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# NYLitigator

A Journal of the Commercial & Federal Litigation Section
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## Inside

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## Committee Report

# Message from the Chair

By the time you read this, there likely will be a chill in the air, the leaves will be turning and, perhaps, falling, and snow may not be far away, but as I write we are still in the dog days of summer and all that seems quite a long way away. The lag between my writing and the publication of the *Litigator* causes me to think about what will have transpired in the intervening two or so months.

Summer is a time of planning for our Section, with the main events commencing in September. By the time this issue of the *Litigator* is published, I hope you have taken advantage of the many opportunities to get involved in Section activities.

But if you have not yet gotten involved, fear not—there is still time! And some of the year's best events are yet to come:

- Our Annual Meeting will take place this week on Wednesday, January 16, 2019, during Bar Week. Join us for three hours of outstanding and timely CLE programming, followed by cocktails and our annual luncheon. As we do each year, during the luncheon we will confer the Stanley H. Fuld Award, which recognizes outstanding contributions to the development of commercial law and jurisprudence in New York State. Now is the time to register!
- For our Spring Meeting, we will be traveling to a new location. Join us on May 3-5, 2019 at the Equinox in Manchester, Vermont for a weekend filled with interesting programs and lots of opportunities to socialize and network with Section members as well as members of the judiciary, all in a gorgeous location (and, if you are so inclined, there's a great spa too!).

But these two events do not even begin to scratch the surface of the Section's activities. We sponsor dozens of events each year on a broad range of subjects, and something is happening every month of year. Check our Section website for the most current list of upcoming events.

And, please, tell us how you would like to get involved. The ideas for many of our programs come from one individual, who comes forward and suggests a topic, which begins a discussion that ultimately results in a successful event. And we are always looking for people to speak on our panels, write for our publications, and otherwise become involved in leadership of our Section. Please reach out to me or any other Section officer or Committee chair—we have a place for you at the table.

Finally, I would like to note one important event that recently occurred. The second-ever meeting of the Standing International Forum of Commercial Courts was held September 27 and 28 in New York City, hosted by the judges of the Southern District of New York. The Section assisted with planning for the event, with Stephen P. Younger, our former chair and former NYSBA President, and Clara Flebus, co-chair of our Committee on International Litigation, taking the lead in assisting with the programming for the event. Congratulations to Steve and Clara on a job well done.

I look forward to seeing you at the Annual Meeting or another event soon.

**Robert N. Holtzman**

# Court Reaffirms the Importance of Sufficiently Alleging Demand Futility in Derivative Lawsuits

By Michael A.H. Schoenberg

Attorneys face myriad hurdles and pitfalls in their representation of business owners. In its recent decision in *Retirement Plan for General Employees of the City of North Miami Beach v. McGraw*,[1] the Appellate Division, First Department reminded us of one often overlooked in the litigation context—the importance of an owner adequately alleging demand futility in a derivative action.

## What Is a Derivative Action?

Before one can understand the role demand futility plays in a derivative lawsuit, and why it is so important, one must understand what a derivative claim is in the first place. Generally speaking, if a claim concerns harm directly to the business, but it is asserted by a shareholder on behalf of the business, then it is a derivative claim.

The determination of whether a claim is direct or derivative turns on who was harmed first and who would receive the benefit of any recovery or other remedy, the member or the entity.[2] As the Court of Appeals explained nearly a century ago, claims asserted by a business owner are derivative when "[t]he remedy sought is for wrong done to the corporation; the primary cause of action belongs to the corporation; [and] recovery must enure to the benefit of the corporation."[3]

Examples of typical derivative claims include those alleging waste and mismanagement of corporate funds, the payment of excessive salaries to majority members and their families, and diversion of corporate opportunities.[4] Although often misasserted, the courts have made clear that claims based solely on a purported decrease in the value of one's ownership interest is a quintessential derivative claim.[5]

## Why Is Demand Futility Necessary?

Understanding that a derivative claim is one that primarily seeks to benefit the business, one can next see why demanding that the business bring a lawsuit or asserting demand futility is important.

It is a basic principle of the general corporation law that directors, rather than shareholders, manage the business and affairs of the corporation under their charge. With this responsibility comes the authority to decide whether to bring a lawsuit, or to refrain from litigating a claim, on behalf of the corporation.[6]

The board, however, does not have exclusive dominion over this decision. Shareholders and members alike are imbued with the authority to assert claims derivatively on behalf of the businesses in which they have an ownership stake.[7]

Because a shareholder's ability to institute an action on behalf of the corporation inherently impinges upon the directors' power to manage the affairs of the corporation, and can cause the corporation to incur significant legal fees upon reimbursement to the litigating owner,[8] the law imposes certain prerequisites on an owner's right to sue derivatively.

## When Is a Demand Futile?—The *McGraw* Decision

Business Corporation Law § 626(c) requires that a shareholder bringing a derivative action seeking to vindicate the rights of the corporation allege, with particularity, either that an attempt was first made to get the board of directors to initiate such an action or that any such effort would be futile. The same requirement is imposed upon members of companies asserting derivative claims.[9]

Initially, if a demand is made and the board rejects it or refuses to initiate the lawsuit, then the shareholder can assert his or her derivative claim. The corporation can then move to dismiss the complaint based on the board's business judgment that the suit is not in the best interests of the corporation. But, if the board's rejection of the pre-suit demand is a foregone conclusion, then the shareholder is excused from making it.

Under well-settled case law, a demand is deemed futile under any one of three possible scenarios: (1) when a majority of the directors are interested in the challenged transaction, (2) when the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) if the directors failed to exercise their business judgment in approving the transaction.[10]

Under the first scenario, it is not just a matter of simple math. In order to meet the heightened pleading standard, the plaintiff must explain why he or she believes that a majority of the directors are interested in the challenged transaction. If the majority of the board members are interested in the challenged transaction, then they cannot be expected to cause the corporation to sue themselves for breaching their obligations.

Of course, in cases where a business only has two owners, demand futility is relatively easy to allege because the coequal owner-defendant has an obvious conflict of interest.[11] But still, futility must be alleged.

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In the more complex circumstance presented by larger corporations with full and active boards and committees, a bare allegation that directors are interested simply because they are "substantially likely to be held liable" for their actions is not enough. New York law in this regard differs from that of the standard-bearer, Delaware.[12] As the decision in *McGraw* teaches, the plaintiff in New York must allege specifically why and how the board members' independence in deciding to bring a lawsuit is compromised.

*"A derivative claim is one that primarily seeks to benefit the business."*

A lack of independence can be stated if, for example, one can allege that the majority of the board members took an active role in the disputed transaction, they personally reaped the benefits of the transaction, or they are under the control of the primary bad actor, either by familial relationship or otherwise. In *Marx*, self-interest was shown by allegations that the outside directors comprised a majority of the board and therefore received a personal benefit in fixing their own excessive compensation.

With these types of allegations, the court will infer that the interested directors or members are so conflicted that they, as the majority on control, would not authorize the company to bring the lawsuit that would cause themselves financial harm.

Under the second scenario to establish demand futility, the plaintiff needs to allege the board of directors, even if independent, turned a blind eye to "red flags" or that they abdicated their oversight of the business's practices such that they could not exercise validly their business judgment.

In *McGraw*, the plaintiff's claim was defeated by the defendant establishing that the board members held regular meetings where they discussed the challenged transactions and their specific responsive action to allegations of malfeasance.[13] But such meetings and attempts to remedy a problem are not always the case.

If the plaintiff is relying on this basis to establish demand futility, he or she must specifically identify the alleged instances of the board's intentional ignorance or blatant disregard of concerning facts. For example, the First Department reinstated a shareholder derivative complaint where the plaintiff alleged that compensation committee members approved stock options without question more than a month after the options were granted, orally approved the options in direct violation of the company's bylaws, and approved options without making any inquiry whether the grantees were employees of the company.[14]

Under the third scenario, the plaintiff must "allege with particularity that the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors."[15] This is not a catchall standard. As one court put it, only in "rare cases" will a board's action be deemed "egregious" enough to satisfy the third test under *Marx*.[16] A plaintiff relying on this basis to avoid demand futility must allege why the board's approval of the transaction cannot meet the business judgment test. For example, a plaintiff could allege that the board improperly delegated approval of the transaction to an unauthorized person.

## Conclusion

The decision in *McGraw* reaffirms that, under any *Marx* scenario, a plaintiff asserting a derivative claim must allege with particularity why it would be futile for the owner-plaintiff to make a demand upon the board of directors to authorize the corporation to bring the lawsuit.

Practitioners must pay careful consideration to the basis for demand futility during the early stages of the engagement because it will be vital to the initial success of a derivative complaint. If it is treated as a mere afterthought, all of the hard work put into investigating the claims and then drafting the complaint could be for naught when the lawsuit is dismissed on this basis.

## Endnotes

1. 2018 N.Y. Slip. Op. 01027 (Feb. 13, 2018).
2. *Yudell v. Gilbert*, 99 A.D.3d 108 (1st Dep't 2012) (explaining that "[a] plaintiff asserting a derivative claim seeks to recover for injury to the business entity" while "[a] plaintiff asserting a direct claim seeks redress for injury to him or herself individually").
3. *Isaac v. Marcus*, 258 N.Y. 257 (1932); *see also Marx v. Akers*, 88 N.Y.2d 189 (1996).
4. *See, e.g.*, *Glenn v. Hoteltron Sys.*, 74 N.Y.2d 386 (1989), *Abrams v. Donati*, 66 N.Y.2d 951 (1985).
5. *Abrams*, *supra* note 4, 66 N.Y.2d at 953-54.
6. *Bansbach v. Zinn*, 1 N.Y.3d 1 (2003).
7. *See* B.C.L. § 626(a) (McKinney's 2018); *Tzolis v. Wolff*, 10 N.Y.3d 100 (2008).
8. *See* B.C.L. § 626(e).
9. *Najjar Group, LLC v. W. 56th Hotel LLC*, 110 A.D.3d 638 (1st Dep't 2013).
10. *Marx v. Akers*, 88 N.Y.2d 189 (1996).
11. *Jones v. Voskresenskaya*, 125 A.D.3d 532 (1st Dep't 2015).
12. *See, e.g.*, *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).
13. *McGraw*, 2018 N.Y. Slip Op. 01027 at *2.
14. *Matter of Comverse Tech., Inc. Derivative Litig.*, 56 A.D.3d 49 (1st Dep't 2008).
15. *Marx*, 88 N.Y.2d at 200-01.
16. *Wandel v. Eisenberg*, 60 A.D.3d 77 (1st Dep't 2009).

# Mediation Myths: Barriers to the Use of Mediation

By Steven C. Bennett

Surveys of mediation participants and their counsel routinely report satisfaction with the process, reflecting appreciation of the ability of parties, with the assistance of capable mediators, to maintain control over resolution of their dispute, avoid the delays and expense of arbitration or litigation, and adapt the process with great flexibility to meet their needs. Yet, despite a record of success, in some quarters mediation continues to receive skeptical treatment as an unnecessary step in dispute resolution. This article briefly addresses some common myths that may explain why mediation has not, to date, reached its full potential.

## Myth: Skilled Lawyers Don't Need Mediation

Lawyers are natural negotiators, and litigation lawyers are generally familiar with negotiation and settlement of disputes. So, why bother with mediation? Let the lawyers work it out. That common-sense instinct ignores the qualities and processes that an experienced mediator can bring to dispute resolution. The mediator is an independent neutral, with "no dog in the fight." A mediator's assessment of the strengths and weaknesses of a case thus may prove especially effective in getting parties to think hard about their settlement positions and about the costs, burdens, and delays of pursuing litigation. An experienced neutral, moreover, is adept at finding creative options for settlement of a dispute, which parties might not consider on their own. Perhaps most important, a never-say-die mediator can also push the parties to consider settlement, even in circumstances where prior negotiations have produced an impasse and even hostility. The ability of a mediator to facilitate simultaneous negotiations with multiple parties in a complex dispute is also a particularly valuable tool, which is not generally available to individual lawyers acting on their own.

## Myth: Only "Elite" Mediators Are Worth the Money

Experienced lawyers and clients often have their "go-to" preferred list of mediators, and the less-experienced may sometimes assume that anyone not on such an "elite," recommended-by-name list are somehow incapable of handling complex or difficult disputes. As a result, elite mediators are in demand and can command quite high rates, reinforcing the view that only expensive mediators are worth engaging. A related form of the myth is that well-known ex-judges are "best" for mediation of stubborn problems because they are used to commanding parties and counsel in the courtroom, and they provide special gravitas when delivering evaluations of the likelihood of success of claims and defenses. These assumptions ignore the fact that most disputes, even sizable commercial and financial disputes, can be mediated successfully by any number of qualified, experienced practitioners, many of whom offer quite reasonable rates. And more, since there is in many jurisdictions, especially large metropolitan areas, often an abundant supply of highly qualified mediators, parties and their counsel generally have a great array of choices. The internet has facilitated greater access to information about the qualifications and experience of mediators, making it easier for parties and their counsel to find the "right" mediator for their particular dispute. Further, many jurisdictions have adopted mandatory training and experience requirements, at least for mediators serving on court-annexed ADR rosters, giving parties even greater assurance that the rank-and-file of mediators can provide excellent service.

## Myth: Court-Mandated Mediation Doesn't Work

Objections to court-mandated mediation often question the wisdom of mediation at early stages in a dispute. Counsel and their clients may claim that they have not conducted sufficient discovery, a key motion is under consideration, or the parties have not had a chance to discuss settlement among themselves. Other objections proceed from the assumption that parties have little choice in court-annexed mediator selection, or that it is unfair to impose the costs of appearance before a mediator on unwilling participants. These objections ignore the fact that court-sponsored mediation has developed, and grown, over the past decades, and that experience with these programs has demonstrated significant ability to resolve disputes, to reduce burdens on the courts, and to offer parties a relatively simple means of access to mediation resources. Recent statistics from around the country suggest that in an array of cases, and with a wide variety of program features, court-annexed mediation can achieve settlements in 50 percent of cases or more. For most courts, local rules permit parties to "opt out" of mandatory mediation for good cause or to defer mediation when parties are not ready to participate. The rosters of available neutrals in many courts, moreover, are extensive, providing parties with a range of choices. Most courts also impose significant training and experience requirements for court-annexed mediators.

## Myth: A Court-Conducted Settlement Conference Is the Same as Mediation

Parties and counsel sometimes opine that if they must conduct settlement discussions at the direction of a court, they should do so with the least expensive neutral available—i.e., a court officer. Yet, a court-conducted settlement conference often differs from facilitative mediation. A

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settlement conference before a sitting judge is often mandatory because it is ordered by the court. Typically, the only parties that appear are those who are formally part of the litigation. For example, in a multi-party dispute, the settlement conference may omit parties who have not been joined in the litigation. Further, a record of the conference is often public, as a docket notation for the case, and the scope of confidentiality attendant to a settlement conference may be less clear than in mediation, where, presumptively, all aspects of mediation are confidential. The conference is generally conducted at the courthouse, using the court's facilities. Often, the conference is held in the chambers of the judge assigned to conduct the conference. The judge often has only a limited amount of time for the conference, and it is relatively rare for conferences to be conducted on more than one day. Many judges apply evaluative techniques, suggesting, in effect. that the parties settle because their "case is not as good as counsel thinks it may be." Significantly, moreover, this is an appearance before a judicial officer. Contending lawyers often treat the conference as the equivalent of a formal hearing rather than as an opportunity for creative, cooperative thinking about alternatives for resolution of the dispute. The imperative for the judicial officer is generally docket-clearing. Some courts use settlement conferences as a screening tool to weed out cases that should not clog the trial docket. Thus, in at least some senses, the "neutral" is not really neutral. Court-conducted settlement conferences can be effective, but they should not wholly supplant the mediation process.

## Myth: Mediation Prevents "A Day in Court"

Many disputing parties, convinced that they are "right," and that the other side will be found wrong by a judge, jury or arbitrator, insist that they want their "day in court" to be heard. Yet, the fact is that most civil cases, sooner or later, will settle, even if no mediation occurs. Of the cases that do not settle promptly, many will be resolved through motion practice, often on issues like statute of limitations, or jurisdiction, which have very little to do with the merits of a dispute. If a case finally does make its way through the gauntlet of discovery and pre-trial motions, the actual trial or hearing process often does not permit a party to tell their "story" in the fullest sense. The facts relevant to the legal points at issue may be far less than the total history of the dispute. The cross-examination portion of the process may also focus on credibility issues and other unpleasant distractions from a party's central "story."

By contrast, mediation is flexible. Most mediators encourage the parties themselves to speak (not just their counsel) and encourage them to give a full picture of the dispute in their own words. Indeed, parties often find the mediation process cathartic, reporting satisfaction with a mediator's active listening processes. In the broadest sense, for many disputing parties, mediation offers the best, and sometimes the only, "day in court" they will have.

## Myth: Mediation Is Pointless Unless a Settlement Occurs

Parties and their counsel sometimes insist that their dispute is "too complex" to settle or that the other side is "too stubborn" to listen to reason. They worry that a mediation process may waste time and money that could be better spent in preparing the case for trial. Even worse, many fear that mediation will provide the adversary with "free discovery" and make the process of litigation more difficult.

It is true that some cases simply cannot be settled, but they are, by far, the minority of disputes. Parties and counsel are often amazed at how even seemingly intractable disputes can be resolved through a dedicated commitment to the mediation process. Even where parties cannot settle an entire case, they may obtain at least partial settlement of their dispute or settlement of the dispute between one pair of disputing parties. Such partial settlements are much better than nothing. They show that settlement is possible, and they tend to encourage additional efforts at settlement by the remaining group of disputants. Even if there is no settlement at all, parties often can narrow issues for formal proceedings (in arbitration or litigation), and they may also brainstorm about how to separate parts of the larger problem for resolution through continued mediation. Parties may use the mediation process, for example, to agree, without the need for court direction, on the focus of additional discovery, which can perhaps help return the parties to negotiation or at least streamline the process of formal dispute resolution. Thus, mediation, even if "unsuccessful" in the classic sense of a complete settlement, may provide valuable assistance in the dispute resolution process.

