Alternatives
TO THE HIGH COST OF LITIGATION
The Newsletter of the International Institute for Conflict Prevention & Resolution
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Court Decisions

Analyzing the Text: Insights from the Supreme Court's 2023-2024 Arbitration Rulings

BY IMRE SZALAI

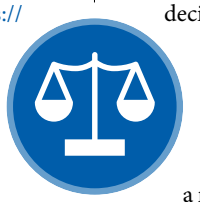
The U.S. Supreme Court issued three decisions during the term ending in July involving the Federal Arbitration Act. These cases showcase the Court's textual approach and also provide a glimpse regarding the possible future development of arbitration in the United States.

The Rulings

These cases involved fine points of arbitration law or distinctive fact patterns. In *Bissonnette v. LePage Bakeries Park St. LLC*, No. 23-51 (April 12) (available at https://bit.ly/4avulyl), the Court clarified the contours of the transportation worker exemption. The Court held that a worker may still qualify for the exemption even if the worker's employer is not in the transportation industry.

Smith v. Spizzirri, No. 22-1218 (May 16) (available at https://bit.ly/3XWp4Nc), involved a procedural matter under FAA Section 3. The Court held that judges do not have discretion to dismiss a lawsuit when a party requests a stay pursuant to Section 3. Instead, the statute requires the court to stay the court proceedings.

Finally, in *Coinbase Inc. v. Suski*, No. 23-2 (May 23) (available at https://bit.ly/4eWiEDO), the Court addressed a "Who decides?" problem involving a special fact pattern: When there are two contracts between the parties—one contract with a delegation provision and the other with a forum-selection clause designating a court as the proper forum—who decides which contract governs? According to the Court in *Coinbase*, a judge decides which contract governs.



The FAA's Evolution

The FAA is now about five years into a new phase of development where the Court is using textualism as the dominant approach to interpret the statute, subject to one caveat explained below.

For the past several decades, the Court, likely motivated by a desire for docket-clearing, expanded the scope of the FAA beyond its text, mainly by relying on a federal policy favoring arbitration. But the Court's 2019 decision in *New Prime Inc. v. Oliveira*. 139 S.Ct. 532 (2019) (available at https://bit.ly/34N4VKM), marked a turning point in the FAA's development, when the Court began applying a stronger textualist approach in FAA cases.

The textualist approach is prominent in the Court's arbitration rulings from this term. For example, in the unanimous *Spizzirri* decision, where the Court held that judges must stay court proceedings and have no discretion to dismiss, Justice Sonia Sotomayor in a unanimous opinion epitomized the textual approach when she observed that "'shall' means 'shall,'" and "'stay' means 'stay.'"

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CPR

The author is a law professor at Loyola University New Orleans College of Law. He has served as an arbitrator in hundreds of cases and has authored books, book chapters, and articles about the development of arbitration. His previous *Alternatives* article is "To Stay or Not to Stay: Scotus Continues Fine Tuning the Federal Arbitration Act," 42 *Alternatives* 27 (March 2024).

CPR News

CPR's Annual Awards Open for Submissions

CPR's Annual Awards program, honoring advances in conflict resolution thought leadership in books and professional and student articles, is open for 2024 submissions.

This year's awards program will cover the publication period of November 2024 to October 2024.

The closing date for submissions is Nov. 14. For full details, including past award winners, see www.cpradr.org/annual-awards.

Send electronic file nominations (in PDF or MS Word format), to CPR Institute Senior Vice President Helena Tavares Erickson at herickson@cpradr.org. Submissions should be led by a cover letter with name, address, telephone, and email address. Submission on behalf of others should supply the author's contact information as well.

More details will be posted at the website and will be included in CPR News in the October *Alternatives*.

Pressing Issues and Emerging Trends at Africa Arbitration Day-New York

BY NAOMIE MALUMBA

Late last year, legal professionals from diverse backgrounds gathered at the New York City Bar Association in Midtown Manhattan for Africa Arbitration Day-New York. Organized by the Africa Arbitration Day-New York Steering Committee, in partnership with the International Institute for Conflict Prevention and Resolution-CPR, which publishes this newsletter, the conference augured a new era of engagement and dialogue surrounding arbitration in Africa, linked to CPR's Annual Global Conference.

The highlights from that event are presented below as preparation intensifies this fall for the second Africa Arbitration Day-New York, to be hosted by White & Case at its New York City office on Nov. 1. Registration and full details are now available at https://www.cpradr.org/events/cpr-2024-africa-arbitration-day-new-york. (See box on page 136 for the panel program details.)

Africa Arbitration Day-New York—AAD-NY opened on Dec. 8 with a welcome by CPR Institute Director for International Initiatives, Knar Nahikian, followed by a keynote from AAD-NY lead organizer, Nawi Ukabiala, an associate in the New York office of Debevoise & Plimpton and one of the six members of CPR's Y-ADR Steering Committee (the full list is at the link above).

Ukabiala discussed the agenda of CPR's first AAD-NY conference, including an AAD-NY Arbitration Moot in the morning (more on the competition below, and on the opening of 2024's competition in an accompanying page 137 box), two substantive panels featuring leaders

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Alternatives

CPR

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Prevention

An Invitation to Go Back to School On Dispute Management

BY KATE VITASEK

Welcome to the first of many articles in my *Back-to-School* series of monthly columns on Dispute Management. I'm a professor at the University of Tennessee's Haslam College of Business, in Knoxville, Tenn., where I study trading partner relationships.

More specifically, I examine how to make trading partner relationships work well, which ultimately keeps business relationships successful and dispute-free.

Over the years, my research and work have led me to collaborate with some of the world's most successful business relationships, to learn what they are doing that keeps their relationships healthy and dispute-free.

I've also had the opportunity to collaborate with some of the world's most progressive individuals who are pioneering dispute prevention practices, where I have been exposed to many creative and successful dispute prevention mechanisms.

Not as much fun–but equally interesting–is studying the companies that get it wrong. Any dispute management professional knows that misalignments can sadly end up in costly and protracted disputes. Needless to say, being on the academic side of dispute management is an exciting job!

The Goal

My goal in volunteering to host a monthly *Back to School on Dispute Management* column in *Alternatives* is to invite dispute management professionals to pause and explore various dispute management approaches organizations are using in practice with a focus on dispute prevention, as contrasted with dispute resolution.

Why focus on dispute prevention? The field of dispute *resolution* is well established, with ADR courses, seminars and continuing education courses taught all over the world. The dispute *prevention* world, however, is much newer and less understood. To quote Benjamin Franklin, "An ounce of prevention is worth a pound of cure." Each month, I will share insights that may be valuable to your own business relationships, thus helping you go back to school for a few minutes while you read the articles.

ADR History

While the majority of the articles will focus on dispute prevention, I want to kick off this series by taking a step back and providing a historical perspective on just how far the practice of dispute management has come.

Judicial (court) systems for resolving disputes have existed throughout civilized history. And for almost as long as courts have existed, individuals and organizations have sought simpler, more efficient and more cost-effective means to resolve disputes—processes known today as alternative dispute resolution techniques.

While modern ADR methods have only been in place for about 40 years, the roots of ADR date at least as far back to a decree issued by the Chinese Emperor Kang-Hsi (1654-1722). In response to complaints from citizens about the corruption and tyranny of the Chinese courts, the Emperor made the following decree:

> The Emperor, considering the immense population of the Empire, the great division of territorial property and the notoriously litigious character of the Chinese, is of the opinion that lawsuits would tend to increase to a frightful extent if people were not afraid of the tribunals and if they felt confident of always finding in them ready and perfect justice. As man is apt to delude himself concerning his own interests, contests would then be interminable, and the half of the Empire would not suffice to settle the lawsuits of the other half. I desire, therefore, that those who have recourse to the courts should be treated without any pity and in such a manner that they shall be disgusted with law and tremble to appear before a

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Dispute Management: A purposefully designed program that organizations put into place that incorporates various dispute prevention and resolution mechanisms designed to work together to reduce friction and transaction costs between contracting parties by optimizing working relations, preventing disputes where possible and resolving disputes effectively and efficiently when they arise.

New *Alternatives* columnist Kate Vitasek is a Distinguished Fellow in the Global Supply Chain Institute at the Haslam College of Business at the University of Tennessee in Knoxville, Tenn. Her university webpage can be found at https://haslam.utk.edu/people/profile/kate-vitasek/.

Prevention

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> magistrate. In this manner, the evil will be cut up by the roots; the good citizens who may have difficulties among themselves will settle them like brothers by referring to the arbitration of some old man or the mayor of the commune. As for those who are troublesome, obstinate and quarrelsome, let them be ruined in the law courts; that is the justice that is due to them.

Frank Goodnow Johnson, "The Geography of China," *National Geographic Magazine* 661-662 (June 1927) (Johnson was president of Johns Hopkins University).

'An ounce of prevention is worth a pound of cure.'

Michael McManus and Briana Silverstein have presented an excellent history of ADR techniques in their paper, "Brief History of Alternative Dispute Resolution in the United States," *Cadmus* (Nov. 1, 2011) (available at https://bit.ly/3y8HqQn). Their research revealed that formal ADR techniques existed at the time of the 11th Century Norman Conquest, which allowed local and highly respected laypersons to conduct informal, quasi-adjudicatory settings in their communities, rather than use a more formal King's court.

