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Kindred Nursing Centers L.P. v. Clark: Flouting the Court’s Precedents or Contract Defenses?
By Marcia L. Adelson and Joan D. Hogarth – November 28, 2017

When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward. The conflicting rule is displaced by the FAA. But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or . . . unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.


Kindred Nursing Centers L.P. v. Clark, 137 S. Ct. 1421 (2017), represents yet another state challenge to the application of the Federal Arbitration Act of 1925 (FAA), 9 U.S.C. §§ 1–16, to pre-dispute mandatory arbitration agreements, i.e., arbitration agreements affecting consumers, primarily—nursing home residents, credit card holders, or employees, for example. This was one of the more recent arbitration cases granted certiorari by the U.S. Supreme Court in which the Court confirmed its long-standing position and held that any state laws, rules, or schemes that frustrate the objectives of arbitration shall be deemed preempted by the FAA. So in Kindred, despite the sensitive nature of the case, nursing home admissions, the Court performed its usual analysis under federal preemption and its "equal treatment" rules for arbitration agreements. This article discusses the Court's well-established and repeatedly reinforced rules on arbitration agreements under the FAA, as seen in one of its landmark cases; the continued effort by state courts to reject arbitration agreements for certain types of claims, as is evidenced in Kindred Nursing Centers L.P. v. Clark; and the outlook for state laws and precedents that currently reject the use of arbitration to resolve certain types of claims.

An Authoritative Clarification of the FAA's Reach
The FAA, enacted in 1925, was "in response to the widespread judicial hostility to arbitration agreements." AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

The relevant section of the act, section 2, states:
A written provision in any . . . contract . . . involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.


The Court's position on the status of arbitration agreements has been consistent and has been laid out most recently and comprehensively in the holding in Concepcion. In summary, the Court held that the FAA (i) reflects the "liberal federal policy favoring arbitration" (Concepcion, 563 U.S. at 346 (citing Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)); (ii) reflects the “fundamental principle that arbitration is a matter of contract” (Concepcion, 563 U.S. at 339 (citing Rent-A-Center West Inc. v. Jackson, 561 U.S. 63 (2010)); and (iii) mandates that courts place arbitration agreements on an equal footing with other contracts (Concepcion, 563 U.S. at 339 (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006))). Further, the Court solidified its interpretation of the status of arbitration agreements, noting that parties may object to the use of arbitration agreements only by using the same defenses as they would for other contracts. Thus:

The final phrase of section 2, however, permits arbitration agreements to be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract . . . generally applicable contract defenses such as fraud, duress or unconscionability, but not for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.

Concepcion, 563 U.S. at 339 (citing Doctor’s Associates, Inc. v. Casarotto, 517 U. S. 681, 687 (1996)).

In Concepcion, the Court discussed the purpose of using arbitration agreements and provided a list of reasons for doing so.

First, the Court comprehensively viewed sections 2, 3, and 4 as evidencing the overarching purpose of the FAA. Whereas section 2 makes arbitration agreements valid and enforceable, section 3 mandates courts to stay litigation until the arbitral forum is closed; and section 4 orders courts to compel arbitration assuming that the agreements are valid.

Second, the Court reasoned in Concepcion that the point of the parties designing agreements to arbitrate is to afford them the opportunity to resolve the dispute in an efficient and streamlined process, tailored to the type of dispute in question. Concepcion, 563 U.S. at 344. This type of dispute resolution technique allows the parties to access an arbiter who specializes in the area of the dispute. For example, if there is a patent dispute, the specialist would be one
who has litigated patent claims. The "[p]arties to an arbitration contract [have] considerable latitude to choose what law governs some or all of its provisions." Parties can keep their trade secrets confidential, and because of the informality of arbitration, the parties can keep costs low and speed up the process for an effective and efficient resolution.

Reinforcing the Authoritative Interpretation of the FAA

In *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530 (2012), the West Virginia court had found the pre-dispute arbitration agreements in the nursing home admissions agreement of the deceased to be unconscionable. Yet, the Supreme Court held that this prohibition against arbitrating certain types of claims such as personal injury nursing home claims was against the FAA. Here, the state court was attempting to apply a legitimate contract defense of unconscionability. The Supreme Court found that this defense derived its meaning from the fact that an arbitration agreement was at issue. It was the very nature of the arbitration agreement as an alternative to access to jury trial to which this defense was aimed. The Court rejected an otherwise legitimate contract defense because of the national policy of favoring arbitration and because the benefits that arbitration brings to the dispute resolution process would have been thwarted by the West Virginia law.

Similarly, in *DIRECTV v. Imburgia*, 136 S. Ct. 463 (2015) (seeking to invalidate a class action waiver arbitration agreement), the California court appeared to be flouting the holding in *Concepcion* where it interpreted an arbitration agreement using the laws of California with no regard to the FAA. The California courts relied on the freedom and flexibility of the parties to create the terms and conditions of the contract. The arbitration agreement stated that the contract would be governed by the law of the state. However, the law was invalidated by *Concepcion*, and the FAA is the governing law. In *DIRECTV*, the Supreme Court rejected the California court's holding, noting both the need for states to respect the preemptive force of the FAA and that California treated this arbitration agreement differently from all other contracts in that California had never applied an invalid law to govern any other type of contracts.

