

## THE DOMESTIC FRONT...

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### ***Benjamin, Weill & Mazer v. Kors* and California's Broadened Arbitrator Disclosure Requirement**

The California Court of Appeal recently adopted an expansive interpretation of arbitrator disclosure requirements under the California Arbitration Act. In *Benjamin, Weill & Mazer v. Kors*, 189 Cal. App. 4th 126 (2010), the court held that arbitrators must disclose substantial financial relationships that create an impression of possible bias even if the relationships do not relate to parties involved in the arbitration. If arbitrators do not disclose these relationships, their arbitral awards are subject to challenge and vacatur. Unfortunately, the court did not clearly define what a "substantial" financial relationship is or when such a relationship would create an impression of possible bias. By failing to provide specific guidelines about what arbitrators must disclose, *Kors* is likely to open the door to an increased number of attacks on arbitration awards based on an arbitrator's failure to make the required disclosures.

#### ***A. Current Disclosure Standards***

A review of the disclosure standards of major regulatory schemes and arbitral bodies reveals that there is no consensus as to the exact disclosures arbitrators must make. Federal, state and private arbitration schemes, however, are all designed to eliminate the appearance of bias.

The plain language of the Federal Arbitration Act (FAA) does not require

arbitrators to make disclosures, but instead allows courts to vacate an arbitration award "where the award was procured by corruption, fraud, or undue means," or "where there was evident partiality or corruption in the arbitrators." The Supreme Court has elaborated upon this standard, holding that the FAA requires arbitrators to disclose any dealings which could create an impression of bias. *Commonweath Corp. v. Casualty Co.*, 393 U.S. 145 (1968).

Similarly, Judicial Arbitration and Mediation Services, Inc. (JAMS) also has very general disclosure requirements. The JAMS Arbitrators Ethics Guidelines require that arbitrators avoid a conflict of interest or the appearance of a conflict of interest. Arbitrators must disclose "any actual or potential conflict of interest or relationship or other information, of which the Arbitrator is aware, that reasonably could lead a Party to question the Arbitrator's impartiality." An arbitrator need not disclose the existence of a personal or professional relationship unless a particular relationship reasonably inspires doubt about the arbitrator's neutrality. JAMS Arbitrators Ethics Guideline V.B.

By contrast, the California Arbitration Act (CAA) has much more specific disclosure requirements. Section 1281.9, subdivision (a) of the CAA requires that arbitrators timely

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disclose “all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.” This section lists several matters that arbitrators must disclose. Under the CAA, arbitrators must disclose any matters that would be grounds for disqualifying a judge, and any matters required to be disclosed under the ethics standards adopted by the California Judicial Council. Arbitrators must also disclose the names of any parties, or lawyers representing parties, in the action currently before them for whom the arbitrator has previously served as a neutral or party arbitrator or an attorney. In addition, the CAA states that an arbitrator must disclose any professional or significant personal relationship the arbitrator, or his or her spouse or minor child, has had with a party to the arbitration or a lawyer for such a party.

The Code of Ethics of the American Arbitration Association (AAA) also requires arbitrators to disclose interests or relationships likely to affect impartiality or create the appearance of partiality. Like the CAA, the AAA has specific disclosure requirements. Before accepting a position as an arbitrator, a potential arbitrator must disclose any known direct or indirect financial or personal interest in the outcome of the arbitration, as well as any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. Arbitrators must also disclose the nature and extent of any prior knowledge they may have of the dispute, and any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure. If the AAA disclosure rules require disclosure of confidential information, the arbitrator must either secure permission to share the information or withdraw.

## ***B. Kors and the California Arbitration Act's New Disclosure Requirement***

In *Benjamin, Weill & Mazer v. Kors*, the California Court of Appeal found that

Section 1281.9 of the CAA requires arbitrators to disclose “substantial” relationships that “involve financial considerations creating an impression of possible bias.” This broadens the disclosure requirements significantly beyond those specified in the text of the CAA.