The concept of using alternatives to court was expanded more formally in the early trade guilds that sought to enforce standards of quality, performance and marketplace behavior. Many of those systems continue today in commercial markets, such as the diamond market and the textile industry. Earl S. Wolaver, "The Historical Background of Commercial Arbitration," U. of Penn. L. Rev. 132-146 (December 1934) (available at https://bit.ly/4cKrq6n).

The Pilgrims in 1620 brought the concept of ADR to the United States, "preferring to use their own mediation process to deal with community conflicts." When disagreements occurred, members of the community would hear claims, determine fault, assess damages, and ensure the parties reconciled with one another. McManus and Silverstein, 101.

Mediation was one of the first ADR mechanisms formally recognized in the United States. It was institutionalized in the U.S. in 1898 when Congress, following initiatives begun a few years earlier in Massachusetts and New York, authorized mediation for collective bargaining disputes. Ibid. Arbitration was institutionalized in 1925 when Congress enacted the Federal Arbitration Act, which included express authorization for courts to enforce arbitration awards. Ibid.

'Healthy and Dispute Free'

The subject: Commercial dispute prevention.

The goal: Making prevention conventional business operating practice. Accepting that conflict is inevitable is passé.

The new forum: Kate Vitasek of the University of Kentucky will write monthly on why an ounce of prevention is worth a pound of cure.

The concept and name "ADR" got a boost in 1976 during the first Pound Conference (inspired by Harvard Law School Professor Roscoe Pound), which promoted the use of mediation and arbitration as adjuncts to the traditional legal system. The 21st Century namesake Global Pound Conference series was inspired by Prof. Pound and the 1976 conference named for him; the original conference was an impetus for the growth in the popularity of U.S. arbitration and mediation. See the International Mediation Institute's webpage at https://imimediation.org/research/gpc/gpc-about.

The Pound Conference marked the beginning of a formal "Alternative Dispute Resolution" movement that encouraged the business world to actively embrace out-of-court processes for managing conflict. This movement undertook to move the dispute resolution process farther "upstream," closer to the origins and sources of disputes.

The 1980s were a decade of increased interest and use of ADR. In 1977, the Center for Public Resources (now more aptly named the International Institute for Conflict Prevention and Resolution, or CPR) was established as a think tank for the improvement of ADR processes, adopting the motto "alternatives to the high cost of litigation" [and publishing this newsletter under that name since 1983].

In a 1984 address to the American Bar Association, then-Supreme Court Chief Justice Warren Burger advocated for lawyers to increase their ADR use. He acknowledged that while trials may be the only way to resolve some disputes, the legal system is too adversarial, painful, destructive, and inefficient to effectively manage all disputes. Mary Dunnewold, "What Every Law Student Should Know," 38/2 *Student Lawyer* (October 2009) (available at https://bit.ly/4c6S2x0).

Next year will mark the 100th anniversary of the Federal Arbitration Act and the 40th anniversary of CPR. Today there are dozens of ADR mechanisms in practice that help organizations resolve disputes effectively. ADR is used to resolve disputes effectively and efficiently between 50% and 79% of the time, depending on the industry, saving billions of dollars. See, e.g., Alternative Dispute Resolution at the Department of Justice (available at https://bit.ly/3WFXIK0), and American Arbitration Association fact sheet (available at https://bit.ly/3A9kVeE).

As we look back at the last 100 years, everyone who has made ADR successful should be applauded.

A Look Ahead

In next month's column, I will explore the rise of dispute prevention and highlight some thought leaders who have pioneered the concept of preventing—not just effectively resolving—disputes. After all, to reiterate Benjamin Franklin's famous words, an ounce of prevention is worth a pound of cure.

International ADR

Stepping Safely Off the Ledge: An Asian Perspective On Escalation Clauses in Dispute Resolution

BY BRANDON YAP

At its genesis and ascendancy, arbitration was touted as a speedier, cheaper, more efficient way to resolve disputes–especially when considered against the perceived drag of national court litigation.

Unfortunately, a common refrain in recent years has struck right at those advantages. With disputes becoming more and more complex, and tribunals ever more careful to cover all of the issues—no matter how small—in the fear that an eventual award proves unenforceable, arbitrations are taking longer and costing more than ever to reach their conclusions.

Escalation clauses–also known as multi-tier dispute resolution clauses–offer an elegant way out for both parties and tribunals. Parties agree to resolve their disputes progressively: going through a sequence of methods starting from the non-adversarial, non-binding (negotiation and mediation), toward the intermediate (adjudication, expert determination), and eventually to the formal (arbitration or litigation).

The goal here is for parties to resolve more and more issues between themselves as the progress flows, such that any eventual arbitration or litigation is narrowed down to only those issues that are absolutely critical. This is true to the spirit of alternative dispute resolution.

Conducted properly, this process can result in significant time and cost savings. Major disputes typically encompass a multitude of different issues, with varying levels of severity; escalation clauses allow parties the air cover necessary to find solutions for less mission-critical problems prior to having a legal body formally adjudicate for them.

This process also serves as an enforced cooling off-period for the parties, especially those that are in long-term commercial relationships for which it is difficult to switch contractual counterparties. Sensitive sectors–for example, the semiconductor industry–only have a few major players at the top, and the supply chain should not easily be disrupted by major legal disputes between these players.

In this author's view, escalation clauses should be actively promoted in commercial contracts large and small. Of course, as with all things involving legal innovation, such an initiative cannot exist in a vacuum. Institutions, regulators, courts, and of course tribunals must participate actively in this capacity building such that its true potential can be realized.

Legally Enforceable?

As the legal cliché goes: It depends. Effective escalation clauses should be underpinned by the following principles:

- First, as parties desire to attempt preliminary resolution through pre-arbitration steps, these steps have to be enforceable and not just superficial.
- Second, if these methods prove ineffective, a party must be able to formally commence arbitration proceedings.

Consequently, tight and disciplined drafting is essential for an escalation clause to achieve its full effect. If such a clause is loosely worded, a party seeking to commence the negotiation/ADR process is likely to find itself stymied in its efforts to get the other to engage in the stipulated process.

On the other hand, if a party bypasses these steps and commences arbitration directly, it is possible that the tribunal may not have jurisdiction to hear the dispute, and/or an eventual award may be subject to challenges on enforcement.

The key legal issue here pertains to "jurisdiction" and "admissibility." The esteemed authors of Redfern & Hunter put it best: jurisdiction refers to "*the power of the tribunal to hear a case,*" whereas admissibility refers to "*whether it is appropriate for the tribunal to hear it.*" Redfern and Hunter on International Arbitration (Seventh Edition) at 5.110.

This is a crucial distinction: if the issue only pertains to admissibility, the tribunal can rehear the case once the relevant procedural pre-condition has been corrected or complied with. On the other hand, if a tribunal does not have jurisdiction, it simply cannot hear a case.

This article analyzes the above legal question through a comparative lens from the perspective of a few major Asian jurisdictions: Singapore, Hong Kong, South Korea, Japan, and China. In tandem, it also discusses each jurisdiction's approach to capacity building in relation to multi-tier dispute resolution frameworks.

Singapore: The legal position in Singapore appears to be in favor of admissibility.

Two recent authorities—*BBA v. BAZ* [2020] 2 SLR 53 (available at https://bit.ly/3WkkVQA) and *BTN v. BTP* [2020] SGCA 10 (available at https://bit.ly/3WqSuAn)—highlight the prevailing view that tribunals' decisions on objections regarding preconditions to arbitration, including the fulfilment of conditions precedents such as conciliation provisions before arbitration may be pursued, are matters of admissibility and not jurisdiction. If, however, parties intend for such preconditions to operate as jurisdictional bars, they should simply be clearly expressed as such. See, e.g., *CZQ v.*

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International ADR

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CZS [2023] SGHC (I) 16 (available at https://bit.ly/3WKwCRV).

In addition to judicial support, Singapore has also taken big steps in terms of capacity building from the institutional and statutory aspects. For example, the Singapore Mediation Centre (see https://mediation.com.sg) has recently introduced a new ADR service, known as the Integrated Appropriate Dispute Resolution Framework, or Integraf (see https://bit.ly/4frosFh), which is a fluid mechanism that deploys both mediation and neutral evaluation to different strands of a dispute. See Response delivered at the opening of the Legal Year 2024, Chief Justice Sundaresh Menon (Jan. 8, 2024) (available at https://bit.ly/3A7t4R1).

The Singapore International Arbitration Centre (see https://siac.org.sg/) has also partnered with the SMC to pioneer the SMC "AMA Protocol"–in this method, arbitration proceedings will be stayed in favor of mediation; if it is successful, the parties' settlement will be recorded in a binding consent award.

Hong Kong: Likewise, Hong Kong appears to favor admissibility over jurisdiction. In *C v. D* [2022] HKCA 729 (available at https://bit.ly/3ykCEPT), the Court of Final Appeal considered an escalation clause that included a requirement to negotiate in good faith prior to commencing arbitration proceedings.

