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After a Business Fails to Pay AAA Fees, N.J. Consumers May Litigate

By P. Jean Baker – May 22, 2017

An emerging trend in arbitration is the refusal of a party to pay its share of the fees and costs in accordance with either the arbitration agreement or the governing administrative rules. Typically, the only option available to a paying party who wants arbitration to move forward is to pay the nonpaying party's share of the fees and costs. But what if the paying party is a consumer? Relying for guidance on decisions rendered by the Ninth and Tenth Circuits, the New Jersey Supreme Court now offers another option for consumers—litigation when a business breaches the agreement to arbitrate by refusing to pay. Roach v. BM Motoring, LLC, No. 077125 (N.J. Mar. 9, 2017).

Roach v. BM Motoring

Emelia Jackson and Tahisha Roach separately purchased used cars from BM Motoring, LLC and Federal Auto Brokers, Inc., doing business as BM Motor Cars (collectively BM). Each signed an identical dispute resolution agreement (DRA), which required resolution of disputes through arbitration in accordance with the rules of the American Arbitration Association (AAA) before a retired judge or an attorney. The DRA required the dealership to "advance both [parties'] filing, service, administration, arbitrator, hearing, or other fees, subject to reimbursement by decision of the arbitrator."

Two months after her purchase of a vehicle, Jackson filed a demand for arbitration against BM with the AAA. Despite repeated requests by the AAA, BM did not advance the filing fees that the DRA obligated BM to pay or otherwise respond to the AAA. The AAA dismissed Jackson's arbitration claim for nonpayment of fees by BM and directed BM to remove the AAA's name from its arbitration agreement due to BM's failure to comply with the AAA's rules. Jackson never received a response to her arbitration demand from BM.

Six months after Roach purchased her vehicle, she filed a complaint in New Jersey Superior Court against BM and its president and vice president. The defendants filed a motion to dismiss for lack of jurisdiction based on the arbitration provision of the DRA. The court dismissed the complaint without prejudice and ordered the parties to arbitrate. Roach filed a demand with the AAA. The AAA dismissed Roach's claim because BM had previously failed to comply with the AAA's rules and procedures regarding payment of fees. Roach never received a response from BM to her arbitration demand.
Jackson and Roach then filed a putative class action in New Jersey against the defendants, who moved to dismiss the complaint in favor of arbitration. The defendants alleged that they had not paid the AAA fees because the DRA did not contemplate using the AAA as the arbitral forum. Jackson and Roach responded that prior to moving to compel arbitration, BM had never expressed any objections about the AAA administering the arbitration. Further, they asserted that BM had materially breached the DRA by failing to advance the AAA fees and therefore had waived its right to arbitrate.

The trial court, finding the parties clearly intended to arbitrate disputes, ordered the parties to attempt to reinstate the claims with the AAA, and to comply with the AAA’s rules. The court further provided that if the AAA refused to administer the cases, Jackson and Roach could reinstate their complaint. The AAA reinstated the arbitration and the court dismissed the complaint with prejudice. Contending that BM again failed to pay the applicable fees, the claimants agreed to place arbitration in abeyance pending an appeal.

The New Jersey Superior Court Appellate Division affirmed the dismissal of the complaint, finding BM's conduct did not constitute a material breach of the DRA because there was a sufficient factual dispute as to whether the AAA was the proper arbitral forum.

The New Jersey Supreme Court granted the petition for certification, and in a case of first impression held that BM's nonpayment of the AAA fees amounted to a material breach of the DRA, thus precluding BM from enforcing the arbitration agreement and allowing the case to proceed in the courts.

Guidance from the Ninth Circuit
In reaching its decision, the court first sought guidance by looking to case law from the Ninth and Tenth Circuits. In Sink v. Aden Enterprises, Inc., 352 F.3d 1197 (9th Cir. 2003), an employee filed a federal lawsuit against his employer. The matter was referred to arbitration pursuant to the parties' employment agreement. Arbitration was dismissed due to a failure of the employer to advance the arbitration fees. The district court held that the employer had defaulted by failing to perform a contractual duty—namely, to advance the arbitration fees—and had waived its right to arbitrate. The Ninth Circuit affirmed the trial court, concluding that the employer's failure to pay the required costs of arbitration constituted a material breach of the arbitration agreement.

Two years later, the Ninth Circuit again addressed the nonpayment issue in Brown v. Dillard's, Inc., 430 F.3d 1004 (9th Cir. 2005). A former employee filed a demand for arbitration with the AAA and paid her share of the filing fees after she was terminated. Dillard's failed to pay its share, and the AAA dismissed the claim. The former employee filed a complaint in state court, and Dillard's removed the action to federal court and moved to compel arbitration. The district court denied the motion, and the Ninth Circuit affirmed. The court held that a business
materially breaches an arbitration agreement by refusing to "participate in properly initiated arbitration proceedings."

**Guidance from the Tenth Circuit**
Applying the reasoning of the Ninth Circuit in *Sink* and *Brown*, the Tenth Circuit held that a party's failure to pay required fees constitutes a material breach of an arbitration agreement. In *Pre-Paid Legal Services, Inc. v. Cahill*, 786 F.3d 1287 (10th Cir.), *cert. denied*, 136 S. Ct. 373 (2015), a former employee sued his former employer in state court. The former employee removed the action to federal court and requested that litigation be stayed pending arbitration, pursuant to the parties' arbitration agreement. Pre-Paid initiated arbitration proceedings with the AAA and paid the required fees. The former employee, however, did not pay his share or request an accommodation, such as a modification of his payment schedule or an order requiring Pre-Paid to pay his share so arbitration could continue. After repeated requests for payment, the arbitration panel suspended and then terminated the arbitral proceedings. The district court lifted the stay, allowing litigation to proceed.

The Tenth Circuit affirmed. The former employee's refusal to pay his fees in accordance with the AAA's rules and failure to make any genuine effort to seek alternative payment arrangements resulted in the arbitrators' terminating and subsequently closing the case—a formal finding of default because there clearly was no indication that proceedings might continue. Because the AAA's rules allowed for termination of a proceeding for nonpayment of the AAA's fees, arbitration had "been had" in accordance with the terms of the agreement as required by section 3 of the Federal Arbitration Act (FAA), and the stay could be lifted and litigation allowed to proceed.

**Addressing a Preliminary Issue in *Roach*: The Appropriate Forum**
The court had to determine whether the AAA was the appropriate arbitral forum. If the DRA did not permit a party to file a claim with the AAA, BM would not have been obligated to respond, and the nonpayment of fees would not constitute a breach of the DRA. The court found that the DRA required arbitration pursuant to the AAA's rules, and the current commercial arbitration rules in effect when the DRA was executed provided that "parties who agree to arbitrate in accordance with AAA rules consent to AAA-administered arbitration." By requiring that arbitration be conducted under the AAA's rules, BM "reasonably should have expected that customers would file claims directly with the AAA."

**Did Failure to Pay Constitute a Material Breach?**
The court addressed whether BM had materially breached the arbitration agreement by failing to advance the required fees. The court concluded that the failure to advance required fees resulting in dismissal of the arbitration claims deprives a party of the primary benefit of arbitration agreements—namely, the ability to arbitrate claims. The failure to advance fees
"goes to the essence" of the DRA and constitutes a material breach. BM, therefore, having materially breached the DRA, was barred from compelling arbitration.

