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TO THE HIGH COST OF LITIGATION

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Arbitration Law

It's Time for Doctrines: The Supreme Court Wrestles with 'Severability' and the 'Clear and Unmistakable' Standard

BY PHILIP J. LOREE JR.

The current U.S. Supreme Court term features a trilogy of arbitrability cases: *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.,* No. 08-1198; *Rent-a-Center West Inc. v. Jackson*, No. 09-497; and *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, No. 08-1214.

At this writing, *Stolt-Nielsen*, argued Dec. 9 (see www.supremecourtus.gov/oral_arguments/argument_transcripts/08-1198.pdf), awaits a decision.

Even more recent vintages are *Rent-a-Center West*, for which cert was granted on Jan. 15, and *Granite Rock,* which was argued on Jan. 19 (transcript available here: www.supremecourtus.gov/oral_arguments/argument_transcripts/08-1214.pdf).

This pair involves, to some degree, the *Buckeye Check Cashing/ Prima Paint* doctrine of severability—a/k/a "separability." *Rent-a-Center West* also examines the "clear and unmistakable doctrine."

And, in this author's view, both were wrongly decided by the Ninth U.S. Circuit Court of Appeals.

Rent-a-Center West addresses an important "who" question: Who—court or arbitrators—gets to decide whether an arbitration agreement is unconscionable if the parties clearly and unmistakably agree to submit arbitrability questions to arbitration?

In *Rent-a-Center West*, an employer and an employee signed a stand-alone arbitration agreement that said, among other things, that the arbitrators shall "resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable."

The author is a partner in the Manhasset, N.Y., firm Loree & Loree, where he focuses his practice on commercial litigation, arbitration, and reinsurance-related matters. He frequently comments on arbitration and reinsurance law at his firm's blog, the Loree Reinsurance and Arbitration Law Forum, at www.LoreeLawFirm.com/blog. Prior to forming his current firm, the author was a litigation partner at Cadwalader, Wickersham & Taft LLP., and Stevens & Lee P.C.

Despite that clear and unmistakable agreement to arbitrate arbitrability, the employee challenged the arbitration agreement in a Nevada U.S. District Court on unconscionability grounds. *Jackson v. Rent-a-Center West Inc.*, 581 F. 3d 912, 914 (9th Cir. Sept. 9, 2009), petition for cert. granted (Jan. 15, 2010).

The Ninth Circuit reversed the district court's order directing the parties to arbitrate the unconscionability claim. It ruled 2-1—in an opinion written by Circuit Judge Sidney R. Thomas, joined by Senior Circuit Judge Thomas G. Nelson, and with a dissent by Senior Circuit Judge Cynthia Holcomb Hall—that the court decides unconscionability even when the parties clearly and unmistakably agree otherwise.

The employee's unconscionability challenge asserted that the agreement was one-sided with respect to the claims covered by the arbitration clause. He also said that the agreement was unfair because it limited discovery and permitted the parties to share arbitration costs where state arbitration law allowed cost sharing, which could "subject him to costs greater than those usually associ-

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CPR News

ASIA INITIATIVES: CPR'S BRENNAN GOES TO SHANGHAI AND NEW DELHI

CPR Senior Vice President Lorraine M. Brennan traveled to China and India late last year to pursue CPR Institute's work on Asian initiatives.

Brennan's trip to Shanghai and New Delhi was part of an emerging markets project the CPR Institute is pursuing under a grant from General Electric Co. Brennan and CPR are working on developing an Asia Pacific Advisory Council, under the leadership of David L. Sandborg, a professor from the City University of from Hong Kong,

In Shanghai, Brennan visited the American Chamber of Commerce, and met with group's director, Brenda Foster, and David Turchetti, program director, to discuss CPR's plans for a survey of Asia Pacific business. They also discussed potential programs and training for mediators, arbitrators, and business executives as an outgrowth of the survey results.

The CPR Emerging Markets Project and the Asia Pacific Advisory Council also plan to prepare a commercial conflict resolution white paper this year. The chamber executives offered to host a Shanghai white paper "launch" party, in conjunction with the Shanghai Expo, a six-month event beginning in May. See http://en.expo2010.cn/index.htm. Plans are under discussion.

Brennan also delivered a presentation to international law and business students at the Shanghai Jiao Tong University's Koguan Law School. The school has designed an LL.M. program, which will be taught in English. The program is an ambitious 32-credit, two-year curriculum, and hopes to attract students from other countries. The subjects offered will provide an opportunity for foreign students to study Chinese law, which is rarely addressed at non-Chinese law schools.

Also in Shanghai, Squire Sanders hosted a reception for CPR Board of Directors member Dale Matschullat, who recently retired from his post as general counsel of Newell Rubbermaid, and who was in Shanghai on business. Brennan spoke briefly at the reception about CPR and its Asia work.

At the reception, a general discussion examined the U.S.-China Business Mediation Center, which the CPR Institute established in

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Arbitration Tools

Increasing Efficiency Through Discovery Protocols

BY JOHN WILKINSON

In recent years, criticism has mounted that arbitration in the United States is taking so long and has become so expensive that the distinction between arbitration and litigation has sometimes become blurred. In Spring 2009, JAMS decided to take a serious look at these concerns in order to help arbitrators and attorneys better manage their arbitrations and control related costs.

As its starting point, JAMS formed a task force, which focused on the New York State Bar Association's April 2009 Report on Arbitration Discovery in Domestic, Commercial Cases. The report contains many helpful suggestions for making arbitration discovery more cost-effective. The task force then turned to adapting that report for particular use in JAMS arbitrations, in the specific context of the following basic principles on which the task force agreed:

1. There are many different types of arbitration—such as consumer, labor, employment, international, maritime and commercial—all of which are very different and cannot possibly be covered by a single umbrella. Thus, the task force quickly decided to focus its work on domestic commercial arbitration since this was the area where problems with excessive discovery appeared to be most prevalent.
2. To an extent, the recent trend toward arbitrating larger and larger commercial disputes has required the expansion of arbitration discovery in order to assure a full inquiry and a fair result in such cases. The task force did not seek to prevent such expanded discovery in larger arbitrations but, rather, sought a mechanism to keep it under better control.
3. Arbitrators do not have specific rules to guide them in their discovery decisions. As a result, they often apply radically different approaches. This means that
   - some arbitrators are prone to slashing the discovery, refusing to allow any inquiry into large segments of proof and, basically, shortening the case significantly by being invasive and peremptory.
   - at the other end of the spectrum, some arbitrators simply open the flood gates and permit mountains of pointless discovery and evidence, all in the interest of following the safe approach of permitting overly comprehensive discovery, often followed by unnecessarily lengthy, exhaustive hearing.
4. In light of the unpredictability of the scope of arbitration discovery, what was most needed were guidelines that hopefully could help arbitrators strike a good balance and exercise good judgment in furtherance of a more uniform approach to arbitration discovery. More specifically, the JAMS task force concluded that what it really needed to facilitate and encourage was:
   - Arbitrators who are sufficiently assertive to ensure that the case will be resolved much less expensively and in much less time than if it had been litigated in court and, *at the same time,*
   - Arbitrators who are sufficiently patient and restrained to ensure that there is enough discovery and evidence to permit a fair result in a complex, commercial setting.

The author serves on the JAMS arbitration and mediation panels in New York City. He is co-chair of the Arbitration Committee of the New York State Bar Association's Dispute Resolution Section. Last year, he coauthored the New York State Bar Association's "Report on Arbitration Discovery in Domestic, Commercial Cases," which is discussed in this article.

