

Alternatives

TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute for Conflict Prevention & Resolution

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The Master Mediator

Pushing the Envelope with Ex-Parte Field Trips

BY ROBERT A. CREO

The problem is the perception of partiality.

Lawyers think of legal processes as being linear with consistent and predictive ways that neutrals should act to preserve

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impartiality or neutrality. The mediation process is often considered to commence with an in-person session attended by all participants. This likely derives from the legal system forum models of court and arbitration.

Despite the years that mediation has been common, even experienced practitioners refer to the mediation session as a "hearing." I just agreed last month to be on a roster of mediators with a private provider who referenced the mediation "hearing" in all of its documents.

Most professionals in the field shy away from this type of adversary-based terminology. Many of us frame the in-person meetings as sessions.

The author is a Pittsburgh attorney-neutral who has served since 1979 as an arbitrator and mediator in the United States and internationally handling thousands of cases. He conducts negotiation and decision behavior courses that focus on neuroscience and the study of decision-making. He is annually recognized by Best Lawyers in America and was named in both 2017 and 2014 as Pittsburgh Mediator of the Year. He is the author of numerous publications, including "Alternative Dispute Resolution: Law, Procedure and Commentary for the Pennsylvania Practitioner" (George T. Bisel Co. 2006). He is the principal of Happy Effective Lawyer LLC, an initiative focusing on lawyer contentment, core competencies, soft skills, and peak performance, which publishes *The Effective Lawyer* (<https://happyeffectivelawyer.org/>) Blog. He is a long-time member of *Alternatives'* editorial board and of the CPR Institute's Panels of Distinguished Neutrals. His website is www.robertcreo.com. He can be reached at racro@gmail.com.



People are rightfully skeptical of ex-parte communications with third-party interveners in disputes. The legal system has ingrained in advocates rules that shield adjudicators, especially jurors, from receiving information in an unstructured manner. The transparency and openness of a judicial system gives it credibility and public acceptance. A key foundation of due process and fundamental fairness in the adversary dispute resolution

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THE THEME

Master Mediator columnist Bob Creo is examining the good, bad, and ugly of the mediation process and mediator practices in a series of columns on storytelling. Each column will provide case profiles and contributions from master mediators of what actually happened. The stories will be analyzed for process points and human behavior indicators to explore lessons learned from triumph, failure, or the unknown consequences of alternative mediator choices or controversial techniques. The current road trip theme will return with the next installment in the semi-monthly Master Mediator column series, slated for the July/August issue, and featuring a road trip with Los Angeles mediator Jeff Kichaven.

CPR News

CALL FOR APPLICATIONS TO Y-ADR STEERING COMMITTEE

CPR's Y-ADR program is seeking new leaders for a two-year term on its steering committee.

Y-ADR promotes the full spectrum of dispute resolution mechanisms with the younger generation of lawyers—that is, those who are 45 years old or younger and those with less than eight years of professional experience in international ADR practice.

Through periodic seminars and other initiatives, Y-ADR participants gain an insider's look at the role of dispute resolution processes and practices in corporations and multinational organizations. They get the opportunity to network with in-house counsel and experts in the field.

The Y-ADR Steering Committee is the leadership group for Y-ADR. The committee is chaired by Natalie L. Reid, a New York partner in Debevoise & Plimpton LLP, and Alberto Ravell, senior legal counsel—arbitrations, at ConocoPhillips Co. in Houston.

The Y-ADR Steering Committee is composed of young in-house counsel and practitioners at leading law firms around the world. Over the past two years, the current committee has organized numerous seminars

and programs on dispute prevention and resolution, written articles, and collaborated on a number of other initiatives of interest to young in-house counsel and practitioners in international dispute resolution.

CPR's Y-ADR Steering Committee members are selected through a competitive vetting process. Applications are now being accepted for the partial renewal of the Steering Committee, the term for members selected this year scheduled to begin on July 1, and end on June 30, 2021.

The committee meets on a regular basis to plan and implement projects and initiatives, such as organizing and participating in Y-ADR seminars and other events, as well as writing articles on behalf of Y-ADR for publications and blogs and launching other initiatives of interest to young lawyers. The Y-ADR Steering Committee is also responsible for promoting CPR's work and activities with the younger generation of in-house counsel and dispute resolution practitioners.

Applicants should email a short statement of interest by no later than May 27, to the CPR Institute's Chris Silva at csilva@cpradr.org. The email should describe the applicant's background and interest in dispute resolution and include ideas on supporting CPR's Y-ADR and furthering its mission. And applicants should indicate whether their company or organization is a CPR member.

Alternatives



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International Arbitration

The Prague Rules: Problem Detected, but Imperfectly Solved

BY ANKE SESSLER & MAX STEIN

The Rules on the Efficient Conduct of Proceedings in International Arbitration (“Prague Rules”) were launched on Dec. 14, 2018, after several rounds of drafts, comments and redrafting, with the involvement of more than 40 highly regarded, mostly European practitioners.

In 12 articles, the Prague Rules set out how an arbitration should be conducted more efficiently. The Prague Rules’ proclaimed solution to a more efficient arbitration is a strong, proactive tribunal and a limitation of the parties’ rights.

You can find the rules in their entirety at praguerules.com.

WHAT IS THE PURPOSE OF THE PRAGUE RULES?

Much has been written about the Prague Rules, both before and after their launch. But the most basic questions appear to remain unanswered: What is the purpose of the Prague Rules? Do they supplement or deviate from existing arbitration rules, do they seek to replace the International Bar Association Rules on the Taking of Evidence in International Arbitration, or can they co-exist with the IBA Rules?

Devoid of provisions on basic procedural steps such as the constitution of an arbitral tribunal, the Prague Rules are not, nor do they purport to be, comprehensive arbitration rules. But the Prague Rules are not mere “gap fillers” either. In contrast to the IBA Rules, the Prague Rules do not limit themselves to questions of procedure on the taking of evidence not normally addressed by arbitration rules.

Instead, the Prague Rules overlap with both the IBA Rules as well as institutional arbitration rules.

AN ALTERNATIVE TO THE IBA RULES?

One author accepted that “the scope of the Prague rules is much broader [than the IBA Rules]: they are not only about evidence but also about managing the conduct of the arbitration.” Andrey Panov, “The Prague rules—dispelling misconceptions” (Nov. 22, 2018) (available at <http://bit.ly/2FKdtZ6>).

Another explained that “the Prague Rules are not a competitor of the IBA Rules on Taking of Evidence in International Arbitration. To the contrary, not only may the Prague Rules supplement the IBA Rules—and vice-versa—but, more importantly, they play a fundamental role in according the parties with more options with a tailor-made process to fit their interests and needs.” Duarte G. Henriques, “The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?” 36: 2/2018 *ASA Bulletin* 351 (June 2018) (available at <http://bit.ly/2HVjFi6>).

Looking at the drafting history that was not always the stance of the Prague Rules. Instead, it appears that the attitude toward the IBA Rules changed from confrontation to potential co-existence—albeit without fully implementing that change of attitude by providing a mechanism for the two sets of rules to operate together.

An earlier version of the Prague Rules, of March 11, 2018, was called “Inquisitorial Rules on the Taking of Evidence in International Arbitration.” (Available at <http://bit.ly/2YB5tRB>.) The title itself indicated that these rules were intended to become an *alternative* to the IBA Rules, not a supplement.

In the “Note from the Working Group” of that draft, the IBA Rules were specifically addressed and criticized as being “still closer to the common law traditions.” While the Prague Rules in their final version do not address the

IBA Rules at all and their language became more conciliatory, they do not propose a true solution for the potential conflict between the Prague Rules and the IBA Rules.

Instead, the only solution the Prague Rules provide in respect of any overlap or conflict with the IBA Rules is Article 1.2., which provides that “[t]he arbitral tribunal may apply the Prague Rules *or any part thereof* upon the parties’ agreement or at its own initiative after having heard the parties.” (Emphasis added.)