**Not a Bright-Line Rule**

The court went on to opine that BM owed a duty of good faith and fair dealing, which it violated not only by refusing to pay but also by refusing to respond to arbitration demands in a timely fashion. BM's "knowing refusal to cooperate with [the] plaintiffs' arbitration demands," filed in reasonable compliance with the DRA, constituted a material breach, barring BM from later compelling arbitration. To find otherwise would result in a "perverse incentive scheme" whereby "a company could ignore an arbitration demand and, if the claimant did not abandon the claim, later compel arbitration." The court cautioned, however, that the refusal or failure of a party to respond to a written arbitration demand within a reasonable period of time is a determination that must be made on a case-by-case basis after considering the agreement's terms and the parties' conduct.

**Impact of Federal Rule of Civil Procedure 41(b)**

This rule provides that if "the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." What if a plaintiff who has been ordered to arbitration is unable to pay his or her share of the fees and costs and the arbitrator terminates the arbitration proceedings without entering an award or judgment or otherwise resolving the case? Can the defendant move the court pursuant to Federal Rule of Civil Procedure 41(b) to dismiss the plaintiff's case?

The Ninth Circuit addressed this issue in *Tillman v. Tillman*, 825 F.3d 1069 (9th Cir. 2016). The case involved a client's claim for legal malpractice against her lawyers. The retainer agreement had a mandatory arbitration provision. Following the filing of a motion by the law firm defendant in federal district court, litigation was stayed and the case was compelled into arbitration. When the plaintiff was unable to pay the AAA's required deposit of $18,562.50, the AAA asked the defendant if it would agree to pay the plaintiff's share. The law firm declined. The arbitrator terminated arbitration due to nonpayment and closed the case. The defendant moved to lift the stay and have the case dismissed for the plaintiff's failure to comply with the court order under Federal Rule of Civil Procedure 41(b).

Although the district court explicitly found that the plaintiff was "unable to pay for her share of arbitration," it ultimately dismissed the complaint because the AAA's rules required the parties to bear the costs of arbitration equally and the FAA deprived the court of authority to hear "the claims that would have been subject to an arbitration agreement." *Id.* at 1072–73.

The Ninth Circuit reversed. The court first focused its attention on section 3 of the FAA. Section 3 requires courts to stay court proceedings "until such arbitration has been had in accordance with the terms of the agreement." The court found that because the AAA's rules allowed the
arbitrator to terminate the proceedings for nonpayment, the arbitration had been "had" in accordance with the terms of the arbitration agreement. So, lifting the stay was appropriate.

The district court erred when it dismissed the client's claim. Because nothing in the FAA or binding precedent required dismissal of the litigation, the district court was obligated to decide the case properly before it.

The court went on to limit its holding, noting that it did not apply where parties refused to arbitrate by choosing not to pay the costs of arbitration when they clearly have the capacity to do so. Dismissal would then be appropriate under Federal Rule of Civil Procedure 41(b).

**Conclusion**

Courts are loath to deny litigants the ability to pursue their claims if they are clearly unable to afford the fees and costs associated with private arbitration. However, failure to clearly demonstrate an inability to pay could result in termination of arbitration and dismissal of pending litigation. Conversely, businesses that attempt to game the system by refusing either to respond in a timely way to arbitration demands or to pay the agreed upon share of the fees and costs will quickly find themselves in litigation.

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Litigation Funding: Are These Costs Recoverable in Arbitration?

By Jim Reiman – May 22, 2017

The use of third parties to fund plaintiffs' legal and litigation expenses ("litigation funding") is becoming an increasingly common practice in Europe and the United States, and has been used in Australia for many years. As the litigation funding industry has grown and evolved, it is becoming more common in arbitration. Indeed, there are some litigation funding companies that limit their investments to cases that are being arbitrated rather than tried in a country's court system. Thus, arbitrators are being increasingly asked to award litigation funding expenses as costs.

As a result, the question has arisen: may they? Corollary questions are: If permitted, what elements of litigation funding fees may be awarded? Only the money actually advanced for legal and other fees and litigation-related expenses? Interest? The "uplift" (the fee over and above normal interest)? All of the above? Additionally, if permitted, should litigation funding costs be awarded? What principles should guide the arbitrator or arbitration panel in reaching its decision?

These questions were the subject of a U.K. (England and Wales) case decided in December 2016—Essar Oilfields Services Ltd. v. Norscot Rig Management Pvt Ltd. [2016] EWHC (Comm) 2361 (Eng.). The case is reportedly the first U.K. decision to address the issue, and is notable not only for its initial statement on the issue for U.K. litigants but also for the reasoning of its decision, which this commentator believes is an appropriate guide for arbitrators around the world.

The Backstory

Essar Oilfields was an action to set aside an award issued by a sole arbitrator in a dispute between Essar Oilfields Services Limited and Norscot Rig Management Pvt Limited. In that dispute, Norscot claimed that Essar breached an operations management agreement, causing Norscot substantial damages. Pursuant to the parties' contract, the dispute was arbitrated in England before a single arbitrator under the International Chamber of Commerce Rules of Arbitration (effective January 1, 1998) (ICC 1998 Rules).

The arbitrator entered a preliminary award in favor of Norscot whereupon Norscot, pursuant to the ICC 1998 Rules, filed an application for its costs. Norscot had engaged a litigation funding company to pay its legal fees and expenses relating to its arbitration against Essar, and included in its claim of costs the fees of such company. The litigation funding company's fee was 300

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percent of the sums it had advanced on Norscot's behalf, or 35 percent of the recovery, whichever was higher. A total of £647,000 had been advanced; hence Essar sought £1,941,000 (the litigation funding company's entire fee). The arbitrator awarded Norscot that entire sum as costs.

Essar challenged the costs award and asked the High Court of Justice to vacate the award, arguing (1) under the law of England and Wales, litigation funding fees are not allowed as "costs," and thus the arbitrator had no power to include them in his award; and (2) "there was a serious irregularity under [the English Arbitration Act] because the arbitrator exceeded his powers and, given the amount ordered, it would cause substantial injustice to Essar if it had to be paid." Both arguments were rejected by the English court, and the arbitrator's award was affirmed.

The Applicable Law
The *Essar Oilfields* court commenced its opinion by noting the limited scope of its review and when it may vacate an arbitral award. The applicable law is the Arbitration Act 1996, England's and Wales's version of the U.S. Federal Arbitration Act. More specifically, at issue was section 68(2)(b) of the Arbitration Act, which provides that the challenging party must establish a "serious irregularity," defined as "an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant[. . . ] the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction . . .)."

English law, like the law in the United States and other countries, holds that for a tribunal to exceed its powers and a court to vacate an award, the conduct must be egregious. As the court in *Essar Oilfields* noted:

"Section 68 is really designed as a longstop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected."

. . . .

"Section 68(2)(b) does not permit a challenge on the ground that the tribunal arrived at a wrong conclusion as a matter of law or fact. It is not apt to cover a mere error of law. . . . A mere error of law will not amount to an excess of power under the section."

[2016] EWHC (Comm) 2361 [8], [10] (quoting *Lesotho Highlands Dev. Auth. v. Impregilo SpA* [2006] 1 AC (HL) 221 [27], [31]–[32] (appeal taken from Eng.)). Thus, the *Essar Oilfields* court reviewed the award before it from roughly the same perspective as an American court—
arbitration awards are to be given great deference and cannot be vacated for mere errors in law or fact.

Having established the parameters of its review, the Essar Oilfields court next turned to the assertion that the arbitral tribunal exceeded its power by awarding litigation funding expenses as costs. It framed this question by asking (1) does the law of England and Wales permit the awarding of costs, (2) did the parties’ agreement or the rules that governed the arbitration permit the awarding of costs, and (3) if the answer to both (1) and (2) is yes, what elements of the litigation funding fee may be included in costs?

The court held that, under English law, costs may be awarded under the Arbitration Act. It also found that costs may be awarded under article 31(1) of the ICC 1998 Rules.


