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CONFLICT MANAGEMENT

American Bar Association ◆ Section of Litigation

In This Issue

CO-CHAIRS' MESSAGE

Learn About the "Arbitration Fairness Act" Before Its Too Late

The year 2007 may be remembered by ADR enthusiasts as the year that arbitration came under attack. First, we had the introduction of the Arbitration Fairness Act of 2007 ("AFA"), which purportedly would ban predispute arbitration clauses in consumer contracts, employment agreements, and franchise agreements. Co-editor Manjit Gill first reported about this development in the Fall 2007 edition of this publication. Now, we learn that a new bill is seeking to expand this arbitration ban to mortgage agreements. What encouraged this groundswell of opposition to such a longstanding procedure?

We are sure the sponsors of the AFA had good intentions and there is understandable debate on the issue of whether there has been a use of arbitration to eliminate, for example, consumer class actions. To us, however, there has been way too little time spent investigating the other aspects of the AFA. And, that includes the recent testimony on the bill before the House Judiciary Committee.

The AFA goes much further than consumer disputes. It applies to undefined franchise disputes and any dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of "unequal bargaining power." These terms are not defined and are exceptions any creative lawyer will drive his semi-truck through.

But, the AFA will cause more damage to arbitration than a mere Mack truck. The current draft of the bill purportedly would have a court determine the validity or enforceability of **any** agreement to arbitrate under federal law, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement. The AFA thus would overturn forty-year-old U.S. Supreme Court precedent,[1] which precedent was reaffirmed just last year in Buckeye Check Cashing, Inc. v. Cardegna, where the Court held that a claim that a contract was usurious and thus that the arbitration provision therein was void for illegality was to be determined by the arbitrator, not a court.[2]

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MESSAGE FROM THE EDITORS

Dear ADR committee members:

Last issue we reported on a significant piece of legislation that, if passed, will alter the terrain of arbitration in entire categories of contracts. That law is still pending, though greatly broadened, and this issue the co-chairs are asking the membership to become involved. Learn about this significant bill, help keep it within bounds and avoid disrupting the well settled landscape of ADR.

A recent Seventh Circuit decision addressed deadlines in arbitration proceedings and the benefit (burden?) of the bargain that contract arbitration clauses can create. In this issue, Manjit Gill provides an examination of that case and the pitfalls that might entrap the unwary. Also, the difficulty of obtaining third party discovery in an arbitration proceeding is addressed by Jeremy Taylor and David Saunders, outlining the "yes", "no" and "maybe" decisions that have been handed out by the courts.

Also in this issue, Lawrence Mills brings the wisdom of the Rolling Stones to bear on arbitration and uses statistics to persuasively suggest that arbitration should be considered even when a contract doesn't force it. The requirement of the intent to arbitrate is examined by Jonathan Shaffer and Tamara Dunlap in the context of enforcing an arbitration clause. Finally, providing us with a preview of his longer piece for *Harvard Negotiation Law Review*, Don Philbin gives a tactical examination of mediation as the preferred method of dispute resolution with the least acrimony among the parties.

Every quarter we send you the latest news, helpful guides, resources and network connections for everything relating to all forms of alternative dispute resolution. The greatest resource we have to draw our material from is the membership of the committee. If there is an article you want to write, or a subject you are interested in having addressed, please contact us at aescobar@astidavis.com.

Sincerely,

David B. Collier
Rome McGuigan, P.C.
Hartford, CT

Co-editor-in-chief

Manjit S. Gill
Becker & Poliakoff, P.A.
Coral Gables, FL

Co-editor-in-chief

Annette C. Escobar
Astigarraga Davis
Miami, FL

Co-editor-in-chief

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ADR Alert: Arbitration Deadlines-Getting What You Bargained For

By Manjit Gill, Esq.

If you are brought in by your client to assist in the preparation of a dispute resolution provision to govern a particular business transaction, the parties may decide that if a dispute arises, that dispute will be arbitrated, and further, that the arbitration will be governed by certain agreed procedures. One of the factors that may persuade the parties to choose arbitration over litigation could be the belief that arbitration will offer some flexibility and relative "informality" that would not be available in a court proceeding. If the recent decision from the Seventh Circuit Court of Appeals in *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571 (7th Cir. 2007) offers any insight into this debate, that belief may not be justified.

Background to Dispute

In the *Argonaut* dispute, Underwriters, a U.K.-based reinsurance syndicate, had entered into reinsurance contracts with California-based insurer Argonaut. These contracts contained the following arbitration provision:

> If any dispute shall arise between the Company [Argonaut] and the Underwriters with reference to the interpretation of this Agreement or their rights with respect to any transaction involved, this dispute shall be referred to three arbitrators, one to be chosen by each party and the third by the two so chosen. If either party refuses or neglects to appoint an arbitrator within thirty days after receipt of written notice from the other party requesting it to do so, the requesting party may nominate two arbitrators, who shall choose the third.[1] (Emphasis added).

Argonaut resolved certain claims with its insureds and then wanted Underwriters to reimburse Argonaut under the contracts. Underwriters asked Argonaut for more information before considering Argonaut's claim. Argonaut responded with an arbitration demand. As part of that demand, Argonaut requested Underwriters to name its arbitrator within thirty (30) days, and Underwriters complied on September 3, 2004.[2]

On August 6, 2004, Underwriters sent a written demand to Argonaut to nominate its own arbitrator for the dispute, also reminding Argonaut of the 30-day limit on Argonaut's nomination. Although the demand did not specifically identify when the 30-day window would run, the 30th day fell on Sunday, September 5, 2004.[3]

Sunday came and went without Argonaut giving Underwriters the notice. Nor did Argonaut give the notice on Monday, September 6th, which was Labor Day, a legal holiday in the United States. However, as it was not a holiday in the U.K., Underwriters sent Argonaut a faxed letter invoking the default provision in the contract and identifying Underwriters' choice for the second arbitrator.[4]

On September 7th, Argonaut responded to Underwriters with an e-mail, claiming that Argonaut had selected their arbitrator on the preceding Friday, the 3rd, and that Argonaut had sent Underwriters the notice at that time. After some further investigations revealed that was not the case, Argonaut faxed Underwriters a letter naming its choice for the second arbitrator and taking the position that the strict thirty-day deadline did not apply because the thirtieth day was on a Sunday and was then followed by a legal holiday in the U.S., such that Argonaut was only required to name the arbitrator by the 7th.[5]

Proceedings Before Trial Court

Underwriters petitioned the federal district court pursuant to the Federal Arbitration Act, 9 U.S.C. § 5, to order that its two arbitrator nominees be confirmed so that they could pick

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the third panelist and the arbitration could proceed. In response, Argonaut sent Underwriters a written notice that it was withdrawing its demand for arbitration "without prejudice" and filed a motion to dismiss the court case for lack of jurisdiction.[6]

The district court denied Argonaut's motion to dismiss, concluding that Argonaut would not be able to avoid Underwriters' invocation of the default language in the arbitration provision in the contract by simply withdrawing the demand and filing it again. The court then proceeded to grant summary judgment to Underwriters, effectively concluding that, based on the application of federal common law, Argonaut's selection of the second arbitrator was not timely because it was not communicated within thirty (30) days. Argonaut appealed.[7]

Seventh Circuit's Decision

The Seventh Circuit first addressed the issue of whether the trial court could entertain Underwriters' petition once Argonaut informed Underwriters that it was withdrawing the initial demand for arbitration. Argonaut argued that the withdrawal of its demand for arbitration rendered the issue moot. Like the district court, the Seventh Circuit disagreed, noting that the matter was not moot because "Argonaut explicitly reserved its rights to institute a new arbitration proceeding, evincing its intent to move forward with a course of conduct the legality of which the district court in this action was charged with deciding."[8]

Having disposed of the jurisdictional question, the Seventh Circuit proceeded to address the more significant question: should the court apply state or federal law to interpret an arbitration agreement under the New York Convention when the agreement contains no choice-of-law provision?[9]

To answer this question, the court first considered the history and purposes of the New York Convention. After having reviewed the FAA's history, the Seventh Circuit concluded that, although it was understood that "the Convention would displace certain domestic laws, it would do so only in the narrow context of truly international disputes; within that narrow context, where appropriate, federal arbitration law under the FAA would fill the gaps left by the Convention."[10]

The Seventh Circuit then turned to the question of whether state or federal law should be used to interpret the terms of the parties' agreement, and in particular, the thirty-day requirement. As a starting point, the court noted that other Circuits, when addressing issues of arbitrability or enforcement under the Convention, have turned to federal rules of decision.[11] The court thus reasoned that the issue of the appointment of arbitrators was an issue "closely aligned with the other issues of interpretation of arbitration agreements under the Convention" and therefore should be resolved by the application of a uniform federal rule.[12]

Applying this standard, the Court affirmed the district court and held as follows:

> In the absence of a choice-of-law provision, we conclude that parties are to be bound to the explicit language of arbitration clauses, with no state-specific exceptions that would extend otherwise clear contractual deadlines. Of course, sophisticated commercial parties such as these may provide by contract that thirty days does not include Sundays and holidays, or that a contract with a terminus for performance on a Sunday or holiday ... may be timely performed on the next business day…
>
> [W]hen the parties do not otherwise determine by contract, deadlines included in arbitration agreements under the Convention will admit of no exceptions. Thirty days must *mean* thirty days. When the end of the thirty days falls on a Saturday, a Sunday, a national holiday or a state or parochial holiday, the parties will be bound nonetheless to comply with the deadline for which they bargained.[13] (Emphasis added).

The lessons to be learned? First, be extremely vigilant of all deadlines in your arbitration. Second, do not assume that arbitration has all the "flexibility" that you believe litigation lacks.

Manjit S. Gill, Esq., *is an attorney with Becker & Poliakoff, PA in Coral Gables, Florida. (mgill@becker-poliakoff.com) He specializes in international arbitration and dispute resolution with a focus on Malaysia and India.*

The article expresses Mr. Gill's personal views and is not intended to reflect in any manner the views of his law firm.

[1] *Argonaut*, 500 F.3d at 572.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.* at 572-573.
[6] *Id.* at 573.
[7] *Id.* at 573-574.
[8] *Id.* at 575.
[9] *Id.*
[10] *Id.* at 577.
[11] *Id.* at 577-78 (citing *InterGen N.V. v. Grina*, 344 F.3d 134, 144 (1st Cir. 2003); *Beiser v. Weyler*, 284 F.3d 665, 673 (5th Cir. 2002); *Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l. Inc.*, 198 F.3d 88, 96 (2d Cir. 1999); *McDermott Int'l., Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1209 (5th Cir. 1991)).
[12] *Id.* at 578.
[13] *Id.* at 581-582.