But as explained in more detail below, such selective use will be highly impractical given the current structure of the Prague Rules and in particular the fact that they do not indicate where they conflict with the IBA Rules.

The decision not to position the Prague Rules as a clear competitor to the IBA Rules is unfortunate because there should be room for such a set of rules. There can be no doubt that there is some truth in the now-deleted section of the “Note from the Working Group” that the IBA Rules are closer to common law principles than to civil law principles.

But the IBA Rules are no real middle ground. A civil law-driven alternative to the IBA Rules may be what in particular disputing parties from civil law countries may be looking for, whether the amounts at stake are high or low.

Shaping and positioning such a set of comprehensive rules limited to the realm of the taking of evidence would have prevented the problem of overlap and potential conflict with institutional arbitration rules.

OVERLAP AND COLLISION WITH INSTITUTIONAL ARBITRATION RULES

The problem of an overlap and potential conflict with institutional arbitration rules appears to have been ignored by the Prague Rules’ authors altogether.

In their Preamble, the Prague Rules state that they “are not intended to replace the arbi-

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International Arbitration

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tration rules provided by various institutions and are designed to supplement the procedure to be agreed by parties or otherwise applied by arbitral tribunals in a particular dispute.”

If that was the intention, it is surprising that the Prague Rules provide no solution for their overlap with institutional arbitration rules. Such overlap and indeed contradiction becomes obvious when for example comparing Article 24 of the International Chamber of Commerce Rules with the Prague Rules’ Article 2.

Pursuant to Article 24 of the ICC Rules, the case management conference serves the sole purpose of discussing procedural measures. Article 2 of the Prague Rules, on the other hand, asks the tribunal to also clarify parties’ respective substantive positions and possibly even indicate a preliminary view on, for example, the submitted evidence.

If the parties agree on the ICC Rules and the Prague Rules, which provision is to prevail? Clearly, Prague Rules Article 2 does not merely “supplement” the ICC Rules in that regard; it would lead to an entirely different case management conference.

Similar problems arise when comparing the German Arbitration Institute (DIS) Arbitration Rules with the Prague Rules. Article 27 of the DIS Arbitration Rules regulates the case management conference in an even more detailed manner than Article 24 ICC Rules and—like the ICC Rules but unlike Article 2 of the Prague Rules—reserves the case management conference for questions of procedure.

Article 27 of the DIS Rules also conflicts with Article 9.1 of the Prague Rules. Pursuant to Article 27.4 of the DIS Rules, the tribunal *shall* specifically address with the parties “the possibility of using mediation or any other method of amicable dispute resolution to seek the amicable settlement of the dispute or of individual disputed issues.”

Pursuant to Article 9.1 of the Prague Rules, a tribunal “*may* assist the parties in reaching an amicable settlement of the dispute at any stage of the arbitration.”

In each case there are instances of conflict, not only of supplementation. The Prague Rules provide no solution for such conflict.

ARE THE PRAGUE RULES NEEDED?

One argument against the implementation of any new set of rules such as the Prague Rules may be that more efficiency can be achieved through the choice of the right arbitrator.

Based on the experience of this article’s authors, when it comes to the efficiency of the proceedings, the arbitrator choice may indeed be more important than the choice of rules.

Choosing arbitrators from a civil law background will likely lead to a more limited document

Bringing In Reinforcement[s]

The new arbitration tool: The Rules on the Efficient Conduct of Proceedings in International Arbitration—The Prague Rules.

Why all the questions? This new offering is competing with many sets of international guidelines. So as intersection points arose during drafting, and as clashes arise in practice, comparisons have been and will continue to be inevitable.

Is there a winner? The authors here point to accommodations that will need to be made as arbitrations invoking the Prague Rules emerge.

production (if there is any document production at all), a proposal by the arbitrators to assist the parties in a potential amicable settlement, and more active arbitrators that are likely, for example, to indicate which witnesses they would prefer to be examined at an evidentiary hearing, and to ask witnesses and experts more questions.

Such measures are possible under any set of rules. The Prague Rules are certainly a good reminder of the many powers arbitrators already have but are sometimes reluctant to exercise. Referencing them, or a part of them, in an arbitration agreement can certainly underscore the parties’ intention to conduct efficient proceedings with a proactive tribunal.

In high-value, bet-the-company disputes, parties are less likely to turn to the Prague Rules with their stance for a strong, if not authoritarian tribunal. More power to the tribunal means less power to the parties and which party—if it can afford it—will be willing to hand over more power to the tribunal in a truly important dispute?

Nevertheless, even in high-value disputes, some features of the Prague Rules may be appealing, at least if all disputing parties come from civil law jurisdictions. For example, an aversion to document production is deeply rooted in many companies from civil law countries, even if operating on a global level.

Therefore, the Prague Rule’s attitude toward document production that “[g]enerally, the arbitral tribunal and the parties are encouraged to avoid any form of document production, including e-discovery” may find rapport with such companies.

Agreement, of course, would seem unrealistic if the dispute involves at least one common-law party, as it appears unlikely that it would waive what some may consider a “right” in international commercial arbitration—the possibility to request production of documents from the other party.

ROOM FOR REFORM

The Prague Rules need to find their real purpose, and be reformed to best achieve that purpose.

Given the degree of detail in most modern arbitration rules, based on the opinion of the authors of this article, the Prague Rules would be best placed to be construed as a tool box on certain clearly defined topics. Those topics could include “case management conference,” “document production,” “witnesses,” “experts,” etc., which the parties could choose to apply specifically and which—as a form of *lex specialis*—should then prevail over the chosen, more general arbitration rules.

Such a solution of specifically agreeing on certain topics or opting in and out of certain clearly defined topics would also resolve the problem that some of the Prague Rules provisions are too controversial, even for parties from some civil law countries.

For example, in many jurisdictions the early indication by a tribunal on matters of fact or law at the case management hearing would

be perceived as problematic from a perspective of impartiality. Where (at least) one party comes from a jurisdiction where such concerns may arise, the parties would not opt for the Prague Rules regulation on the topic of “case management conference” but they still may opt to apply, for example, the topics “witnesses” and “experts.”

For the Prague Rules to provide a tool box for certain specific topics that the parties may wish to import into their arbitration agreement, each topic contained in the Prague Rules will need to be sufficiently developed, defined and separated from the other topics.

There are also a few deficiencies in the current document that need to be fixed. A central element of the Prague Rules is the case management conference. Pursuant to Article 2 of the Prague Rules, the occasion of the case management conference serves as the point in time when a tribunal attempts to identify undisputed facts, clarify the parties’ legal positions, indicate evidence it would consider appropriate for disputed facts and possibly even voice preliminary views on the allocation of the burden of proof, the relief sought, the disputed issues and the weight and relevance of evidence already submitted by the parties.

Despite attributing such significance to the case management conference, however, the Prague Rules are much less specific when it

comes to the timing of such a case management conference. All they state in Article 2.1 is that “the arbitral tribunal shall hold a case management conference without any unjustified delay *after receiving the case file*.” (Emphasis added.)

But what is the case file? Depending on the applicable rules of procedure—for example, assuming an ad hoc arbitration in Germany—the case file at the beginning may not consist of more than a one-page request by the claimant to refer a vaguely described dispute to an arbitral tribunal, and both parties’ declarations as to the appointment of an arbitrator.

That clearly is not sufficient to enable the tribunal to address the topics the Prague Rules expect arbitrators to do at the case management conference.

Similarly, for example, in LCIA proceedings a request for arbitration and response may only briefly summarize the dispute’s nature and circumstances. The response may, naturally, equally only provide a similarly brief summary.

That would be sufficient to hold a case management conference with its traditional purpose—that is, the scheduling of the arbitration and an agreement on the specific rules of procedure, but not for the type of case management conference contemplated by the Prague Rules.

In addition, although the Prague Rules are intended to increase efficiency, they may actually have the opposite effect. For example,

Articles 6.6 and 6.7 envision expert conferencing, a procedure that may help the tribunal in identifying the points truly contentious between the experts.