While this was considered to be a condition precedent to arbitration, the Court held that it would be an "over-simplification" to automatically equate a precondition in an escalation clause to go straight to jurisdiction: the correct approach is to ask whether "it is the parties' intention (or agreement) that the question of fulfilment of the condition precedent is to be determined by the arbitral tribunal," which goes toward admissibility. This approach, which examines parties' intentions, generally tracks with the Singapore position discussed above.

The Hong Kong International Arbitration Centre Rules 2024 also expressly highlight the possibility of staying the proceedings in the event parties agree to pursue other means of settling their disputes. See Article 13.11 in the rules at https://bit.ly/3Ys5dpd.

Furthermore, in the event there is an open question as to whether pre-arbitral ADR steps have been fulfilled, parties can have recourse to an emergency arbitrator that decides that narrow question without a full-fledged hearing for the merits of the main dispute.

South Korea: Although multi-tier dispute resolution clauses are not common in South Korea, with parties still preferring determinative approaches such as litigation and arbitration, there is likely to be a meaningful opportunity for growth in its use as Korean parties become some of the most sophisticated users of dispute resolution in the world, in line with the rapid progress in its economy. See Joongi Kim, "Might There Be a Future for Multi-tiered Dispute Resolution in Korea? Challenges and Prospects," in "Multi-Tier Approaches to the Resolution of International Disputes: A Global and Comparative Study," 161–181 (2021) (available at https://bit.ly/4daFkik).

There appears to be no jurisprudence dealing with the enforceability of escalation clauses. In addition, multi-tier dispute resolution mechanisms do not find much support from institutions or regulators. This is a vicious cycle–with parties already inexperienced with the use and deployment of such clauses within commercial contracts, the lack of a statutory framework or "formal" guidance from regulatory bodies makes it even more difficult for such clauses to find purchase.

Put another way: if users do not know about alternatives to formal dispute resolution, they are unable to consider these alternatives. There is also a cultural aspect to the slow uptake of more "conciliatory" resolution methods such as mediation–the hierarchical and Confucian traditions that still inform Korean society mean that formal litigation or arbitration is often pursued if only just to "save face." See Andrew White and Saeyoun Kim, "Early Resolution of Disputes in Korea: Negotiation, Mediation and Multi-tiered Dispute Resolution," 72(1) *Dispute Resolution Journal* 15 (2017).

Nevertheless, under Korean law, agreements obliging parties to negotiate prior to arbitration are typically considered not to give rise to a binding precondition to arbitration, with no consequent legal effects from breaching such a clause. In other words, the conventional split between jurisdiction and admissibility is not even at issue to begin with, and escalation clauses run the risk of having no bite.

Therefore, parties who intend to use escalation clauses should clearly and expressly provide for the consequences of breaching preconditions to arbitration, in line with the approaches in Singapore and Hong Kong.

In terms of capacity building, South Korea has now become a signatory to the Singapore Mediation Convention (with the Korean Commercial Arbitration Board enacting its international mediation rules in January 2024), the country will hopefully also consider putting in place a broad-based general mediation statute. Not only would this bring awareness to mediation–and by extension, the possibility of deploying escalation clauses in commercial contracts–it will bring long-needed legal clarity on how the regime should work.

Japan: As a matter of practice, multi-tier dispute resolution clauses appear to be common in Japan and are considered to be enforceable.

Capacity building in Japan in relation to a more-fluid ADR approach has gone slightly further than the other Asian jurisdictions discussed, although it is likely to take some time before users get familiar enough with the relevant regimes.

For example, the Japan Commercial Arbitration Association launched the Interactive Arbitration Rules in 2019. This offers the potential of a bespoke arbitration that can

Pacific Rim Perspective

The contractual issue: Multi-tiered escalation clauses, AKA step ADR provisions.

The forums: Major Asian jurisdictions—Singapore, Hong Kong, South Korea, Japan, and China.

The push: 'Escalation clauses should be actively promoted in commercial contracts large and small.' Because disputes are getting exponentially more complex.

be combined with mediation. See Interactive Arbitration Rules, Art 3(1) (available at https://bit.ly/4d5K08Z) and Commercial Arbitration Rules (2021) (available at https://bit.ly/3LJU3Vn).

Beyond that, unique provisions under these rules include the tribunal taking a more active role in clarifying the issues and parties' positions, as well as expressing their preliminary views (Articles 48 and 56). This active approach carries the benefit of streamlining the dispute for the parties because they are consistently apprised of the direction in which the proceedings are headed, with the possibility of having certain issues hived off and mediated instead.

If issues are settled prior to the conclusion of the main arbitration, these can be recorded in a "consent award," which is binding and enforceable pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), more widely known as the New York Convention (available at www.newyorkconvention.org). If mediation is unsuccessful, the arbitration can resume.

The Japanese approach has much to commend in terms of capacity building, even if adoption is not quite there yet. The first major step in achieving widespread acceptance for ADR methods is statutory clarity: in this regard, Japan is pushing forward with a framework that supports more common use of escalation clauses in the future.

China: In line with China's increasing amenability to arbitration and ADR, Chinese courts have in recent years offered more guidance in respect of escalation clauses. In sum, for an escalation clause to be binding and enforceable, parties must draft the agreement in such a way that clearly expresses that they are willing to be bound by the pre-arbitral conditions, with the relevant procedural consequences stipulated. See Yue (Sophie) Zhao, "Pre-arbitration ADR Requirements: A Chinese Perspective" in Romesh Weeramantry and John Choong (eds), 24(2) *Asian Dispute Review* (2022) (available at https://bit.ly/3WNwql7).

In terms of non-compliance, what are the legal consequences arising when a party does not comply with pre-arbitration ADR steps? Chinese courts have held that such compliance is not a formal precondition to arbitration proceedings. Although this does not augur particularly well for the effectiveness of such steps, it at least means that arbitration proceedings will not be disqualified on a "technicality."

That is a position more aligned with jurisdictions that consider escalation clauses through the lens of admissibility rather than jurisdiction. In this formulation, it would not be likely for a party to be entitled to seek relief from the Chinese courts in relation to the invalidity of the arbitration agreement.

In addition, at the enforcement stage of proceedings, it remains an open question as to whether Chinese courts would enforce an award rendered further to an arbitration commenced in breach of arbitral pre-conditions.

Under Chinese law, the general principle is that procedural irregularities are a ground for a court to set aside or refuse enforcement of an award. See Arbitration Law of the People's Republic of China 1994, Article 58(1)(c); Civil Procedure Law of the People's Republic of China 1991 as amended, Articles 237(2)(c) and 274(1)(c), and the New York Convention, Article V(1)(d)).

For example, a Chinese court previously refused to enforce a foreign award on the basis that the claimant failed to complete the negotiation period prior to commencing arbitration. *PepsiCo Investment Ltd. (U.S.) v. Sichuan Province Yun Lu Industrial Co., Ltd., Cheng Min Chu Zi* [2008] No. 36.

On the other hand, it appears that Chinese courts are taking a more relaxed view in recent years, holding that non-compliance with a pre-arbitration negotiation requirement should not be considered to rise to the level of procedural irregularity that merits the setting aside of an award. See Minutes of the National Courts' Symposium on Foreign-related Commercial and Maritime Trials, Item 107 (Jan. 24, 2022). While the exercise appears to be a fairly fact-centric inquiry, it appears that Chinese courts have not decisively come down on a consistent position on whether non-compliance with arbitral pre-conditions constitute a disqualifying jurisdictional issue.

The Way Forward

Notwithstanding the somewhat unsatisfactory and inconsistent treatment different Asian jurisdictions have provided in respect of this issue, one clear thread is that an escalation clause that is unambiguously drafted, spelling out the consequences of non-compliance with pre-arbitral conditions, is likely to be recognized as valid by national courts.

Set out below are some drafting tips for an escalation clause.

First, parties should decide what goes in the "toolbox" for their clause. Assuming the endpoint is formal arbitration (or litigation) proceedings, parties can choose from some, or all, of the following options:

- Negotiation
- Mediation/conciliation
- Expert determination/dispute adjudication board

Second, the drafting party must decide whether it considers pre-arbitral conditions to be permissive or mandatory. If the former approach is adopted, it is likely that breach of these conditions will not impact arbitral proceedings (and/or an eventual award), and parties have less incentive to comply.

> Escalation clauses can serve as an enforced cooling off-period for the parties.

If the latter approach is preferred, dispute resolution takes on a more formalistic tenor that is likely to be less conciliatory. To this end–if the terms "may" or "might" are used, parties retain a choice not to engage the ADR steps; if the terms "shall" or "must" are used, parties are compelled to comply with the appropriate steps.

Third, the drafting party must take care to prepare the clause in as detailed a fashion as possible. The following considerations should be considered when preparing an escalation clause:

- Which stakeholders are involved in negotiations? Typically, the companies' general counsel or C-level executives.
- How should parties initiate the process? For example, through the issuance of a Dispute Notice.
- How long should each step of the process take?
- How should a mediator/conciliator be

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International ADR

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nominated? To avoid controversy here, parties can incorporate a standard mechanism from an established mediation institution.