In this case, appellant Nancy Kors appealed a trial court order which upheld an arbitration award requiring her to pay attorneys’ fees to the law firm of Benjamin, Weill & Mazer (“BWM”). Kors had hired BWM to represent her in an action that she eventually dismissed voluntarily. She unsuccessfully moved for an award of legal fees and costs, claiming that the voluntary dismissal rendered her the prevailing party. At that time, Kors had paid BWM over \$225,000 for legal services and costs, but still owed a balance of almost \$70,000.

BWM instituted proceedings against Kors for the balance of its fees, and the trial court ordered the dispute to arbitration under the Rules of the Bar Association of San Francisco. The three-arbitrator panel found that Kors owed BWM over \$100,000, consisting of unpaid fees and accrued interest.

After the arbitration panel issued its award, Kors learned that Sean M. SeLegue, the panel’s chief arbitrator, specialized in representing law firms in malpractice suits and fee disputes. In fact, SeLegue personally argued a case in front of the California Supreme Court on behalf of a law firm involved in a fee dispute a mere six days after presiding over the arbitration hearing between BWM and Kors. Also, as he was writing the award in favor of BWM, SeLegue filed petitions on behalf of another large law firm client he was representing in a malpractice action.

BWM petitioned the trial court to confirm the arbitration award. Kors moved to vacate the award on the grounds that, to avoid questions about his ability to be impartial, SeLegue should have disclosed that his practice focused on defending large law firms in fee disputes. The trial court granted BWM’s petition to confirm the award and denied Kors’ request to vacate or correct the award.

The Court of Appeal reversed the trial court order and remanded with instructions

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to grant *Kors*' petition to vacate the award, finding that SeLegue had a duty to timely disclose to the parties the nature of his legal practice, including that he was at the time of the arbitration representing a law firm engaged in a fee dispute.

In so holding, the court found that the list of required disclosures under Section 1281.9 of the CAA is not exclusive. Instead, arbitrators have a duty to disclose any matter that could cause a reasonable person to entertain a doubt that the arbitrator would be able to be impartial, in addition to matters specified in Section 1281.9.

When the trial court decided *Kors* in 2009, the law was still unclear about the CAA's disclosure requirements. By the time the Court of Appeal decided the case, however, the California Supreme Court had found that Section 1281.9(a) generally required that arbitrators disclose "any matter that reasonably could create the appearance of partiality." In *Haworth v. Superior Court*, 50 Cal. 4th 372 (2010), the California Supreme Court found that a former judge did not have to disclose his past censure for creating a hostile work environment for minorities and women in his chambers when serving as an arbitrator in a case in which a woman sued her cosmetic surgeon for negligence. Despite the broad pronouncement that arbitrators must disclose any matter that reasonably could create the appearance of partiality, the court stated that it found "no reason to interpret the appearance-of-partiality rule more broadly in the context of arbitrator disclosure than in the context of judicial recusal." The court held that it did not see a reason why the arbitrator's past censure would create the appearance of partiality requiring disclosure.

In its response to *Haworth*, the *Kors* Court provided an explanation for treating arbitral and judicial disclosures differently in certain situations. It reasoned that the circumstances in *Kors* "could not arise in the judicial arena, where a sitting judge could not simultaneously represent parties of the same class as one of the parties to the litigation." In arbitration, parties encounter the "repeat player" problem, in which arbitrators have financial incentives to rule

more favorably towards the large entities that employ them over and over. Also, arbitrators often have financial ties to the business sectors in which the parties before them practice, meaning that arbitration decisions could have implications for the arbitrator's other business dealings.

The court further explained that, unlike a sitting judge, an arbitrator reaps financial benefits by being chosen by parties to mediate disputes and may also be employed by a party after the arbitration is over. It noted that *Kors* sought disclosure of information concerning potential conflicts which would have led an objective person to question SeLegue's impartiality. She did not merely seek disclosure of information that might lead her to prefer a different arbitrator.

For these reasons, the *Kors* Court opted in favor of a "sunshine policy" that will allow parties to scrutinize arbitrators' backgrounds for financial situations that could potentially create bias. This has the benefit of allowing parties to challenge awards where arbitrators, like SeLeague, have clear financial ties that would most likely prevent them from ruling fairly.