## Conclusion

It is easy to find fault with the system of mediation available in the United States. One major criticism is simply that there are multiple mediation "systems": private and court-annexed, rule-based, and ad hoc. Requirements for mediator training and qualifications vary. The range of specific applications of mediation systems, from divorce proceedings and commercial disputes to employment matters, and much more, means that there is no one-size-fits-all "best" structure for mediation of every type of dispute. A similar criticism, however, could be launched at most forms of dispute resolution—there simply is no one "best" system for resolving all disputes. The central focus of lawyers, constituent clients and interest groups, academics, policy analysts, lawmakers and judicial personnel should be on development and exchange of competent information that is beyond the myths. They should be focused on what works well in the design of dispute resolution systems, including the various forms of mediation, and what lessons may be learned from systems that are not so effective. Mediation is here to stay. The challenge is to make it better and the best forms more widely available.

# Ten Common Mistakes to Avoid in Arbitration

By Joseph P. Zammit

There is no shortage of books, articles, and CLE courses that aim to educate practitioners about commercial arbitration, both domestic and international. These typically deal with such topics as the reasons for choosing arbitration over litigation, drafting arbitration clauses, arbitral jurisdiction, comparing the rules of various arbitral institutions, enforcing and vacating awards, and esoteric issues such as whether the manifest disregard of the law doctrine survives and whether 28 U.S.C. § 1782(a) discovery orders can be utilized in international arbitrations. It hardly needs to be said that anyone aspiring to be an effective arbitration lawyer needs to be knowledgeable about these things.

However, for purposes of this article, I put aside such weighty matters and address the much more mundane topic of convincing the arbitrator(s) hearing your case that your client should win. I am currently a full-time neutral focusing on complex commercial and technology-related cases, but during my professional career I have acted both as an arbitrator and as counsel in numerous arbitrations. My thesis arising from this experience is simple: seeing things from the perspective of the arbitrator can make one a better advocate. Hardly earth-shattering news, but I never cease to be surprised at how often even good counsel miss opportunities to effectively persuade the arbitrator or do things calculated to confound, confuse, or annoy her. Don't get me wrong: we arbitrators try to get it right despite the oversights or foibles of counsel, but we're only human. We cannot rely on evidence that was never presented, or resolve issues that were never addressed.

I have distilled my suggestions to 10 mistakes to avoid in prosecuting or defending an arbitration. Making one or more of these mistakes constitutes an unnecessary obstacle to a successful outcome. I should note that every arbitrator is different, and some may not agree with everything I say here. I suspect, however, that my suggestions will resonate with most arbitrators.

## Mistake # 1: Treat the Pleadings as Unimportant

The rules of most arbitral institutions do not require detailed statements of claim or answers (or, indeed, any answer at all). It is tempting, therefore, to make them as barebones as possible to save expense and keep the opposition guessing about the theory of your case. After all, we are accustomed to notice pleading in court, and there will always be time to amend after discovery is closed or to make our position clear in the pre-hearing brief.

While this attitude *might* work in court where judges do not typically read the pleadings when a case is initially filed and liberally grant motions to amend or to conform to the proof after trial, it certainly is not a wise strategy in arbitration. For one thing, after the statement of claim and answer are filed and the arbitrator appointed, amendment is normally in the discretion of the arbitrator. Why take the chance it will not be permitted? A post-award proceeding to vacate an award because of the arbitrator's abuse of discretion is not likely to succeed.

More importantly however, the first thing an arbitrator does after being appointed (if not before) is read the pleadings. They are the arbitrator's first introduction to the dispute. Why squander the opportunity to educate her about the facts and the theory of your case? It may be months before you get another chance, and it may not come until the eve of the hearing. A lucid statement of what happened and why your client should win (with key documents attached as exhibits) will linger in the mind of the arbitrator and provide her a logical framework within which to view what is to come. While an arbitrator will not make up her mind based simply on the pleadings, however good they may be, they will help the arbitrator understand what is really in dispute. It is likely that before every conference or ruling (such as on discovery disputes) the arbitrator will refer back to the pleadings to refresh herself on the nature of the dispute. Spartan pleadings, on the other hand, inevitably raise myriad questions that are not likely to get answered for a long time.

You may be concerned that a comprehensive pleading educates your adversary. While that may be true, it is foolish to assume that your adversary does not already have a pretty good idea of what your best case is. The minimal surprise value of playing it close to the vest is not worth losing the chance to begin the education of your arbitrator.

What about the possibility that discovery may provide different facts or suggest a different legal theory than you have at the outset of the case? So long as those different facts or legal theory are not inconsistent with what you've pleaded, there is no problem. An arbitrator is not going to hold it against you or your client that you discovered something that has augmented or improved your case. A problem arises only if the discovered facts

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undercut those you have pleaded or demonstrate that your legal theory cannot be supported. That, however, is a problem of your or your client's own making, because it suggests someone has not been straight with the arbitrator or has naively banked on the absence of contrary evidence to advance a false or questionable narrative. That kind of "problem" should not dissuade good counsel from drafting and filing as complete a statement of claim or defense as is possible with the facts then known to the pleader.

### Mistake # 2: Insist on as Many Depositions, Interrogatories, Requests to Admit, and Document Production Requests as Possible

Many advocates still approach arbitration as if it were a case filed in federal court. That is a mistake. There's a reason they call it "alternative" dispute resolution. Arbitration is supposed to be faster, cheaper, more efficient, and less formal than litigation. But many lawyers do their best to frustrate those goals by demanding the same kind of discovery as is permitted under the Federal Rules of Civil Procedure. Why? They say it's to make sure justice is served by having all the facts, but if truth be told it's more likely because they have a hard time moving out of their traditional, open-ended discovery comfort zone. It is somewhat ironic that in recent years the courts themselves have been trying to put the brakes on runaway discovery.

Of course, if your client really wants discovery *a la* the Federal Rules, they can—and should—write it into the arbitration clauses your client is agreeing to so that their wishes will be honored under the principle of party autonomy. If the arbitration clause is silent on the subject, though, and the other side is unwilling to agree, I would suggest that you be restrained in what you ask for. A demand for 20 depositions, 50 interrogatories, 100 requests to admit, and 250 document requests each beginning "All documents. . ." is likely to mark you as an arbitration novice and irritate many arbitrators who pride themselves as specialists in a process that is distinct from, and in many ways superior to, judicial litigation.

Few arbitration rules expressly authorize interrogatories or requests to admit.[1] I have never actually had a case, as either arbitrator or advocate, where they were utilized. Let's be honest, when was the last time you got an interrogatory answer or response to a request to admit (both typically drafted by counsel) that was really useful? Therefore, unless you have some compelling reason unique to your case, my advice is, retain your credibility and don't ask.

In contrast, document requests are generally permitted. The questions, though, are how specific and how closely related to the issues in the arbitration must the requests be. The answers depend on the applicable rules, whether the arbitration is domestic or international, and the predilections of the arbitrator. For example, Rule 22(b)(iii) of the *Commercial Arbitration Rules* of the American Arbitration Association permits the arbitrator to:

> require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues.

In practice, most arbitrators operating under the American Arbitration Association's (AAA) rules do not require a showing of relevance or materiality in advance and resolve that issue upon objection by the party resisting the request. How strictly an arbitrator applies the relevance/materiality standard varies by arbitrator and the facts of the case.

International arbitration, on the other hand, tends to reflect to some degree the hostility to discovery of its civil law origins. Some international rules do not expressly address the subject of document requests, while others leave it to the discretion of the tribunal. In many, if not most, international arbitrations nowadays, the subject is controlled by the International Bar Association's *Rules on the Taking of Evidence in International Arbitration*, which are adopted either by agreement of the parties or at the direction of the tribunal. Article 3(3) of the IBA Rules provides in relevant part that a Request to Produce shall contain:

> (a) (i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
>
> (b) a statement as to how the Documents requested are relevant to the case and material to its outcome . . . .

Thus the IBA Rules require significant specificity in posing document requests and puts the burden on the requesting party to identify in advance the relevance and materiality of the requested documents. A common device to organize document requests, the statement of their relevance and materiality, arguments over objections, and the tribunal's rulings is the so-called Redfern schedule (named after Alan Redfern). International arbitrators—especially those from civil law backgrounds—are generally

stricter than U.S. domestic arbitrators about enforcing specificity, relevance, and materiality standards.

Savvy counsel will strive to pose document requests that are carefully targeted to elicit documents that will significantly enhance her case or undermine her opponent's, and not simply be redundant of those already in her possession. She will be prepared to advance strong arguments about why the documents sought are not merely relevant to the subject matter of the arbitration, but material (i.e., important) to the resolution of the issues in dispute. (This goes double for international arbitration.) And she will avoid blunderbuss requests, which are likely to get short shrift from most experienced arbitrators.

When it comes to depositions, there is a definite dichotomy between international and domestic arbitration. Depositions are almost unheard of in international arbitrations. Except in rare circumstances, it is a waste of breath to even ask for one.

On the other hand, depositions in domestic arbitration have become more common in recent years, at least within limits. Some arbitral rules explicitly address the subject of depositions. For example, Rule L-3(f) of the *AAA's Procedures for Large, Complex Commercial Disputes* provides:

> In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.

Other rules implicitly recognize an arbitrator's authority to permit the taking of depositions.[2]

Note, however, that the AAA procedures contemplate that depositions will be permitted only in exceptional cases and the International Institute for Conflict Prevention and Resolution's (CPR) rules emphasize "the desirability of making discovery expeditious and cost effective." In practice, where the parties are in disagreement, whether and how many depositions will be allowed depends on the inclinations of the arbitrator. In my experience, arbitrators are often skeptical of the argument that permitting depositions of adverse party employees will "streamline" their cross-examination at the hearing. More likely to succeed is an argument that a deposition is necessary because a witness is or likely will be unavailable to attend a hearing due to illness or infirmity, or because attendance at the hearing cannot be compelled or would cause a non-party significant inconvenience or expense. Arbitrators might also be inclined to permit a deposition where they are convinced it may enable a party to discover facts essential to establishing its claim or defense; for this purpose, a 30(b)(6) type deposition of an adverse party representative might be appropriate. In short, don't just ask for depositions because you can, and be prepared with solid reasons to explain why you need to take a person's deposition even though they are available to testify at the hearing.

### Mistake # 3: Ignore the Contract

You're probably saying to yourself, "What competent lawyer ignores the contract?" My response is: more often than you would think.

I recently served as an arbitrator in a dispute in which one party was seeking reformation of the agreement between the parties. The parties battled back and forth vociferously about whether a basis for reformation had been shown. Curiously, until drawn to their attention by the arbitrators, neither side dealt with a provision in the arbitration clause that said the arbitrators were without authority to modify or amend the agreement. Even after the provision was pointed out, the party advocating reformation failed to address the question of arbitral jurisdiction head on, and the party opposing reformation devoted a single paragraph in its post-hearing brief to the issue.

Why this somewhat cavalier attitude to what one would think was a pretty fundamental point, especially in light of the arbitrators' expressed concern about it? Perhaps it was because it was not within the parties' preconceived theory of the case. Perhaps it was because they found no controlling legal authority on whether such language deprived the arbitrators of jurisdiction. Or perhaps it was because they simply missed it. I don't know. However, I think it was a mistake because they surrendered the opportunity to persuade the arbitrators one way or the other, and left the arbitrators to struggle with the issue on their own.

When preparing a claim or defense for an arbitration, counsel should scour the contract to ascertain what provisions might have a significant bearing on the outcome, and formulate their arguments accordingly. It rarely does any good to hide one's head in the sand and ignore problematic contractual provisions. It certainly makes no sense to ignore helpful provisions because you missed them or because you think the facts are so good for you that you don't need the help.

The practice of many, if not most, arbitrators is to read the contract soon after being appointed. You don't want to leave them to wonder why a seemingly pertinent provision such as the one in the example discussed above is not addressed in the pleadings. Most arbitrators take very seriously their obligation to enforce the contract. If the contract is clear, they are generally more comfortable making decisions based on that contract, if possible, than

in resolving tough witness credibility issues or weighing hotly contested expert opinions.

### Mistake # 4: Rely on the Equities

There seems to be an almost unconscious belief on the part of many counsel that arbitrators should want to do what's "just," regardless of "technical" legal rules or the formal provisions of the contract, and that this is what really distinguishes arbitrators from judges. Frankly, a few arbitrators seem to share this view.[3] This belief leads counsel who have what they feel is a sympathetic client and facts to focus on the "equities" and give relatively little attention to the legal arguments. I would suggest that that is a mistake.

Unless the parties have expressly agreed that the arbitrator may act as an "amiable compositeur" or decide disputes *ex aequo et bono*, she is obligated to enforce the provisions of the arbitration clause and substantive law chosen by the parties. While courts will not vacate an award merely because an arbitrator erred in construing a contract or interpreting the applicable law, they can and will vacate an award (either on the basis that the arbitrator has exceeded her powers or through the manifest disregard doctrine) where an arbitrator has flagrantly and intentionally disregarded the terms of the contract or applicable law in an attempt to dispense her own brand of industrial justice.

More to the point for present purposes, however, I do not believe most arbitrators (especially if they are lawyers) *want* to decide cases this way. They are uncomfortable deciding matters based only on the abstract concept of doing the "right thing," unguided by established principles of law. Instead, they strive to understand what the parties agreed to in their agreement and to determine liability based on that understanding and their application of the substantive rules of law. To arbitrators, that constitutes doing "justice." Therefore, arguments pitched exclusively to fairness and equity are likely to receive a skeptical reception.

For example, in the arbitration I alluded to earlier, the party seeking reformation of the contract introduced an expert who testified that, based on the theory of economic rationality (i.e., that business people act in their own economic self-interest), it did not make any sense for that party to have made the agreement described in the contract as written because it was clearly a money-loser, and hence that the contract should be reformed to what the party claimed was the true intent of the parties. This testimony was unaccompanied by either any satisfactory evidence that the parties had in fact reached a different agreement than that set forth in the written contract, or by the citation of any legal authority that the principle of economic rationality can support a ruling in favor of reformation. Unsurprisingly, the panel held that, even aside from the question of jurisdiction, the party had failed to satisfy its burden of proof on the issue of reformation.

The foregoing does not mean that equities are unimportant. Arbitrators are human, and long to do what is fair. However, it does mean that an advocate must proffer a legally principled route to that "fair" result. Take advantage of the opportunity to submit well-reasoned prehearing and post hearing briefs, supported by citation of relevant legal authorities, to provide the legal framework upon which to build your case, and show how the legal principles apply to the facts.

### Mistake # 5: Focus on Liability and Damages Will Take Care of Themselves

Too often, advocates become so focused on proving or refuting liability that they do not pay enough attention to the question of damages. Respondents are particularly prone to fall into this trap out of fear that proffering an alternative damage theory suggests that they are implicitly conceding liability. This is not a problem unique to arbitration, and can be found in court litigation as well. Regardless of the forum, this attitude can lead to disastrous results. The classic example is the $10.53 billion jury verdict in the Pennzoil-Texaco litigation (subsequently reduced by settlement to a mere $3 billion).

Arbitrators are not jurors, and they are unlikely to view a respondent's alternative damages theory as a concession of liability. Simply attacking the claimant's damages analysis is necessary, but not sufficient. If the respondent fails to put in its own damages case, and if liability is found, the arbitrators will be left with only one side's version of what an appropriate damages award should be. Counsel for a respondent would be well-advised to devote substantial attention to developing and presenting relevant evidence and convincing expert testimony leading to the conclusion that claimant suffered quantifiable damages in an amount substantially less than that sought. Doing so may not only soften the blow of an adverse finding on liability, but may also result in the incidental benefit of calling into question the claimant's entitlement to a finding of liability: if claimant is inflating its requested damages, what else might it be exaggerating?

Claimants are not immune from the temptation to devote insufficient attention to damages. The danger here is not that the arbitrators will be left with a one-sided view of damages, but that they will be unconvinced by the view expounded by the claimant. Even if the respondent fails to put in its own damages case, it is not inevitable that the claimant will get what it asks for simply because it prevails on liability. An arbitrator is not precluded from slashing elements of a requested damages award because she feels that the evidence does not support them, or, for that matter, refusing to award any damages at all because she finds that they are speculative. It behooves claimant's counsel, therefore, to spend the time to develop a valid damages model, to find relevant evidence to satisfy that model, and to select and work with an experienced dam-

ages expert to present a cogent and convincing damages case.

### Mistake #6: Assume That a Tutorial Is Unnecessary Because the Arbitrator Is an Expert

It is commonplace these days for arbitration clauses to specify that arbitrators have certain industry experience or technical backgrounds, and for arbitral organizations to maintain specialty panels of arbitrators with such experience and backgrounds. This is one of the reasons that arbitration often offers a superior dispute resolution mechanism than court litigation.

But just because the arbitrator possesses industry experience or a technical background does not mean that a tutorial may not be useful. If a matter involves complex information technology, for example, the fact that the arbitrator may be an attorney with substantial IT industry experience does not mean she will necessarily have expertise in the specific technical area involved in your arbitration. It may be quite helpful to provide a tutorial for the arbitrator on that specific area as background to her consideration of the evidence and determination of the relevant factual issues.

