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Arbitration

The Unintended Consequences of Presuming that Counsel's Intentional Omissions Were Unintentional

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Arbitrators sometimes see aspects of a dispute the parties don't argue. But discussions on how to deal with that situation usually presume the omission is unintentional. Sometimes, but surely not always.

The possibility of intentional omission needs more weight in arbitrators' analysis of how to handle the situation.

Miles' Law ("Where you stand, depends on where you sit") may not be positive law adopted by any country or international body. But, like the more well-known Murphy's Law or any universal law, such as the laws of physics, it surely affects arbitrations.

Arbitrators sit in different places from in-house counsel. This creates important differences on where they stand on dealing with arguments that might have been but were not made in an arbitration.

Real-world situations of omission seen by arbitrators were addressed in several practical forums recently. These focus on what, if anything, arbitrators should do when they see issues not raised by the parties.

Examples of these practical forums include a recent CLE program, "The Law According to Whom? How Arbitrators 'Get It Right,'" sponsored in May by the International Dispute Resolution Committee of the Dispute Resolution Section of the New York State Bar. In addition:

- "The Resolution Roundtable," a blog sponsored by that same section, had more than 20 comments about this topic just over two years ago. See the thread on arbitrator authority at https://bit.ly/2LI5qLL.
- "Do Arbitrators Know the Law (and Should They Find It Themselves)?" was an exchange between Richard Mattiaccio, a partner in New York's Allegaert Berger & Vogel, and New York neutral Steven Skulnik, at a New York Law School program on April 11 (edited transcript at 73(1) *Dispute Resolution Journal*, 97 (2018)(available at https://bit.ly/2N5vdCn)). It discussed how arbitrators should deal with issues they see that the parties have not addressed.
- The August 2018 ABA Section of Dispute Resolution's Arbitration Committee E-newsletter included K. Krause, "May an Arbitrator Conduct Independent Legal Research?—A Brief Overview—Part 1" (concluding that at least in domestic arbitration, an arbitrator should not research issues not raised by the parties).
- At least two publications by Boston University Prof. William W. Park, who is former president of the LCIA—the London Court of International Arbitration, have mentioned it. See, W. Park, "The Four Musketeers of Arbitral Duty," 8 *ICC Dos-*

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cover the very definition of mediation: Does it include conciliation, and if it is to be distinguished from conciliation, would different legislations be required for each? What would we do with Part III of the A&C Act, which regulates conciliation?

Concerns have been expressed on the loss of integrity of the mediation process if the two were addressed without distinction in the policy. This flows from the conviction among many mediators that their role must be purely facilitative, and this responsibility blurs if the policy does not define or set out responsibilities of the neutral in these terms.

The counterpoint is to define mediation and conciliation in terms of its common, essential functions and attributes—a neutral facilitating voluntary and nonbinding discussions with a view to reach a resolution or settlement of the dispute. This would avoid hair-splitting on what processes had been followed, and consequently what the outcome would be.

Should mediation be mandatory for disputes before applying to the courts? The opt-out model adopted in Italy, where litigants in certain types of disputes are required to attend mediation for one session, at least has resonance with us in India.

The outcomes of this policy have by many accounts been successful in terms of the number of disputes being resolved at such mediations and may be a tool for reducing our cases in courts. See, e.g., Leonardo D'Urso, "Italy's 'Required Initial Mediation Session': Bridging the Gap between Mandatory and Voluntary Mediation," 36 *Alternatives* 49 (April 2018).

This led to further discussions on infrastructure, capacity building, and certification of mediators. Who will the mediators be? If mandatory mediation was introduced in certain disputes, could this not be successfully challenged on the ground of violation of equal access to justice?

Another issue was the need for the law to define disputes that can be settled through mediation—or, conversely, define disputes that cannot be settled through mediation? The law in Ireland sets out disputes to which mediation would not apply, including "proceedings against the State in respect of alleged infringements of the fundamental rights and freedoms of a person."

Defining this has a great amount of value in India and would clarify the rights of disempowered communities and persons. The other view is that the policy would run the risk of being inflexible.