In reaching its ruling, the court acknowledged that ordinary business dealings do not necessarily require disclosure, and that arbitrators cannot remove themselves from the business world. Arbitrators are often chosen for their knowledge of a particular field. To the extent, however, that an arbitrator has "substantial" relationships that "involve financial considerations creating an impression of possible bias," they must be disclosed. Failure to do so is grounds for vacating an arbitrator's award.

### ***C. Practical Implications—What is a Litigant to Do?***

Although its exact ramifications are uncertain, it is clear that *Kors* has the potential to undermine the finality of arbitration awards. *Kors* is a bellwether case because it provides a platform for collateral challenges to arbitration awards.

Parties will seek to push the envelope of what constitutes nondisclosure of a "substantial" financial interest, including in cases in which the potential for bias is

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much less clear-cut. This is the inevitable result of a system in which arbitration awards are only reviewable on limited grounds. Parties who wish to overturn arbitration awards must attempt to attack these awards collaterally, and *Kors* provides a path to do so.

Although in an ideal world an arbitrator would disclose the information necessary to ensure that the award cannot be attacked because of failure to disclose, parties may have to take additional steps to obtain sufficient knowledge to judge whether an arbitrator has disclosed adequate information. Parties who want arbitration awards to remain final should conduct investigations of the information available about potential arbitrators before choosing an arbitrator and make sure the arbitrator has disclosed this information. Parties seeking to overturn an award should likewise conduct detailed investigations to see if their arbitrators have any business interests that could arguably create an appearance of possible bias.


*Kors* also affects arbitrators, making it significantly more difficult for arbitrators to conduct business in addition to serving as decisionmakers. Arbitrators are often chosen based upon their familiarity or experience with a specific subject matter. Such arbitrators develop their expertise by working in the relevant field, and are almost certainly bound to develop financial or personal ties to other companies or individuals. Consequently, those arbitrators whose skill could be most valuable because of their knowledge of a topic will have to make significant disclosures and are less likely to be chosen to arbitrate disputes. Individuals who wish to continue serving as arbitrators may be put under pressure to curtail other business associations to avoid the appearance of conflicts.

#### ***D. Conclusion***

It is unclear how far the disclosure obligation extends post-*Kors*. The court did not give guidance as to what constitutes a “substantial” relationship “involv[ing] financial considerations

creating an impression of possible bias.” It is reasonable to assume that arbitrators must disclose when they take partisan stances in their professional lives that relate closely to the subject matter of the arbitration, such as SeLegue’s defense of law firms in fee disputes. Given that the court did not give any guidance as to what constitutes a “substantial” relationship, or what could create a “possible impression of bias,” *Kors* could result in a slippery slope of disclosure.

In a post-*Kors* world, parties must be careful to research the backgrounds and professional affiliations of potential arbitrators to avoid having an award reversed on appeal on the grounds of arbitrator nondisclosure. A party unhappy with an arbitration award should search for potential undisclosed interests that could raise doubts as to the arbitrator’s ability to render a judgment fairly and impartially.

Finally, to avoid having their decisions vacated, arbitrators must be cognizant of broadened disclosure requirements and must disclose relevant business interests that may give rise to a reasonable fear of potential bias. Arbitrators may ultimately be forced to choose between continuing to serve as decisionmakers and maintaining active involvement in the business world. 

*In a post-Kors world, parties must be careful to research the backgrounds and professional affiliations of potential arbitrators to avoid having an award reversed on appeal on the grounds of arbitrator nondisclosure.*

## State Law to the Rescue! Protecting Assets While Enforcing an International Arbitration Award in the U.S.

### *Introduction*

A regrettable reality in the global business world is that the victor in an international arbitration dispute may have to enforce its award against a party intent on hiding or dissipating assets which could otherwise be reached. In such a situation, where assets may be located in different jurisdictions, the award holder should carefully consider state law regarding provisional remedies before choosing the forum where it will confirm or enforce the award. When considering provisional remedies, U.S. district courts will apply the laws of the state in which they sit, and differences in state laws regarding provisional remedies can be significant. The showing required for attachment of a defendant's assets, for instance, is materially more onerous in New York than in California. Consequently, while questions of state law almost never arise in federal actions to confirm or enforce an international arbitration award under the New York Convention, state law becomes highly pertinent where there is a risk that a party will dissipate assets in response to a petition to confirm.