THE PROTOCOLS

On Jan. 6, JAMS adopted its "Recommended Arbitration Discovery Protocols for Domestic, Commercial Cases" which, together with an executive summary, can be found on the JAMS website at /www.jamsadr.com (direct link: www.jamsadr.com/arbitration-discovery-protocols/). Some of the protocols' highlights include:

- The protocols emphasize that effective control of arbitration discovery must be based on the exercise of good judgment by the arbitrator and, in furtherance of that goal, the protocols set forth a list of 27 factors an arbitrator might take into account when shaping the scope of discovery in a particular arbitration.
- The protocols emphasize the importance of the arbitrator's involvement at an early point, and quickly setting strict deadlines, as well as discovery ground rules which will avoid surprise and loss of control by the arbitrator as the proceeding progresses.
- The protocols encourage the arbitrator to consider limiting document requests so that they are:
  - confined to documents that are directly relevant to significant issues in the case or to the case's outcome.
  - restricted in terms of time frame, subject matter and persons or entities to which the requests pertain, and
  - do not include broad phraseology such as "all documents directly or indirectly related to."
- As to E-discovery, the protocols suggest in the absence of compelling need that

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- there should be production of electronic documents only from sources used in the ordinary course of business, and
- the production should normally be made on the basis of "generally available technology in a searchable format which is usable by the party receiving the E-documents and convenient and economical for the producing party."

- The protocols recognize that in some circumstances, depositions in a complex arbitration can significantly shorten cross examination and the length of the hearing on the merits. Unless carefully controlled, however, depositions in arbitration can become extremely expensive, wasteful and time-consuming. The protocols therefore provide that absent agreement by the parties to the contrary, there should be realistic, efficient limits on the number and length of depositions, as well as the time frame in which they occur. The protocols go on to suggest language which an arbitrator might use to accomplish this result.
- The protocols encourage the consensual resolution of discovery disputes. They call for strict limits on the length of briefs or other submissions concerning such disputes, and they provide for prompt resolution of such disputes so as not to delay the scheduled progress of the arbitration.
- The protocols recognize that dispositive motions can expedite an arbitration if directed to discrete legal issues but that, on many occasions, such motions are unnecessarily time-consuming and expensive since they raise obvious factual issues and, on their face, have no chance of success in the context of arbitration. Thus, the protocols contain suggestions for distinguishing between potentially productive motions and wasteful motions and for spending meaningful time of the parties and arbitrator only on potentially productive motions.
- Finally, the protocols recognize that despite all of their aspirational goals for arbitrators and arbitration efficiency, the fact remains that arbitration is a creature of contract and if the parties, for example, agree on full-blown discovery under the Federal Rules of Civil Procedure, it is not within the province of the arbitrator to implement something other than what the parties jointly want.

* * *

In the end, one will not find bright lines in the protocols. And one will not find hard and fast rules, either. But what one will find is a product that will help arbitrators strike a good balance when making arbitration discovery decisions.

* * *

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Arbitration Law *continued*

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ated with litigation."

The employee did not dispute that the parties clearly and unmistakably submitted arbitrability issues to the arbitrator. And he did not contend that the parties' agreement to arbitrate arbitrability was in any way unfair.

The district court agreed with the employer, holding that the agreement "clearly and unmistakenly [sic] provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable" and that "'the question of arbitrability is for the arbitrator.'" 581 F.3d at 915 (quoting district court).

The district court also held that, even were it to decide the merits of the unconscionability challenge, the employee had not shown the cost-sharing provision to be substantively unconscionable. But the district court did not address whether the claims-covered and discovery provisions were substantively unconscionable, or whether any of the provisions were procedurally unconscionable.

THE NINTH REVERSES

The Ninth Circuit reversed, and remanded to the district court to determine whether the claim coverage and discovery provisions of the agreement were substantively unconscionable.

On the "who" question, the appellate panel held that "where, as here, a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court."

The Ninth Circuit said that the employee's unconscionability challenge concerned not what the arbitration agreement said, but whether he assented to it in the first place. Id. at 517 (quotations omitted).

Noting that the employer argued that the court should limit its inquiry to the contract language, the Court said that was not what the Supreme Court had in mind in *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938 (1995).

First Options, said the Court, "did not suggest . . . that where arbitration provisions—unlike other contractual provisions—are concerned, clear contractual language is enforceable per se." The court read *First Options* as ruling "that as a threshold matter the court must decide—by applying 'ordinary state-law principles'—whether the parties agreed to arbitrate arbitrability." at 917.

On the merits, the court noted that while there was apparently no dispute that the agreement was procedurally unconscionable—it was nonnegotiable—the district court considered and rejected only one of the employee's three arguments concerning substantive unconscionability. While the Ninth Circuit affirmed this finding, it remanded to the district court to determine whether the claims coverage and discovery provisions were substantively unconscionable.

Senior Circuit Judge Cynthia Holcomb Hall dissented. Hall wrote that "what we have . . . is an arbitration agreement more favorable than most and unconscionability allegations that are thinner than most."

According to the dissent, "the majority's opinion will send this case (not to mention all those run-of-the-mill ones) to a mini-trial in the district court to determine an agreement's validity based on just the bare allegation

of unconscionability, *even* when the contract language "clearly and unmistakably" chooses a different forum for that question." This "makes it difficult to understand what the Supreme Court meant when it said that, although the general rule gives the threshold question of arbitrability to courts, parties may provide for the arbitrator to decide the question instead if they do so clearly and unmistakably." 581 F.3d at 920-21 (dissenting opinion) (emphasis in original; citations and quotations omitted).

Hall's dissent concluded that the majority permitted the court to assume a more expansive role than *First Options* permitted: "[T]o the extent the district court has a role to play here, it should certainly be a more limited one than the majority envisions, perhaps permitting courts to remain attuned to *well-supported* claims of unconscionability or the potential that arbitration might be illusory, while still resolving any doubts as to what the parties agreed in favor of arbitration." 581 F.3d at 922 (dissenting opinion) (emphasis in original; citations and quotations omitted).

ANALYSIS: 'SURFACE APPEAL'

The Ninth Circuit's decision has some surface appeal in that ordinarily, courts decide state law challenges directed specifically at arbitration agreements. And while the parties may have clearly and unmistakably agreed to arbitrate arbitrability, that agreement was—as is often the case—simply a component of the rest of the arbitration agreement. If the entire arbitration agreement is unenforceable because of unconscionability, then so too must be the agreement to arbitrate arbitrability.

The problem with the majority's logic is that it allows the general rule to swallow up the exception: *First Options* said that the exception to the general rule is that arbitrators decide arbitrability questions when the parties clearly and unmistakably so agree. But the Ninth Circuit's decision would, in a great many cases, render this exception effectively meaningless, even though the parties clearly and unmistakably intended it to apply.

The First Circuit has sought to avoid the Ninth Circuit's absurd consequences. It requires arbitration of unconscionability where the parties clearly and unmistakably agree to arbitrate arbitrability, unless the challenging party can show that the agreement's cost-sharing or other provisions render it illusory, effectively denying the challenging party of a forum in which to claim unconscionability. See *Awuah v. Coverall N. Am. Inc.*, 554 F.3d 7, 13 (1st Cir. 2009).

Circuit Judge Hall's Ninth Circuit dissent proposes a similar solution–that the court "remain attuned to well-supported allegations of unconscionability or the potential arbitration might be illusory." The U.S. Supreme Court might adopt it, or something akin to it.