Obtaining Pre-hearing Discovery From Non-parties In Arbitration

By Jeremy M. Taylor and David P. Saunders

One of the great advantages of the arbitration process -- in theory -- is a streamlined and efficient discovery process. As one federal court of appeals explained: "Parties to a private arbitration agreement forego certain procedural rights attendant to formal litigation in return for a more efficient and cost-effective resolution of their disputes. A hallmark of arbitration -- and a necessary precursor to its efficient operation -- is a limited discovery process."[1]

Still, in some arbitrations, the "streamlined" discovery process can become anything but that. After all, today's arbitrations are not limited to simple, straightforward cases -- disputes of enormous complexity routinely are submitted to arbitration. Those matters can involve mountains of evidence, and, of course, that evidence is not always exclusively in the hands of the parties that agreed voluntarily to submit their dispute to arbitration. Thus, as in the case of court-based litigation, discovery from non-parties often will be an important part of the arbitral process.

When it comes to obtaining discovery from non-parties in the arbitration context, however, what does the process for obtaining such discovery look like? In the world of litigation, the game plan is fairly straightforward: you serve your subpoenas on the non-parties; collect and review the documents those non-parties produce to you; take the non-parties' depositions when you and your opponent can agree to schedule them; learn what relevant information is out there -- both good and bad -- and then package the gathered information for presentation at trial. Thus, while the process can be long, costly, frustrating, grueling, or all of the above, the rules of the game are well established and well known.

That is not the case in arbitration, where the rules of the game for obtaining prehearing discovery from non-parties are far less clear. Indeed, those rules can vary significantly from case to case.

At least -- and perhaps, at most -- everyone generally agrees on the starting point: Section 7 of the Federal Arbitration Act, 9 U.S.C. § 7. Section 7 provides arbitrators with authority to issue subpoenas, including to obtain evidence from non-parties to the arbitration: "The arbitrators … may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case."

In the context of prehearing discovery, however, Section 7's language begs an obvious question for the practitioner: Can a non-party be compelled by an arbitrator's subpoena to appear for a deposition or produce documents to a requesting party as part of prehearing discovery? Looking only at the language of Section 7, the answer would appear to be "no." After all, under Section 7, the attendance of the witness, with or without documents, is to be "before them or any of them," with "them" being the arbitrators.

Reading that "before them" language in Section 7 for the first time, many a seasoned litigator might respond, "That just cannot be right." No prehearing discovery from non-parties? "Impossible." No non-party depositions unless it is before the arbitrator? "Ridiculous." No documents from non-parties until the arbitration hearing itself? "Absurd." So, going on instinct and based on past practice, many litigators new to the world of arbitration simply assume that the answer must be "yes" and that they can proceed with prehearing discovery against non-parties by following the same process common in court-based litigation.

Not so fast. In fact, three federal courts of appeal have directly addressed the Section 7 question of whether a non-party can be compelled by an arbitrator's subpoena to appear for a deposition or produce documents as part of prehearing discovery, and each of those courts has offered a different answer -- answers that fairly can be summed up as "yes," "no," and "maybe." A practitioner must understand those different interpretations of Section 7 and know what options may be available for obtaining prehearing discovery from non-parties.

"[A] party might, under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship." [Fourth Circuit]

"Maybe" The Fourth Circuit's "Special Need" Approach

The Fourth Circuit squarely addressed the question of whether Section 7 authorizes an arbitrator to subpoena non-parties for prehearing discovery in *COMSAT Corp. v. National Science Foundation*.[2] While the Fourth Circuit declined to read Section 7 as broadly authorizing prehearing discovery from non-parties, the court -- as the first of the federal circuits to address the question -- not surprisingly left itself some wiggle room by creating an exception to its own rule that such prehearing discovery generally is not available

by holding that such discovery might be obtainable if a party can show that a "special need" exists.[3]

In *COMSAT*, the National Science Foundation ("NSF") entered into an agreement with Associated Universities, Inc. ("AUI") to have AUI administer a nationwide network of research telescopes. AUI then entered into a contract with COMSAT to build such a telescope in West Virginia. A dispute arose between COMSAT and AUI over AUI's liability for cost overruns, as a result of which COMSAT and AUI submitted their claim to arbitration.[4]

As part of the prehearing discovery process, and at COMSAT's request, the arbitrator issued a subpoena to NSF requiring the agency to produce to COMSAT all documents related to the telescope at issue. NSF refused to comply. In response, COMSAT requested, and the arbitrator issued, three additional subpoenas -- all returnable to COMSAT's counsel -- directing two NSF employees and NSF's "Document Custodian" to appear and produce certain documents. When NSF again refused to comply with the subpoenas, COMSAT turned to the federal district court to enforce the subpoenas. The district court ordered NSF to comply.[5]

[I]n the Eighth Circuit, you may charge ahead with obtaining prehearing discovery from non-parties…

On appeal, the Fourth Circuit reversed.[6] Starting with the basic proposition that "[t]he subpoena powers of an arbitrator are limited to those created by the express provisions of the FAA," the Fourth Circuit held that "[n]owhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery."[7] The Fourth Circuit focused on the "before them" language of Section 7, stating that "the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear 'before them;' that is, to compel testimony by non-parties at the arbitration hearing."[8]

But, just when it appeared that the Fourth Circuit was going to slam the door shut on the prospect of prehearing discovery from non-parties in the arbitration context, it left the door open just a crack. In dicta, the Fourth Circuit stated that "a party might, under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship."[9] The court declined to define what qualified as a "special need" except to say that "at a minimum, a party must demonstrate that the information it seeks is otherwise unavailable."[10]

Thus, what "minimum" showing of "special need" a party needs to make remains an open question. In *COMSAT*, for example, the Fourth Circuit noted that COMSAT would not have been able to make the "minimum" showing because the documents it had requested were obtainable either from the opposing party or through a Freedom of Information Act request.[11] By comparison, in *In re Campania*, the District Court for the Eastern District of New York found that a "special need" existed when the subpoena related to evidence located on a ship that was about to leave port with its return to the United States uncertain.[12] What qualifies as a "special need" short of such an extreme situation, however, remains a case-by-case determination with little guiding precedent.

"Yes" The Eighth Circuit's Implied Powers Approach

If the Fourth Circuit left the door for obtaining prehearing discovery from non-parties cracked open in *COMSAT*, the Eighth Circuit kicked that same door wide open in *In re Security Life Insurance Company of America*.[13] While not the first court to do so,[14] the Eighth Circuit was the first federal circuit to read Section 7 as implicitly authorizing arbitrators to issue subpoenas to non-parties to compel their attendance at prehearing depositions or to compel prehearing document production.

The case involved a reinsurance contract between Security Life and a group of seven reinsurers, including Transamerica. The contract, to be managed by Duncanson & Holt ("D&H"), provided that the seven reinsurers would assume 85% of the risk under Security Life's policies. Subsequently, a $14 million judgment was entered against Security Life, but the reinsurers refused to acknowledge liability for their share of the judgment, taking the position that Security Life had failed in its dealings with D&H to honor the "counsel and concur" provision of the reinsurance contract.[15]

Pursuant to an arbitration clause in the reinsurance contract, Security Life demanded arbitration against D&H. As part of prehearing discovery, Security Life petitioned the arbitration panel for a subpoena against Transamerica, "requir[ing] Transamerica to produce documents and to provide the testimony of a certain employee." Transamerica refused to respond, however, claiming that, because it was not a party to the arbitration, the subpoena issued by the panel was not authorized under the FAA. Security Life then successfully petitioned the district court to compel Transamerica to comply with the subpoena.[16]

On appeal, the Eighth Circuit affirmed, taking a very different approach from that of the Fourth Circuit in *COMSAT*.[17] The Eighth Circuit acknowledged that Section 7 "does not … explicitly authorize the arbitration panel to require the production of documents for inspection by a

party,"[18] but the court chose not to end its analysis there. Instead, the court decided that, on balance, the "efficiency" of the arbitration process was furthered by permitting litigation-like prehearing discovery with regard to non-parties: "Although the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing."[19] Driven by this policy consideration, and finding some comfort in Transamerica's close relationship to the underlying arbitration, the Eighth Circuit held that "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing."[20]

"No" The Third Circuit's Textualist Approach

After the *COMSAT* and *Security Life* rulings, parties to arbitral proceedings could expect that they either could obtain litigation-style prehearing discovery from non-parties or, at the very least, could have an opportunity to show why they had a "special need" for such discovery. Then, the Third Circuit jumped into the fray. Rather than choose sides in the somewhat-limited debate between the Fourth and Eighth Circuits, the Third Circuit rejected the rationale of both, holding instead, in *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, that a third party may not be compelled by an arbitrator's subpoena to produce documents to a party as part of prehearing discovery.[21]

The facts of the case were straightforward. An employee of Hay Group left to join another company. The employee's separation agreement included an anti-solicitation provision that Hay Group later alleged the employee violated. Arbitration followed. At Hay Group's request, the arbitration panel issued a subpoena against the employee's current employer, E.B.S., for the production of certain related documents. E.B.S. refused to comply with the subpoena and Hay Group sought enforcement from the district court. The district court enforced the subpoena.[22]

In quashing the subpoena, the Third Circuit -- with now-Supreme Court Justice Samuel Alito writing the opinion -- took a textualist approach to interpreting Section 7, holding that "Section 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time."[23] The court broke down the language of Section 7, noting that "[t]he only power conferred on arbitrators with respect to the production of documents by a non-party is the power to summon a non-party 'to attend before them or any of them as a witness *and* in a proper case *to bring with him or them* any book, [or] record."[24] Going a step further, the court reasoned that "the use of the word 'and' makes it clear that a non-party may be compelled 'to bring' items 'with him' only when the non-party is summoned 'to attend before [the arbitrator] as a witness.'"[25] The court found support for its strict reading of Section 7 in the similar language of the pre-1991 version of Rule 45 of the Federal Rules of Civil Procedure, which also had been interpreted to prohibit the issuance to non-parties of prehearing document subpoenas.[26]

The Third Circuit went on to explain why it did not consider its strict reading of Section 7 to be "absurd."[27] In fact, the court stated that "we believe that a reasonable argument can be made that a literal reading of Section 7 actually furthers arbitration's goal of 'resolving disputes in a timely and cost efficient manner.'"[28] The court offered three reasons for its ruling. First, the court took comfort in the fact that the federal courts had operated for decades within the boundaries set by the pre-1991 version of Rule 45.[29] Second, the court recognized the arbitrator's limited power to affect those parties who had not agreed to the arbitrator's jurisdiction.[30] Third -- and perhaps most practically given what is supposed to be the "limited discovery process" in arbitration[31] -- the court reasoned that its interpretation of Section 7 would "discourage the issuance of large-scale subpoenas upon non-parties," while a contrary interpretation of Section 7 would create "less incentive to limit the scope of discovery and more incentive to engage in fishing expeditions that undermine some of the advantages of the supposedly shorter and cheaper system of arbitration."[32]

… in the Third Circuit, you cannot.

