Law Subcommittee, and perhaps played a role in slowing the march towards full Judiciary Committee approval originally contemplated for later that week.

Many of the problems with the proposed Act may simply be awkward drafting by legislative staffers and government affairs representatives (i.e., lobbyists) who are not familiar with commercial and international arbitration. Or, the draft Arbitration Fairness Act may be intended as a "fast-and-dirty" early platform for more thoughtful revisions to U.S. arbitration. That first possibility (that the problems with the legislation are principally caused by awkward drafting) only illustrates the risk for business-to-business and international arbitration. Pressures arising in the U.S. domestic political arena over consumer and employee rights may produce fundamental changes to the FAA without full consideration of their impact on commercial and international arbitration.

Of course, unlike parliamentary systems, the fact that members of the majority Congressional party (Senator Feingold in the Senate and Representative Johnson in the House) propose a bill does not tell us much about the

chances for ultimate passage of that bill. *The Washington Post*, a very politically savvy newspaper, recently editorialized about arbitration law proposals being considered by Congress. *The Post* criticized Senator Feingold's bill—"This goes too far." While criticizing Senator Feingold's proposed bill, *The Post* did speak sympathetically in its editorial about another proposal to broadly regulate arbitration. Senator Jeff Sessions, a Republican from Alabama, is the principal sponsor of that bill, the Fair Arbitration Act of 2007, S. 1135 (the titles of the two bills are confusingly similar). Senator Sessions, of course, is a member of the minority party in Congress. His sponsorship of a serious proposal in this area illustrates that arbitration legislation is part of the agenda for both major U.S. political parties.

Just like the Arbitration Fairness Act sponsored by Senator Feingold, the Fair Arbitration Act sponsored by Senator Sessions is not restricted solely to consumer and similar arbitration involving individuals. Instead, Senator Sessions' bill also covers all arbitration (international as well as domestic). As explained below, the text of Senator Sessions' legislation will come as a surprise to many commercial and international arbitration practitioners.

The CRS official summary of this bill states:

> Requires a contract containing an arbitration clause, in order to be binding on the parties, to: (1) have a heading "ARBITRATION CLAUSE" printed in bold, capital letters; (2) state explicitly whether participation in arbitration is mandatory or optional; (3) identify a source that a consumer or employee can contact for additional information regarding the arbitration program; and (4) provide notice that all parties retain the right to resolve a dispute in a small claims court for a claim of $50,000 or less.
>
> Entitles each party under arbitration to: (1) a competent, neutral arbitrator and independent, neutral administration of the dispute; (2) representation by an attorney or other representative at such party's expense; (3) a fair arbitration hearing; (4) a face-to-face hearing; (5) the right to present evidence and cross examine witnesses; (6) a written explanation of the basis for the arbitrator's decision; and (7) the right to opt out of binding arbitration and into the small claims court (for claims of $50,000 or less).
>
> Prescribes procedures for complaints by any party of denial of rights by the other party or the arbitrator.

These provisions do not initially appear to undermine long-standing foundations of U.S. arbitration. The specific text of the proposed Fair Arbitration Act, however, contains a number of changes to the framework for U.S. arbitration that may surprise arbitration observers. For example, the proposed Act appears to, *inter alia*:

(i) Bar ad hoc arbitration, notwithstanding the extraordinarily successful role played by the UNCITRAL Arbitration Rules in legitimating ad hoc arbitrations in international arbitration (The proposed Act provides: "The arbitration shall be administered by an independent, neutral alternative dispute resolution organization to ensure fairness and neutrality and prevent ex parte communication between parties and the arbitrator.").

(ii) Prohibit institutional appointment of arbitrators (The proposed Act states: "Each party shall have a vote in the selection of the arbitrator"). This provision appears to require party-appointed arbitrators, instead of allowing the parties to agree that an arbitral institution may select the entire arbitral panel. Additionally, this language leaves unclear how the chair of a three-member tribunal would be selected in the case of deadlock.

(iii) Establish broad arbitrator disclosure obligations, ban arbitrators from serving if they have "any relation to the underlying dispute or to the parties or their counsel that may create an appearance of bias," and statutorily obligate an arbitrator to comply with the 2004 ABA/AAA Code of Ethics for Arbitrators even if the arbitrator in question is a non-U.S. arbitrator. The proposed Fair Arbitration Act would consequently impose mandatory arbitrator disclosure and conflict-of-interest standards that are considered broader in many cases than, for example, the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration.

(iv) Mandate that, unless the parties mutually agree otherwise, the arbitrator must be a member of the bar of the court in the state where the arbitral hearing is sited. Accordingly, the Fair Arbitration Act would seem to ban all non-lawyer arbitrators. This would result in immediate unemployment for the many non-lawyer arbitrators in the construction, insurance, maritime and accounting industries. In addition, the Act would ban arbitrators not qualified as lawyers in the relevant U.S. hearing location. One result of this language would be to prohibit most non-U.S. arbitrators from serving on any arbitral tribunals for international arbitrations sited in the United States. Another consequence would be that a U.S. arbitrator who is a member solely of, say, the New

York State bar could not sit on an arbitral panel located in Chicago, Illinois or San Francisco, California, unless both parties so agreed.

(v) Require that the substance of the dispute must be resolved under the same substantive law that would be applied pursuant to the choice-of-law principles applicable in a court of the state in which the party who is not the contract drafter resided. That choice-of-law rule is quite different from the well-accepted "most significant relationship" and "closest connection" choice-of-law principles used throughout the U.S. and Europe to identify the substantive law applicable to contractual obligations.

(vi) Provide that "consistent with the expedited nature of arbitration, relevant and necessary pre-hearing depositions shall be available to each party at the direction of the arbitrator" and require parties to the arbitration to "grant access to all information reasonably relevant to the dispute to the other parties, subject to any applicable privilege or other limitation on discovery under applicable State law." As international practitioners are aware, the mere mention of "depositions," no matter how carefully limited, gives heartburn to many non-U.S. parties and arbitration practitioners. In contrast, the International Centre for Dispute Resolution (ICDR), the international arm of the American Arbitration Association, is seeking to move international arbitration in the exact opposite direction—the ICDR recently issued Guidelines for Arbitrators Concerning Exchanges of Information that clearly states, "Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration." The ICDR's efforts to rein in the use of U.S. discovery techniques in international arbitration stand in sharp contrast to the endorsement of those tools in Sen. Sessions' proposed Fair Arbitration Act. That contrast illustrates clearly the disconnect between the consumer/employment-focused effort to regulate arbitration behind the pressure in Congress to regulate arbitration and the concerns of the international arbitration community.

(vii) Specify fixed outside dates for answers (30 days after the complaint); hearings (90 days following the answer, with an "extraordinary circumstances" exception); and decisions (30 days following the hearings). The Fair Arbitration Act would be federal statutory law. Therefore, if the Act were passed in the form proposed by Senator Sessions, none of these time periods could be altered by the parties, except where the text of the Act specifically authorized the parties to agree to the contrary. While the prospect of swifter resolution of business disputes is a goal of the ICDR, the International Chamber of Commerce and many others in the commercial and international arbitration field, the Fair Arbitration Act fixes these time periods in statutory concrete, without taking account of the complexity of the dispute. The Act would thus prevent the disputing parties or the arbitrators from establishing more sensible time periods for complex disputes or unexpected events. Virtually all arbitration treatises remind their readers that specifying short time deadlines in an arbitration clause is a trap for the unwary; imagine how much more painful if that trap cannot be avoided by mutual agreement of the parties. Moreover, just as a practical matter, these time periods are very tight for a procedure in which broad document production and deposition tools are available to the litigants, as the proposed Act contemplates.

As discussed above, many of these surprising provisions may just be the result of poor legislative drafting. Moreover, Senator Sessions' Fair Arbitration Act (like Senator Feingold's Arbitration Fairness Act) may in reality be targeted only at consumer and similar arbitrations involving contracts of adhesion. Still, many members of Congress, on both sides of the aisle, are moving forward to rethink arbitration. Therefore, members of the arbitration community worldwide should watch developments in the U.S. carefully as 2009 unfolds.

Mark Kantor is an independent arbitrator. He teaches both international arbitration and international business transactions as an Adjunct Professor at Georgetown University Law Center and is a Fellow at the Columbia Program on International Investment (a joint undertaking of Columbia Law School and the Earth Institute at Columbia University). He can be contacted on the web at http://clik.to/kantor and by e-mail at mkantor@mark-kantor.com.

New N.Y. Court Rules for ADR Neutral Qualification

A new Part 146, Rules of the Chief Administrative Judge, establishes statewide guidelines for the qualification and training of mediators and neutral evaluators serving on court rosters. Entitled, "Guidelines for Qualifications and Training of ADR Neutrals Serving on Court Rosters," they are not intended to cover arbitrators. Each District Administrative Judge may compile rosters of qualified neutrals; neutrals shall be redesignated to the roster in the district every two years.

Neutral evaluators must have substantial experience in the specific subject area of the cases referred to them, complete at least six hours of approved training in procedural and ethical matters related to early neutral evaluation, and be lawyers admitted to practice for at least five years or individuals who have served at least five years as judges. Mediators who wish to qualify for appointment to a court roster must have successfully completed at least 40 hours of approved training—at least 24 hours of training in basic mediation skills and techniques, and at least 16 hours of additional training in the specific mediation techniques pertaining to the subject area of the types of cases referred. Mediators must also have recent experience mediating cases in the subject area of the type of cases referred to them. All neutrals must attend at least six hours of additional approved training relevant to their respective practice areas every two years.

Part 146 was adopted and added on June 18, 2008. The full text of the new rules is available at http://www.courts.state.ny.us/rules/chiefadmin/146.shtml.

New Pilot Program at FINRA

The Financial Industry Regulatory Authority (FINRA) recently announced it will launch a two-year pilot program, whereby investors will be able to choose an arbitration panel of three public arbitrators. So far, six major financial institutions have volunteered to participate in the pilot program. It is anticipated that more than 400 arbitration cases will be referred by these institutions and may be heard by all public arbitrator panels. FINRA is reaching out to a wide range of other firms to join the pilot so that a variety of firm sizes and business models will be represented. The pilot will be available to eligible claims filed on or after October 6, 2008. The pilot program will be evaluated according to a number of criteria, including the percentage of investors who opt into the pilot and the percentage of investors who choose an all-public panel after opting in. FINRA will compare the results of pilot and non-pilot investor cases, including the percentage of cases that settle before award (and how quickly they settle). FINRA will also study the length of hearings and the use of expert witnesses in pilot and non-pilot cases.

Currently, an arbitration panel is composed of two public arbitrators, and one industry arbitrator (a person affiliated with the financial industry). Now, the investor filing for arbitration will have the right to choose a panel made up of three public arbitrators. The pilot program will give investors greater choice in selecting an arbitration panel. FINRA currently maintains a roster of approximately 6,400 arbitrators and conducts arbitrations in 73 hearing locations in the United States and abroad.

FINRA's press release about this new pilot program can be found at http://www.finra.org/PressRoom/NewsReleases/2008NewsReleases/P038958.

ICDR Issues New "Discovery" Guidelines

By James H. Carter

Everyone talks about the weather, but as Mark Twain famously said, no one does anything about it. Similarly, despite the existence of much lamenting of the fact that international commercial arbitration has tended to take on many of the trappings of common law (particularly U.S.) litigation, the wailing and hand wringing has been slow to develop into concrete proposals for action.

"These ICDR Guidelines, proposing limitations on 'discovery' in international proceedings under the ICDR International Rules, are not merely suggestions."

That changed in May 2008, when the American Arbitration Association's International Centre for Dispute Resolution (ICDR) promulgated its Guidelines for Arbitrators Concerning Exchanges of Information (available at http://www.adr.org). These ICDR Guidelines, proposing limitations on "discovery" in international proceedings under the ICDR International Rules, are not merely suggestions. For all ICDR-administered international cases commenced after May 31, 2008, they are mandatory. They also can be adopted at the discretion of individual tribunals in pending cases.

The ICDR Guidelines also are not mere "on the one hand, on the other hand" sets of suggestions that various factors be considered when tribunals address requests for discovery. Rather, they look very much like rules and, according to the introductory statement from the ICDR, they will be reflected in amendments incorporated into the next revision of the ICDR's International Arbitration Rules.

The ICDR Guidelines arose from the work of a task force composed of American and international arbitrators and practitioners. An initial issue it considered was whether to draft specific proposals, in the nature of potential rules, or more general admonitions of the type published recently by, for example, the International Chamber of Commerce Commission on Arbitration in its 2007 report, "Techniques for Controlling Time and Costs in Arbitration." The task force's decision, after careful discussion, was that the time had come to try to provide specific guidance to arbitrators and counsel on best practices that ordinarily should be followed, which is what the Guidelines then set out to do.

For document production, the Guidelines take as a baseline that each party will exchange with the other all documents upon which that party intends to rely. Thereafter, the tribunal will entertain document production requests, which are described in language familiar to readers of the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration. Production may be requested of documents in the opposing party's possession "not otherwise available to the party seeking the documents that are reasonably believed to exist and to be relevant and material to the outcome of the case." In addition, requests for documents must contain "a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case."

In a significant departure from litigation practice, the Guidelines provide that electronic documents are to be treated in essentially the same manner as paper documents and are not intended to be a new ocean available for imaginative fishing expeditions. Thus, electronic documents on which a party will rely are to be exchanged, and document requests may seek from opposing parties electronic documents on the same basis as requests for paper documents. The Guidelines specify that requests for documents maintained in electronic form "should be narrowly focused and structured to make searching for them as economical as possible." To me, this means requesting particular documents or categories of documents from the electronic files of named individuals or other specific files, rather than "any and all documents" requests to search all electronic files of entire corporate entities. When electronic documents are to be produced, the producing party has the option of making them available in the form most convenient and economical for it (which may be paper copies), unless there is good reason and a "compelling need" for access to the documents in a different form. The Guidelines also state that the tribunal "may direct testing or other means of focusing and limiting any search" for electronic documents.