Section 59 of the Arbitration Act states (emphasis added):

(1) References in this Part to the costs of the arbitration are to—

(a) the arbitrators' fees and expenses,
(b) the fees and expenses of any arbitral institution concerned, and
(c) the legal or other costs of the parties.

(2) Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration (see section 63).

Section 63 of the Arbitration Act states:

(1) The parties are free to agree what costs of the arbitration are recoverable.

(2) If or to the extent there is no such agreement, the following provisions apply.

(3) The tribunal may determine by award the recoverable costs of the arbitration on such basis as it thinks fit.

If it does so, it shall specify—

(a) the basis on which it has acted, and
(b) the items of recoverable costs and the amount referable to each.
The court also examined article 31(1) of the ICC 1998 Rules, which provides (emphasis added):

> The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitral proceedings, as well as the fees and expenses of any experts appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.

Lastly, and most importantly, the *Essar Oilfields* court addressed the question: What sums may be included in "costs"? Put another way, what is the definition of "costs"? The court focused on the amorphous language "other costs" in the Arbitration Act and the ICC 1998 Rules. In the arbitration, Norscot argued that "other costs" could include all litigation funding expenses, including the uplift. The arbitrator agreed, and expressly found that it was within his discretionary power to award all litigation funding expenses as "costs."

The Court's Holding and Analysis
The court, having noted that, under the law, only truly egregious awards could be vacated, concluded "that there was no serious irregularity within the meaning of [section] 68(2)(b), even if the arbitrator was wrong in his construction of 'other costs.'" [2016] EWHC (Comm) 2361 [47]. This conclusion was based in part on the court's finding that both English law and the applicable arbitral rules permitted the award of costs. Specifically, the court held: "In my judgment, the relevant power here is the undoubted power to award costs. If the arbitrator fell into error, it was an error as to the scope of such costs by reason of his allegedly erroneous interpretation of [section] 69(1)(c) and Rule 31(1)." *Id.* at [41].

The court further held that any such error does not and cannot be held to be a "serious irregularity," and thus it disposed of the case. Nonetheless, the court deemed it appropriate to address the other issues raised, specifically: whether the arbitrator was correct in its determination that applicable law permitted it to award all litigation funding expenses, including the uplift, and whether it should have done so.

To answer these questions, the court focused on the Arbitration Act's and ICC 1998 Rules' use of the term "other costs." Essar argued that the term should be defined narrowly, and limited to "costs of arbitration," thus precluding the award of litigation funding costs. The court disagreed:

> Essar seeks to cut down on the scope of [Arbitration Act section 59(1)(c)—"the costs of the arbitration are . . . the legal or other costs of the parties"] by saying that the governing expression is really "costs of the arbitration" and that in itself would exclude
the costs of third party funding, since the latter is not the cost of the arbitration, but the costs of funding it. However, that is the wrong way round. It is the collection of items in [section] 59(1) itself which defines what the costs of the arbitration are. "Costs of arbitration" is not some prior limiting definition.

I accept, of course, that "other costs" has to be seen as other costs which relate to the arbitration proceedings. But, in my judgment, that does not help Essar very much, because the question then is what such costs are or might be. Certainly, where a party to an arbitration is funding it by obtaining specific litigation funding . . . , it is very hard to see how that is excluded for all purposes from the expression "other costs." Indeed, [Essar’s counsel] in his submissions came close to accepting that when he said that other costs connoted "something necessary to get the arbitration off the ground or on the road." Here, at least, that could be said to include the costs of third party funding.

. . . . The better view, as noted above, is to look at the expression functionally.

. . . . The expression ["other costs"] should not be confined by some legal straightjacket imposed by reason of what a court might or might not be permitted to order. . . .

. . . .

In my judgment, therefore, I unhesitatingly conclude that the arbitrator’s interpretation of "other costs" was correct, in that it extended in principle to the costs of obtaining third party legal funding.

[2016] EWHC (Comm) 2361 [53]–[55], [68], [70]. Next, the court addressed, indirectly, what to this commentator is the most important question: Should the arbitrator award litigation funding expenses as costs, and if so, what elements of the litigation funding fee? The court posed the question in the context of arbitral discretion, and whether the arbitrator properly exercised that discretion. Without expressly so stating, the court held that he did.

The facts of the Essar Oilfields case are particularly poignant, and are detailed in some length both in the arbitral award and the court’s opinion. Briefly, Essar engaged in a deliberate and premeditated course of conduct specifically intended to "cripple Norscot financially" and then to exploit Norscot's financial weakness. Payments to Norscot, its crew, and its suppliers were withheld. "Essar made and persisted in unjustifiable personal attacks and allegations of fraud and dishonesty against" Norscot employees. Id. at [21].
In short, the court concluded that (1) Norscot had no alternative and likely would have been precluded from pursuing its claim absent the litigation funding, and (2) Essar knew that Norscot had entered into a litigation funding agreement in order to finance the pursuit of its claims. These conclusions persuaded the court that the arbitrator's discretion had been properly exercised. Additionally, and very significantly, the arbitral tribunal and the court found that the litigation funding fee charged was reasonable and consistent with "standard market rates."

**Conclusion**

*Essar Oilfields* makes the clear statement that under English and Welsh law, where either the parties' agreement or the rules of the arbitral proceeding permit the award of costs, the tribunal has the power to award litigation funding expenses, including the uplift, as an element of costs. While not expressly stated, it also implicitly stands for the proposition that although a tribunal has the power to award litigation funding expenses, it should use its discretion in determining whether and when to do so, and that the fee assessed must be commercially reasonable and consistent with market rates.

For American lawyers, this commentator notes that many commercial agreements permit the award of legal fees and costs to the prevailing party, and that the ICC's cost rule is not unique. For example, *UNCITRAL Arbitration Rule 40(2)* (2013) provides (emphasis added): "The term 'costs' includes only: . . . The legal and *other* costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable."

Additionally, most arbitral institution rules similarly permit the award of costs. However, the definition of "costs" varies among the arbitral organizations' rules. For example, the *American Arbitration Association's Commercial Arbitration Rules* (effective October 1, 2013) do not use the term "costs," but rather encompass such in several rules, including R-53 (administrative fees), R-54 (expenses), and R-55 (neutral arbitrator's compensation). Additionally, R-47 (scope of award) states (emphasis added):

(a) The arbitrator may grant *any remedy or relief* that the arbitrator deems just and equitable and within the scope of the agreement of the parties . . . .

. . . .

(d) The award of the arbitrator(s) may include:

   i. interest at such rate and from such date as the arbitrator(s) may deem appropriate; and
ii. an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

One or more of these rules may permit the award of litigation funding costs, including the uplift. Thus, the issue is applicable to American arbitrations, and the *Essar Oilfields* decision's analysis and implicit recommendation that discretion should be used should serve as a guide to American arbitrators.

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Young Lawyers: The Nuts and Bolts of Arbitration from Preliminary Hearing Through Award and Post-Award Motions

By Kelly Turner – May 22, 2017

This is the second part of a "Nuts and Bolts of Arbitration" article regarding the arbitration process. This piece picks up after the arbitrator's appointment and follows to the end of the arbitration and post-award motions. By understanding arbitration and the ways it may differ from court-based litigation, counsel and clients can make their arbitration an efficient and economical way of resolving the client's commercial dispute.

The Preliminary Hearing

After the arbitrator is appointed (for this article, we assume a sole arbitrator presides), he or she may convene a preliminary hearing. See Am. Arbitration Ass'n (AAA) Commercial Arbitration Rule R-21 (2013); Int'I Inst. for Conflict Prevention & Resolution (CPR) Rule for Administered Arbitration of Int'I Disputes 9.3 (2014); JAMS Comprehensive Arbitration Rule 16 (2014). While preliminary hearings are within the arbitrator's discretion (note that, under JAMS Rule 16, a party also may request a preliminary hearing), arbitrators usually hold preliminary hearings in all but the smallest and most straightforward commercial cases. The preliminary hearing often takes place telephonically, but it can be held in person if the parties or arbitrator prefers.