But that solution might simply breed litigation over what constitutes "well-supported" allegations of unconscionability, or whether an agreement is or might be "illusory." The Court would better advance Federal Arbitration Act purposes by engaging in a severability analysis of sorts when confronting questions like the *Rent-a-Center* issue.

More Arb at the Top Court

The issues: Separability, severability, and who decides if a case is arbitrable.

Again? Yes. This time it's from an employment case, and, just argued, a management-labor case.

Significance: Neither likely rises to the importance of the *Stolt-Nielsen* class arbitration case, but Federal Arbitration Act changes could be in store in *Rent-a-Center*.

The severability doctrine is an arbitrability rule that limits the court's authority to challenges that fall under Section 2 of the Federal Arbitration Act—challenges that relate specifically to the existence, validity, enforceability or revocability of an arbitration agreement. By treating an arbitration as severable from the contract as a whole, it provides that a general challenge to the validity, enforceability or revocability of a contract containing an arbitration agreement does not undermine the enforceability of the arbitration agreement.

Typically, it comes into play when a party challenges a contract containing an arbitration agreement as being invalid or unenforceable on grounds such as fraud in the inducement. Where the challenge is directed at a contract as a whole, the arbitrator gets to decide it. But if it is directed specifically at the arbitration agreement itself i.e., a claim that the arbitration agreement was fraudulently induced—then the court gets to decide it. See *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 446 (2006).

The Supreme Court has said the severability doctrine was designed to address a "conundrum": The severability doctrine "permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void." But without the severability doctrine, courts could "deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable." Severability "resolve[s] it in favor of the separate enforceability of arbitration provisions." Id at 448-49.

THE ENFORCEABILITY CONUNDRUM

When parties agree not only to arbitrate the merits of controversies unrelated to the arbitration agreement, but also clearly and unmistakably agree to arbitrate questions concerning the enforceability, validity or revocability of that agreement, a similar conundrum arises.

Enforcing the agreement to arbitrate arbitrability permits a court to enforce an arbitration agreement that the arbitrators later may determine to be void. But not enforcing it enables a court to withhold enforcement of an arbitration agreement that it may later determine to be perfectly enforceable.

Just as the Supreme Court resolved that question in favor of the separate enforceability of arbitration agreements generally, so too should it resolve it in favor of the separate enforceability of clear and unmistakable agreements to arbitrate arbitrability.

One agreement concerns disputes over the existence, formation or enforceability of the other agreement, while the other concerns all other disputes. Each should be analyzed separately under FAA Sec. 2, as each is a separate arbitration "provision" within Sec. 2's meaning.

What the *Rent-a-Center* appeals panel assumed was that since the parties entered into a stand-alone arbitration agreement that was challenged on unconscionability grounds, the court

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must decide the challenge because it related to specifically to the arbitration agreement. Perhaps ironically, the Ninth Circuit found support for this analysis in the *Prima Paint/Buckeye Check Cashing* line of cases, but as discussed above, those cases support treating as separately enforceable the agreement to arbitrate arbitrability.

The court should have limited its inquiry to whether the parties' agreement to arbitrate arbitrability was unconscionable. Under applicable Nevada law, the employee would have had to demonstrate that the agreement to arbitrate arbitrability was both procedurally and substantively unconscionable.

Procedural unconscionability addresses the question whether the agreement was a take-it-or leave it proposition—whether the employee basically had no choice but to agree to it as written—while substantive unconscionability addresses whether there are provisions in the contract that are unfair. Substantive unconscionability is a "no-harm, no foul" requirement; the law may be concerned about enforcing adhesion contracts, but only when they are unfair.

Had the Ninth Circuit looked at the problem from that perspective, this author believes it would have concluded that the unconscionability defense did not apply to the parties' clear and unmistakable agreement to arbitrate arbitrability, and that, accordingly, the arbitrators had to decide the merits of the challenge to the balance of the arbitration agreement.

The appellate court instead attempted to justify ignoring the parties' clearly expressed intent to arbitrate arbitrability by concluding that a question of the employee's assent to the arbitration agreement was presented "in light of the parties' unequal bargaining power, the fact that the Agreement was presented as a nonnegotiable condition of his employment, and the absence of any meaningful opportunity to modify the terms of the Agreement. . . ." 581 F.3d at 917.

Yet these considerations—if true—merely establish procedural unconscionability, which means the contract was one of adhesion. But in the absence of a showing that the agreement to arbitrate arbitrability contains substantively unconscionable terms, it was fully enforceable under Nevada law. Thus, the Court's assumption that these considerations undermined the enforceability of the agreement to arbitrate arbitrability—or even the remainder of the arbitration agreement—was not well grounded.

The author believes it likely that the U.S. Supreme Court will reverse the Ninth Circuit's decision. We do not know whether the Court, which will hear the case April 26, will base its decision on the severability doctrine or even if the employer will argue for severability. But if the Court adopts a severability analysis in *Rent-a-Center*, it would give full force and effect to the parties' clearly expressed intentions, FAA Sec. 2's pro-enforcement policies, and the letter and spirit of *First Options*–a case argued and won by Chief Justice John G. Roberts Jr., who at the time was a partner in Washington's Hogan & Hartson.

WHAT DOES THIS ARBITRATION COVER?

In contrast to Rent-a-Center's "who decides" orientation, *Granite Rock Co. v. International Brotherhood of Teamsters* is a labor arbitration case that focuses more on when an arbitration can occur, and what the arbitration will cover. The case arises under Section 301 of the Labor Management Relations Act.

First, note that it is not just an arbitration case. *Granite Rock* also involves an important federal labor law issue concerning whether an employer can file suit against the international chapter of the local union where the local was party to a collective bargaining agreement, but the international union was not. That issue does not concern labor or commercial arbitration principles, and is therefore outside this article's scope.

The Court heard oral argument on Jan. 19 and, at press time, the case had not yet been decided. Though not governed by the Federal Arbitration Act, *Granite Rock* is a contractual arbitration case that touches upon the severability doctrine. But it can and should be resolved without regard to that doctrine.

Granite Rock arose out of a dispute between an employer and a union over whether the parties entered into a collective bargaining agreement, or CBA, containing a no-strike clause. The disputed CBA contains an arbitration agreement, which requires arbitration of all disputes "arising under" the agreement. The arbitration agreement also says, "Decisions of the impartial Arbitrator shall be within the scope and terms of this agreement . . . provided such decision is specifically limited to the matter submitted and does not amend any provisions of this agreement."

The facts and procedural history below were gleaned from the Ninth Circuit's decision; the parties' Supreme Court briefs, and the oral argument transcript. You can access copies of the briefs at www.abanet.org/publiced/preview/briefs/home.html; see web address above for the oral argument transcript. The Ninth Circuit's decision is reported at 546 F.3d 1169 (2008).

The basic background facts are:

- The litigating parties were, for a number of years also parties to a CBA. After that CBA expired at the end of April 2004, the parties tried to negotiate a successor CBA. Negotiations resulted in an impasse, and a strike followed.
- On July 2, 2004, after an all-night bargaining session, the union and Granite Rock–the century old privately held mining and construction firm, based in Watsonville, Calif., actually is known as Graniterock—tentatively agreed to a successor CBA containing the arbitration agreement referenced above, and, among other things, a no-strike provision.
- The tentative CBA was expressly made subject to the union's ratification–apparently scheduled for the same day the agreement was reached. Upon ratification it was to become the parties' successor CBA.
- The union claimed it did not ratify the CBA on July 2, but one member later claimed the union ratified it that day.
- The union went on strike again on July 6, 2004, in an effort to secure a back-to-work agreement with a hold-harmless provision.
- It is undisputed that on Aug. 22, 2004, the union did, in fact ratify the CBA. It is also undisputed that, by its terms, the CBA applied retroactively to May 1, 2004, the first day after the original CBA expired. The CBA was executed in December 2004.