Flouting the Authoritative Interpretation of the FAA: Kentucky's "Clear Statement Rule"

Covertly Disfavors Arbitration

In *Kindred*, the Supreme Court of Kentucky rejected the agreement to arbitrate signed by family members of the deceased patients, even though they had broad powers of attorney—one broader than the other. The Kentucky court claimed that the agent-in-fact lacked the authority to waive the "divine God-given right" to a jury trial where such a waiver was not specifically identified in the power of attorney. It did not matter to the Kentucky court that the power of attorney gave the agents the power to enter into contracts on behalf of their principals. What was lacking was the express mention of arbitration agreements in the power of attorney—Kentucky's "clear statement rule."
On February 22, 2017, the U.S. Supreme Court heard the case, in which two issues relevant to contracts under the FAA were presented. The formal question presented was "whether the FAA preempts a state-law contract rule that singles out arbitration by requiring a power of attorney to expressly refer to arbitration agreements before the attorney-in-fact can bind her principal to an arbitration agreement." That court was referring to enforcing the arbitration agreement against the Kentucky Constitution's "God-given right" to a jury trial. An alternative argument posited by the respondents was that the "clear statement rule" referred only to contract formation, which is not preempted by the FAA.

On May 5, 2017, the Supreme Court held that "the Kentucky Supreme Court specially impeded the ability of attorneys-in-fact to enter arbitration agreements." The Kentucky Supreme Court's "clear statement rule" violates the FAA by singling out arbitration agreements for disfavored treatment. Arbitration agreements are like any other contracts, but when they are singled out, they were no longer on equal footing with other contracts. Moreover, as to the second argument, the Court ruled that section 2 of the FAA established an equal-treatment principle focused on contract formation.

Disfavoring Arbitration Agreements Is Not Equal Treatment
Under the authoritative interpretation of the FAA, the power of attorney, authorizing the parties to enter into any contracts, should have included arbitration agreements. But it did not. The respondents argued that the law did not disfavor arbitration agreements. The "new" law applied to all types of contracts where other fundamental constitutional rights would be waived. They gave examples of other fundamental constitutional rights such as the right to consent to an arranged marriage or to bind a principal to personal servitude. The Court, in a strongly worded response, characterized those contract waivers as "patently objectionable and utterly fanciful." The new rule really was targeted at arbitration agreements and to "black swans." There was no history of cases to which this agency rule had been applied.

Both the Kentucky court and, most recently, the California court in DIRECTV were doing exactly what the Court had explicitly barred in Concepcion. Kentucky had adopted a rule that disfavored arbitration in its application and had refused to allow equal treatment of those arbitration agreements.

Contract Formation Is Contemplated in the FAA
Not as emphatically as it had articulated in past holdings, the Court noted that the FAA applies equally to contract formation as it does to contract enforcement. In addressing the respondents' argument, the Court referred the parties to section 2 of the FAA, regarding the validity, irrevocability, and enforceability of arbitration agreements, and reminded them of its reference in Concepcion to the contract defense of duress, which defense is implicated only in the formation stage of the contract.
In its opinion, the Court chided the Kentucky court for flouting "the FAA's command to place these agreements on an equal footing with all other contracts." In this holding, the Court once again emphasized that any state law, whether it makes reference to the formation of contracts or the enforcement of contracts directly or indirectly, "that happens to be correlative to the right to arbitrate" will be rejected.

Are Other States Flouting the FAA's Command?

In Atalese v. U.S. Legal Services Group L.P., 219 N.J. 430 (N.J. 2014), the New Jersey Supreme Court held that an arbitration agreement must state its purpose "clearly and unambiguously" for the agreement to be enforced. Atalese brought a claim against U.S. Legal Services, an organization that provides debt adjustment services. Ms. Atalese sued for reimbursement of payments made, alleging that the defendant had done nothing. U.S. Legal Services sought to compel arbitration. The New Jersey law requires that where parties are about to waive statutory rights, there must be a clear and unambiguous notice that such rights are being waived. "[B]ecause arbitration involves the waiver of the right to pursue the case in a judicial forum, courts take particular care in assuring the knowing assent of both parties to arbitrate and a clear mutual understanding to the ramifications of that assent." Atalese, 219 N.J. at 442. The New Jersey court noted that this is a rule that has long been applied to employment cases—namely, the law against discrimination. The New Jersey court declared its understanding and compliance with the FAA, recognizing that arbitration agreements are like any other contracts, and suggested that it required no greater burden on arbitration agreements than any other agreements waiving a statutory right. It appears that the New Jersey court has followed a narrow path between the FAA, as articulated in Concepcion and reinforced in Kindred, and describing language sufficient to put a reasonable consumer on notice.