The goal of the preliminary hearing is to "establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute," AAA Rule R-21(b). At the preliminary hearing, the arbitrator, working with counsel, will craft a schedule for the case, including discovery deadlines, motion deadlines (if any), and dates for the evidentiary hearing. AAA Preliminary Hearing Procedure P-2; CPR Rule 9.3; JAMS Rule 16. Importantly, to the extent the arbitration clause requires the hearing to take place within a certain time period, the arbitrator will work to meet the clause's requirements absent the parties' waiving them.

Before the preliminary hearing, counsel should confer on and agree to if possible a case schedule to propose to the arbitrator. Even if the parties cannot agree on all aspects of the schedule, their agreement on some parts will streamline the preliminary hearing. Additionally, the arbitrator will appreciate the parties' attempted collaboration.
The arbitrator will hold the parties to the ultimate scheduling order and, more importantly, the hearing date, absent good cause shown to reset deadlines and postpone the hearing.

**Discovery**

Discovery first and foremost will be dictated by the parties' arbitration agreement, should it address what discovery is and is not allowed in the arbitration. Assuming the arbitration provision is silent as to discovery, the arbitrator will decide what, if any, discovery to allow. In considering parties' requests for discovery, the arbitrator will aim to balance the efficiency and speed of the requested discovery and the arbitration as a whole with the parties' ability to develop and present their case. See AAA Rule R-22(a); CPR Rule 11.

The arbitrator has the authority to control discovery, and discovery in arbitration will (or at least should) be more limited than in a court case. In commercial cases, arbitrators generally allow the following types of discovery: (1) focused document requests; (2) limited interrogatories, usually regarding persons with knowledge or damages calculations (but note that some arbitrators may not allow any interrogatories); and (3) limited depositions in larger cases. See AAA Procedure for Large, Complex Commercial Disputes L-3; JAMS Rule 17. If they allow depositions, arbitrators may limit either the number of depositions per party or the total number of hours of deposition per party.

Arbitrators can issue third-party subpoenas. Arbitrator subpoenas for documents or depositions for discovery purposes, however, may not be enforceable in some state or federal courts should the subpoenaed party fail to comply. See Joseph M. Cacace, "Compelling Evidence from Non-Parties in Arbitration," 43 Mass. Law. Wkly., no. 38, May 5, 2015 (reviewing cases); cf. Federal Arbitration Act (FAA), 9 U.S.C. § 7 (allowing for the subpoena of witnesses and documents at the arbitration hearing itself). If enforceability of a discovery subpoena is a concern, an arbitrator could convene a "hearing" solely for the purposes of obtaining the third party's documents or testimony.

Before the evidentiary hearing, parties often must exchange lists of exhibits they intend to use at the hearing and of witnesses they intend to call. See, e.g., AAA Rule R-22(b); JAMS Rule 17(a), (c). This information may be included within discovery or may be part of the parties' prehearing submissions, if allowed. Additionally, should one or both parties retain experts, they usually must disclose the expert and his or her opinion, although full-blown expert reports are not always required.

**Motions**

Motion practice in commercial arbitrations should be more limited than in court proceedings.
The types of motions arbitrators are most likely to allow are dispositive motions and discovery motions (i.e., motions to compel).

Some providers' rules specifically allow for dispositive motions. AAA Rule R-33; JAMS Rule 18. Arbitrators may allow dispositive motions if the motions are likely to limit or narrow the issues in the case, even if they won't dispose of the full case. Some arbitrators may require a party to seek leave to file a dispositive motion; if so, often the request for leave can be short and focused, as can the response to the motion for leave. In ruling on a motion for leave to file a dispositive motion, the arbitrator will look at whether the time and money to be spent on briefing and arguing a dispositive motion would be well spent in terms of limiting the scope and length of the evidentiary hearing.

Arbitrators also will hear motions to compel discovery. See, e.g., JAMS Rule 17(c). To keep motions cost-effective, they may allow informal motions to compel (email or letter motions) and may hear telephonic argument on the issues in dispute in lieu of having full briefing on the dispute.

Arbitrators generally will not allow motions in limine, as there is no jury to shield evidence from, and the strict rules of evidence do not apply. AAA Rule R-34(a); CPR Rule 12.2; JAMS Rule 22(d). Accordingly, the arbitrator may allow into evidence hearsay or other types of evidence parties normally might seek to exclude by motion in limine, and will give that evidence the appropriate weight under the circumstances. AAA Rule R-34(b); CPR Rule 12.2; JAMS Rule 22(d). A motion in limine might be allowed if granting the motion could save time and money, for example, barring the in-person testimony of an overseas witness.

Prehearing Submissions
Particularly in more complex cases, the arbitrator may ask the parties to submit prehearing briefs. CPR Rule 12.1; JAMS Rule 20. The parties' prehearing submissions also generally include a list and copies of trial exhibits—joint and individual party's exhibits—and a list of witnesses the party intends to call or may call at the hearing.

The Hearing
The evidentiary hearing—the arbitration trial—usually will be conducted in person. There is flexibility, however, as to how witnesses are presented; they may testify by video or phone, and in some cases all direct examination is presented by written statement. See AAA Rule R-32(c); CPR Rule 12.2; JAMS Rule 22(e), (g). As with the rest of the arbitration, the arbitrator has discretion as to how the hearing will proceed. The arbitrator will exercise his or her discretion with an eye toward balancing (1) treating the parties equally and providing each party a fair
opportunity to present its case, with (2) being efficient and expeditious. AAA Rule R-32(a), (b); CPR Rule 9.2; JAMS Rule 22(d).

While arbitrators are ethically bound to maintain the confidentiality of the hearing and the overall arbitration itself, the parties are not so limited absent a confidentiality provision in their arbitration agreement or a confidentiality or protective order entered by the arbitrator.

**The Award**

Once the parties have submitted all evidence, including post-hearing briefs if desired by the parties and allowed by the arbitrator, the arbitrator will declare the hearing closed. AAA Rule R-39; JAMS Rule 22(h). If the contract does not dictate a deadline for issuing the award, many administering providers' rules provide defaults—under the AAA's and JAMS's rules, the award is due 30 days after the hearing is declared closed. AAA Rule R-45; JAMS Rule 24(a).

The arbitrator will issue a written award, signed by the sole arbitrator or, if a panel, at least a majority of the arbitrators. AAA Rule R-46(a); CPR Rule 15.2; JAMS Rule 24(b). There are generally three types of awards: (1) standard—usually a sentence or two stating which party wins and how much, if anything, it is awarded (AAA's default, AAA Rule R-46(b)); (2) reasoned—a longer narrative providing at least brief reasons for the award (CPR's and JAMS's default, CPR Rule 15.2; JAMS Rule 24(h)); and (3) findings of fact and conclusions of law—a detailed recitation of the arbitrator's factual findings and legal conclusions in support of the award.

**Post-Award Motions**

One of arbitration's benefits is finality: parties resolve their business disputes efficiently and economically, without appellate review, so they can get back to business. Not surprisingly, then, post-award review options are few.

Before the arbitrator, parties are limited to motions to correct clerical, typographical, calculation, or other similar types of errors in the award. See AAA Rule R-50; CPR Rule 15.6; JAMS Rule 24(j). The arbitrator has no authority to redetermine the merits of the case, so he or she should deny any motion to reconsider the award regardless of how it is framed.