### *The Availability of Provisional Remedies in Federal Court*

Rule 64 of the Federal Rules of Civil Procedure provides that, “[a]t the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment.” Fed. R. Civ. P. 64(a) (emphasis added). The Federal Rules of Civil Procedure reach “all civil actions and proceedings in the United States district courts,” with certain limited exceptions provided for in Rule 81, and therefore encompass all actions or proceedings falling under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “Convention”). See Fed. R. Civ. P. 1. Such actions are deemed to arise under the laws and treaties of the

United States, and the district courts are granted original jurisdiction over such actions and proceedings. See 9 U.S.C. § 203. Article I of the Convention states that the Convention covers “the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.” A suit seeking to confirm a foreign arbitration award, therefore, is clearly within the scope of the Convention, to which Federal Rule of Civil Procedure 64 would apply. Accordingly, when the holder of a foreign arbitration award seeks to confirm the award in U.S. federal court against parties who are dissipating assets, the laws of the state where the confirmation is sought will govern the availability of provisional remedies to preserve the defendant's assets.

With respect to provisional remedies available to a party seeking to enforce an arbitral award, the importance of Federal Rule of Civil Procedure 64 can be illustrated by comparison of the laws of two prominent jurisdictions—New York and California.

### *New York's Attachment Law*

Under New York law, when a plaintiff seeks a money judgment, attachment is available on five different statutory grounds. See N.Y. C.P.L.R. § 6201. Two of these grounds are particularly relevant when the holder of an international arbitration award suspects the defendant of dissipating assets. First, attachment may be ordered if the defendant has “assigned, disposed of, encumbered, or secreted property, or removed it from the state or is about to do any of these acts” with the intent to frustrate creditors and the enforcement of a judgment. N.Y. C.P.L.R. § 6201(3). A separate ground exists where “the cause of action is based on . . . a judgment which qualifies for recognition under the provisions of article 53.” N.Y. C.P.L.R. § 6201(5). Article 53, in turn, states that “a foreign-country judgment that is

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final, conclusive and enforceable where rendered must be recognized and will be enforced as ‘conclusive between the parties to the extent it grants or denies recovery of a sum of money.’” *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 809 F.2d 195, 204 (2d Cir. 1987) (quoting N.Y. C.P.L.R. § 5303).

However, an arbitration award does not qualify as a “foreign-country judgment.” Therefore, unless a party first obtains a judgment on the award in the foreign country where it was issued or other country where the opposing party has assets, a party seeking attachment in New York on § 6201(3) grounds will have to prove “that the defendant has an intent to frustrate judgment.” *Mason Tenders Dist. Council Pension Fund v. Messera*, 1997 WL 223077, No. 95 Civ. 9341 (RWS), at \*4 (S.D.N.Y. May 1, 1997). Such a showing may be quite difficult, because the “plaintiff must demonstrate either actual disposal or secretion of funds at the time the order is sought, or declarations of intent to defraud by the defendant.” *Id.* (citations omitted). And attachment is unavailable under this section in situations where the dissipation of assets or impending insolvency is not shown to be motivated by a clear intent to frustrate the judgment. *See, e.g., Eaton Factors Co. v. Double Eagle Corp.*, 232 N.Y.S.2d 901 (1962) (removing funds from the jurisdiction alone is not sufficient); *see also Computer Strategies, Inc. v. Commodore Business Machs., Inc.*, 483 N.Y.S.2d 716 (1984) (removing inventory to another state to keep it out of creditor’s reach is not sufficient).