- What kind of information should be exchanged during the ADR process, and what kind of confidentiality burdens should be assumed?
- If a dispute board/expert determination is contemplated, express reference to the relevant set of experts and/or adjudicators should be built in from the beginning. For this measure to be effective, the clause should expressly state that any issue that parties have decided to refer to expert or neutral evaluation will be finally resolved by that adjudicator, and not raised again in future arbitration proceedings.

A well-drafted escalation clause can achieve significant efficiencies for a complex, multifaceted dispute, especially between parties who have a continuing commercial relationship that they wish to preserve.

Assuming that there are numerous issues that have arisen between the parties, some can be dealt with at an earlier stage through negotiations or a mediation process. Further issues can also be dealt with by a dispute resolution board. Through this escalation process, the scope of dispute would likely have narrowed significantly–ostensibly leaving only the most major issues for an arbitral tribunal to deal with.

As disputes get exponentially more complex in the near future, escalation clauses should see more widespread use in commercial situations. While capacity builders such as institutions and governments should offer their support, parties can get ahead of the curve by carefully and precisely crafting their multi-tier agreements such that unnecessary issues on the way up are avoided, and the process produces a smooth, progressive journey to the finish line.

A well-drafted escalation clause can achieve significant efficiencies for a complex, multifaceted dispute.

Court ADR

Integrating Mandatory Mediation: Transforming the U.K.'s Small Claims Process

BY AKSHATHA ACHAR

The United Kingdom's moves to make mediation mandatory in the nation's courts took a step forward this spring. The target is small claims.

On May 22, 2024, the U.K. Ministry of Justice signed the 166th Practice Direction update to the nation's Civil Procedure Rules 1998, "Practice Direction 51ZE–Small Claims Track Automatic Referral to Mediation Pilot Scheme." (It can be found at https://bit.ly/46tV4dv.) The pilot mandates mediation sessions for monetary claims under £10,000 in the Small Claims track once the case is allocated to that path.

This is the natural next step to the U.K.'s Civil Justice Council's controversial June 2021 report on conflict resolution processes (see "Making It Mandatory: The U.K.'s Slow, and Definitive, Move to Compulsory ADR," 39 *Alternatives* 134 (September 2021)). In the wake of that report, the U.K. government published a post-consultation report on Dec. 20, 2023, confirming the government's intention to fully integrate mediation into civil claims court processes valued up to £10,000. (See the consultation reports at https://bit.ly/4d5pQvI).

To deliver this, the report outlined plans to enhance the Small Claims Mediation Service (the program details are available at https://bit.ly/4ch62EM), run by HM Courts and Tribunals Service, or HMCTS, which administers criminal, civil and family courts and tribunals in England and Wales. See https://bit.ly/3SwvrmP.

The mediation offering is a free service that is expected to assist more than half of its users in reaching a resolution within weeks of starting their case.

The policy aims to ensure that all parties have the opportunity to resolve their cases consensually before a court hearing. Settlement at mediation remains voluntary, but those requiring a hearing before a judge can still have one.

The Policy's Application

The integrated mediation policy now applies to all small claims in the U.K. County Courts issued under the standard Part 7 procedure of the Civil Procedure Rules, covering court claims for money claims allocated to the small claims track. See https://bit.ly/3LLjINg. The policy does not apply to non-standard procedures such as possession claims.

Parties will have access to reasonable adjustments similar to those in a court hearing, including extending the mediation appointment, conducting it in person, or using an interpreter. HMCTS plans to develop a safeguarding and vulnerability protocol for mediation, providing a framework to conclude the process in case of concerns or unavailability of alternative reasonable adjustments. If

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necessary, the process may be concluded ahead of the appointment. The protocol will also offer a framework for connecting parties to external support services where there is a potential risk of harm.

The New Lifecycle

Here is how the pilot scheme will orient and track the cases—a new lifecycle for small claims matters:

1. Legal Problem: A claimant has a dispute with a defendant and believes his, her or its legal rights have been infringed.
2. Claim: The claimant issues legal proceedings by filing a claim with the County Court.
3. Defense: The defendant files a defense, and the case is allocated to the small claims track.
4. Directions Questionnaire: Parties complete a questionnaire detailing expert evidence, unavailable dates, vulnerabilities, and reasonable adjustments.
5. Progression to Mediation: Mediation is integrated for all Part 7 claims, with appointments offered within 28 days after receiving case details.
6. Appointment Confirmation: Parties receive a three-hour appointment window for a one-hour telephone mediation session.
7. Mediation: At the appointment, the mediator will contact each party and speak to them in turns. This means the parties talk to the mediator only, not to each other. The mediator speaks to each party separately—caucuses—exploring areas of potential compromise.
8. Mediation Outcome: If a settlement is reached, it becomes a legally binding agreement. If not, the case proceeds to a court hearing.

The format of the future process for small claims described above has been set forth in a consultation outcome report by the U.K. Ministry of Justice. See the report at https://bit.ly/46nUi1I. Parties are expected to engage in mediation in good faith, recognizing it as a tool to facilitate resolution.

If a party does not attend its scheduled mediation appointment, a judge may apply a suitable sanction at their discretion. This could be a "strike-out" of all or part of the claim, automatically ruling in the other party's favor, or a cost sanction, ordering the non-compliant party to pay for part or all of the other party's legal or court costs (even if the judgment overall is in favor of the non-compliant party).

Development History

In various international jurisdictions, compulsory mediation for civil cases has already been successfully established.

Mediation First

The reform: Big ADR ideas for small claims.

The context: The U.K.'s former flirtation with mandatory mediation progresses and now has real teeth in a two-year program for civil cases.

The bigger picture: Streamlining the justice system by using effective conflict resolution processes. A long, slow, but imminent changeover.

In Italy, for example, judges can order parties to attempt mediation in any civil dispute, and in some cases, parties must attend an "initial mediation session" before they can bring a claim. In Australia, similar court powers exist.

In Ontario, Canada, parties to civil disputes have been automatically required to attempt mediation at the beginning of court proceedings for more than 20 years, with courts able to dismiss or strike-out the non-complying party's claim or defense. See www.ontario.ca/page/mandatory-mediation-civil-cases.

There is strong support for these measures from the legal profession within their respective jurisdictions, success rates are high, and they have driven a genuine culture change in how people view the resolution of legal disputes.

Reviewing these and other international examples, alongside existing elements of compulsion and case law on that subject within the courts of England and Wales, in July 2021, the Civil Justice Council's Judicial ADR Liaison Committee published a report setting out the view that compulsory mediation is not only lawful but should be encouraged. See Compulsory Compulsory ADR Report, Civil Justice Council Judicial ADR Liaison Committee (June 2021) (available at https://bit.ly/3Sv51lq).

> The U.K. government intends to fully integrate mediation into civil claims court processes for small claims.

The report noted that mediation is a form of dispute resolution "which is not disproportionately onerous and does not foreclose the parties' effective access to the court." Moreover, if there "is no obligation on the parties to settle and they remain free to choose between settlement and continuing the litigation then there is not … 'an unacceptable constraint' on the right of access to the court."

The report concluded that as long as parties are not forced to settle their case at mediation and they remain able to access the court, introducing a requirement to attempt mediation is acceptable.

The final report by the Civil Justice Council on the resolution of small claims—the Practice Direction 51ZE–Small Claims Track Automatic Referral to Mediation Pilot Scheme noted above—is at https://bit.ly/46tV4dv.

* * *

Current U.K. mediation developments are preceded by significant ADR history: On Sept. 21, 2023, the U.K. government signed the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York 2018). In its wake, the new policy of integrated mediation was declared to apply to all small claims in the County Court issued under the standard Part 7 procedure of the Civil Procedure Rules.

The Practice Direction 51ZE was formally issued by the Ministry of Justice. It was set to run from May 22, 2024, to May 21, 2026. During this period, once a claim has been issued

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Court ADR

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and directions questionnaires filed by all parties, it will be stayed and parties will be referred to the one-hour mediation described above, which is free of charge.

The Order to Engage

In a late 2023 decision, in *Churchill v. Merthyr Tydfil County Borough Council*, [2023] EWCA Civ 1416 (available at https://bit.ly/3A5Tmmt), the England and Wales Court of Appeal Civil Division ruled that courts can order parties to engage in alternative dispute resolution, provided that this (i) does not impair the essence of the claimant's right to a fair trial; and (ii) "is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly, and at reasonable cost."

While *Churchill* relates to ADR generally, its impact can be expected to be magnified in light of the practice order for mandatory mediation issued last month.

Claimant Churchill purchased a property and alleged that Japanese knotweed from the defendant council's adjacent land caused damage. Despite the council's warning to use its internal complaints procedure, Churchill initiated legal proceedings. The initial hearing declined to stay mediation proceedings, and Deputy District Judge Kempton Rees stated that he was obligated to follow Lord Justice Dyson's assertion in the seminal case of *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576 (available at https://bit.ly/3jy8FZw) that "to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court."

The council appealed, and in delivering the Court's leading judgment, Sir Geoffrey Vos determined that Dyson's *Halsey* statement was not essential to that case's reasoning and thus not binding on the lower court.

Vos then addressed the primary issue on appeal: whether courts have the authority to lawfully stay proceedings for, or mandate, parties to engage in ADR.