It is difficult to generalize on the subject of how tutorials should be conducted. Every case is different, and every arbitrator has her own predilections. For me, the chief benefit of a tutorial is to educate me about those aspects of the technology (or other area of specialized knowledge) as to which there is no dispute so that I will be in a better position to evaluate the evidence (including expert testimony) as to those aspects that are in dispute. I do not find it of much value to have two separate tutorials that themselves are in conflict, or that are used *sub rosa* to color disputed questions of fact. If a neutral statement is not possible, I'd rather scrap the idea of a separate tutorial altogether and just hear what the contending experts have to say during their respective hearing testimony.

Fortunately, this should not normally be necessary. Counsel can and should work together to develop a tutorial that is unbiased, technologically sound, and as complete as possible given the factual issues upon which the parties disagree. A tall order perhaps, but one that will pay dividends in terms of streamlining the hearing and providing a better-educated decision-maker.

One way to accomplish this is for the parties to mutually appoint a single expert whose sole function is to provide the tutorial, and who may not be examined about the specific technological issues in dispute in the arbitration. Alternatively, the arbitrator can, in consultation with the parties, appoint an expert to serve the same purpose. Yet another way is for the parties to jointly prepare a written or video description of the technology. This approach may provide a less satisfying tutorial, but has the advantage of avoiding the expense of a separate tutorial expert.

What form should the tutorial take? There are myriad possibilities. These include a live expert lecture, PowerPoint slides, a video presentation, animations, a stipulation of undisputed facts, glossaries, or some combination of these. What works best for any given matter depends on the subject matter, the extent to which the parties agree about the technology, the level of cooperation of counsel, and the preferences of the arbitrator.

Whatever method is chosen, it would be a waste to forgo the opportunity to provide a tutorial in those cases in which it would be helpful to the arbitrator. How do you know if it would be helpful? Listen to see if the arbitrator broaches the possibility or ask the arbitrator yourself.

### Mistake #7: Don't Let the Arbitrator's Silly Questions Get in the Way

We've all been there: you're comfortably into your examination of a witness, proceeding in a logical sequence to establish facts or an expert opinion consistent with your theory of the case, when out of left field, the arbitrator interrupts to ask you a question that (a) jumps ahead to matters you were planning to get to later in your examination, (b) makes no sense to you, (c) reveals a worrisome view of the facts or the law, or (d) raises a problem with your case that you were trying to skirt. While it may be tempting to give short shrift to the question and get back to your examination of the witness, I don't recommend that approach.

One of the advantages of arbitration over jury trials is the opportunity for real time feedback. With a jury, you typically don't know if you are in trouble until the verdict is in, by which time it is too late to do anything. An arbitrator's questions at least give you a hint regarding where her head is at. Use the opportunity to educate your arbitrator. Avoiding an arbitrator's question, or deferring a response, is only going to annoy and frustrate her or, worse, suggest that you are trying to conceal or avoid something.

Deal with the question head on. If the question raises something you planned to cover later with the witness, go with the flow. Respond with something like, "I was planning to get to that a bit later, but let me ask the witness right now." Whatever tactical advantage you had perceived in the planned sequence of your examination, it is outweighed by the value of immediately satisfying the arbitrator's interest or concern. If need be, you can always return to the point again at the time you had originally planned.

If the question does not seem to make sense or is just plain stupid (it happens), you might start with something like, "Could you please ask me that again, so I can make sure I'm answering the right question." If that fails to help, you need to do your best to explain—politely—why, for example, the fact that the respondent is a cat hater is

not legally relevant to the issue of whether he breached a contract to provide outsourcing services. Needless to say, this must be done in a fashion that treats the question as a serious one, and avoids a tone that implies the arbitrator is playing with something less than a full deck.

An arbitrator's question may not be an unintelligent one, but rather suggest that her perception of the facts or the applicable law is one not favorable to your client. Here the response must be two-fold. First, you need to immediately answer the question calmly, succinctly, and in a way that conveys that the facts or the law (or both) actually support your client's position. This requires that you have a detailed command of the facts and the law, and the ability to use them to formulate a cogent answer on the spot. But often this is not enough. The question may be a red flag that the arbitrator has an inclination that must be addressed and overcome in presenting the balance of your evidence and in the post-hearing briefs.

An arbitrator's question may spotlight a hole or weak point in your case. Truth be told, if you have been hiding your head in the sand and have not already dealt with such a hole or weakness before the arbitrator asks the question, you are in trouble. The ostrich-like approach rarely is a wise strategy. You are usually best off acknowledging the problem from the beginning, and having an explanation or rationale worked out to deal with it. Having been upfront with your explanation, the arbitrator's question may never come, but if it does, you will be prepared to respond credibly and in as strong a manner as possible.

### Mistake #8: Never Use One Witness or Exhibit Where You Can Use Two or More

Although counterintuitive, it is frequently true that the evidentiary hearing in an arbitration can last longer than a jury trial of an equivalent case in court. Why? Because overworked judges in busy venues often impose strict limits on the length of trials. It is not unusual for even complex matters, like patent cases, to be tried in four or five days. Arbitrators, on the other hand, are sensitive to the principle of party autonomy and more inclined to be flexible on the question of hearing length if the parties are in agreement. While there is value in having an adequate amount of time to present one's case, there is also the danger that evidence will expand to fill the time allotted. Aside from the waste of unnecessary time and expense, having three witnesses testify to essentially the same thing poses a strategic risk. Almost inevitably, two of the witnesses are going to be weaker than the third, and only result in dissipating the impact of the strong witness. Even worse is the risk that the multiple witnesses will contradict each other, even if only in small ways, either on direct or cross-examination, thereby undermining your case.

The best advice is to go with the fewest number of witnesses possible to make out your case or defense, and those of course should be the strongest of the possibilities, even though that may be an articulate lower level employee rather than a senior executive. I hasten to add that there is at least one exception to this rule. If you are planning to call adverse witnesses on your case in chief, it may be beneficial to call overlapping witnesses for exactly the same reasons you want to avoid doing that with your own witnesses: they may contradict, and thereby impeach, one another.

When it comes to exhibits, there is a kitchen sink approach on the part of many counsel. There will be many large binders (or the electronic equivalent) filled with hundreds of exhibits, generally broken down into joint exhibits, claimant's exhibits, and respondent's exhibits. Typically, only a relatively small percentage of these are referenced in any witness's testimony or even cited in any brief. Apparently, they are there "just in case." Yet counsel almost invariably move that all the exhibits be deemed in evidence.

What is the point? If the document was not important enough to address with a witness, or even cite in a brief, how material to your case can it be? Submitting such documents into evidence is, in effect, asking the arbitrator to do your work for you, and implicitly laying on her the burden to read, interpret, and determine the significance of the documents, unaided by any witness testimony or legal argument. That is, at best, unfair to the arbitrator and, at worst, constitutes a cynical attempt to lay the basis for a manifest disregard argument on a motion to vacate in the event of an unfavorable award. I do not believe an arbitrator has any obligation to consider such documents, and in fact think that attempting to do so is prone to error and borders on inappropriate *ex parte* factual investigation. My own view is that an arbitrator can and should exclude such documents from evidence.[4]

My recommendation to counsel is that they offer in evidence only the documents they actually use, and that they withdraw the unused documents at the end of the hearing or after submission of post-hearing briefs.

### Mistake #9: Give 'em the Ol' Razzle Dazzle

By now, the use of animations, computer-driven presentation systems, projectors, charts, graphs, and all sorts of audio-visual aids during arbitrations is old hat. Sometimes it seems like counsel are competing for the title of "The Greatest Show on Earth." At the risk of sounding like a Luddite, I suggest that you show some restraint in the use of all the fancy technology and colorful graphics. It's not that I am against technology (after all, I concentrate on technology-related matters), it's just that I think overdoing it during the hearing can be distracting and become an obstacle—rather than an aid—to understanding. After all, your goal is to inform and persuade, not to entertain.

The use of technology can definitely serve very useful purposes. An animation illustrating how a complex system or process works, for example, can be extremely helpful to an arbitrator. But sometimes technology does not add much, if anything. It is not particularly helpful, for example, to project on a screen the simple image of a page from a document if, as should be the case, the arbitrator has a copy of the full document in front of her. Indeed, doing so can interfere with the arbitrator's focus. Moreover, the overuse of technology can come across as "dumbing down" your presentation. You picked your arbitrator because of her sophistication and subject matter expertise; don't insult her by acting as if you think you must spoon-feed her your argument.

I suggest you attempt as best you can to assess in advance the arbitrator's preferred method of absorbing information and tolerance for showy displays. Some people learn best by listening, others by reading, and still others by seeing. At the risk of gross overgeneralization, I suspect that in general younger arbitrators are used to receiving information visually, whereas older arbitrators are quite comfortable receiving information through reading and listening. In any event, be judicious in your use of trial presentation technology.

And one more thing: if you are going to use it, make sure in advance it works and that you are fully prepared to integrate it seamlessly into your presentation. Few things are more deflating to counsel and annoying to an arbitrator than having to waste time because of balky technology or an advocate uncomfortable using it.

## Mistake #10: Don't Forget to Pound the Table

Let me conclude with what should be an obvious point. Respect—for the arbitrator, for opposing counsel, for witnesses, and for the process itself—is the key to being an effective advocate.

Some lawyers view arbitration (as well as litigation) as a form of warfare. While there may be some theoretical validity to that analogy (there is, after all, a winner and a loser), my strong advice is: do not go there. Raised voices, *ad hominem* remarks, sarcastic tones, feigned incredulity, and belligerent cross-examinations don't win you any brownie points with the arbitrator. Rather, the opposite is true. As noted earlier, arbitrators are not lay jurors, and they are rarely impressed with theatrics. Moreover, aside from being rude and inconsistent with the notion of arbitration being a business-like means for resolving disputes, such behavior inevitably raises the question whether it is a smokescreen to hide a lackluster case.

Being respectful does not mean counsel cannot be aggressive. To be effective, counsel may have to be aggressive, for example, in cross-examining an adverse witness who is dissembling, evasive, or argumentative. Counsel must be persistent, demand an answer to the question asked, and refuse to let the witness off the hook. However, at the same time, she must be invariably civil and polite. The contrast in demeanor between counsel and the witness will make the cross-examination all the more devastating.

Likewise, respect for opposing counsel does not mean that one should not vigorously object to a clearly inappropriate line of questioning or argue strongly that an opposing party's position is not supported by the facts or the law. In doing so, though, counsel must let clarity of expression, the force of logic, and legal principle carry the day, and not the number of times she can interrupt or belittle her colleague.

Respect for the arbitrator does not mean counsel should be obsequious. Directness and simple courtesy are far more prized by most arbitrators than flattery. Respect means listening to the arbitrator's questions and concerns and attempting to address them head on with logic and law, rather than evade them. If you disagree with the arbitrator, politely tell her so, but be sure to tell her why.

Finally, it should go without saying that counsel should never stretch or shade the truth. If you are discovered, and you probably will be, it is the kiss of death. It can cost your client the case, and severely damage your reputation. Worst of all, it demonstrates disrespect for perhaps the most important person of all, yourself.

## Endnotes

1. One notable exception is the CPR Institute's Rules for Non-Administered Arbitration of Patent and Trade Secret Disputes, which contain a presumptive limit of ten interrogatories.
2. *See, e.g.,* International Institute for Conflict Prevention & Resolution, Administered Arbitration Rules, Rule 11 ("The Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.").
3. I once was taken aback to hear a retired federal appellate judge turned arbitrator say that, as an arbitrator, he strove to do what he thought was "right," even if that meant ignoring the law.
4. My comments do not apply to documents that underlie a summary presented through a witness or documents reviewed by an expert for purposes of formulating an opinion.

# *In Memoriam*

## Hon. Thomas Dickerson
1944-2018

The Hon. Thomas Dickerson, a former justice of the Appellate Division, Second Department, passed away on July 26, 2018.

Readers of this journal are no doubt familiar with Justice Dickerson's numerous articles concerning the legal issues affecting the travel and leisure industry. Indeed, his articles, which ranged from the rights of cruise ship passengers to the rise of Uber to class actions in this arena, frequently appeared in this *Journal*. Justice Dickerson provided our Section with insight into an area of the law not addressed by other *NY Litigator* authors. His contributions will be missed.

Justice Dickerson was born on March 3, 1944, in Lockport, New York, to the late William and Esther Dickerson. He served as an Army paratrooper for the Green Berets during the Vietnam War. He graduated in 1969 from Colgate University and from Johnson Graduate School of Business and Public Administration, Cornell University and Cornell Law School in 1973. Before being appointed to the Appellate Division, he was a justice on the Yonkers City Court, the Westchester County Court and the New York State Supreme Court. He retired from the Appellate Division in 2017. Following retirement, he served as Of Counsel to Hertzfeld & Rubin LLP in Manhattan.

**Daniel K. Wiig**
**Editor**

# The Return of the Chinese Tick Case

By Thomas A. Dickerson

After years of appeals the Chinese Tick case has finally been resolved by the United States Second Circuit Court of Appeals in *Munn v. The Hotchkiss School*,[1] awarded to a student of The Hotchkiss School in Connecticut for injuries she sustained during a school-sponsored educational trip to China where she contracted tick-borne encephalitis during a hike on Mount Panshan in northeast China. "As a result of being bitten by an infected tick... the plaintiff suffered permanent brain damage that has impacted severely the course of her life."[2]

## The Facts

As noted by the court, The Hotchkiss School, is a private boarding school located in Lakeville.[3] Cara L. Munn was a student there and joined an educational trip to China.[4] In July, she contracted tick-borne encephalitis as a result of being bitten by an infected tick during a hike on Mount Panshan and suffered permanent brain damage.[5] At a trial in March 2013 a jury awarded Ms. Munn $10.25 million in economic damages and $31.5 million in non-economic damages.[6]

*"The court held that 'a school having custody of minor children has an obligation to use reasonable care to protect those children from foreseeable harms during school sponsored activities...'"*

## A School's Duty to Warn

The court found that Connecticut public policy properly imposes upon a school that organizes a school-sponsored tour program a duty to warn of foreseeable insect bites such the one experienced by Ms. Munn.[7] In addition, the court held that "The following additional facts that the jury reasonably could have found in support of its verdict are relevant."[8] In the spring of 2007, school officials in charge of cultural programs provided the students who would be traveling to China with information about the trip.[9] The itinerary did not describe Mount Panshan as a forested area requiring protective clothing or insect spray.[10]

## Inadequate Medical Advice

The school emailed students and parents medical advice including "a hyperlink to a United States Centers for Disease Control and Prevention (CDC) website that erroneously directed users to the page addressing Central America, rather than the one addressing China."[11] A packing list provided to the students going on the China trip included "[b]ug spray or lotion (or bug spray wipes)."[12] Unfortunately, the school failed to provide "any warning about insect-borne illnesses, although other health and medical issues, such as immunizations, prescriptions and sexually transmitted diseases, were discussed."[13]

## CDC Webpage Viewed

The school officials in charge of the trip to China contacted the CDC and saw for themselves that "[tick borne] encephalitis occurs in forested regions in northeastern China and in South Korea. Protecting yourself against insect bites (see below) will help to prevent these diseases."[14] A section that followed, captioned "Prevent Insect Bites," instructed travelers to use insect repellent containing the chemical compound DEET and to "wear long sleeves and long pats when outdoors."[15] Notwithstanding this vital information school officials failed to warn parents and students of CDC's advice and recommendations. As a result Ms. Munn and the other students that ascended Mount Panshan were dressed in shorts and T-shirts or tank tops and without insect repellant or protective clothing.[16]

## Special Relationship

The court held that "a school having custody of minor children has an obligation to use reasonable care to protect those children from foreseeable harms during school sponsored activities, including educational trips abroad ... Although we agree that tick-borne encephalitis is not a widespread illness, when it strikes, the results can be devastating.[17] At the same time, some of the measures one might take to protect against it are simple and straightforward—covering exposed skin, applying insect repellant containing DEET, closely checking one's body for ticks and/or avoiding the woods in areas where the disease is known to be endemic."[18]

## Damages

The extraordinary damages awarded Ms. Munn were justified since she cannot speak, has limited dexterity, limited control over facial muscles "causing her to drool, to

The late **Thomas A. Dickerson** was a retired Associate Justice of the Appellate Division, Second Department and the author of Class Actions: The Law of 50 States, Law Journal Press (2018).

have difficulty eating and swallowing and to exhibit socially inappropriate facial expressions...her reading comprehension and math comprehension scores have fallen to the third and first percentiles, respectively...What is the price of relying on your parents to find you a prom date? ... How much money replaces the loss of the joy you felt when playing the piano?...Can you calculate the cost of missing your teenage years, of never maturing socially and emotionally beyond the age of 15?"[19]

## Endnotes

1. *Munn v. The Hotchkiss School*, 795 F.3d 324 (2d. Cir. 2015) (February 6, 2018) affirming trial court decisions on liability and damages of $41.5 million; *Cara Munn, et al. v. The Hotchkiss School*, 24 F. Supp. 3d 155 (D. Conn. 2014); *Orson D. Munn, III, as Parent & Next Friend of C.M. & Ind., Christine Munn, as Parent & Next Friend of C.M. & Ind., Cara L. Munn v. The Hotchkiss School*, 795 F. 3d 324, (2d Cir. 2015) (certified questions to Connecticut Supreme Court); *Orson D. Munn III, et al. v. The Hotchkiss School*, 165 A. 3d 1167 (Conn. Sup. Ct. 2017) (certified questions answered).
2. Hon. Thomas A. Dickerson, *The return of the Chinese tick case: Total award to injured student tourist of $41.5 million affirmed on appeal*, eTurboNews (Jun. 6, 2018), https://www.eturbonews.com/216040/the-return-of-the-chinese-tick-case-total-award-to-injured-student-tourist-of-41-5-million-affirmed-on-appeal.
3. *Munn*, 165 A.3d 1167 at 1172.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 1173.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 1173-74.
17. *Id.* at 1178-85.
18. *Id.* at 1185-86.
19. *Id.* at 1187-91.