The discussions also have considered mediator qualifications—the setting up of a professional body for their oversight and for uniform standards for training of mediators. We have looked at the advantages of leaving these issues for the market to decide versus ensuring accountability and quality of mediators.

The enforceability of an agreement to mediate disputes that may arise was another issue. The A&C Act makes an agreement to arbitrate disputes enforceable. Courts will not exercise jurisdiction in a dispute where the parties have agreed to arbitration for resolution of their disputes.

In the case of agreements for mediation of disputes, arguments for their enforceability have been made on the basis that such agreements should be honored, and therefore enforced. Agreements to mediate will not be taken seriously if not enforced.

The alternative point to enforcing agreements to mediate is in the philosophy of mediation being a voluntary process, and whose very core is undermined if parties are forced to mediate.

The result of this engagement has been two distinct approaches to policy, each envisioning and urging a narrative for mediation as a part of access to justice. One approach mandates mediation in certain types of disputes, while the other stops with setting out the rights and obligations of parties and certainty in outcome.

One treats mediation and conciliation similarly, while the other is confined to mediation, at the same time retaining the conciliation policy in Part III of the A&C Act. Several differences in approaches, brought out by experiences and priorities, have cohered in two drafts.

This has been a wonderful space for us to contemplate an eco-system that facilitates disputants' decision making, and look at policy frameworks that support this. The fact that at the end we have two draft legislative measures, possibly more with further discussion, demonstrates the spirit of the exercise.

WHAT'S NEXT?

The drafts are undergoing reviews by stakeholders. With these drafts, we take to the attention of policymakers perspectives from the mediation community for strengthening mediation not just as an ancillary to arbitration, but through an independent policy.

A mediation proposal should lend certainty in terms of processes and outcomes for the business community to embrace this process. Furthermore, the legislation will need to link arms with mediation laws across other jurisdictions to acknowledge and set out grounds for enforcement of mediation settlements in commercial disputes that take place outside India. The drafts attempt just this.

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siers 25 (ICC Institute of World Business Law 2011) at 28-29 (discussing the right to comment on legal duties)(available at https://bit.ly/2Nz46ga), and W. Park, Arbitrators and Accuracy, 1 *J. Int'l Dispute Settlement* 25 (2010) at 44 (available at https://bit.ly/2N0Splq)(discussing doctrine that "the judge knows the law").

- And in the Chartered Institute of Arbitrators Accelerated Track to Fellowship Program (see https://bit.ly/2NzVPIP), this author took several years ago, two tutors spent more than an hour on a debate about it.

The question also has been addressed elsewhere.

In of all these discussions, there has been an important implicit assumption: that the omission is inadvertent—that counsel did not even realize there was an argument on the issue.

The purpose of this article is to point out that at least sometimes the omission is intentional. Failure to consider this has rendered shallow the discussion of how an arbitrator, panel, or tribunal should respond when it perceives an omission.

PORTFOLIO MANAGEMENT

In-house counsel for large businesses often manage a portfolio of litigation. Most busi-

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nesses of any size are often simultaneously plaintiff and defendant in many cases.

That sometimes means that a legal argument helpful in a case with less at stake may be hurtful in a case with more, perhaps much more, at stake. Or an argument helpful in a single case will be unhelpful in the run of cases.

Businesses sometimes find themselves on opposite sides of the same legal question in different matters, sometimes even involving the same or related parties. Failure to manage the litigation portfolio, so that an argument made in the smaller or less frequent matter cannot be thrown back in the business's face in the larger or more frequent one, would be inattention by counsel.

The decision not to make the argument in the smaller or uncommon case is sound management, not unintentional.

Data support the common-sense notion that businesses have portfolios of disputes. A 1996 study of data from 1971-91 found 95 "mega litigants" (averaging 2,546 cases per business), and an overall average of 257 cases per business among nearly 2,000 big businesses. Dunworth and Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991* (American Bar Foundation) (available at https://bit.ly/2ow3P2R).

As the data are for 20 years, but the average time a case is pending is roughly two years, it seems rough justice to divide these numbers by 10 to get the caseload at any moment. In 2005, the law firm Fulbright & Jaworski (now Norton Rose Fulbright US LLP) estimated 20% of all businesses had more than 100 pending cases at any moment. These sizes make the term "portfolio" appropriate.