On the other hand, it is a procedure that requires additional time and effort by the parties and experts, and it is a procedure that the proactive, well-informed tribunal should not need.

* * *

In summary, the Prague Rules in their current form are a good reminder of the already existing powers of an arbitral tribunal that may be exercised, in particular in disputes with small values without any due process paranoia.

But the Prague Rules still need to find their purpose and should be reformed to perform that purpose. Competing with both IBA Rules and arbitration rules—even if inadvertently—is too much.

Transforming the authors’ ideas set out above into a clearly defined set of topics collated as a tool box for efficiency in arbitration from which the parties may choose some—or all—to apply would foster the adoption of the Prague Rules.

It should also be made clear that if and to the extent agreed upon, the Prague Rules prevail over the agreed set of arbitration rules. 

In-House ADR

How In-House Counsel Can Be Viewed as an Agent of Change

BY KÁTIA JUNQUEIRA

“**T**he Legal Department in Mediation” is a project conceived by this author and pioneered by the pipeline gas distribution company of Rio de

Janeiro—“Companhia Distribuidora de Gás do Rio de Janeiro—CEG” one of the companies of Gas Natural Fenosa Brasil—Naturgy. The project is a partnership signed with the

Court of Justice of Rio de Janeiro, and chaired by the Court’s Judge César Cury, through NUPEMEC/RJ—Permanent Nucleus of Consensual Methods of Conflict Resolution, which is part of the structure of the Court of Justice of the State of Espírito Santo.

How did it come about? It is a simple idea, but innovative. And, so far as we know, unprecedented in the world.

It is a move to encourage the use of media-
(continued on next page)

The author is a lawyer at Kátia Junqueira Law Firm and Consultancy in Rio de Janeiro. She is former Legal Director of Gas Natural Fenosa Brasil (Naturgy), a Spanish energy company operating in Rio de Janeiro and São Paulo. She was elected in 2016 to the Brazil Legal 500 (see www.legal500.com/c/brazil). She is a member of the Legal and Strategic Council of the Commercial Association of Rio de Janeiro, and Judge at the Electoral Court in Rio de Janeiro. She has written many law articles and co-authored law books. She is a professor, and has an MBA in Regulation, Competition and Concessions, and has done post-graduate work in business law and environmental education. She is Director of Environmental Affairs of IARA—Institute of Racial and Environmental Law, in Rio de Janeiro. For more information, see www.katijunqueiraadvocacia.com.

In-House ADR

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tion as a peaceful means of resolving disputes through in-house legal departments.

The project was formed due to the judicial backlog in Brazil—a nation with more than 100 million judicial procedures resulting from the judiciary’s credibility in the eyes of the population for resolving disputes and, consequently, a “sentence culture,” which means that nearly one in two Brazilians is a plaintiff or defendant in a lawsuit.

The project’s general objective is to create a culture of mediation among corporate employees to solve their personal problems that have the potential of winding up in court cases. The project is being made through the support of in-house lawyers of the GNF Naturgy pipeline gas company with hope of being a model to be followed by other legal departments of large companies, and a partnership with the mediation centers that are part of the judiciary of the Brazilian states.

PROJECT PRINCIPLES

These are the main principles observed by the project:

A) Principle of the Peaceful Settlement of Controversies contained in the preamble of the Brazilian Federal Constitution:

We, the representatives of the Brazilian people, assembled in a National Constituent Assembly to institute a Democratic State for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, based on social harmony and committed, in the internal and international spheres, to the peaceful solution of disputes, promulgate, under the protection of God, this Constitution of the Federative Republic Of Brazil.

B) Principle of the Consensual Conflict Resolution, contained in the Brazil’s new Code of Civil Procedure - Law 13.105/2015:

Art. 3 Paragraph 2. The State shall promote, whenever possible, the consensual

solution of conflicts.

Paragraph 3. Conciliation, mediation and other methods of consensual resolution of conflicts shall be encouraged by judges, lawyers, public defenders and members of the Public Prosecution Service, including in the course of the judicial proceedings.

Addressing an Overload

The problem: Brazil’s exploding dockets.

The coping mechanism: An in-house corporate law department is helping its employees navigate a court system with 100 million cases by trying to instill a culture of mediation.

Potential benefits? The idea gets the in-house lawyers involved in cases to get them resolved. That will help the courts. And “allows the humanization of the image of the internal lawyer, besides having a positive impact on the company image.”

C) Principle contained in Resolution CNJ (National Council of Justice Brazil) 125/2010:

(...)

“A Public Policy for the Adequate Treatment of Legal Problems and Conflicts of Interests”

(...)

Art. 3 - The CNJ will assist the courts in the organization of the services mentioned in art. 1º, and partnerships with public and private entities may be signed, especially regarding the training of mediators and conciliators... .

Art. 4 - It is the responsibility of the National Justice Council to organize a

program with the objective of promoting actions to encourage litigation and social pacification through conciliation and mediation.

Art. 5 - The program will be implemented with the participation of a network constituted by all organs of the Judiciary and by public and private partner entities, including universities and educational institutions.

SYSTEM SUMMARY

The system in the “Legal Department in Mediation” project consists of the lawyers in the company’s legal department.

They will join a particular project, and provide a small part of the work day to evaluate and select issues from the company’s employees, identify the possibility of mediation, and then send them to the NUPEMEC/RJ for mediation. They will accompany the plaintiff during the mediation and seek to head off a court case.

Then, the Court of Justice of Rio de Janeiro, through NUPEMEC/RJ, receives the cases and seeks to conduct mediation, avoiding “judicialization,” and creating a culture of peaceful means of conflict resolution.

The following steps show the project logistics:

- a) Disclosure of the date of the employee’s attendance 30 days in advance;
- b) The employee’s registration email 20 days in advance of the employees’ attendance;
- c) Email confirmation and request of documents to the employees, sent by the legal department, 10 days in advance of the employee’s attendance;
- d) Documents delivered by employees up to five days before the attendance by the Legal Department;
- e) “Effective attendance,” where the lawyer and the employee will talk and confirm that the case can be sent to NUPEMEC/RJ to be mediated.

AGENTS OF CHANGE

In modern advocacy, lawyers, especially corporate lawyers, must act as agents of change of the views of the organization’s members, especially with regard to social responsibility.

This understanding is in line with the Brazilian Code of Ethics and Discipline of Advocacy. Here is a comparison of two recent versions:

- Code of Ethics and Discipline of Advocacy (*previous*)
“Art. 2º.
Single paragraph. The duties of the lawyer are:
[...]
VI - to stimulate conciliation between litigants, preventing, whenever possible, litigation.
- Code of Ethics and Discipline of Law (*effective Sept. 1, 2016*)
“Art. 2º.
Single paragraph - The duties of the lawyer are:
[...]
VI - to encourage, at any time, conciliation and mediation between litigants, preventing, whenever possible, litigation.

KEY IMPACT

The project's key impact is the lawyer acting as a change agent within the corporation, which means a direct benefit to the employees, with indirect repercussions in society.

The following are the essential participants for the realization of the Legal Department in Mediation project in Brazil:

- The internal lawyers of the company, acting in compliance with social responsibilities and ethical duties;
- The company, complying with the principles of corporate social responsibility and establishing an institutional communication channel, with the State Court of Justice;
- The Court of Justice and NUPEMEC, complying with the guidelines of Resolution CNJ 125/10 and aiming at the public interest;
- Company employees, as beneficiaries and multipliers of the practice of mediation among colleagues, family, and friends;
- The society, as beneficiary, ultimately, of the project's success, since its goal is to provide a reduction of the resort to the courts, with an improvement of the quality of the courts' jurisdiction.

THE PROJECT'S ADVANTAGES

There are countless advantages of the project. It is win-win for all involved, and especially for Brazilian society.