Notably, the Third Circuit was clear that it considers itself to be in direct conflict with the Fourth Circuit's *COMSAT* decision and the Eighth Circuit's holding in *Security Life*.[33] While the Third Circuit found the Fourth Circuit's interpretation of Section 7 to be "largely consistent" with its own, the Third Circuit stated that it "cannot agree" with the Fourth Circuit's "dicta" allowing for the possibility of a "special need" exception.[34] As the Third Circuit stated, "while such a power might be desirable, we have no authority to confer it."[35] The Third Circuit was just as blunt in rejecting the Eighth Circuit's "power-by-implication analysis" in *Security Life*, reasoning that, because the FAA confers the power to compel a non-party witness to bring documents to a hearing before the arbitrator, but is silent with regard to the power to compel prehearing discovery, "the FAA implicitly withholds the latter power."[36]

Where does this leave the practitioner?

Given the growing popularity of arbitration in recent years, the frequent importance of obtaining prehearing discovery from non-parties, the general acceptance of that practice in

litigation, and the conflict that currently exists among the federal circuits as to the ability to obtain prehearing discovery from non-parties in arbitration, something will have to give. Perhaps it will come in the form of an amendment to Section 7 of the FAA, as Rule 45 of the Federal Rules of Civil Procedure previously was amended. Perhaps it will come in the form of the U.S. Supreme Court resolving the conflict. But, for the practitioner with an arbitration currently in the prehearing discovery stage, those longer-term resolutions are of little help today. Today's question is more straightforward: What do I do?

Outside [the Third, Fourth, or Eighth Circuit], … practitioners have to guess…

For the practitioner whose arbitration falls under the umbrella of the Third, Fourth, or Eighth Circuit, the answer is fairly clear. If you are in the Eighth Circuit, you may charge ahead with obtaining prehearing discovery from non-parties, just as you would if your case was before a federal district court. If you are in the Third Circuit, you cannot. If you are in the Fourth Circuit, you contemplate what "special need" for the discovery you may have, perhaps looking to see if a ship -- proverbial or not -- with your evidence aboard it is heading out of port.

Outside those circuits, however, practitioners have to guess at the rules of the game when it comes to obtaining prehearing discovery from non-parties.

District courts have faced the same problem. In one case in the Southern District of New York, for example, the district court followed the Eighth Circuit's approach, but only to the extent it required a non-party to produce documents on a prehearing basis.[37] The district court decided that the logic of *Security Life* could not be extended to require non-parties to appear for prehearing depositions.[38] Another district court, the Northern District of Georgia, weighed the logic of the Eighth Circuit's and Third Circuit's competing approaches and decided to adopt the Eighth Circuit's approach in full.[39]

So, is there a "safe" option for obtaining discovery from non-parties on a prehearing basis in arbitration, one that would be acceptable to each of the federal circuits that has interpreted Section 7? Perhaps, but with one important caveat -- the prehearing discovery must be conducted, at least in part, before the arbitrator.

This option was suggested by Judge Chertoff in his concurring opinion in the Third Circuit's *Hay Group* case when he wrote separately "to observe that our opinion does not leave arbitrators powerless to require advance production of documents when necessary to allow fair and efficient proceedings."[40] Judge Chertoff's solution was for the arbitrator to compel the non-party witness to appear with documents before the arbitrator, who then could adjourn the hearing to allow the parties to review the produced documents.[41] Judge Chertoff surmised -- correctly, in all likelihood -- that many non-parties would agree to produce the requested documents to the parties without the need for a hearing to forego the inconvenience of an appearance.[42]

Proceeding in the manner suggested by Judge Chertoff would not be without its potential downsides -- be it in terms of cost, time, or case strategy -- particularly if the arbitrator chooses to have a more active role than simply adjourning the hearing. In the case of a prehearing deposition, for example, Judge Chertoff's process probably would require the arbitrator to remain present throughout the testimony unless the non-party waived that requirement. As a result, counsel would have to decide whether they want the arbitrator to hear raw testimony. And, all of this assumes, of course, that the arbitrator is willing to proceed with discovery in this manner, hardly a given. But, in that case, when counsel makes the reasoned decision that prehearing discovery from a non-party is necessary -- and the arbitrator agrees -- counsel choosing to proceed can take some comfort in the fact that another federal circuit -- the Second Circuit -- has examined a somewhat similar process and essentially blessed it.

In *Stolt-Nielsen SA v. Celanese AG*,[43] Celanese was a party to an arbitration dealing with anti-competitive behavior in the shipping business. The arbitration arose after a supplier, Stolt-Nielsen SA ("Stolt"), pled guilty to charges of criminal conspiracy to rig bids and fix prices. Stolt was not a party to the actual arbitration.[44]

At Celanese's request, the arbitrators issued a series of subpoenas to Stolt's former general counsel and its custodian of records, seeking both testimony and the production of documents. But, in contrast to the subpoenas at issue in *COMSAT, Security Life,* and *Hay Group*, the subpoenas issued in *Stolt* directed the recipients to "appear and testify in an arbitration proceeding" and to bring the requested documents with them. Stolt nonetheless refused to comply with the subpoenas and moved to quash the subpoena issued to its former general counsel in the district court. Celanese countered by moving to compel Stolt's compliance with the subpoenas issued to Stolt's custodian of records.[45] The district court enforced the subpoenas, holding that subpoenas that "call for the non-party to appear before the arbitrators themselves"[46] comply with Section 7's requirement that the "arbitrators … summon witnesses to testify 'before them.'"[47]

On appeal to the Second Circuit, Stolt argued that, because the hearing that the witnesses were called to attend was not a "trial-like arbitration hearing on the merits," the challenged subpoenas were a "thinly disguised attempt" to compel prehearing discovery beyond Section 7's authorization.[48] Thus, while Stolt asked the Second Circuit "to decide

whether Section 7 authorized arbitrators to issue subpoenas to non-parties to compel pre-hearing discovery" -- the same issue squarely addressed by the Fourth, Eighth, and Third Circuits -- the Second Circuit declined to do so.[49]

Instead, the Second Circuit held that "Section 7 unambiguously authorizes arbitrators to summon non-party witnesses to give testimony and provide material evidence before an arbitration panel,"[50] determining that this power was "limited only by the requirement that the witness be summoned to appear 'before [the arbitrators] or any of them' and that any evidence requested be material to the case."[51] Moreover, the court read Section 7 to "authorize[] the use of subpoenas at preliminary proceedings even in front of a single arbitrator."[52] The court rejected Stolt's argument that allowing such subpoenas would be "unduly burdensome" to non-parties, instead adopting Judge Chertoff's reasoning from *Hay Group*: "Nor should we lightly assume that arbitrators will subpoena third-party witnesses gratuitously, since the arbitrators themselves must attend any hearing at which such subpoenas are returnable."[53]

Conclusion

At some point in the not-too-distant future, an answer likely will be provided to the question of whether a non-party can be compelled by an arbitrator's subpoena to appear for a deposition or produce documents as part of prehearing discovery in arbitral proceedings. The Supreme Court may choose to weigh in on the question, for example, or the FAA may be amended. Until that time, however, practitioners have to be aware of the competing interpretations of Section 7 and of the option to proceed with prehearing discovery pursuant to the process suggested by Judge Chertoff in *Hay Group* and recently endorsed by the Second Circuit in *Stolt*.

Jeremy M. Taylor *is a partner at Jenner & Block LLP and a member of the firm's Arbitration and Business Litigation Practices. He can be reached at jmtaylor@jenner.com.*

David P. Saunders *is an associate at Jenner & Block LLP and a member of the firm's Arbitration Practice. He can be reached at dsaunders@jenner.com..*

[1] *COMSAT Corp. v. Nat'l Science Found.*, 190 F.3d 269, 276 (4th Cir. 1999) (citing *Burton v. Bush*, 614 F.2d 389, 390-91 (4th Cir. 1980) ("When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial.")).
[2] 190 F.3d 269 (4th Cir. 1999).
[3] *Id.* at 275-76.
[4] *Id.* at 271-72.
[5] Id. at 272-74.
[6] *Id.* at 278.
[7] *Id.* at 275.
[8] *Id.*
[9] *Id.* at 276 (following *Burton*, 190 F.2d at 391).
[10] *Id.* at 276.
[11] *Id.* at 276-77.
[12] *In re Campania*, No. 03 CV 5382(ERK), 2004 WL 1084243, *3 (E.D.N.Y. Feb. 6, 2004); *see also In re Deiulemar Compagnia Di Navigazione*, 198 F.3d 473, 479 (4th Cir. 1999).
[13] 228 F.3d 865 (8th Cir. 2000).
[14] See, e.g., *Meadows Indem. Co. v. Nutmeg Ins. Co.*, 157 F.R.D. 42 (M.D. Tenn. 1994).
[15] *Id.* at 867.
[16] *Id.* at 868-69.
[17] *Id.* at 872.
[18] *Id.* at 870.
[19] *Id.*
[20] *Id.* at 870-71(citing *Meadows*).
[21] 360 F.3d 404, 411 (3d Cir. 2004).
[22] Id. at 405-06.
[23] *Id.* at 407.
[24] *Id.* at 407 (quoting 9 U.S.C. § 7) (emphasis in original).
[25] *Id.* (quoting 9 U.S.C. § 7).
[26] *Id.*
[27] *Id.* at 409.
[28] *Id.* at 409 (quoting *Painewebber Inc. v. Hofmann*, 984 F.2d 1372, 1380 (3d Cir. 1993)).
[29] *Id.*
[30] *Id.* at 409 (citing *Legion Ins. Co. v. John Hancock Mut. Life Ins. Co.*, No. 01-162, 2001 U.S. Dist. LEXIS 15911, *4 (E.D. Pa. Sept. 5, 2001) ("the authority of arbitrators with respect to non-parties who have never agreed to be involved in arbitration is severely limited")).
[31] *COMSAT*, 190 F.3d at 276.
[32] *Hay Group*, 360 F.3d at 409 (citing *COMSAT*, 190 F.3d at 269).
[33] *Id.* at 408-10.
[34] *Id.* at 409-410.
[35] *Id.* at 410.
[36] *Id.* at 408.
[37] *Atmel Corp v. LM Ericsson Telefon*, 371 F. Supp. 2d 402 (S.D.N.Y. 2005); *see also Schlumbergersema, Inc. v. Xcel Energy Inc.*, No. Civ. 02-4304, 2004 WL 67647 (D. Minn. Jan. 9, 2004) (same).
[38] *Amtel Corp*., 371 F. Supp. 2d at 403.
[39] *Festus & Helen Stacy Found. v. Merrill Lynch, Pierce Fenner & Smith Inc.*, 432 F. Supp. 2d 1375 (N.D. Ga. 2006).
[40] *Hay Group*, 360 F.3d at 413.
[41] *Id.* at 413-14.
[42] *Id.* at 413.
[43] 430 F.3d 567 (2d Cir. 2005).
[44] *Id.* at 569-70.
[45] *Id.* at 569-71.
[46] *Id.* at 571.
[47] *Id.* (quoting 9 U.S.C. § 7).
[48] *Id.* at 577.
[49] *Id.* at 569.
[50] *Id.* at 580.
[51] *Id.* at 578-79 (quoting 9 U.S.C. § 7).
[52] *Id.* at 579.
[53] *Id.* at 580.