The winning party may file in court (state or federal, if there is federal court jurisdiction) a motion to confirm the arbitration award. If the court grants a motion to confirm, it will enter a judgment in the winning party's favor, which that party then can enforce like any other court judgment.

The losing party may file a motion to vacate the award. Note, however, that the FAA and most states' arbitration acts provide narrow grounds for vacatur. The FAA lists the following bases for vacating an arbitration award:
(1) where the award was procured by corruption, fraud, or undue means;

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

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

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

9 U.S.C. § 10(a). Each of these ultimately focuses on the fairness of the arbitration process overall and not whether the arbitrator reached an incorrect conclusion or result in the award. Accordingly, motions to vacate under the FAA are difficult to win unless the process itself was inherently unfair to one party.

Appellate Arbitration
Some administering providers have rules or procedures for an appellate arbitration process that provides for a higher level of review of the underlying arbitration award than judicial review under the FAA or state arbitration statutes. See AAA Optional Appellate Arbitration Rules (2013); CPR Arbitration Appeal Procedure (2015); JAMS Optional Arbitration Appeal Procedure (2003). Because appellate arbitration is still arbitration, all parties must agree to it—either in the parties' original arbitration agreement or in an agreement reached after the dispute arises.

These procedures generally allow for an appellate arbitrator or tribunal of three arbitrators to review the original arbitration award after a tight briefing schedule and to affirm, reverse, or modify the award. The appellate arbitrator cannot, however, remand the arbitration back to the original arbitrator. AAA Optional Appellate Arbitration Rule A-19(a); CPR Arbitration Appeal Procedure Rule 8.2(b); JAMS Optional Arbitration Appeal Procedure (d). In its review of the original award, the appellate arbitrator will apply broader standards of review, similar to that of an appellate-level court. AAA Optional Appellate Arbitration Rule A-10; CPR Arbitration Appeal Procedure Rule 8.2(a); JAMS Optional Arbitration Appeal Procedure (d). The appellate award then becomes the final award for the purposes of motions to confirm or vacate in court.

Conclusion
From the preliminary hearing through the evidentiary hearing, the arbitrator uses his or her discretion to run the arbitration as efficiently as possible while keeping the process fair to the
parties. Counsel should be flexible as to how much discovery, motion practice, and witness testimony they need to keep the arbitration efficient and to avoid turning the arbitration into courtroom litigation. Being well versed in the arbitration process, from clause drafting to appellate arbitration, and the applicable rules will allow you to help your client get the most out of arbitration and resolve its commercial disputes efficiently and economically.

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International Arbitration in Switzerland: The Basics in a Nutshell

By Daniel Hochstrasser and Isabelle Oehri – May 22, 2017

For more than a century, Switzerland has been among the preferred venues for international arbitrations worldwide, whether in ad hoc or in institutional proceedings, and be it for commercial, investment, or sports-related disputes. What is the secret behind this leading position Switzerland is successfully defending against an increasing competition from recently emerging new arbitration hubs?

Various factors may account for Switzerland's reputation as a well-recognized center for arbitration, including its long-standing tradition of neutrality, democracy, and stability, which made it an ideal host country for many international organizations and dispute settlement institutions, such as the United Nations, the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO), and major international sports organizations including the Court of Arbitration for Sport (CAS), the International Olympic Committee (IOC), FIFA, and UEFA. Such success is, however, above all owed to the clear and liberal Swiss international arbitration law, which offers maximum flexibility for the parties and arbitrators to tailor the proceedings to their needs. The efficiency and predictability of this legislation is further enhanced by the straightforward approach adopted by Swiss courts and practitioners.

This article provides an overview on this regulatory framework governing international arbitration in Switzerland.

Legal Framework

Switzerland's international arbitration law in chapter 12 of the Federal Private International Law Act (PIL) (unofficial English translation) comprises a concise and streamlined set of 19 articles in force since January 1, 1989. It applies to all Swiss arbitrations involving at least one party that had its domicile or regular place of residence outside Switzerland when the arbitration agreement was concluded.

Moreover, Switzerland has signed more than 120 bilateral investment treaties containing arbitration-related rules and is, of course, a member state of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC).

Contractual parties often combine their jurisdictional choice of arbitration in Switzerland as their agreed dispute resolution mechanism with a choice of Swiss law as the substantive law
applicable to their relationship. Swiss contract law, in particular the Swiss Code of Obligations (unofficial English translation), is widely recognized as a reasonable and solution-oriented regime suitable for international business disputes.

**Arbitrability and Arbitration Agreements**

For submitting a dispute to arbitration in Switzerland, a valid arbitration agreement must be concluded. The formal and substantive validity requirements imposed by Swiss law are rather moderate and, in general, do not constitute a major hurdle to take for contractual parties wishing to resort to arbitration.

With respect to formal validity, article 178[1] PIL requires the arbitration agreement to be made in writing or by any other means of communication evidenced in text. This requirement is generally met by any modern means of electronic communication, such as email. A currently discussed draft bill on the revision of chapter 12 PIL suggests to further alleviate the formal criteria by restricting the mandatory text form requirement to only one of the parties' declarations while the other declarations may be made orally or through unambiguous conclusive acts.

Pursuant to article 178[2] PIL, an arbitration agreement is valid in substance if it conforms to the law chosen by the parties, the law governing the dispute, or Swiss law. By offering three alternative options for upholding an arbitration agreement's substantive validity, Swiss law establishes a flexible conflict of law rule that reflects its favorable attitude toward arbitration.

If examined under Swiss law, substantive validity requires that the parties have the capacity to enter into an arbitration agreement (subjective arbitrability) and that the matter of the dispute be arbitrable (objective arbitrability; see below). Moreover, the parties' consent with regard to the essential elements of the arbitration agreement is required—i.e., the parties must express their intention to submit to arbitration and the arbitration clause must specify the object or legal relationship subject to arbitration.

By stipulating that any dispute of financial interest may be the subject of arbitral proceedings, article 177 PIL offers a broad definition of arbitrability. Thus, under Swiss law, contractual parties may resort to arbitration not only in connection with genuinely commercial disputes, but, in principle, also in relation to monetary claims arising in areas such as labor law, family and inheritance law, intellectual property, antitrust and competition law, real estate, and corporate matters including shareholder disputes.

Arbitration agreements usually are binding on the original signatories only. However, Swiss court practice, acknowledging in certain situations the practical need for broadening arbitration
clauses, adopts a liberal case-by-case approach allowing for an extension to third parties or related disputes, once the common intent to arbitrate is established (see, as examples, the Swiss Federal Supreme Court's decisions 4P.115/2003 of October 16, 2003 [DFT 129 III 727] and 4A_438/2013 of February 27, 2014 [DFT 140 III 134]). Accordingly, several legal extension theories are recognized, including the principle of confidence (Vertrauensprinzip), agency law, or the piercing of the corporate veil.

**Arbitral Proceedings**
Swiss law grants the parties a high degree of flexibility to adapt the arbitral proceedings to their liking. They are free to determine the procedure directly or by reference to specific arbitration rules or by submission under a procedural law of their choice (article 182[1] PIL). Absent such party agreement, the arbitral tribunal determines the applicable procedural rules (article 182[2] PIL).

This wide procedural discretion is only limited by article 182[3] PIL: obliging the arbitral tribunal to ensure the parties' equal treatment and right to be heard, this provision expresses the minimum standard of due process guaranteed by Swiss constitutional law that demands application in any judicial proceedings conducted in Switzerland.

**Role of State Courts**
The role of state courts in international arbitrations in Switzerland is one of passive and active support.