In recognition of the fact that document production and preparation of written witness statements are the primary instruments of pre-hearing discovery, the ICDR Guidelines broadly reject the other implements of U.S. litigation discovery. Guideline 6B states:

> Depositions, interrogatories and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.

The ICDR Guidelines thus set their face firmly against depositions, in particular, in the normal case, although the language stating that they are "generally not appropriate" provides some leeway for use of depositions where a tribunal is convinced that they are appropriate and

necessary. For example, there may be material witnesses not under the control of either party and thus not willing to submit a witness statement and/or unlikely to be available at the hearing. If such witnesses are located in a jurisdiction where depositions in aid of arbitration are permitted, this language could be construed as allowing an exception.

In a further limitation on discovery beyond what is typically found in American courts, the Guidelines provide expressly for potential shifting of the cost of complying with discovery requests to the requesting party. Guideline 8A states that, in resolving a dispute about document exchanges, a tribunal "shall require a requesting party to justify the time and expense that its request may involve, and may condition granting such a request on the payment of part or all of the cost by the party seeking the information." The Guideline adds that the tribunal may allocate the costs of such document production either in an interim order or in an award.

Finally, the Guidelines require arbitral tribunals to respect applicable rules of privilege or professional ethics. When the parties, their counsel or the documents are subject under applicable law to different rules, the Guideline states that "the tribunal should to the extent possible apply the same rule to both sides, giving preference to the rule that provides the highest level of protection."

Broadly speaking, international arbitration rules now resemble each other, with minor variations. Their preference has been to say virtually nothing specific about discovery, leaving the subject entirely to individual arbitrator discretion. Will other rules drafters be content with that solution, perhaps supplemented by non-binding guides on some aspects of discovery, or will specific discovery rules now multiply?

Also, what about U.S. domestic arbitrations among business entities? For the present, the ICDR Guidelines apply only to international cases administered by the ICDR; but if they prove popular, who knows what might be next?

James H. Carter is Co-chair of Sullivan & Cromwell LLP's international arbitration practice. He and John Beechey were Co-chairs of the AAA Task Force that prepared the ICDR Guidelines. He can be reached at CarterJ@sullcrom.com

The European Directive on Commercial Mediation: What it Means, What It Says, and What It Doesn't

By F. Peter Phillips

On May 21, 2008, the European Parliament enacted a Directive on mediation in civil and commercial matters. The Directive (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:HTML) culminated a 10-year process that occasioned each member of the European community to consider the role of mediation in commercial affairs, and to take a position on the minimum requirements of the use of commercial mediation throughout the region.

The Directive represents an intentional effort, on a pan-European scale, to achieve a degree of homogeny and predictability in the treatment of mediated resolutions of commercial disputes. Such a singular event deserves our study, encouragement and support.

Context of the Directive

As the practice of commercial ADR has grown around the world, certain aspects of its legal and commercial recognition have followed—some quickly, as in the United Kingdom, and others slowly. In the United States alone, some jurisdictions have adopted the Uniform Mediation Act and others have not; some states have approved ethical regulations requiring advising clients of ADR and others have not; and so on.

In Europe, the absence of uniform treatment of rudimentary ADR processes has been regarded by some observers as an inconvenience, and by others as a palpable hindrance to commercial growth in the region. The process of regional homogenization began with a call, in 1998, for the European Commission to issue a Green Paper on the use of mediation in civil and commercial matters (excluding arbitration).

The European Commission's 2002 Green Paper (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002DC0196:EN:HTML) set forth some observations on the desirability of pan-European ADR practices in a wide range of civil disputes (including family law, commercial disputes and consumer complaints), and prompted more than 160 responses. (See summary at http://ec.europa.eu/civiljustice/adr/adr_ec_en.pdf.) Despite this showing of interest, the European Parliament remained unconvinced that a centrally derived set of shared requirements was needed to stimulate economic efficiencies in the management and resolution of commercial disputes in the region.

In 2005, Member of European Parliament Arlene McCarthy promulgated a questionnaire on the proposed ADR Directive that had the effect of convincing some skeptics that the need existed for uniform treatment of ADR, at least in the commercial sector. The energy driving the movement was then recharged, and the Directive was eventually approved in 2008.

Political Philosophy of the European Parliament

Europe is not a sovereign state, and the European Parliament is not a strictly legislative body in the way Americans conceive the term. Rather, the sovereign states that are members of the European Union have agreed to grant to a European Parliament the power to issue "Directives," which are statements of political or governmental objectives that each of the sovereign states constituting the Union must thereafter achieve by enacting laws that are consistent with those objectives. That is to say, in the case of the ADR Directive, the members of the European Union must, within 30 months of official publication of the Directive, enact their own laws whose provisions are consistent with and enact the stated provisions in the Directive; but each state is free to do so pursuant to laws of its own making.

The Directive is therefore not a harmonious law applicable throughout Europe, but rather a statement of political principles that are to be enacted by the several states so as to be consistent throughout Europe.

Two philosophical principles inform this process, and their effects may be seen in the substance of the Directive itself. One is "subsidiarity," which teaches that no act should take place by any level of government that could equally effectively take place by a smaller one, or a more local one. Thus, in the ADR Directive, the government in Brussels is agreeing upon an outcome, but then instructing each of its constituent governments to do the actual enacting of legislation.

The second principle is "proportionality." This concept instructs that a government should reach only so far as is absolutely necessary in order to accomplish a particular goal and no further. Adherence to this principle is evident in, for example, the provisions of the Directive that limit its scope to cross-border commercial disputes. Because the initial issue was homogenization of pan-European commercial transactions, it followed that transactions within a particular member state were not properly within the domain of pan-European concerns and should not be included in the Directive.

Provisions of the Directive

Scope: The United Kingdom and Ireland have voluntarily agreed to be bound, although they would not otherwise have been, and Denmark has exempted itself. As a result, all states within the EU except Denmark are bound.

As previously noted, the Directive applies only to cross-border disputes and only to civil and commercial matters. That means that matters that arise internally—for example, between two French companies or between two German companies—are unaffected by the Directive. The Directive also excludes disputes sounding in family law and community law.

The Directive does not apply to administrative actions, to matters in which the state itself may be liable, and to any efforts by courts to settle matters that are before them.

Finally, the Directive does not apply "to rights and obligations on which the parties are not free to decide themselves." The import of this exclusion in a commercial context is unclear, because there are many commercial contracts where one could argue that one party or the other was "not free to decide themselves." For example, prospective McDonald's franchisees are given a contract that they will either accept or reject; McDonald's does not negotiate the provisions of its agreements with each franchisee. Thus, the application of this proviso to numerous commercial transactions that are presumably within the intent of the Directive drafters will need to be developed; it will be interesting to watch what the various national legislatures do with the language.

Mediation Quality: The Directive calls on the states to "encourage voluntary codes of conduct by mediators and by organizations providing mediation services." This is substantially short of a requirement that mediators must be licensed. Instead, the states "shall encourage codes of ethics and shall encourage training of mediators to ensure effectiveness, impartiality and competence in relation to the parties."

Status of Agreements Achieved Through Mediation and of Agreements to Mediate: The Directive requires states to provide for enforcement of agreements that result from mediation. This is particularly useful in a region of many languages and laws, almost all of whose civil justice systems are enshrined in a Civil Code. Each Civil Code will now grant judges the power to recognize settlement agreements obtained through mediation to be enforceable contracts.

However, the Directive does not address whether an agreement to mediate—including, for example, an agreement that mediation must take place as a condition precedent to arbitration—is enforceable.

Tolling the Statute of Limitations: In elegant phrasing, the Directive provides that "parties who choose mediation in an attempt to settle a dispute are not [to be] subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process." Thus, unless treaties or other international obligations proscribe it, mediation shall effectively toll the statute of limitations on a civil claim.

Confidentiality: Article Seven of the Directive addresses the confidentiality of mediation processes and provides: "Mediators and those administering mediation shall not be compelled to give evidence in civil and commercial judicial proceedings or in arbitration" except in limited circumstances. The flaw in this provision is that any statement, offer, demand or concession made by a party during mediated settlement discussions can be repeated, reproduced, compelled, broadcast or entered in evidence by anybody except the mediator.

Many commentators tried to make clear to the drafters of the Directive that the mediator is not the problem. The heart of the concern is that no well-counseled party will enter into serious negotiations of compromise if one's adversary can take any statement made during negotiations and use it in open court, in arbitration, in regulatory proceedings, or in the press.

Closing Observations

Many corporate leaders invested in the European market have long held that the greatest obstacle to the growth of commercial mediation in Europe is not its lack of regulation, or even the differences in the legal status of mediation sessions or mediated agreements, but rather the lack of awareness of the economic benefit of mediation, and ignorance of what mediation is and how it works. Too many European businesses and their legal counsel don't understand what commercial mediation is, what it does, how you do it, and why it saves money.

The greatest need, therefore, is pan-European education and advocacy, and an understanding from the business level, not from the legal sector, of how to do business better by solving commercial problems better. In other words, the challenge is not that commercial mediation is not practiced well enough; it is that it is not practiced enough. Perhaps what is needed in Europe today is the service that the Center for Public Resources provided in the United States in the 1980s.

Nevertheless, the consideration of this Directive was thorough and deliberative. In the course of the preparation of the Directive, the Ministers of Justice of each of the European Union's constituent members studied a topic that most of them had never addressed. The entire 10-year process of framing, and eventually enacting, the EU Directive speaks to the first plenary opportunity that Europe had to look at this process. In that sense, it is warmly welcome.

F. Peter Phillips is an arbitrator, mediator and dispute management consultant practicing through Business Conflict Management LLC in Montclair, NJ (www.BusinessConflictManagement.com) and was formerly Senior Vice President of the International Institute for Conflict Prevention and Resolution (CPR). He may be contacted at Peter.Phillips@BusinessConflictManagement.com.

The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards

By Stephanie Cohen

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or the "Convention")[1] is a strong incentive to choose arbitration as a means of international dispute resolution. The Convention eliminates some of the uncertainties of transnational business by providing a uniform legal framework for the enforcement and recognition of foreign arbitration agreements and arbitration awards in 142 contracting states, including the United States.[2] By contrast, there is no international regime for the enforcement and recognition of foreign court judgments.[3] It has been said that the Convention, which is celebrating its 50th year, "could lay claim to be the most effective instance of international legislation in the entire history of commercial law."[4] This article provides an overview of the Convention's origin and purpose, in addition to the key substantive provisions of the Convention and its implementing legislation in the United States. The article also summarizes major criticisms of the Convention and suggested improvements.

Origin and Purpose

The New York Convention originates in a report and preliminary draft convention that was presented by the International Chamber of Commerce to the United Nations Economic and Social Council (ECOSOC) in 1953, as a proposed replacement for the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (the "Geneva Convention").[5] The ECOSOC subsequently presented a revised draft convention to a conference at the United Nations in New York from May 20 to June 10, 1958, which resulted in the adoption of the Convention in its current form.[6]

A major impetus for adopting the New York Convention was the elimination of a cumbersome procedure under the Geneva Convention known as "double exequatur." Because the Geneva Convention required that a party seeking enforcement of an award first prove that the award is "final," many courts interpreted the Geneva Convention to require that a party obtain leave for enforcement in the country of the award's origin before seeking enforcement abroad.[7] The New York Convention sought to streamline enforcement procedures by requiring that an award be "binding" instead of "final," and by shifting the burden of proof to the party against whom enforcement is sought.

Another major impetus for the New York Convention was its limitation of the grounds (set forth below) that could be relied upon by national courts to refuse to enforce an award rendered abroad.

The Convention's Enforcement Regime

Signatories to the New York Convention have two principal obligations.

First, they must recognize "written" arbitration agreements, which are defined in Article II(2) to include "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

Second, they must recognize and enforce foreign arbitral awards as "binding" in accordance with national rules of procedure.[8]

With respect to the second obligation, Article V(1) stipulates that recognition and enforcement of an award "may be refused . . . only if [the party resisting enforcement]" proves: (a) incapacity of a party or that there was an invalid arbitration agreement; (b) a party had improper notice or was unable to present its case; (c) the award exceeded the scope of the submission to arbitration; (d) there were defects in the composition of the tribunal or selection procedure; or (e) the award has not yet become binding on the parties, or has been set aside. In addition to these grounds, under Article V(2), a court may decline to enforce an award on its own initiative if either the subject matter is not capable of settlement by arbitration under its laws, or if recognition or enforcement would be contrary to the "public policy of that country."

Notwithstanding the unenforceability of an award under Article V, as discussed below, some national courts have enforced awards by invoking Article VII(1) to apply more favorable national arbitration law.[9] Article VII(1) provides that the Convention's provisions shall not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

U.S. Implementation of the Convention

The United States was slow to adopt the New York Convention. It was not until 1970, 12 years after the Convention was signed, that the United States acceded

to it, and that Congress passed Chapter 2 of the Federal Arbitration Act (the "FAA") in order to implement it.[10] Specifically, Section 202 of the FAA applies the New York Convention in the United States to arbitration agreements and awards that relate to "commercial" disputes that are "not considered as domestic."[11]

The two principal obligations of signatories to the New York Convention are tracked in Sections 206 and 207 of the FAA. Section 206 authorizes federal courts to compel arbitration and appoint arbitrators in accordance with an arbitration agreement governed by the Convention, regardless of whether arbitration is to take place in or out of the United States. Section 207 provides that upon the application of a party within three years of an award having been made, a court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the . . . Convention."