# New York PFOA Environmental Tort and Medical Monitoring Class Action Certified

By Thomas A. Dickerson

As part of the recent sea change in the certifiability of mass tort class actions under Article 9 of the CPLR,[1] Rensselaer County Supreme Court Justice Patrick J. McGrath certified a mass tort class action.[2] The *Burdick* action involves groundwater and soil contamination in the town of Petersburgh, New York with perfluorooctanoic acid (PFOA) which came from a facility manufacturing fabrics coated with polytetrafluoroethylene (PTFE or "Teflon"). "Plaintiffs allege that defendant released PFOA which carried through the air and deposited into the soil, which then migrated into the groundwater. Additionally, but to a lesser extent, that defendant directly contaminated the groundwater beneath its facility by the discharge of waste containing PFOA."[3]

## Failure to Reveal High PFOA Levels

In 2004, defendant tested the groundwater underlying its plant and discovered it was contaminated with "high amounts of PFOA." In 2006, defendant installed carbon filtration systems on its wells to reduce the amount of PFOA in the water it used and "began providing bottled water to employees and residents living in homes owned by Defendant...located immediately adjacent to its manufacturing facility. *Defendant did not notify the town or town residents that it had discovered high amounts of PFOA in wells on and around its facility or make any attempt to test the water of any properties other than the handful that it owned.*"[4] It was not until 2016, that the state of New York disclosed that the Petersburgh public water system serving 79 residences and 239 residents was contaminated with PFOA. As a result, Rensselaer County officials began testing and eventually found that over "200 private wells located within a seven mile radius of (Defendant's) facility testing positive for PFOA contamination."[5] Of course, that number may have been considerably lower had defendant disclosed its finding 10 years earlier.

## Consent Order and Blood Testing

In November of 2016 defendant entered into a Consent Order with the New York State Department of Environmental Conservation (DEC) that required it to provide "a granulated carbon filtration system for the Petersburgh Public Water System and point-of-entry treatment (POET) granulated carbon systems for contaminated private wells to reduce levels of PFOA in the drinking water."[6]

The New York State Department of Health (DOH) began offering blood testing for PFOA; some 477 residents were tested and over 400 had PFOA blood levels "above the 2013-14 U.S. general population geometric mean of 1.86 ug/L (parts per billion). Plaintiffs allege that the accumulation of PFOA in the body has been associated in the medical and scientific literature with increased incidence of cancerous and non-cancerous conditions in humans and animals."[7]

## Four Sub-Classes

The *Burdick* action consists of four sub-classes including: (1) Town Water Property Damage Class: real property owners who obtained drinking water from the Petersburgh Public Water System; (2) Private Well Water Property Damage Class: real property owners within a seven-mile radius of defendant's facility who obtain drinking water from privately owned wells contaminated with PFOA; (3) Private Well Nuisance Class: real property owners within a seven-mile radius of defendant's facility who obtain drinking water from privately owned wells contaminated with PFOA; (4) PFOA Invasion Injury Class: all individuals who (a) ingested PFOA-contaminated water from the Petersburgh Public Water System or private wells and (b) who have suffered invasion of their bodies and accumulation of PFOA in their blood as demonstrated by blood serum tests disclosing a PFOA level above 1.86 uf/L.

*"It was not until 2016, that the state of New York disclosed that the Petersburgh public water system serving 79 residences and 239 residents was contaminated with PFOA."*

## Class Identification

In earlier mass tort class actions, the courts were concerned about class identification.[8] In *Burdick*, however, the court found that "plaintiffs have alleged a specific injury to their property, confirmed by objective testing to confirm the presence of PFOA in their soil, water and

The late **Thomas A. Dickerson** was a retired Associate Justice of the Appellate Division, Second Department and the author of Class Actions: The Law of 50 States, Law Journal Press (2018). Mr. Dickerson appeared as an expert witness on behalf of the *Burdick* plaintiffs.

wells…Defendant does not contest that it was the cause of contamination."[9] Regarding the bodily invasion subclass,[10] the court held that "plaintiffs have all demonstrated that they were in fact exposed to PFOA, and have clinically demonstrated the presence of PFOA in their blood serum, above background levels."[11]

## Commonality

The defendant having conceded numerosity (901(a)(1)) and adequacy of representation (901(1)(4)), the court focused upon commonality (901(a)(2)), typicality (901(a)(3)) and superiority (901(a)(5)). As for the predominance of common questions of law or fact the court noted that differing damages amongst class members is not dispositive and "'will not prevent the suit from going forward as a class action if the important legal and factual issues involving liability are common to the class.'"[12] The court also noted that the "'fundamental issue under CPLR 901(a)(2) is whether the proposed class action asserts a common legal grievance'" and relying, *inter alia*, upon *Deluca*, *supra* ("plaintiff established that there are common questions of law or fact whether defendants negligently discharged chemicals into the atmosphere and whether such negligent conduct caused decreases in property values or quality of life") found that "the central factual basis for all of Plaintiff's claims is defendant's course of conduct and its knowledge of the potential hazards. All class members allegedly suffered a common injury-soil and water contamination (from) PFOA. The method of contamination is uniform. It is defendant's common course of conduct which caused injury to all of the proposed members of the property damage/nuisance classes."[13]

## *Osarczuk* and *Evans* on Causation

The court also distinguished *Osarczuk v. Associated Univs., Inc.*,[14] and *Evans v. Johnstown*.[15] As for *Osarczuk*,[16] the court found causation from "one chemical, emanating from one source has contaminated all of the properties."[17] And as for *Evans*,[18] the court found that "plaintiffs have alleged a specific injury to their property, confirmed by objective testing to confirm the presence of PFOA in their soil, water and wells."[19]

## Medical Monitoring

Although the court in *Askey*, *supra* note 8, in 1984 seemed inclined to certify a medical monitoring class,[20] it declined to certify such a class because of a lack of class identification. In *Burdick*, the court found "[t]he medical monitoring issue affecting the entire putative class is based upon the common and overriding fact of an above background level of PFOA exposure caused by a single source by a defined method at a level which Plaintiffs allege will significantly increase their risk of the development of numerous health conditions."[21] This medical monitoring class action certification is the first in New York State under CPLR Article 9.

## Conclusion

Although it has taken some 40 years for the courts to fulfill the promise of the legislative history of CPLR Article 9,[22] the *Burdick* decision is refreshing, indeed, and consistent with the recent decisions of the Court of Appeals in *Borden* and the Appellate Divisions in the First Department in *Roberts*, *supra*, and the Fourth Department in *DeLuca*, *supra*.

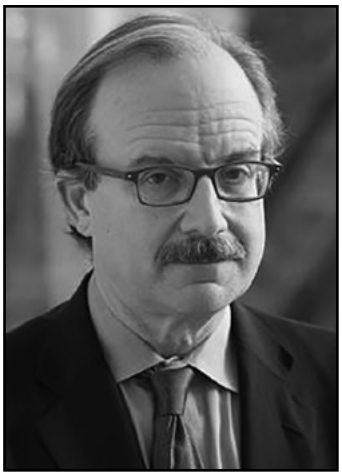
## Endnotes

1. *See* Thomas A. Dickerson, *NY Mass Tort Class Actions: A Sea Change*, Law.com, July 29, 2018, www.law.com/newyorklawjournal/2018/06/29/070218ny_dickerson/?slreturn=20180708180725.
2. *Burdick v. Tonoga, Inc.*, 2018 N.Y. Slip Op. 51075(U) (Rensselaer Sup. July 3, 2018), relying upon, *inter alia*, *Borden v. 400 E. 55th St. Assoc., LLP*, 24 N.Y.3d 382 (2014); *DeLuca v. Tonawanda Coke Corp.*, 134 A.D.3d 1534 (4th Dep't 2015) (air pollution); *Roberts v. Ocean Prime LLC*, 148 A.D.3d 525 (1st Dep't 2017) (flooding); *Menna v. Maiden Land Props., LLC*, 2018 N.Y. Slip Op. 30721(U) (N.Y. Sup. Ct.) (flooding).
3. *Burdick*, 2018 N.Y. Slip Op. 51075(U) at 2.
4. *Id*. (emphasis added).
5. *Id.* at 3.
6. *Id*.
7. *Id*.
8. *See, e.g.*, *Wojciechowski v. Republic Steel Corp.*, 67 A.D.2d 830 (4th Dep't 1979) (air pollution) ("the class has not been and cannot be described with certainty"); *Askey v. Occidental Chemical Corp.*, 102 A.D.2d 130 (4th Dep't 1984) (toxic waste dump) (failure to "provide the needed factual basis for identifying a genuine class"; "no way to determine...those persons who may need medical monitoring").
9. *Burdick*, N.Y. Slip Op. 51075(U) at 5.
10. (Distinguishing *Rowe v. E.I. DuPont de Nemours & Co.*, 2008 WL 5412912 (D.N.J. 2008)) (PFOA) (no evidence of what constitutes "significant exposure").
11. Citing *Abusio v. Consol. Edison Co.*, 656 N.Y.S.2d 371 (2d Dep't 1997), quoting *Wolff v. A-One-Oil, Inc.*, 216 A.D.2d 291 (2d Dep't 1995) (plaintiff must establish "that he or she was in fact exposed to [a] disease-causing agent and that there is a 'rational basis' for his or her fear of contracting the disease").
12. Citing *inter alia*, *Borden*, *supra* note 2, *DeLuca*, *supra* note 2.
13. *Burdick*, N.Y. Slip Op. 51075(U) at 6.
14. 82 A.D.3d 853 (2d Dep't 2011) (toxic emissions).
15. 97 A.D.2d 1 (3d Dep't 1983) (sewage plant).
16. "Questions of whether the emissions of various toxic materials, over several decades, from various sources and in various ways caused injury."
17. *Burdick*, N.Y. Slip Op. 51075(U) at 5.
18. "Main issues of whether a specific injury to property or persons was caused by the sewage plant."
19. *Burdick*, N.Y. Slip Op. 51075(U) at 5.
20. "The novel issue presented is whether those persons who have an increased risk of cancer, genetic damage and other illnesses by reason of their exposure to the toxic chemicals emanating from the landfill, but whose physical injuries are not evident, should be certified as a class for the purpose of determining their right to recover the costs of future medical monitoring services to diagnose warning signs of the development of diseases."
21. *Burdick*, N.Y. Slip Op. 51075(U) at 11.
22. "Mass exposure to environmental offences." *See* Dickerson, *New York State Class Actions: Make It Work, Fulfill the Promise*, Vol. 74.2 at 711-729 (2010), which details the disappointing history of Article 9 of the CPLR from its enactment in 1975 to 2010.

# When Experts Come From Different Planets: Finding the Difference Driving Seemingly Irreconcilable Expert Evidence in Arbitration

By Theodore K. Cheng and Sherman Kahn

Theodore K. Cheng



Sherman Kahn

Expert opinion evidence is a necessary part of many arbitrations that involve technical subject matter or require decisions on disputed issues of economics, accounting, or other specialized subject matter. With each party retaining its own expert witness, parties and their counsel sometimes push their respective expert witnesses to extremes in support of their positions. To the arbitrators, it often seems like the expert witnesses are coming from different planets. When this occurs, it can be difficult for arbitrators to resolve the matter because the experts have not given the arbitrators sufficient or adequate information—or even the correct information—from which to bridge the gap between the expert's opinions and reach the right result. Leaving the arbitration panel without sufficient tools to effectively resolve the case adds uncertainty and risk to the process. The authors note that the same problems often arise in court litigation, but write this article from their perspective as arbitrators.

When expert testimony is so affected by advocacy as to lose its ability to be considered credible, an arbitrator otherwise sympathetic to a party on the merits may be unable to provide the party its requested relief. Expert testimony that is insufficiently explained or supported leaves the arbitrator with no choice but to reject the testimony. What can be done when the proceeding is faced with the submission of expert reports and/or testimony that appear to be irreconcilable? What can arbitrators and counsel do when confronted with that situation, and, perhaps more important, what can they do to prevent that situation from ever occurring in the first place?

This article will explore some tools and techniques that arbitrators and counsel may wish to use to ensure that the presented expert opinion evidence is useful and to help the arbitrator find the common ground in seemingly irreconcilable expert testimony. These tools can help arbitrators efficiently and effectively analyze expert evidence to identify the real points of controversy and efficiently reach the correct result on the merits. Along the way, this article will also highlight considerations to keep in mind to enable the arbitrators to fully utilize the expert evidence that is being presented.[1]

This article is organized loosely according to the typical stages of an arbitration proceeding, starting with the preliminary conference, moving on to the evidentiary hearing, and then, finally, to the preparation of the award.

## I. Expert Evidence Considerations in the Preliminary Stages

At the outset, it is important for arbitrators and counsel to recognize when expert testimony is necessary or helpful. The obvious situations might be where scientific, technical, or other specialized subject matter is anticipated to be addressed during the evidentiary hearing.[2] Disputes heavily steeped in industry custom and practice or jargon are also likely candidates for expert opinion testimony. In addition to the presentation of technical or scientific evidence, economics, accounting, valuation of property or business assets, and various damages theories frequently lend themselves to the use of expert witnesses.

Counsel will be more persuasive (and, thus, more effective) if the arbitrators are comfortable with the technical evidence and understand the key definitions. Counsel should come to the preliminary hearing prepared to have a realistic discussion about the nature and amount of expert testimony that is expected to appear in the proceeding. They should be prepared to advise the panel regarding how expert evidence may help the arbitrators decide the case and, thereafter, work with the arbitrators to develop a procedure for the presentation of expert evidence that will advance the resolution of the matter. Specifically, counsel should be prepared to discuss how to best present written summaries of expert opinions. Counsel should be willing to explore methods to enable opposing experts to access and manipulate their opponent's data; be prepared to discuss any procedures for the exchange of expert evidence; strongly consider using rebuttal reports to enable the experts to respond to one another's positions; and always consider how to ensure that the panel will understand the experts' opinions.

Certainly, arbitrators do not want their deliberations hampered, in any way, by a misunderstanding or a lack of understanding of the important technical evidence that may arise during the pendency of the case. Thus, arbitrators should affirmatively raise the issue of expert testimony with the parties and their counsel during the preliminary hearing, soliciting their input and views on the extent to which expert testimony will be helpful. They should also encourage the disclosure of expert opinions in advance through some orderly mechanism (such as the exchange of expert reports) and consider asking for rebuttal reports from each side. Arbitrators should also manage the process of exchanging these reports through careful scheduling to ensure that the opinions are fully fleshed out in the written work-product. The arbitrators should, of course, review the reports before the evidentiary hearing, with the objective of endeavoring to absorb the technical information in advance, identifying areas of commonality and divergence, and preparing any questions for possible use at the evidentiary hearing. All of the foregoing can be set forth in detail in the scheduling order that emerges from the preliminary hearing so that the exchange and development of expert evidence is well-handled. Doing so will also provide a mechanism for the parties to involve the panel if the exchange of expert evidence should somehow break down.

## II. Preparing for the Evidentiary Hearing

Because the evidentiary hearing is the main event, during the final pre-hearing conference the arbitrators and counsel should discuss the presentation of expert testimony, exploring issues such as the timing of expert witnesses (i.e., witness order), the possibility of presenting a pre-hearing tutorial for the benefit of the panel, and the method of delivering the experts' testimony. Counsel should think well in advance about how expert testimony can assist the panel to understand the case. In particular, consideration should be given as to what presentation format will place the panel in the best position to fully consider the expert evidence that is being presented.

In a technology-laden case, consideration could be given as to whether a separate pre-hearing technology tutorial might assist the panel. Such a tutorial can be included in the parties' pre-hearing submissions or as a stand-alone presentation with slides and handouts. Tutorials can be presented by an outside or in-house technical expert, or even counsel with a technical background. To avoid unnecessary disputes over basic, foundational information, the contents of the tutorial may be agreed upon by counsel in advance, focusing on the technical issues that either counsel want to explain to the panel or that the panel has indicated that it wants explained. A pre-hearing tutorial, however, is not the appropriate time to deliver another opening statement to a party's evidentiary hearing; nor is it intended to be focused on the legal positions that a party will take during that hearing. It is meant to be a useful, educational tool designed to assist the panel in comprehending and distilling the technical aspects of the case so that those issues are better handled at the evidentiary hearing. In that regard, counsel might seek guidance from the panel about linking the tutorial to the disputed claims without too much advocacy about a party's position on the legal issues.

There are also many variations on how expert witnesses may deliver testimony.[3] Aside from the traditional direct examination followed by a cross-examination, there are other options that may result in significant savings of time and cost and/or be more suitable based upon the nature of the technical evidence being presented. For example, because direct examinations are frequently well-rehearsed and planned presentations of the expert witness' report, counsel can consider submitting the expert's report itself in lieu of presenting a live direct examination, and then permit the expert to be cross-examined by opposing counsel. Moreover, if the expert's testimony will include a lot of jargon or acronyms, counsel might consider providing a glossary and collaboratively working with the arbitrators in their efforts to fully understand the expert evidence. For their part, the panel should consider the wide discretion afforded to them under most provider rules so as to take advantage of the flexibility in arbitration to fashion a cost-effective and expeditious proceeding.[4] They should also consider *in camera* the extent of the questioning they intend to pursue during the evidentiary hearing, as well as the respective roles of the panel chair and wing arbitrators during the parties' presentations.

*"In a technology-laden case, consideration could be given as to whether a separate pre-hearing technology tutorial might assist the panel."*

## III. Tools for Finding Common Ground at the Evidentiary Hearing

Where the parties are presenting competing expert opinion evidence, the authors recommend that the arbitration panel employ tools that find any common ground between the seemingly disparate positions articulated by the parties. Technical experts usually testify based upon scientific or industry expertise and, within a given scientific discipline, employ certain agreed-upon principles.