The unanimous judgment, written by Vos, who is designated Master of the Rolls, and joined by Lady Carr of Walton-on-the-Hill, Lady Chief Justice, and Lord Justice Birss, highlighted that compelling ADR no longer contravenes Article 6 of the European Convention on Human Rights (ECHR).

The decision's main holding provided that the order to mediation, as noted above, does not impair the essence of the claimant's right to a fair trial, and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly, and at reasonable cost.

This opinion mandates careful consideration of a range of factors including the prospects of the claim being resolved, costs, mediation suitability, legal representation, urgency, parties' resources, and reasons for resisting mediation, before issuing a stay for mediation. The ruling represents a significant shift toward mandatory mediation, which when considered alongside the recent Practice Direction, evinces the courts' renewed belief in the principle that taking a case to trial should really be the last resort.

ADR Reform Goals

The United Kingdom's move to integrate mandatory mediation in small claims is a potentially significant step toward streamlining the civil justice system. Crafted following extensive consultations, the Practice Direction is expected to affect about 92,000 cases annually, thereby freeing up to 5,000 judicial sitting days each year. See U.K. Ministry of Justice press releases, from July 25, 2023, at https://bit.ly/4dwCfca and May 22, 2024, at https://bit.ly/3WpK9wW.

> Claims will be stayed and parties will be referred to one-hour, free-of-charge mediation.

Churchill further supports this direction by upholding the legality of court-mandated ADR, emphasizing the judiciary's support for mediation as a valuable dispute resolution tool. The HM Courts and Tribunals Service will continue to expand the Small Claims Mediation Service by recruiting more mediators and upgrading technology.

While this integration has started with small claims, the broader goal emblazoned across this shift is to simplify civil case processes and reduce court backlogs, promoting quicker, cost-effective resolutions outside of court, marking a new era in the U.K.'s approach to civil justice.

ADR Brief

NYC Bar Association's Blueprint for Better Mediation Confidentiality

BY SARAH BOXER

A recent report from a New York City Bar Association subcommittee provides significant recommendations for bolstering mediation confidentiality in New York State. The subcommittee's analysis reveals a fragmented confidentiality framework and suggests several actions to ensure the protection of confidential information throughout the mediation process.

The author was a CPR 2024 Summer intern. She is a student at Harvard University Law School in Cambridge, Mass., and is beginning an LL.M. program in international law at Cambridge University, in Cambridge, England.

The 18-page report, titled "Mediation Confidentiality in New York State: Overview of the Current Regulatory and Institutional Landscape with Recommendations," provides an in-depth analysis of the current state of mediation confidentiality in New York. The report can be found at https://bit.ly/3WhkWEL

Through their recommendations, the Mediation Privilege Subcommittee's members—from the association's ADR, Arbitration, International Commercial Disputes, and

ADR Brief

Litigation Committees—aim to enhance protection for all parties involved in mediation processes.

According to subcommittee Chair Myrna Barakat Friedman, a New York City-based commercial arbitrator and mediator, by increasing awareness of different confidentiality standards, more mediators and counsel will scrutinize specific rules for their mediations and consider supplementing them with confidentiality agreements, as recommended in the report.

"I think the report is a bit of an 'eye-opener' to mediators and counsel," states Friedman in an email, adding, "Many mediation participants were under the impression that mediation was generally confidential subject to certain narrow rules but didn't scrutinize the specific rules that applied. Very few focused on the differing standards and the fragmented landscape. It was somewhat taken for granted."

The report aims to address these issues by encouraging a more thorough examination of relevant rules and agreements.

The report recommends mediators highlight the benefits of separate confidentiality agreements to counsel at the outset of mediation. This practice helps dispel misconceptions about confidentiality and ensures a comprehensive review of applicable forum rules and mediator agreements.

Incorporating robust confidentiality provisions into mediator agreements and aligning these provisions with forum rules tailored to the specific mediation are also advised. Reiterating the importance of confidentiality at each session further reinforces the protection of sensitive information, the report recommends.

For mediation counsel, the report suggests a comprehensive examination of all existing confidentiality provisions, including those in dispute resolution agreements, forum rules, and mediator agreements. Counsel, the report advises, should assess whether additional confidentiality agreements are necessary to cover any gaps, ensuring that protections address disclosures made by parties, the mediator, and any third parties.

The authors also advise counsel to prepare for potential compulsory processes, such as subpoenas, by incorporating provisions to manage such risks. Ultimately, the report emphasizes that participants' understanding of their confidentiality obligations is crucial to maintaining mediation process integrity.

Before issuing its recommendations, the report provides a detailed explanation of the sources of confidentiality protections and the disjointed nature of New York's legal framework regarding mediation confidentiality rules.

The association highlights the absence of a unified statutory or common law framework governing court-mandated mediations in New York. It notes that the state has not adopted the Uniform Mediation Act, which provides comprehensive confidentiality protections in 12 states and the District of Columbia.

Instead, New York relies on a collection of local rules and voluntary confidentiality agreements between parties. For example, the New York County Supreme Court's Commercial Division ADR Rules impose strict confidentiality requirements, preventing the disclosure of mediation-related documents and communications outside the mediation process.

In contrast, federal courts in New York apply more standardized confidentiality protections through local rules influenced by the federal Alternative Dispute Resolution Act of 1998, ensuring that mediation communications remain confidential unless ordered otherwise by the court.

The report also examines confidentiality practices across major ADR providers. For example, the American Arbitration Association's Commercial Mediation Procedures prohibit mediators from disclosing confidential information unless compelled by law or with parties' consent, while JAMS' Mediators Ethics Guidelines mandate secure storage and limited retention of mediation records.

Similarly, CPR's Mediation Procedure enforces comprehensive confidentiality, barring disclosure of process details and settlement outcomes to anyone not involved. [Editor's note: *Alternatives*' publisher, the International Institute for Conflict Prevention and Resolution—CPR, owns CPR Dispute Resolution Services LLC, which provides mediation services.]

The report identifies a significant gap in confidentiality protections for private mediations not conducted through court programs or administered entities like the providers above. For these mediations, it is recommended that neutrals and legal practitioners consider entering into confidentiality agreements at the outset. In court-adjacent or administered mediations, additional confidentiality agreements may be necessary to address the involvement of third parties who may encounter mediation communications.

Despite the presence of confidentiality agreements, the report notes that "New York courts have allowed the discovery of certain mediation communications in exceptional and narrow cases." This may include scenarios where compulsory processes such as subpoenas are issued by individuals or entities without direct involvement in the mediation. The report advises parties to be aware of this potential risk and to prepare accordingly.

The report also details several exceptions to New York mediation confidentiality that vary depending on the jurisdiction and specific rules applicable. Common exceptions include situations where disclosure is mandated by law, such as preventing illegal conduct or addressing child-abuse allegations. Mediation confidentiality is also subject to exceptions in cases of unethical behavior, where disclosure may be necessary to address or report misconduct by a mediator or party.

Additionally, some rules allow for the disclosure of information to collect unpaid mediator fees or to report administrative details of the mediation process, such as session attendance.

These exceptions emphasize the difficult balance between protecting the confidentiality of mediation proceedings and addressing circumstances where transparency is deemed necessary to uphold legal, ethical, and procedural standards.

In its conclusion, the bar association report outlines the disjointed landscape of New York mediation confidentiality and offers recommendations to address these inconsistencies.

The report identifies the need for clearer and more robust confidentiality protections across different mediation settings, including both court-mandated and private mediations. It suggests that mediators and counsel take

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steps to clarify and reinforce confidentiality provisions.

Additionally, the report identifies gaps in existing confidentiality protections and provides guidance on navigating exceptions, such as those involving legal requirements or unethical behavior.

The recommendations' goal is to improve the overall awareness and effectiveness of mediation confidentiality in New York State. "Going forward," concludes Myrna Friedman, "I expect that more people will scrutinize the specific rules that apply to their mediations and consider supplementing them with confidentiality agreements."

The report has been distributed to the press, academics, administering institutions, other bar associations, and ADR-related groups, according to Friedman. See, e.g., Christine DeRosa, "NYC Bar Advises Strengthening Confidentiality in Mediations," *Law360* (July 9) (available at https://bit.ly/3xZkPpy). The New York City Bar Association is expected to organize discussions on the topic as part of its fall programming and participate in similar public discussions in the coming year.

Court Decisions

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Likewise, in the unanimous decision in *LePage Bakeries*, Chief Justice John G. Roberts Jr. carefully examined FAA Section 1's transportation worker exemption, and he observed that the text of the exemption did not contain any requirements regarding an employer's industry.

With this textual approach from the Court, one can expect more restrained decisions, as opposed to the pre-2019, policy-driven decisions, which were less tethered to the FAA's text and expanded the FAA's scope.

Future FAA Development—And Sailing Ships

The Court's rulings from this term also hint at the FAA's future trajectory. For the foreseeable future, the Court is likely to continue its textualist approach, subject to one caveat revealed by the *Coinbase* decision.