As a procedural matter, Section 203 confers subject matter jurisdiction over any proceeding falling under the Convention on the federal courts, while Section 204 specifies the district courts with proper venue. Further, if a proceeding governed by the New York Convention is brought in state court, it may be removed to federal court under Section 205.[12] Finally, Section 208 provides that Chapter 1, which governs the enforcement of domestic awards, has residual effect to proceedings under Chapter 2, to the extent that it is "not in conflict" with Chapter 2 or "the Convention as ratified by the United States."[13]

Not a Perfect Document[14]

In the 50 years since the New York Convention was signed, it has proved highly effective in the enforcement of foreign arbitral awards abroad.[15] In the United States, ratification of the Convention also has contributed to a strong federal policy favoring arbitration.[16] Nonetheless, the Convention has been criticized for textual ambiguities that have resulted in disparate judicial treatment of foreign arbitral awards, as well as costly litigation and lengthy delays in enforcement. A few of the more prominent criticisms of the Convention's enforcement regime are as follows:

The Requirement of a "Written" Arbitration Agreement Is Too Strict and Outdated

Commentators have long lamented that the requirement that an arbitration agreement be in "writing," as defined in Article II(2), is out of step with commercial practice, including e-commerce, and that it is unnecessarily stricter than most national laws.[17] While some national courts have "corrected" this problem by interpreting Article II(2) expansively or relying on national law for determining compliance with the writing requirement,[18] the degree to which strict adherence to Article II(2) is required by national courts has resulted in inconsistent application of the Convention.[19]

To address this disparity, UNCITRAL adopted a recommendation in July 2006 that Article II(2) be applied "recognizing that the circumstances described therein are not exhaustive."[20] It further recommended that the "more favorable rights" provision of Article VII(1) be interpreted to allow "any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement."[21] In doing so, UNCITRAL acknowledged both the "wide use of electronic commerce" and that domestic legislation and case law may be more favorable than the Convention in respect of the form requirement for a valid arbitration agreement.[22] Whether the UNCITRAL recommendation will be effective in harmonizing application of Article II(2) remains to be seen.

The Application of National Procedural Rules to Enforcement Proceedings Creates Invisible Barriers to Global Enforcement

By specifying in Article III that the signatories to the Convention enforce arbitral awards "in accordance with the rules of procedure of the territory where the award is relied upon," the application of national rules of procedure may result in unforeseen barriers to the enforcement of arbitral awards.[23] In the United States, for example, enforcement proceedings have failed based on jurisdictional requirements of federal civil procedure even though awards otherwise were enforceable under Article V of the Convention.[24]

Article V(1)(e) of the Convention Fails to Define the Term "Binding"

Article V(1)(e) provides that enforcement may be refused if the award has not yet become "binding" on the parties, but leaves that term undefined. Although there appears to be a consensus that "binding" does not require a party to obtain leave for enforcement in the country of the award's origin (as many courts interpreted the Geneva Convention to require), there are divergent interpretations in national courts regarding what law should be applied to the question of whether an award is considered binding.[25] One approach, for example, is to consider an award binding if it is no longer subject to appeal on the merits, while another approach is to consider an award binding unless it has been set aside or suspended.[26]

Article V(2)(b) Fails to Establish a Common International Standard of Public Policy

Article V(2)(b) permits a country in which recognition or enforcement is sought to refuse to do so if it would be "contrary to the public policy of that country," but does not draw any distinction between public policy for domestic relations and public policy for international relations.[27] Even though numerous national courts, including federal courts in the United States,[28] have applied a restrictive concept of international public policy to enforcement under the Convention, losing parties may be

encouraged by this ambiguity in the Convention to resist enforcement of arbitral awards on the basis of domestic public policy.[29]

Tension Between Article V(1)(e) and Article VII(1) Creates the Potential for Disparate National Rules of Enforcement and Conflicting Judgments in the Same Dispute

Some have reasoned that by using the word "may" in Article V(1)(e), the Convention grants courts discretion to enforce awards that have been set aside in the country of origin.[30] Others argue the use of the word "shall" in Article VII(1) compels enforcement of an otherwise unenforceable award if domestic law provides more favorable rights.[31] Because the Convention is silent regarding the standards for annulling an arbitration award, or when annulments should have extraterritorial effect, the interplay between these two provisions creates both the possibility of (i) disparate national rules of enforcement, and (ii) conflicting decisions in the same dispute resulting from the enforcement of awards that have been set aside in the place of arbitration.[32]

In the United States, these issues first surfaced in the *Chromalloy* case in 1996.[33] In that case, a court in the District Court of Columbia invoked Article VII to enforce an award made in Egypt that had been annulled by an Egyptian court, reasoning that the award would not have been annulled under U.S. domestic arbitration law. Subsequently, U.S. courts have largely distinguished *Chromalloy* and granted comity to foreign judgments annulling awards.[34] In addition, the D.C. Court of Appeals recently held that a foreign court judgment annulling an award should be respected, absent evidence that the foreign court proceedings were "fatally flawed" procedurally or that the judgment was inauthentic.[35]

The Convention Is Silent on Judicial Authority to Grant Pre-Award Attachments and Other Interim Measures

Because there are no express provisions in the Convention regarding the competence of courts to grant interim measures in aid of foreign arbitration, it is an open question whether national courts are competent to grant pre-award attachment in aid of foreign arbitrations.[36] According to one commentator, "by spinning a web of conflicting precedent and inexplicable exceptions" on this issue, "U.S. courts have increased the cost of private dispute resolution in international transactions."[37]

The Future of the Convention

Such criticisms of the Convention have led to radical proposals for improvement of the international enforcement regime for arbitration agreements and awards. Most notably, in 1993, Judges Howard M. Holtzmann and Stephen M. Schwebel advocated the creation of an International Court of Arbitral Awards with exclusive jurisdiction to determine whether recognition and enforcement of an international award could be refused under the New York Convention,[38] while in June 2008, the foremost authority on the Convention, Professor Albert Jan van den Berg, proposed a "modernization" of the Convention.[39] Others have vigorously opposed tinkering with this highly successful Convention that binds 142 states, for fear that efforts to amend it could lead to its demise. While the adoption of such drastic proposals does seem unlikely given the number and diversity of countries that are parties to the Convention,[40] other commentators have noted that harmonization in the global enforcement regime could be achieved through changes to national arbitration laws and recommendations regarding uniform interpretation by international bodies such as UNCITRAL.[41] However, practitioners can also take control of avoiding roadblocks to enforcement of international arbitration agreements and awards by drafting better arbitration clauses and undertaking due diligence regarding the arbitration laws of countries where international arbitrations will take place and where awards are likely to be enforced.[42]

Endnotes

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38, implemented by Chapter 2 of the Federal Arbitration Act, 9 U.S.C. § 201.
2. *See* United Nations Commission on International Trade Law ("UNCITRAL"), Status Table for the Convention, http://www.uncitral.org/uncitral /en/uncitral_texts/arbitration/NYConvention_status.html (last visited July 22, 2008).
3. On June 30, 2005, the Convention on Choice of Court Agreements, governing the recognition and enforcement of certain foreign court judgments, was included in the Final Act of the Twentieth Session of the Hague Conference on Private International Law. Of the Hague Conference's 69 Member States, only Mexico has ratified that convention to date. *See* http://www.hcch.net/index_en.php?act=conventions. text&cid=98 (last visited July 22, 2008).
4. Alan Redfern, *Having Confidence in International Arbitration*, 57 Disp. Resol. J. 60, 61 (2003) (internal quotation omitted). *See also* Gary Born, *International Commercial Arbitration in the United States: Commentary and Materials* 18 (1994).
5. ICC, *Enforcement of International Arbitral Awards: Report and Preliminary Draft Convention*, reprint of ICC Publication No. 174, *in* 9 ICC Bulletin 32 (1998); Geneva Convention, Sept. 26, 1927, 92 L.N.T.S. 302. *See also* Charles H. Brower II, *What I Tell You Three Times Is True: U.S. Courts and Pre-Award Interim Measures Under the New York Convention*, 35 Va. J. Int'l L. 971, 1012 (1994-1995).
6. *Id.* at 1012–14.
7. Albert Jan van den Berg, *The New York Convention of 1958: An Overview* 1, 17 (June 6, 2008), http://www.arbitration-icca.org/articles.html (last visited July 23, 2008).
8. *See* New York Convention, *supra* note 1, Article III.
9. *See* van den Berg, *supra* note 7 at 21.
10. *See supra* note 2.
11. 9 U.S.C. § 202 (applying the New York Convention to commercial legal relationships to which either a non-citizen is a party or there is a reasonable relation with one or more foreign states). *See also Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2d Cir. 1997).

12. There are significant procedural differences between the enforcement regimes for domestic and international awards under the FAA. In particular, under Chapter 2, there is a longer statute of limitations period for confirming a Convention award, and, unlike Chapter 1, Chapter 2 provides for federal subject-matter jurisdiction. *See* 9 U.S.C. §§ 9, 207.

13. In light of this provision, some U.S. courts have held that a party seeking to vacate an award covered by the Convention but *made in the United States* may invoke both the grounds for refusing to enforce an award which are set forth in Article V of the Convention and the "full panoply of express and implied grounds for relief" contained in § 10 of the FAA. *See Toys "R" Us*, 126 F.3d at 23, *supra* note 11. Practically speaking, however, since the U.S. Supreme Court's recent ruling in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, No. 06-989, 2008 WL 762537 (Mar. 25, 2008) has called into question the availability of any implied grounds for relief under § 10 of the FAA, there is substantial overlap between the grounds for vacating an award under Chapters 1 and 2 of the FAA. *See, e.g., Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969, 976 (2d Cir. 1974) (observing that Article V(1)(c) of the New York Convention merely "tracks in more detailed form 10(d) of the Federal Arbitration Act").

14. A comment made in Dana Freyer and Hamid Gharavi, *Finality and Enforceability of Foreign Arbitral Awards: From "Double Exequatur" to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity*, 13(1) ICSID Rev. 101, 102 (1998).

15. *See* Albert Jan van den Berg, *New York Convention of 1958: Refusals of Enforcement*, 18 ICC Bulletin 1, 34-35 (2007) (noting that out of some 1,400 court decisions on the interpretation and application of the New York Convention, there were refusals in roughly 10% of the cases, and that a "fair number of the decisions resulted from a mistake of one kind or another," such as parties drafting inadequate arbitration clauses). *See also* Freyer and Gharavi, *supra* note 14 at 102; Robert Briner, *Philosophy and Objectives of the Convention*, *in* Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects 8, 8 (June 10, 1998), http://www.uncitral.org /uncitral /search. html?q=new+york+convention (last visited July 23, 2008).

16. *See, e.g., Scherk v. Alberto-Culber Co.*, 417 U.S. 506, 520 note 15 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *Toys "R" Us*, 126 F.3d at 23, *supra* note 11.

17. *See* Neil Kaplan, *Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?*, 12 Arb. Int'l 28, 43 (1996); Vivienne M. Ashman, *UNCITRAL Initiatives to Further Harmonize and Modernize Arbitration Laws, Rules and Practices*, *in* Practising Law Institute, Litigation and Administrative Practice Course Handbook Series 635, 651 (2000); *Q&A with Albert Jan van den Berg*, 3 Global Arb. Rev. 21, 21 (2008).

18. *See* van den Berg, *supra* note 7 at 7.

19. *See* Susan L. Karmanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and the United States Courts*, 34 Geo. Wash. Int'l L. Rev. 17, 67–74 (2002); van den Berg, *supra* note 15 at 3–6. *Compare, e.g., Khan Lucas Lancaster, Inc. v. Lark Intern. Ltd.*, 186 F.3d 210 (2d Cir. 1999) *and Filanto, SpA v. Chilewich Intern. Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992); *Genesco Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840 (2d Cir. 1987).

20. UNCITRAL, Recommendation Regarding the Interpretation of Article II(2) and VII(1), http://www.uncitral. org/uncitral/en/ uncitral_texts/arbitration/2006recommendation.html (last visited July 25, 2008).

21. *Id*.

22. *Id.*

23. S.I. Strong, *Invisible Barriers to the Enforcement of Foreign Arbitral Awards in the United States*, 21 J. Int'l Arb. 439 (2007); van den Berg, *supra* note 15 at 22–23.

24. *See, e.g., Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 479 F. Supp. 2d 376 (S.D.N.Y. 2007); *Transatlantic Bulk Shipping Ltd. v. Saudi Chartering S.A.*, 622 F.Supp. 25 (S.D.N.Y. 1985). *See also* van den Berg, *supra* note 15 at 22–23; Lawrence S. Schaner, John R. Schleppenbach, *Looking Back at 2007: Another Good Year for the Enforcement of International Arbitral Awards in the U.S.*, 63 Disp. Resol. J. 80, 85 (2008).

25. *See* Freyer and Gharavi, *supra* note14 at 103–07; van den Berg, *supra* note 7 at 17; van den Berg, *supra* note 15 at 14–15.

26. *See* Freyer and Gharavi, *supra* note 14 at 103–07.

27. *See* van den Berg, *supra* note 15 at 18.

28. *See Parsons & Whittemore*, 508 F.2d at 974, *supra* note 13.

29. *See* Audley Sheppard, *Interim ILA Report on Public Policy as Bar to Enforcement of International Arbitral Awards*, 19 Arb. Int'l 217, 220, 247 (2003).

30. *See* Kenneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 37 Tex. Int'l L.J. 43, 57 (2002); van den Berg, *supra* note 15 at 15–17.

31. *Id.*

32. Courts in the United States and France have enforced awards despite that they were set aside in their countries of origin. *See In re Chromalloy Aeroservices*, 939 F.Supp. 907 (D.C. Cir. 1996); *Omnium de Traitement et de Valorisation v. Hilmarton*, reported in Y.B. Comm. Arb. XXII (1997), 696–701 (France No. 45).

33. *See Chromalloy Aeroservices*, 939 F.Supp. at 909, *supra* note 32.

34. *See, e.g., Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.* 191 F.3d 194 (2d Cir. 1999); *Spier v. Calzaturificio Tecnica, S.p.A*, 71 F. Supp. 2d 279 (S.D.N.Y. 1999).

35. *TermoRío S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 941 (D.C. Cir. 2007).

36. *See* van den Berg, *supra* note 7 at 12; Charles H. Brower II, *supra* note 5 at 973.