Here are the main advantages identified so far:

- Collaboration with the judiciary to reduce the “judicialization” of claims;
- Contribution to the preservation of the constitutional principle of access to justice;
- Compliance with the principles of corporate social responsibility by the company;
- Creation of an institutional channel/partnership with the judiciary;
- Public and private segments working together with a commitment to the common good and for the benefit of society;
- Benefits to the company's image vis-à-vis employees and third parties;
- Compensation by the company for the effects caused by the provision of its services;
- Benefits to the image of the legal department to other company departments;
- Compliance with the ethical obligations of lawyers;
- Fulfillment of the duty of each citizen to act with social responsibility for the benefit of society and its neighbors;
- Training participating lawyers in mediation (also useful as knowledge for company negotiations);
- Creation of a benefit for employees;
- A welcoming work environment conducive to tranquility;
- With the positive experience, the employees can serve as “multipliers” of the project—effectively spreading the word;
- NUPEMEC/RJ complies with the CNJ guidelines--Res. 125/2010;
- Possibility of extending the project to other local and national companies;
- Reaching the project's main objective—in other words, reducing the judicialization effect should bring other benefits to the whole society; to the parts of the judicial procedures in general (that is, speed in the decisions); to the lawyers (speed of receipt of fees, the possibility of planning work, benefits to the image etc.), court personnel, and magistrates (less volume of actions);
- Increasing the labor market for mediators;
- There was no need for a specific budget for the project;

- Application of the win-win theory;
- Creation and diffusion of the culture of mediation, of the self-composition/consensus resolution of conflicts, instead of the culture of the judicial sentence explained above.

THE STEPS

In order for us to achieve the implementation of the project, it was necessary to establish the steps listed below:

- Presentation of the project proposal to the judge and signing of the agreement between the company and NUPEMEC/RJ (Sept. 17, 2015);
- Training of lawyers of the Legal Department in Mediation by NUPEMEC;
- Disclosure of the project regulations among employees;
- A lecture by NUPEMEC President, Judge César Cury, for the company's employees;
- Beginning of the remittance of employees' complaints to the Legal Department, and, when applicable, dispatch of cases by Legal Department to NUPEMEC;
- Mediation by NUPEMEC, and
- Benchmarking.

The results of the project have been positive since the beginning of in the second half of 2016 until March 2018:

- 46 requests as of March 2018;
- 41% of the agreements concluded;
- The remaining unresolved cases are divided into the following categories: absence of the required party, 13%; waiting for the interested party to return, 15%; absence of a proposal by the requested party, 9%, and employee's application does not fit in mediation, 9%;
- Main issues involved: civil (44%), family (26%) and consumer (24%) issues.

POINTS FOR IMPROVEMENT

Some improvement points have been identified, and the main ones are:

- Need to intensify the dissemination of the project among employees;
- Organization of new events about the institute of mediation, and the simulation of cases;

(continued on next page)

In-House ADR

(continued from previous page)

- Request to NUPEMEC for attendance of family cases by specialized mediators;
- Agreement with Brazilian Bar Association in Rio de Janeiro to provide a list of lawyers to the employees when the project is not successful in solving their issues.

* * *

It is clear that the Legal Department in Media-

tion project is a seed in fertile soil, with great concrete possibilities of expansion and dissemination of the culture of mediation between a significant part of the population that does not know of its existence.

The project's positive perception among Gas Natural Fenosa Brasil employees allows the humanization of the image of the internal lawyer, besides having a positive impact on the company image.

On the other hand, the project's results show the same positive prospects for expansion to other companies, and local and even

national legal departments, such as banks.

In this sense, companies that on the one hand contribute to the accumulation of demands that result in judicialization will be able to "compensate" for their negative effects by joining the project, spreading mediation as a peaceful means of resolving controversies within Brazilian society, and changing concepts and cultures.

Due to its simplicity and great effectiveness, who knows? Maybe this project can also expand beyond Brazilian borders and spread globally. ■

Commentary

Wrestling with Precedent. Or Ignoring It.

BY ADAM SAMUEL

The modern pace of legal practice and the gradual assimilation of arbitration into litigation has led to many losses. One of the most notable concerns diminished levels of knowledge about the past.

This is a serious issue for modern practitioners. Seriously.

When forced to argue a legal point, they often do not know where the documents that they are trying to interpret come from, and the evils that the domestic and international legislation to which they are referring sought to address.

Legislatures and judges make mistakes that show a lack of depth of knowledge from knowing where we come from and what we have done in the past. A little history awareness could improve laws, case decisions and just a general appreciation of what things are and

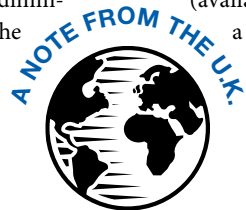
how they work.

A practical example of this can be found in *Rent-A-Center v. Jackson*, 130 S. Ct. 2772 (2010)

(available at <https://bit.ly/2HxOIIK>) (if a party challenges specifically the enforceability of an agreement to arbitrate, the district court considers the challenge, but if a party challenges the enforceability of an agreement as a whole, the challenge is for the arbitrator). When talking about severability in arbitration clauses, Justice Antonin Scalia completely missed the point that this doctrine refers to the separate nature and legal existence of an arbitration clause and its distinctness from the substantive contract in which it is physically contained.

He may have been writing about a blue-pencil test for the unenforceability of ordinary contracts, but he should not be using terms like "severability" which in U.S. case law connotes a totally different subject. A muddle is created for the reader by the way in which the opinion's author seems to have forgotten *Prima Paints v. Conklin*, 388 U.S. 395 (1967) (available at <https://bit.ly/2FPRNvz>) (a claim of fraud relating to the inducement of a con-

sulting agreement generally, rather than in the arbitration clause, must be arbitrated under the Federal Arbitration Act); *El Hoss Engineering & Transport Co. v. American Independent Oil Co.*, 289 F.2d 346 (2d Cir. 1961) (available at <https://bit.ly/2RRmqYa>) ("[W]e would not look to a dimly expressed 'intent' of the parties to determine whether the arbitration clause is 'separable' from the rest of the contract, but would rather make separability a strong principle of construction, to be overcome only by express language"), and other 1960s and 1970s cases in France, Germany and Holland—not to mention the U.S. Supreme Court's correct decisions in *Robert Lawrence Co. v. Devonshire Fabrics Inc.*, 271 F.2d 402 (2d Cir. 1959) (available at <https://bit.ly/2FLbrZG>), cert. granted 362 U.S. 909, 80 S. Ct. 682, 4 L. Ed. 2d 618, dismissed pursuant to Rule 60, 364 U.S. 801, 81 S. Ct. 27, 5 L. Ed. 2d 37 (1960) (the validity and interpretation of an arbitration agreement must be determined by the federal substantive law of arbitration as expressed in the FAA), and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (available at <https://bit.ly/2l4q4c0>) (a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, must go to



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the arbitrator, not the court). (More recently, post-Scalia, see *Henry Schein v. Archer & White Sales*, 139 S.Ct. 524 (2019) (available at <https://bit.ly/2CXAgPw>); see also Liz Kramer & Rachel Scherf, Severability Doctrine: Scotus (and Others) Offers a Refresher on Defeating a Motion to Compel Arbitration, 37 *Alternatives* 33 (March 2019) (available at <http://bit.ly/2P4M4Up>)).

The error is curious coming from a justice with a history of arguing with Justice Clarence Thomas against the application of the Federal Arbitration Act to state courts on the basis that the 1925 act's drafters never intended this result. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (available at <https://bit.ly/2BgVarC>).

BAD HISTORY, GOOD LAW

The cases on this subject from *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (available at <https://bit.ly/2RMaSVU>) (enforcing an arbitration agreement and holding that California's Franchise Investment Law conflicts with the FAA) onward used to be referred to by New York University School of Law Prof. Andreas Lowenfeld as "bad history but good law."

On the subject of U.S. arbitration history, the inevitable passing of the American Arbitration Association's founding first two generations has led to a strange loss of institutional memory. This is perhaps not entirely coincidental following the association's disposal of its once superb library administered in its heyday by Laura Ferris Brown. (See "Follow-Up: AAA Transfers Its Library to Pepperdine," 25 *Alternatives* 14 (January 2007) (available at <https://bit.ly/2SbEk76>)).