Likewise, in New York, in an unpublished opinion, Benjamin v. Jewish Home Lifecare, 2015 NY Slip Op 30742(U) (N.Y. Sup. Ct. 2015), a judge found that where the decedent's medical records at the time of executing the nursing home admissions agreement containing the arbitration clause and where a neurologist gave his expert opinion as to her competency in an advanced state of dementia, there could not have been assent in the formation of the contract. For that reason, the court ruled as invalid the arbitration agreement contained in the nursing home admissions agreement.

A Nevada rule, Nevada Revised Statutes section 597.995, seems to defy the Supreme Court's holding as well. The "specific authorization rule" places limitations on arbitration agreements and states in relevant parts:
1. Except as otherwise provided in subsection 3, an agreement which includes a provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement must include specific authorization for the provision which indicates that the person has affirmatively agreed to the provision.

2. If an agreement includes a provision which requires a person to submit to arbitration any dispute arising between the parties to the agreement and the agreement fails to include the specific authorization required pursuant to subsection 1, the provision is void and unenforceable.


On its face, this law discriminates against arbitration by requiring unique acknowledgments for arbitration agreements by requesting specific evidence that such agreements were entered into knowingly. Only arbitration agreements appear to be subject to the specific authorization requirement. At this time, no cases can be cited, but the very existence of the law signals that, like Kentucky, Nevada has failed to give arbitration agreements the same treatment it gives other contracts.

Comments and Conclusion
The U.S. Supreme Court in Kindred reached a consistent result. It struck down a state law that restricted arbitration agreements in a way other contracts were not restricted, thereby frustrating the FAA’s purpose. "Although §2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." Concepcion, 563 U.S. at 343.

The issue goes further than the courts would articulate. The issue is less about the formation or enforcement of arbitration agreements or even the preemption of state rules in the field. It is more about the type of persons who are being subjected to mandatory arbitration. Recently, the Centers for Medicare and Medicaid Services (CMS), the National Labor Relations Board (NLRB), and the Consumer Financial Protection Bureau (CFPB) abandoned rules that they had promulgated to address some of the challenges presented in these cases. There is value in using arbitration in all sectors, yet consumers remain suspicious of the opportunity of a fair hearing. Unfortunately, it is highly unlikely that Kindred will settle the issue. There will be more challenges until such time as the real issues are addressed, such as whether or not there was an unambiguous acceptance of the agreement. In the interim, alternative dispute resolution practitioners—advocates and neutrals alike—are well advised to closely monitor what takes
place in the respective states and at the U.S. Supreme Court relating to arbitration agreements in the consumer sector. Practitioners should continue to study *Kindred* and *Concepcion* as road maps for creating binding arbitration agreements and for developing defenses against the use of arbitration agreements.

Supreme Court Hears Arguments on Class Action Waivers

By Laura M. Wong-Pan – November 28, 2017

On October 2, 2017, the U.S. Supreme Court heard oral argument in three consolidated cases, each of which involved the issue of whether employees may be required to waive their rights to commence class or collective action proceedings, either in a judicial or arbitral forum, as a condition of employment.

The Supreme Court’s decision is expected to resolve an existing split among the circuit courts on this issue. The three cases are National Labor Relations Board v. Murphy Oil USA Inc., No. 16-307 (a Fifth Circuit case), Epic Systems Corp. v. Lewis, No. 16-285 (a Seventh Circuit case), and Ernst & Young LLP, v. Morris, No. 16-300 (a Ninth Circuit case).

Each of the circuit court decisions calls into question the validity of individual employment agreements signed by employees as a condition of their employment. In each case, the agreements resulted in a waiver of the opportunity to commence a collective or class action proceeding and instead required employees to individually submit their work-related disputes to binding arbitration on an individual basis.

In recent years, there has been a proliferation of employment agreements with class action waivers. This decision could nullify those agreements, opening the doors for class action lawsuits that were previously resolved administratively or through individual arbitration proceedings.

Background Leading to the Circuit Split

In Murphy Oil USA, Inc., Sheila Hobson and three fellow employees brought an action against their employer, Murphy Oil, alleging violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 8. While the employer's motion to dismiss was pending, Murphy Oil employees filed an unfair labor practice charge with the National Labor Relations Board (NLRB). The charge alleged that the agreements the employees were required to sign, which compelled arbitration of the FLSA dispute, violated their rights under section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157. Section 7, by its terms, guarantees the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The NLRB sided with the employees in Murphy Oil USA, Inc., 10-CA-038804, 36 NLRB No. 72 (Oct. 28, 2014). Murphy Oil appealed the NLRB decision to the Fifth Circuit Court of Appeals. The circuit court’s three-judge panel unanimously reversed the NLRB decision, in Murphy Oil
USA Inc., v. NLRB, 808 F.3d 1013 (5th Cir. 2015). The panel concluded that "Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums. . . ."