37. *Id.*

38. *See* Charles N. Brower, *Keynote Address at Premier Arbitration Conference*, 13 World Arb. & Mediation Rep. 270, 271 (2002), *citing* Howard M. Holtzmann, *A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards*, *in* The Internationalisation of International Arbitration, the LCIA Centenary Conference 111 (Martin Hunter et al. eds., 1995) and Stephen M. Schwebel, *The Creation and Operation of an International Court of Arbitral Awards*, in *id.* at 115.

39. *Q&A with Albert Jan van den Berg*, *supra* note 17 (explaining that he drafted an amended Convention because "the New York Convention is really ageing and . . . need[s] to be modernised, also because courts have become more critical of arbitration").

40. *See* Charles N. Brower, *supra* note 38 at 293; *Sheppard*, *supra* note 29 at 247; Freyer and Gharavi, *supra* note 14 at 114.

41. *See, e.g.,* Pieter Sanders, *The Making of the Convention*, *in* Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects 3, 4–5 (June 10, 1998), http://www.uncitral.org/ uncitral/search. html?q=new+york+convention (last visited July 23, 2008); William W. Park, *Duty and Discretion in International Arbitration*, 15 Mealey's Int'l Arb. R. 28, 39 (2000) (calling for a new federal international arbitration act in the United States).

42. *See* Freyer and Gharavi, *supra* note 14 at 110.

Stephanie Cohen is a senior associate in the New York office of White & Case LLP who has acted as counsel in several international arbitrations. She can be reached at scohen@whitecase.com. Research assistance for this article was provided by summer associate Ana Sempertegui, a student at Northwestern University School of Law.

Investor-State Arbitration: An Overview on ICSID

By Janet Whittaker

1. Introduction

While in recent months actual and threatened withdrawals by certain Latin American states have raised concerns about the future of investor-state dispute resolution in that region, the World Bank's International Centre for Settlement of Investment Disputes (ICSID) continues to be the world's foremost forum for the resolution of disputes between states and investors. Established in 1966 under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID or Washington Convention),[1] ICSID today boasts more than 140 member states (155 signatory states in total), including both developed and developing nations.[2] ICSID is one of the World Bank's tools for development. The mission through ICSID is to foster the rule of law, thereby increasing legal security and promoting investment in member countries and stimulating economic growth.

The ICSID Convention created an innovative and novel mechanism via which investors can assert direct claims for breach of treaty or contract rights against host states through neutral international arbitration. Previously, an investor was limited in its avenues for recourse against a host state either to taking an action in the home courts of that state, presenting issues surrounding the impartiality of the domestic courts and the enforcement of any eventual judgment, or to lobbying its home government to espouse its claims in international proceedings against the host state, raising concerns about loss of control and frequently the need to exhaust local remedies before diplomatic protection could be pursued.

Under the ICSID Convention, signatory states agree in advance—through investment treaties and investment agreements—to arbitrate disputes brought by an investor concerning alleged violations of investment protections. There is no appeal from ICSID awards, which must be enforced by a member state as though they were final judgments of that state's highest court. In return for according this increased legal certainty to investors, ICSID member states expect to attract increased investment from capital-exporting states which can have greater confidence in the viability of their investments.

2. The Rapid Growth and Influence of ICSID Arbitration

The use of ICSID arbitration has increased exponentially over the past two decades. With fewer than 30 cases having been filed before 1990, the number of cases registered by ICSID over its lifetime is now almost 270.[3] Indeed, ICSID has registered 25 cases in the past year alone, covering a wide range of subjects, including debt instruments, hydrocarbon concessions, oil and gas enterprises and telecommunications.

As most ICSID arbitration claims assert violations of a bilateral investment treaty (BIT) or the investment chapter of a free trade agreement (FTA) (e.g., the North American Free Trade Agreement (NAFTA)), the rapid explosion of ICSID arbitration has proceeded hand-in-hand with the burgeoning number of BITs and FTAs concluded over the past 25 years. These instruments accord certain investment protections to investors, including substantive guarantees of fair and equitable treatment, national and Most Favored Nation treatment, full protection and security, and a prohibition on expropriation without compensation, as well as a promise to resolve disputes via international arbitration. During the 1990s alone, the number of BITs increased four-fold, with more than 2,600 BITs being in existence today. Although these BITs and FTAs typically provide for a choice of fora for resolution of disputes arising under them, the most commonly chosen forum is ICSID.

The increased volume of cases has led to a growing number of issues touching upon matters of public policy and complex questions of international law on the treatment of foreign investors. As a result, ICSID cases are drawing increasing public attention and, in some cases, criticism. In response to the increased call for public participation, ICSID recently amended its rules to permit the filing of *amicus curiae* submissions under certain conditions. ICSID serves an important role in the development of international law and ICSID awards increasingly are being referred to in discussions of the law on state responsibility.

3. Organization of ICSID

ICSID has an Administrative Council and a Secretariat. The Administrative Council is responsible for, *inter alia*, adopting ICSID's rules of procedure for arbitration and conciliation, and is composed of one representative of each contracting state. ICSID's Secretary General presides over the Secretariat, which provides administrative services to tribunals and parties in ICSID arbitrations. The Secretary General serves as the registrar for ICSID arbitrations and has the power to authenticate ICSID awards.

For ICSID proceedings, ICSID maintains a Panel of Arbitrators, composed of designees of member states, each of which has the power to appoint four persons to the Panel (who do not need to be nationals of the member state), together with 10 appointees nominated by the President of the World Bank, acting in his capacity of *ex*

officio Chairman of the Administrative Council. Similarly, ICSID administers a Panel of Conciliators.

Under the ICSID Additional Facility Rules established in 1978, certain disputes falling outside of the ICSID Convention may still be resolved at ICSID, including disputes arising directly out of an investment where one of the host states or the investor's home state has not ratified the ICSID Convention. The Additional Facility has been used in many disputes under NAFTA, two member states of which—Canada and Mexico—had not, until recently in the case of Canada, ratified the ICSID Convention. Canada is now in the process of completing the formal ratification process.

4. Jurisdiction of ICSID and Arbitration Procedure

The basic procedural framework for ICSID arbitration is provided by the ICSID Convention, and is supplemented by detailed rules, including the Rules of Procedure for Arbitration Proceedings (Arbitration Rules), which were amended most recently in 2006.

ICSID can exercise jurisdiction over (1) "any legal dispute arising directly out of an investment" (2) between a member state of ICSID and an investor—either an individual or company of another member state (3) that has been submitted to ICSID in writing by the parties (ICSID Convention, Art. 25). A host state may consent in advance to submit disputes to ICSID's jurisdiction through an arbitration clause in a BIT, FTA or an investment contract; an investor can simply accept this offer to arbitrate by filing a request for arbitration. Once the investor has invoked its right to ICSID arbitration with respect to a particular dispute, the member state cannot unilaterally retract its consent to arbitrate (ICSID Convention, Art. 25). As a pre-condition of registering a request for ICSID arbitration, the Secretary General must be satisfied that the dispute is not "manifestly outside the jurisdiction" of ICSID (ICSID Convention, Art. 36). Ultimately, the tribunal hearing the dispute will decide whether it has jurisdiction (ICSID Convention, Art. 41). An investor's decision to invoke ICSID arbitration has the effect of excluding its resort to any other remedy (ICSID Convention, Art. 26).

ICSID proceedings are commenced by way of a request for arbitration, providing information about "the issues in dispute, the identity of the parties and their consent to arbitration" (ICSID Convention, Art. 36). Once a tribunal is in place, ICSID cases are frequently bifurcated into two separate phases dealing with jurisdiction first, followed by issues concerning the merits of the case and damages. Each phase involves a written stage, during which the parties present their respective cases through written submissions, and an oral stage, consisting of a hearing at which the parties present factual and sometimes expert testimony. Tribunals also have the power to order the production of documents or other evidence at any stage of the proceedings (ICSID Convention, Art. 43).

Following the hearing, the tribunal issues a written award, which must be reasoned (ICSID Convention, Art. 48). ICSID can only publish the award with the consent of the parties (ICSID Convention, Art. 48). ICSID awards cannot be appealed or reviewed in domestic courts, but can be reviewed only via the mechanisms prescribed in the ICSID Convention (ICSID Convention, Art. 53). Specifically, a party may request annulment of an award by an ad hoc annulment Committee, which can set aside awards on certain limited grounds specified in the Convention; if an award is annulled, a party may resubmit the dispute to a new ICSID tribunal (ICSID Convention, Art. 52). While there is no binding precedent in ICSID cases, decisions of previous tribunals are frequently cited by parties and tribunals alike as persuasive authority.

5. Recent Developments at ICSID

Since the Centre's inception, proceedings have been brought at ICSID against over 50 states. The state against whom the greatest number of cases has been pursued is Argentina; most of these cases have arisen out of Argentina's economic crisis earlier this decade, and the measures taken by the government in response to that crisis, including currency devaluation.

Concerns recently have arisen that actions by Bolivia, Ecuador and Venezuela may affect investors' future access to ICSID arbitration for disputes arising out of their investments in those countries. On May 2, 2007, Bolivia formally denounced the ICSID Convention, representing the first time that a contracting state has withdrawn from ICSID. Bolivia's withdrawal from ICSID took effect six months following ICSID's receipt of the notice of denunciation, namely, on November 3, 2007 (ICSID Convention, Art. 71). While Bolivia's denunciation has no effect on its commitments under the Convention "arising out of consent to the jurisdiction of the Centre" given prior to ICSID's receipt of the notice of denunciation (ICSID Convention, Art. 72), issues surround the repercussions of that denunciation for investors now wishing to avail themselves of Bolivia's consent to ICSID jurisdiction under Bolivia's BITs.

While Ecuador has not denounced the ICSID Convention, it did declare in August 2008 that it was no longer willing to submit investment disputes to ICSID arbitration, and that it would cancel oil contracts with foreign investors unless they would commit to arbitrate in South America outside of the ICSID framework. Ecuador had previously in 2007 declared its intention to reassess its commitments under BITs, several of which permit investors to opt for ICSID arbitration, and a desire potentially to limit oil and mining disputes from being resolved at ICSID. Also in 2007, Venezuela declared its intention to withdraw from the World Bank. As yet, however, Ven-

ezuela has neither withdrawn from nor denounced the ICSID Convention or its BITs. These events are symptomatic of the rising tide of nationalism that has been sweeping certain Latin American states, which view the ICSID process as being predisposed against them.

Despite this perception that ICSID is one sided, the reality is different. Host states have often been successful in their disputes with investors. As reported by Ana Palacio, then Secretary General of ICSID, in a speech delivered in November 2007, about 40 percent of the proceedings have been settled amicably and final awards have been divided fairly evenly between awards ordering respondent governments to pay damages and awards dismissing claims on the merits or on jurisdictional grounds.[4] Accordingly, despite the recent dissent expressed by a limited number of states, it is clear that ICSID arbitration continues to serve its purpose as a vehicle for resolving investor-state disputes and thus promoting investment. Its sphere of influence will continue to develop in the future.

Endnotes

1. The ICSID Convention is available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf.
2. For a listing of member states, see http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDataRH&reqFrom=Main&actionVal=ViewContractingStates&range=A~B~C~D~E.
3. For a listing of ICSID cases, see http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ViewCases.
4. Ana Palacio, *Recent Institutional Developments*, ICSID Newsletter Vol. 24, No. 2 (2007) at pp. 20–22. *Available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ShowDocument&DocId=DC20.

Janet Whittaker is a senior associate at Simpson Thacher & Bartlett LLP and is active in the firm's international arbitration practice. She can be reached at jwhittaker@stblaw.com.

The Future of Arbitration

By John Wilkinson

In order to meaningfully assess the future of arbitration, it is first necessary to focus briefly on the remarkable developments in the field over the last 10 to 15 years. This can almost be done through use of a single word—bigger, bigger, bigger! Yes, the growth has been spectacular, and it is largely attributable to the fact that general counsel have been putting more and more huge cases into arbitration, and they have been doing so in ever-accelerating fashion. I am aware of a recent arbitration, for example, where $20 billion was legitimately in dispute, and arbitrations in the $10 to $100 million range have come to be commonplace.

An important aspect of arbitration's exponential growth is its increasing expansion into areas of big-case litigation, which had traditionally been reserved for the courts. In *Green Tree Financial Corp. v. Bazzle*,[1] for example, the Supreme Court opened the way for arbitration of class actions and, since then, the arbitration of class claims has increased at an accelerating rate. So, too, many believe that arbitration is the wave of the future in large product-liability cases and even in certain categories of toxic tort litigation. And the courts have already authorized arbitration of many other categories of large disputes, including antitrust, securities and patents.

The dramatic increase in the size and types of arbitrations has led to other significant changes in the overall arbitration process. Thus, for example:

1. As arbitrations get bigger and bigger, parties have increasingly been trying to inject into them what traditionally had been reserved for litigation—things like dispositive motions, interrogatories, depositions and the like.
2. Along with bigger and bigger have come better and better panels of arbitrators. The days when an arbitrator goes to sleep in an important case are long gone.
3. As awards involve more and more money, it is certainly not surprising that there is vastly more activity in the courts in trying to overturn them.
4. All of this has been accompanied by much longer and more detailed, reasoned awards to accommodate the added complexity, and
5. The increased size has also led to a striking upturn in the level of arbitration advocacy. Again, this is not surprising—as arbitrations get bigger and bigger, the large firms are of course jumping in and putting themselves in position to represent that they are accomplished experts in the field.

Addressing the Most Common Criticism

All this growth has brought us to a real crossroad in the life of large-case arbitration. In my view, what lies in arbitration's future is completely dependent on how well we deal with a highly significant result of this growth, i.e., the ever-increasing complaint that arbitration is becoming too much like litigation. If there is significant and continuing validity to this commonly voiced criticism, then why would anyone arbitrate? The simple answer is that, in large part, they wouldn't—arbitration would make little, if any, sense in such circumstances.

"An important aspect of arbitration's exponential growth is its increasing expansion into areas of big-case litigation, which had traditionally been reserved for the courts."