For example, it is unlikely that most experts would find disagreement about the laws of physics; even economists often agree on basic methodology. It is, however, the *application* of the relevant laws or methodology that is the source of the seemingly irreconcilable differences that emerge when the parties present their respective expert opinion evidence. Identifying common ground enables the arbitrators to find which element(s) of the experts' analysis are driving that difference.

In many cases there are a limited number of factors driving the differences in expert opinions. In general, experts value their reputations, and most reputable experts adhere to established methodologies. Careful and incisive work by the arbitrators can expose a remarkable amount of agreement among even the most contentious experts. Doing so effectively requires the arbitrators to actively engage with the evidence and expose the various positions to better identify and isolate those areas of common ground.

Take, for example, a case in which competing expert witnesses will be presenting evidence on the value of a manufacturing business. In this example, the experts generally agree that the business should be valued based upon the value of the real estate and the physical plant, along with a discounted value for the business' future revenue. Yet, the experts reach radically different valuation conclusions. This happens because their other assumptions may differ markedly. The job of the arbitration panel is to identify which assumptions are driving the difference. In the example, the arbitration panel can identify the source of the difference by looking at the following questions:

- Do the experts agree on the value of the real estate and/or the physical plant?
- Do the experts agree on the methodology for depreciation?
- Do the experts agree on the plant's production estimates?
- Do the experts agree on the plant's capacity?
- Do the experts agree on the discount rate?
- Do the experts agree on the future market conditions?

If the experts approach even one of these assumptions differently, this difference may ultimately lead to the expert witnesses setting forth highly divergent and, sometimes, irreconcilable opinions. If the arbitrator can isolate which of the assumptions is driving the difference, the arbitrator will be better positioned to resolve the issue(s) accurately and fairly based upon the evidence.

Arbitrators may employ a variety of techniques to uncover the experts' points of agreement and disagreement. One such technique that arbitrators and counsel can consider is the "hot tubbing" of experts (also known as "concurrent evidence"), which can include a situation where the expert witnesses are sworn and provide their testimony at the same time, often sitting together at a table or in the witness box. The experts may then challenge and question one another, and the panel often questions the witnesses directly, thereby stimulating a near-direct dialogue between the experts and the panel, with counsel sometimes limited to stating objections.[5]

There are many varieties of hot tubbing, the full explanation of which is beyond the scope of this article. However, one way in which hot tubbing may be accomplished is to follow these steps: (1) the arbitrators identify the issues to be addressed and apprise the experts; (2) with both experts present, one of them addresses the first issue; (3) the other expert may then provide a counter-opinion on that same issue; (4) the arbitrators then ask their questions; (5) each side then separately questions one or both experts; and (6) the arbitrators return for further questions, and counsel ask any last clarification questions.

This technique is frequently discussed in the literature (particularly with respect to international arbitration), but is rarely used in U.S. domestic arbitration, more likely than not due to domestic counsel's relative lack of familiarity with the technique and their discomfort at losing some degree of control during the process. Joint testimony, though, allows arbitrators and counsel to question the experts with immediate input from the other expert(s). It also allows the experts themselves to directly challenge each other's evidence and can enable arbitrators to more easily identify and focus in on the key issues in a case.

Another technique that arbitrators and counsel can consider is to agree to hold a pre-hearing expert meeting. Sometimes considered an offshoot of hot tubbing, the experts would meet prior to the evidentiary hearing, without counsel present, to pinpoint the areas of disagreement and discuss the relevant issues. The arbitrators would set a time by which the parties' experts are to meet and identify their points of agreement or common assumptions. The experts would then be asked to submit a joint written report to the arbitrators identifying those points.[6]

A variation on this type of meeting is to identify shared assumptions at the evidentiary hearing itself by scheduling an expert-to-expert colloquy at the hearing.[7] The arbitrators ask the experts to briefly supplement their written reports in each other's presence. The experts then discuss their differences in front of the panel to see if they can come to an agreement or better clarify the issues. This is then followed by having the arbitrators (and not counsel) examine the experts. The arbitrators' approach is usually different from counsel's approach because the arbitrators have no preconceived notions about the case. They tend to see inconsistencies, omissions, or outright mistakes—often overlooked by counsel—and can afford the experts an opportunity to explain them away. Obvi-

ously, an examination of the experts, either separately or jointly, presents distinct advantages and disadvantages, which the arbitrators and counsel should discuss in advance of the evidentiary hearing.

Ultimately, all of the foregoing techniques are designed to focus the inquiry on determining what is driving the difference among the experts, to crystallize the disputed issues and assist the arbitrators to reconcile what, on its face, appears to be irreconcilable expert opinion evidence. Any questions posed by the arbitrators should be to obtain a better understanding of the case and not, of course, to assist one or the other party in the presentation of its case.

These techniques can help the tribunal identify the variables in the analysis about which the experts really disagree. For example, returning to the manufacturing valuation case above, if it turns out that the difference between the experts is driven by market assumptions and an assumed discount rate, the arbitrators can then assess those elements free from the noise introduced by the other, essentially undisputed, assumptions adopted by the experts in their opinions.

## IV. The Post-Hearing Phase

After the evidentiary hearing is over, the case is largely in the hands of the arbitrators. But in large, complex, and technology-laden cases, it may be useful to provide for post-hearing briefing and/or oral argument. In such post-hearing submissions, it is incumbent upon counsel to tie together the disparate elements of the presentation at the evidentiary hearing, including the portion relating to expert testimony evidence, and give the arbitrators the tools they need to resolve the case. Counsel should seek to bridge seemingly irreconcilable expert testimony gaps for the panel during this post-hearing phase. For example, if there was testimony about a test and its results, counsel should explain what they want the panel to understand about the test and the results as it supports proof of the claims or defenses. The parties should explain what the technical evidence demonstrated and how, including providing testimonial and documentary references from the record.

Linking the technical evidence to proof of the elements of the disputed claims and defenses provides necessary and valuable context for the arbitrators. Providing a roadmap of the key technical evidence/events (*e.g.*, product development and/or testing, design/construction of building, etc.) can also be enormously helpful in marrying that technical evidence with the other non-technical evidence adduced at the hearing. It is also always helpful to provide the arbitrators with copies of the slides and/or handouts that the arbitrators can take with them for use in their deliberations and award-writing.

For their part, arbitrators should let counsel know the technical issues that they consider important and where they would like the parties to address the technical evidence and issues. Arbitrators need to be clear and specific about what issues should be briefed so as to provide the necessary guidance during this final advocacy stage of the proceeding. If the panel has actively worked at the hearing to identify common ground and the issues driving the differences, they should be in a good position to ask the right questions to be addressed in the parties' post-hearing submissions, and, ultimately, arrive at the right result.

## Endnotes

1. The authors previously presented a webinar version of this article for the American Arbitration Association, a recording of which is available at https://www.adreducation.org/courses/when-experts-come-from-different-planets-tips-for-maximizing-the-value-of-experts/17prw012/.
2. *See* Patricia D. Galloway, *Using Experts Effectively & Efficiently*, Dispute Resolution Journal (Aug./Oct. 2012), at 27 ("The purpose of expert reports and testimony is to assist the arbitration panel's deliberations and specifically facilitate the panel's understanding of the technical issues.").
3. *See, e.g.*, George Ruttinger and Joe Meadows, *Using Experts in Arbitration*, Dispute Resolution Journal (Feb./Apr. 2007), Vol. 62, No.1, at 48 (discussing effective expert presentation).
4. *See* Galloway, *supra* note 2, at 28 (discussing how established arbitral institutions have rules and procedures to afford arbitrators wide discretion in the conduct of the proceeding and encourage processes that are cost-effective and efficient).
5. *See generally* J. Christian Nemeth and Lisa Haidostian, *The 'Hot Tub' Method of Taking Expert Testimony Is Gaining Steam: What You Need to Know*, Arbitration News (Feb. 2014), at 91; Galloway, *supra* note 2, at 33-34.
6. *See* Nemeth and Lisa Haidostian, *supra* note 5, at 91.
7. *See* Galloway, *supra* note 2, at 30-33 (discussing the practice of a joint expert meeting).

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# International Litigation: Recognition of Foreign Country Money Judgments and the Jurisdictional Nexus

By Clara Flebus

## I. Introduction

In a recent decision, *AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A.*,[1] the Appellate Division, First Department revisited the issue of whether personal jurisdiction over a judgment debtor in New York is required in an action for recognition of a foreign country money judgment pursuant to Article 53 of the Civil Practice Law and Rules.[2] First, the appellate court held that the *Daimler* restriction of general personal jurisdiction to states where a corporation is "at home" does not apply in the context of an action to recognize or enforce a previously rendered foreign judgment. Second, the court clarified that when a judgment debtor asserts substantive statutory grounds to deny recognition, there must be either an *in personam* or an *in rem* jurisdictional basis for maintaining the action. *AlbaniaBEG* distinguished prior case law on this issue, which held that no jurisdictional nexus was necessary, as applicable only where the judgment debtor does not raise any defenses to recognition available under Article 53.

New York has been traditionally considered "a generous forum" in which to enforce money judgments rendered by foreign courts.[3] Foreign judgments granting or denying recovery of a sum of money are recognized in New York based on the doctrine of comity and pursuant to the principles and procedures set forth in Article 53, which codified existing case law and was designed "to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement [in New York]."[4] Article 53 applies to judgments that are "final, conclusive and enforceable where rendered."[5] CPLR 5304(a) sets forth two mandatory grounds for nonrecognition. A foreign judgment "is not conclusive" and thus cannot be recognized if: (1) "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process;" or (2) "the foreign court did not have personal jurisdiction over the defendant."[6] The next subsection, CPLR 5304(b), sets forth eight discretionary grounds upon which the court may deny recognition. Relevant to the *AlbaniaBEG* case, the statute provides, *inter alia*, that a judgment need not be recognized if it conflicts with another final and conclusive judgment (CPLR 5304[b][5]), is repugnant to the public policy of New York (CPLR 5304[b][4]), or resulted from a proceeding that was contrary to an agreement between the parties providing that the dispute was to be settled in a different venue than the foreign court (CPLR 5304[b][6]). Notably, Article 53 does not provide for nonrecognition on the ground that the New York court lacks personal jurisdiction over the judgment debtor.

## II. Background

In 2000, two Italian companies, Becchetti Energy Group S.p.A. (BEG) and Enelpower S.p.A, a subsidiary of Enel S.p.A., which is Italy's largest power company, entered into an agreement to develop a hydroelectric power plant in Albania, pursuant to a concession previously granted to BEG by the Albanian government. The agreement was governed by Italian law and provided for the resolution of any disputes by arbitration in Rome. Subsequently, Enelpower withdrew from the agreement (based on its alleged contractual right of withdrawal) after concluding that the project was not feasible, and the parties' relationship broke down. BEG then commenced arbitration proceedings in Rome claiming breach of contract and bad faith. In 2002, the arbitration panel rendered an award dismissing BEG's claims. BEG sought to vacate the award in the Italian courts. However, BEG's application was rejected by a judgment of the Rome Court of Appeals in 2009, which was later affirmed by the Supreme Court of Italy in 2010.[7]

After BEG lost the arbitration, its Albanian subsidiary, AlbaniaBEG Ambient Sh.p.k. (ABA), which was created to hold the concession, filed an action against Enelpower and Enel in the Tirana District Court (Albania), asserting tort and unfair competition claims. ABA argued that its claims were not barred by the arbitration agreement and subsequent award because it was not a party to that agreement, it did not participate in the arbitration, and its claims did not have a contractual basis. In 2009, the Albanian court issued a judgment in favor of ABA, awarding it Euro 25,188,500 in damages for the year 2004, plus a damages amount to be calculated according to a specified formula for the years 2005-2011. The judgment was affirmed by the Tirana Court of Appeals and the Supreme Court of Albania refused to entertain a further appeal.[8]

## III. The Proceedings in New York

In 2014, ABA commenced an action in New York County Supreme Court against Enel and Enelpower seeking recognition and enforcement of the Albanian judgment in the sum of Euro 433,091,870 (approximately U.S. $500 million),[9] alleging it arrived at that amount using the formula set forth by the Albanian court. The defendants moved to dismiss the action, *inter alia*, for lack of personal jurisdiction and noted that, if the motion was denied, they intended to raise several mandatory and discretionary grounds for nonrecognition pursuant to Article 53. The defendants' counsel represented that Enel and Enelpower did not conduct any business in New York nor had any property in the state. Counsel argued that under the *Daimler* standard, the defendants were not subject to general

jurisdiction in New York because they were neither organized nor headquartered in New York. Plaintiff's counsel conceded that defendants had "no known presence" in New York.[10] Relying on the prior case of *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contr. & Fin. Servs. Co.*,[11] which domesticated an English judgment against a foreign party, the motion court denied dismissal, holding that ABA could maintain the recognition and enforcement action even if the defendants were not subject to jurisdiction nor had property in New York.[12] The Appellate Division reversed.

### A. *Daimler* Does Not Extend to Actions for Recognition of Foreign Judgments

In *Daimler AG v. Bauman*,[13] the U.S. Supreme Court limited the scope of general "all-purpose" jurisdiction over a foreign corporation defendant to instances in which the corporation's affiliations with the state are so continuous and systematic as to render it essentially "at home" in the forum, clarifying that the place of incorporation and principal place of business are paradigm bases for general jurisdiction.[14] At issue in *AlbaniaBEG* was whether the *Daimler* jurisdictional standard required dismissal of the Article 53 action because the defendants were entities incorporated under Italian law with their principal places of business in Italy and the claims upon which the Albanian judgment was based had no connection with New York. The Appellate Division observed that *Daimler* addressed the question of constitutional requirements for jurisdiction to adjudicate a claim on its merits in a plenary action, and not an action to recognize and enforce an already existing foreign judgment. Relying on the seminal case of *Shaffer v. Heitner*,[15] the appellate court pointed to a distinction between jurisdictional standards for plenary actions and those for recognition and enforcement actions, suggesting that the *Daimler* restrictions on general jurisdiction should not apply in the recognition context. In *Shaffer*, the U.S. Supreme Court preserved asset-based jurisdiction for actions to enforce judgments, noting that:

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.[16]

The appellate court further relied on *Shaffer*'s consideration that "a wrongdoer 'should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit.'"[17] Thus, in *AlbaniaBEG*, the Appellate Division took the position that *Daimler* is not controlling in an action to recognize a foreign judgment pursuant to Article 53.

### B. *Abu Dhabi* Applies Only Where the Judgment Debtor Does Not Assert Statutory Grounds for Nonrecognition

The Appellate Division then turned to the question of what jurisdictional principles govern Article 53. *Abu Dhabi*, a prior case addressing recognition of foreign judgments, had held that "a party seeking recognition in New York of a foreign money judgment … need not establish a basis for the exercise of personal jurisdiction over the judgment debtor by the New York courts."[18] In *Abu Dhabi*, a bank incorporated in the United Arab Emirates sought to enforce a judgment of the English High Court of Justice against a Saudi Arabian limited partnership.[19] The judgment debtor moved to dismiss the action on the ground that the New York court lacked personal jurisdiction, but did not raise any of the defenses to recognition set forth in Article 53. The *Abu Dhabi* court observed that Article 53 satisfies constitutional due process standards by requiring a showing that the foreign court was impartial and followed basic due process principles in rendering the foreign judgment.[20] *Abu Dhabi* concluded that the New York court should not be required to grant further protection during a recognition/enforcement action, which was characterized as a "ministerial" function.[21]

Unlike *Abu Dhabi*, the defendants in *AlbaniaBEG* raised several mandatory and discretionary nonrecognition grounds, specifically alleging that: Albania did not provide impartial tribunals or procedures compatible with due process; the Albanian judgment conflicted with the prior final Italian judgment; the Albanian action was contrary to the parties' agreement pursuant to which the dispute was to be resolved by arbitration in Italy; and the Albanian judgment was repugnant to New York's strong public policy in favor of arbitration because it circumvented the prior arbitration agreement.[22] The defendants also argued that the judgment was not conclusive because it was not for the recovery of a sum of money, but rather it set forth a formula to calculate the amount to be recovered through additional litigation.[23] The Appellate Division reasoned that since in this case "there is something to defend and the court's function ceases to be merely ministerial," requiring the defendants to litigate substantive issues in a forum where they had no contacts or property would "offend [the] traditional notions of fair play and substantial justice" that are at the heart of constitutional due process.[24] Finding that the record did not establish either an *in personam* or *in rem* jurisdictional predicate, which was deemed necessary under the circumstances, the court dismissed the recognition action.