Nowadays, blank faces greet references to the extraordinary Frances Kellor, author of the splendid "Arbitration in Action," and an AAA founder and vice president, and so much more. This fantastic role model for women and LGBT participants in the dispute resolution process seems to be lost to a modern generation. But when explaining the difference between arbitration and mediation, Kellor's characterization of the former as a "destroyer of disputes" remains hard to match.

In Europe, there is a similar damaging loss. The case of *Societe Europeenne d'Etudes et d'Entreprises* [SEEE] v. *Yugoslavia*, Case No.

The French SEEE v. Yugoslavia case used to bring shudders and excitement to arbitration audiences in the 1980s for its potential creation of a 'floating' arbitration award not anchored in the law of its seat.

982/82 (France Cour d'appel de Rouen Nov. 13, 1984) (available at <https://bit.ly/2sLY1UG>), used to bring shudders and excitement to arbitration audiences in the 1980s for its potential creation of a "floating" arbitration award not anchored in the law of its seat.

This dispute about a railway, which happily still works in modern Macedonia, persuaded one of the arbitrators, Andre Panchaud, virtually to invent the current notion of the seat of arbitration (in a 1966 article) which dominates all modern legislation on the subject.

The case can teach lawyers more about how not to draft an arbitration clause than almost any textbook. The SEEE v. Yugoslavia courts in Lausanne, Switzerland, refused to enforce the award because of problems with the arbitration clause. But they also refused to set it aside.

The case concluded that while the arbitrator's decision did not comply with local law, it might be enforceable somewhere else. This decision, and the three subsequent decades of judicial mayhem in Holland, France and even Uruguay, explains both moves toward the deracination of arbitration and its firm anchoring to a seat, both in one memorable example: the French Code of Civil Procedure (CPC).

FLOATING AWARDS

In France, either party can apply to set aside an award if the place of arbitration is in that country. This reversed the SEEE-inspired Cour d'appel de Paris decision in *Gotaverken* not to allow setting-aside proceedings against a not very-French award rendered in Paris. *General National Maritime Transport Co. v. Société Gotaverken Arendal A.B.*, Case No. F 9224 (France, Cour d'appel de Paris Feb. 21, 1980) (available at <https://bit.ly/2FQQpc2>).

Under the same code, however, the award's annulment in a non-French seat is irrelevant to the enforceability of the award. This makes a foreign award "float," at least from a Gallic perspective.


Modern lawyers cannot understand U.S. cases like *In Re Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F. Supp. 906 (D.C. Cir. 1996) (available at <https://bit.ly/2G1Lp3M>), *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999) (available at <https://bit.ly/2CJ4R20>), and *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, 962 F. Supp. 2d 642 (S.D.N.Y. 2013) (available at <https://bit.ly/2TmUxUg>), *aff'd* 832 F.3d 92, 106 (2d Cir. 2016) (available at <https://bit.ly/2B6NZIU>), cert. dismissed, 137 S. Ct. 1622 (2017), all on the limited scope for enforcement courts in dealing with confirming awards that have been annulled in their place of origin without appreciating the discussion, primarily in Europe, over SEEE, *Societe Pabalk v. Norsolor*, No. 83-11.355 (France: Cour de cassation Oct. 9, 1984) (available at <https://bit.ly/2Wj9Teq>) (the first French case to enforce an award set aside in its origin), and *Gotaverken*.

There are many more of these stories.

It is typically argued that the Federal Arbitration Act has its origins in the New York Arbitration Act of 1920, and that no doubt has a historical basis. But it is striking to note how similar the FAA's Sections 3 and 4 are to the Geneva Protocol 1923, which the United States never ratified but which lies at the heart of Article 2 of the New York Convention—of which the United States is one of its keenest adherents.

The role of German refugees or emigres such as NYU School of Law's Martin Domke, Arthur Nussbaum, of Columbia Law School, and more recently, Michael Hoellerling, a longtime AAA general counsel, and the above-noted Prof. Lowenfeld—all scholars in international arbitration—in the development of modern U.S. arbitration is hard to miss.

History, however, is by its nature a very partial thing. The roles of African-Caribbean and Native Indian populations to the arbitration story need telling too.

That may be the next story to tell. 

The Master Mediator

(continued from the front page)

system is this transparency, versus the antithesis of conflicting stories. Openness is healthy.

Although some master mediators advocate a process based exclusively on joint sessions, the opposite is the norm. Confidentiality is at the core of the dominant shuttle diplomacy model.

This creates a natural tension between confidentiality and impartiality. This is heightened when parties prefer an evaluative or directive approach by the mediator. Lawyers are uncomfortable when they perceive they lack knowledge and that there is some potentially unknown information out there.

RIDING THE TRACTOR

In the 1990s, when I was early in my mediator career, I had a product liability case with a farm equipment manufacturer involving injury to an elderly man.

Although we did not settle at the mediation session, we made progress before the defense in-house lawyer left to return the long distance to company headquarters. During my follow-up call, the defense lawyer confidentially advised me that he had obtained more authority but not enough to meet the last demand of the plaintiff.

The plaintiff, meantime, was not heeding the concerns of his lawyer about the weakness of both the liability claim and the damages.

The defense counsel suggested that I call the plaintiff's counsel and offer to meet the claimant at his farm, with or without claimant counsel present, with the understanding that I would be able to step out and call the defendant counsel privately.

It sounded unorthodox, but mediation was truly considered a newly discovered and evolving "alternative" process.

The plaintiff's lawyer was content to be absent. I sat on the tractor with "Grandpa Buddy" while he guided me through the events of the accident. He took my photo with a Polaroid on the tractor! He told his story in full almost as a reenactment. He showed me how his injury affected his ability to access areas of the farm and limited his functioning.

He explained he wanted to settle the claim but had to consider his future and also be com-

pensated fairly for his limitations. He appreciated my making the time and effort to focus on all aspects of his case and life.

We sat on his porch and drank lemonade and talked numbers. After a series of calls to all counsel, a resolution was reached. For a number of years he sent me a Christmas card.

HOUSE CALL

I was appointed by a state court judge to mediate a complex case involving revocation of a building permit and zoning for work done at a concrete production facility located in an otherwise almost exclusively residential township.

Outside Activity

The mediation action: Getting out. Literally. Here's what can happen when the mediator visits a party.

The principle invoked: Impartiality. How can this happen?

The purpose: With careful steps, this builds trust and rapport to enhance the prospects for mediation success. That potential gets both sides on board. The advice: Get out and go!

The site was owned by a leading businessman, John, who resided in the community on a large estate.

After a preliminary meeting with all counsel, we structured a process that enabled me to caucus with John and the full township council before my first meeting with John. I would then attend a portion of the evening township meeting—and then concluding with a late-evening meeting with John, who had decided he would personally conduct the sessions without his counsel being present.

The township had counsel involved at all times as my point of contact. Due to the township meeting schedule, the process stretched over many months.

The normal pattern was that I would begin at about 5 p.m. at John's mansion, then going to the township, and then back to the mansion.

Although John was not boastful, he did point out some of his antique furniture from French palaces, and a small portion of the steps of the Eiffel Tower that he had somehow purchased at salvage in Paris during modifications.

John had a wife and children with whom I interacted with briefly during my visits before going to his study to talk in the room's two comfortable easy chairs. I remarked that his desk was always clear of papers. He explained that he ran many businesses so he developed a habit of only handling a piece of paper or report once. He would take whatever amount of time necessary to make a decision on next steps, act, and then move on to the next matter.

During the course of small talk, I learned that he had been born into a family of 10 in Asia and literally was raised in a one-room structure with a dirt floor. He became a flight attendant. On a layover in Greece, he found himself alone one late night in a bar talking with an elderly man.

Aristotle Onassis advised John that becoming one's own boss in any enterprise is always better than being an employee. Businesses could be started with borrowed money if he was willing to put in the sweat equity. This he did very successfully.