Decisions emanating from the Seventh Circuit in Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016), and from the Ninth Circuit in Morris v. Ernst and & Young, LLP, 874 F.3d 975 (9th Cir. 2016), reached the opposite conclusion.

In those cases, employees also brought federal court claims of FLSA violations, after having signed agreements containing class action waivers. The Seventh and Ninth Circuits affirmed the decisions of the respective district courts, siding with the employees. Both circuit courts concluded that the waiver clauses in the employment agreements restrained employees' exercise of section 7 rights, including the right to act in concert to pursue work-related legal claims as a group.

Petitions for a writ of certiorari in all three actions were subsequently granted by the Supreme Court.

Justices Challenge Employers' Contentions
At the oral argument on October 2, 2017, the attorney for Murphy's Oil and Epic Systems, Paul D. Clement, urged the Court to adopt a more narrow definition of the section 7 "mutual aid or protection" language than that followed by the NLRB, arguing that section 7 protects concerted activities within the physical workplace, rather than efforts to pursue joint grievances in a court.

Challenging that argument, Justice Ginsburg commented that the text of section 7 does not explicitly state that the right to engage in concert for "mutual aid and protection" is limited to the workplace setting. Justice Kagan referenced the Court's prior decision in Eastex v. NLRB, 437 U.S. 556 (1978), which held that the "mutual aid and protection clause swept further than the workplace itself, as long as the ultimate goals were workplace-related."

In Eastex, the Court had ruled that employees engaged in concerted activity when they distributed a newsletter with articles encouraging employees to contact legislators to oppose a proposed change to the state constitution. The Court, in that case, read the "mutual aid and protection" language broadly, to include efforts outside the workplace to improve employee working conditions.

The employers argued that section 7 only prevents retaliation for filing a lawsuit and that the employer may lawfully move to dismiss based on the terms of the arbitration agreement. Relying on American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013), the employers contended that the Federal Arbitration Act's (FAA's) presumption in favor of the
enforceability of arbitration agreements is not trumped by the NLRA, in the absence of clear evidence of congressional intent.

Justice Ginsburg compared the arbitration agreement to a "yellow dog" contract, in which employees are required to forgo the collective rights to form and join unions. However, employers' counsel pointed out that the class action waiver does not require employees to relinquish a substantive right, such as the right to form and join unions.

The ability to pursue a claim as a group may be viewed as a procedural right inasmuch as it defines the avenue for pursuit of a wage-and-hour claim, rather than the right to do so. The employers noted that both the FAA and the NLRA permit parties to agree to submit disputes to arbitration, rather than going to court.

**The Solicitor General Argues Against the NLRB**

In an unusual twist, for the second time in seven days, the Justice Department took a position that contradicted that of a federal agency charged with enforcement of the very statute at issue.

The solicitor general initially filed a petition for a writ of certiorari on behalf of the NLRB. In that petition, the solicitor general argued on behalf of the NLRB that the proposition that employees may not be forced to waive their right to join with others in pursuing work-related claims is "soundly anchored in decisions of this Court. . . ." Those decisions hold that even voluntarily negotiated arbitration agreements are unlawful if they interfere with employees' rights to engage in concerted activity.

Notwithstanding the "soundly anchored" language in the petition, the Justice Department reversed position with the advent of the new administration. In its amicus curiae brief, filed June 16, 2017, the solicitor general argued that the Court should rule in favor of the employers and against the NLRB.

Echoing the employers' argument, the Justice Department agreed that the ability to access collective class action procedures to litigate FLSA claims is a procedural option but not a substantive section 7 right. Because there were no substantive rights at stake, the arbitration agreements were enforceable under section 2 of the FAA.

**Justices Question NLRB Attorney**

The NLRB's general counsel, Richard F. Griffin Jr., conceded that a judicial collective or class action waiver does not violate the NLRA, as long as employees may instead demand a collective
or class action arbitration. An employer may not "bar employees from pursuing their legal
claims collectively in any forum, arbitral or judicial," according to the NLRB.

On questioning by Justice Breyer, NLRB counsel agreed that the NLRA allows two workers to
"join together to go into a judicial or administrative forum for the purpose of improving
working conditions," and the signed agreements result in a waiver of that statutory right.
However, as long as an alternative forum is available, the waiver is legitimate under the NLRA.
The Murphy Oil agreement had prohibited collective or class action complaints in any forum.

Both Chief Justice Roberts and Justice Alito challenged the NLRB's position that employees have
a protected right to pursue a collective or class action, but not in court. Chief Justice Roberts
raised a hypothetical situation in which the arbitration rules might prohibit class actions, yet
employees have waived the right to pursue their claims in a court. Chief Justice Roberts noted
that, for instance, if an arbitral forum requires class action claims to include 50 or more
claimants, and there are only 49 individuals employed by that employer, the employees would
be effectively barred from bringing class action claims.

In response, Mr. Griffin agreed that those employees would be foreclosed from pursuing a class
action claim based on the rules of the arbitral forum; however, the employment agreement
itself would not infringe on section 7 rights. As he argued to the Court, "the employee takes the
rules of the forum as they find them."