On the one hand, state courts must respect the parties' intention to replace them by an arbitral tribunal and shall therefore, in general, abstain from intervening in arbitration proceedings. Here, the so-called competence-competence principle is of crucial importance. Stipulated in article 186[1] PIL, this principle empowers Swiss-seated arbitral tribunals to rule on their own jurisdiction and, in this context, to decide any questions regarding the existence, validity, or scope of arbitration clauses. This applies even if an action on the same matter between the same parties is pending before a state court or another arbitral tribunal, unless there are serious reasons to stay the proceedings (article 186[1bis] PIL). Conversely, a Swiss state court, seized with a dispute falling within the ambit of a valid arbitration agreement, must decline its jurisdiction to hear the case (see article 7 PIL; article II[3] NYC). If such arbitration agreement provides for arbitration in Switzerland, this priority principle, according to the case law of the Federal Supreme Court (see, for instance, decision 4A_119/2012 of August 6, 2012 [DFT 138 III 681]), even goes one step further by limiting the state court's review to a prima facie assessment only. Once it has satisfied itself that there appears to be a valid and binding
arbitration clause, the state court will leave any in-depth examination of specific issues regarding validity and scope to the arbitral tribunal.

On the other hand, in some situations, not merely passive support but active assistance of a state court is needed to enable and ensure the proper and efficient conduct of arbitration proceedings and to protect their outcome. In the course of ongoing arbitration proceedings, a party may, for instance, seek assistance from the court at the place of arbitration in appointing, removing, or replacing arbitrators (article 179 PIL). Further, state courts may be seized in the context of interim relief, in particular, where measures are to be directed against third parties or if a party refuses to voluntarily comply with provisional measures ordered by an arbitral tribunal (article 183 PIL). Eventually, after the rendering of the arbitral award, enforcing the tribunal's decision or, quite the contrary, annulling it may become the subject matter of post-arbitration litigation before state courts. Both in enforcement as well as in setting aside proceedings, the state courts' role is, according to the Swiss system, to conduct a review on the arbitral proceedings and findings essentially restricted to their compliance with the most fundamental principles of due process and fairness, and, these being complied with, to protect the arbitration's results by ensuring the award's efficient enforcement.

Arbitral Award and Its Finality
Any international award rendered in Switzerland is final from its notification (article 190[1] PIL). This means that the award is enforceable and binding by operation of law without any additional state court scrutiny.

Here, a further feature underscoring Switzerland's arbitration friendliness comes into play: the restrictive approach toward challenges of arbitral awards. A party seeking annulment of an unfavorable award may only avail itself of one ordinary means of remedy, i.e., the appeal to the Swiss Federal Supreme Court set forth in articles 190–192 PIL. By limiting any state court review of arbitral awards to a number of limited grounds for appeal that might be brought directly before the highest court in Switzerland, and by acknowledging, under certain conditions, even a complete waiver of appeal, Swiss arbitration law helps in ensuring that the parties obtain a final decision within reasonable time and at reasonable costs. This effect is further enhanced by the expeditious and uniform handling of setting aside motions by the Federal Supreme Court and its express policy of noninterference, which is reflected in a famously low rate of successful challenges of approximately 7 percent.

If none of the parties has its domicile, habitual residence, or business establishment in Switzerland, they may, by an express statement in the arbitral agreement or a subsequent written agreement, entirely exclude the right to challenge the award (article 192 PIL).
Absent such valid waiver, article 190[2] PIL provides for the following exhaustive list of five narrowly defined grounds for appeal, which are, to a large extent, aligned to the grounds for denial of recognition and enforcement contained in article V NYC:

1. irregular composition of the arbitral tribunal (article 190[2][a] PIL);
2. incorrect decision on jurisdiction (article 190[2][b] PIL);
3. decision *ultra, infra, or extra petita* (i.e., the arbitral tribunal went beyond the claims raised or failed to address certain of them; article 190[2][c] PIL);
4. violation of the principle of equal treatment or the parties’ right to be heard (article 190[2][d] PIL); and
5. incompatibility with public policy (article 190[2][e] PIL).

The nature and scope of these grounds for appeal clearly demonstrate that the overruling of an arbitral award is only possible in rare situations where either essential procedural rights are manifestly violated or where an award contradicts the foundations of Swiss (procedural or substantive) public policy. The latter constitutes the sole plea allowing for a review of the challenged award’s merits. The Federal Supreme Court has so far only once, in its famous *Matuzalem* decision (*4A 558/2011 of March 27, 2012* [DFT 138 III 322]), granted a set aside petition for substantive public policy reasons. It found that the challenged sports arbitration award, which de facto imposed on a soccer player an unlimited ban from any soccer-related professional activities, was such a severe violation of the player’s right of personality as to amount to incompatibility with public policy. The exceptional circumstances of this case, as well as the fact that, to date, it remains the only one, strikingly illustrate the extremely close boundaries within which the Federal Supreme Court is prepared to reassess the merits of arbitral decisions.

From a procedural angle, the appealing party must file its fully motivated setting aside petition within 30 days of the award's notification, and the opposing party is granted an opportunity to respond. The Federal Supreme Court’s subsequent review is limited in two ways. First, its scope is strictly confined to the specific pleas raised by the petitioner. Second, the review is generally based on the finding of facts of the challenged award, and no additional evidence or new facts are admitted. Only in case of an allegedly incorrect jurisdictional decision (article 190[2][b] PIL) does the Supreme Court examine the tribunal’s assessments with unfettered powers.

If a setting aside petition is rejected, the challenged award remains binding and enforceable; otherwise, the Federal Supreme Court will annul and remand it to the arbitral tribunal for
reconsideration. However, there are two exceptions to this purely cassatory nature: upon successful appeal for irregular composition of the tribunal (article 190(2)[a] PIL) or for incorrect decision on jurisdiction (article 190(2)[b] PIL), the Federal Supreme Court may itself issue a new decision replacing the annulled award.

Apart from this ordinary appeal (articles 190–192 PIL), a party may, as an extraordinary remedy, also request the revision of an arbitral award. Revision can, in particular, be sought if an award was influenced by a criminal offense or if a party has obtained knowledge of new and relevant facts that were previously unknown. Although not expressly provided for in the current text of chapter 12 PIL, the possibility to seek revision has long been recognized by the Federal Supreme Court. Here again, being the only competent authority, it rules on revision requests by applying the provisions of the Swiss Federal Statute on the Federal Supreme Court by analogy (in particular, articles 123 and 124). The currently discussed draft amendment of chapter 12 PIL proposes to codify this case law by including an explicit rule to this extent.

**Legislative Developments and Outlook**

In order to keep the legal framework up to date, it is key to continuously adapt it to the needs of the rapidly developing global environment.

Recognizing these dynamics, the Swiss legislator has initiated a reform project on chapter 12 PIL. A first draft bill, published by the Federal Council on January 11, 2017, envisages several additional modernizations and liberalizations. For instance, parties would, in future appeal and revision proceedings before the Federal Supreme Court, be allowed to file their submissions and documents in English while, to date, all filings must be made in an official Swiss language (i.e., German, French, Italian, or Rhaeto-Romanic). Similarly, as regards validity of arbitration clauses, the formal requirements would be relaxed (see above), and the admissibility of unilateral arbitration clauses (e.g., in the context of trusts and wills) would be expressly acknowledged. Further, the reform project aims at codifying settled case law in some areas (e.g., regarding the revision of awards, see above).

Overall however, the rather moderate dimension of the reform proposal, which preserves the cornerstones of the existing chapter 12 PIL, focuses on continuity and thereby again mirrors the global acceptance and success of the Swiss international arbitration law built up over the past decades.