You Can Get What You Need in Arbitration

By Lawrence R. Mills, Esq

There is wisdom in the words of Mick Jagger.

Cases are won and cases are lost to varying degrees. In a contested case, it is rare that a client wins everything the client wants. Moreover, there seems to be a growing concern among lawyers that the court system does not always deliver the "just, speedy, and inexpensive determination" of disputes envisioned by the drafters of the civil rules.

Although a lawyer can never guarantee a favorable result for her client, the lawyer can design or influence the dispute resolution process to ensure that the client's claims are decided in a fair and cost-effective manner. In this respect, while you can not always get the result you want, you should be able to get a process that meets your needs.

The most flexible dispute resolution process for determination of contested civil cases is arbitration. In arbitration, there are many options available to customize the process. For example, you can choose the decision maker; you can agree on pre-hearing procedures; the case can be resolved faster; and the proceedings are confidential.

You can't always get what you want,

but if you try sometimes you just might find,

you get what you need.

- The Rolling Stones.

However, all too frequently litigators limit their arbitration cases to "demand cases," that is, cases where a pre-existing contract contains an arbitration clause requiring a dispute to be arbitrated. But virtually any case can be taken to arbitration, whether or not a pre-existing contract provision exists, if the parties agree to make it a "submission case" by stipulating, after the dispute has risen, to arbitration. A commercial arbitration, whether a demand case or a submission case, can take whatever form the parties agree.

In 2003, the ABA Section of Litigation Task Force on ADR Effectiveness conducted a survey of members of the Litigation Section of the ABA regarding their attitudes toward arbitration. Although the survey is now somewhat dated, at that time, 78% of the lawyers who responded said they believe arbitration is more efficient than court proceedings and 56% said they believe arbitration is more cost-effective than litigation.

Nonetheless, in the same survey, over 60% of the lawyers who responded said that they recommend arbitration to clients as an alternative method of resolving disputes less than four times out of ten. Stated another way, approximately 34% of the lawyers surveyed said that they actively counsel clients against arbitration six times out of ten. Of the lawyers responding to the survey who counseled their clients against arbitration, the four most often cited reasons are: (1) lack of appellate options (38%); (2) lack of discovery (24.4%); (3) excessive costs involved (22.2%); and (4) bias of the panel, lack of neutrality or occupational prejudices (15%).

Without minimizing the perceived disadvantages of arbitration, creative lawyering can eliminate or ameliorate the most common objections to arbitration.

If it is deemed desirable to give up the considerable advantage of having the arbitration award be final and binding (except for the limited grounds for vacatur specified in the applicable law), it is possible to provide for a second-stage, merits-based arbitral review by another arbitrator or arbitration panel. In such event, the arbitration agreement could specify that the arbitrator must apply the applicable law; that the award include findings of fact and conclusions of law; and that the standard of arbitral review be that the findings of fact made by the first arbitrator or arbitration panel are supported by evidence and that the legal conclusions are not clearly erroneous. In order to have meaningful arbitral review, it would also be advisable to arrange for a transcript of the first, testimonial arbitration hearing. When the appellate arbitral panel has decided the appeal, the award, as modified or corrected on appeal, should be treated as final and binding to the same extent as an award not subject to arbitral review.

Moreover, if it is deemed desirable to avoid the streamlined, proportional discovery of a typical arbitration, and instead to engage in full-blown discovery as permitted by the Federal Rules of Civil Procedure, the arbitration agreement can so provide. The arbitration panel will, in most cases, comply with the level of discovery desired by the parties. Nonetheless, if the arbitrators believe the discovery agreed upon by the parties is excessive, or too expensive in consideration of the amount in controversy, the arbitrators may schedule a conference call with the lawyers and representatives of the parties to ensure that the parties are

aware of the arbitrators' concerns regarding costly and time-consuming discovery.

Similarly, if there is concern that the costs of arbitration are too high, lawyers can take a number of steps to reduce the costs, including, but not limited to, electing non-administered arbitration to avoid the payment of provider filing and administrative fees; engaging a single arbitrator, rather than a panel of three, and selecting an arbitrator with a lower hourly rate; voluntarily exchanging relevant documents and information to eliminate expensive pre-hearing discovery; and stipulating to uncontested facts to reduce the hearing time. Significantly, while, the parties in arbitration must pay an arbitrator rather than using a "free" judge provided by the court system, in a litigated commercial arbitration hearing where the parties are represented by counsel, the arbitrator is generally the lowest paid professional in the hearing room. Arbitrator fees should not present a cost impediment to choosing arbitration.

Finally, if there is concern about arbitrator bias, particularly because the grounds for vacatur of an arbitration award are quite limited, attorneys and parties should carefully select the arbitrator who will preside over the dispute. Arbitrators must comply with the disclosure requirements of the applicable arbitration law, and arbitrators serving on panels in arbitrations administered by reputable arbitration organizations comply with the disclosure guidelines in the Code of Ethics for Arbitrators in Commercial Disputes as a matter of course. Nonetheless, it is incumbent upon the participants in arbitral proceedings carefully to investigate the background, qualifications, and demonstrated fairness of the candidates that may serve as the arbitrator before the arbitrator is appointed. If there is any question of actual or apparent bias, the factual basis for the question should be called to the attention of the arbitral organization or the arbitrator before or during the arbitral proceedings so that the arbitrator can recuse herself or be removed immediately. Allegations of bias after an adverse award has been rendered should be viewed with skepticism.

There are considerable benefits to choosing arbitration as an alternative to court litigation for resolution of civil disputes. Parties electing arbitration can get the fair and cost-effective process they need, even if they cannot always get the outcome they want.

Lawrence R. Mills, Esq. *a principal in the Seattle law firm Mills Meyers Swartling, is an experienced arbitrator and mediator. Mr. Mills is the Chair of the ABA Section of Dispute Resolution. He may be contacted at* lmills@mms-seattle.com *or* www.millsadr.com.

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Enforcement of Arbitration Provisions: The Requirement to Demonstrate Clear and Unmistakable Intent to Arbitrate

By Jonathan D. Shaffer and Tamara F. Dunlap

The Federal Arbitration Act ("FAA") provides for the enforcement of agreements to arbitrate in all transactions involving interstate commerce, except circumstances that permit revocation of the underlying contract. The Act provides for a stay of any proceedings brought in the U.S. courts on issues referable to arbitration under a written agreement between the parties. Before enforcing an arbitration clause or staying litigation, however, a court will examine the arbitration clause and the nature of the parties' disputes to determine whether there was a clear and unmistakable intent to arbitrate. If there was not such an intent as to the issues a party seeks to arbitrate, the court may not enforce the arbitration provision.

Statutory Requirements

The FAA requires enforcement of agreements to arbitrate as follows:

> § 2. Validity, irrevocability, and enforcement of agreements to arbitrate.
> *A written provision in any* maritime transaction or 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.[1]
>
> *(emphasis added).*

Similarly, the FAA requires stay of legal proceedings as follows:

> § 3. Stay of proceedings where issue therein referable to arbitration.
> If any suit or proceeding be brought in any of the courts of the United States *upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration* under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.[2]
>
> *(emphasis added).*

Courts have provided further that arbitration will not be enforced unless there is a "clear and unmistakable" intent to arbitrate. In *Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1982), the Supreme Court stated, upon affirming the 4th Circuit Court of Appeals decision compelling arbitration,

> The Arbitration Act establishes that, as a matter of federal law, *any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration*, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.[3]
>
> *(emphasis added).*

And, in *Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), the Court held, in part,

> *An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute*.[4]
>
> *(emphasis added).*

Because the FAA establishes Congress' intent to promote the enforcement of arbitration agreements between parties, the U.S. Supreme Court has held that federal law preempts state arbitration laws that conflict with the FAA's broad principle of enforceability.[5] Yet, at the same time, courts have noted that

> *When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally(though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts….* This Court, however, has (as we just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: *Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clear*

and unmistakable" evidence that they did so.[6]
(emphasis added).

Who Decides Arbitrability of a Dispute?

While federal law will preempt state law that conflicts with the enforceability of an arbitration clause under the FAA, courts use state contract interpretation law in deciding what matters the parties have agreed to arbitrate.[7] And, when the parties are arguing *who* decides whether the issue should be arbitrated in the first place, it is the court unless the parties expressly provided otherwise in their contract.[8]

> Federal practice… has long recognized the existence of an independent proceeding to resolve the threshold procedural issue of whether a dispute should be arbitrated…. Both parties agree that under the Federal Arbitration Act, the *general rule is that the arbitrability of a dispute is to be determined by the court. Parties may, however, agree to allow the arbitrator to decide both whether a particular dispute is arbitrable as well as the merits of the dispute.*[9]
> *(emphasis added).*

The Intent to Arbitrate

Who are the parties to the contract?