Justice Alito replied, "If that's the rule, you have not achieved very much because, instead of
having an agreement that says no class, no class action, no class arbitration, you have an
agreement requiring arbitration before the XYZ arbitration association, which has rules that
don't allow class arbitration."

**Supreme Court Decision Could Invalidate Millions of Agreements**
Employer, union, and employee groups alike recognize the widespread impact of this case on
the validity of binding employment agreements. Twenty-seven amicus curiae briefs were
submitted, reflecting arguments on both sides of the dispute, including ten international labor
unions, the National Academy of Arbitrators, the Chamber of Commerce, and the NAACP Legal
Defense & Educational Fund, among others.

If the Court were to rule in favor of employers, that would effectively close the courthouse door
on the ability of millions of employees who are party to agreements containing class action
waivers to bring class action wage-and-hour claims. The inability to litigate as a group could
make it financially infeasible for individual employees to pursue FLSA claims.
On the other hand, if the Court were to rule in favor of employees, millions of employment agreements requiring individual arbitration of class action claims would be invalidated and may need to be renegotiated, and employers would be open to the risk of costly litigation.

**Keywords:** litigation, alternative dispute resolution, arbitration, Supreme Court, waiver, employment contracts

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International Commercial Mediation: Brief Update on Developments in Enforceability

By Erin Gleason Alvarez – November 28, 2017

Your client has a contract for services with a business located outside the United States. Although the relationship between the parties is long-standing, your client has expressed dissatisfaction with service quality over the last year. Repeated appeals for improvement have been rebuffed, and the client is now aggravated and losing sales as a result of the decline in service.

The contract includes an arbitration clause, but your client fears that initiating an action would cause irreparable harm to the relationship. Your client would like the partnership to continue if possible and fears that an adversarial process would tarnish any possibilities for improved relations. You would like to suggest mediation but fear that without an international convention to support the enforceability of any settlement achieved, these efforts might be futile. What might happen if you need to go outside the United States to try to enforce the settlement?

Enforceability of mediated settlements in international commercial disputes is a legitimate concern in many jurisdictions and a topic that has been taken up by the United Nations Commission on International Trade Law (UNCITRAL). A number of UNCITRAL working group meetings have been held to examine whether an instrument is needed to enforce international commercial settlement agreements that result from conciliation or mediation. The initiative is still under review to date.

Earlier this year, New Jersey recognized the importance of enforceable agreements in this space by enacting the New Jersey International Arbitration, Mediation, and Conciliation Act, N.J. Stat. 2A:23E, which took effect on May 7, 2017. This article addresses client preferences for mediation, particularly in international commercial disputes; obstacles to enforcing agreements achieved through international mediation; and mechanisms in place for overcoming these concerns, highlighting the new framework in New Jersey for enforcing agreements achieved through international mediation.

Client Preferences for Using Mediation

In the example above, your client is concerned about preserving an important business relationship but also needs to resolve a dispute that is costing the client in money and in employee exasperation. Mediation is often looked to as the preferred method for resolution in circumstances where the parties desire an amicable dispute resolution process. In mediation,
the parties craft a negotiation process that is tailored to their needs with guidance and assistance from a neutral third party, the mediator. The ability to be creative and collaborative and to step outside prescribed litigation or arbitration rules is one of the most attractive features of mediation.

Mediation can also be the ideal venue for dispute resolution of claims where parties’ cultural approaches to negotiation differ. Variations in confrontation style, establishing trust in the negotiation process, and the formality required in communications can be adeptly addressed by a sensitive and informed mediator. Understanding these differences and how to leverage them to unite the parties is a unique opportunity presented in mediation.

In our example case, the parties seem to have shared a beneficial business arrangement historically. But that does not necessarily guarantee performance on a mediated agreement now. While mediation appears to be the preferred vehicle for dispute resolution here, enforcement options remain an issue.

Obstacles for Enforcement in International Mediation
Despite mediation’s many attributes, fears over enforcement in the international context endure. Unlike awards rendered in international arbitration, mediated agreements do not have widely accepted procedures in place that are specifically created to protect them.

In international arbitration, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) obligates states to recognize and enforce arbitral awards made in other contracting states. The New York Convention has been entered into force by 157 states, thus providing parties with a reliable mechanism for making sure that an award reached in international arbitration will be enforced.

The vast majority of institutional arbitration rules include a process for recording settlements reached during the pendency of an international arbitration as consent awards, to memorialize the conclusion of the arbitration and help provide for enforcement of the agreement. (See, for example, International Centre for Dispute Resolution, International Dispute Resolution Procedures, Article 32; International Institute for Conflict Prevention & Resolution, Rules for Administered Arbitration of International Disputes, Rule 21; and International Chamber of Commerce, Rules for Arbitration, Article 33).