A concrete example in detail makes the point. In the early part of this century there were five major inter-dealer brokers—wholesale players between other financial industry businesses. They all hired from each other, inducing people to move by paying more. The then-head of one of the five—Mickey Gooch Sr. of GFI—was said to have described this practice as "a circular firing squad."

A case arising from this practice was brought by GFI against Tradition, another one of the five. *GFI Securities LLC v. Tradition Asiel Securities Inc.*, 21 Misc.3d 1111(A), 873 N.Y.S.2d 511 (Sup. Ct. NY Co. 2008)(available at https://tinyurl.com/yba28n3z), aff'd, 878 N.Y.S.2d 689 (1st Dept. 2009).

That case involved GFI seeking a preliminary injunction based on a restrictive covenant against several brokers who had moved to Tradition. In the section of the trial court opinion addressing "Judicial Estoppel" (at 873 N.Y.S. 2d 522) the court recognized that in two then-recent prior cases GFI, as a defendant seeking to avoid similar preliminary injunctions, had successfully argued to the court that injunctive relief was unavailable because money damages were adequate. It now argued the opposite.

The opinion went on:

> The court notes that with alarming frequency, these competing parties are asserting alternative and contrary positions depending on which side of a particular suit they are on. Their interpretation of the relevant case law seems to depend, not on the individual facts of the matters, but rather whether, … they are the party seeking to prevent the alleged misconduct or whether they are defending against the conduct. This type of self-serving litigation unfortunately appears to have become routinely practiced.

A Big Miss

The tactic: Accidentally leaving out a legal point in an arbitration matter. Was it really an accident?

The typical advocates' challenge: 'Counsel must … manage the legal arguments so any shift in its position protects [the client's] interest.'

The reality: The concern about having one's own arguments thrown back in their faces is more common than might first appear. For arbitrators, caution is needed in even raising the issue.

This situation is not unique to the brokerage industry. See, Anenson, "Litigation between Competitors with Mirror Restrictive Covenants: A Formula for Prosecution," 10 *Stan. J.L. Bus. & Fin.* 1 (2005).

Given the "circular" firing squad, counsel for any business in this position should attempt to determine, if possible, whether the greater business goal is adding employees or protecting against losing them. Counsel must then manage the legal arguments so any shift in its position protects that interest, as well as is dependent "on the individual facts of the matters," not whether they were seeking to prevent or defend the hiring in an individual matter.

THROWN IN THEIR FACES

The concern about having one's own arguments thrown back in their faces is more common than might first appear.

For example, claims made by a business against a faithless employee may later be recited by shareholders claiming the business managers were derelict in allowing the problem to develop.

Software companies, for which copyright protection is vital, might themselves be accused of copyright violations, either of other software or of unrelated ordinary business products. Their potential dilemma is obvious.

Likewise, a company accused of patent infringement may be wary of arguing in a single case a basis for patent invalidity that reflects that company's practice in its own patent portfolio. Here the balance may be between a single case and the run of cases, not just a smaller weighed against a bigger matter.

Counsel who regularly represents plaintiff employees, at a recent New York program sponsored by *Alternatives*' publisher, the CPR Institute, and a law firm, noted that she and her colleagues had discussed their response to the Supreme Court decision in *Epic Systems Inc. v. Lewis*, 138 S. Ct. 1612 (May 2018). [Details on the program appear in CPR News on page 142 of this issue.] *Epic Systems* validated class action waivers in arbitration. Part of their agreed response is to bring multiple individual arbitrations, coordinate their strategies, and then make use of asymmetric non-mutual estoppel against the common employer.

On the employer side, strategy in the faster

arbitrations of this group must include potential issues in the slower matter.

This author has seen simultaneous court cases on both sides of the Hudson River in New York and New Jersey between the same entities on opposite sides of a question that each raised analyzing the scope of the preclusive effect of different prior arbitration awards. There were vastly different sums at stake in each case. Should either party be wary of shooting itself in the foot?

Sometimes the potential problem is caused by as yet non-public information, such as a dispute still at the claim letter or negotiation stage; sometimes by a corporate deal or transaction still in negotiation.