The first question when deciding whether the parties in dispute under a contract evidenced an intent to arbitrate is – who are the parties to the contract? This would appear to be a straight forward question – are both parties signatories to the contract? But, at times, this does not mean that a party intended to bind itself to an arbitration provision. In *Celanese Corp. et al. v. The BOC Group PLC*, 2006 U.S. Dist. LEXIS 88191 (D. Tex. 2006), the Court found a signatory to a contract was not a party to the arbitration clause contained in that contract as it had exempted itself from the arbitration provision and therefore, that signatory could not enforce the arbitration clause against other parties to the agreement. The signatory was a defendant in a suit filed by two plaintiffs. Only one of the plaintiffs was a signatory to the contract. The defendant, also a signatory to that contract, moved to compel arbitration pursuant to the arbitration clause in that contract. The plaintiffs objected to the motion to compel and the Court noted that the signatory defendant

> [E]xpressly excluded themself [sic] as a party to the arbitration clause. Although the arbitration agreement may evidence clear and unmistakable intent to arbitrate questions of arbitrability between the two parties, this hardly evidences a clear intent between BOC plc [defendant] and Plaintiffs to arbitrate questions of arbitrability when BOC plc and BOC Nanjing acted as separate entities when negotiating the Agreement and BOC plc chose to be a non-party to the arbitration clause.[10]

The Court in *Apollo Computer, Inc. v. Helge Berg, et al.*, 886 F.2d 469 (1st Cir. 1989) held, under Massachusetts contract law, that a non-signatory to a contract could enforce an arbitration provision in a contract. In *Apollo*, the Plaintiff argued that the contract included a non-assignment clause and that clause prevented Defendant from enforcing the arbitration clause in the contract since Defendant was the assignee of the original signatory to the contract. The Court rejected Plaintiff's argument as, under Massachusetts law, non-assignment clauses are construed "as barring only the delegation of duties, not the assignment of rights."[11]

Impact of State Contract Law

As noted above in *Apollo Computer, Inc. v. Helge Berg, et al.*, a state's law on interpretation of contracts can have a profound impact on the question of a parties' intent to arbitrate. In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Supreme Court addressed this issue. The Court stated,

> When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts. *The relevant state law here, for example, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration.*[12]
> *(emphasis added).*

In *First Options of Chicago, Inc.*, a clearing house firm sought to hold a husband and wife personally liable for losses suffered by the husband's wholly owned business. The clearing house firm sought arbitration. The arbitrators and lower court found for the clearing house. The Court of Appeals reversed, and the Supreme Court affirmed the reversal, in pertinent part because the couple never agreed to arbitrate their dispute with the firm.[13]

"Courts decide whether there is an agreement to arbitrate according to common law principles of contract law."

Similarly, in *Arrants et al. v. Buck et al.*, 130 F.3d 636 (4th Cir. 1997), the Court also turned to state common law. In *Arrants*, the Plaintiffs sued Defendants – the Plaintiffs' brokerage firm and two of its employees – for securities fraud. The Defendants moved to compel arbitration under a contract between the Plaintiffs and a third party, the clearing

broker. The Fourth Circuit rejected Defendants' motion to compel arbitration. In reviewing the agreement and ultimately rejecting the Defendants' arguments, the Court noted that "Courts decide whether there is an agreement to arbitrate according to common law principles of contract law."[14] The Court found that (a) the parties must be "identified with reasonable certainty" in the agreement – which defendants were not, (b) the language or circumstances surrounding the agreement's execution did not indicate the Defendants intended to be parties to the agreement, and (c) the course of dealing with the parties did not establish that the Plaintiffs and third party intended for the Defendants to be able to assert the arbitration clause in the agreement.[15]

Impact of Incorporation of AAA or ICC Rules into an Agreement

Courts have generally held that where parties incorporate AAA or ICC rules into their agreements, the parties have evinced a clear and unmistakable intent to arbitrate under those rules. For example, in *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006), the Court concluded that because the agreement between the parties incorporated the AAA rules and because those rules give the arbitrator the power to rule on his or her own jurisdiction, the parties' incorporation of the AAA rules demonstrate a clear and unmistakable intent to have the arbitrator determine arbitrability.[16] The *Qualcomm* Court followed a decision of the 2nd Circuit in *Contec Corp. v. Remote Solution Co.*, where the Second Circuit held that because the agreement at issue in that case incorporated the AAA Rules and because those rules give the arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement," *the parties' incorporation of those rules evidences a clear and unmistakable intent to delegate the determination of arbitrability to an arbitrator*.[17] *(emphasis added).*

Similarly, in *Apollo Computer, Inc.* the agreement at issue incorporated the ICC's Rules of Arbitration. The First Circuit held that incorporation of the ICC rules evidenced a "*prima facie*" intent to arbitrate and to have the arbitrator, not the Court, determine issues of arbitrability.[18]

However, not all courts follow this approach. In *Willie Gary, LLC v. James & Jackson, LLC*, 2006 Del. Ch. LEXIS 3 (2006)(*aff'd by* 906 A.2d 76, 2006 Del. LEXIS 130 (Del. 2006)), the Court determined not to follow the above noted decisions, finding that the parties did not expressly agree to arbitrate the issues in dispute. The Court recognized that the agreement at issue involved interstate commerce and therefore, did not fall within the Delaware Uniform Arbitration Act.[19] Instead, the agreement implicated the FAA.[20] And, while agreeing that the FAA and Delaware policy required the enforcement of arbitration provisions, the Court noted that it must look toward state contract law to interpret the agreement.[21] The Court held:

> In sum, the mere fact that claims and controversies that must be arbitrated, or that the parties agree to arbitrate, will proceed under the procedural rules of the AAA does not plainly divest the judiciary of its authority to determine whether a controversy among parties to the LLC Agreement must be arbitrated.[22]

Clear Draftsmanship

The key to avoiding a decision like *Willie Gray, LLC v. James & Jackson, LLC*, is clear draftsmanship by the parties regarding their intent to arbitrate and to have the arbitrator determine arbitrability.[23] In *Qualcomm*, as discussed above, the Court found the parties' inclusion of the AAA Rules sufficient evidence of the parties' intent to arbitrate their disputes and to have the arbitrator, not the Court, determine the scope of arbitrability. But, the Court in *Willie Gary, LLC*, found that was not enough.

Generally, the courts have divided arbitration clauses into "broad" or "narrow" clauses. "Broad" clauses such as many of the standard form clauses, frequently note that "any controversy or claim arising out of or relating to the contract or the breach thereof, shall be settled by arbitration." To avoid an expansive interpretation by the courts, some contracts contain a "narrow" arbitration clause that specifically delineates the issues subject to arbitration.

In *Kleveland v. Chicago*, 141 Cal. App. 4th 761 (Cal. App. 2d Dist August 22, 2006)(*req. denied* 2006 Cal. LEXIS 13111 (Cal. Oct. 25, 2006)), the Court was faced with a problem of draftsmanship and Defendant's failure, as draftor, to clearly indicate that arbitration of disputes was required under the parties' contract.[24] The Plaintiff, a purchaser of title insurance, filed an action alleging breach of contract and bad faith against the Defendant, the title insurance issuer. Defendant responded with a motion to compel arbitration. Plaintiff had received a preliminary title insurance report that did not include an arbitration clause. The Defendant subsequently issued a different insurance policy than that found in the preliminary report and, this report contained an agreement to arbitrate clause. The Defendant argued that arbitration was appropriate as the Plaintiff had accepted the substituted policy.

The Court found for the Plaintiff, refusing to support the substituted agreement – as the nature of title insurance is different from that of other insurance. The insured's "approval and acceptance of the conditions set forth in the preliminary report create a binding contract based on the terms set forth in the report and any materials that are incorporated by reference."[25] In addition to rejecting Defendant's argument that Plaintiff failed to object to the substituted policy, the Court rejected Defendant's argument that the preliminary report had an arbitration provision

incorporated by reference. The Court found it "unreasonable to rely on an arbitration clause in a non-existent policy to deny plaintiff's right to a jury trial."[26]
Given the broad and liberal interpretation courts have applied to "Arbitration" clauses, a party who wishes to draft a narrow "Arbitration" clause should first consider whether an "Arbitration" clause should be included in the contract at all. Contract parties are free to draft all types of dispute provisions that require the use of ADR without using the word "arbitration" and invoking all of the special rules of interpretation and enforcement related to arbitration.[27]

The wide scope of a "broad" arbitration clause was addressed in *Drews Distributing, Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347 (4th Cir. 2001). There, the parties had entered in to two different contracts. The first contract did not contain an arbitration clause. The defendant argued that this contract was superseded in light of the merger clause in a second contract. The second contract contained an arbitration clause. When disputes arose, Defendant filed a claim for arbitration under the second contract while Plaintiff filed suit in federal court. The district court found that the disagreement between the parties arose from the first agreement and stayed arbitration. The Fourth Circuit reversed.

The Court looked at the parties' arbitration clause in the second agreement and found it to be a "broad" one, since the agreement stated it covered 'any controversy or claim arising out of or related to' that agreement.[28] The Court stated that the question before it was simply does the dispute between the parties "relate to" the second agreement? It found immaterial whether the dispute grew out of the first contract.[29] The Court looked at the facts and found that the parties' dispute was in fact related to the second contract.

Further, the Court rejected the reading of the merger clause as "carving out" the first agreement from all terms of the second agreement. It stated that such a reading "turns the clause on its head."[30] The first agreement was not excepted from the *subject matter* of the second agreement. The parties' excepted the first agreement as money was still owed under the first agreement and therefore, the parties did not want to allow the first agreement to be superseded by the second agreement.[31]

Similar "broad" language was addressed in *Long v. Silver et al.*, 248 F.3d 309 (4th Cir. 2001). In *Long*, there were two arbitration clauses at issue. The first stated that arbitration applies "to any and all disputes … arising out of or in connection with this Agreement."[32] The second stated that it applies to "any dispute arising out of or related to this Agreement." Plaintiff, instead of filing for arbitration, filed suit against the Defendant. Defendant moved to stay the litigation and compel arbitration pursuant to the parties' agreements. The magistrate court denied Defendant's motion. Defendant appealed and the Court reversed the magistrate court's ruling, thus compelling arbitration.

The *Long* Court first noted that the

> [T]he Federal Arbitration Act "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." To that end, "*the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.*"[33]
> *(emphasis added).*

The Court further found that

> [A]lthough the intention of the parties is relevant, "the intentions of parties to an arbitration agreement are generously construed in favor of arbitrability." Here… the parties explicitly agreed on arbitration clauses "that by their plain language have a broad scope." Thus, it is not inconsistent with the intentions of the parties to give the arbitration clauses broad effect.[34]

The Court then reviewed the Plaintiff's claims to determine which ones were subject to arbitration pursuant to the parties' Agreements.

Again, these decisions highlight the importance of adequately and accurately identifying whether the parties want their disputes to be subject to arbitration. If not, they might find themselves compelled to arbitrate matters despite their own wishes.