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A Mediator’s Perspective on Probate and Trust Resolution

By Edmund J. Sikorski Jr. – May 22, 2017

When probate and trust issues arise, mediation is superior to litigation for resolving disputes. Mediation affords clients more control and involvement in the dispute resolution process and is more cost-effective, and the mutually negotiated outcomes are generally more satisfactory to clients than the imposition of a third-party decision.

Early Case Resolution
The longer the conflict rages on, the more likely the victor will in fact become the vanquished. The emotional and physical commitment necessary to pursue this type of litigation is enormous. It is accurate to say that the acrimony generated by the litigation process is a death sentence for any sense of family for ensuing generations.

More complex cases (such as capacity and undue influence cases) are less capable of early resolution because they are fact-intense and thus require substantive discovery. Court intervention may be needed to compel the production of records and other relevant information, particularly when the information is potentially adverse to one or more litigants. Discovery gamesmanship not only precludes early case resolution, it also substantially interferes with the process, regardless of the stage of the litigation.

Avoidance of Trial Expense and Imposition of Third-Party Decision
The expense of proceeding down the litigation track is enormous. When you consider the time spent preparing for, taking, and then reviewing and summarizing the testimony, a single witness deposition could cost more than $3,000. In cases alleging incapacity or undue influence, for example, the fees for expert reports can easily exceed $5,000 per litigant.

A decision imposed by a third party is always unpredictable, whether it be by judge or jury. What is predictable about a third-party decision is that it will not come until long after the parties have respectively spent tens of thousands of dollars on attorney fees, experts, and discovery.

Suffice it to say that litigating a matter to its bitter end—with a judge, jury, and possibly an appellate court deciding the outcome—serves no meaningful purpose but to deplete the financial and emotional resources of the parties. This is so even where a litigant simply wants to "have their day in court."
Management of Malpractice Claims and Charges of Ethics Violations
Litigated claims eventually encompass the estate planning attorneys. The facts of each case, developed in part by the discovery responses of those attorneys (who often become witnesses in the proceeding), increase the likelihood that a claim of malpractice and/or professional ethics charges will arise. See Thomas J. Watson, "Managing Risk: Estate Planning Work—Not for the Timid," 84 Wis. Law., no. 12, Dec. 2011. The participation of estate planning counsel, and perceptions regarding their testimony and work product, are a potential hindrance to the mediation process because it invites additional litigation within or separate from the proceeding the parties are trying to resolve.

Satisfied Clients
Clients who are actually involved in crafting a mediated resolution are more satisfied clients. See John DeGroote et al., Settle and Sue Again: Strategies and Snares, Address Before the ABA Spring 2013 National Legal Malpractice Conference; see also "Why Facilitative Mediation Produces Better ADR Results Than Evaluative Mediation," 45 Res Ipsa Loquitur, no. 5, Sept./Oct. 2016, at 4.

Effective Mediation Produces Practical Outcomes
I believe that there are six core principles that both the mediator and counsel for the litigants must understand and convey in every estate and trust-related mediation:

Deeper understanding. The purpose of mediation is to help people consider another perspective, develop a better understanding of the situation, and recognize what they really need from the conflict so that they can move on with their lives. The mediator’s ability to identify issues and educate the litigants is critical to a successful process; the parties must learn to overcome the distractions of trivial matters in order to see the bigger picture.

Effective common goal. The focus must always be on finding an effective agreement—a common vision that satisfies most of the participants' needs (not necessarily desires) in the best manner available.

Mutual problem solving. The task in mediation is to help solve the other side's problem as a means of solving your own problem. Stated differently, you are their primary problem and they are yours. Mediators must help the parties identify possible solutions to common and less significant problems to establish a framework for resolving complex issues where they might have more divergent interests.
**Positions vs. interests.** Positions must be differentiated from interests. Positions reflect what we assert we want as outcomes. The more we defend them, the stronger we seem to hold on to them. Interests reflect what is important to us as outcomes. Interests are the reason why they are important. They reveal hopes, needs, values, beliefs, and expectations. They can get lost in the fight for positions and do not necessarily reflect what the conflict is about. *Do not confuse the two.*

**It's business.** Mediation is fundamentally about cutting a business deal. You may not get what you think you want, but you will be better off than if there were no deal at all. This may be a foreign concept at first because from the beginning the dispute is principled, emotional, and more difficult to mold into a reasoned risk assessment that is at the heart of an informed business decision.

**Experience equals realism.** The mediator selected should have subject matter knowledge in this area of the law. Such experience/expertise allows a systematic analysis of the conflict and management of the unrealistic expectations of the parties.

**Mediator Expectations**
Here are a few things a mediator expects from the parties prior to the mediation conference:

**Prepare and exchange a mediation brief.** Mediation briefs tell the mediator in advance the essence of the factual and legal issues in dispute, and likewise, the issues not in dispute. Do everything within your power to objectify the claim, position, or defense. Make the content *easy* and *simple* to understand. *Brevity* is best.

Just like an opening statement, a mediation brief should tell a story that starts with a theme that is well thought out in advance. The theme should be one sentence or phrase that appeals to the moral force of the "jury" and captures the essence of the party's story. A good theme should be easy to remember, useful in decision making, supported by the evidence, and consistent with the "juror's" concept of fairness and justice.

There are four magic words that introduce a theme: "This case is about . . ." The theme should be expressed in a single opening paragraph that combines an account of the facts and the law in such a way as to lead to the conclusion that you will prevail if the matter proceeds to and concludes in trial.

**Cut to the chase with the mediator.** If the mediator understands "where you are coming from" and recognizes wiggle room in the outcome, he or she will be in a better position to relate that to the other side (and vice versa).
Prepare. Every primer on mediation exhorts the participants to prepare. However, this is like telling your kids to "go clean their rooms." What does this mean and how do you do it? This requires negotiators to pre-plan and prepare an intensely thoughtful, scripted plan that offers the other side a reason to accept one of a variety of alternative proposals. It might start with an ambitious proposal that does not automatically alienate the other side. The plan should be flexible and progress toward a final settlement proposal that weighs the client's best interests against the risks associated with a solution imposed by a third party. From my point of view as a civil mediator, failure of a party to come to the mediation session with such a scripted plan is fatal to the mediation process.

Mediation Participant Expectations

There are three substantive matters that the mediation participants should expect from the mediator in probate and trust mediation proceedings:

Knowledge of the law. Review and discuss the elements of the cause of action and the proofs necessary to establish the relief sought and the standard of review if appellate action might ensue. The causes of action will fall into one of the following categories:

1. Tortious interference with a prospective advantage;
2. Tortious interference with a trust/expected inheritance;
3. Intentional infliction of emotional distress;
4. Negligent infliction of emotional distress;
5. Fraud;
6. Unjust enrichment;
7. Creation of an express oral trust;
8. Conversion; or
9. Constructive trust, undue influence, and breach of fiduciary duty.

Knowledge of attorney fees. When the subject of attorney fee shifting is involved in the litigation (almost always in light of statutory provisions allowing probate courts to grant them), entitlement to those fees from a source other than the asking party will be a subject of mediation caucus. I urge mediation participants who have such claims involved in their matters to carefully digest the extensive discussion of that subject contained in *In re Temple Marital Trust*, 278 N.W.2d 265 (Mich. Ct. App. 2008). The standard for an award of attorney fees is different in estate litigation than in trust litigation. You should expect to revisit these cases and their common subject matter in caucus with your mediator.

Discussion of probable outcomes using decision tree analysis. A mediator having extensive knowledge and experience with contested probate proceedings is in the best position to help the litigants identify the possible consequences of their decisions as they relate to their interests in the case. Using decision trees in caucus allows the mediator to offer each party a perspective on the uncertainties of litigation, including the economic and psychological costs. It also allows for a logical analysis of those decisions and a greater sense of predictability regarding possible outcomes—removing the impact of counsel's posturing that litigants might not fully understand. The result is greater confidence and credibility in the chosen solution.