During the course of the case, I was traveling to the area with a colleague to present a CLE program, and I asked my co-presenter if he minded stopping at John's so I could have a short session.

When I called John, he insisted we dine with him at his home. John personally cooked an amazing meal from a variety of foods native to his home country while the three of us chatted about life.

A potential settlement was crafted which became dependent on a ruling from a trial judge on the legal issue on the validity of the township revoking the building permit after the construction had been completed. My opinion was that the township's action should not be sustained, and if it was, the Pennsylvania appellate courts would not uphold a post-facto revocation of a permit application made in good faith without fraud or corruption.

Strict confidentiality was maintained as the judge was asked to rule on the narrow issue without informing the court that the settlement hinged upon the outcome. The ruling was in favor of the township and against the owner, so the resolution fell apart and the

mediation ended.

New litigation against the township, and the individual supervisors, was filed by John in federal court, while the ruling upholding the building permit invalid was appealed to the higher Pennsylvania courts.

As I expected, the appellate court reversed, and held for John. The federal court litigation went forward for a number of years. The result was a multi-million dollar verdict against the township and its supervisors.

There was a \$1 million insurance policy which was paid to John, who waived the remaining balance and released everyone so the community's taxpayers did not have to bear the financial burden.

And although I was no longer involved, the framework on the earlier mediated settlement was implemented for the non-economic issues.

John and I developed a respectful rapport and working trust necessary to address difficult and complex matters. Unfortunately, within a short time of the final resolution, John developed throat cancer. He traveled to Pittsburgh for treatments and would telephone me to say hello and chat. I was saddened by his death.

A MEDIATOR'S NARRATIVE

In his own words, here's a narrative by Jeffrey Krivis, a Los Angeles mediator, and a longtime *Alternatives* Editorial Board member:

The plaintiff, a 26-year-old actress, brought a construction defect case against contractors and governmental agencies for negligence maintenance of a roadway. She sustained catastrophic injuries of losing both legs above the knees.

Leading up to the mediation, I presented the case basics to his law students to get their feedback and perspectives. One of the students sat on a table, covered her legs and role-played as if she was the plaintiff. It was very powerful for all of us.

This caused me to call the plaintiff's lawyer and arrange a pre-mediation meeting with his client at her apartment.

When I got there, the plaintiff rolled up in a wheelchair with nothing covering her

legs. Stumps, pins and needles protruded as a result of her various surgeries to extend her bones to qualify for prosthetics. This was a profound moment for everyone.

I asked her what she was doing at the time she was struck by a car. She said she was standing in her driveway putting a tape into her cassette player located in the trunk of her own car. The tape was given to her by her boyfriend, who was in the process of breaking up with her. The tape was a song called "I want to live."

We then played the song. She cried. It was a very touching and powerful moment for all of us. We connected on a different level. None of the lawyers had asked her about the song when they deposed her.

At the mediation session conducted in my office there were lots of people and insurers. During the long and difficult day, the plaintiff trusted me to guide her to a resolution which would provide lifetime security.

I stayed in touch with her for many years thereafter. She did not withdraw from life. She became active as a downhill skier in the Special Olympics. She was able to tell her story on various talk shows as an inspiration to others.

Mediator Krivis had cleared the home visit with the defense team. Although the visit seems unusual, this is only true at first glance. Once you unpack it from a process standpoint, there is nothing out of the ordinary which does not comport with mediation ethics, principles or best practices.

If the setting had been the office, instead of her home, watching a replay video of both scenes would yield nothing amiss. The boyfriend could have been present during the office mediation session.

Playing the song is a non-evidentiary issue and perhaps inadmissible in court, but inconsequential from a procedure viewpoint in mediation. Still, the song could be played in caucus or as part of the presentation in a joint mediation session. The defense might think it "hokey" or manipulative, but so what? Her mental state and recovery are a key aspect of damages.

I would not block a song being played in a joint session.

THE STORIES' REVEAL

A key goal of mediators is to build trust and rapport with as many participants as possible. In a catastrophic loss claim, this can happen naturally and is always productive for all parties, including the defense. Any application of impartiality concepts that inhibits mediators from caucusing outside the confines of conference rooms is highly likely to be a counterproductive elevation of form over substance.

I respond the same way—"So What?"—to mediators staying in touch with disputants following the resolution of the dispute. In many ways, these types of post-resolution dynamics confirm that mediation can be a transformative, and sometimes, transcendent experience.

Most people like to host others at their home and to share their daily routines. In basic mediation training, we like to note that the mediation forum may allow aggrieved individuals to be heard and to have their "day in court."

Grandpa Buddy was able to let go of the case after I spent hours with him reliving it and visiting his farm.

By John and the township structuring the process in a practical way, it strengthened the forces pulling us toward resolution. I had a good relationship with all of the participants, but obviously my relationship with John was more personal and human.

Participants trusted me not to have back door communications with the trial judge or to otherwise act in a manner inconsistent with mediator neutrality concepts. Although the mediation reached an impasse, the tone and tensions of the conflict in many ways subsided as both parties accepted that litigation in the court system was a practical way to move forward.

THE TAKEAWAYS

Mediators must trust themselves to protect impartiality and neutrality when utilizing *ex parte* tools such as site visits.

Taking the conference to the home court or site is almost always going to be productive and rarely counterproductive.

Trust and rapport can be cultivated in a manner which does not distort impartiality. ■

Bilateral Investment Treaties

Time-Bar Defenses in Enforcement Proceedings: Analyzing the *Rusoro* Decision by the Paris Court of Appeals

BY PIERRE F. DE RAVEL D'ESCLAPON

Venezuela's 2011 nationalization of its gold-mining industry resulted in three arbitral awards, all grounded in the Canada-Venezuela Bilateral Investment Treaty and rendered by tribunals constituted according to the ICSID Additional Facility, a set of arbitration, conciliation and fact-finding rules for parties that fall outside of the International Centre for Settlement of Investment Disputes' Convention.

All the tribunals sat in Paris. Each tribunal condemned Venezuela to pay compensation for the expropriation of each respective company's assets in Venezuela: Gold Reserve \$713 million, Crystallex \$1.2 billion and Rusoro \$966.5 million. See *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1 (Sept. 22, 2014) (referred to as "Gold Reserve" below); *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2 (April 4, 2016) ("Crystallex"), and *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5 (Aug. 22, 2016) ("Rusoro" or "Claimant" below).

Then, all three awards were confirmed by the U.S. District Court for the District of Columbia in contested proceedings. *Gold Reserve Inc. v. Bolivarian Rep. of Venezuela*, 146 F.Supp.3d 112 (D.D.C. 2015); *Crystallex Int'l Corp. v. Bolivarian Rep. of Venezuela*, 244

F.Supp.3d 100 (2017), aff'd (Feb. 14, 2019) (D.C. Cir.) No. 17-7068; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, 300 F. Supp.3d 137 (D.D.C. 2018) (available at <http://bit.ly/2HLCULI>).

Venezuela sought to annul the *Gold Reserve* award, but in February 2017, the Paris Court of Appeals confirmed the award. Cour d'appel de Paris Pole 1 chambre 1 RG n° 14/21103 (Junction avec le n° RG : 15/00496).

Yet, when Venezuela sought to annul the *Rusoro* award, the same court, on Jan. 29, annulled that award. Cour d'appel de Paris Pole 1 chambre 1 N° RG 16/20822 - N° Portalis 35L7-V-B7A-BZ2EA. (Public documents in the case, including the Washington, D.C., U.S. District Court opinion, the Paris Court of Appeals decision, and the award are available here: <https://www.italaw.com/cases/2048>.)

Why the two seemingly opposite results?

The answer lies in the different fact patterns between the *Gold Reserve* and *Rusoro* cases: *Rusoro* is the only one where Venezuela raised an objection to the competence *ratione temporis* of the tribunal—that is, the ability of the tribunal to deal with acts that occurred outside the temporal scope of the treaty in determining the compensation amount. See Sadie Blanchard, State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration, 10 *Washington U. Global Stud. L.R.* 419, 430-440 (2011) (available at <http://bit.ly/2JS3jJT>).