The burden faced by the plaintiff is made all the more difficult by the fact that New York attachment statutes are “construed strictly against those who seek to invoke the remedy.” *Buy This, Inc. v. MCI Worldcom Comm’n*, 178 F. Supp. 2d 380, 383 (S.D.N.Y. 2001).

### **California’s Attachment Laws**

The substantive law related to attachment in California—which reflects that of many other states—does not require the same showing of “need” as in New York. To obtain attachment in California, a

claimant must show only that (1) the claim is one for which attachment is available, (2) the claim has probable validity; (3) the attachment is for no other purpose than recovery on the claim, and, (4) the amount to be secured is greater than zero. *See* Cal. Civ. Proc. Code § 484.090(a); *see also Sony Ericsson Mobile Comm’n AB v. Delta Elecs. (Thailand) Pub. Co.*, 2009 WL 1011722, No. C-09-1326 MMC, at \*3 (N.D. Cal. Apr. 15, 2009) (applying California attachment statute in an action to confirm an international arbitration award).

Thus, compared with the New York attachment statute, the California statute is significantly more favorable to the plaintiff. The California statute does not impose on a plaintiff the heavy burden of proving “actual disposal or secretion of funds” or an “intent to defraud” by the defendant. In fact, the only roughly similar requirement in the California statute is the second requirement that the plaintiff prove the probable validity of its claim, which simply requires the court to consider the relative strength of the grounds to vacate the award under the New York Convention.

The other requirements of the California statute are fairly easy to meet. In order to show that the claim is one for which attachment is available, the claim sued upon must only be (1) based upon an express or implied contract, (2) for an amount greater than \$500, (3) either unsecured or secured by personal property, and (4) a commercial claim. *See* Cal. Civ. Proc. Code § 483.010(a). As long as the underlying arbitration award is based upon a contract claim, therefore, it will likely qualify as a claim for which attachment is available. *See, e.g., Sony Ericsson Mobile Comm’n AB*, 2009 WL 1011722 at \*3.

The requirement regarding the purpose for the attachment requires only that a claimant declare that the attachment is for no other purpose than recovery on the arbitration award. *See id.* at \*5. Absent any evidence to the contrary, such a declaration will suffice.

Similarly, the requirement that the amount secured by the attachment

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## An Interview with Stephen Smith, Arbitrator and Former General Counsel of Lockheed Martin Space Systems Company

*Stephen E. Smith retired on February 1, 2011 from the position of Vice President and General Counsel for Lockheed Martin Space Systems Company, which he held since 1995. As General Counsel of Lockheed Martin Space Systems Company, he was responsible for the oversight of all legal matters, as well as the export/import and security functions, of the operating elements reporting to Lockheed Martin's space business. Steve has acted as counsel in and managed a considerable number of U.S. domestic and international arbitrations and mediations, including proceedings before the AAA, ICDR, ICC and LCIA. He is a Fellow of the Chartered Institute of Arbitrators, a U.S. delegate to the ICC Commission on Arbitration and serves in a leadership capacity in corporate counsel groups focused on international arbitration. He now works as an independent arbitrator, mediator and consultant. Steve is also a frequent speaker on arbitration topics. More information on Steve's background and experience can be found on his website, [www.stevesmithadr.com](http://www.stevesmithadr.com). He is interviewed by Fred Bennett.*

**FGB: What do you see as the main strengths and weaknesses of the arbitration process, both domestically and internationally, when you compare it to litigation?**

**SS:** The strengths are obvious—enforceability, impartiality and possibly confidentiality, among others. In terms of weaknesses, I, like many of my counterparts, believe arbitration, and particularly international arbitration, should be much quicker and less expensive than litigation. That is not always the case. As those of us who have had major cases know, there are huge costs in U.S. domestic litigation as a result of discovery, including particularly, document production and depositions. It's gotten even worse recently in terms of e-discovery, which is an enormous weapon

against large companies. In international arbitration, generally, there's very limited document production and no depositions. So international arbitration should be much less expensive and much faster than U.S. litigation. Unfortunately, sometimes it is not.

