ARIZONA ADR FORUM

WINTER 2020

CONTENTS

FROM THE CHAIR

STEVEN P. KRAMER

GREETINGS!

As we enter a new decade, try to imagine how our profession may change in the 2020's. During the 2010's:

- Electronic communication and data storage grew at exponential rates, and litigants and courts have wrestled with ways to expand, limit or streamline access to, and review of, electronic data. The role of mediators and arbitrators in managing or resolving e-discovery disputes continued to grow.
- Contracts providing for the submission of disputes to arbitration have become increasingly prevalent, and rules for various types of arbitration continue to be promulgated and updated. The AAA website lists more than 40 sets of "active" arbitration and mediation rules.

- In the field of domestic relations, efforts to encourage collaborative divorce have not gained a lot of traction in Arizona. In some other states, collaborative divorce is growing in popularity. Will Arizona join this trend in the 2020's?
- As the ***#MeToo*** movement against sexual harassment/assault has empowered more workplace victims to hold perpetrators responsible, it has also encouraged law-makers and ADR Professionals re-examine whether, and to what extent, defendants should be allowed to silence victims through the use of confidentiality, non-disclosure or non-disparagement agreements. While confidentiality has historically been a useful bargaining tool in resolving disputes, some state legislatures have considered, and even passed, legislation aimed at limiting the use of confidentiality or non-disparagement provisions in certain circumstances. Will this trend continue?
- ADR Research continues to either validate long-held beliefs, or contradict them. For example, a March 2019 study published in *Psychological Science* concludes that asking parties to "stand in the shoes" of their adversary may impede, rather than facilitate, settlement[1]. The authors found that taking an opponent's perspective can

STATE BAR OF ARIZONA

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We welcome comments about this newsletter and invite you to suggest topics or submit an article for consideration. Email the Editor, Jeremy Goodman at jeremy@goodmanlawpllc.com.

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cause a party to generate arguments that are incongruent with the party's own values, which diminishes their receptiveness to attitude change, and undermines their ability to be persuaded. No doubt, research into the psychology of negotiation and dispute resolution will continue to challenge and inform the strategies and beliefs of ADR practitioners.

» As the cost of litigation has continued to rise, the attractiveness of mediation and arbitration to resolve disputes has grown.

As these trends continue, lawyers will increasingly benefit from training in arbitration, negotiation and meditation. Whether you represent parties seeking to resolve disputes or are employed to arbitrate or mediate disputes, the ADR Section will continue to provide programs and publications to help you keep abreast of new developments and to hone your skills. In early 2020, these opportunities include:

STEVE KRAMER currently serves as chair of the State Bar of Arizona Civil Jury Instructions Committee, and chair of the Executive Counsel of the Alternative Dispute Resolution Section fo the State Bar.

He has brought and defended civil lawsuits involving catastrophic injuries and commercial disputes since 1986 and has been mediating civil disputes since 2009. He earned his B.A. in Economics from Grinnell College in 1979. In 1986, Steve earned his J.D. from The College of William & Mary, where he received American Jurisprudence Book Awards in Evidence and Torts.

In 2016, 2017 and 2018, Steve chaired Bar Convention CLE programs, and received President's Awards in 2016 and 2018.

» On January 29, 2020, master mediator Lee Jay Berman will present a 90-minute program entitled *25 Closing Skills for Mediation of Litigated Cases.* According to Mr. Berman, many of the closing techniques that effective salespeople use to "close the deal" can be useful in negotiating and settling lawsuits. Closing a sale is not about trickery, but rather about helping people when an emotional barrier is stopping them from doing what may be good for them. Mr. Berman will discuss effective ways to assist a party when doubts or fears mentally paralyze them, or emotions get in the way of logic.

» On March 24, 2020, the ADR section will present an ADR Law Update program, to keep us up to date on recent case law and legislative developments that affect arbitration and mediation.

For lawyers who arbitrate or represent parties in arbitration, there will be two very different offerings.