Conclusion
Be prepared, but be flexible. Mediation is ultimately about working to realize common goals. Bring an adaptive and educated mindset to your negotiations. You can get closer to the ultimate goal of making lemonade out of lemons.

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PRACTICE POINTS

A Look at In Re Kleimar

By Christopher M. Campbell – May 15, 2017

Practitioners of international arbitration are usually highly critical of U.S.-style discovery and try to avoid it whenever possible, which makes the recent decision of In re Ex Parte Application of Kleimar N.V., No. 16-MC-355, 2016 WL 6906712 (S.D.N.Y. Nov. 16, 2016) that much more interesting. There, the District Court for the Southern District of New York (SDNY) decided that the London Maritime Arbitration Association, a private association, is a "tribunal" with respect to 28 U.S.C.A. § 1782 (§ 1782) and, therefore, binds the tribunal and the parties to an arbitration before it can seek U.S.-style discovery in federal court.

What is Section 1782?

Section 1782 governs the production of evidence in the United States for use in a foreign proceeding. It grants exclusive subject matter jurisdiction to federal courts to rule on discovery applications submitted under the statute.

To be entitled to discovery under §1782, the applicant must meet a three-prong test:

1. The "person" from whom discovery is sought must "reside" or be "found" in the district of the court in which the application is made;
2. The request or application must be made "by a foreign or international tribunal or upon the application of any interested person;" and
3. The evidence sought must be "for use in a proceeding in a foreign or international tribunal."

Lancaster Factoring Co. Ltd. v. Mangone, 90 F.3d 38, 41 (2d Cir. 1996)

Facts and Procedural History of In Re Kleimar

Kleimar and Dalian were engaged in a series of arbitrations in London before the London Maritime Arbitration Association (LMAA). In October 2016, Kleimar filed an ex parte application to obtain discovery from the SDNY for use in the London Arbitration. The court granted Kleimar's application and allowed Kleimar to seek discovery of Vale and certain other persons. Kleimar thereafter served Vale with a subpoena and Vale Responded with another action in the SDNY, the instant case—a motion to quash that subpoena and vacate the discovery motion previously granted.
As a result, the question before the court was: "Whether the LMAA tribunal, a private arbitral tribunal, is a 'tribunal'" for purposes of § 1782.

Holding and Reasoning
The district court noted that other courts in the Second Circuit had ruled that private foreign arbitrations did not qualify for discovery under § 1782, but that these courts had not yet considered the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004).

In *Intel*, the United States Supreme Court considered two questions: (1) does Section 1782 of Title 28 of U.S. Code authorize a federal district court to compel the release of material for use in a "foreign tribunal" when the foreign tribunal itself is unwilling to demand production of the material?; and (2) does Section 1782 authorize a federal district court to compel the release of material for a fact-finding investigation by the directorate general of the European Commission on the theory that the information may eventually lead to an investigation by a foreign tribunal? *Id.*

In *Intel*, the Supreme Court ruled that just because a foreign tribunal was unwilling to demand certain documents did not mean that those tribunals would be unwilling to accept them if provided by other means. By permitting, but not forcing, American judges to allow discovery of certain documents, Congress allowed judges to exercise their discretion to decide whether a foreign tribunal would be receptive to the documents at question. The Court also ruled that it would be impractical to limit the fact-finding to only the actual trial before a foreign tribunal because, in cases like this one, the foreign tribunal does not gather evidence itself but instead relies on the evidence presented to the investigatory commission (in this case the directorate general).

As a result, though it did not explicitly say so, the district court in *Kleimar* appears to have considered the *Intel* ruling as support for the proposition that, in a given case, it is up to the judge, at his or her discretion, to assess what is a foreign tribunal, and whether § 1782 provides access to "U.S. style discovery." This ruling is in direct conflict with the decision in *National Broadcasting Corp. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d. Cir. 1999). Though not definitive, *Kleimar* seems to indicate a departure from *NBC* as to what future courts in the Second Circuit will consider to be a foreign or international tribunal.

Practice Pointers
The *Kleimar* decision demonstrates that the definition of a foreign tribunal under § 1782 has not been decisively determined. Accordingly, those involved in a foreign arbitration who need
more discovery than the foreign tribunal will permit should consider whether they can obtain such discovery by making application to a federal court under § 1782.

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Do Employment Arbitration Clauses Apply When the Former Employee Is Not Named as Defendant?

By Alexander F. Stopak – May 10, 2017

Yet again, two tech giants are engaged in a legal battle. This time, it is Waymo, a subsidiary of Alphabet (parent company of Google), and Uber technologies. Waymo has claimed that Uber infringed on Waymo's patent, as well as misappropriated trade secrets, in Uber's development of their driverless cars program.

At the crux of Waymo's claim is former Waymo engineer Anthony Levandowski. Levandowski resigned from Waymo in January of 2016, and subsequently founded Otto Trucking, which was acquired by Uber in August of 2016. Waymo alleges in its complaint that before resigning, Levandowski, among other things, downloaded roughly 14,000 confidential files from Waymo's servers. During Levandowski's tenure at Google and Waymo, he signed two different employment contracts. Both of these contracts contained arbitration clauses that required any disputes between Levandowski and the company be resolved through arbitration.

On March 27, Uber filed a motion to compel arbitration. In its motion, Uber argued that the arbitration clauses from Levandowski's employment contracts should apply to the current dispute, because Waymo based its complaint on the assertion that Uber benefitted from the supposed violation of those employment contracts.

There appears to be some legal precedent to support Uber's motion. For example, a San Jose federal judge ordered Torbit, a tech company, to arbitrate its case against a fired software developer who allegedly misappropriated the tech company's trade secrets while starting his own company. Torbit, Inc. v. Datanyze, Inc., No. 5:12-CV-05889-EJD, 2013 U.S. Dist. LEXIS 19584, (N.D. Cal. Feb. 13, 2013). However, in the Torbit case, the former employee was the named defendant in the law suit. Here, Waymo has not included Levandowski as a defendant.

In its motion, Uber claims that Waymo deliberately omitted Levandowski as a defendant in order to circumvent the precedent of Torbit that would require Waymo to participate in
arbitration. According to Uber, "Waymo's purpose for proceeding in this curious manner seems clear: through artful pleading, it hopes to avoid arbitrating the misappropriation... claims at all costs." Waymo, LLC v. Uber Technologies, Inc., 2017 U.S. Dist. LEXIS 54662, Case No. 3:17-cv-00939 (N.D.Cal S.F. Apr. 10, 2017). Uber further bolsters its case by pointing out that Waymo had attempted to force Levandowski into arbitration over the same matter last November.

Waymo contends that Uber is the party conducting shady litigation practices. Along with the motion to compel arbitration, Uber proposed an expedited timeline that gave Waymo only 7 days to respond to the motion. The attorney for Waymo, John W. McCauley, filed a declaration in support of Waymo's opposition to Uber's motion to shorten time. In this declaration, McCauley essentially claims that Uber purposefully delayed filing its motion in order to limit Waymo's time to reply to Uber's motion to compel arbitration.

This case is still ongoing, but the outcome of Uber's motion is certain to have an effect on future cases involving arbitration. Although Waymo alleges misconduct from various former employees that went to work for Otto and subsequently Uber, Levandowski is the only employee it has identified by name, and he clearly is a major focus of Waymo's claims. This case will essentially determine whether a company can sue for violation of employment agreements, and bypass its own arbitration clauses, by simply not naming the employee and suing the company that ultimately benefits from that employee's alleged violation.

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