**FGB: What role do you think the major players in international arbitration have in improving the process?**

**SS:** In my view there are at least four major constituencies in international arbitration, the arbitral institutions, arbitrators, outside arbitration counsel, and finally inside counsel and their clients, whom I will refer to as "the users", who are the parties to arbitrations and generally pay the costs. With respect to the institutions, I think that, historically, sometimes the institutions have done less than an adequate job in terms of making sure their arbitrations move along efficiently. Sometimes an arbitration goes on for three, four, five years, and the institutions have not always pushed the arbitrators to move things along more quickly.

I believe the institutions have become much more sensitive over the last several years to concerns of the user community. As rules have been revised, the major institutions have actively sought the views and participation of corporate counsel. For example, the ICC is about to finalize its new rules. I'm on the ICC commission, and I can predict that the new ICC rules are going to be more user-friendlier than previously had been the case. I think the institutions are being more responsive. And, part of it, quite frankly, is defensive, because the institutions are very concerned that if they don't become more responsive and help make arbitration more efficient in terms of time and cost, large corporations may become more tempted to use litigation instead of arbitration to resolve disputes.

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*I, like many of my counterparts, believe arbitration, and particularly international arbitration, should be much quicker and less expensive than litigation, and that is not always the case.*

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I think arbitrators have also become more sensitized to the users' concerns. Many of the up and coming arbitrators have gotten their experience primarily acting as outside counsel, and have experienced first-hand their clients' concerns about costs, so they're quite sensitive to user concerns. As they move more towards being arbitrators, hopefully they'll carry those concerns with them.

Corporate counsel as a group, as representatives of the users of international arbitration, have become more organized and talk a lot more among themselves, both in terms of institutions and in terms of arbitrators. For example, the Corporate Counsel International Arbitration Group now has over 100 members representing over 80 international companies. The U.S. Council for International Business, the U.S. affiliate of the ICC, has a corporate counsel subcommittee, which is also a vehicle for reflecting user concerns. As the institutions have revised their rules, they have actively sought input from the user groups and their members. I think the institutions have generally reacted positively to users' concerns.

All that said, according to a recent ICC Task Force, over 80% of the cost of international arbitration relates to counsel and expert costs, with only about 2% being institutional costs and the remainder being costs of arbitrators. So the arbitrators and the institutions might say to the user community, why are you picking on us? That's a point well taken. Inside counsel, working with their law firms, can and should encourage cost efficient behavior. That said, I believe that institutions and arbitral tribunals can have a major role in making arbitrations more efficient.

So I think each of the four constituencies here—the institutions, arbitrators, outside counsel and inside counsel—all have a stake in helping to fix the concerns about international arbitration raised by the users.

**FGB: What did you consider in your position with Lockheed Martin, and**

**outside, to be the key weaknesses of the arbitration process compared to litigation?**

**SS:** Let's see. Key weaknesses. Well, you know, sometimes something can be a strength or a weakness depending on one's perspective. A U.S. trial lawyer might say a key weakness of arbitration is you don't get to do much discovery. From an inside counsel standpoint, that was generally fine with me. I've observed that American litigators who do arbitrations only occasionally typically want to do broad discovery. U.S. counsel more familiar with international arbitration know that isn't the way things are done in international arbitration. Given the totality of the circumstances, I would rather have less than more discovery in arbitration.

One of the things I've been concerned about is the potential lack of mutuality in terms of document discovery or document production, which can be a weakness in international arbitration. And by that, I mean when a U.S. company is involved in an international arbitration that involves a non-U.S. company, the foreign company and its lawyers can have a totally different view of obligations to disclose documents than U.S. companies and their American lawyers. In most legal systems, there is virtually no discovery as we know it in the U.S., so it's not surprising that non-U.S. lawyers and their clients can have a different view of their disclosure obligations. If we, as American lawyers, get a request that says produce all e-mails from Steve Smith to Fred Bennett over a two-year period that deal with a particular subject, we will look for all the e-mails and even if some of them are awful, we will produce them. We will produce all the bad stuff. However, it's not at all clear if the other side will engage in the same kind of search we would and will produce the same type of bad documents. And that is just the way their legal systems are geared. Some lawyers in those countries might even think that it absolutely would be unethical to produce documents

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harmful to their client's case.