» March 9-10, 2020 – The ABA's 13th Annual Arbitration Training Institute is being held at Sandra Day O'Connor College of Law in downtown Phoenix. The program, for experienced, seasoned arbitrators and arbitration advocates, will be presented by twenty of the leading arbitrators and arbitration advocates in the country. Because the State Bar of Arizona's ADR Section is co-sponsoring this event, Section Members are entitled to the "cooperating organization member" rate, a $100 discount. Register at: **http://ambar.org/arb2020**. Do it by February 1 and save an additional $100.

» April 2, 2020 – the State Bar is presenting a comprehensive 6-hour Arbitration Boot Camp, which will cover case law, rules and statutes that govern arbitration in Arizona. This program and materials will cover significant Arizona appellate decisions that affect arbitration in Arizona, and will provide tools useful to both experienced practitioners and those new to arbitration.

More detailed information on these programs, and how to sign up for them, will be posted for section members.

It is impossible to predict everything the 2020's will throw at us. I truly hope that most of it will be good. Whatever happens, our Section will help you prepare for anything the ADR world has in store for us during the coming decade. On behalf of the State Bar of Arizona Executive Counsel, I wish you all a happy, safe and prosperous New Year.

— Steve Kramer
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ENDNOTE

1 Rhia Catapano, Zakary L. Tormala, Derek D. Rucker *Perspective Taking and Self-Persuasion: Why "Putting Yourself in Their Shoes" Reduces Openness to Attitude Change*, Psychological Science, 2019, Vol. 30(3) 424–435.

NINTH CIRCUIT HOLDS THAT SMARTPHONE APP PROVIDER FAILED TO PROVIDE USERS WITH REASONABLE NOTICE OF MANDATORY ARBITRATION CLAUSE IN APP'S TERMS OF USE

BY STEVE KRAMER

On December 20, the 9th Circuit issued an opinion holding that a mandatory arbitration clause in the Terms of Use for a smartphone application was not enforceable, because the app did not provide users with reasonable notice of the arbitration provision. *Wilson v. HUUUGE, Inc.* No 18-36017, Filed December 20, 2019.

Defendant HUUUGE, Inc. operated an on-line casino. Plaintiff Wilson, an app user, brought a class action suit in Washington, alleging that HUUUGE violated Washington gambling and consumer protection laws. HUUUGE moved to dismiss, based on a provision in the app's Terms of Use providing for mandatory arbitration, and prohibiting class actions.

The Court affirmed the District Court's denial of HUUUGE's motion to compel arbitration, pointing out that the app did not require users to ever acknowledge or agree to terms of use before using the app, and that users needed to go through steps to even find or read the Terms of Service. Applying basic contract law, the Court found that Plaintiff had neither actual nor constructive notice of the arbitration provision.

> "There is no box for the user to click to assent to the Terms. Instead, the user is urged to read the terms – a plea undercut by Huuuge's failure to hyperlink the Terms. This is the equivalent to admonishing a child to "please eat your peas" only to then hide the peas"

In affirming the denial of HUUUGE's motion to compel arbitration, the opinion concludes:

> "Instead of requiring the user to affirmatively assent, Huuuge chose to gamble on whether its users would have notice of its Terms. The odds are not in its favor. Wilson did not have constructive notice of the terms and thus is not bound by Huuuge's arbitration clause in the Terms.

The takeaway from this not-so-HUUUGE opinion is that a party who wants to make an on-line arbitration clause enforceable should take steps to ensure that the other party is given notice that they are bound by the contract's terms. The party should be directed to the contract, have easy access to it, and be required to click an acknowledgement that they are bound by the terms.

BY KEN MANN

IF THERE'S ANY DOUBT, DISCLOSE!!!