The employer sought, among other things, damages resulting from the strike between July 6, 2004, and August 22, 2004. The union's position is that the no-strike provision did not apply during that period.

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The case history gets even more tangled. As a result of complicated procedural wrangling, the following results ensued at the federal district court level:

- The district court, after a hearing, initially held that the CBA was not ratified on July 2, 2004.
- After Graniterock secured and submitted the certification of the union member who believed the CBA was ratified on July 2, the district court granted a new trial. The case was submitted to a jury that concluded that the union ratified the CBA on July 2, 2004.

The Ninth Circuit reversed. It held that there was no dispute over whether the arbitration agreement—as opposed to the CBA as a whole—was entered into because (a) the employer filed suit to enforce the CBA, which contained the arbitration agreement; and (b) the union sought to enforce the arbitration agreement, albeit not the rest of the CBA.

The Ninth Circuit also held that the dispute over the CBA's formation fell within the arbitration agreement's terms. But it did not rely on the subsequent, undisputed ratification of the CBA on Aug. 22, its execution in December 2004, and its retroactivity provision.

The parties were also involved in administrative proceedings before the National Labor Relations Board. On May 31, 2006, the board concluded that (a) the union did not ratify the agreement on July 2; (b) by not ratifying the agreement on July 2, the union committed an unfair labor practice; and (c) the CBA, as finally executed, should be given retroactive effect to July 2, 2004.

The Ninth Circuit, in a proceeding unrelated to the one currently on appeal to the Supreme Court, enforced the board's ruling.

REVERSAL COMING?

The Supreme Court should, and probably will, vacate the Ninth Circuit's decision and remand to the appeals court to enter an order: (a) vacating the district court's judgment; and (b) directing the district court to enter an order directing the parties to arbitrate the issue of whether the union breached the no-strike provision.

The Ninth Circuit's decision was analytically incorrect and would probably be interpreted by the arbitrators as a license to disregard the CBA's no-strike provision, even though there is no dispute that the CBA was, by its terms, retroactive to May 1, 2004. Arbitrators also would note that the Ninth Circuit had previously affirmed the NLRB's decision that the agreement should be retroactive until July 2, 2004, the date the union was supposed to have ratified it.

The circuit court, in the guise of applying the severability doctrine, determined that the parties agreed to arbitrate based not on the undisputed reality of the parties' transactions, but by mixing and matching the parties' litigation positions, as if the litigation were a game of "Let's Make a Deal."

The Ninth Circuit held that after the employer filed suit to enforce the entire CBA, the union, through its own litigation position, could effectively ratify the arbitration agreement while rejecting the balance of the agreement, including the no-strike provision. The Ninth Circuit also held that what it characterized as a dispute over CBA formation fell within the parties' arbitration agreement.

But the Ninth Circuit's reliance on the severability doctrine was misplaced. The severability doctrine only applies where there is a dispute over the validity or enforceability of the contract containing the arbitration agreement. As the Supreme Court observed in *Buckeye Check Cashing*:

> The issue of the contract's validity is different from the issue of whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract, whether the signor lacked authority to commit the alleged principal, and whether the signor lacked the mental capacity to assent. 546 U.S. at 444 n.1 (citations omitted).

As noted above, the severability analysis stems from Buckeye's seminal predecessor, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

Even assuming the Ninth Circuit correctly pieced together an arbitration agreement from the parties' litigation positions, the court's analysis of the scope of that agreement contravened basic arbitrability principles.

The clear and unambiguous language of the parties' arbitration agreement simply does not cover the issue of whether a CBA was formed. The clause applies only to disputes "arising under" the CBA, and says that the arbitrator's decision "shall be within the scope of the terms of this agreement" and may not "amend any provisions of" the agreement. It presupposes the CBA's existence, and cannot be reasonably interpreted to cover a dispute over the CBA's existence. There were simply no ambiguities to resolve in favor of arbitration.

CORRECT APPROACH

The correct approach to deciding Graniterock—and the one that was raised by Associate Justices Stephen G. Breyer, Sonia Sotomayor and Ruth Bader Ginsburg at oral argument—has nothing to do with the severability doctrine and whether a dispute over contract formation fell within the scope of the arbitration agreement.

The parties undisputedly entered into an agreement containing the arbitration provision and no-strike clause, which was ratified with retroactive effect to May 1, 2004. Given the CBA's retroactive nature, whether the parties intended the no-strike provision to be in effect during the July 6-Aug. 22, 2004, period, is a dispute "arising under the agreement."

It simply requires the arbitrators to interpret the meaning of the retroactivity provision and the no-strike provision.

From Graniterock's perspective, that would be far from a perfect outcome—but far preferable to one based on the Ninth Circuit's rationale. That court's reasoning presupposed that the parties intended to enter into an arbitration agreement separate from the rest of the CBA terms, even though that conclusion is belied by the undisputed facts.

The decision practically invites an arbitration panel to rule that the union did not ratify the CBA at the relevant time, but nevertheless agreed to an arbitration clause. That suggests that the arbitration panel was free to ignore an important tenet of federal labor law first expressed by the Court more than 50 years ago: that "the agreement to arbitrate grievance

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Arbitration Law *continued*

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disputes is the *quid pro quo* for an agreement not to strike." *Textile Workers v. Lincoln Mills of Ala.*, 353 US 448, 455 (1957).

Unfortunately for Graniterock, the arbitration panel could find that the no-strike provision was not breached because it was not in effect despite what the clear and unambiguous terms of the contract say. If that happens, then Graniterock may once again find itself embroiled in court proceedings, only this time over whether the arbitrator's award drew "its essence from" the CBA. See *United Paper Workers International Union v. Misco, Inc.*, 484 US 29, 36-37 (1987). If the arbitrator rules that the parties did not intend the no-strike provision to apply during the July 2, 2004-August 22, 2004, period, then vacatur of the award is far from a foregone conclusion.

But the arbitration panel may rule that the union breached the no-strike clause, in which case Graniterock will prevail and there will be no question whether the arbitrator's award drew its essence from the contract.

To the extent that Graniterock may be inconvenienced by having to arbitrate the seemingly obvious issue of whether the retroactivity provision means what it so plainly says, and to the extent that may weaken Graniterock's otherwise strong position on the merits, the powerful federal policy favoring arbitration of labor disputes demands no less.

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Worldly Perspectives

Worldly Perspectives: Israel

BY GIUSEPPE DE PALO AND MARY B. TREVOR

Dispute resolution in Israel is a multifaceted reflection of the nation's history under the British mandate, with the accompanying legal doctrine and structures; its religious and cultural roots and identity, and its continuing embroilment in the complex internal and regional disputes that have long been a part of Israeli life.

The Israeli court system is highly developed, with multiple courts designed to handle a variety of legal issues. The jurisprudence is based on Anglo-American common law, and Israeli court decisions borrow heavily from the substantive content of systems based on this law.