Between 2006 and 2008, Rusoro, a Toronto Stock Exchange-listed company, bought 24 Venezuelan companies owning 54 gold-mining concessions. Between 2009 and 2011, Venezuela imposed numerous regulatory changes to the gold industry, including limits to the amount of gold that could be exported and imposition of foreign exchange controls.

On Sept. 16, 2011, Venezuela nationalized all gold production. After negotiations failed between Rusoro and Venezuela, Rusoro lost all rights to its gold-mining assets, which Venezuela took over in April 2012.

On July 17, 2012, Rusoro filed a demand for arbitration pursuant to the Washington, D.C.-based ICSID's Additional Facility procedures based on the Canada-Venezuela BIT.

THE BIT

Article XII.3 of the Canada-Venezuela BIT provides

(d) not more than 3 years have elapsed from the date on which the investor 1st acquired, or should 1st acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

The parties agreed that the cutoff date was July 17, 2009.

Art. VII.1 provides that the compensation for expropriation "shall be based on the genuine value of the investment or returns expropriated immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is the earlier..."

The award stated—and the court did not disagree—that the expression "genuine value" refers to the fair market value of the investment. See Award at p.140 et seq. (direct link: <http://bit.ly/2uz7EXX>).

THE AWARD

To determine the fair market value the tribunal used a weighted average of three different valuation methods:



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- The adjusted investment value of Rusoro's investment: 50% weight.
- The book value of Rusoro's investment: 25% weight.
- The maximum market value of Rusoro's stock: 25% weight.

With respect to the adjusted investment value, the tribunal concluded that the combination of the price paid for the acquisitions between 2006 and 2009, and the further investments in property, plant and equipment (\$774.3 million), adjusted for the increase in value due to the significant gold price increases had there been no expropriation, led to a total adjusted valuation of nearly U.S. \$1.13 billion.

The tribunal reasoned that, all other things being equal, the price of gold was the factor that would have affected the claimant's enterprise value.

To calculate the book value, the tribunal took the book value reflected in the claimant's most recent quarterly financials, noting that it is listed on the Toronto Stock Exchange and has no assets or activities outside of Venezuela. It then adjusted that amount for the corresponding depreciation to arrive at a total of U.S. \$908 million.

To calculate the claimant's market capitalization, the tribunal reviewed the evolution of the market capitalization of listed companies from November 2006 through November 2011. The tribunal noted that in 2008, before Venezuela adopted the restrictive measures of 2009-2010, the claimant's equity was valued by the market at U.S. \$750 million.

To calculate the claimant's enterprise value, the tribunal took into account the outstanding debt and decided that on Feb. 28, 2008, the enterprise value was U.S. \$700.6 million.

Weight averaging the three valuations and noting that the discounted cash-flow method was not applicable in the case—that is, the circumstances of the expropriation—the tribunal arrived at a total fair market value of U.S. \$966.5 million. Award at §§787-790.

THE DISTRICT COURT CASE

Venezuela argued that the tribunal determined the compensation by using economic elements that went beyond the three-year limitation period of Art. XII.3(d) of the BIT, therefore acting beyond the scope of its jurisdictional writ in violation of Art. V(1)(c) of the Convention on the Recognition and Enforcement of

Foreign Arbitral Awards, best known as the New York Convention.

Specifically, Venezuela argued that:

- The Maximum Market Valuation, dated Feb. 28, 2008, fell outside of the limitation period,
- The use of the gold price increases to justify increasing the Adjusted Investment Valuation was wrong, and
- The book value computation failed to account for the impact of the 2009-2010 governmental restrictions.

BIT Gold

The surprise decision: A Paris appeals court annuls an arbitration award under a bilateral investment treaty, after confirming another arising out of the same government actions.

The reasoning: Unusual facts and circumstances. The tribunal acted outside its authority in conducting a complex valuation.

The setting: These arbitrations and cases, and the appeal nullifying one of the awards, involve the hot topic of Venezuela's government, which nationalized the holdings of three firms that demanded arbitration to value the stakes they had lost. This article spans the awards and courts in Washington and France.

U.S. District Court Judge Richard J. Leon in his memorandum opinion dated March 1, 2018, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, 300 F. Supp.3d 137 (2018) (available at <http://bit.ly/2HLCULI>), followed the analysis of his colleagues in *Gold Reserves* and *Crystallex*, holding that the tribunal's view of the scope of its jurisdiction was entitled to substantial deference because the parties agreed to arbitrate the question of arbitrability.

After reviewing Venezuela's challenge to the three valuation methods, District Judge Leon dismissed the challenge, concluding:

These are no more than disagreements as to the damages calculation, however, and 'courts have no authority to disagree with [the arbitrator's] honest judgment in that respect.' [Citations omitted.] ... It is abundantly clear to this Court that the Tribunal, in its extensive damages analysis, see Award ¶¶ 634-855, did not exceed the scope of its authority under our Circuit's case law.

300 F. Supp.3d at 148.

Somewhat surprisingly, the Judge added that he would have reached the same result if he had conducted a *de novo* review.

THE PARIS DECISION

On Oct. 19, 2016, Venezuela sued in Paris for annulment of the Award but the request was denied on March 16, 2018. Venezuela then appealed to the Court of Appeals in Paris.

For awards rendered after Jan. 13, 2011, new Article 1520 of the French Code of Civil Procedure lists the possible annulment grounds. Here, Venezuela argued annulment was proper because under Art. 1520(3), the tribunal "did not decide in conformity with the mission entrusted to it." "3° Le tribunal arbitral a statué sans se conformer à la mission qui lui avait été confiée," enacted pursuant to Decree No. 2011-48 (Jan. 13, 2011).

The court first observed that in public international law, it is perfectly proper for a state to subject its consent to arbitrate to certain conditions—here the three-year limitation from the date of the investor's knowledge.

Then, the Paris appeals court observed that the arbitrators had considered the time-bar defense at length and had concluded that the breaches resulting from the "2009 Measures" (as defined in the Award) could not be taken into account, but "provide the necessary background and context for adjudicating the case, and the legitimate expectations of an investor may depend crucially on matters that occurred before such Cut-Off Date." Award at §232-233. Note that there was no discussion of these points in Judge Leon's opinion.

Thus, the court held that the proper analysis was for the judge deciding the annulment request to ascertain whether the arbitrators wrongly decided their competence with respect to facts that were known to the claimant more

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Bilateral Investment Treaties

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than three years before the expropriation.

In reviewing the award, the court noted that 25% of the final valuation stems from the claimant's 2008 market capitalization without taking into account the subsequent variation, and that 50% of the final valuation is derived from the total investments realized by the claimant from 2006 to 2008. Based on the premise that all other things are equal, the

price of gold was the only variable that affected Rusoro's enterprise value.

For the court, that premise is faulty because things were not otherwise equal due to the regulatory restrictions adopted in 2009 which drove down the claimant's market capitalization, and the enterprise value fell outside the three-year limitation period.

Therefore, the court noted that on the day before Venezuela announced the nationalization of the gold-mining industry, the claimant's market capitalization had dropped to U.S. \$106.8 million. For the court, the big drop in the claim-

ant's value was attributable to events having occurred before the BIT's three-year cutoff date.

Thus, the court held that "[t]o neutralize the effects of the gold export restrictions of 2009 is tantamount to including in the compensation amount for the 2011 expropriation a compensation for the impact of the 2009 restrictions, although that impact is outside the jurisdiction of the Tribunal *ratione temporis*" (decision at 5).

Accordingly, the Paris court held that the tribunal lacked competent jurisdiction and annulled that portion of the award condemning Venezuela to pay Rusoro U.S. \$966.5 million. ■

ADR Brief

FEDERAL JUDGES VOICE ARBITRATION CONCERNS

BY EVAN DRAKE

In recent months, several federal judges have expressed concerns about the fairness of arbitration as an alternative to litigation in U.S. courts.