In *Monster Energy Co. v. City Beverages, LLC*, Nos. 17-55813, 17-56082, ___F.3d ___ (9th Cir.(C.D. Cal.) Oct 22, 2019), in reversing the arbitration award for Monster Energy, including $3 million they had been awarded in legal fees by the sole Arbitrator, a majority of the 9th Circuit 3-judge panel upheld the mantra that all experienced, well-meaning arbitrators constantly preach: **IF THERE'S ANY DOUBT, DISCLOSE!!!**

I recognize the downside of disclosure is the risk in some instances that we may lose the opportunity to arbitrate that case; but the upside is that IMHO, we have preserved the two, far more important and essential professional and personal considerations: the fairness of the arbitration process and our reputations, respectively. As we all learned many moons ago, it takes years to build a reputation, but only a minute to lose it.

Unfortunately for Monster Energy and the sole arbitrator, he tried to cut corners in his disclosures; and it came back to bite not only him but the prevailing party, Monster Energy, as well as Jams, the arbitration administrator.

In reverse order, unlike FINRA and the American Arbitration Association, Jams is a ***for-profit*** organization; ***and*** the arbitrator in *Monster Energy* was not just the sole arbitrator of the particular dispute, but he was also one of the ***owners of Jams***. Thus, he not only received arbitration fees, but he also received a share of the profits of Jams. Yet, he not only failed to disclose his ownership interest to the parties, but instead he camouflaged it by offering a vague description that he was "associated" with Jams.

But wait. There's more. He also did not disclose that ***Jams had previously conducted 97 arbitrations for Monster Energy within the past five years*** – because Monster Energy's contracts with ***all*** of its beverage distributors not only required the parties, as many entities do, to arbitrate all their disputes in lieu of litigation, but ***its contracts also required all of its distributors to arbitrate their disputes via Jams***.

Before arbitrating, City Beverages had sought to escape mandatory arbitration under a State of Washington statute; but the federal district court judge had denied the attempt. However, as the majority of the 9th Circuit panel wrote (op. at 15) in reversing Monster Energy's award:

> Clear disclosures by arbitrators aid parties in making informed decisions among potential neutrals. ***These disclosures are particularly important for one-off parties facing "repeat players."*** **[Emphasis added]**. *See* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Emp.Rts. & Emp Pol'y J. 189, 209-17 (1997)(finding that employees disproportionately failed to recover damages against repeat-player employers compared to non-repeat-player employers).

The majority opinion was unconcerned with its opinion's potential precedential effect on prior decisions, noting that the statute of limitations under the FAA, 9 U.S.C. § 12, was only three months. Conversely, the dissenting judge found that disclosure of the arbitrator's ownership interest in Jams, and the fact that Jams had previously conducted many other arbitrations for Monster Energy, were immaterial to the ultimate outcome.

She further noted that in the one arbitration in which the arbitrator had previously ruled that had involved Monster Energy and another distributor, he had issued an award of almost $400,000 ***against*** Monster Energy. Another arbitration involving the arbitrator, Monster Energy, and another distributor was still pending at the time of the instant arbitration.

She concluded with the caveat that: "[t]he majority laudably seeks to mitigate disparities between repeat players and one-shot players in the arbitration system. But I disagree that requiring disclosures about the elephant that everyone knows is in the room will address those disparities. It will only cause many arbitrations to be redone, and endless litigation over how many repeated arbitrations there will be."[Op. at 26].

KEN MANN now focuses on serving as an arbitrator and mediator for the American Arbitration Association, FINRA, private arbitrations and mediations, and occasionally as a discovery special master. He previously represented clients for many years in complex securities, real estate, and commercial transactions, trusts, probates and guardianships, litigation, and ADR.

Before law school, Ken was a CPA and audit senior with the Miami office of Price Waterhouse, where his primary clients were the first NYSE mortgage portfolio REIT, the first offshore, open-end, U.S. real estate equity portfolio REIT, and a Florida private securities broker-dealer and market-maker in Florida securities.

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BY KEN MANN

NON-DISCLOSURE, DON'T WAIT TO SEE THE OUTCOME.