The arbitration community has two fundamental expectations that bear on this problem and, in a sense, they are light-years apart:

FIRST, there are expectations based on the notion that the purpose of arbitration has historically been to dispense quick and dirty rough justice that is over and done with in a blink, and

SECOND, there are the expectations of those who perceive that cases in arbitration are getting larger and more complex every year and that such cases cannot be fairly resolved without a comprehensive, sometimes rather extended, pre-hearing and hearing process.

It is easy in the pre-hearing and hearing phases of a complex arbitration to accommodate one of the foregoing expectations, while ignoring the other. More particularly, for example, it is easy for an arbitrator to slash the discovery, refuse to allow inquiry into large segments of proof and, basically, shorten the case significantly by being invasive and peremptory. The problem with this, however, is threefold:

- **First**, it isn't fair.
- **Second**, the case might well be reversed because one of the few grounds for *vacatur* under the Federal Arbitration Act is a refusal "to hear evidence pertinent and material to the controversy."
- **Third**, we are left with two general counsel who will probably never use arbitration again.

At the other end of the spectrum, it is similarly easy for an arbitrator just to open the floodgates and permit mountains of pointless discovery and evidence—all in the interest of following the safe approach and permitting a full hearing. The problem with this, of course, is that such an arbitration may very well be as expensive and time-consuming or even more expensive and time-consuming than if the case had simply been litigated in court. And again, there would be two general counsel who would likely never use arbitration again.

* * *

While it is certainly much easier said than done, the fact is that an arbitrator can and must strike a balance between the foregoing two extremes in a complex case. More particularly:

- The arbitrator must be sufficiently assertive to ensure that the case will be resolved much less expensively and in much less time than if it had been litigated in court and *at the same time*.
- The arbitrator must be sufficiently patient and restrained to ensure that there is enough discovery and evidence to permit a fair result.

Available Tools

Fortunately, the arbitrator has many tools that are unique to arbitration and which can be used to facilitate an efficient and fair result in a complex case. Set forth below are a few of many examples:

- Time-consuming objections to admissibility of documents can be kept to a minimum in arbitration because few such objections will be sustained. Rather than excluding a document for lack of admissibility, an arbitrator will generally take the document into evidence and, then, consider any factors detracting from its reliability when ultimately deciding how much weight it should be accorded. This is far more efficient than engaging in endless arguments about admissibility and, given the fact the case is not being presented to a jury, it is eminently fair.
- Unlike a court, an arbitrator need not strictly apply the rules of evidence. This greatly enhances arbitration's informality, flexibility and efficiency and, again, is fair to the parties because there is no need for strict rules of evidence when the proof is being presented to an arbitrator, as opposed to a jury.
- Arbitration dispenses with the laborious process of authenticating every document that is offered into evidence. In arbitration, documents are presumed to be authentic, and arbitrators will only entertain argument about authenticity in extreme circumstances involving such things as a possible forgery. While this shortcut in no way reduces the likelihood of a fair result, it greatly speeds the arbitration process in relation to what one encounters in court.
- In arbitration, exhibits are typically arranged in tabbed binders, and everyone can simply fly from tab to tab, saving huge amounts of time. In a trial in court, on the other hand, documents are generally trotted out one by one, with each document being separately marked, distributed and pored over by counsel before it might ever be accepted in evidence.
- Serious scheduling and jurisdictional problems can sometimes be averted in arbitration by taking video testimony outside the presence of the arbitrators on the understanding that the arbitrators will review the entirety of the testimony before rendering their award.
- There is generally no need to even offer a document in evidence in arbitration. If a questioning attorney begins to use a tabbed document and if opposing counsel does not promptly object, the document is deemed to be in evidence, without more, in most arbitrations.
- Arbitration witnesses can be taken out of order to facilitate efficient and expeditious scheduling. Thus, for example, it is not at all unusual in arbitration to have a key witness for respondent testify in the middle of claimant's case. While this time-saving device in no way detracts from the fairness of presentations to an arbitrator, it would be literally unthinkable in a case being tried to a jury.
- In arbitration, there is typically no need to qualify a witness as an expert. This eliminates the endless argument and *voir dire* which one so often encounters in court on that subject. This is not to say that lack of expert qualifications is ignored in arbitration but, rather, it is explored in orderly fashion on cross examination and is ultimately considered by the arbitrator in determining how much weight to accord the expert's testimony.
- Testimony of both sides' experts is often taken in a single phase of an arbitration so that the arbitrator has one side's experts well in mind when hearing the expert testimony from the other side. So, too, arbitration testimony of experts is often taken simultaneously in a kind of town-meeting setting where the experts are *seriatim* responding to the same questions and where they even get to question each other. This can be highly effective and save a lot of time for the reason, among others, that experts' areas of disagreement really do narrow in this kind of face-to-face format.

- The direct testimony of some if not all witnesses in an arbitration is often introduced in written form, with the live testimony being limited to that which is adduced on cross examination. When used appropriately, this has proven time and again to vastly increase the efficiency and cost-effectiveness of an arbitration, in relation to a court trial.
- Finally, there is great flexibility in scheduling arbitrations, with hearings not being unusual on Saturdays, Sundays and holidays, as well as during evenings. While this can often be a most effective tool for moving the process forward to a prompt conclusion, it is almost never an option in a court trial.

* * *

The foregoing are just a few of many examples of tools that are available in arbitration, but not in court. An arbitrator who makes good use of the full array of such tools and who is intent on carefully balancing the need for efficiency, on the one hand, and the need for a fair hearing, on the other, is going to be a critically important factor in continuing the dramatic growth of arbitration in complex cases.

A Recent Important Trend

Many general counsel have come to understand that it can sometimes be difficult for an arbitrator to effectively balance efficiency and fairness in a complex arbitration and, as a result, general counsel have recently been injecting themselves into the process and have been taking some of the judgment calls out of the hands of the arbitrators. These general counsel have primarily been doing this by adding to their large, commercial contracts a variety of highly aggressive, detailed arbitration clauses which, for example, might:

- provide for a very limited scope of discovery in any upcoming dispute, with the totality of such discovery to be completed within 60 days of appointment of the arbitrator;
- require that the hearing will commence not more than 90 days from appointment of the arbitrator;
- mandate that a reasoned award will be rendered within 30 days of receipt of post-hearing briefs; and
- provide that an arbitrator must agree to all of this before he or she accepts appointment.

While it is sometimes necessary to further negotiate and refine such arbitration clauses in the context of the particular dispute that arises, the fact remains that these clauses really do work—they really do get the job done. And while they place a most difficult burden on both parties and arbitrators, they may nonetheless be commonplace in the not too distant future.[2]

* * *

In the author's view, the criticism that arbitration has become too much like litigation in no way marks the beginning of the end of complex arbitration, as so many obliquely predict. Rather, the criticism presents a challenge to which the arbitration community can and must respond with understanding, imagination and resolve. If it does (and I fully expect it will), then complex case arbitration will be very healthy indeed for many years to come.[3]

Endnotes

1. 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003).
2. There is still a need to clarify the legal consequences of missing one or more of the deadlines in one of these clauses. In this regard, however, it should be noted that the author has been involved in implementing a number of these clauses and has never encountered missing a deadline that led to a dispute among the parties.
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John Wilkinson is on the arbitration and mediation panels of JAMS (The Resolution Experts) and co-chairs the Mediation Committee of the NY State Bar Association's Section on Dispute Resolution. He can be reached at jwilkinson@jamsadr.com or johnhwilkinson@msn.com.

The Reasons for Mediation's Bright Future

By Edna Sussman

Traditional litigation is a mistake that must be corrected. . . . For some disputes trials will be the only means, but for many claims trial by adversarial contest must in time go the way of the ancient trial by battle. . . . Our system is too costly, too painful, too destructive, too inefficient for really civilized people.

—Chief Justice Warren E. Burger of the U.S. Supreme Court

The growth of mediation over the past 15 years has been exponential, a tribute to the success of the process. Settlement rates in mediation are said to be on the order of 85 to 90 percent and are achieved long before the traditional "court house steps" at a significant saving of cost and time for the parties. User satisfaction is high as parties retain control and tailor their own solution in a less confrontational setting that preserves relationships and results in a win/win instead of a win/lose.

"Settlement rates in mediation are said to be on the order of 85 to 90 percent and are achieved long before the traditional 'court house steps' at a significant saving of cost and time for the parties."

Multiple drivers are at work to further the already resounding success of mediation as a tool for dispute resolution. There are now literally thousands of court-sponsored mediation programs around the country. Business lawyers are increasingly inserting step clauses in contracts that require an attempt at mediation before an arbitration or litigation can be commenced. State ethical obligations requiring that attorneys advise their clients about the availability of resolution through Alternative Dispute Resolution (ADR) are on the rise. Many government agency processes make an attempt at ADR a prerequisite to filing suit. Corporations are increasingly trying ADR, as exemplified by the signatures by 4,000 corporations of the CPR pledge which commits signatories to trying ADR before filing suit in a dispute with another signatory. Deal mediation and other innovative uses of expert facilitation are emerging. The EU, where mediation has not yet taken off, recently issued a mediation directive calling on all member states to enact legislation and take steps that will foster mediation. The long traditions of harmony and conciliation in the Far East will inevitably influence the resolution of disputes in our global economy and advance the use of mediation.

The widespread use of mediation and its continuing expansion is well deserved and is a natural consequence of the many benefits of mediation. However, even with the rapid growth of mediation as a testament to its effectiveness, some lawyers don't see why they cannot just settle the matter themselves and often prefer to proceed with the litigation process. This article reviews the ways in which mediation provides a host of benefits not generally available in direct negotiation or in litigation. While not every case can be settled, the many benefits suggest that mediation should be attempted in virtually every dispute.

The Benefits of Mediation Over Direct Negotiation

Designing an Effective Process

Constructing a mediation process is an art form. Each mediation presents its own set of challenges with its unique issues, personalities, sensitivities and impediments to settlement. Who is at the table, what is on the table, when the discussions should take place, the sequence and manner in which parties and issues are addressed, all have tremendous impact on the likelihood of a successful resolution. A mediator can assess the distinctive characteristics of each mediation to design and shepherd the process. With direct negotiation there is no one who can embark on and implement such a fine-tuned analysis. Direct negotiation simply does not create a vehicle for adjusting the negotiating process to the needs of the specific case.

Persistence in Pursuing Settlement

The mediator is not a champion of any party but is a champion for settlement. Often in direct negotiation the lawyers meet, talk, fail to resolve and go back to litigation. Lawyers often feel that being the one to raise settlement again, and perhaps even again as the case unfolds, can be seen as a sign of weakness that will be a disadvantage in achieving the best result for the client. The mediator can persist in pursuing the settlement options as the case progresses and raise the issue again as more optimal times for resolution present themselves.

Providing an Opportunity for A "Day in Court"

Strong emotions are frequently found in the context of any dispute, whether it is a family dispute or a strictly business relationship dispute. In such cases settlement is best achieved after those emotions have found an outlet. Many litigants need to be listened to by an empathetic ear before they can settle, and they need to feel like they have

had their "day in court." The mediator fills that role and enables the litigant to get the cathartic release of telling his or her story to one who appears to them to be sufficiently similar to a judge to fulfill his or her needs.

Identifying Impediments to Settlement

A mediator is in a better position than trial counsel to identify what is going on outside the narrow confines of the dispute that can be an impediment to settlement. Is there a financial statement issue that is driving the settlement process? Is someone about to retire and wants the settlement on someone else's watch? Does someone have an outside confidant or adviser who must be brought into the loop for a settlement to succeed? The mediator can help craft solutions or bring outside parties into the conversation to obviate impediments to settlement.

Posturing Left at the Door

In direct negotiations lawyers generally continue to speak to the strength of their client's case and posture in the effort to maximize their negotiating position. No sensible discussion of the strengths and weaknesses takes place. With a mediator, the posturing can be eliminated in the course of the conversations and areas of agreement can be developed. The mediator provides a safe environment in which more meaningful progress to settlement can be made.

Ability to Explore Underlying Interests

The mediator can meet privately with each of the parties and find out what they really care about. Often interests emerge that are not obvious and that a lawyer cannot bring up in a negotiation, either because it undercuts some position in the case or could be seen as a sign of weakness, or must be kept confidential. A mediator can identify those interests and assist in developing mechanisms to satisfy those interests in the settlement.

Providing a Realistic Risk Assessment

It is often useful to have an independent fresh set of eyes look at the dispute and assist the parties by helping them analyze the strengths and weaknesses of their case. Lawyers and parties often become convinced as to the strength of the case beyond any realistic appraisal. The mediator provides that independent unbiased review and can assist in the development of a more realistic analysis of the likelihood of success.

Getting the Client's Attention

A mediation requires the participation of decision-makers with authority to settle. Indeed, pursuant to court order, and if at all possible in private mediation, such decision-makers must actually participate in person in the mediation session. The mediation provides the opportunity to get the undivided attention of those who must make the decision on settling the dispute.

Ability to Test Solutions

Using a mediator as an intermediary enables the parties to test settlement positions before they are disclosed to the other side. The mediator can assess whether the settlement proposal is likely to be productive and hold it back if it is not a feasible solution. Thus, parties can explore options without looking like they are giving in or negotiating against themselves. The mediator can utilize such negotiating tools as two-step offers (i.e., an offer is made conditional on the other side's making another better offer as well) and other shuttle diplomacy techniques to drive the settlement process forward that are difficult to utilize in direct negotiation.

The Benefits of Improved Communication

Enables the Parties to Meet

The mediation provides a venue for the parties to meet and talk safely in a confidential[1] setting with the other party. The parties can directly educate the other party about their view of the case and reveal any emotional elements, thus providing a more realistic view of the case without a lawyer's screening. The appeal of important witnesses can often be assessed at an early stage. These frank exchanges often lead to changes of heart and new perspectives on the matter.

Taking the Litigator Off the Hook

Often the litigator is retained because he or she is viewed as a fighter who will advocate for the client vigorously. It is sometimes difficult for the lawyer to draw back from being a champion for the client's cause as litigation counsel and become settlement counsel championing the cause of resolving the dispute. The lawyer may feel that the client will view him or her with disfavor if he or she is not able to project continued confidence in the case. The mediator can help the lawyer bring about a reassessment of the case without undermining the client's confidence in the lawyer by facilitating the development of a more realistic view.