To accommodate parties’ desire to mediate these disputes, practices have also emerged to try to transform a mediated settlement agreement into an arbitral award. Here, a mediation may be initiated absent any arbitration; once the mediation is concluded, parties either request that the mediator memorialize the settlement in arbitral award form or secure an arbitrator
separately for this purpose. The theory here is that the mediated agreement, now transformed to arbitral award, will be afforded the protections of the New York Convention. Some commentators caution that this practice has risks because laws may require that an actual dispute exist prior to the appointment of an arbitrator. Parties might also initiate arbitration, fully intending to mediate the claim after filing, to secure a consent award.

All of these steps do add a significant amount of process to mediation, which parties tend to like because it is simpler and less tied to formal rules than arbitration. Making sure that your client’s mediated agreement will be enforceable and incorporating med-arb or arb-med-arb mechanisms can be tricky and should be pursued carefully to maximize the potential for enforceability. (See also Edna Sussman, “The New York Convention Through a Mediation Prism,” 15 Disp. Resol. Mag., Summer 2009.)

Other recourse for enforcement of mediated settlements in international commercial disputes can include pursuing claims for enforcement of the agreement under contract law. But this may also be difficult in the international context, depending on the jurisdiction where enforcement is sought. Protracted cross-border litigation to enforce a mediated settlement is counterintuitive at best.

Strategies for Using International Mediation to Secure Enforceable Agreements

Enter the New Jersey International Arbitration, Mediation, and Conciliation Act, which was enacted to help promote the growth of international trade, business, and commerce in New Jersey, while also encouraging efficiency in the dispute resolution processes required of international disputes. New Jersey is the latest among a small group of U.S. states to take similar legislative actions, including California, Colorado, and Hawaii. Further, the European Union’s Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters required members states to develop mechanisms to promote the enforcement of mediated settlements across borders; some states have adopted rules that allow for the recognition of settlement agreements as the equivalent of arbitral awards.

The New Jersey act defines “arbitral award” as an award that is signed by an arbitrator and that may be the result of a settlement in arbitration, mediation, conciliation, or other form of dispute resolution that involves the assistance of a neutral. The act applies to disputes between U.S. and foreign entities or among U.S. entities, where the property in question is outside the United States, performance or enforcement of the contract occurs outside the United States, or there is some other relation to one or more foreign countries. It further provides that awards issued pursuant to the act are to be enforced by any court of competent jurisdiction, as permitted by law and consistent with the Federal Arbitration Act and the New York Convention.
By defining an agreement reached in mediation, conciliation, or some other dispute resolution mechanism as one that will be afforded the protections of the New York Convention, the New Jersey act takes a progressive step toward driving efficiency and cost-effective dispute resolution in the state. The act provides for a streamlined enforcement process for international commercial disputes and will likely encourage an uptick in mediated agreements achieved in the state.

The New Jersey act also allows for application without regard to whether the place of arbitration is within or without the state so long as one of the following conditions is met:

1. The underlying arbitration agreement expressly states that the laws of New Jersey shall apply.

2. In the absence of a choice-of-law provision relating to the intent to arbitrate, the undertaking forms part of a contract, the interpretation of which is to be governed by the laws of New Jersey.

3. In any other case, in which the arbitral tribunal—or other panel established pursuant to the act—decides that under applicable conflict of laws principles, the arbitration shall be conducted in accordance with the laws of New Jersey.

Thus, clients that favor mediated agreements in the international commercial context are given wide breadth in availing themselves of a New Jersey international dispute resolution scheme for settling their claims. Further, arbitrators’ power to determine that New Jersey law should apply, though it may not be specifically called for in the contract, is expressly set out in the act.

Conclusion

The New Jersey act may go a long way in assuaging concerns over international mediation in the hypothetical example above. Moreover, if there are not sufficient contacts with New Jersey, there are a handful of other statutes that may be of assistance instead.

Looking forward, parties may wish to leverage the New Jersey act in their dispute resolution contract clauses in order to have comfort in using international commercial mediation. And it is reasonable to assume that we should watch for similar statutes to be enacted elsewhere as parties continue to encourage enhanced efficiencies in international commercial dispute resolution.

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Clarification—A Valid Exception to *Functus Officio*

*By Sarah Miller Espinosa – November 28, 2017*

**General Re Life Corp. v. Lincoln National Life Insurance Co.**

On March 31, 2017, the U.S. District Court for the District of Connecticut issued a ruling and order in the matter of *General Re Life Corp. v. Lincoln National Life Insurance Co.*, No. 15-cv-1860 (D. Conn. Mar. 31, 2017). In 2002, General Re executed an Automatic Self-Administered YRT Reinsurance Agreement with Lincoln. Pursuant to that agreement, General Re had the right to increase the reinsurance premiums if the new rates were based exclusively on a change in the anticipated mortality. In the event of such an increase, the agreement specified that Lincoln could elect to recapture the life insurance policies and terminate the reinsurance. In 2014, General Re informed Lincoln and increased the rates. Lincoln demanded arbitration, asserting the rate increase was improper.