Trend Toward Capturing Third Parties and Non-Signatories

While the general rule, as discussed above, is that only parties to an arbitration clause may be compelled to arbitrate, it is important to note that some courts have circumvented that rule. Commentators note an emerging trend by some courts to capture those not party to the arbitration clauses, as "circumstances do arise where the courts determine that nonsignatories to the arbitration are proper parties to arbitrations. In making this determination, the courts generally rely on ordinary contract or agency principles…."[35] And, "… a range of decisions have emerged within the past two decades allowing acts, omissions, and manifestations of intent – other than express oral or written consent – to constitute the foundation of party joinder in arbitration proceedings."[36]

Finally, not only are non-parties forced into arbitration, but they might find themselves liable for an arbitration award, despite being a non-party to the arbitration agreement or the arbitration itself.[37] Relying on *Cecil's Inc. v. Morris Mechanical Enterprise, Inc.,* the Court in *Productos*

Mercantiles E. Industriales, S.A. v. Faberge USA, Inc. provided a five part test to be used in determining whether an arbitration award should be enforced against a non-party:

> In determining whether to enforce an arbitration award against a non-party, a court will look at such factors as whether (1) the non-party was a party to any indemnification agreement; (2) holding the non-party liable is manifestly unfair or unreasonable; (3) the non-party was consistently informed of the arbitration; (4) the non-party was aware of its potential liability; and (5) the non-party was excluded from participating in its defense.[38]

Jonathan D. Shaffer, Esq. is a partner with the Vienna, Virginia law firm Smith Pachter McWhorter, PLC, where he practicesin the areas of Government Contracts and Construction law, and the resolution of commercial disputes

Tamara F. Dunlap, Esq. is an associate with the Vienna, Virginia law firm Smith Pachter McWhorter, PLC, where she practices in the areas of Government Contracts and Construction law, and the resolution of commercial disputes.

[1] 9 U.S.C. § 2
[2] 9 U.S.C. § 3
[3] Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1982).
[4] Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-583 (1960).
[5] *See* Jonathan D. Shaffer et al., Challenges & Pitfalls in Drafting "Arbitration" Clauses, Construction Briefing, Second Series, No. 97-4, March 1997.
[6] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (citations omitted).
[7] See, eg., Apollo Computer, Inc. v. Helge Berg, et al., 886 F.2d 469 (1st Cir. 1989), Arrants et al. v. Buck et al., 130 F.3d 636 (4th Cir. 1997), First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).
[8] See, eg., AT&T Technologies, Inc. v. Communications Workers of America et al., 475 U.S. 643 (1986); Apollo Computer, Inc. v. Helge Berg et al., 886 F.2d 469 (1st Cir. 1989).
[9] *Apollo Computer, Inc. v. Helge Berg et al.*, 886 F.2d 469, 472-473 (1st Cir. 1989) (citations omitted).
[10] *Celanese Corp. et al. v. The BOC Group PLC*, 2006 U.S. Dist. LEXIS 88191, *10-11 (D. Tex. 2006).
[11] Apollo Computer, Inc. v. Helge Berg, et al., 886 F.2d 469, 472 (1st Cir. 1989).
[12] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (citations omitted).
[13] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).
[14] *Arrants et al. v. Buck et al.*, 130 F.3d 636, 640 (4th Cir. 1997).
[15] *Arrants et al. v. Buck et al.*, 130 F.3d 636, 641-642 (4th Cir. 1997).
[16] *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372 (Fed. Cir. 2006).
[17] *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006) (citing *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2nd Cir. 2005)).
[18] *Apollo Computer, Inc. v.Helge Berg et al.*, 886 F.2d 469 (1st Cir. 1989)("The contract therefore delegates to the arbitrator decisions about the arbitrability of disputes involving the existence and validity of prima facie agreement to arbitrate.")
[19] *Willie Gary, LLC v. James & Jackson, LLC*, 2006 Del. Ch. LEXIS 3, 14 (2006)(*aff'd by* 906 A.2d 76, 2006 Del. LEXIS 130 (Del. 2006)).
[20] *Willie Gary, LLC v. James & Jackson, LLC*, 2006 Del. Ch. LEXIS 3, 15 (2006)(*aff'd by* 906 A.2d 76, 2006 Del. LEXIS 130 (Del. 2006)).
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[22] *Willie Gary, LLC v. James & Jackson, LLC*, 2006 Del. Ch. LEXIS 3, 24 (2006)(*aff'd* by 906 A.2d 76, 2006 Del. LEXIS 130 (Del. 2006)).
[23] *See* Jonathan D. Shaffer et al., Challenges & Pitfalls in Drafting "Arbitration" Clauses, Construction Briefing, Second Series, No. 97-4, March 1997.
[24] *Kleveland v. Chicago*, 141 Cal. App. 4th 761 (Cal. App. 2d Dist August 22, 2006)(*req. denied* 2006 Cal. LEXIS 13111 (Cal. Oct. 25, 2006) (This case was not subject to the FAA but California code which are substantially similar to the FAA and California contract law).
[25] *Kleveland v. Chicago*, 141 Cal. App. 4th 761, 764 (Cal. App. 2d Dist August 22, 2006)(*req. denied* 2006 Cal. LEXIS 13111 (Cal. Oct. 25, 2006).
[26] *Kleveland v. Chicago*, 141 Cal. App. 4th 761, 765 (Cal. App. 2d Dist August 22, 2006)(*req. denied* 2006 Cal. LEXIS 13111 (Cal. Oct. 25, 2006).
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[28] Drews Distributing, Inc. v. Silicon Gaming, Inc., 245 F.3d 347, 350 (4th Cir. 2001).
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[31] Drews Distributing, Inc. v. Silicon Gaming, Inc., 245 F.3d 347, 351 (4th Cir. 2001).
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Comprehensive Trial Preparation Includes ADR Process Design: What Type of Mediator Best Fits This Case?

By Don Philbin, Esq.

If 98.4 percent of filed legal claims settle pre-trial,[1] tailoring dispute resolution to the particulars of each case and casting the right players in key roles are as central to trial preparation as developing case themes.

Trial lawyers are typically cast in the role of generals preparing for battle. Among their options is the location at which to engage opponents. The default location is often a jury trial. And there is no more effective way to uncover truth and to test witness veracity than with the liberal discovery and live jury trials that are uniquely American.

Having said that, no more than conventional warfare, trials are not a one-size-fits-all solution. For some battles, there is no substitute to trial. For others, there are several. Hard-fought trials convert friends and business partners into heat seeking missiles. The cost of the battle also may exceed the prize. But, even under threat of war, peace often becomes the preferred alternative after analyzing the costs associated with other potential outcomes. Diplomatic activity reaches fever-pitch in the run-up to war, but those conversations are rarely conducted directly between the generals conducting the war. Other countries or world organizations are often called in to help avert a costly fight.

And, there are psychological reasons why such third-parties boost settlement prospects – there are things we just do not want to hear from our opponents, even if it is a reasonable proposal. A Cold War experiment quantified the magnitude of this reactive devaluation bias. Soviet leader Gorbachev made a proposal to reduce nuclear warheads by one-half, followed by further reductions over time.[2] Researchers attributed the proposal to President Reagan, a group of unknown strategists, and to Gorbachev himself. The surprise was not that the group reacted differently to the same proposal depending on its source, but the wide range of difference between those reactions. When attributed to the U.S. President, 90 percent of U.S. subjects reacted favorably to Gorbachev's proposal. That high level of support dropped only marginally when attributed to the third-party unknown strategists (80 percent), but to half of that (44 percent) when attributed to the Soviet leader.[3] Accordingly, the same proposal was *received* dramatically differently by the same audience depending only on the speaker. Furthermore, the third-party unknown strategists carried more weight with both sides.

Parties to litigation react similarly. The receipt of even a *reasonable* suggestion or creative settlement offer will be colored by the fact that it comes from the other side. As a result, our litigation planning necessarily includes developing alternative dispute resolution alternatives that cast neutrals in a variety of roles. Those scenarios may range from facilitating direct or mediated negotiations that maintain the parties' control over the outcome to arbitrations and trials that necessarily turn that control over to others to resolve the dispute. Even under the "mediation" rubric, there are a number of flavors to choose from, depending on the dispute.

Professors Sander and Goldberg wrote the classic article Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure[4] in 1994. The article methodically analyzes various different forms of alternative dispute resolution, focusing on (1) the disputants' *goals* in making a forum choice and (2) the *obstacles* that each choice entails and might overcome.[5] In 1994, Professor Leonard Riskin also published a "grid" describing mediators' approaches to mediation.[6] Riskin's article recognized that not all mediation styles are the same and graphed mediator styles along a two-dimensional "grid." Ironically, the "grid" itself has kept practitioners of dispute resolution busy with their own "debate" for a decade.[7] A helpful "style index" followed.[8] Later articles and Riskin's revisions to his own thesis acknowledged the fact that effective mediators roam from one stylistic quadrant of the grid to another, depending on the circumstances of each case.[9] That is to say, mediators do not camp in just one quadrant of the "grid."[10]

"Mediation is the only procedure to receive maximum scores on each of these dimensions – cost, speed, and maintain or improve the relationship – as well as assuring party privacy."[11]

The Rule of Presumptive Mediation

Sander and Goldberg focus on process design. Specifically, emphasizing the realization of client goals and the minimization of obstacles to resolution, they ask "how can I design a procedure that provides that kind of help?"[12] Detailing many options, they favor a rule of presumptive mediation: "Mediation is the only procedure to receive maximum scores on each of these dimensions – cost, speed, and maintain or improve the relationship – as well as assuring party privacy, another interest which is present in many business disputes."[13] Using mediation to satisfy the goals of the parties while reducing obstacles to efficient

resolution of disputes, a mediator would:

1. Gain a clearer sense of the parties' goals and the obstacles to settlement using "customary mediation techniques"; and

2. If mediation were not initially successful, "the mediator could then make an informed recommendation for a different procedure" that could be utilized to narrow the disputed issues before "looping-back" to mediation with more perfect information in an effort to break the impasse.[14]

Having developed a well-rounded view of the case from listening to both parties' respective positions, the mediator might perceive that the issues have been narrowed to a legitimate difference of opinion regarding the probability or magnitude of the resolution of a specific issue at trial. In turn, at that point, the mediator might suggest a quick mock trial of that discrete issue, followed by a return to mediation, in an effort to further narrow the negotiating positions of the parties in light of this improved information. Furthermore, by allowing room for such a loop back to mediation, the mediator helps the parties maintain settlement momentum even as they also prepare their strategy for trial and other alternatives to reach a deal.

If you wish to make a man your enemy, tell him simply, "You are wrong." This method works every time.