The court system includes three main components: 1) The Civil Court System, which handles the major portion of litigation, as well as all criminal and administrative matters; 2) The Religious Court System, comprising separate courts for Jews, Christians and Moslems that are responsible for matters pertaining to marriage, divorce and personal status; and 3) The Labor Court System, which primarily is responsible for employee-employer suits and for large-scale disputes between organized labor and management.

De Palo is cofounder and president of JAMS International ADR Center, based in Rome. He also is Hamline University School of Law's first International Professor of ADR Law & Practice. Trevor is an associate professor of law and director of the legal writing department at Hamline, which is in St. Paul, Minn. Flavia Orecchini, of the JAMS International ADR Center Projects Unit, is assisting the authors with research. This monthly column is expanded and updated from reports gathered for a book edited by the authors, "Arbitration and Mediation in the Southern Mediterranean Countries," published by Wolters Kluwer International in 2007 as the second volume of its Global Trends in Dispute Resolution series. The original chapter on Israel was authored by Noam Ebner, Yael Efron, Galit Manobla-Landman and Yifat Winkler.

The civil court system deals with all commercial litigation other than labor disputes. There are no specialized local formal frameworks for dispute resolution in domestic or foreign investment disputes.

Israeli society is extremely adversarial and litigious, as indicated by the million or more motions filed with the courts every year. Faced with this extraordinary demand and a backlog of three to four years, the system has been on the verge of collapsing numerous times since the late 1980s.

Several formal and informal mechanisms are in place in order to deal with this influx, including the court system itself, mediation and arbitration services, and in-house processes in specific frameworks. More details below.

ARBITRATION OFTEN PREFERRED

Arbitration often is preferred to litigation in the Israeli commercial world.

A fairly well-rounded legislative framework for arbitration proceedings was established by the Arbitration Act of 1968. Parties may proceed to arbitration only if they have agreed to do so. Under no circumstances is arbitration ever mandatory.

Generally speaking, the act grants parties wide discretion in designing their own arbitration mechanism, process, and choice of law. Parties rarely use this broad discretion, however, and instead make do with *ad hoc* arbitration: inserting a simple arbitration clause in wider pre-dispute agreements, or agreeing on an arbitrator in post-dispute agreements.

If the parties have not designed their own process, the Arbitration Act sets out a default procedure to govern the case. The procedure grants far-reaching authority to the arbitrator, often leading both parties to complain or feel unsatisfied with the process.

Once a party has agreed to arbitration, the party may not renege on the agreement and seek to resolve the dispute in court. The

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act, true to this "hands-off" policy, guarantees the court's intervention only in cases where a party attempts to avoid arbitration after having committed to the process, or in cases where the procedure is being managed in a grossly unprofessional or unfair manner. See generally "International Comparative Legal Guide to International Arbitration 2009," Ch. 51 Israel (Global Legal Group)(available at www.iclg.co.uk/khadmin/Publications/pdf/3067.pdf).

There is no official, state-mandated arbitration body, center or institute. In order to meet the market's demand for arbitration services, private practitioners have established themselves as service providers. Quite a few professional guilds have set up arbitration panels for in-house disputes.

Still other entities serve as clearinghouses for arbitration services. Most notable is the Israeli Bar Association, which maintains rosters of attorneys who offer arbitration services in various specialty areas and refers cases to these attorneys. Other professional guilds without regular panels often receive requests for aid in appointing arbitrators, and provide informal assistance or referral services. Due to the private nature of these enterprises, there is no readily accessible data on their rulings or statistics on court confirmations or interventions.

A DECADE OF MEDIATION GROWTH

After arbitration, mediation is the leading Israeli ADR mechanism. Mediation's widest use in Israel is in family and divorce issues. It also is commonly encountered in labor disputes. All of the various courts in the system described above have integrated mediation methods and mechanisms into their day-to-day operation.

Mediation was rarely encountered in Israel before the late 1990s, but the past 10 years have seen an impressive rise in its use. Leading the effort to import and implement the process were the court system and the Ministry of Justice. This effort led to the establishment of two important bodies:

- The Court Administration's Advisory Committee on Court-Connected Mediation, which was charged with approving mediators and mediator training qualification for court-connected mediation;
- The Ministry of Justice's National Center for Mediation and Dispute Resolution was established as an independent justice ministry unit, charged with promoting the use of mediation and raising public awareness of its benefits. This body has played a key role in some of the major developments in the Israeli mediation scene. It was instrumental in orchestrating the signing of two major "Mediation Treaties" in the commercial/industry and labor sectors, calling for use of mediation in disputes encountered in these fields. For more information on the center, go to: www.justice.gov.il/MOJEng/The+National+Center+for+Mediation+and+Conflict+Resolution/.

Later on, other institutional players became involved. Most notable is the Israeli Bar Association, which established a dispute resolution section, as well as a "Mediation Institute" offering services to the public and the courts. Local bar association chapters followed suit, establishing similar institutes.

The large majority of cases mediated in Israel are court referrals. Due to the multiple court systems, comprehensive data on court referrals is difficult to obtain and to quantify.

But all of the different court systems refer cases to mediation to some extent. The courts are examining the issue of instituting mandatory mediation. In a recent pilot program conducted by the civil courts, parties to all civil suits valued at more than $12,500 were ordered to meet with a court-appointed mediator for a preliminary mediation session in order to evaluate whether mediation might be a suitable method for resolving the dispute.

As with arbitration, there is no official center or institute charged with providing the public with mediation services. It should be mentioned that the past couple of years have seen a rise in the amount of in-house mediation services offered by courts, mainly on an informal basis decided by the administrator or presiding judge of a particular courthouse.

Official bodies may have referral systems in place, but provision of the actual services is left, for the most part, to private practitioners. In that arena, Israel has a thriving mediation scene, with many service providers offering services in many areas, including divorce and family matters, commercial affairs, community issues, labor disputes, and others.

While many professionals offer services on their own, the "mediation center" has been the preferred organizational framework for mediation activities in all sectors: private, community and public. The "center" is not an officially recognized method of incorporation; it is merely a name given to an enterprise

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Worldly Perspectives in the Holy Land

The ADR setting: Israel's highly litigious and adversarial society.

The ADR assessment: It's plentiful and ingrained . . . just like litigation.

The ADR future: With growth and institutionalization, the promise of better results will be fulfilled in this nation.

The Basics

Israel is roughly the size of New Jersey, inhabited by about 7 million people. About 80 percent are defined as Jews, with the majority of the remaining 20 percent as Arabs. Each group consists of multiple sub-groups with wide variations in culture, religion, and even language.

Israel is a party to a number of private international law and dispute resolution agreements, such as the New York and Washington conventions. Israel also has signed—though not yet ratified—the recent Hague Convention on Private International Law regarding jurisdiction clauses in international and multinational commercial contracts, although this convention is of tangential interest because it does not deal with arbitration.

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Worldly Perspectives *continued*

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that seems to have developed some special characteristics. Centers were–and still are–usually initiated by a single mediator (or, at the most, two or three partners), aided perhaps by a one- or two-person support staff or by freelance mediators.

Mediation awareness and use have increased in all sectors of the legal community, with the judiciary at the forefront. Although the business community had long considered arbitration as the major ADR process, awareness of mediation has grown in recent years, and various actors in the business community have entered into agreements preferring the use of mediation over litigation. The attorney general has issued a directive ordering all government agencies to consider the use of mediation, particularly in interdepartmental or interagency disputes. Every law faculty in Israel offers at least one elective ADR course in its curriculum; and some offer more.

TRADITIONAL METHODS

Other, traditional, dispute resolution processes exist; though their impact on commercial life is negligible.