**FGB: Do you believe there are any special provisions that should be included in arbitration clauses, whether they're domestic or international, to which a U.S. company is a party, or which the U.S. company negotiates, beyond the "bare bones" clause that everyone is familiar with?**

**SS:** My view of this has changed a lot over the years as I've become more acquainted with the process. For example, I think one of the problems is that in many cases, lawyers who write transactional deals implemented through large contracts frequently are not familiar with the arbitration process, domestic or international. They use arbitration clauses which have appeared in prior contracts, and they really don't know what ought to be in arbitration clauses. I'll give you an example. I suspect that most transactional lawyers presume that arbitrations are, by their nature, confidential. In fact, that is not always the case. While some institutional rules provide for confidentiality unless the parties opt out, others, like the ICC rules, do not. Also, transactional lawyers may not be aware that the choice of the seat of an arbitration can be quite important, and should be carefully considered.

**FGB: So do you suggest any particular kinds of provisions?**

**SS:** As I just mentioned, I think, confidentiality, if the parties want that, should be specified. Choice of the seat of the arbitration can be very important since that venue's procedural laws can become important factors, both during the arbitration and when enforcing an award. If a suggested seat of the arbitration is a non-arbitration-friendly venue, meaning one that typically does not embrace arbitrations, I'd be careful of that. Choice of the arbitral institution and the rules to be applied, ICC, LCIA, ICDR, etcetera are very important. I can't envision wanting an ad hoc arbitration

in a case involving significant sums. Choice of the law that will govern the contract, and any dispute, is obviously very important. I would probably try to negotiate an arbitration clause that had some kind of limitations on discovery. I certainly wouldn't want to even take the chance that I might expose my client to U.S. style discovery.

I also am a proponent, and this can be somewhat controversial, of putting in the disputes clause that the arbitration shall be completed within a specified period of time. Now, some in the user community might say 90 days. In my view, in a major dispute that's not really realistic, nor is six months or maybe even a year in a major case, particularly if you want to get the quality of arbitrators that you need. However, I think it would be a very rare case that you couldn't get done in 18 months.

That's a non-exhaustive list. Last October the International Bar Association approved the report of its Task Force on Guidelines for Drafting International Arbitration Clauses. I served on that Task Force and think the report provides an excellent summary of the issues to be considered in drafting arbitration clauses.

**FGB: Are the existing international rules of the major international institutions, the LCIA, the ICC, adequate to deal with the complexities of modern arbitration?**

**SS:** A preface is, with respect to international rules, that they need to be widely accepted by the international community. For example, over 90 countries are represented on the ICC Commission. And so what might be the ideal rules for me as an American might not be the ideal rules for somebody from Switzerland or Singapore or from Dubai. So, by definition, international arbitration rules need to try to bridge the various legal systems and outlooks. In general, I've been pretty pleased with the rules. Obviously, I sometimes would like to see them maybe be more user friendly than they are but overall I'd say

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I'm quite satisfied with the openness that the institutions have shown particularly over the last several years in terms of at least considering user inputs.

**FGB: You've already mentioned that there can be a problem with this mutuality of production where an American based company would tend to give up more of its documents than would be expected of a European company or a company from some other country. What other things do you think could be done to deal with the "mutuality" issue in the international arena?**

**SS:** To the extent that it becomes obvious that one party is complying with an order, with respect to document production, and another party is not, I think the arbitrators ought to consider sanctions and this is something I think that the user group would like to see. Drawing adverse inferences is an obvious action a tribunal might take. More broadly where it should be obvious to a tribunal that one party is intentionally delaying the progress of an arbitration, I think cost sanctions can be appropriate there. First, I think the tribunal ought to provide an adequate warning to the offending party and next it ought to be willing to consider sanctions.