Enabling the Party to Have a Voice

There are situations in which the party wants to settle but the lawyer is determined to fight on. The party may not feel so strongly as to change counsel because so much has already been invested in the lawyer's familiarity with the case, but cannot persuade the lawyer that it is time to settle and move on. The mediator can ensure that the party has a voice and is in fact the last word on whether a settlement should be negotiated and on what terms.

Improving Communication Between Lawyer and Client

Sometimes the lawyer and the client are just not hearing each other. They may have very different perceptions of the case and where they want it to go; they may have had a change of heart since the matter started. Some-

times a lawyer or a client is so locked into a position that they simply are not communicating. The mediator can facilitate that conversation and make sure that each perspective is fully communicated and, most importantly, understood.

The Benefits of Mediation Over Litigation

Speedier Resolution

Court proceedings generally take some years to resolve a dispute, and the case may go on even longer if there is an appeal. The plaintiff must wait for the recovery and the defendant has the matter hanging over him or her. A settlement in mediation can often be concluded in a day. Even very complex, big-dollar cases generally resolve in one (or a very few) mediation sessions, which can be scheduled on an expeditious basis.

Reduced Cost

Preparing a case for trial is expensive. Discovery, motion practice and trial preparation do not come cheap. The expedited resolution of a dispute in mediation avoids all of those costs. The earlier in the process the mediation is commenced, the more likely the most significant cost savings will be achieved. While the dispute may not be ripe for resolution at an early stage, the mediator can assess when to press for settlement and reduce the costs incurred until that stage is achieved. The cost of the mediation itself is a small fraction of the costs incurred during the development of an average case.

Streamlining Any Exchange of Information

If the mediation process is commenced at the beginning of the litigation, or even better before litigation is commenced, the parties can work with the mediator to determine if any exchange of information is necessary before a meaningful conversation can be conducted. Generally such discovery, if any is deemed necessary, can be streamlined dramatically and involve a small fraction of what would be exchanged under court discovery rules. In many cases no exchange is needed. Especially in these days of e-discovery, such discovery streamlining can lead to huge cost savings.

Ability to Explore Creative Solutions

A judge must sit in a circumscribed universe applying the law to the facts and meting out remedies that are set out in the law. Mediation provides an avenue for the exploration of remedies unavailable in court that can achieve a successful result for all. An award of money damages or an injunction is not the optimal resolution of many cases and workable solutions in multiple settings can be achieved in mediation. For example, a mediation may achieve acceptable compromises on how a construction project should be adjusted to suit all, what new business arrangement can be made to replace the one in dispute, what alternate position is available for an employee who claims discrimination, and what changes a franchisee will make to retain the franchise. Tools unavailable in court can be used to achieve resolution such as structured settlements, apology letters and references.

Party Control

Mediation affords the parties an opportunity to control the result. The mediator does not sit as a judge or jury but only as a facilitator to a settlement agreed to by the parties. Parties walk away with a result they feel they can live with as they have been the ones to decide it. The parties are not left to the mercy of whatever a judge or jury might rule.

Confidential Result

Mediation enables the parties to keep their dispute and the nature of the settlement achieved private and not available to the public in court files where it can be embarrassing, or serve as a detrimental precedent that triggers further litigation.

Confidential Process

The confidential nature of the mediation itself enables the parties to explore with the mediator their real interests and concerns and discuss the facts of the case without informing the other party. The mediator will not disclose information he or she is not authorized to disclose. It also provides the opportunity for the parties to speak to one another in a confidential setting, which encourages an openness not otherwise achieved and which often enables the parties to find innovative solutions.[2]

Maintains Relationships

Many disputes are between parties with an important personal or business relationship. Litigation's adversarial nature can drive a rift between parties who would be better served by maintaining the relationship. Mediation provides a venue for resolution of the dispute in a manner that preserves the relationship as common ground is reached consensually in a less contentious setting. Indeed, the relationship is often improved as a result of the collaborative process.

Less Burdensome

Litigation is a lengthy process and often requires enormous expenditures of time by the parties to work with counsel, work on document production, prepare for depositions and trial. All of these steps interfere with daily work and personal schedules. Mediation's prompt resolution relieves the parties of these burdens and minimizes disruption to their schedules.

Less Stressful

The mediation is generally conducted in a comfortable conference room, a setting much less intimidating than a courtroom. The scheduling of the mediation can be arranged at the parties' convenience. The mediator is

open to all that the party would like to discuss and can respond informally in a way that a judge or arbitrator cannot. Consequently, the process is much less stressful to the parties.

Elimination of Issues

Even an unsuccessful mediation is often useful to eliminate areas of dispute, narrow the issues in the case and uncover and organize issues for future discussion and negotiation.

Higher Rates of Compliance

It is said that settlements reached in mediation have a higher rate of compliance than court decisions. As the parties have themselves developed a resolution they feel is fair to them and that they are capable of performing, the likelihood of not fulfilling obligations of the settlement is reduced. For example, a structured settlement with payment terms within a party's ability to pay is much more likely to be paid and useful to the other party than a court-ordered money judgment that leaves the prevailing party with the unhappy task of moving forward with collection actions as the loser simply cannot make the payment.

Flexibility

Mediation is a flexible process. Different ADR techniques can be used as the particular matter dictates. For example, it can be preceded or succeeded by a mini-trial, mediation-arbitration can be considered, or a single neutral evaluator can be appointed to render an opinion on a legal or fact based point of difference. The process can be fine-tuned to meet the needs of the case. If all else fails, the parties can continue in court with a better understanding of the case.

Conclusion

The many benefits of mediation and the steady growth of its utilization are the result of the recognized success of the process. Litigants continue to look for cheaper and faster ways to resolve disputes with greater party satisfaction. Acceptance of mediation is increasing in the international arena. Mediation's future growth is assured.

Endnotes

1. The questions that have been raised about confidentiality in mediation are discussed elsewhere in this issue. We will discuss in a forthcoming issue the extent to which a greater level of comfort in the confidentiality of the process can be effected through the use of a well-drafted pre-mediation agreement.
2. *See* footnote 1.

Edna Sussman is a seasoned arbitrator and mediator. She serves on the arbitration and mediation panels of many of the leading dispute resolution institutions, including the American Arbitration Association (AAA), the International Centre for Dispute Resolution (ICDR), the International Institute for Conflict Prevention and Resolution (CPR), the World Intellectual Property Organization (WIPO) and the mediation panels of the federal, bankruptcy and state courts in New York. She can be reached at esussman@hnrklaw.com.

The Future of Collaborative Law

By Norman Solovay

The so-called U.S. "mediation explosion" began in about the 1980s. The initial spark that ignited it was mediation's growing use in divorces as clients and family lawyers alike became increasingly aware of how catastrophic the courts could be for divorcing couples. From there, mediation spread into the mainstream of civil dispute resolution as a similar reaction against the huge costs and delays of so many other areas of our litigation system.

That "explosion" is still ongoing. Despite mediation's generally high success rate and now widespread acceptance, it has hardly been a full cure for the problems that called it into being. Continuing concern about these problems has led to experimentation with, and increasing use of, additional alternate dispute resolution (ADR) methods, including Collaborative Law.

Collaborative Law is a relatively new ADR technique "invented" in 1990 by a Minnesota divorce lawyer named Stuart Webb. Thanks to a growing cadre of dedicated practitioners, its use in resolving family-law disputes has continued to expand dramatically. Its utility in other dispute settings is being proposed and, in some cases, implemented by practitioners.

The Origins and Nature of Collaborative Law

While dissatisfaction with divorce litigation provided the initial impetus for the mediation explosion, divorce mediations have often been unsuccessful and problematic. Whatever the cause, it is clear that divorce mediation has not succeeded in eliminating the huge docket of protracted, costly and destructive divorce litigations. The problems associated with both divorce mediation and litigation continued to propel Collaborative Law into the forefront of family law alternate dispute resolution, and many of its advocates expected that history would quickly repeat itself as regards other civil law use.

Pauline Tesler, a nationally recognized leader in the promotion of Collaborative Law for use in family-law disputes, has described it as a "close cousin" to mediation and the "next-generation family-law dispute resolution mode."[1] As conceived by Stuart Webb, it was designed to avoid the frequently occurring "catastrophes when we [the divorce lawyers] have cast the normal issues facing a divorcing and restructuring family into the highly polarized positions of court-based dispute resolution."[2] Under Webb's scenario, each party retains his and her own trained collaborative lawyer for the specific purpose of working out the most mutually beneficial settlement agreement possible for the entire family. Basic to that retention is an agreement both lawyers sign undertaking to freely exchange all necessary information, to be civil to each other throughout the process, to select and utilize just one expert rather than adversarial competing ones if an expert is needed, and to disqualify themselves and withdraw from participation in any future litigation if no settlement is achieved.

The cost of a Collaborative Law divorce is typically a fraction of a litigated divorce. Moreover, its settlement rate when using skilled collaborative lawyers—and frequently, now a collaborative interdisciplinary professional team—is well above that of both divorce litigations and mediations and its results are almost always more satisfying to everyone involved. So the fact that Collaborative Law is the fastest growing ADR modality in family law dispute resolution should come as no surprise.

Its proponents have not been reticent in pointing out how well Collaborative Law could work in many other kinds of civil litigations. Although Ms. Tesler's practice is primarily in the family law area, she noted:

> Collaborative Law can also be used in probate conflicts, business partnership dissolutions, employment and commercial conflicts, and much more. In fact, it is appropriate in any situation in which the parties who have issues to resolve all want a contained, creative, civilized process that builds in legal advice and counsel, aims solely at settlement, and distributes the risks of failure to the lawyers as well as the clients.[3]

Another leading practitioner and promoter of Collaborative Law for non-family civil law cases, Sherrie Abney, conducts frequent training sessions on such use for other lawyers and is the author of a persuasive book on the subject. In it she describes Collaborative Civil Law as "an opportunity for the return of common sense and dignity to dispute resolution," and expresses her belief "that Collaborative Law or some similar dispute resolution process will replace litigation in most civil disputes."[4]

Likewise, David Hoffman, a renowned Boston-based ADR practitioner, who is another leading advocate of such expanded use of Collaborative Law, has similarly described it as "one of the most important and, in my view, worthwhile developments in law practice in recent years."[5]

Moreover, one respected legal scholar and educator, David Hall, has taken this hope for Collaborative Law a significant step further, describing it as "a movement which [contains] the seeds for the revitalization and transformation of the legal profession."[6]

However, these and virtually all other proponents of such expanded Collaborative Law acknowledge that its spread into other civil law matters has been disappoint-

ingly slow compared to its still expanding utilization in family law. Whether the Collaborative Law movement will ever duplicate the success of the mediation explosion or fulfill all of the high hopes for it held out by its advocates still remains to be seen.

Are Collaborative Law Divorces Any Better Than Mediated Ones?

What many view as a significant drawback of divorce mediation, compared with Collaborative Law, is the practice of many divorce mediators of dealing directly only with the parties and of actively discouraging participation by lawyers, thereby opening the door to the following possible problems:

> With the lawyers looking in from outside, their role has been compared to that of "a paid sniper."[7] Because the lawyers frequently have not been a part of the negotiations, they may regard themselves as free to criticize and generate further negotiations and/or legal proceedings in which they may then play a more meaningful part.
>
> Without lawyers present during mediations, there may be imbalances between the parties making for an uneven playing field, such as disparity in financial sophistication and/or negotiating ability, and/or lifetime habits of submission or control, or manipulative or dishonest behavior by one party. Mediators who try to step in and rectify these imbalances may be perceived as taking sides, thereby causing the mediation to be disrupted. On the other hand, a truly neutral mediator, intent on achieving a settlement, may generate a one-sided unfair outcome.

An agreement reached in a mediation that is not vetted by the parties' counsel may generate significant subsequent problems and challenges—e.g., lack of fully informed consent, unfairness, failure to be made aware of one's legal rights and/or to resolve all issues.

Despite the expansion of divorce mediation and the existence of many qualified mediators, there is still a lack of regulation over them. In many states almost anyone can hold himself or herself out as a mediator. There is obviously, therefore, a greater danger of parties ending up with poorly qualified mediators than with poorly trained collaborative lawyers.

Even if all divorce mediators could be directed to include lawyers in their proceedings, problems could still remain. For example, typical divorce lawyers are not normally forthcoming with all necessary information and are not likely to change their spots in an adversarial mediation. Moreover, the concern of many mediators that adversarial divorce lawyers are likely to impede settlement efforts is by no means unfounded.

There have been frequent complaints in connection with divorce mediations that one party is not participating in good faith and is using the mediation just for delay, obstruction and other improper purposes. While there is no absolute guarantee that this could not happen in a Collaborative Law divorce, it is less likely. As Ms. Tesler has pointed out:

> While divorce mediation works very well for couples who cooperate well and whose goal is to reach a quick settlement agreement with a minimum of conflict and expense, and while many mediators are gifted and dedicated conflict resolution professionals, mediation lacks the structural elements that make Collaborative Law so effective.[8]

What's So Good About a Collaborative Law Divorce?

Among the important "structural elements" and benefits referred to by Ms. Tesler making Collaborative Law an improvement over divorce mediation are:

- Each spouse has built-in legal advice and advocacy at all times during negotiations.
- The job each lawyer has signed up for is to guide his or her own client toward jointly reasonable resolutions rather than conducting an adversarial battle to squeeze the most out of the situation at the expense of the other spouse.
- The process is geared to proceed in structured, non-adversarial stages in which all necessary information is exchanged freely.
- Although legal advice is an integral part of the process, key decisions are usually made by the parties themselves, most often during four-way joint meeting with counsel and parties present.
- It creates a safe space where both parties feel free to express themselves.
- It discourages negative comments and conduct that could interfere with the process.
- It creates a climate where empathy and understanding rather than power and control are driving the process.
- It helps search for and articulate the real interests underlying troublesome positions and demands and recognize that conflicts of this kind are not simply fights over "stuff" but rather involve highly personal issues of many kinds.