RDC Golf of Florida, I, Inc. v. Apostolicas, 925 So.2d 1082 (Fla. 5th DCA 2006), *reh'g. den.*, 940 So.2d 1125 (Fla. S.Ct. 2006), *review den.*, 549 U.S. 1253 (2007) *cert. den.*, illustrates important lessons for arbitrators and parties' counsel. For arbitrators, it again demonstrates our most important obligation – even above our skills at conducting the arbitration and drafting the award – **DISCLOSURE.**

For parties (and their counsel), 1st: **DISCLOSE IF YOUR ARBITRATOR DOESN'T. DON'T WAIT.** And 2nd: If you have a potential objection over a non-disclosure, don't wait to see the outcome. **USE IT OR LOSE IT!** As soon as you see or hear it, raise it with the case administrator for the AAA, FINRA, or other administrator organization, as applicable.

Before the appellate wrangling in *RDC Golf*, the administrator organization appointed me in connection with round 1 – the *vacatur* proceeding – ***not*** to represent the errant arbitration chair as such, nor, necessarily, to even protect the award the panel had issued, but ***solely*** to represent the administrator organization ***vis-à-vis*** protecting the sanctity of the arbitral deliberations. Similar to the Las Vegas motto, in arbitration discussions among the panel, what goes on in deliberations, stays in deliberations. We succeeded. Mission accomplished. ***And***, as a bonus, the award was upheld all the way to the Supremes in D.C.

At the end of the litigation tunnel, the *partially* undisclosed relationship between the chair and the prevailing party's attorney was insignificant. (He'd disclosed they were members of the same synagogue, that he was the former president, and that counsel for the ultimate prevailing party was a board member.

Unfortunately, he had ***not*** disclosed that because of his historical knowledge, he was to be the ultimate scrivener of the Rabbi's new contract, ***and*** that the attorney for the party that ultimately prevailed would be reviewing it as an attorney member of the temple's current Board of Directors.

In that context, but neither of them having mentioned the forgoing to the parties or the losing party's counsel before or at the beginning of the arbitration, the ultimately successful attorney said to the Chair while the parties and their counsel waited for the elevator after the final hearing concluded, along the lines: "My wife and I are leaving for England for vacation but I'll call you when we return so you can send me your draft of the contract."

The losing side did not call the administrator's case manager to complain until **AFTER** the parties' counsel had received the panel's unanimous award a number of weeks after the above conversation.

Ultimately, the award was upheld, but ***only*** after:

(a) trial court depositions of the prevailing attorney, the panel chair, and a couple of other witnesses;

(b) an evidentiary hearing thereafter;

(c) a lengthy confirmation order by the assigned [and very competent, from my personal experience] Circuit Court judge (Florida's equivalent to our Superior Court judges);

(d) an unsuccessful appeal to Florida's 5th District Court of Appeal;

(e) an unsuccessful request for *certiorari* to the Florida Supreme Court (the latter two being briefed and argued, unsuccessfully, by a former Florida Supreme Court Chief Justice; and an equally unsuccessful petition for *certiorari* to the Supremes in D.C.

One Mann's opinion: The case ***might*** have ended differently ***and sooner***, had the losing party ***timely*** raised its concern when it first learned of the undisclosed relationship. Conversely, although the Chair and prevailing counsel had disclosed to some extent their prior relationships, the issue likely never would have occurred **IF** the chair **OR** the prevailing attorney had disclosed the ***particular ongoing relationship*** at the outset.

KEN MANN now focuses on serving as an arbitrator and mediator for the American Arbitration Association, FINRA, private arbitrations and mediations, and occasionally as a discovery special master. He previously represented clients for many years in complex securities, real estate, and commercial transactions, trusts, probates and guardianships, litigation, and ADR.