In the Israeli-Arab community, the process of *Sulha* is sometimes encountered, primarily for settlement of blood feuds and intercommunal disputes. This rarely-invoked process has no official standing. *Sulha* was described in detail in "Worldly Perspectives: The West Bank and Gaza," 28 *Alternatives* 3 (January 2010). It is a binding, obligatory process to end disputes that is grounded in law but lacking the courts' formality. It has roots in tribal justice systems, though still recognized as an effective ADR method for some disputes in modern law.

In addition to the *Sulha*'s processes, it is quite common, in issues ranging from marital strife to commercial matters, to find parties requesting help from a local dignitary or communal leader. This help might be a mixture of consultation, arbitration, and/or mediation. Such situations are generally limited to cases in which family or village ties necessitate solutions that take community issues into consideration. Anything of a less local nature will be brought to court.

In cases where both disputants are from the Orthodox Jewish community, parties often go to a "private" court to have the case adjudicated by rabbis according to *Halachic* (Orthodox Jewish) law. This possibility is not unique to the Orthodox community, although it would seem that in this sector, the privatization of law is ubiquitous. Members of other religious communities may decide they want their interpersonal disputes handled according to their own code, and by turning to their recognized authority figures they grant them, in effect, the role and status of arbitrator under the Arbitration Act.

From a legal standpoint, this is essentially a type of arbitration, and this is how the state views such institutions and judgments. It is difficult to estimate the number of cases brought to such private adjudication, or the number of Israelis who view these private courts as their sole recourse for adjudication.

In the larger frame of Israeli adjudication, however, these are certainly marginal. Outside of this adjudicative process, it is quite common to find religious parties to disputes ranging from marital to commercial jointly requesting help from a rabbinic figure. As with other forms of private, informal dispute resolution, the rabbi's assistance might take forms reminiscent of consultation, arbitration, or mediation.

* * *

ADR is a recognized, institutionalized part of the Israeli legal, commercial, and community infrastructure. The veteran process of arbitration was supplemented with what can only be called a mediation boom in the late 1990s, and there is no lack of capable professionals in either field.

The feeling remains, however, that ADR in Israel has not yet reached its peak. For example, recent efforts have been made to advance the use of early neutral evaluation. This process, borrowed from the California state court system, is initiated after parties have filed their initial briefs in court. A neutral evaluator, with expertise in the claim's subject matter, meets with the parties and their attorneys, hears case summaries, and probes the parties' cases further.

The neutral evaluator can then comment on each party's strengths and weaknesses, and render an opinion on the probable outcome of the litigation process. The evaluator sometimes provides mediation-like services by helping the parties reach agreement on case management issues. The process also can end with the evaluator facilitating a settlement between the parties. This process is not yet in widespread use in Israel, but has potential.

We predict that the future holds in store increased public awareness, enhanced practitioner professionalism, and more effective institutionalization that will enable ADR to achieve its full promise.

* * *

Next month: Italy and Jordan.

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ADR Brief

CEDR RULES TRY TO PUSH ARBITRATION TOWARD SETTLEMENT

London's Centre for Effective Dispute Resolution is receiving nods of conflict resolution professionals' approval for its recent rules encouraging arbitrators to focus on settling cases.

CEDR Chief Executive Karl Mackie says that the goal of creating "a safe transnational standard" that accommodates local and regional arbitration customs, but develops the process in accordance with calls for greater efficiency, has been met. The rules' ultimate success, he suggests, will come with their application.

CEDR, England's leading mediation education, training and provider organization, released a 30-page report on arbitration settlement in November by its 75-member Arbitration Commission.

The report's key element is the CEDR Rules for the Facilitation of Settlement in Internation-

ADR Brief

al Arbitration, which adopts pieces of practices from common law settings, civil law countries, and private schemes in an effort to answer critics' calls for better arbitration processes.

The rules' push for settlement is complementary to other recent initiatives that seek to minimize discovery and other litigation-like practices that frequent users say bog down international arbitration. The report cites the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration and the International Chamber of Commerce's Techniques on Controllin Time and Cost in Arbitration, among others. [See also. "Global Rules For Accelerated Commercial Arbitration" (Effective Aug. 20, 2009)(available at www.cpradr.org), by the International Institute for Conflict Prevention and Resolution, which publishes this newsletter.]

The CEDR rules supplement whatever arbitration rules govern the procedings, as well as applicable law, and are general. CEDR's arbitration rules aren't required. The Facilitation of Settlement rules allow for party adaptation. They also establish "core minimum standards" for the tribunal, says Mackie, including discussing with parties and counsel settlement processes early in the arbitration timeline. Where settlement is pursued, a "mediation window" may be established in the arbitration process.

The settlement talks also provide a basis for potential sanctions against parties who decline good-faith settlements and receive awards that are smaller. The CEDR rules allow the tribunal to take the numbers into account in assessing attorneys fees–a United Kingdom practice that is likely to surprise some international arbitration parties seeing it for the first time.

The report also has several appendices, two of which provide more specific practice guides. Where the CEDR rules explicitly bar ex parte arbitration party-tribunal meetings, one appendix acknowledges that when the parties agree, arbitrators can take on advanced mediation roles, beyond the scope of the CEDR settlement rules. The appendix, which strongly suggests using a third-party mediator, provides safeguards including written party consents to arbitrators making the process switch.

The second appendix can be potentially tough on parties that decline settlements. The appendix encourages the offering party to bring the settlement terms to the tribunal and specifies the descriptive terms that should be present. The rules provide that the tribunal can take into account in its fees assessment the fact that a party has turned down an offer and "has not done better in the award of the Arbitral Tribunal than the terms of the offer to settle."

Mackie says that the appendices point to the next step for the rules, which would be more specific procedural development. He says he expects the CEDR Arbitration Commission to begin work later this year. The commission originally weighed doing a white paper when it began looking at ways to expedite arbitration in 2007, he says, but it decided to take more concrete action with the rules. And, he adds, there probably are mediation and arbitration partisans who believe that the rules don't go far enough.

In addition, Mackie says that CEDR is exploring developing training programs related to the rules.

For now, he says he is satisfied with the reception that the rules have received. "Judges increasingly have been playing a part on building settlement into court systems," says Mackie, "and if anything, arbitration was being left behind."

He says he believes that the rules have added to the debate over arbitration efficiency steps. Mackie says that, in addition to the ad hoc adoption by parties of the procedures, CEDR hopes and expects regional arbitration institutes world-wide will incorporate the settlement principles into their own rule revisions. He also hopes that more use will be made of the rules' processes in international contracts.

The efforts have been noticed by the ADR community. "The CEDR Settlement Rules are a very welcome and useful tool for contemporary international arbitration," noted a Jan. 7 post on the Kluwer Arbitration Blog (available at http://kluwerarbitrationblog.com). "They manage to strike a good balance between the arbitrators' powers to take proactive steps to assist the parties in achieving a negotiated settlement of part or all of their dispute and their duty to remain impartial."

Veteran Haverford, Pa., neutral Judith P. Meyer, says that the rules are "a wonderful invention. . . . It's a much more modern, realistic approach, and meets the parties' needs."

But, adds, Meyer, there are problem areas. She says that the ban on ex parte communications for settlement makes sense to preserve an tribunal's neutrality in devising an arbitration award, but it won't work as well as a conventional mediation.

"It's ADR in a fishbowl," says Meyer. "The tribunal meets with everybody, and anything anyone puts on the table is shared. No one is going to risk a potentially bad strategic move of putting something on the table that will end the case."