## IV. Conclusion

The *AlbaniaBEG* decision provides useful guidance regarding the jurisdictional requirements to maintain actions for recognition of foreign judgments in New York. These types of actions are limited in scope and involve few statutory defenses. It would be onerous for a judgment debtor to litigate those defenses in any forum in

which the judgment creditor might decide to commence a recognition action, regardless of whether the debtor had some connection to the forum. On the other hand, the strict *Daimler* general jurisdiction standard may prevent judgment creditors from having the judgment satisfied because the debtor's assets could be located in states where the debtor is not at home. Regarding the latter point, it should be noted that the Second Circuit applied *Daimler* to resolve an action for confirmation of an international arbitral award against a foreign corporation in *Sonera Holding B.V. v. Cukurova Holding A.Ş.*[25] The Second Circuit found that the award debtor's contacts with New York fell short of those required to render it "at home" in the forum and directed the District Court to dismiss the case for lack of personal jurisdiction.[26]

## Endnotes

1. *AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A.*, 160 A.D.3d 93 (2018), *rev'g* 2014 WL 5364093 (N.Y. Sup. Ct. 2014).
2. CPLR Article 53, entitled "Recognition of Foreign Country Money Judgments," essentially adopts the Uniform Foreign Country Money-Judgments Recognition Act (*see* CPLR 5309).
3. *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 221 (2003).
4. *Id.*
5. CPLR 5302.
6. CPLR 5304(a)(1) and (2).
7. *See AlbaniaBEG*, 160 A.D.3d at 95.
8. *See id.* at 95-96.
9. Currency conversions made on August 21, 2018.
10. *AlbaniaBEG*, 160 A.D.3d at 96.
11. *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contr. & Fin. Servs. Co.*, 117 A.D.3d 609 (2014).
12. *AlbaniaBEG*, 160 A.D.3d at 96-98.
13. *Daimler AG v. Bauman*, 571 U.S. 117 (2014).
14. *Id.* at 137-39.
15. *Shaffer v. Heitner*, 433 U.S. 186 (1977).
16. *Id.* at 210, n. 36.
17. *Id.* at 210, quoting Restatement (Second) of Conflict of Laws § 66, Comment *a* (1971).
18. *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contr. & Fin. Servs. Co.*, 117 A.D.3d 609, 611 (2014).
19. *Id.* at 609-10.
20. *Id.* at 612.
21. *Id.* at 613.
22. *AlbaniaBEG*, 160 A.D.3d at 100.
23. *Id.* at 101.
24. *Id.* at 108, quoting *International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted).
25. *Sonera Holding B.V. v. Cukurova Holding A.Ş.*, 750 F.3d 221 (2nd Cir. 2014).
26. *Id.* at 226-27.

# Administering Financial Antitrust Settlements Involving Complex Financial Instruments and Related Markets

By Loree Kovach and Lauren McGeever, Epiq

Since the financial crisis in 2009, there has been a significant influx in litigation related to an emerging class of antitrust matters that counsel on both sides of the bar know relatively little about: matters involving complex financial products and related markets.

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These hybrid matters, a unique combination of securities and antitrust litigation stemming from the manipulation of various exotic financial instruments, including but not limited to foreign exchange, swaps, options, futures and derivatives, have resulted in record-breaking settlements. Consider the $1.8 billion settlement awarded in the *In re Credit Default Swaps Antitrust Litigation,* one of the largest private antitrust settlements in United States history originating from accusations that 12 major banks violated antitrust laws by fixing prices and restraining competition in the credit default swaps market. Or the $2 billion settlement in the *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, alleging that 15 banks conspired to fix FX Benchmark Rates.

Early administrations of these record-breaking settlements, many of which have been approved by the court only in recent years, illustrate the material distinctions between traditional securities administrations and complex financial antitrust settlements. Here we explore where these hybrid settlement administrations diverge from traditional securities matters, providing an in-depth look into the impact those differences have for counsel and class members throughout each phase of settlement administration.

## Data Collection + Transfer

In a traditional securities matter, claims administrators do not know the identity of potential claimants, nor is eligible transaction data made available to them at the outset of the administration. As a result, preliminary notice is circulated to banks, brokers, third-party filers, proprietary databases as well as posted to DTC LENS to advise potential claimants of the pending action and, ultimately, secure transactional data for processing. Banks, brokers, and defendants may advise the administrator of potential claimants, providing names and contact information for the administrator to conduct direct noticing. Alternatively, these entities may elect to receive bulk notices from the administrator to circulate notice to their stakeholders directly, or may file electronically on behalf of potential claimants.

Financial antitrust matters require a markedly different process. Administrators often receive claimant contact information and transactional data from external sources, including clients, counsel, defendants, other financial institutions, or the DTCC, creating several unique challenges. First, the formatting of those data sets varies by source, and data sets themselves are extremely voluminous, making it difficult to transmit by Excel, the preferred format in traditional securities cases. Further, the source data typically includes irrelevant data points, incorrect or outdated claimant contact information, and may overlap with data received by other sources. In addition, the use of intermediaries such as prime brokers in executing transactions may make identification of the class member counterparty to a transaction difficult.

Perhaps most challenging, the transaction types, which vary by case, are not easily identifiable. In one matter, the transactions might be trade, termination, assignment, or bespoke; in another, they might be futures, swaps, spots, forwards, or options, to name a few. Because different types of transactions are valued differently, the administrator must have thorough transaction records, which are often difficult for filers to identify in their records.

The complex nature of financial antitrust cases mandates that user-submitted data adheres to a template format (or that submitters explain deficiencies when data is

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not in the appropriate format). The submission templates are then modified throughout the life of an administration as the result of class members' submissions and feedback. Incorrectly formatted transactional data may require that the administrator send personalized communication to each filer detailing the deficiency, although in some cases a template indicating the deficiency may suffice.

Once appropriately submitted, transactional data is transferred from the administrator to the data expert assigned to the case whereby the expert confirms eligible transactions and calculates the damages model using a previously designed data model. The settlement agreement will specify how transactions are valued for the purposes of the settlement, and the administrator and data expert remain in close contact as transaction templates are modified and data models are adjusted. Although the data expert will attempt to determine all possible permutations for a particular financial instrument up front, inevitably there will be class members who negotiated a special version of the instrument that will need to be accommodated.

## Data-Related Takeaways

Counsel should seek administrators who have demonstrated experience and understanding of how complex trades and transactions are executed internationally and domestically, and have the expertise to collaborate with the data experts assigned to each case. The administrator and data expert together will discuss and determine outcomes for complex or unique submissions.

Counsel on both sides of the bar should work with the administrator early in the administration to clarify what data is necessary and in what format to determine eligibility and avoid delays. Where possible, if data from settling defendants or other resources is available, providing class members with the option to accept payment based on this data rather than submitting their own transactional data can facilitate the claims submission process and decrease confusion.

However, the decision to utilize existing data for this purpose needs to be made by the parties when data is collected from the defendant(s) and other resources. Parties should keep in mind that, even when a complete or mostly complete set of transaction data is available, it may not contain enough information to identify all transactions made by class members, particularly when some class members utilized prime brokers or other intermediaries. In some cases, even when data exists, the parties may not want to allow class members to elect to use that data as the basis for their award calculation in lieu of submitting their own data, most frequently when a portion of the disclosed data relates to entities in countries with stricter data privacy laws than in the U.S.

## Notification and Claims Submission

Notification and claims submission in a traditional securities matter is a fairly streamlined process. A notice or umbrella claim form is circulated via U.S. and electronic mail to broker databases and posted to major news outlets and the DTTC, alerting potential claimants of the settlement and outlining the plan of allocation. Eligible claimants, or their authorized third-party filers of record, return the claim forms with the standard transactional data required across most securities matters: name, account number, transaction date, quantity, and price. Investors and managers are accustomed to sending "data dumps" to administrators in response to securities class action matters; administrators sort information from data sets and retrieve relevant information for claims processing.

In a financial antitrust matter, however, custom notice documents are created and circulated for each account. The notices may include log-in information and credentials for viewing eligible transactions via a secure, online portal as well as instructions for challenging loss determinations and submitting additional transactions not previously identified.

Because notices are sent to addresses provided by multiple sources in the initial data transfer, there is a significant chance they may not reach the entity responsible for managing funds or filing claims. Accordingly, a fund or company may disregard the notice, incorrectly assuming it was also received by and will be processed by the claims preparer of record. Further, financial institutions executing transactions for hundreds of different accounts may receive a large volume of notice documents, one for each eligible account, making it difficult to log into the applicable portal and separately view eligible transactions for each account. In complex matters, third-party filers may be required to produce evidence of authorization to obtain information or file claims on behalf of their clients that is more specific than any standing authorizations that satisfy requirements in traditional securities cases.

As part of the claims submission process for some complex cases, claimants may be asked to submit their own transactional data, adhering to strict deadlines and formatting parameters. Because of the time period covered by many settlements, data required for the claim may date earlier than common record retention periods. Further, with more trades occurring internationally and in open-market venues, available records are less consistent, placing the onus on claimants to maintain comprehensive records and produce necessary transactional data. Finally, because the majority of transactions have been pre-identified for claimants, class counsel is less likely to extend deadlines or accept claims submitted beyond the deadline.

## Notice and Claims-Related Takeaways

Complex financial antitrust matters do not follow the same notice methods as traditional securities cases, so claimants and their representatives must remain atten-

tive to incoming notices and stringent deadlines. In many cases, standing authorizations for third-party claim preparers may be too narrow to suffice for matters involving complex financial products, requiring third-party filers to submit new authorizations covering the case at issue and signed by their clients to the administrator before communicating with the administrator on their clients' behalf. Further, class members who fail to meet deadlines risk total rejection of their claims.

With commodities increasingly traded internationally and occurring when reporting requirements were less rigorous, administrators should avoid relying strictly on standard broker lists as a means of providing notice to potential claimants. In addition to disseminating notice via financial and trade publications, counsel should insist that administrators have advanced knowledge of how commodities are traded so they are able to assist in identifying potential claimants.

Finally, time, budget, and privacy requirements must be considered when providing notice internationally. A significant financial investment may be required to notice claimants residing outside of the U.S., inclusive of noticing methods that provide for tracking to confirm delivery of notice, since mail is seldom returned "undeliverable."

## Claims Processing + Reconciliation

Traditional securities matters call for the submission of transactional data by claimants to the settlement administrator via U.S. mail or secure upload to a dedicated, online portal. That data is then loaded into a case-specific database and audited by the administrator, typically within 72 hours of receipt.

Following the audit, filers are alerted of discrepancies or missing or incorrect information by deficiency notice or, in cases of online submission, by real-time notification in the secure portal. At that time, they have the opportunity to revise and resubmit their claims. Depending on the case type and settlement parameters, class members may have the option to contest how their data is handled. For example, the administrator may exclude certain undocumented transactions, in which case the claimant may have the opportunity to provide further documentation. In other instances, claimants may dispute how their recognized loss was calculated.

However, because transactional data is analyzed on a damages model, not reconciled against pre-populated trade data provided by one or more source, there are relatively few obstacles to reconciliation.

In a similar way, claim forms in a financial antitrust matter are submitted by filers, either electronically or by mail, accompanied by the transactional data required by the administrator. Processing and reconciliation is challenging due to the complex nature of the required data. For example, damages models may exclude or "roll up" certain types of transactions, so an administrator's transaction count may not align with class members' records, requiring additional review and reconciliation. Further, incomplete transactional data, including ICE-cleared or prime broker-executed trades, may not contain key information such as class member names.

Challenges to data models and pre-identified transactions may be made by class members, although the challenge process and formatting requirements will vary by case. It is important to note, however, any challenges that include transactions found to be duplicative of those already identified for the claimant could require additional data reconciliation by class members or, in some cases, may result in the total rejection of a claim.

## Processing and Reconciliation-Related Takeaways

Administrators, together with counsel, can expedite the claims reconciliation and approval process by requesting from claimants information about transactions known *not* to be included in the administrator's initial transaction records, thereby focusing the claimants' efforts on specific transactions, such as those executed by prime brokers.

In recognition of the growing prevalence of complex financial antitrust matters, counsel should stress to their clients the importance of detailed recordkeeping to assist in the recovery of funds from transactions dated earlier than standard record retention periods. For example, in one particular settlement administration, the ID numbers class members used to report transactions to the DTCC were instrumental in helping them identify and reconcile transaction data and identify additional eligible funds and accounts. In another, records dating back several years were required to confirm under which jurisdiction trades were executed.

Finally, the risks of submitting challenges should be clearly communicated to class members prior to filing claims in a complex matter. A cost-benefit analysis should be conducted to determine if the cost of challenging—or submitting additional transactions—is worth the effort to compile and format the data sets. In all cases, class members should be encouraged to utilize electronic filing portals as a means to expedite reconciliation and facilitate challenges in near real time.

## Settlement Distribution

When claims reconciliation is complete and the settlement has been finalized in a traditional securities matter, prorated settlement funds are distributed to eligible claimants. Those funds are distributed based on the names and contact information provided by filers when submitting claims forms, so the margin of error is low. Detailed summaries with information about ineligible accounts, such as those whose prorated payout fell below the minimum threshold for distribution, are available to claimants during the settlement distribution phase.

When, however, awards are based on data provided by defendants or clearinghouses, as is the case in financial antitrust settlements, funds are distributed according to the data received by multiple sources. Thus, the financial institutions or investment funds in receipt of settlement distributions may not know to which accounts the credits should be applied.

Complicating the settlement distribution further, class members may elect to have payments issued to different payees or wired to an account whose owner is different from the class member. In these situations, incorrect wiring instructions or differential wiring requirements between issuing and beneficiary banks may result in payment delivery issues and complicate payment tracking. International funds distribution presents unique difficulties in confirming delivery of payments issued by check and communicating international wire instructions, which often require an intermediary bank.

### Distribution-Related Takeaways

The allocation of settlement funds presents a unique challenge for all stakeholders involved in the administration of complex financial antitrust settlements. Both class counsel and administrators must remain cognizant of the fact that they are likely to receive extensive follow-up inquiries from claimants requesting assistance in correctly allocating payments amongst internal accounts, a factor that should be considered in the preparation of administration plans and budgets.

Counsel may also consider assisting class members in preparing documentation to direct settlement funds to other payees in advance of distribution. In instances where a claim has been sold, copies of the sale documents may be requested to effectuate redirection of payment. In cases where a third-party filer's agreement with its clients includes receipt of settlement funds, portions of the contract that indicate this clause together with documentation signed by the "owner" of the claim may be needed to redirect payment.

Filers and their representatives should be familiar with changes to wire instructions, especially for funds sent from outside the country in which the account is located. Finally, filers should be advised to promptly respond to follow-up inquiries from the administrator regarding failed wires or uncashed checks, as unclaimed funds are donated or otherwise disposed of after certain periods as outlined in the settlement agreement.

Simply put, financial antitrust settlements involving complex financial instruments are unique. As such, investors and financial managers who routinely file claims in securities class action suits may fail to recognize the nuances that exist in these hybrid matters, resulting in the inability to recover funds.

As trading becomes increasingly international and complex in nature, and these compound legal matters continue to settle in court, counsel on both sides of the bar will have to stay abreast of evolving requirements to more effectively counsel their clients. A collaborative relationship with a claims administrator experienced in financial antitrust settlements will ensure the best outcome for both counsel and class member.

# The Application of *Daimler AG's* Principal-Place-of-Business Standard in New York Courts

By John R. Higgitt

Personal jurisdiction is a significant topic in the realm of civil procedure. That topic has generated many important decisions by the United States Supreme Court, such as *Pennoyer v. Neff*,[1] *International Shoe Co. v. State of Washington, Office of Unemployment Compensation and Placement*,[2] and *Goodyear Dunlop Tires Operations, S.A. v. Brown*.[3] Add to that list the Court's 2014 decision in *Daimler AG v. Bauman*,[4] which had a lot to say about where corporations may be haled into court. This article will provide a snapshot of personal jurisdiction law, generally; review the *Daimler AG* litigation and the Supreme Court's decision resolving it; examine the principal-place-of-business aspect of the *Daimler AG* decision; and discuss some of the procedural impacts of the decision on New York civil procedure.

## Personal Jurisdiction, Generally

To issue a judgment, order or decree that is binding on and enforceable against a defendant, a court must have personal jurisdiction over that party.[5] In New York, personal jurisdiction comprises three elements:[6] (1) a basis upon which to assert the court's jurisdiction over the defendant;[7] (2) proper service of process on the defendant;[8] and (3) proper commencement of the action.[9] Our focus here is on the first element. (Also, the court must have subject matter jurisdiction over the action. More on that below.)

The requirement that a court have a basis to assert personal jurisdiction over a defendant comes from the federal Constitution. Due process requires that, before a court asserts its jurisdiction over a defendant, the defendant must have sufficient contacts with the forum state.[10] There are two types of basis jurisdiction. General (or all-purpose) jurisdiction permits a court to hear and determine any and all claims asserted against the defendant, regardless of where the claims arose and regardless of whether the claims have any connection to the forum state.[11] Specific (or long-arm) jurisdiction allows a court to adjudicate a forum-related claim against a defendant with certain ties to the forum.[12]

For approximately 100 years, New York law dictated that a corporation that was "present" or "doing business" in the state was amenable to general, all-purpose jurisdiction.[13] A corporation was therefore subject to our courts' general jurisdiction if it was "engaged in such a continuous and systematic course of doing business here as to warrant a finding of its presence in this jurisdiction."[14]

That familiar standard was displaced by the United States Supreme Court's January 14, 2014 decision in *Daimler AG v. Bauman*.[15]

### *Daimler AG*

In 2004, 22 Argentinian residents commenced an action in the United States District Court for the Northern District of California against Daimler AG, a German corporation with headquarters in Stuttgart, Germany, that manufactures Mercedes-Benz vehicles.[16] The plaintiffs alleged that during Argentina's 1976-1983 "Dirty War," Daimler AG's Argentinian subsidiary collaborated with Argentinian state security forces to commit atrocities against certain workers at the subsidiary.[17] The plaintiffs sought to hold Daimler AG vicariously liable for the alleged tortious conduct of its Argentinian subsidiary.[18]

The plaintiffs claimed that the California courts[19] could exercise personal jurisdiction over the German corporation Daimler AG because an American-based subsidiary of Daimler AG had significant contacts with California, that those contacts were imputable to Daimler AG, and that, by virtue of those imputed contacts, Daimler AG was subject to the California courts' general jurisdiction.[20] The United States subsidiary was a Delaware limited liability corporation that maintained its principal place of business in New Jersey, but had substantial and continuous contacts with California (e.g., the subsidiary had multiple facilities in California, was the largest supplier of luxury vehicles to the California market, derived substantial revenue from sales in California).[21]

Daimler AG moved to dismiss the complaint for want of personal jurisdiction; the California courts, said Daimler AG, had no basis upon which to assert jurisdiction over it.[22] The District Court agreed and granted the motion, but the Ninth Circuit reversed the dismissal of the complaint. "In sustaining the exercise of general jurisdiction over Daimler [AG], the Ninth Circuit relied on an agency theory, determining that the [United States subsidiary] acted as Daimler [AG]'s agent for jurisdictional purposes and then attributed [the United States subsidiary]'s contacts to Daimler [AG]."[23]

The Supreme Court granted certiorari. In its opinion, the Court stated that "[t]he question presented [wa]s whether the Due Process Clause of the Fourteenth Amendment preclude[d] the District Court [in California] from exercising jurisdiction over Daimler AG ..., given the absence of any California connection to the atrocities,

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perpetrators, or victims described in [the plaintiffs'] complaint."[24] The Court was focused on whether the California courts[25] had general jurisdiction over Daimler AG, as the plaintiffs did not assert that those courts had specific jurisdiction over the German corporation.[26]

Stressing that it was assuming for the purposes of resolving the appeal that the United States subsidiary's California contacts were imputable to Daimler AG, the Supreme Court held that the California courts lacked general jurisdiction over Daimler AG.[27] General jurisdiction, said the Court, may be exercised over a corporation only if it is "at home" in the forum.[28] "[T]he place of incorporation and principal place of business are paradig[m] bases for general jurisdiction over a corporation."[29] That is to say, a corporation is "at home" in the state in which it was incorporated and in the state in which the corporation maintains its principal place of business.[30] (The Court did "not foreclose the possibility that in an exceptional case...a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.")[31] Because California was neither Daimler AG's place of incorporation nor its principal place of business, the German corporation was not "at home" in the Golden State.