- It encourages full participation of both parties in the process and in assuming responsibility for its results, with the understanding that arrangements made must be mutually workable.
- It seeks to actively create multiple options in a search for win-win solutions as opposed to looking for small gap-narrowing compromises on each side.
- It encourages participation in an open, honest exchange of information with no "hide the ball."
- It provides a setting where neither party takes advantage of the miscalculations or mistakes of the others, but instead identifies and corrects them.
- It insulates the children from their parents' conflicts, including damaging custody battles, where necessary, by making use of specially trained coaches and a child development specialist to arrive at solutions that reflect the children's needs and concerns that both parents can accept.
- It uses joint accountants, appraisers, and other advisers, instead of adversarial experts.
- It focuses on constructive planning for the future rather than redress for past grievances and replaces tactical bargaining backed by threats of litigation.

What Are Collaborative Law's Problems?

Even its strongest advocates don't say Collaborative Law is problem-free. Here are some of them:

David Hoffman views the "most serious problem for clients" as the possibility of "the additional cost if collaborative negotiations break down and the original attorneys must withdraw,"[9] with another related one being its potential for being abused—"for example, parties with greater financial resources could feign an interest in the collaborative process in order to take advantage of its cooperative discovery practices and then, because they can better afford to change counsel, resist settlement."[10]

Sherrie Abney puts at the top of her list problems she has encountered with collaborative lawyers who do not properly screen out clients not suitable to the Collaborative Law process, as well as the related problems generated by supposed collaborative lawyers similarly unsuitable to the process by virtue of not having made the required "paradigm shift" away from being overzealous advocates.

Pauline Tesler's book similarly acknowledges[11] that not all lawyers are capable of meeting the Collaborative Law requirement of "undoing a professional lifetime of conscious and unconscious [adversarial} habits . . . and rebuilding from the bottom up an entirely new set of attitudes behaviors and habits" and that many clients, such as those with "clinically significant psychiatric problems" or already involved in "hot-potato cases" may also be poor candidates for the collaborative model. She believes, however, that these problems can and must be dealt with by the careful selection of qualified collaborative lawyers and clients at the outset, coupled with continuing education requirements (on top of the original training requirements) in various aspects of conflict resolution and substantive matrimonial law for Collaborative Law practitioners.

Yet another criticism is that Collaborative Law practitioners in some cases impose a "harmony ideology" on clients pursuant to which they "may feel pressured to accept [unwanted] agreements that the lawyers believe are in the interest of the whole family."[12] Mr. Hoffman persuasively disputes this, insisting, based on his extensive experience, that "vigorous bargaining" does go on in Collaborative Divorce negotiations and that Collaborative Lawyers, as part of the process, are more sensitive and responsive than most to the wishes of their clients. As noted in an article jointly authored by David Hoffman and Pauline Tessler, although it is a lawyer's duty, even in Collaborative Law matters, to represent a client zealously, collaborative lawyers do so

> in a context in which a fair and reasonable settlement is the client's highest priority . . . [and] settlement is measured not only in terms of quantifiable numeric measures, but also in terms [especially in family law matters] of the impact of it on all aspects of the client's anticipated quality of life for years to come."[13]

These objections to Collaborative Law generated by lawyers' reluctance to part with their clients are often couched in terms of arguments that the process violates a lawyer's duty of zealous representation. It is urged that the agreements signed by collaborative lawyers requiring them to take into account the interests of the entire family unit interfere with that duty. Indeed, one state's bar association (Colorado) has issued an opinion declaring collaborative representation to be a breach of legal ethics for this reason.

But Colorado's is a distinctly minority view. The American Bar Association's Collaborative Law Committee of the Dispute Resolution Section, chaired by David Hoffman, was initially formed to combat this then-anticipated negative opinion from the Colorado Bar Association and, with the assistance and support of many other state bar associations and organizations, successfully did so. Now, the practice of Collaborative Law is almost universally upheld so long as the duties of competence and diligence are met, and informed consent of the client is obtained. Moreover, as noted above, the New York Supreme Court, in its sponsorship of the Collaborative Law Program, is promoting the use of Collaborative Law in family-law matters.

Why Not Collaborative Civil Law?

Resistance to the expansion of Collaborative Law may be based on the understandable reluctance of lawyers to turn clients over to another lawyer if Collaborative Law negotiations break down. While this drop-out requirement

may be less significant among divorce lawyers whose cases do not normally involve continuing client relations and who in all events are used to migrating clients, it is generally acknowledged as probably the greatest obstacle so far encountered to the expansion of Collaborative Law into other civil law areas.

While these factors have so far kept Collaborative Civil Law for other disputes from keeping pace with the growth of Collaborative Family Law, it hasn't stopped many leading Collaborative Law practitioners, including Ms. Abney and Mr. Hoffman, from remaining optimistic about Civil Collaborative Law's future:[14] In a recent article entitled "Philosopher Walk: Forging New Paths for Civil Collaborative law," Mr. Hoffman describes a discussion among collaborative lawyers which he and Ms. Abney led at the October 2007 IACP forum in Toronto. After acknowledging that they, too, were frustrated at the still existing paucity of non-family Collaborative Law cases, they confirmed the already demonstrated suitability of Civil Collaborative Law not only for dispute resolution but also for transactional work and counseling in transactional work. After exploring "what has kept us involved in the effort to develop Civil Collaborative Law"; what obstacles . . . we encountered in seeking to expand [its] use; and what options and opportunities . . . we see for overcoming those obstacles," they concluded that "the civil collaborative movement has already been successful in more ways than are readily apparent and great success is likely to ensue."[15]

Moreover, they and other Civil Collaborative Law proponents have demonstrated their flexibility and willingness to make compromises in furtherance of fulfilling Ms. Abney's prediction "that Collaborative Law or some similar dispute resolution process will [eventually] replace litigation in most civil disputes."

As one such compromise, Mr. Hoffman and Juliana Hoyt have prepared a "stripped-down" version of a corporate Collaborative Law Agreement which, through various non-material language changes, overcomes some objections they encountered in the connection with non-family law Civil Collaborative Law standard agreement, although leaving in place the requirement that the lawyers be disqualified if the matter does not settle.[16]

Taking compromise perhaps a step further, Mr. Hoffman has also devised a substitute for the usual Collaborative Law participation agreements which he has named "Co-operative Negotiation Agreements" ("CNAs"). These agreements (which he sometimes semi-humorously refers to as "Collaborative Law Lite"), are essentially identical to the standard Collaborative Law participation agreement except for the omission of the provision requiring the withdrawal and disqualification of counsel. In a detailed, well-reasoned discussion Mr. Hoffman explains the benefits and drawbacks of his proposed compromise of "collaboration without firing the lawyers."[17]

While CNAs have already been much discussed and frequently utilized, Mr. Hoffman's chapter concluded that it is too early to tell if they will become a permanent ADR fixture. He goes on to say that in all events "the best predictor of a successful process—involving interest-based problem-solving, respectful communications, and collaborative negotiations—is not whether a particular form of agreement is signed but rather the chemistry, intentions, and skill of the participants."[18]

Conclusion

The utilization of Collaborative Law to resolve family law disputes is clearly continuing to grow. The expansion of Collaborative Law into many other areas of civil law is something to watch out for and seriously consider as another useful option in the ADR toolbox.

Endnotes

1. Pauline H. Tesler, Collaborative Law: Achieving Effective Resolution In Divorce Without Litigation (ABA), 2001, p. 3.
2. *Id.* at pp. 3, 7.
3. *Id.* at p. 2.
4. Sherrie R. Abney, *Avoiding Litigation: A Guide to Civil Collaborative Law*, pp. 216, 236 (Trafford Pub. 2005).
5. *Collaborative Law, A Practitioner's Perspective,* Dispute Resolution Magazine, p. 25 (Fall 2005).
6. *In Search of the Sacred,* The Collaborative Review, p. 27 (Winter 2005).
7. David Hoffman & Pauline Tesler, Collaborative Law and the Use of Settlement Counsel, Chapter 41, p. 4 in *The Alternative Dispute Resolution Practice Guide*, B. Roth, ed. (West Publishing 2002).
8. "Why Not Collaborative Law?" materials, p. 15.
9. Hoffman & Pollak, Chapter on Collaborative Law from The Divorce Law Practice Manual (Mass Continuing Legal Education, Inc.), p. 3.
10. *Id.*
11. Tesler, *supra* note 1, at pp. 24–26.
12. David A. Hoffman, *Collaborative Law: A Practitioner's Perspective,* Dispute Resolution Magazine (Fall 2005), pp. 26–27.
13. Hoffman & Tesler, note 7 *supra*, at p. 8.
14. *See* notes 5 & 6, *supra.*
15. *See* note 4, *supra*.
16. Chapter 41 in *The Alternative Dispute Resolution Practice Guide*, B. Roth, ed. (West Pub. 2002), pp. 1–2.
17. See his chapter entitled, "Cooperative Negotiation Agreements: Using Contract to Make a Safe Place for a Difficult Conversation," in the Association of Family and Conciliation Courts book, "Innovations in Family Law" (2007).
18. *Id.*

Norman Solovay, is a long-time litigator who, after extensive involvement in all aspects of arbitrations and mediations, authored several books on those subjects. More recently, he has become a practitioner of Collaborative Law in family-law matters where it is now widely used, as well as an advocate of continuing to expand its use in other civil law matters. He can be reached at nsolovay@hartmancraven.com.

Scope of Discovery in Commercial Arbitration

By Charles J. Moxley, Jr.

With a case in federal or state court, litigators generally have a good idea of what discovery will be allowed. The Federal Rules of Civil Procedure, the New York Civil Practice Law and Rules, and other such rules set forth the standards for discovery, and a large body of case law elaborates on such standards.

Do we have anything similar in arbitration? Is there any way of knowing with reasonable certainty what discovery will be allowed in a commercial arbitration? Is the scope of discovery entirely within the discretion of the arbitrator? Is there a governing standard? What discovery is typically permitted?

In what follows, I will set forth some tentative answers to these questions, based on my experience as an arbitrator in more than 125 commercial cases over many years. While, given the confidentiality of arbitration, there are generally no reported decisions on discovery questions in arbitrations (or even informal decisions), I will also draw upon the experience of many fellow arbitrators with whom I have served on panels, based on the general views, experience, and practices expressed in our consideration of discovery questions. While I will focus primarily on arbitrator practice as to discovery, I will also reference some of the applicable rules of arbitration providers such as the American Arbitration Association (AAA), JAMS, and the International Institute for Conflict Prevention and Resolution (CPR), and the treatment of the matter by the Revised Uniform Arbitration Act. My focus is on domestic arbitrations.

Overriding Rationale as to Discovery in Arbitration

In theory and in practice, the primary governing considerations for arbitrators are essentially threefold:

(1) Arbitration should be quicker than litigation, and hence discovery, which consumes substantial time, should be more limited than in litigation.

(2) Arbitration should be less expensive than litigation, and, for that reason too, discovery, which accounts for the bulk of the huge attorneys fees in litigation, should be more limited than in litigation.

(3) Parties are entitled to discovery sufficient to prepare and try their case.

There is a certain bedrock of discovery in every arbitration, including the exchange of relevant documents. The above balancing test essentially comes down to the standard that parties to an arbitration only get depositions and other further discovery *if they can demonstrate a real need for it*. The arbitration goals of expedition and economy generally cause arbitrators to require parties to justify more extensive discovery in light of the needs of the case. Parties may, of course, agree to more extensive discovery.

Expedition

The discovery phase in a complex commercial litigation typically takes years. Not so with a commercial arbitration. Arbitrators typically want to get to the hearing, depending on the case, within some three to eight months. It would be a rare arbitration and a particularly large or complex one where, absent special circumstances, arbitrators would be happy with a more extended schedule. Arbitrators generally feel it is part of their job to deliver the expedition that arbitration promises. Depositions can cause substantial delays.

Economy

Discovery is widely regarded as a major problem with U.S. litigation. Complex commercial litigations with millions of dollars at stake typically involve many depositions, sometimes dozens or more. The practice is widespread to depose everyone who may have relevant information, even where the testimony is likely to be cumulative or redundant. No stone is left unturned. Every witness is deposed who could possibly show up at trial, no matter how subject to cross-examination he may be based on the documents. Every deposition is extended as long as possible to make sure the witness' knowledge is exhausted. While "fishing expedition" is a pejorative term in motion practice as to discovery, counsel on both sides of a litigation typically seek to probe every imaginable line of attack or defense. A litigator in a substantial commercial matter would generally find it unimaginable to wait until trial to take the testimony of a witness of any importance not under his or her control.

Arbitrators generally have a different perspective on these matters: They want to avoid the expense of discovery to the maximum extent consistent with allowing each side reasonable opportunity to prepare and try their case. Arbitrators' strong preference is generally to have a witness testify only once. Witnesses should testify live at trial; the expense of that earlier and generally more protracted testimony at deposition should be avoided. Subject to the exigencies of the particular case, a witness within subpoena range of the hearing or under the control of a party should testify at the hearing and not be deposed first.

Of course, some witnesses are beyond subpoena range of the site of the arbitration and not under the

control of a party. Even with such witnesses, arbitrators generally prefer to have them testify live at the hearing, if only by video-conference or telephone, rather than by deposition.

Litigators are often apprehensive about going into hearings without having deposed key witnesses, but generally find themselves well able to cross-examine the other side's witnesses effectively based on the documents, informal investigation, and general trial skills. Perhaps depositions, or at least the extent of them, are not as important as we have come to assume.

Fair Opportunity to Parties to Prepare and Try Their Case

Arbitrators understand that the level of discovery reasonably needed in a particular case depends on the facts and circumstances of the case. In most commercial arbitrations, the parties will need to exchange documents, sometimes a substantial number of them, specifically relating to the dispute. Counsel will conduct their investigations and serve subpoenas for the hearing and will then be ready to go to hearing, subject to disclosures as to experts, if any, and pre-hearing briefs and identification of witnesses and documents.