The Court's *Coinbase* analysis was the least textual of the three rulings this term. In *Coinbase*, the Court re-affirmed and applied the framework developed almost 30 years ago in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (available at https://bit.ly/2WEXGnF), where the Court examined first-level disputes (the underlying merits), second-level disputes (Is there an agreement to arbitrate?), and third-level disputes (Who has the primary power to decide second-level disputes?).

Textually, FAA Sections 3 and 4 suggest an answer regarding third-level disputes: Courts must always decide arbitrability matters. The *First Options* Court, however, developed a different answer and allowed arbitrators to decide under certain circumstances.

In the Court's 2019 decision in *Henry Schein Inc. v. Archer & White Sales Inc.*, 139 S.Ct. 524 (2019) (available at https://bit.ly/2YLDkWQ), the Court quickly dismissed the textual argument that courts are always the answer to third-level disputes by quipping "that ship has sailed" and by applying the precedent of the *First Options* framework. In *Coinbase*, the Court relied on this well-established, though arguably non-textual, framework.

Based on *Coinbase*, alongside the more textual decisions in *LePage Bakeries* and *Spizzirri*, one can predict how the Court is likely to rule in future FAA cases.

If there is existing FAA precedent, the ship has likely sailed, and the Court is likely to honor that precedent, as illustrated by the Court's application of the *First Options* framework in *Coinbase*. But for new matters not addressed by prior Supreme Court FAA opinions, the Court is likely to continue fine-tuning the FAA by relying primarily on a textual approach.

The Court's *Spizzirri* decision will also influence future FAA development. Prior to *Spizzirri*, some federal district courts would dismiss court proceedings when finding a case is referable to arbitration under Section 3, "Stay of proceedings where issue therein referable to arbitration."

Such dismissals in the past generally allowed an immediate appeal of the district court's finding of an enforceable arbitration clause. As a result, a substantial body of federal appellate decisions developed over the years exploring and providing guidance about the enforceability of arbitration clauses. After *Spizzirri*, however, federal courts no longer have discretion to dismiss a case, and instead, federal courts must stay the court proceeding when a party moves for a stay under FAA Section 3.

Such a stay does not allow for an immediate appeal, and thus, federal appellate decisions about the enforceability of an arbitration clause are likely to become less common in the wake of *Spizzirri*. Instead, such appellate guidance will be more likely to arise in state court systems, depending on applicable state arbitration laws.

Also, in the wake of *Spizzirri*, the

Scotus's Shifting View

The commentary: Loyola Law's Imre Szalai sees more textual analysis and restraint in the U.S. Supreme Court's arbitration jurisprudence.

The illustrations: The three cases decided in the Court term concluded in July.

The current mode: Since 2019, the arbitration case analysis trend appears to be accompanied by judicial supervision over, rather than facilitation for, the ADR setting.

applicability of the FAA's appellate procedures in state court may become a more important issue. Compare *Simmons v. Deutsche Financial Services*, 532 S.E.2d 436, 440 (Ga. Ct. App. 2000) ("[A]ssuming § 16 of the FAA would prohibit the appeal, it does not preempt Georgia's procedural rule allowing this appeal."), with *Biotricity Inc. v. DeJohn*, 2024 Ohio 1593, 2024 WL 1794798 (Ohio Ct. App. April 25, 2024) (FAA, instead of state law, governs appeals in the state court system).

The Judiciary's 'Supervisory' Role

The Court's *Spizzirri* decision also provides a glimpse into how the Court currently views its role with respect to arbitration.

Before the 1920s, courts generally refused to enforce pre-dispute arbitration agreements, which were viewed as contrary to public policy and a threat to the authority of courts under the ouster doctrine.

One can view the FAA's 1925 passage as involving a transfer or shift of power, whereby courts would recognize party autonomy and give force to pre-dispute arbitration agreements. Judicial power diminished to some degree with the FAA's enactment.

Particularly since the 1980s, with the Court's expansion of the FAA, one can view judicial power as continuing to decrease in some respects. For example, at one time, disputes arising out of statutes, such as antitrust claims or civil rights disputes, were viewed as non-arbitrable. However, landmark cases such as *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985) (available at https://bit.ly/4cxzl6S), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (available at https://bit.ly/461lBP9), expanded the role and power of arbitrators under the FAA to allow for the arbitration of such disputes.

With *Spizzirri*, the Court seems to acknowledge a stronger role for the judiciary in connection with arbitration. In particular, the unanimous *Spizzirri* decision describes a "*supervisory* role that the FAA envisions for the courts." (Emphasis added.)

Personally, I would describe the judiciary as having a "facilitating" role under the FAA, whereby courts are supportive of arbitration when the arbitration process breaks down. The *Spizzirri* Court's choice of words and self-described "supervisory" role, however, suggests judicial authority over arbitration, or a hierarchy or judicial primacy over arbitration, where there is some oversight and accountability. One can argue that such a view of the judiciary's supervisory role is consistent with the post-2019 evolution of the FAA, where the Court appears to be engaged in more restrained FAA interpretations.

If one examines legal history in the United States and other countries, there is a long-term dynamic involving ebbs and flows of judicial power and arbitral power over decades. With the Court's more textual approach in recent years, the new chapter four of the FAA restricting arbitration of disputes involving sexual assault and sexual harassment (§§ 401 – 402), and the Court's recent pronouncement of the judiciary's supervisory role, there are signs pointing to a new phase of the FAA's development.

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in African arbitration practice on pressing issues and emerging trends, and a networking reception for attendees.

The first panel last December focused on "The State of Arbitration in Africa and the Prospects for 'Africanization,'" while the second panel was titled "The Role of Arbitral Institutions and the Future of Ad Hoc Arbitration in Africa." (CPR's webpage for the 2023 event, which includes links to the speakers' web pages, can be found at www.cpradr.org/events/cpr-global-conference-africa-arbitration-day-new-york.)

The opening panel, moderated by Mohannad A. El Murtadi Suleiman, counsel in the New York office of Curtis, Mallet-Prevost, Colt & Mosle, comprised experts in the field including Ibironke Odumosu-Ayanu from the University of Saskatchewan School of Law in Saskatoon, Saskatchewan, Canada; Alice Gyamfi, an associate in the New York office of DLA Piper; Uché Ewelukwa Ofodile from the University of Arkansas School of Law, in Fayetteville, Ark., and Jennifer Glasser, a partner in New York's White & Case, who chairs the CPR Institute Arbitration Committee.

Drawing from the recently adopted Investment Protocol by the African Union and the Model Bilateral Investment Treaty (BIT) from the Africa Arbitration Academy (the protocol is available by scrolling down here: https://africaarbitrationacademy.org; the BIT is available at https://bit.ly/3vvwlaI), the panel addressed several points, including:

- Strategies for implementing the Investment Protocol and Model BIT without conflicting with fragmented existing regimes across the African states.
- Evaluation of the suitability of Investor-State Dispute Settlement, best known as ISDS, mechanisms for Africa.
- Justifications for the inclusion of ISDS provisions in the Investment Protocol and Model BIT.
- Protections and the scope of the investors' obligations in the Model BIT.

1. The Implementation of the Investment Protocol and the Model Bit with Regard to the Existing Regimes.

Prof. Ofodile provided five ways to harmonize the framework as strategies for implementing the Investment Protocol and the Model BIT.

The first method would be to terminate most of the existing treaties or their non-renewal when they expire. Another solution would entail revising the treaties with "a view to harmonization." A third option is joint interpretation, to the extent that it is possible.

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Implementing a moratorium on new treaties could serve as yet another solution, delaying further agreements until harmonization is achieved.

Finally, Ofodile suggested the creation of a common African investment framework beyond the Investment Protocol, hinting toward the idea of transferring competence to the African Union, even if—she seemingly admitted to herself—it is a "very controversial" idea.

While acknowledging the investment protocol's attempt to address harmonization, Prof. Ofodile highlighted its limitations. As existing BITs are outdated, simply amending them isn't sufficient, leading to a complex and fragmented framework. African countries haven't fully engaged in interpreting the treaties, prompting the need for self-reflection on why this is the case.

Furthermore, Ofodile discussed the lack of implementation of Model BITs between African countries. For example, a Nigeria-Morocco BIT was "wonderful" but has not been implemented.

On the other hand, a Morocco-Japan BIT, which was concluded after the Nigeria-Morocco BIT, has less "Africanized" features. "When African countries are negotiating with each other," said Uché Ofodile, "they bring out all the Africanization hard, but when they're now concluding BITs with third countries, they tend to be timid—very, very timid."

Also, there are few BITs among intra-African parties—about 50—but many more in force with third countries (more than 500). "Investment treaty protection: How to safeguard foreign investments in Africa," *Africa Focus 2022*, White & Case (Dec. 12, 2022) (available at https://bit.ly/3TX099E).

2. The Sustainability Of ISDS in Africa.

According to Prof. Ofodile, there is no consensus about whether ISDS is good or sustainable in Africa. The investment protocol and the Model BIT try to strike a middle ground by providing ISDS while introducing some "African sentiments" into it, she said. They try to encourage African arbitration centers, and they require at least one African arbitrator.

She explained that the "Ubuntu principle" was added in the Model BIT, and it prioritizes community involvement and reflects African communal ethos in treaty interpretation.