– Henry Link.[15]

"Mediation" Means Different Things to Different People

Even if mediators "roam the style grid" in an adaptive way on a case by case basis, Riskin's original observation that mediators employ different styles holds true. Those styles range from facilitating dispute-focused conversations to offering conclusory case evaluations. Indeed, some scholars caution mediators against making evaluations[16] and many parties are sorry they asked for one after they get it.[17] But, parties will not settle lawsuits unless they believe prospective settlement terms are preferable to trial.[18] "Absent an analytical structure for understanding a complex case, the parties have no mechanism with which to consider how the mediator's feedback on individual issues, if accepted, will affect their case's value."[19] The irony is that the party who most needs an evaluation may be the least receptive to it. Mediators elicit potential payoffs and probabilities from the parties and objectively build and test outcomes "before their very eyes."[20] That is easier to work through and more conducive to settlement than simply telling them that they are wrong. Testing outcome scenarios with the parties' own data and assumptions often leads to the same endpoint through entirely different paths. Notice the difference between:

1. If this suit gets tried 100 times, how many times do you think the outcome will be $72,000 [gesturing to the right side of a drawn curve]? What about $24,000? $7,000? And $0?

2. You will never get $72,000 for this claim.

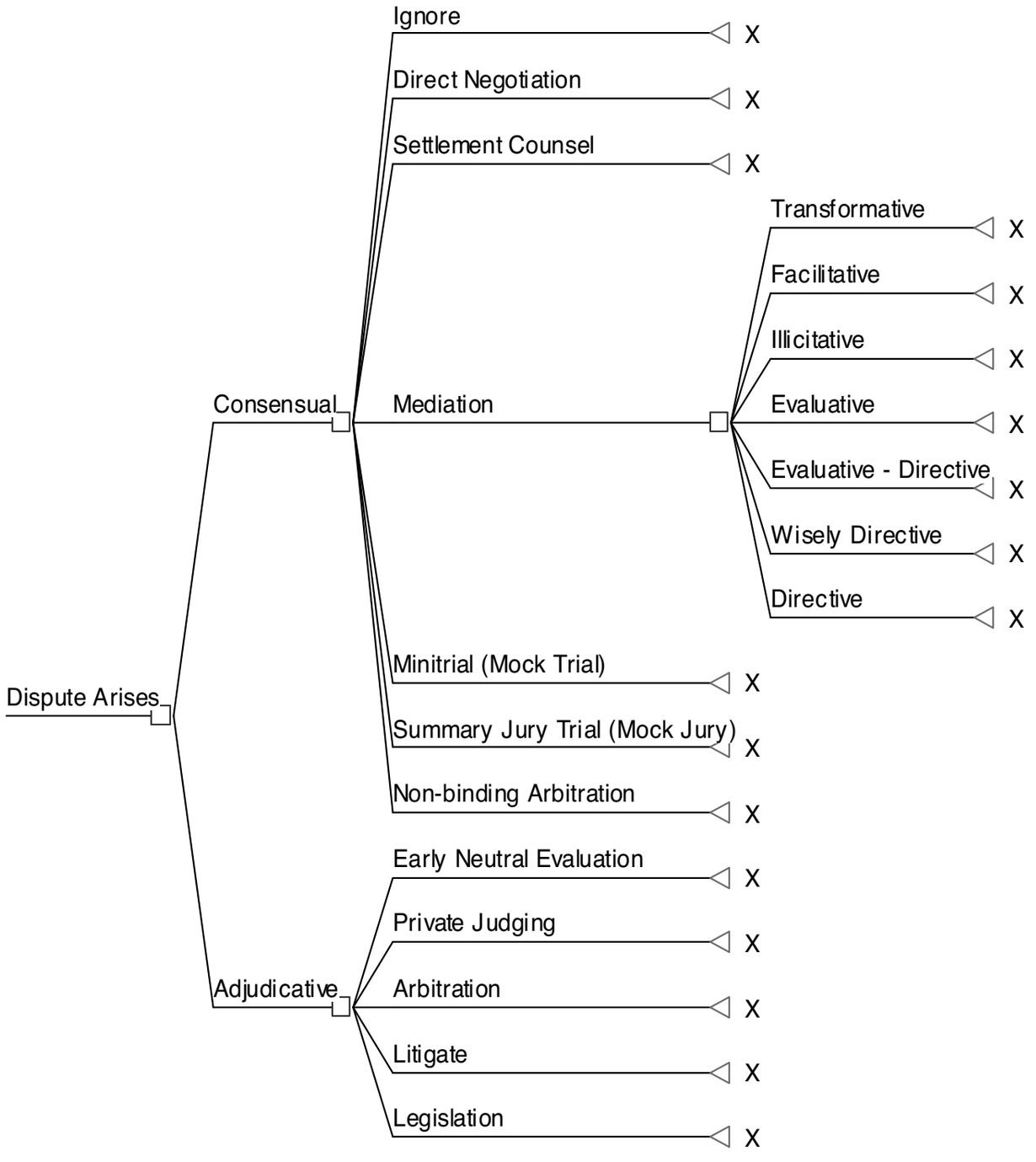
Both methods test the asserted claims.[21] Without thoughtful analysis and reasoning, however, a party may be left wondering if the mediator "just tells both sides that their case is lousy."[22] "A mediator addresses this suspicion head-on by testing positions with analytical tools in an effort to find efficient outcomes."[23] Parties reasonably assume that the mediator is conducting similar discussions with the other parties.

Whether the question of dispute resolution comes up after a dispute arises, or whether we have the luxury of thinking them through before the euphoria of the new deal we are drafting rubs off, parties have options. Decision trees help us visualize these strategic decisions.

At one extreme, parties can simply ignore the problem and see what happens. It may get worse, but it also may go away. Moving on to other choices, parties may decide to resolve the dispute the same way they got into the initial deal – through direct party-to-party negotiations. That is "[t]he most common form of dispute resolution."[24] In direct negotiation, parties retain complete control of the process and the solution. Additionally, either or both parties may decide to use settlement counsel. This is an increasingly popular means of formally assigning the dispute resolution task to settlement counsel while keeping the trial team focused on the march to war if that alternative becomes necessary.[25] Both are complementary. Trial counsel's efforts may make peace a more acceptable and appealing outcome. Furthermore, routinely assigning settlement counsel reduces any perceived weakness that may be telegraphed by trial counsel opening settlement discussions. Both are simply playing their assigned role while closely coordinating each move.

If the parties do not want to hire independent settlement counsel, they could agree to hire a neutral mediator early in the case that would confidentially work through analyses with both sides in caucus and potentially recommend processes to reduce uncertainty. By retaining control over the ultimate outcomes, parties have more say in how the process evolves than if they turned it over to others through a binding decision process. Sophisticated former business

Figure 1. Some Dispute Resolution Options



partners may want to decide their own destiny, but may need some outside help to do so. That help may range from keeping them focused on outcomes and improving the lines of communication, to testing hypothetical outcomes and gauging their probabilities. Ignoring a problem is almost entirely within our control; legislation rarely is. Even near the middle of the graph (non-binding arbitration), parties surrender some control over specific deal terms while retaining the ultimate right to agree or disagree with the result. In fact, some would argue that one has less control in arbitration than in court due to the very limited appellate review to which such arbitral awards are subject. If the parties cannot or do not agree to a consensual process, the law and the parties' contracts will provide the default procedures. Those can range from early evaluation and private judging to precedent setting litigation, or even trying to adjust the BATNA[26] for entire groups through legislation.

Information is a negotiator's greatest weapon.

– Victor Kiam.[27]

The "Goal" is a Tailored Process Through Information

Lawyers are used to fitting specific facts within the parameters of general rules. Sander and Goldberg analyze several fact patterns in formulating the relative weightings they assign to different dispute resolution processes. While helpful, the end product *depends* on client goals and objectives. And, while mediation is the statistical favorite because it has the highest probability of satisfying party goals and reducing barriers to a negotiated outcome, it is more difficult to resolve law changing cases like *Brown v. Board of Education* in mediation. Riskin's "grid" is also a helpful starting point for mediation *process* decisions. Casting the right players in the right process roles offers opportunities to marry case nuances to party expectations. If the parties want an evaluation, that is what they should get. If they need to be drawn to uncomfortable places, however, a quick evaluation may instinctively force them into a defensive position that increases the likelihood of an impasse. A neutral mediator may elicit "best" and "worst" outcomes and lead parties through NEV calculations, psychological debiasing, and other analyses to reach a similar result with lower barriers.

Don Philbin, Esq. is an AV-rated attorney, mediator, arbitrator, and consultant based in San Antonio, Texas. His experience as a commercial litigator, general counsel and president of a hundred-million dollar plus company augment his business and legal education. He is listed in The Best Lawyers in America (Alternative Dispute Resolution; Woodward/White 2007, 2008).

This article is based upon "The One Minute Manager Prepares for Mediation: A Multidisciplinary Approach to Negotiation Preparation," forthcoming in volume XIII of the Harvard Negotiation Law Review.

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[1] Richard C. Reuben, *Tort Reform Renews Debate Over Mandatory Mediation*, 13 NO. 2 DISP. RESOL. MAG. 13, 14 (2007), *citing* Marc Galanter, *The Vanishing Trial: An Examination of Trial and Related Matters in State and Federal Courts*, 1 J. EMPIRICAL LEG. STUD. 459 (2004).

[2] "Respondents were asked to evaluate the terms of a simple but sweeping nuclear disarmament proposal – one calling for the immediate 50 percent reduction of long-range strategic weapons, to be followed over the next decade and a half by further reduction in both strategic and short-range tactical weapons until, very early in the next century, all such weapons would have disappeared from the two nations' arsenals. As a matter of history, this proposal had actually been made slightly earlier, with little fanfare or impact, by the Soviet leader Gorbachev." Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, *in* BARRIERS TO CONFLICT RESOLUTION 26, 29 (Kenneth Arrow et al. eds., 1995).

[3] *Id.*

[4] Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: Guide to Selecting an ADR Procedure*, 10 NEG. J. 49, 67 n.7 (1994).

[5] *Id.* at 66; Peter Robinson, *Contending With Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 Baylor L.R. 963, 964 (1998) ("Mediation is facilitated negotiation.").

[6] Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

[7] *See*, *e.g.*, Kimberlee Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998).

[8] Jeffery Krivis & Barbara McAdoo, *A Style Index for Mediators*, 15 ALTERNATIVES TO HIGH COST LITIG. 157 (1997).

[9] Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 14 (2003) ("mediators often evaluate on some issues and facilitate on others, all within the same time block, and they typically decide on their moves at least partially in response to the personalities and conduct of the other participants.").

[10] Cris M. Currie, *Mediating off the Grid*, 59-JUL DISP. RESOL. J. 9, 11 (2004) ("Most mediators resist defining themselves in terms of Riskin's four styles. The best mediators will draw from all available mediation techniques, depending on the situation.").