Where more is necessary, it is generally worked out without difficulty. Arbitrators typically set the tone at the preliminary hearing that they expect counsel to work such things out, but are prepared to direct them if necessary.

If a party reasonably needs particularization of the other side's claims, defenses, purported damages, or the like, arbitrators, if requested, will generally direct that such information be provided.

If a party reasonably needs to examine at the hearing someone under the control of the other side, arbitrators, if requested, will typically obtain the other side's agreement to produce the witness, whether in person or by video conference or telephone.

If a reasonable number of limited depositions seems necessary, arbitrators, if requested, will generally permit them.

Parties are increasingly submitting huge commercial cases to arbitration. Cases in the tens and hundreds of millions of dollars and more are not uncommon. In some such cases, parties and their general counsels, while desirous of speed and economy, are perhaps more interested in getting the right decision-maker. They prefer arbitration for the opportunity it gives them to pick a highly experienced and effective arbitrator or panel of arbitrators, who can be selected eyes open, rather than take their chance on the spin of the wheel in the court clerk's office.

Such very large cases often require substantial document production, numerous depositions, and some interrogatories, as well as extensive pre-hearing motions. Arbitrators will generally be open to more expansive discovery in such cases, subject nonetheless to trying to keep it far more limited and moving the cases along far more expeditiously than would typically happen in court. Arbitrators also understand that some cases have so much at stake that general counsels and other party representatives may reasonably—and mutually—want the "no-stone-unturned" approach to discovery even in arbitration, and indeed can provide for same in their arbitration agreements.

What Actually Happens in Arbitrations

The Easy Case: The Parties' Arbitration Agreement Specifies the Scope of Discovery

The easiest case is where the parties' arbitration clause specifies the scope of discovery. Occasionally parties provide in their arbitration clause that the Federal Rules of Civil Procedure or a particular state's rules of procedure shall apply to discovery in a dispute. In my experience, this is relatively rare (I would say, anecdotally, that it occurs in less than 5 percent of cases).

Where this happens, arbitrators will generally administer discovery pursuant to the specified rules of procedure, subject, where appropriate, to challenging counsel somewhat as to what discovery is really needed and trying to jawbone them down to a more limited scope of discovery.

The Power of Arbitrator "Jawboning"

"Jawboning," whereby an arbitrator probes for consensus among counsel on pre-hearing issues before ruling on them, can be particularly effective in resolving discovery disputes. Arbitrators, who are often chosen because of their decades of experience as litigators in similar types of cases, draw upon their ability to distinguish between the positions litigators take and what they reasonably need.

By educating themselves about the case and engaging counsel in meaningful dialogue, arbitrators are often able to penetrate to what is really at stake, determine what discovery is reasonably necessary as a result, and build on that foundation to create consensus on the matter.

Arbitrators, to be able to help the parties in such matters, generally try to get an understanding of the case as early as possible. This is one of the reasons arbitrators generally invite counsel to discuss the case at the preliminary conference and welcome the parties' elaboration of the case as it unfolds. It is in counsels' interest to project their case as fully as possible when such opportunities arise.

The Most Typical Situation: Counsel Agree to Over-Broad Discovery

Usually the arbitration clause is silent as to the scope of discovery, except insofar as it implicitly adopts the discovery practices contemplated by the rules of the

particular arbitration association under which the matter is proceeding. (Arbitration clauses typically provide for disputes arising between the parties to be arbitrated under specified arbitration rules of a particular organization, such as the AAA.)

The most typical situation is that, at the preliminary conference, counsel for the parties will substantially agree as to what discovery should take place in the case. They will indicate that they have agreed to exchange relevant documents and will often agree that each side may take a limited number of depositions.

Arbitrators generally leave counsel's agreement as to documents alone. The attorneys know their case and, if they can agree on document discovery, great.[1] Until a dispute arises, arbitrators generally will not get involved in document production.

As to depositions, arbitrators will typically remind counsel of arbitration's objectives of expedition and economy and probe as to the depositions counsel have in mind. If the depositions involve witnesses within subpoena range of the locale of the hearing or under the control of a party, arbitrators will generally jawbone the matter, questioning the need for the depositions.

Oftentimes counsel will respond by agreeing that they are able to prepare and try the case without the depositions. Part of this may be in deference to the arbitrator, but counsel also generally understand that arbitration is supposed to be different and realize they may not really need the depositions.

How Arbitrators Decide the Matter When Both Sides Want to Proceed with Depositions

When the arbitrators' cajoling does not work and both sides want to continue with the depositions, arbitrators typically take a step back and accept the idea of depositions, but try to limit them as to number and duration.

This effort is generally successful. In the unusual case where it is not, arbitrators are prone, within reason, to bow to the parties' agreement on the subject and let the depositions or other discovery proceed.

How Arbitrators Decide Disputed Issues as to Discovery

Where the parties do not agree as to discovery, the arbitrators obviously have to rule on the matter.

The ruling essentially comes down to what the arbitrators think is reasonable under the circumstances, given the applicable considerations as to expedition, economy and fair opportunity to prepare and try the case.

Here, arbitrators' practices differ. Some resolve discovery disputes based on counsels' papers on the matter. Others, and I think this approach yields more enlightened rulings, hold a conference with counsel, once the dispute is briefed, and go through, to the extent necessary, the disputed items one by one, dialoguing and jawboning them. Often, it is only necessary to go through a sampling of the disputed items and establish some guidelines, whereupon counsel can work out the rest.

Whatever they feel they need to argue in their papers, counsel in the conferences tend to move towards consensus when the arbitrator, in connection with suggesting comparable restraints on both sides, figures out what discovery is reasonably necessary in the particular situation. If the arbitrator is able to grasp and propose limitations on the objected-to discovery that protect the objector's interests while according the other side what it reasonably needs, the jawboning will be successful (the arbitrator, of course, will be figuring the matter out, as the discussion unfolds, learning, among other things, from counsel's reactions to the various possibilities). Consensus will have emerged, which, while the arbitrator will likely write it up as a ruling, will represent a sensible accommodation of each side's rights and interests.

Where no such agreement emerges, the arbitrator will rule, generally based on the above considerations. The rulings will often bear a striking resemblance to the approaches suggested by the arbitrator in the conferencing of the matter.

Applicable Arbitration Association Rules

Decision-making by arbitrators on discovery questions is not typically a heavily rules-based matter. Counsel generally recognize a wide range of discretion in the arbitrator as to the scope of discovery and only rarely argue their case for or against discovery based on the discovery rules of the organization under which the arbitration is being held. Experienced arbitrators generally have internalized the expedition/economy/fairness standard and rarely find themselves analyzing discovery matters with reference to specific provisions of applicable arbitration rules.

Yet not surprisingly, arbitration practice, as described above, is generally reflective of the arbitration rules of leading arbitration organizations. Following are some examples.

The AAA, in its Commercial Arbitration Rules, places discovery in the discretion of the arbitrator, subject to the expedited nature of arbitration. Rule 21(a) on "Exchange of Information" provides that the arbitrator, "consistent with the expedited nature of arbitration," may direct "the production of documents and other information."[2] Rule 21(c) provides that the arbitrator "is authorized to resolve any disputes concerning the exchange of information."[3]

The AAA further recognizes the discretion of arbitrators in discovery matters in the portion of its Commercial

Arbitration Rules consisting of Procedures for Large, Complex Commercial Disputes. Rule L-4 on "Management of Proceedings" sets forth the standard for arbitrators' permitting depositions: "good cause shown . . . consistent with the expedited nature of arbitration."

Rule L-4 provides:[4]

> (a) Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of large, complex commercial cases.
>
> (b) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a large, complex commercial case.
>
> (c) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the conduct of such discovery as the arbitrator(s) shall deem appropriate. If the parties cannot agree on production of documents and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.
>
> (d) At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.
>
> * * *
>
> (g) The arbitrator is authorized to resolve any disputes concerning the exchange of information.
>
> * * *

Rule 9 ("Discovery") of the AAA's Employment Arbitration Rules provides:[5]

> The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.

The discovery rules of JAMS are comparable, except that they contemplate one deposition per side, while leaving additional depositions to the discretion of the arbitrator, based on "the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness."[6]

CPR in Rule 11 of its Rules for Non-Administered Arbitration similarly provides that arbitrators may permit such discovery as they deem appropriate, "taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective."[7]

While the Revised Uniform Arbitration Act (RUAA)[8] has not been adopted in New York, it is interesting to note that the RUAA's provisions as to discovery are similar to the above rules of the AAA, JAMS, and CPR.

As to the arbitrator's authority as to discovery, RUAA § 17(c) provides, "[a]n arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective."[9]

Non-Party Out-of-Jurisdiction Witnesses

The above focuses on party discovery. Complex and largely unsettled issues are presented as to compelling discovery from non-party witnesses who are outside subpoena reach of the place of the arbitration.[10] Such issues include the extent to which, under the Federal Arbitration Act[11] and other law, such foreign non-party witnesses may be compelled to submit themselves to a deposition or formal hearing testimony and produce documents where they are located and whether the arbitrators (or one of the members of a panel) may conduct a session in the locale where the witness is located for purposes of taking the witness' testimony either on a pre-hearing/deposition basis or as formal hearing testimony.

While such matters are beyond the scope of this article, it is noteworthy that the arbitrators' practice of jawboning is potentially as helpful here as with party discovery. Not infrequently, distant non-party witnesses, in response to an informally transmitted subpoena of litigable enforceability (or other informal approach), will be willing to appear by teleconference or telephone at a time convenient to them, if they can thereby avoid having to deal with potential court procedures for the enforcement of a subpoena; some witnesses even agree to appear out of respect for the process.

Conclusion

The established rules and practices for party discovery in arbitration are clear, sensible and workable. The vast majority of party discovery disputes in commercial arbitrations are worked out among counsel, either on their own or with the aid of the arbitrator. When counsel cannot agree as to discovery matters, arbitrators will decide them based on balancing the arbitration objectives of expedition, economy and fair disclosure. Parties may provide for more expanded discovery in their arbitration agreements or by subsequent agreement of counsel.

Endnotes

1. The subject of electronic discovery is beyond the scope of this article. Parties in arbitrations are often willing to limit it in the interests of expedition and economy, although there will increasingly be cases where it will be important. *See, e.g.*, Irene C. Warshauer, *Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence*, Disp. Res. J., Nov. 2006/Jan. 2007 *available at* http://www.mediate.com/warshauer/docs/ediscovery%20article%20final%20printed%20AAA%20dispute.pdf.
2. Commercial Arbitration Rules, Rule R-21, AAA (effective September 1, 2007) *available at* http://www.adr.org/sp.asp?id=22440#R21.
3. *Id.*
4. *Id. at* Rule L-4 *available at* http://www.adr.org/sp.asp?id=22440#L4.
5. Employment Arbitration Rules, Rule 9, AAA (effective July 1, 2006) *available at* http://www.adr.org/sp.asp?id=32904#9.
6. Comprehensive Arbitration Rules and Procedures, Rule 17, JAMS (revised March 26, 2007) *available at* http://www.jamsadr.com/rules/comprehensive.asp#Rule%2017.
7. Rules for Non-Administered Arbitration, Rule 11, CPR (effective November 1, 2007) *available at* http://www.cpradr.org/ClausesRules/2007CPRRulesforNonAdministeredArbitration/tabid/125/Default.aspx
8. Revised Unif. Arb. Act (2000).
9. *Id.* at § 17(c).
10. *See, e.g.*, Leslie Trager, *The Use of Subpoenas in Arbitration*, Disp. Res. J. Nov. 2007/Jan. 2008 *available at http://www.aaauonline.org/upload/The%20Use%20of%20Subpoenas%20in%20Arbitration.pdf.*
11. Fed. Arb. Act, 9 U.S.C. §§ 7 *et seq*.

Charles J. Moxley, Jr. is Of Counsel to Kaplan Fox & Kilsheimer LLP, focusing on complex litigation and arbitration, and an Adjunct Professor of Law at Fordham Law School. He is Co-Chair of the Legislation Committee of the NYSBA's Dispute Resolution Section and regularly serves as an arbitrator and mediator. He has served on the American Arbitration Association's Panel of Commercial Arbitrators for more than 25 years. He can be reached at cmoxley@kaplanfox.com.

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Hodgson Russ LLP
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New York, NY 10165
rschrager@hodgsonruss.com

ADR within Governmental Agencies
Robert E. Curry, Jr.
2 Thorne Lane
Locust Valley, NY 11560-2609
recurry@gmail.com

Jeffrey E. Stockholm
New York State Public Service Commission
3 Empire State Plaza
Albany, NY 12223-1000
jes@dps.state.ny.us

Arbitration
Carroll E. Neesemann
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0012
cneesemann@mofo.com

Sherman W. Kahn
Morrison & Foerster LLP
1290 Avenue of The Americas
New York, NY 10104-0101
skahn@mofo.com

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csteinberger@mindspring.com

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bmentz@mentz.org

Ethical Issues and Ethical Standards
Elayne E. Greenberg
St. John's University School of Law
8000 Utopia Parkway
Jamaica, NY 11432
elayneegreenberg@juno.com

Legislation
Charles J. Moxley Jr.
Kaplan Fox & Kilsheimer LLP
850 Third Avenue, 14th Floor
New York, NY 10022-7513
cmoxley@kaplanfox.com

William J.T. Brown
Dewey & LeBoeuf LLP
125 West 55th Street
New York, NY 10019
wbrown@dl.com

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

Abigail J. Pessen
Mediation Services, Inc.
80 Broad Street, 30th Floor
New York, NY 10004
abigail@pessenadr.com

Membership
Louis B. Bernstein
50 East 89th Street
New York, NY 10128-1225
louisbernsteinatty@gmail.com

Gail R. Davis
Resolutions NY Inc.
120 East 30th Street
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gdavis@resolutionsny.com

Nominating
Stephen A. Hochman
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Publications
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