3. Protection Of Local Communities.

On the protection of local communities and sustainable development, Prof. Odumosu-Ayanu, of the University of Saskatchewan, challenged the traditional investor-state dispute settlement framework which, given its primary focus, can neglect the complexities involving affected local communities.

Many disputes transcend the investor-state dichotomy and require a more nuanced approach, she explained. The Investment Protocol has provisions aiming at protecting the rights of Indigenous peoples and local communities, as well as promoting sustainable development. But some provisions are subjected to host states' positions, raising questions about enforceability.

Registration Open: AAD-New York 2024 Details

Here are the details for Africa Arbitration Day-New York 2024, to be held on Nov. 1 at White & Case in New York, with registration now open at www.cpradr.org/events/cpr-2024-africa-arbitration-day-new-york.

AAD-NY 2024 will include networking, an arbitration moot competition for students, two substantive panels, and a post-program cocktail reception with hors d'oeuvres.

The program agenda includes two scheduled panel discussions:

- Unpacking the SOAS Arbitration in Africa Survey Reports—The SOAS Arbitration in Africa Survey Reports have offered invaluable insight into the state of arbitration in Africa since the first report was published in 2018. The panel will explore how the conclusions in the reports continue to inform understanding of the state of arbitration in Africa today, and how the 2024 Report may deepen that understanding.
- Arbitrating Natural Resources Disputes in Africa—Disputes are inevitable as Africa's natural resources continue to attract foreign investments. Arbitration is expected to play a vital role in resolving those disputes. This panel will discuss the role of arbitration in natural resources disputes in Africa and the impact that African states' legal reforms related to natural resources could have on the future of foreign investment in Africa.

The purpose of AAD-NY is to: (i) highlight prominent issues in international arbitration pertinent to the Africa region; (ii) foster greater community among international arbitration practitioners in North America and Africa, and (iii) help develop the next generation of Africa-related arbitration practitioners.

CLE credits are pending verification, but organizers anticipate offering three New York Continuing Legal Education in the category of Professional Practice. CPR's financial aid policy for attendance support, as well as details on the 2024 AAD-New York Scholarship Fund is available at the link above.

Panelist Alice Gyamfi of DLA Piper highlighted Investment Protocol article 29 about capacity-building that emphasizes middle management and managerial positions because the "investment must be made in every aspect of the value and the production chain."

This allows for the hiring of not only the workforce within the local jurisdictions but also hiring locals for middle managers and people to act as liaisons with the corporation.

Article 30 pushes the investment to go beyond the transfer of technology to also "transfer information that relates to the expertise in that

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Law Students: A Call for Moot!!

CPR's Africa Arbitration Day–New York Steering Committee has a Sept. 20 deadline for law students to participate in the program's arbitration moot competition.

The competition will be held as part of 2024 Africa Arbitration Day-New York's events on Friday, Nov. 1, at the New York office of White & Case. See the accompanying article and box for AAD-NY details and information on last year's competition.

Awards this fall will be presented for Best Oralist and Best Written Submission. The awards, to be presented during the 20224 AAD-NY the same day, led by moot organizer Prince-Alex Iwu, of Miami's Diaz, Reus & Targ, and a member of the 2024 AAD-NY Steering Committee

The moot competition's application form and details can be found by scrolling down on CPR's webpage for 2024 AAD-NY at www.cpradr.org/events/cpr-2024-africa-arbitration-day-new-york.

sector," said Gyamfi, "because if we need to maintain[, for example,] a mining concession agreement for 100 years, it cannot be the case that we have to import that talent all the time."

There is a need to develop a steady and strong stream of talent at all levels, Gyamfi said, because "maintenance can then begin to happen on an Africa level and not require an investment of capital all the time."

White & Case's Jennifer Glasser, in discussing the Model BIT, also acknowledged the necessity to have mechanisms that reflect local circumstances and engage local communities in investment dispute resolution. A foreign-dominated process risks legitimacy and effectiveness in attracting direct investment, she said. There also is the question of balancing Africa-driven processes with the need to attract foreign investment by ensuring an optimal dispute resolution solution in terms of efficiency, costs, and quality of results.

Furthermore, the Model BIT provision requiring the selection of a chair of African nationality aims to promote the growth of African talent in arbitration, Glasser noted. There's a concern, however, about limiting the pool of available arbitrators if too many specific criteria are included. Balancing capacity building with ensuring a wide pool of qualified arbitrators is crucial. The Model BIT strikes a balance by allowing the appointment of a non-African arbitrator if it's not possible to find a qualified candidate of African nationality, albeit with a high standard, explained Glasser.

Alice Gyamfi emphasized the importance of balance in addressing the duties and obligations of investors toward the host state. She highlighted that both the Model BIT and the investment protocol aim to achieve a more equitable balance of obligations, ensuring that the duty of the host state to protect investments is "on equal footing with the obligation to respect … fundamental and internationally recognized human rights and environmental protections."

Regarding the scope of investor protections, Gyamfi discussed the "FET" provision, which traditionally refers to fair and equitable treatment. She noted that while the Investment Protocol has narrowed the scope of the investor's obligations, the intention is not to offer fewer protections but to provide clarity on the types of investments and behaviors being protected. By clarifying these provisions, the goal is to enhance predictability and reduce the risk of broad interpretations by arbitral tribunals, which can lead to uncertainty and inconsistency in decision-making.

4. Protections and the Scope of the Investors' Obligations in the Model Bit.

Jennifer Glasser raised an important concern regarding the narrowing of protections in the Model BIT, particularly concerning so-called FET provisions. She argued that while the Model BIT aims to achieve clarity by providing a detailed definition of fair and equitable treatment, it also limits the scope of what constitutes a treaty violation by enumerating specific classes of measures.

She said that these measures focus primarily on procedural protections and do not adequately address broader investor expectations or protection against fundamental changes in the legal framework.

Glasser explained that by limiting the scope of fair and equitable treatment provisions, the Model BIT may hinder investors' ability to seek relief in cases where their investments are adversely affected by changes in the legal framework. This could have tangible impacts on investment decisions, particularly in sectors like renewable energy, which are expected to see future increased activity.

The last issue discussed was raised by Prof. Uché Ofodile and was about the investors' obligations in the African BITs. "The languages are so weak as to be almost useless," she said, "they're not binding and they're not even up to the standard that you see in some other countries." None of these documents provide remedies for the communities as do UN guiding principles or the EU with its corporate sustainability reporting directives, for instance.

For final comments, Prof. Ofodile wanted to acknowledge her ambivalent feelings about the concept of "Africanization" because it implies something different, contrary to the established order. This, she suggested, might not be entirely accurate. Therefore, she said the term must be employed with caution.

* * *

A break after the first panel allowed time to reward the participants of the 2023 AAD-NY Arbitration Moot Competition in which Benjamin Allen, of the University of Virginia in Charlottesville, Va., won Best Oralist. Juan David Arciniegas Parra, of the Universidad Nacional de Rosario, in Rosario, Argentina, and Naomie Mujinga Malumba, of

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Yeshiva University's Benjamin N. Cardozo School of Law in New York [and the author of this article] received Certificates of Participation.

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The second Africa Arbitration Day-New York panel, moderated by Victoria Safran, a partner in New York's Sentner Safran and a former chair of the New York City Bar Association African Affairs Committee, tackled the subject of the "Role of Arbitral Institutions and the Future of Ad Hoc Arbitration in Africa."

The panel was composed of Mohamed Sweify, an associate at Hinshaw & Culbertson in New York (and CPR Y-ADR Steering Committee member); Prince-Alex Iwu, an associate in the Miami office of Diaz, Reus & Targ, and Mélida Hodgson, a New York partner at Arnold & Porter.

On the first topic, about the key considerations in choosing between ad hoc and institutional arbitration in Africa, Sweify's first answer was to focus on a competent arbitral institution, and listed advantages of institutional provider arbitration. But incompetent and corrupt arbitral institutions can pose challenges and undermine trust in the process, he said, noting they were numerous, while a competent institution allows process predictability.

The judiciary's role also must be considered, he noted. Quality judges can significantly affect the success or failure of arbitral proceedings, necessitating robust judicial oversight.

Furthermore, arbitral institutions enhance stability by defining arbitrators' powers and imposing procedural requirements. That doesn't take away the arbitral process's flexibility as it suits parties' needs for efficiency.

Finally, Sweify noted, the lack of clear regulation and set criteria as to what constitutes an arbitral institution opens the door to unpredictability. Nevertheless, he said, recently, Egypt's highest court decided that a permanent arbitral institution has the following characteristics: The institution has to be established based on regional convention legislation or any other law with the purpose of administering international commercial disputes; it must be universally or regionally reputable and well-known, and it must gain participants' confidence in the field of international and commercial business. Finally, it must have a stable administrative mechanism that is weighed by the practical experience and the regular administration of arbitral disputes.

Sweify noted that these criteria apply to the existing arbitral institutions with a long history of handling arbitration cases, and newly established providers will not be able to fulfill these criteria.

According to panelist Mélida Hodgson, in ad hoc arbitration, "you run things yourself and can be more in charge," whereas institutions provide security and predictability. She said she thinks that from her "Western point of view," an institution is better because when a dispute has already arisen, it is difficult to agree on essential process features, with parties not wanting to "give an advantage to the other side."