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The Singapore Convention— A Word of Caution for Mediators

By Jeremy M. Goodman

When international parties arbitrate their disputes, they can take comfort that the arbitral award will be enforceable almost worldwide. Thanks to the New York Convention[1] and its 161 state parties–as well as similar conventions and the voluntary co-operation of non-party states–enforcement of international arbitral awards is very likely. Unfortunately, mediated agreements between international parties have not enjoyed the same certainty of enforcement.

JEREMY M. GOODMAN regularly serves as a neutral mediator and arbitrator of complex disputes worldwide. He also serves as an expert witness in matters affecting financial institutions and other creditors. Jeremy is presently the Compliance Officer and General Counsel of a ninety-year-old financial institution. In his former private practice, he acted as a transaction, regulatory, and trial attorney focused on complex issues related to financial institutions and other creditors Jeremy is presently completing his LL.M. in International Commercial Arbitration at the prestigious Straus Institute for Dispute Resolution at the Pepperdine University Caruso School of Law. Jeremy is honored to be included as a panelist on the American Arbitration Association National Rosters of Commercial and Consumer Arbitrators, as well as other noted national and international panels.

At their core, mediated agreements are just contracts. When a dispute arises about the enforcement of a mediated agreement between international parties, the parties are often left to litigate or arbitrate the matter and then seek enforcement of the resulting judgment or award. This can cause substantial years-long delays–effectively meaning the initial mediation was little more than a useless delay. This problem has presented a significant impediment to the widespread adoption of mediation as a method of dispute resolution between international parties.

To resolve this problem, the United Nations Commission on International Trade Law ("UNICTRAL") just last year finalized the draft of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention"). The United Nations General Assembly adopted the Singapore Convention, and a signing ceremony was completed on August 7, 2019, where it was ratified by various state parties.[2]

It is hoped that the Singapore Convention will have the same effect on international mediation as the New York Convention had on international arbitration. It may well do just that. However, several of its provisions have raised concerns in the international mediation community. At the very least, the Singapore Convention will require careful contemplation about the effectiveness and application of the current ethical and contractual principles under which most mediators operate.

Mediators should be aware that mediated agreements may not be enforced under the Singapore Convention if it can be shown that the mediator seriously breached the "standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement." Of course, this provision is not particularly instructive to mediators because it does nothing to define what constitutes a serious breach or what standards are applicable to the mediator or the mediation. Of course, this is troubling where the identified standards governing mediation are not uniform from one country to another–if they even exist.

Arbitrators have long known that their international arbitral awards are subject to attack based on their evident partiality, based on their misconduct, or based on exceeding their powers. As a result, a losing party in an international arbitration frequently undertakes a "deep dive" to try and find anything about the arbitrator that might justify such a claim. International arbitrators have come to expect such scrutiny which enjoys the benefit of 20/20 hindsight.

It is unclear if the Singapore Convention will create a similar scrutiny of mediators as losing parties hope to avoid enforcement based on mediator "misconduct." Most mediators will likely be comfortable knowing that mediated agreements might be found to be unenforceable under the Singapore Convention in the event of mediator fraud. Clearly that would be a serious breach of any known standard of mediator conduct. But, are mediators ready for private investigators combing through their pre-mediation conflict disclosures? Are they ready for a losing party's attempt to have them testify about how they conducted the mediation and what was said in different ex-parte caucuses?

It remains to be seen if, and to what extent, the Singapore Convention will shake up the international mediation landscape. At a minimum, though, international mediators should pay careful attention to the Singapore Convention and the expectations of international parties to mediation. Mediators should ensure that their mediation engagement agreements capture these expectations.

Mediators should ensure that their mediation engagement agreements carefully identify exactly what standards will govern their conduct and that there are no additional standards applicable to the mediator or the mediation that are among the parties' expectations but not disclosed to the mediator or other parties.

ENDNOTES

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, United Nations Treaty Collection, vol. 330, No. 4739, p. 3, available from treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en (last visited January 8, 2020).

[2] Available from treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-4&chapter=22&clang=_en (last visited January 8, 2020).