The Court rejected the notion that general jurisdiction can be exercised over a corporation on the basis that it "engages in a substantial, continuous, and systematic course of business" in the forum,[32] the test New York courts had been using to ascertain whether general jurisdiction exists over a corporation.[33]

## Principal Place of Business

The first paradigm basis identified by the *Daimler AG* Court—the place of incorporation (i.e., the state with which the corporation has filed its certificate of incorporation or other similar document)—is usually readily ascertainable. Let's focus on the second place in which a corporation is "at home": the principal place of business of a corporation.

The *Daimler AG* Court did not define expressly what constitutes a corporation's principal place of business for the purpose of determining whether a corporation is "at home" in the forum state. But, in noting that the paradigm bases for general jurisdiction "have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable,"[34] the Court cited to its prior decision in *Hertz Corp. v. Friend*,[35] a familiar face on the subject-matter-jurisdiction scene.

As noted above, a court needs subject matter jurisdiction over an action and personal jurisdiction over the defendant.[36] Personal jurisdiction relates to whether a court can exercise its power over a particular defendant and, therefore, render a binding and enforceable judgment, order or decree against that defendant.[37] Personal jurisdiction was the subject of the *Daimler AG* decision.

Subject matter jurisdiction deals with the separate concern of whether a particular court has the authority to adjudicate a particular type of action or proceeding.[38] In this regard, the question is whether the court has the competence, by virtue of a constitutional provision or statute, to entertain a given action or proceeding.

A federal district court has subject matter jurisdiction over actions involving federal questions and actions in which there is diversity of "citizenship" among the parties ("diversity jurisdiction").[39] To ascertain the citizenship of a corporation and evaluate whether diversity jurisdiction exists in an action involving a corporation, 28 U.S.C. § 1332(c)(1) must be consulted. That provision states that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." What constitutes a corporation's "principal place of business" under the statute? *Hertz Corp.* considered and answered that question.

The plaintiffs in *Hertz Corp.* were citizens of California and they sued the defendant corporation in California state court, seeking damages for violations of that state's labor law.[40] The defendant removed[41] the action to federal court on the basis that diversity jurisdiction existed because the plaintiffs and the defendant were citizens of different states.[42] The defendant, which was not incorporated in California,[43] asserted that its principal place of business was in New Jersey, where both the defendant's corporate headquarters were located and the "core executive and administrative functions" were performed.[44] The defendant stated that it also had significant administrative operations in Oklahoma.[45]

With respect to its California contacts, the defendant acknowledged that the State accounted for (1) 273 of the defendant's 1,606 car rental locations; (2) approximately 2,300 of the defendant's 11,230 employees; (3) approximately $811 million of the defendant's $7.371 billion annual revenue; and (4) approximately 3.8 million of the defendant's 21 million annual rental transactions.[46] The plaintiffs argued that the defendant's significant contacts with California rendered it a "citizen" thereof; that the parties were citizens of the same state; and, therefore, the District Court lacked diversity jurisdiction over the matter.[47]

In evaluating whether diversity jurisdiction existed in the matter, the District Court employed the analysis dictated by Ninth Circuit precedent, which required the *nisi prius* to identify the defendant's principal place of business by first determining the amount of the defendant's business activity state by state.[48] Next, the District Court had to determine whether the amount of activity was "significantly larger" or "substantially predominated" in one state.[49] If it did, then that state was the defendant's principal place of business.[50] If the amount of the defen-

dant's business activity was not "significantly larger" or did not "substantially predominate" in one state, the defendant's principal place of business was the defendant's "nerve center"—the place where the majority of its executive and administrative functions were performed.[51] Applying that analysis, the District Court found that "the differential between the amount of th[e] [defendant's business] activities in California and the amount in the next closest state was significant."[52] Therefore, the court determined that the defendant's principal place of business was California, that diversity of citizenship among the parties was lacking, and that the court lacked subject matter jurisdiction over the action.[53] The District Court remanded the action to the California state courts.

The Ninth Circuit affirmed the order of the District Court remanding the action to the California state courts. Because different tests had emerged for identifying a corporation's "principal place of business" for the purposes of applying the diversity jurisdiction statute, the Supreme Court granted certiorari.[54]

After reviewing the history of diversity jurisdiction—particularly the 1958 amendment to 28 U.S.C. § 1332(c)(1) that added the principal-place-of-business form of corporate citizenship—and surveying the various tests and analyses set forth by the courts for ascertaining a corporate defendant's principal place of business, the Supreme Court held that a corporation's principal place of business is "the place where [its] officers direct, control, and coordinate the corporation's activities."[55] This place is the corporation's "nerve center."[56] The Court observed that "in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control and coordination."[57]

The Supreme Court endorsed the "nerve center" rule for three principal reasons. First, the plain language of 28 U.S.C. § 1332(c)(1)—"the State where [the corporation] has its principal place [of business]"— suggested that the main, prominent or leading single place of business within a state is the corporation's principal place of business.[58] Second, convoluted jurisdictional rules should be eschewed: "[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims."[59] Complicated jurisdictional rules, found the Court, frustrate predictability regarding the proper forum for a potential action, and consume judicial resources.[60] Third, the legislative history of the 1958 amendment to § 1332 indicated that the test for ascertaining the citizenship of a corporation should be feasible, and easy to apply.[61]

The $75,000 question:[62] Does the *Hertz Corp.* Court's principal-place-of-business test, which is employed to ascertain whether a federal court has *subject matter jurisdiction* based on diversity of citizenship, apply in gauging a corporation's principal place of business under *Daimler AG* and, therefore, whether a court has *personal jurisdiction* over a corporation? Numerous district court decisions from throughout the country and a New York State Supreme Court Justice have applied *Hertz Corp.'s* "nerve center" test to ascertain a corporation's principal place of business under *Daimler AG.*[63]

## *Daimler AG* in New York State Courts

A corporate defendant is sued in a New York State court. The defendant is not incorporated in New York, believes that its "nerve center" is in a state other than New York, and suspects that the plaintiff is relying on general jurisdiction in an effort to get the defendant before the New York State court. A CPLR 3211(a)(8)[64] motion to dismiss the complaint for want of personal jurisdiction may be used to bring to a New York court's attention the issue of whether general jurisdiction exists over a corporate defendant.[65]

The CPLR 3211(a)(8) motion must be made within the defendant's answering time. Alternatively, the paragraph 8 objection may be asserted in the defendant's answer and made the subject of a subsequent application (e.g., summary judgment motion).[66] Like most CPLR 3211(a) grounds for dismissal, a paragraph 8 defense may be waived.[67] "An objection based upon... paragraph eight... is waived if a [defendant] moves on any of the grounds set forth in subdivision (a) without raising such objection or, if having made no objection under subdivision (a), [the defendant] does not raise such objection in the [answer]."[68]

There is no requirement in New York State court practice that a plaintiff allege in the complaint a basis for a court's exercise of personal jurisdiction over a defendant.[69] However, the plaintiff must set forth and support a basis for personal jurisdiction if confronted with a CPLR 3211(a)(8) motion: "The pleading burden lies ... with the defendant to raise lack of personal jurisdiction as a defense in a pre-answer motion to dismiss or in the answer. If the defendant moves to dismiss due to the absence of a basis of personal jurisdiction, the plaintiff must come forward with sufficient evidence, through affidavits and relevant documents, to prove the existence of jurisdiction."[70]

Where personal jurisdiction is contested by the defendant on a CPLR 3211(a)(8) motion, the ultimate burden of proof on the issue rests with the plaintiff.[71] That burden is discharged by the plaintiff making a prima facie showing that the court has personal jurisdiction over the defendant.[72]

A party confronted with a pre-answer, pre-discovery CPLR 3211(a)(8) motion may not possess information relevant to ascertaining a corporation's "nerve center." CPLR 3211(d) provides that, "[s]hould it appear from affidavits submitted in opposition to a motion made under [CPLR 3211(a) or (b)] that facts essential to justify opposition may exist but cannot then be stated, the court may

deny the motion, allowing the moving party to assert the objection in his [or her] responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just." The burden is on the party opposing the CPLR 3211 motion to persuade the court that facts "may exist" that would defeat the motion; the party need not convince the court that the facts actually exist.[73] Mere hope, however, that discovery will unearth useful information is insufficient to warrant invocation of CPLR 3211(d).[74]

In *Peterson v. Spartan*, the Court of Appeals stated that subdivision (d) "protects the party to whom essential jurisdictional facts are not presently known, especially where those facts are within the exclusive control of the moving party."[75] When a party invokes subdivision (d) in opposition to a CPLR 3211(a)(8) motion and both makes a "sufficient start" in the opposition papers and shows its jurisdictional position to be non-frivolous, the party may have the opportunity to demonstrate that the movant is subject to the jurisdiction of New York courts.[76]

If a court determines that a party ought to get the benefit of jurisdictional discovery, the court may (1) deny the CPLR 3211(a)(8) motion and allow the movant to assert the lack-of-personal-jurisdiction defense in its answer;[77] (2) direct a continuance of the motion pending the completion of jurisdictional discovery;[78] or (3) deny the CPLR 3211(a)(8) motion with leave to renew upon the completion of the discovery.[79]

### *Robins*

A decision of the First Department, *Robins v. Procure Treatment Center, Inc.*,[80] demonstrates CPLR 3211(d) at work in the context of a motion to dismiss for want of general, personal jurisdiction over a corporate defendant.

The plaintiff in Robins suffered from a non-malignant brain tumor that required surgery.[81] She subsequently underwent proton radiation therapy over a two-month period in New Jersey at a facility owned and operated by defendant PPM.[82] Approximately five months after the therapy terminated, plaintiff experienced blindness; efforts to restore her vision were not successful.[83] The plaintiff's blindness was apparently caused by radiation toxicity of her optic nerves that occurred as a result of the therapy.[84] The plaintiff commenced a damages action against the defendants in Supreme Court, N.Y. County.

PPM moved to dismiss the complaint as against it under CPLR 3211(a)(8) on the ground that no basis existed upon which Supreme Court could assert its jurisdiction over PPM.[85]

In opposition to the motion,[86] the plaintiff alleged that PPM, which was incorporated in Delaware, had its principal place of business in New York.[87] The plaintiff pointed to a filing PPM made with the State of New Jersey's Department of the Treasury in which PPM listed as its "Main Business or Principal Business Address" an address on Lexington Avenue in Manhattan.[88] (For its part, PPM maintained that its principal place of business was situated in New Jersey.)[89]

In analyzing the issue of whether PPM's principal place of business was in New York and, concomitantly, whether the court had general jurisdiction over PPM, Supreme Court, New York County, endorsed the *Hertz Corp.* Court's "nerve center" test to ascertain PPM's principal place of business.[90] Highlighting PPM's filing with New Jersey's treasury department, the court found that the plaintiff had made a "sufficient start" in demonstrating that general jurisdiction exists over PPM.[91] The court therefore denied PPM's motion to dismiss.[92]

The First Department affirmed the motion court's order denying PPM's CPLR 3211(a)(8) motion. The appellate court wrote, in pertinent part, that

> Plaintiff made a "sufficient start" in establishing that New York courts have jurisdiction over PPM under CPLR 301 ... to be entitled to disclosure pursuant to CPLR 3211(d) (*see Peterson v. Spartan Indus.*, 33 N.Y.2d 463, 467 [1977]). With regard to general jurisdiction, codified in CPLR 301, it is not clear whether PPM's "affiliations with the State New York are so continuous and systemic as to render it essentially at home in the State" (*Daimler AG v. Bauman*, ___U.S.___, 134 S. Ct. 746, 761 [2014] [internal brackets omitted]). However, the record contains a State filing in which PPM identified itself as having a principal place of business in Manhattan – "tangible evidence" upon which to question PPM's claims to the contrary (*see SNS Bank v. Citibank*, 7 A.D.3d 352, 354 [1st Dept. 2004]). [93]

The personal-jurisdiction-oriented discovery permitted by the *Robins* Court is similar to the discovery allowed by federal courts when considering whether subject matter diversity jurisdiction exists in an action involving a corporate defendant under *Hertz Corp*.[94]

## Conclusion

*Daimler AG* changed personal jurisdiction jurisprudence, resulting in the new "at home" inquiry and its accompanying "paradigm bases" for determining whether a corporation is subject to the general jurisdiction of our courts. The principal-place-of-business basis will, as evidenced by the *Robins* decision, generate motion practice in New York State courts. That motion practice will occur under, among other statutes, CPLR 3211, which contains conditions, limitations and features that must be reviewed and considered. Civil practitioners should be familiar with the changes wrought by *Daimler AG* and the procedural impacts of the decision.

## Endnotes

1. 95 U.S. 714 (1877).
2. 326 U.S. 310, 66 S.Ct. 154 (1945).
3. 564 U.S. 915, 131 S.Ct. 2846 (2011).
4. 571 U.S. 117, 134 S. Ct. 746.
5. A plaintiff submits to the jurisdiction of the court by bringing an action. The concern therefore is whether the court has personal jurisdiction over the defendant. *See* Siegel & Connors, New York Practice § 58 (6th ed).
6. A defect relating to personal jurisdiction may be waived by a defendant (CPLR 3211[e]), whereas an objection to a court's subject matter jurisdiction – the court's power to hear and decide a particular type of action – cannot. *Lacks v. Lacks*, 41 N.Y.2d 71, 390 N.Y.S.2d 875, 359 N.E.2d 384 (1976); *see Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 658 N.Y.S.2d 205, 680 N.E.2d 578 (1997).
7. *See* Siegel & Connors, New York Practice §§ 58, 80-99, *supra* note 5.
8. *See id*., §§ 58, 66-76B, *supra* note 5.
9. *See Goldenberg v. Westchester County Health Care Corp*., 16 N.Y.3d 323, 921 N.Y.S.2d 619, 946 N.E.2d 717 (2011); *Fry v. Village of Tarrytown*, *supra* note 6; Siegel & Connors, New York Practice §§ 58, 63-63A, *supra* note 5.
10. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72, 105 S. Ct. 2174, 2181-82 (1985) ("The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he [or she] has established no meaningful contacts, ties, or relations.") (internal citations omitted). Of course, a defendant may consent to the personal jurisdiction of a court. *See* Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 301, C301:6; *see also* Siegel & Connors, New York Practice § 98, *supra* note 5.
11. *See* CPLR 301; Alexander, Practice Commentaries, *supra* note 10, C301:1.
12. *See* CPLR 302. Where a New York court has both subject matter jurisdiction over an action and personal jurisdiction over the defendant but a court in a different jurisdiction provides a more appropriate forum for the action, the New York court may decline to adjudicate the dispute under the doctrine of forum non conveniens. *See* CPLR 327; Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 327, C327:1.
13. S*ee* Siegel & Connors, New York Practice § 82, *supra* note 5.
14. *Laufer v. Ostrow*, 55 N.Y.2d 305, 309-10, 449 N.Y.S.2d 456, 458, 434 N.E.2d 692, 694 (1982) (internal quotation marks omitted); s*ee Tauza v. Susqehanna Coal Co.*, 220 N.Y. 259, 267, 115 N.E. 915, 917 (Cardozo, C.J., 1917) ("If in fact [a corporation] is here, . . . not occasionally or casually, but with a fair measure of permanence and continuity, then, whether its business is interstate or local, it is within the jurisdiction of our courts.").
15. 571 U.S. 117, 134 S. Ct. 746; *see* Siegel & Connors, New York Practice § 82, *supra* note 5.
16. 571 U.S. at 121-123, 134 S. Ct. at 750-751.
17. 571 U.S. at 122, 134 S. Ct. at 751-752.
18. *See id.*
19. "'Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons.' *Daimler AG v. Bauman*, 571 U.S.____, ____, 134 S.Ct. 746, 753 (2014). This is because a federal district court's authority to assert personal jurisdiction in most cases is linked to service of process on a defendant 'who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.' Fed. Rule of Civ. Proc. 4(k)(1)(A)." *Walden v. Fiore*, 571 U.S. 277, 283, 134 S. Ct. 1115, 1121, 188 L.Ed.2d 12 (2014).
20. 571 U.S. at 123, 134 S. Ct. at 751-752.
21. *Id.*
22. 571 U.S. at 123, 134 S. Ct. at 752.
23. 571 U.S. at 134, 134 S. Ct. at 758-759.
24. 571 U.S. at 121, 134 S. Ct. at 751.
25. *See* note 19 *supra*.
26. 571 U.S. at 133-134, 134 S. Ct. at 758.
27. 571 U.S. at 136, 134 S. Ct. at 760.
28. 571 U.S. at 122, 136, 134 S. Ct. at 751, 760.
29. 571 U.S. at 137, 134 S. Ct. at 760 (internal citation, ellipses and quotation marks omitted). The Supreme Court repeated and reinforced the "at home" and "paradigm bases" principles it articulated in *Daimler AG* in the Court's 2017 decision in *BNSF Railway Co. v. Tyrrell*, ___U.S.___, ___, 137 S. Ct. 1549, 1558.
30. 571 U.S. 137, 134 S. Ct. at 760. These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims. (If a corporation is incorporated in and maintains its principal place of business in the same state, then the corporation is at home in that one state.)
31. 571 U.S. at 139, 134 S. Ct. at 761, n. 19 (internal citations omitted).
32. 571 U.S. at 137-138, 134 S Ct at 760-761.
33. S*ee* Siegel & Connors, New York Practice § 82, *supra* note 5; Alexander, Practice Commentaries, *supra* note 10, C301:8 (2014 pocket part); Connors, *Impact of Recent U.S. Supreme Court Decisions on Practice in New York*, June 18, 2014 N.Y.L.J.