[11] *Id.* at 52.

[12] Sander & Goldberg, *supra* note 6, at 66.

[13] *Id.* at 52.

[14] Sander & Goldberg, *supra* note 6, at 59.

[15] Joshua N. Weiss, *You Didn't Just Say That! Quotes, Quips, and Proverbs for Dealing in the World of Conflict and Negotiation*, PROGRAM ON NEGOTIATION CLEARINGHOUSE 2005, at 35 (copies are available free of charge through the Program on Negotiation Clearinghouse Website at www.pon.org).

[16] Mediator evaluations come in three primary forms: (1) "gestalt evaluation" (overall reaction without detailed feedback); (2) detailed feedback, with or without "gestalt"; and (3) decision analytic approach. Aaron, *supra* note 50, at 123; *see also* Laurence D. Connor, *How to Combine Facilitation with Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIG. 15 (1996); Dwight Golann,

Benefits and Dangers of Mediation Evaluation, 15 ALTERNATIVES TO HIGH COST LITIG. 35 (1997); Dwight Golann, *Planning for Mediation Evaluation*, 15 ALTERNATIVES TO HIGH COST LITIG. 49 (1997).

[17] Marjorie Corman Aaron, *The Value of Decision Analysis in Mediation Practice*, 11 NEG. J. 123, 123 (1995).

[18] *Id.*

[19] *Id.* at 125.

[20] *Id.* at 129 ("The step-by-step process of building the tree and inserting probabilities and values also eliminates the particular credibility problem created when a mediator's evaluation falls toward the middle of the negotiation gap.").

[21] Riskin, *supra* note 11, at 16 (questions can have evaluative impact).

[22] Marjorie Corman Aaron, *ADR Toolbox: The Highwire Art of Evaluation*, 62 ALTERNATIVES TO HIGH COST LITIG. 62, 62 (1996).

[23] *Id.*

[24] Sander & Goldberg, *supra* note 6, at 50 (emphasis omitted).

[25] Roger Fisher, *He Who Pays The Piper*, HARV. BUS. REV., Mar.-Apr. 1985, at 150, 156 ("Perhaps we, as a corporation, would reach a wiser decision if we had one lawyer develop the case for litigation and a different lawyer press on us the case for settlement."); Kevin R. Casey, *Law Firm ADR Departments Can Respond to Market Challenges*, 25 ALTERNATIVES TO HIGH COST LITIG. 1, 1 (2007) ("When police bargain for a suspect's confession, they often separate the 'good cop' role from the 'bad cop' role. The analogous separation of roles between specialized settlement counsel and the litigation counsel often plays well in resolving major suits."); Id. at 10-11; William F. Coyne, Jr., The Case for Settlement Counsel, 14 OHIO ST. J. ON DISP. RESOL. 367, 367 (1999) (comparing the United Kingdom's division of tasks between solicitors and barristers); Donald Lee Rome, *Resolving Business Disputes: Fact-Finding and Impasse*, 55-JAN DISP. RESOL. J. 8, 15 (2001) ("Some companies have employed settlement counsel as well as trial counsel, each performing their respective functions, in order to separate the mediation effort from the necessary pre-trial activity.").

[26] BATNA – Best Alternative To [a] Negotiated Agreement

[27] Weiss, *supra* note 18, at 26.

Alternative Dispute Resolution Committee

COMMITTEE CO-CHAIRS

Robert L. Hines
Farella Braun & Martel LLP
Russ Building
235 Montgomery Street, 17th Floor
San Francisco, CA
(415) 954-4935
(415) 954-4480 (fax)
rhines@fbm.com

Edward M. Mullins
Astigarraga Davis Mullins & Grossman, P.A.
701 Brickell Avenue, 16th Floor
Miami, FL 33131
(305) 372-8282
(305) 372-8202 (fax)
emullins@astidavis.com

SUBCOMMITTEE CO-CHAIRS

ARBITRATION

Charles Rumbaugh
P.O. Box 2636
Rolling Hills, CA 90274
(310) 373-1981
(310) 373-4182 (fax)
ADROffice@Rumbaugh.net

Neal M. Eiseman
Goetz Fitzpatrick LLP
One Penn Plaza
New York, NY 10119
(212) 695-8100
(212) 629-4013 (fax)
neiseman@goetzfitz.com

Catherine E. Shanks
American Arbitration Association
Northeast Case Management Center
950 Warren Avenue
East Providience, FI 02914
(401) 435-7474
(401) 435-6529 (fax)
Shanks@adr.org

CONSTRUCTION

Jack Perkins
3238 USS Tower
P.O. Box 22365
Pittsburgh, PA 15222
(412) 519-7531
Perkins@aca.org

Ray Garcia
Garcia & Milas, PC
44 Trumball Street
New Haven, CT 06510
(203) 773-3824
(203) 782-2312 (fax)
r_garcia@garciamilas.com

LAW STUDENT LIAISON

Danielle Sherriff
Juris Doctor Candidate, May 2008
Florida State University
(850) 322-1633

EMPLOYMENT

David T. Lopez
David T. Lopez & Associates
3900 Montrose Boulevard
Houston, TX 77006
(713) 523-3900
(713) 523-3908 (fax)
dtlopez@lopezlawfirm.com

Mark L. Bonfanti
Allen, Norton & Blue, P.A.
905 N. Monroe Street
Tallahassee, FL 32303
(850) 561-3503
(850) 561-0332 (fax)
mbonfanti@anblaw.com

MEMBERSHIP

Fern Singer
Baker, Donelson, Bearman,
Caldwell & Berkowitz, PC
420 North 20th Street, Suite 100
Birmingham, AL 35203-5202
(205) 318-0480 (main)
(205) 244-3801 (direct)
(205) 488-2801 (fax)
fsinger@bakerdonelson.com

INTERNATIONAL

J. Noah Hagey
Quinn Emanuel
50 California Street, 22nd Floor
San Francisco, CA 94111
(415) 875-6600
(415) 875-6700 (fax)
noahhagey@quinnemanuel.com

Mark Fleming
Wilmer Cutler
60 State Street
Boston, MA 02109
(617) 526-6909 (direct)
(617) 526-5000 (fax)
(617) 610-1323 (cell)
mark.fleming@wilmerhale.com

SUBCOMMITTEE CO-CHAIRS (Continued)

MEDIATION

John L. Boos
Preston Gates Ellis LLP
55 Second Street, Suite 1700
San Francisco, CA 94105
(415) 882-8200
(415) 882-3222 (fax)
jboos@prestongates.com

Michael S. Orfinger
Upchurch, Waters, White & Max
11060 Maitland Center Commons
Suite 440
Maitland, FL 32751
(386) 253-1560 (direct)
(386) 253-1560 (fax)
(386) 679-3922 (cell)
morfi@uww-adr.com

Jeff Kichaven
JAMS
707 Wilshire Boulevard
46th Floor
Los Angeles, CA 90017
(213) 620-1133
(213) 253-9711 (direct)
(213) 620-0100 (fax)
jkichaven@jamsadr.com

PUBLICATIONS

David Collier
Rome McGuigan, PC
One State Street, 13th Floor
Hartford, CT 06103
(860) 549-1000 (main)
(860) 724-3921 (fax)
dcollier@romemcguigan.com

Annette C. Escobar
Astigarraga Davis Mullins & Grossman, P.A.
701 Brickell Avenue, 16th Floor
Miami, FL 33131
(305) 372-8282
(305) 372-8202 (fax)
aescobar@astidavis.com

Manjit S. Gill
Becker & Poliakoff
121 Alhambra Circle, 10th Floor
Coral Gables, FL 33134-4540
(305) 351-1072
(305) 442-2232 (fax)
msgill@becker-poliakoff.com

PROGRAMS

Lori A. Sochin
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, FL 33131
(305) 579-0637
(305) 579-0717 (fax)
sochinl@gtlaw.com

Nosizi Ralephata
Turner Padget
40 Calhoun Street
P.O. Box 22129
Charleston, SC 29401
(843) 576-2807
(843) 577-1655 (fax)
nralephata@turnerpadget.com

CO-CHAIRS EMERITUS

P. Jean Baker
American Arbitration Association
601 Pennsylvania Avenue, Suite 700
Washington, DC 20004
(202) 737-1673
(202) 737-9099 (fax)
baker@adr.org

Ray Garcia
Garcia & Milas, PC
44 Trumball Street
New Haven, CT 06510
(203) 773-3824
(203) 782-2312 (fax)
r_garcia@garciamilas.com

WEBSITE

Craig Edward Stein
1814 N.E. Miami Gardens Drive
Suite 500
North Miami Beach, FL 33179
(305) 466-2777
(305) 466-5577 (fax)
asialaw@aol.com

Rebecca Williams
Stroock & Stroock & Lavan LLP
200 South Biscayne Boulevard,
Suite 3100
Miami, FL 33131
(305) 789-9353
(305) 789-9302 (fax)
rwilliams@stroock.com

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(Continued from page 1.)

If passed, this particular provision of the AFA would place the U.S. behind the world on the issue of "competence competence" and, at a minimum, would constitute an unconstitutional impairment of contract, if not a violation of the New York Convention.

Today's question is where did this arbitration backlash come from? Arbitration is hardly new. The use of nonjudicial methods of resolving disputes predates formal courts; there is evidence that the precursor to arbitration can be found in ancient Egypt, Greece, and Rome. England passed the first arbitration act in 1697 and the Federal Arbitration Act was passed in the U.S. in 1925. The American Arbitration Association was founded a year later. Arbitration has become the preeminent method of dispute resolution for many sectors of US business, including construction and securities, and is the preferred method for resolving international business and public disputes.

This is hardly a newfangled procedure that needs to be tamed.

This Committee's mandate is to promote all methods of alternative dispute resolution, including arbitration. Thus, we believe the AFA is exceedingly overbroad with respect to the issues it purports to address, putting aside the debate of whether even those issues need to be addressed at all. We encourage our members of this Committee and the Section to educate themselves on the AFA and make their own decisions as to the advisability of this legislation.

Or, face the consequences.

Respectfully submitted,

Robert L. Hines
Farella Braun & Martel LLP
San Francisco, California

Co-Chair, ADR Committee

Edward M. Mullins
Astigarraga Davis
Miami, FL 33131

Co-Chair, ADR Committee

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[1] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (Under the Federal Arbitration Act, claim of fraud in the inducement of entire contract was for arbitrators to decide under arbitration clause providing for reference of any controversy or claim arising out of or relating to agreement or breach thereof to arbitration in absence of evidence that contracting parties intended to withhold that issue from arbitration).

[2] 546 U.S. 440 (2006).