**Arbitration Award**

The matter was heard by a panel of three arbitrators. In issuing the award, the majority of arbitrators determined there had been a change in the anticipated mortality and General Re was permitted to increase rates under the terms of the agreement. The award specified in part that if Lincoln elected to terminate reinsurance as a result of the rate increases, “all premium and claim transactions paid by one party to the other following the effective date of the recapture (I.E., FROM April 1, 2014) shall be unwound.” The award also specified that Lincoln reimburse General Re for certain expenses and costs. The panel retained jurisdiction “to the extent necessary to resolve any dispute over the calculation and payment of the amounts awarded herein.”

**Remedy Disputed**

Lincoln invoked its right to recapture. General Re informed Lincoln it would remit about $5.5 million, the amount General Re believed to be the net recapture balance, and transmitted that amount to Lincoln on October 15, 2015. On October 26, 2015, Lincoln requested that the arbitration panel resolve the dispute between the parties as to the appropriate calculation of the recapture amount pursuant to the remedy portion of the award. General Re asserted that Lincoln’s request was outside the scope of the arbitrators’ authority in that Lincoln sought reconsideration of the award.

**Clarification of Arbitration Award**

On November 19, 2015, a majority of the arbitrators issued a clarification, with one arbitrator dissenting. The clarification interpreted the award’s remedy order in light of the original
agreement of the parties. The clarification resulted in a requirement that General Re make an additional payment of $17 million to $18 million to Lincoln. General Re filed a petition seeking to confirm the original award. Lincoln filed a cross-petition to confirm the clarification.

**Exceptions to Functus Officio**
The court noted the limited authority of federal courts to review arbitration awards per the Federal Arbitration Act and noted the Second Circuit’s repeated strong deference to the arbitration process and arbitral awards. The issue here, the court reasoned, was whether the arbitrators exceeded their authority when they issued the clarification. With limited exceptions, under the doctrine of *functus officio*, once an arbitrator issues an award deciding the issues submitted to arbitration, the arbitrator has no authority to reconsider the award, absent an agreement from the parties.

The district court, citing *Colonial Penn*, 943 F. 2d at 332, stated:

[T]here are three commonly recognized exceptions to the doctrine of *functus officio*:

(1) An arbitrator can correct a mistake which is apparent on the face of his award; (2) where the award does not adjudicate an issue which has been submitted, then as to such issue the arbitrator has not exhausted his function and it remains open to him for subsequent determination; and (3) where the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify.

**Determining Ambiguity**
The court further reasoned that the Second Circuit has “repeatedly discussed whether arbitration awards are ambiguous, such that a court may not enforce the award but should, instead, remand the award to the arbitrators for their clarification.” Thus, the district court reasoned, if the award were, in fact, ambiguous, the clarification would be appropriate. Here, the district court found the award was indeed ambiguous. In reaching this conclusion, the court noted the following factors: The parties were unable to agree as to its meaning, the arbitrators themselves believed the award to be ambiguous, and the clarification did not modify “the spirit and basic effect” of the award. Finally, the court explained “that the vast majority of cases holding that a clarification was legitimate under an exception to *functus officio* doctrine were similar to this case in that the clarifications generally concerned relief that was awarded, rather than the substance of the underlying dispute that led the parties to seek arbitration.”

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Second Circuit Questions Arbitrator's Authority to Bind Absent Members to Class Arbitration

By Melinda G. Gordon – November 21, 2017

In *Jock v. Sterling Jewelers, Inc.*, No. 15-3947 (2d Cir. July 24, 2017), the U.S. Court of Appeals for the Second Circuit cast doubt on whether an arbitrator can certify a class that includes absent class members. The case poses potentially big implications for resolving class arbitration cases with finality.

In this class action case, the plaintiffs charged Sterling Jewelers with sex discrimination in the promotion and compensation of current and former employees. The case, ultimately sent to arbitration, traveled a circuitous route to the Second Circuit. The Second Circuit overturned a decision by U.S. District Court Judge Rakoff, which affirmed the arbitrator’s decision that the women could proceed as a class to arbitration. The proclaimed “narrow question” presented to the Second Circuit in this case was “whether the arbitrator had the authority to certify a class that included absent class members, i.e., employees other than the named plaintiffs and those who had opted into the class.” *Id.*

The Second Circuit queried whether the arbitrator had the authority to adjudicate absent members’ claims, given that the absent class members had never consented to the arbitrator determining whether class arbitration was permissible under the agreement in the first place. The court noted that Judge Rakoff’s reliance on *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2066 (2013), left unanswered whether an arbitrator who decides whether an arbitration agreement provides for a class procedure may thereafter purport to bind nonparties to the class procedure. The Second Circuit vacated the district court’s ruling and remanded the case to the district court to consider whether the arbitrator had exceeded her authority in certifying a class that contained absent members who had not opted in.