An interpretation of a standard clause of a form agreement may be helpful in one case but understood to be troublesome in most cases. The problem is most critical when there are simultaneous cases between identical parties, which sometimes happens.

VIRTUE LOST?

But wait a bit, the oysters cried: Isn't confidentiality part of the virtue of arbitration over litigation? While concern about the effect of positions in one litigation on another may be real, aren't arbitrations different? Will counsel in the later know of the earlier?

It's less different than may first appear. There are many arbitrations conducted under rules that require the award's public disclosure: FINRA, American Arbitration Association employment arbitrations, ICSID, and most matters involving a public body, to name a few.

And even when disclosure is not required it may happen, unpredictably: when there is a motion to vacate or to confirm an arbitral award, the award will nearly always become public.

Not to mention that in some industries, as in the inter-dealer broker example above, there are few enough players that the same parties may well meet on the opposite side of the same or similar issues.

As noted above, employees' counsel are banding together to share information in response to the effects of *Epic Systems*.

Most rules of the major arbitration providers leave to the parties' agreement whether proceedings, including the award, are required to be treated as confidential by the parties (although ethics may require the arbitrators not to disclose).

Whether judicial estoppel, issue preclusion or res judicata formally apply to an arbitral award, the situation will become an unnecessary embarrassment when a later panel learns a party earlier took a contrary position.

Absent such an agreement, either party is free to publicize its victory. If the arbitration is material to a public company, the securities laws concerning "legal proceedings" may require disclosure about major events in the arbitration, as well as its outcome.

So prudent in-house counsel must not assume that any particular award will be confidential.

Accepting, then, that any award may become public and many will, does an award have preclusive effect? The answer is maybe.

Judicial estoppel, issue preclusion and res judicata all have at least sometimes been held to apply to arbitral awards. And whether they formally apply or not, the situation will become an unnecessary embarrassment when a later panel learns a party earlier took a contrary position.

Again, prudent counsel must not only assume that an award may be public, but that positions articulated in it may be used against them in later arbitrations or litigations.

Rung bells may not be unrung; it is uncommon to feed scrambled eggs to chickens to unscramble them. Once an arbitrator, panel, or tribunal has asked about the unaddressed matter, the silent party has lost the silence.

To be sure, counsel asked about an issue may try to deflect the question when he or she made an intentional decision not to argue it. But that deflection may make counsel seem evasive, tip the other side to a sensitivity useful down the road, and have other effects.

In the worst case, the arbitrator will ask follow up questions in response to the "we're not asserting that here" answer. Yet an arbitrator who fully understood the context for the silence might have enough knowledge of the business so as to be disqualified from fairly addressing the dispute at hand.

Party autonomy—unlike court, in arbitration parties get to decide what they want the dispute resolution process to look like—is a crucial component of arbitration. Article 19(1) of the UNCITRAL Model Law on International Commercial Arbitration provides:

> Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

Redfern and Hunter in their standard Law and Practice of International Commercial Arbitration 315 (4th Ed. 2004), note:

> Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organisations. The legislative history of the Model Law shows that the principle was adopted without opposition. …

Whenever an arbitrator, panel or tribunal seeks to introduce an issue the parties have not, the principle of party autonomy is at risk: the arbitrators, not the parties, seem to be controlling the dispute resolution process. The scope of the concern may vary with whether it is an unasserted legal theory; unasserted facts; an unasserted way to read a contract provision; a new claim or defense; or something else. But the concern is, to a greater or lesser degree, present when the arbitrator goes where no counsel in the matter has gone before.

The point is: Arbitrators should not lightly assume that omission of arguments or facts is unintentional. Fairness may require party input in common law (and maybe civil law) arbitrations before the arbitrators address unraised points. Seeking that input may itself have consequences that cannot easily be undone.

Where the party omission is intentional, the arbitrators have injured one of the parties, inadvertently but nevertheless. Caution is counseled in making assumptions about omitted arguments. Asking the parties their view is not riskless, as may appear at first glance.

At a minimum, arbitrators should follow the advice for a railroad grade crossing: Stop, Look, and Listen before proceeding to ask about an issue not argued.