Some tribunals also require an employee or employees of parties, meaning in-house counsel, corporate officers, etcetera, to be present at certain procedural hearings, and I think that is a good idea. It can provide a basis to assure the parties are fully aware of the activities taking place in the arbitration, which are driving cost and/or schedule and procedural rulings the tribunal is making.

I think the user community in general would like to see tribunals issue more interim relief—you don't want to say akin to summary judgment because again that's a U.S. concept. But, to the extent for efficiency purposes it does make sense to decide certain issues early, I think that makes a tremendous amount

of sense. Many, many cases of course come down to contract interpretation issues. If there was a discrete contract interpretation issue that could be decided at a fairly early stage from which flows a whole other bunch of issues, then, in appropriate circumstances, it might make sense for a tribunal to say, before we go through the full blown hearing, let's brief this particular issue, let's have a short hearing and then the tribunal will issue its decision on that issue. But in doing this, you need to make sure that you're not creating enforcement issues under the New York Convention and that sort of thing.

**FGB: What do you think about party-appointed arbitrators?**

**SS:** I believe that in disputes involving significant sums of money it makes sense for each party to appoint an arbitrator, subject of course to the impartiality rules, with the chair to be appointed by those two arbitrators or by the parties, rather than have a single arbitrator appointed by the arbitral institution. Impartiality and independence are obviously important and the party nominated arbitrators need to meet those standards. I see two main advantages to having party-appointed arbitrators. First, while that person may not ultimately agree with its party's positions in the dispute, he or she can and should help to make sure the appointing party's positions are fully vetted and considered by the tribunal. Second, a party nominated arbitrator can help to make sure that the chair does not make a serious mistake regarding the facts or applicable law. None of us are all knowing. I know, just in terms of when I'm doing basic legal analysis, or analyzing a problem, I may not always pick up all the nuances. So for that reason, it's helpful to get another person's views. By having three arbitrators rather than one, I think it helps avoid behaviors by the one that really might not be completely fair. Or avoid a situation where a single arbitrator could just miss something. And the chances of that with three good

*To the extent that it becomes obvious that one party is complying with an order, with respect to document production, and another party is not, I think the arbitrators ought to consider sanctions.*

arbitrators, that the ultimate decision is going to be wrong on a basic matter of law, or so bad as to be unenforceable under the New York Convention, I think are greatly reduced.

**FGB:** Do you see arbitration as a concept and as a tool for resolving disputes expanding or diminishing in the future?

**SS:** If the various constituencies we talked about work together and individually to make arbitration more efficient and less costly, then I see a tremendous future for

arbitration. But, in the user community, and I hear this more in domestic conferences than in international forums, there is a perception among a lot of inside counsel and among a lot of general counsels, that arbitration is broken and it's so damaged, so slow, why don't we just litigate? And if that perception continues and if a number of the leading companies have very negative experiences in arbitration where it takes many years and many millions of dollars to get to an award, then I think arbitration is somewhat at risk. **Q**

*If the various constituencies we talked about work together and individually to make arbitration more efficient and less costly, then I see a tremendous future for arbitration.*

*(The International Front continued from page 6)*

is greater than zero will most likely be satisfied in any action where the plaintiff has engaged in international arbitration. *See id.* (citing 9 U.S.C. § 207, which states that the district court “shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.”).

Thus, a plaintiff seeking to enforce an international arbitration award in California would appear to have an easier road to protecting assets during the process than would be the case in New York.

### **Conclusion**

Article VI of the New York Convention gives a court the power to require a

party against whom enforcement of an international arbitration award is sought to give “suitable security.” However, in the United States, the powers of federal courts to do so appears to be defined by FRCP 64, which in turn invokes the law of the forum state to determine the availability of provisional remedies to protect assets. As a result, where an attachment of assets is sought, and a perceived danger of dissipation of those assets exists, a party seeking “suitable security” under the New York Convention to enforce an international arbitration award should be aware of the different standards of proof required by state attachment law, and—where assets can be reached in any of a number of states—choose the friendlier forum. **Q**

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