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PRACTICE POINTS

Tit for Tat Is Not Just for the Schoolyard

By John Bickerman – November 16, 2017

In 1980, Robert Axlerod published the first article in what would become his book *The Evolution of Cooperation*. Based on a fascinating experiment, actually a tournament he conducted, he coined a negotiation strategy, Tit for Tat. Axlerod invited contestants, first from the United States and then from around the world, to submit algorithms that could be deployed against the classic game theory example, the Prisoner’s Dilemma. In its simplest description, two suspects who have jointly committed a crime are interrogated separately by the police. The best outcome for both of them results from neither of them confessing to the crime and fingering the other person. If one of them squeals on the other while his buddy stays silent, the squealer does even better, receiving a reduced sentence while the silent one gets the maximum jail time. However, if they both squeal, they receive a worse outcome. Thus, the “game” is a study in negotiation strategy and when to “defect” to gain the greatest advantage. Of course, once a defection is known, the reciprocal action may be worse.

The contestants in Axlerod’s tournament submitted hundreds of different strategies, but the one that produced the best joint result was also the simplest. First, start out cooperating. Then, follow what the counterpart does. If the counterpart “defects” in round one, then defect in round two. If the counterpart subsequently cooperates in round two, then cooperate in round three. Axlerod wrote an entire book applying Tit for Tat to different environments, including evolution, international diplomacy, and trench warfare in World War I.

The tournament is a fascinating story, but the lessons for negotiators are even better. Axlerod drew several observations about why Tit for Tat was so effective.

Be Nice
At the start of negotiations, there is no benefit to be gained by being ornery or engaging in unprovoked animus. Wait and see what the other side does. Being nice is not synonymous with making unilateral concessions and does not require that you trust the other party. It does mean conducting oneself in a reasonably cooperative manner that invites cooperative behavior from your counterpart. Concessions may come later – first small but then increasing in importance.

Be Clear
Be clear about your intentions and your action. Make sure the other party can tell when you’re acting cooperatively and when you’re not. Your offers and responses should not leave the other
side wondering why you just acted the way you did. There is no advantage and lots of risks when misunderstandings ensue in a negotiation.

**Be Provocable**
Some negotiators will test you. When a counterpart acts aggressively or badly (or “defects”), then recognize the action and respond appropriately. Most of the time, the appropriate response is not to respond in anger but to take an action that makes clear to the other side that you have detected a defection or aggressive counter-productive action and that you are responding in kind with your own proportionate defection.

**Be Forgiving**
If the other side recognizes and corrects its behavior, there is nothing to be gained by continuing to defect. Good behavior should be rewarded just as bad behavior should be punished. Moreover, if the other side recognizes that you have returned to being “nice” then they may continue cooperating, as well, which will lead to a more productive and successful negotiation.

**Don’t Be Jealous**
Good negotiators recognize that a good settlement is one where both parties get some of their needs met. Tit for Tat is premised on maximizing joint gains. By maximizing joint gains, you may be able to get most of your needs met. It should not matter to you if the other side also “wins” some of the needs it has. Of course, there are times when the more powerful negotiator may be able to secure a better deal than what can be achieved in a cooperative negotiation. However, a reputation for bullying will follow that negotiator and may redound in the future in negative consequences. The research also shows that parties that try to extract an unfair result may be defeated by a counter-party that foregoes its benefit just to prevent the first party from getting an unfair outcome.

The lessons from Tit for Tat are simple to use and have survived the test of time. I have seen this technique used time and again in my mediations, although sometimes without knowledge of the underlying theory behind it.

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Congress Disapproves CFPB Rule Prohibiting Arbitration

By Mark Kantor – November 3, 2017

Late on October 24, 2017, the US Senate voted 50–50 (with Vice President Mike Pence breaking the tie) under the Congressional Review Act to “disapprove” the Consumer Finance Protection Bureau’s rule prohibiting arbitration clauses in consumer finance contracts that bar class actions, as well as various transparency obligations for otherwise permitted arbitration clauses. The U.S. House of Representatives had passed a “resolution of disapproval” on a 231–190 vote in July seeking to overturn the rule, and the Trump Administration has signaled its opposition to the rule. For more information, see a recent Treasury Department report. Consequently, the Consumer Financial Protection Bureau (CFPB) arbitration rule will become inapplicable and the ongoing litigation seeking a judicial ruling to overturn the rule will become moot once President Trump signs the legislation.

The Congressional Review Act provides that a federal agency may not issue a new rule that is substantially the same as the disapproved rule unless Congress thereafter specifically authorizes the new rule:

1. A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

2. A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

5 USC Sec. 801(b)

In light of this statutory restriction, the CFPB will face substantial barriers to adopting new regulations covering this subject matter. However, this statutory language has not been interpreted by any court. So, the extent of those barriers is unclear. The current director of the CFPB, Richard Cordray, is widely expected to leave his post soon to run for governor of Ohio. In any event, his tenure expires in 2018, and this administration will then be able to select a new director, likely to be less supportive of consumer class actions and other aspects of controversial consumer protection measures.

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