With ad hoc arbitration, there is a good possibility of being stalled by the other party and that is going to be disadvantageous at least for one party, she warned.

Diaz Reus's Prince-Alex Iwu spoke about Africa arbitral institutions. Practitioners think of this question, he noted, on the aspect of which institutions give them an experience equivalent to what they have seen elsewhere. "It's probably going to be difficult to find an arbitral institution in Africa that provides an experience that approximates what you'll have with [for example, the International Chamber of Commerce]," Iwu said, but it's not a challenge unique to African institutions.

And even if it is not finding the same experience as at the best-known international institutions, there are Africa providers, he said, that "do what they're supposed to do," and "have the competence to provide the service that users need."

A 2020 survey by the SOAS University of London (School of Oriental and African Studies) identified the top arbitral institutions based on caseload and feedback from Africa arbitration practitioners, as opposed to solely practitioners of African descent, Iwu reported. The study listed:

- Arbitration Foundation of South Africa, in Sandton, South Africa;
- Cairo Regional Center for International Commercial Arbitration, in Cairo;
- Ouagadougou Arbitration, Mediation and Conciliation Center, in Ouagadougou, Burkina Faso;
- Common Court of Justice and Arbitration Center, in Abidjan, Côte d'Ivoire, which is a part of the Organization for the Harmonisation of Business Law in Africa, based in Yaoundé, Cameroun, and
- Kigali International Arbitration Center, Kigali, Rwanda.

Diaz Reus's Prince-Alex Iwu said that hopefully, with time, the Africa providers acquire the reputation that makes international arbitration users think about them first, at least with respect to arbitration that arises from Africa.

Despite the presence of competent institutions, Mohamed Sweify wanted to highlight the absence of clear regulations for Africa arbitral institutions. More than 100 arbitral institutions exist on the continent, he said, citing the survey, yet only a handful are recognized as promising or reputable.

By setting standards and demonstrating effective practices, leading institutions can serve as models for emerging arbitral bodies, fostering improvement and consistency across the sector.

When asked about the reason for choosing ad hoc arbitration over institutional arbitration, Sweify replied that the first reason is the absence of trust in institutional arbitration and the fear of incompetence.

As an example of the incompetence of arbitral institutions, Sweify cited a dispute between Egypt and Saudi Arabia investors, who had

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agreed in a long-running contract to an ad hoc arbitration with its seat in Geneva.

The arbitration, however, was conducted before an Egyptian arbitral institution that refused to decline its jurisdiction. The institution issued an award in favor of the Egyptian party, which then unsuccessfully tried to have the awards confirmed in California and Texas—which was rejected because of procedural irregularity.

This kind of case raises concerns about the legitimacy of the commercial arbitration regime, Sweify said, and its weight on the party's choice to pursue an ad hoc arbitration rather than an institutional process.

In addition, Hinshaw's Sweify said that "excessive transparency," particularly in publishing arbitral awards, is another challenge that may deter parties from choosing institutional arbitration. He even called publicity a crucial concern for the clients, with confidentiality being a key factor in choosing one forum over another to adjudicate the dispute.

Arnold & Porter's Mélida Hodgson added to that argument, noting that transparency initiatives can hold institutions accountable for their appointment practices. That, in turn, potentially drives improvements in diversity representation.

Hodgson acknowledged the importance of transparency, particularly in high-stakes arbitrations involving states or state-owned entities. While commercial transactions may allow for ad hoc arbitration with less transparency, state-involved disputes may necessitate higher levels of transparency.

The choice of the arbitrator is the third appealing point for ad hoc arbitration over institutional arbitration for Mohamed Sweify. That choice can be limited by institutions. He highlighted the issue of the representation of African arbitrators on the lists of many African arbitral institutions. This may influence parties to opt for ad hoc arbitration for tribunal selection purposes, he suggested.

Prince-Alex Iwu and Mélida Hodgson were asked to explain the role of the Common Court of Justice, or CCJA, of the Organization for the Harmonisation of Business Law in Africa, or OHADA. Hodgson explained that the 30-year-old OHADA consists of 17 member countries mostly with a French colonial background, and operates under nine uniform acts governing various commercial activities.

The CCJA is a key component of OHADA, functioning as both an arbitral institution and "a super-national court." From its Abidjan, Côte d'Ivoire, seat, it administers arbitration cases and has jurisdiction over awards' enforcement and nullification, ensuring a consistent legal framework across OHADA member states.

The fact that the recognition by the CCJA president makes an award enforceable in all 17 jurisdictions "sounds like the [European Union's] dream, really," joked Hodgson. She noted it is adding mediation as a feature.

Prince-Alex Iwu suggested that OHADA could leverage its influence to enhance legal capacity and perception within member states.

The panel continued by discussing recent arbitration law reforms on the continent. Iwu cited Nigeria as a good recent example of extensive reforms, even as he acknowledged that South Africa is a "much more mature legal jurisdiction."

When asked about the key challenges of African arbitration, Mélida Hodgson highlighted that some institutions may need to improve their marketing efforts to address negative perceptions and misconceptions about their competency. Foreign entities may be hesitant to trust local institutions, she explained, and trust issues may also exist between institutions from different African countries.

Addressing these challenges requires efforts to improve trust, transparency, and accountability in arbitration processes.

On the same question, Iwu pointed out the power imbalance that has historically favored multinational corporations in contractual relationships with African parties. He revealed that multinationals often prefer the comfort of familiar Western institutions, regardless of the competency of African arbitration institutions.

As African economies grow and gain more influence, he suggested, the power dynamic is shifting, potentially reducing the dominance of Western institutions and increasing the use of African arbitration centers.

The session's last question, addressed to all panelists, was about the most promising strategies for addressing the challenges facing African arbitration institutions.

Mohamed Sweify recommended three different strategies. First, he discussed the development of a culture of arbitration by encouraging training programs led by African experts to bridge the gap in arbitration culture between trainers and trainees. Local judiciary and government support are essential for nurturing the arbitration culture in Africa, he suggested.

Sweify also said that practitioners should advocate for African leadership within arbitration institutions to ensure relevance and trust among users. Building trust with arbitration users takes time and is achieved through effective governance of institutions, not just cost-effectiveness compared to Western counterparts, he said.

Third, Sweify encouraged initiatives like Arbitrator Intelligence (see https://arbitratorintelligence.vercel.app), through which the parties are encouraged to fill out questionnaires about the performance of each arbitrator, which he said can help future disputing parties to choose their tribunal members.

Diaz Reus's Iwu encouraged efforts to increase the number of practitioners involved with these institutions to enhance their visibility, while Arnold & Porter's Mélida Hodgson suggested capacity-building and strategic-marketing efforts to increase the visibility and legitimacy of arbitral institutions, including leveraging renowned figures to lend credibility.

Following the panel discussion, audience members were invited to ask questions.

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Prince-Alex Iwu and Mohamed Sweify took the opportunity in replying to a question about state-owned enterprises—SOEs—to highlight their significant role in arbitration proceedings, and emphasize the need to sensitize SOEs about the benefits of resolving disputes in African arbitration forums.

The panelists noted that SOEs often wield considerable power in transactions and can play a crucial role in choosing arbitration venues. By raising awareness among SOEs and other stakeholders, practitioners can encourage them to opt for African arbitration institutions, thereby contributing to the growth and reputation of these institutions.

Finally, one of the most significant questions was from Mohannad El Murtadi Suleiman, from the previous panel, who asked what can be done to improve the institutions. Should they include provisions requiring parties to appoint an African-descendant arbitrator or to select an institution based in Africa?

Prince-Alex Iwu highlighted the importance of laws like the Nigerian content legislation, particularly within the oil and gas sector. Such regulations promote the hiring of local talent, offering a pathway for skills development and empowerment.

Despite challenges, Iwu remained optimistic about the positive impact of these laws. Mélida Hodgson agreed, noting, "I happen to think that if you actually try to find … arbitrators who are African or of African descent, you will find them."

Mohamed Sweify emphasized the need for increased involvement of arbitration specialists with in-house transaction counsels' efforts in drafting arbitration agreements to avoid procedural issues.

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CPR has posted videos of the events discussed in this article on its website at https://bit.ly/3vzlInl.

New Africa Arbitration Webinar Series

The CPR Institute has launched an Africa Arbitration Webinar Series.

The June 18 kickoff video featured an interview with Adedoyin Rhodes-Vivour, Managing Partner of Lagos, Nigeria's Doyin Rhodes-Vivour & Co, who is a Fellow of the Chartered Institute of Arbitrators and a Centre for Effective Dispute Resolution Accredited Mediator, both U.K. based. Rhodes-Vivour was interviewed by CPR Y-ADR Steering Committee member Tiwalade Aderoju. a Lagos, Nigeria, arbitrator.

Next up is a Friday, Sept. 20 discussion at 9 a.m. Eastern, also set to be moderated by Tiwalade Aderoju. Details on the program were being finalized at press time and can be found, along with registration, at www.cpradr.org/events/africa-arbitration-webinar-series-part-2.

The new series is available on CPR's website at www.cpradr.org/news/africa-arbitration-webinar-series, where new content will be posted.