    The *Daimler* Court observed that:

    > Plaintiffs emphasize two decisions, *Barrow S.S. Co. v. Kane,* 170 U.S. 100, 18 S.Ct. 526, 42 L.Ed. 964 (1898), and *Tauza v. Susquehanna Coal Co.,* 220 N.Y. 259, 115 N.E. 915 (1917) (Cardozo, J.), both cited in *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), just after the statement that a corporation's continuous operations in-state may suffice to establish general jurisdiction. *Id.,* at 446, and n. 6, 72 S.Ct. 413. See also *International Shoe,* 326 U.S., at 318, 66 S.Ct. 154 (citing *Tauza*). *Barrow* and *Tauza* indeed upheld the exercise of general jurisdiction based on the presence of a local office, which signaled that the corporation was "doing business" in the forum. *Perkins'* unadorned citations to these cases, both decided in the era dominated by *Pennoyer* 's territorial thinking, see *supra,* at 753 – 754, should not attract heavy reliance today. 571 U.S. at___, 134 S. Ct. at 761, n 18 (emphasis added; internal citation omitted).
34. 571 U.S. at 137, 134 S. Ct. at 760 (internal citation, ellipses and quotation marks omitted).
35. 559 U.S. 77, 130 S. Ct. 1181 (2010).
36. *Morrison v. Budget Rent A Car Systems Inc.*, 230 A.D.2d 253, 258, 657 N.Y.S.2d 721 (2d Dep't 1997).
37. *International Shoe Co., supra* note 2.
38. *Lacks v. Lacks*, 41 N.Y.2d 71, 75, 390 N.Y.S.2d 875, 877-878, 359 N.E.2d 384 (1976).
39. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513, 126 S. Ct. 1235, 1244 (2006); *see* 13D and 13E Wright, Miller & Cooper, *Federal Practice and Procedure* §§ 3561, 3602 (3d ed.).
40. 559 U.S. at 81, 130 S. Ct. at 1186.
41. "If [an] action is within the concurrent jurisdiction of both the federal and state courts, and the plaintiff chooses the state court, the defendant often has the option of removing the action to the federal court." Siegel & Connors, New York Practice § 619, *supra* note 5.
42. 559 U.S. at 81, 130 S. Ct. at 1186.
43. 2008 W.L. 7071465, *1 (N.D. Cal. 2008) (defendant was incorporated in Delaware).

44. 559 U.S. at 81-82, 130 S. Ct. at 1186.

45. *Id.*

46. 559 U.S. at 81, 130 S. Ct. at 1186.

47. *Id*.

48. 559 U.S. at 82, 130 S. Ct. at 1186.

49. *Id*.

50. *Id*.

51. *Id.*

52. 559 U.S. at 82, 130 S. Ct. at 1187 (internal quotation marks omitted).

53. *Id*.

54. *Id*.

55. 559 U.S. at 84-92, 130 S. Ct. at 1187-92.

56. 559 U.S. at 93, 130 S. Ct. at 1192.

57. *Id*.

58. 559 U.S. at 93, 130 S. Ct. at 1192-93.

59. 559 U.S. at 94, 130 S. Ct. at 1193.

60. *See id.*

61. 559 U.S. at 95, 130 S. Ct. at 1194.

62. 28 U.S.C. 1332(a) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs....").

63. *E.g.*, *Retail Pipeline, LLC v. JDA Software Group, Inc*., 2018 W.L. 1621508 (D. Vt. 2018); *Live Face on Web, LLC v. Archevos Corporation,* 2018 W.L. 1035209, *4 (S.D. Cal. 2018); *Nespresso USA, Inc. v. Ethical Coffee Company SA*, 263 F. Supp. 3d 498, 503 (D. Del. 2017); *Maxchief Investments Limited v. Plastic Development Group, LLC*, 2016 W.L. 7209553, *3 (E.D. Tenn. 2016); *Rullan v. Goden*, 2016 W.L. 1159112, *8 (D. Md. 2016); *Hood v. Ascent Medical Corp.*, 2016 W.L. 1366920, *9 (S.D. N.Y. 2016); *Campbell v. Fast Retailing USA, Inc.*, 2015 W.L. 9302847, *2 n. 3 (E.D. Penn. 2015); *Allstate Ins. Co. v. Electrolux Home Prod., Inc*., 2014 W.L. 3615382, *4 n. 3 (N.D. Ohio 2014); *Flynn v. Hovensa*, LLC, 2014 W.L. 3375238, *2 (W.D. Penn. 2014); *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 428 (D. D.C. 2014), *aff'd in part and rev'd in part* 812 F.3d 127 (D.C. Cir. 2016); *Google Inc. v. Rockstar Consortium U.S. LP*, 2014 W.L. 1571807, *1 n. 1 (N.D. Cal. 2014); *Robins v. Procure Treatment Center, Inc.*, 2017 W.L. 1398812, *1-2 (Sup. Ct., New York County 2017, Silver, J.), *affd* 157 A.D.3d 606, ___N.Y.S.3d___ (1st Dep't 2018); *see* Robert L. Haig, *Commercial Litigation in New York State Courts* § 2:21, n. 8 (4th ed.); *but see* Cornett and Hoffheimer, *Good-Bye Significant Contacts: General Personal Jurisdictio*n *After Daimler AG v. Bauman*, 76 Ohio St. L. J. 101, 147-149 (2015).

64. CPLR 3211(a), entitled "Motion to dismiss cause of action," provides that

> A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> 1. a defense is founded upon documentary evidence; or
>
> 2. the court has not jurisdiction of the subject matter of the cause of action; or
>
> 3. the party asserting the cause of action has not legal capacity to sue; or
>
> 4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or
>
> 5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or
>
> 6. with respect to a counterclaim, it may not properly be interposed in the action; or
>
> 7. the pleading fails to state a cause of action; or
>
> 8. the court has not jurisdiction of the person of the defendant; or
>
> 9. the court has not jurisdiction in an action where service was made under section 314 or 315; or
>
> 10. the court should not proceed in the absence of a person who should be a party.
>
> 11. the party is immune from liability pursuant to section seven hundred twenty-a of the not-for-profit corporation law. Presumptive evidence of the status of the corporation, association, organization or trust under section 501(c)(3) of the internal revenue code may consist of production of a letter from the United States internal revenue service reciting such determination on a preliminary or final basis or production of an official publication of the internal revenue service listing the corporation, association, organization or trust as an organization described in such section, and presumptive evidence of uncompensated status of the defendant may consist of an affidavit of the chief financial officer of the corporation, association, organization or trust. On a motion by a defendant based upon this paragraph the court shall determine whether such defendant is entitled to the benefit of section seven hundred twenty-a of the not-for-profit corporation law or subdivision six of section 20.09 of the arts and cultural affairs law and, if it so finds, whether there is a reasonable probability that the specific conduct of such defendant alleged constitutes gross negligence or was intended to cause the resulting harm. If the court finds that the defendant is entitled to the benefits of that section and does not find reasonable probability of gross negligence or intentional harm, it shall dismiss the cause of action as to such defendant.

65. *See also* CPLR 3012(d) (allowing a defendant to seek leave to interpose a late answer) and 5015(a)(4) (allowing a defendant against whom an order or judgment has been entered to seek vacatur of the paper on the ground that the court lacked personal jurisdiction over the defendant); *see also* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 5015, C5015:9.

66. *See* Siegel & Connors, New York Practice §§ 266, 274, *supra* note 5. Where the CPLR 3211(a)(8) objection is that the plaintiff failed to effect proper service on the defendant, a special rule applies that compels the defendant to interpose and seek judgment on the service objection with dispatch. *See* CPLR 3211(e) ("An objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship.").

67. Of the 11 dismissal grounds provided by subdivision (a), all but three may be waived by a defendant. While paragraphs 1, 3-6, 8-9, and 11 are subject to waiver, paragraphs 2 (lack of subject matter jurisdiction), 7 (failure to state a cause of action), and 10 (absence of a necessary party) are not. CPLR 3211(e).

68. CPLR 3211(e).

69. *Fischbarg v. Doucet*, 9 N.Y.3d 375, 381 n. 5, 849 N.Y.S.2d 501, 880 N.E.2d 22 (2007), citing Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 302, C302:5 (main vol.) ("Nowhere in the CPLR's rules of pleading is there any requirement of an allegation of the court's jurisdiction.").

70. Alexander, Practice Commentaries, *supra* note 69; *see Fischbarg v. Doucet*, 9 N.Y.3d at 381 n. 5, 849 N.Y.S.2d 501, 880 N.E.2d 22.

71. *Wells Fargo Bank, NA v. Decesare*, 154 A.D.3d 717, 62 N.Y.S.3d 446 (2d Dep't 2017); *Mejia-Haffner v. Killington*, 119 A.D.3d 912, 990 N.Y.S.2d 561 (2d Dep't 2014); *Urfirer v. SB Builders, LLC*, 95 A.D.3d 1616, 946 N.Y.S.2d 266 (3d Dep't 2012); *see Bernardo v. Barrett*, 87 A.D.2d 832, 449 N.Y.S.2d 272 (2d Dep't 1982), *aff'd,* 57 N.Y.2d 1006, 457 N.Y.S.2d 479, 443 N.E.2d 953 (1982).

72. *Nick v. Schneider*, 150 A.D.3d 1250, 56 N.Y.S.2d 210 (2d Dep't 2017); *Halas v. Dick's Sporting Goods*, 105 A.D.3d 1411, 964 N.Y.S.2d 808 (4th Dep't 2013); *Cornely v. Dynamic HVAC Supply LLC*, 44 A.D.3d 986, 845 N.Y.S.2d 797 (2d Dep't 2007); *see Coast to Coast Energy, Inc. v. Gasarch*, 149 A.D.3d 485, 486, 53 N.Y.S.3d 16, 18 (1st Dep't 2017) (in opposition to "a motion to dismiss pursuant to CPLR 3211(a)(8), the plaintiff has the burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction").

73. *Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d 463, 354 N.Y.S.2d 905, 310 N.E.2d 513 (1974).

74. *See Cracolici v. Shah*, 127 A.D.3d 413, 4 N.Y.S.3d 506 (1st Dep't 2015).

75. *Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d at 466, 354 N.Y.S.2d at 907-908, 310 N.E.2d at 515.

76. *See Peterson v. Spartan Industries, Inc.*, *supra* note 73; *Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 952 N.Y.S.2d 333 (4th Dep't 2012); *see also Copp v. Ramirez*, 62 A.D.3d 23, 31-32, 874 N.Y.S.2d 52, 60 (1st Dep't 2009); *see generally* Alexander, Practice Commentaries, *supra* note 69, C302:5, at 167 (main vol.) ("With respect to the scope of discovery, it should be noted that the relevant time frame for evaluating the defendant's contacts for jurisdiction based on CPLR 301 ("doing business" in New York) as compared to CPLR 302 (long-arm jurisdiction) is the time of commencement of the action.").

77. *See* CPLR 3211(d).

78. *See id*.

79. *Goel v. Ramachandran*, 111 A.D.3d 783, 788, 975 N.Y.S.2d 428, 435 (2d Dep't 2013).

80. 157 A.D.3d 606, ___N.Y.S.3d___ (2018).

81. 157 A.D.3d at 607.

82. 2017 W.L. 1398812, *1-2; *see* 157 A.D.3d at 607.

83. 2017 W.L. 1398812, *

84. *Id*.

85. *See id.* at *2, 5.

86. The plaintiff claimed that the New York courts had personal jurisdiction over PPM on both general and specific jurisdictional bases. We're concerned here with the former basis.

87. 2017 W.L. 1398812.

88. *Id.; see* 157 A.D.3d at 607.

89. 2017 W.L. 1398812, *3.

90. *Id.* at 5.

91. *Id.*

92. *Id.*

93. 157 A.D.3d at 607.

94. *See, e.g., Cail v. Joe Ryan Enterprises, Inc.*, 65 F. Supp. 3d 1288 (M.D. Ala. 2014); *Robertson-Armstrong v. Robinson Helicopter Co., Inc.*, 18 F. Supp.3d 627 (E.D. Penn. 2014); *Lewis v. Lycoming*, 2012 W.L. 2422451 (E.D. Penn. 2012).

# Proposed Amendment of Rule 3 of the Rules of the Commercial Division, Rule 3(a), Relating to Selection of Mediators

To: John W. McConnell

From: Commercial and Federal Litigation Section of the New York State Bar Association

Date: August 14, 2018

Re: Proposed Amendment of Rule 3 of the Rules of the Commercial Division (22 N.Y.C.R.R. § 202.70(b), Rule 3(a)), Relating to Selection of Mediators

The Commercial and Federal Litigation Section of the New York State Bar Association (Section) is pleased to submit these comments in response to the Memorandum of John W. McConnell, counsel to the Chief Administrative Judge Lawrence K. Marks, dated June 22, 2018, proposing an amendment to Rule 3 of the Rules of the Commercial Division (22 NYCRR § 202.70[g], Rule 3[a]), relating to the selection of mediators (the "Memorandum"). A copy of the Proposal is attached hereto as Exhibit "A".

## I. Executive Summary

Rule 3(a) of the Rules of the Commercial Division currently permits the court to direct or counsel to seek appointment of a mediator to resolve all or some of the issues presented, at any stage of the litigation. The ADR Committee of the Commercial Division Advisory Council (the "Advisory Council") has made two recommendations: (1) that the language of Rule 3(a) be amended to include the following language: "Counsel are encouraged to work together to select a mediator that is mutually acceptable, and may wish to consult any list of approved neutrals in the county where the case is pending"; and (2) that the Office of Court Administration ("OCA") and State ADR Coordinator coordinate with local ADR Administrators in each Commercial Division to determine whether applicable ADR rules should be revised to provide a uniform five (5) business day deadline for the parties to agree upon a mediator before assignment by the court.

## II. Summary of Proposal

Rule 3(a) provides in part: "At any stage of the matter, the court may direct or counsel may seek the ***appointment*** of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation" (22 NYCRR § 202.70[g], Rule 3[a] (emphasis added)). Rule 3(a) refers to the "appointment" of a mediator, and the Advisory Council notes that various Commercial Divisions have implemented programs whereby mediators are appointed by the court from a roster of qualified neutrals, rather than by agreement between the parties.

Citing feedback from Bar Associations, the Advisory Council suggests that mediation may be more successful when parties are given the opportunity to agree upon a mediator. According to the Memorandum, statistically, where parties are permitted to first agree upon a mediator, agreement on a mediator is reached in approximately 70 percent of cases. In federal district courts, where the parties are first given the opportunity to agree upon a mediator, statistics show a settlement rate of around 70 percent.

The rationale asserted by the Advisory Council is that allowing the parties to agree upon a mediator facilitates greater trust in the competence of the mediator and greater party satisfaction, thereby increasing the settlement rate:

> "Experienced counsel recognize that identifying a mediator that all parties and counsel can trust will facilitate information exchange and help create a climate where settlement is more likely to occur—or at least will not be impeded by concerns about the competence, effectiveness and trustworthiness of the mediator."

(Proposal at 3).

While the Advisory Council believes a uniform five (5) business day rule is ideal, the Advisory Council recognizes that local concerns may weigh against adopting formal rule dictating a specific time period for party-selection of a mediator. Therefore, the Advisory Council has suggested an amendment to Rule 3(a) without any specific deadline, as follows:

> "At any stage of the matter, the court may direct or counsel may seek the appointment of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation. ***Counsel are encouraged to work together to select***

> ***a mediator that is mutually agreeable, and may wish to consult any list of approved neutrals in the county where the case is pending***. Additionally, counsel for all parties may stipulate to having the case determined by a summary jury trial pursuant to any applicable local rules or, in the absence of a controlling local rule, with permission of the court."

(Proposal at 4). In addition, the Advisory Council suggests that the OCA and State ADR Coordinator coordinate with local ADR Administrators in each Commercial Division to determine whether the local ADR rules can be revised to provide a five (5) business day deadline to agree upon a mediator before one is appointed by the court.

**Comments**

The Section strongly agrees that confidence in the competence and experience of a mediator is essential to the mediation process, and that allowing party-selection of a mediator facilitates that confidence. The proposed amendment does not provide a firm deadline for party-selection of a mediator, thereby allowing each Commercial Division in the State to adopt its own rule to facilitate party-selection.

Therefore, the Section recommends that the proposed amendment to Rule 3(a) be adopted, and agrees that the OCA and State ADR Coordinator should coordinate with local ADR Administrators to determine whether a five (5) business day deadline for party-selection of a mediator can be implemented.

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