The bottom line, she says, is that "one of the most significant and unique things the mediator does is meet privately and separately with the clients."

The biggest new feature that the report and the rules offer to instill settlement in the arbitration arena is a "mediation window." The rules define it as "a period of time during an arbitration that is set aside so that mediation can take place and during which there is no other procedural activity." The commission report says the tribunal should offer the mediation window to the parties at the outset, and that it could be coordinated with a parallel mediation track.

Meyer says that the pause in the proceedings will require adjustment on the part of arbitrators' schedules, and perhaps fees. And the rules themselves note that "any unreasonable refusal by a party to make use of a Mediation Window" can be taken into account by the tribunal when assessing costs.

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Rules to Settle By

The problem: Once again, arbitration processes.

The adjustment: Push for settlement.

The methods: A new set of rules by the U.K.'s leading ADR advocacy organization puts new techniques and tactics–including a 'mediation window'–in the hands of international arbitrators.

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ADR Briefs

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The CEDR commission acknowledges its own skittishness about interjecting the mediation process into arbitration by forbidding ex parte meetings between the tribunal and individual parties.

The concern, according to the report, is allowing a med-arb process to develop, which could taint the proceedings. Even though such moves can be successful, the report says, "it carries significant risks to the integrity of the arbitral process and hence to the enforceability of any arbitral award in the event that settlement is not achieved in the mediation phase."

Interestingly, while the rules apply the report's recommendations with a preference that the arbitration panel rigorously protect its original mission, at the same time, the appendix provides even deeper procedural guidance if the tribunal takes the step toward mediation and decides to meet with the parties individually.

The rules allow the tribunal to provide the parties its preliminary views on the issues and evidence needed for each party to prevail; provide "preliminary non-binding findings on law or fact on key issues in the arbitration"; offer suggested settlement terms "as a basis for further negotiation," and, upon written request, chair settlement meetings.

The rules also acknowledge that the effort poses a risk and actually could extend the proceedings. The final section, Article 7, advises a post-settlement discussion arbitrator who "develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings" to step down.

"Will the arbitrator have to give back fees?" asks Judith Meyer. Bad actors, she warns, could "derail the whole proceeding," though she quickly adds that those risks exist for any ADR process.

The report's biggest push to getting the parties to settlement is to emphasize more communication from and between the tribunal, counsel and the parties. It recommends that arbitrators discuss ADR processes, providing that the tribunal actually quizzes counsel and parties at appropriate intervals about the status of settlement discussions. And it even requires the tribunal to provide the preliminary case views to encourage the parties to agree.

The derivation of these techniques comes from the cultural differences in arbitration practices, explains CEDR's Mackie. The rules make accommodations in the settlement procedures to comport with such practices. For example, he says that German and Swiss arbitration practices regularly feature evaluation about the potential outcome. Asian arbitration has a lot of settlement emphasis, he says, but little evaluation.

And, generally, the common law nations historically have tended to isolate arbitration from settlement efforts. The sanction-like potential for accounting in costs for settlement participation and derives from United Kingdom practices, he notes, citing the Woolf Reforms, a 1990s initiative that overhauled civil justice procedures named after the then-Lord Chief Justice. (Woolf co-chairs the CEDR Arbitration Commission.)

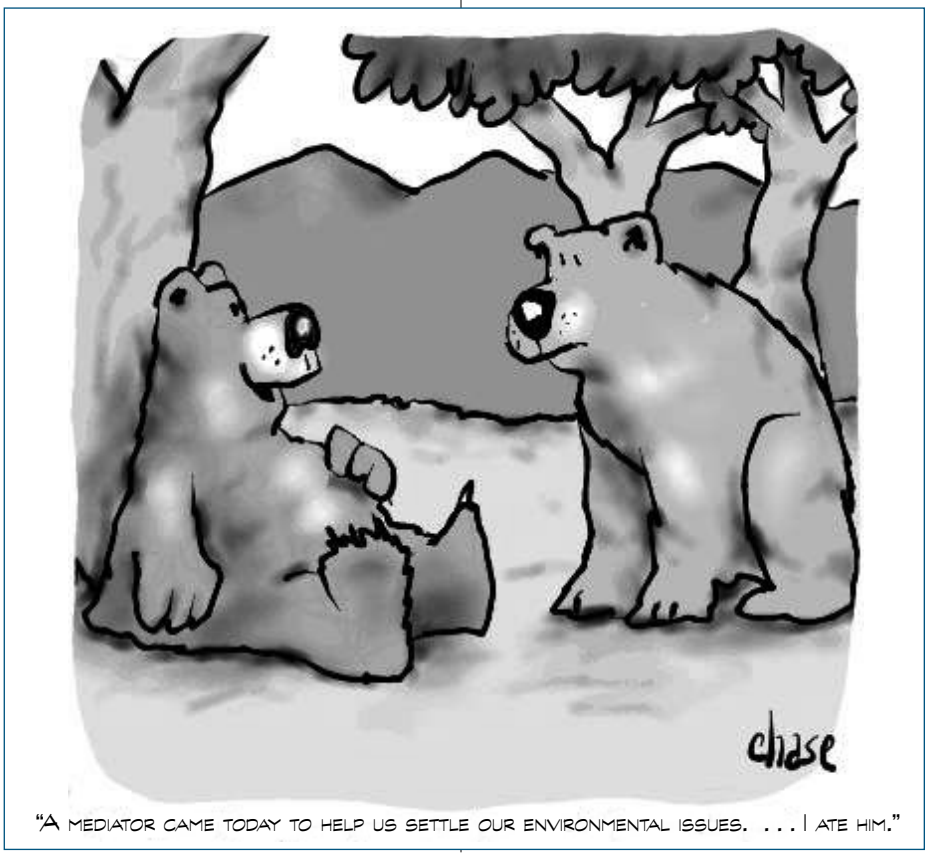
As a result, a tribunal following the rules will need to do some compartmentalizing. It must erect a wall so that settlement discussions don't invade an award determination. The rules also say that the tribunal "shall not judge the credibility of any witness on the basis of either the witnesses having been a party representative during settlement discussions, or anything said by or about, or attributed to, the witness during settlement discussions."

Finally, the rules structure the discussions, too. They include a long list of steps to address settlement at the first arbitration procedural conference, and make the tribunal's preliminary award views, and the evidence needed to establish the case, a key component of the discussion to settle the case.

"A good thing for us was bringing CEDR's mediation history [into] the arbitration world," says Karl Mackie, which "has sometimes been running in a separate track as to what is going on in mediation. I think we're creating some bridges here."

The report, which contains the rules in its first appendix, can be found here: http://www.cedr.com/about_us/arbitration_commission/Arbitration_Commission_Doc_Final.pdf

Cartoon by John Chase



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CPR News

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2004 as a joint project with the Conciliation Center of the China Council for Promotion of International Trade, or CCPIT, and the China Chamber of International Commerce.

In New Delhi, Brennan attended an International Chamber of Commerce/International Bar Association conference on international arbitration. Most of the about 200 attendees were from India, though 22 other countries were represented at the conference.

Lorraine M. Brennan

The gathering examined India's sparse commercial mediation history. The nation's conciliation law is only 14 years' old, and conference participants lamented the lack of mediation guidance available.

Indian arbitration culture also is still developing, Brennan reports, with the courts being more intrusive than the parties would like. Experienced practitioners are trying to persuade their government that intrusive behavior is counterproductive to India's arbitration growth.