In his opinion in *Cellinfo LLC v. American Tower Corp.*, No. 18-11250-WGY (D. Mass. Dec. 19) (available at <http://bit.ly/2txZpLg>), Massachusetts U.S. District Court Judge William G. Young took the opportunity to speak directly to readers on this topic in colorful dictum, ending his opinion with a section titled "Whatever Were They Thinking? Myths and Realities Concerning Courts and Arbitration."

This opinion approaches arbitration with a significant degree of skepticism, to put it mildly. "How could an otherwise sophisticated agreement have made such a hash out of the parties' intentions concerning the interplay of arbitration and court processes?" asks Young. He answered:

It appears that in this "big law" era, the drafters operated under the myth that arbitration is cheaper, faster, and more confidential than litigation (only one of these is true) without talking to trial lawyers who understand the reality that while people

may not want trials, what they do want is a firm and reasonably prompt trial date before an impartial fact-finder as the best chance for a fairly negotiated settlement.

Judge Young suggests that some of the most commonly touted benefits of arbitra-

Judicial Voices

The situation: Arbitration criticism.

The different situation: This isn't veteran practitioners complaining about slow processes or consumer advocates decrying costs and procedures. It is federal judges, present and former.

The gripes: The judges' concerns mirror the other constituencies. But coming from a senior statesman and seeing it in published opinions, as elaborate and "colorful dictum," is an attention-grabber.

tion—specifically cost, speed and confidentiality—may compare unfavorably with litigation in federal courts. And some of his colleagues seem to agree.

Meantime, in Pennsylvania, U.S. District

Court Judge Gerald A. McHugh penned a similar critique of employment arbitration in *Styczynski v. MarketSource*, No. 18-2662 (E.D. Pa. Nov. 30) (available at <http://bit.ly/2tCXJQs>). In a case in which McHugh upheld an arbitration agreement, he reviewed a growing body of academic writing which has portrayed employment arbitration in a negative light under the final substantive section of his opinion, labeling it "Reconsidering the Effects of Mandatory Arbitration in Employment Cases."

The judge cited a number of statistics suggesting that arbitration tends to favor employers, concluding that certain biases may be inherent in any for-profit system of dispute resolution.

Former New York federal judge Abraham D. Sofaer has voiced similar concerns, taking aim instead at arbitral procedure. In a September interview with *Law360* (available at <http://bit.ly/2H2zflh> with a subscription) Sofaer, who was legal adviser to the U.S. State Department under Presidents Ronald Reagan and George H.W. Bush, proposed that arbitrators who resist applying federal litigation rules may actually be reducing the efficiency of the dispute resolution process.

While arbitration may benefit from greater customizability, Sofaer suggests, the system suffers from high barriers for access to appellate review, and awards would benefit from more judicial scrutiny, according to the *Law360* interview.

All three federal judges identified cost, speed, and confidentiality as the areas in which

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arbitration is often seen as superior to litigation. Drawing from some of the same sources, the judges have brought these advantages into question.

1. Cost

According to U.S. District Court Judge Young, the price tag of arbitration may actually be higher than that of a swift federal trial.

He highlights the fact that incidental costs, such as establishing a panel and paying arbitrators' fees, are absent in the court system, where those costs are supported by the public.

Citing a study of arbitration costs, the judge asserts that an arbitration before a three-person panel is "as expensive as the full panoply of federal court litigation." See Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 *Vanderbilt L. Rev.* 729, (2006) (available at <http://bit.ly/2Hh4Y9O>).

Although he concedes that cost comparisons are "tricky" because arbitrators may choose not to authorize discovery, Judge Young notes the big expense of discovery in federal courts as well as arbitrations that contemplate pre-hearing discovery.

Three federal judges—two current, and one retired from the bench—identified cost, speed, and confidentiality as the areas in which arbitration is often seen as superior to litigation. The three have brought these advantages into question.

"More to the point," Young writes, "the initial costs of finding, selecting, and launching a three-person arbitration panel outstrip the costs of filing a complaint in the federal district court. So even before accounting for the real costs—discovery—which comes later, parties have already spent more by choosing arbitration." [Citations omitted.]

Abraham Sofaer seems to second this opinion. With the same caveat about suspending discovery, Sofaer agreed that "the reality is that much of arbitration has become just as lengthy and expensive as litigation, if not more."

He suggests that this may be especially true for large commercial arbitrations.

2. Speed

William Young and Abraham Sofaer are also in

agreement on which system produces results more quickly.

"On this factor, the federal courts [in Massachusetts] win hands-down," Judge Young writes.

In *Cellinfo*, the parties negotiated a slowdown when the contemplated pace of the court outstripped the lawyers' ability to keep up. The judge observes that this is far from an isolated phenomenon. "Had the parties genuinely wanted court adjudication," he relates, "this case would have been resolved before arbitration could get off the ground." Young cites Christopher Villani, *3D Printing Rivals Settle IP Dispute Just Days into Trial*, *Law360* (Sept. 27, 2018) (available at <http://bit.ly/2F8Lx0x>), which recounts an especially speedy trial handled by Young himself.

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Sofaer, who is an emeritus scholar at Stanford, Calif.'s Hoover Institution as well as an ADR neutral in private practice, adds that some procedural innovations may be responsible for slowing down the pace of arbitration.

For example, arbitrators may choose not to apply hearsay rules to document discovery, in order to forestall appeals based on denial of due process. Sofaer adds, however, that such short-cuts can ultimately cause "major delays" because parties may want to include even more documentation as context for the admitted evidence. The flexibility of instruments like the Federal Rules of Evidence, he notes, actually allows parties to resolve their disputes more efficiently.

3. Confidentiality

"Here," Judge Young says, "arbitration really comes into its own."

For the parties involved in *Cellinfo*, the main reason for preferring arbitration may be to avoid publicizing the details of their dispute to competitors and clients, the judge suggests.

While courts will protect parties' trade secrets, moving to arbitration will allow the whole dispute to "disappear entirely from public

view," which Young feels may ultimately be detrimental to the public interest. In the *Cellinfo* opinion, he cited Benjamin P. Edwards, Arbitration's Dark Shadow, 18 *Nev. L.J.* (2018) (available at <http://bit.ly/2CeMJh2>) for a discussion of the public harms associated with removing legal disputes from the public forum.

"Secret, private tribunals carry with them a host of other societal ills" Young wrote, adding, "But on these policy issues the Congressional mandate in the Federal Arbitration Act is crystal clear—corporate secrecy is preferable to public transparency."

Notwithstanding the FAA's "mandate," the other federal judges have also questioned the effects of blanket confidentiality on the administration of justice.

In *Styczynski v. MarketSource*, Pennsylvania U.S. District Court Judge McHugh seemed to concur that secret proceedings may undermine the overall fairness of dispute resolution, specifically in the context of employment arbitration.

Considering the issue of repeat-player employers, he suggested that arbitrators should not ignore the potential for inherent problems presented by a for-profit system of dispute resolution. Moreover, he expressed concern about

a lack of "transparency and error-correcting mechanisms" available to federal court litigants.

Abraham Sofaer argued that this lack of transparency can lead to incorrect decisions, potentially enabling arbitrators to "do whatever they want" in applying the law. He has stated that the risks of abuse are exacerbated by the rarity of appellate review, and the difficulty of challenging all but the most manifestly incorrect decisions.

* * *

Judge Young concludes his opinion with a broad comparison of arbitration and federal litigation. The costs, state the opinion, will be roughly equivalent, while a federal trial in Massachusetts will be much faster. For the *Cellinfo* parties, the greater degree of confidentiality will certainly be preferable, but they will receive only limited appellate rights and no explanation of their award.

It may be unusual for federal judges to write so candidly about their views on arbitration, but the views themselves are less surprising. Perhaps reflecting on the well-known principle of *nemo iudex in causa sua*—no one should be the judge in his own case—Judge Young ends his opinion with a final question: "Which course is better? You be the judge." ■



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