FROM CPR'S MEETING, KEN FEINBERG'S PRE-CONFERENCE REMARKS

Before he gave the keynote address at the CPR Institute's Annual Meeting, attorney-mediator Kenneth R. Feinberg provided a preview for a smaller, early-morning gathering of members of the CPR Employment Disputes Committee.

The committee, chaired by New York Kaye Scholer partner Jay Waks, hosted the Jan. 14 breakfast presentation with Feinberg, who returned to the CPR Institute's annual gathering as President Obama's compensation czar. In that role, Feinberg oversees the pay at seven companies that received U.S. government funds to overcome large losses due to bad loans and debt securities practices.

Feinberg has appeared as a panelist and featured speaker at CPR Institute meetings several times over the past two decades, most notably twice on his role as the administrator of the 2001 Victims Compensation Fund.

At the Intercontinental Barclay hotel in New York in January, Feinberg opened by telling the committee that his oversight work on the companies' executive pay really was conflict resolution practice put to a test. "I am mediating," declared Feinberg at the outset. "I am trying to get Main Street and Wall Street on the same page."

He says that the ADR-style component is a big part of the day-to-day operations, as he administers the program and exchanges information on executive compensation with the companies, in an effort to establish a future compensation scheme.

But unlike acting as a mediator, Feinberg acknowledges that he has the final say in his current role, despite the negotiating in the early stages of the processes. "Under the law and regulations," said Feinberg, "you can call it give-and-take, . . . but at the end of the day, I make my call."

Kenneth R. Feinberg

He explained that the mission, for which he receives no compensation, has two main functions. First, he said he has to unilaterally determine appropriate pay compensation package for the top 25-compensated individuals at the bailed-out companies. The determinations, he said, aren't appealable, and they depend on an analysis of comparable executives in the companies, the marketplace generally, qualitative descriptions of what the executives do, and also take into account severance, retirement and pension packages.

Later, he said, he will look at the full top 100 executives' pay schemes at the companies.

The companies have made presentations to Feinberg, and his team, to justify their pay packages.

Feinberg, who is managing partner of Washington, D.C.'s Feinberg Rozen, said he relies heavily on quantitative analysis by academics who he has brought in to help him make the determinations. "Ultimately, [the pay analysis process] is not really a mediation or even a negotiation," he said, retreating on his initial ADR analogy, "though we are trying to reach an accommodation."

By mid-January, Feinberg said that two of the banks–Citigroup and Bank of America—had repaid their bailout money, and were out from under his office's jurisdiction.

During a question and answer session with CPR Employment Committee members, Feinberg said that he wasn't accommodating the company requests to pay out bonuses or salaries. He said he is merely enforcing the law as set out under the bailout terms by Congress–to help ensure that the companies' operations return to normal, and the troubled asset loans are repaid.

A "populist" streak in his determinations "would violate the law," he said, adding, "In the law, Congress says it wants its money back."

In the Q-and-A session, Feinberg went into the nitty gritty of dealing with top executives' company roles. He said that when he evaluates their employment contracts, he is left with three options:

- To terminate the contracts completely, a tactic he says he has not yet used;
- To renege on the contract, which he said worked everywhere it was deployed except at American International Group Inc., where some top executives resigned, and
- To address what he deems excessive payments in the prospective pay rates the executives are still collecting.

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On that last point, Feinberg explained that the companies are arguing that their people are being penalized now for current and future work, where the compensation was for past work that was properly earned. Moreover, Feinberg said that the companies are contending that he is violating the statute's mandate to return the companies to health by forcing executives to leave.

"The best argument we have is the pressure of not wanting to take on the federal government in a time of uncertainty," Feinberg said of the negotiations between his office and the companies.

In setting future pay, Feinberg is emphasizing incentives. He explained that he is recommending low, cash-based salaries; a ban on "retention payments" and guaranteed bonuses; and payment in stock with delayed vesting dates, where the employee would get 1/3 of his or her stock payment after two years, 1/3 after three years, and the last third after four years.

Feinberg says he also recommends that perks be limited to $25,000 total value. He said he also tells the companies to adjust retirement and severance packages that give top executives preferential treatment–including banning golden parachutes.

Still, Feinberg says a lot of work needs to be done to change the culture that has put these and other companies at risk. He strongly recommended statutory and regulatory reform for the other traditional oversight authorities for executive compensation, corporate governance and shareholder rights.

CPR ON THE PODIUM

CPR Senior Vice President Lorraine M. Brennan later this month will moderate "Negotiating Deals and Managing Commercial Disputes in Asia," a panel discussion at the Harvard Asia Business Conference 2010, at Harvard Business School in Boston.

The conference will be on March 26-27.

The conference is an annual event jointly organized by Harvard Business School, Harvard Law School, and Harvard Kennedy School of Government. Its organizers say it is the largest Asia-focused business conference in North America.

The theme for this year's conference is "Shifting Paradigms, Shaping Possibilities." For information on the program, and to register, visit www.asiabusinessconference.org/2010/.

'POSITIVELY NEUTRAL' RATINGS AVAILABLE SOON FOR CPR PANELISTS

Positively Neutral has begun the process of collecting evaluations of CPR Panels of Distinguished Neutrals. It is the beginning of an exclusive ratings system of CPR panels members who have agreed to be evaluated, and have their ratings included on CPR's website.

The added information about neutrals' skills provides a benefit to panels members, adding users' assessments of their ADR effectiveness.

The ratings system also acknowledges commercial conflict resolution consumers' calls for more transparency and information about the processes, and in particular the mediators and arbitrators they select.

The ratings will be available soon: Positively Neutral's assessment tool will be accessible through the Members Only section of the CPR Institute website at www.cpradr.org. The CPR Institute expects to make the information accessible by the end of next month.

Positively Neutral operates at www.positivelyneutral.com. Its evaluation system will be integrated into CPR's site, to allow individuals at CPR members to log in, and see expanded information on the skills of panels members registering for the system.

In a move to add benefits to members of CPR's Panels of Distinguished Neutrals and CPR members that use the listings, CPR announced late last year that it was partnering with Positively Neutral, a website that provides evaluations of panel members to corporate and law panels users.

Acceptance on CPR panels indicates an ability to handle complex commercial matters. The tool permits neutrals to demonstrate quantitatively their work and talent, without sacrificing the confidentiality of ADR matters over which the mediators and arbitrators have presided.

Panelists will be able to control the information about their performances that is released. Decisions to publish the data rest with the individual neutrals in order to preserve one of the frequent key reasons for using ADR: the ability to keep processes confidential where it is appropriate.

In the questionnaires now circulating, evaluators are being quizzed on the overall performance of the arbitrator and mediator, as well as how the neutral prepares, manages the proceedings; understands the dispute; and displays evenhandedness, among many other areas.

Members of the CPR Panels who want to participate must register with Positively Neutral. A $99 rate, about 80% of PositivelyNeutral.com's standard fees, is still in effect for a limited time.

After registration, panel members are required to provide Positively Neutral with a list of references from proceedings over the past two years. CPR requires the references from both sides of a case.

Neutrals will be able to review the results and choose to publish all or none of the ratings before they are made available to CPR's members. Positively Neutral's FAQs can be found here: http://cpradr.org/Portals/0/CPRPNEnroll1023.pdf. For more information about participating, CPR Panels of Distinguished Neutrals' members may contact CPR Senior Vice President Helena Tavares Erickson at herickson@cpradr.org.

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