Ethical Considerations in Negotiations: Where are the Boundaries?

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Negotiation Ethics – Roadmap

- The rules generally
- Some specific rules
- Example negotiating statements
- Some exceptions to the Rules
- Dealing with opponents
- Metadata and inadvertent/unauthorized disclosures

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Negotiation Ethics – The Rules

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

(Including Amendments Effective March 22, 2016)

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Ethics Opinions

Texas Ethics Opinions Subject Index

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The Rules – Ambiguities in Application?

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Rules Application – Competing Objectives?

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The Rules – Be Zealous

"In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law."

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The Rules – Remember, Be Zealous

"As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."

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The Rules – In Case You Forgot, Be Zealous!

"[A] lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf."

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The Other Rules – Be "Honest"

"As negotiator, a lawyer seeks a result advantageous to the client

but consistent with requirements of honest dealing with others"

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The Other Rules – No “Material” and “Factual” Falsity

“In the course of representing a client a lawyer shall not knowingly:

make a false statement of material fact or law to a third person . . .”

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The Other Rules – No “Material” and “Factual” Falsity

“In the course of representing a client a lawyer shall not knowingly:

fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.”

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Another Rule – No Lying

"A lawyer shall not . . .

engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . ."

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The Psychology of Negotiation

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So Is There a Boundary in Negotiations?

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What Lawyers Say – Puffery?

- “This is a market standard term in our agreements.”
- “This provision is necessary because __________.”
- “The client is ready to perform.”
- “My client will not agree to this.”

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What Lawyers Say – Puffery?

- “There is no evidence/document showing ____.”
- “Ms. X will testify that _____.”
- “The law is clear that _____.”
- “My client is ready to try this case.”
- “My client’s bottom line, best offer is $______.”

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Misrepresentation – "Knowingly Make a False Statement of Material Fact"

- What does "knowingly" mean?

  "Such statements will violate this Rule, however, only if the lawyer knows they are false and intends thereby to mislead."

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Misrepresentation – "Knowingly Make a False Statement of Material Fact"

- What is "a false statement of material fact"?
  - Depends on the circumstances.
  - "Ordinarily" exclude things like "estimates of price or value" and "matters of opinion and conjecture."

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The Settlement Exception

“ . . . under generally accepted conventions in negotiation, a party's supposed intentions as to an acceptable settlement of a claim

may be viewed merely as negotiating positions

rather than as accurate representations of material fact.”

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Lawyer Puffery?

- "There is no evidence/document showing ____."
- "Ms. X will testify that _____."
- "The law is clear that _____."
- "My client is ready to try this case."
- "My client's bottom line, best offer is $______."

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Negotiation With Opponents

Cannot "cause or encourage another to communicate" with someone you know is represented by another lawyer regarding the subject matter of the communication . . . .

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Negotiation Ethics – Metadata Issues

“Draft” agreements exchanged with opposing counsel:

What if one receives opposing party’s draft containing “confidential information” in the metadata?

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Inadvertent Metadata Disclosure

DRAFT

CONFIDENTIAL SETTLEMENT, RELEASE, AND INDEMNITY AGREEMENT

This Confidential Settlement, Release, and Indemnity Agreement is entered into between COMPANY A; and COMPANY B as of the Effective Date.

SECTION 1
DEFINITIONS

. . .

SECTION 3
AGREEMENT

For and in consideration of the mutual benefits to be derived from this Agreement and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

3.1 **Payment**. COMPANY A shall pay to COMPANY B the amount of one million and five-hundred thousand and zero cents ($1,500,000.00). This payment shall be made within five (5) business days of the Effective Date. This payment may be made by wire transfer. COMPANY B shall provide wire transfer instructions within three (3) business days of the Effective Date.

Comment [HNB1]: WOW! I CAN'T BELIEVE COMPANY B IS ABOUT TO AGREE TO THIS . . . WE'D HAPPILY HAVE PAID THEM DOUBLE TO GET THIS OVER WITH!

DRAFT

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Recent (2016) Ethics Committee Opinions

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 664

October 2016

QUESTIONS PRESENTED

1. Do lawyers violate the Texas Disciplinary Rules of Professional Conduct if they fail to notify an opposing party or its counsel that they are in possession of confidential information taken from the opposing party without the opposing party's knowledge or consent?

2. Do lawyers violate the Texas Disciplinary Rules of Professional Conduct if they fail to notify an opposing party or its counsel that they have inadvertently received confidential information of the opposing party?

STATEMENT OF FACTS

In one situation, Client A takes confidential information from the opposing party, Client A's former employer, without the former employer's knowledge or consent. Client A gives the information to Client A's lawyer, who was uninvolved in and previously unaware of Client A's actions. In a second situation, Client A's lawyer inadvertently receives confidential information belonging to the opposing party outside the normal course of discovery. In each situation, the confidential information is relevant and favorable to Client A's case.

DISCUSSION

In this opinion, "confidential information" refers to any private information, including but not limited to privileged information, obtained from the opposing party or the opposing party's lawyer in an unauthorized manner or as a result of an inadvertent transfer.

The facts of the first situation are similar to those in *In re Meador*, 968 S.W.2d 346 (Tex. 1998), a procedural disqualification case. The term "procedural disqualification" refers to a tribunal's decision to disqualify counsel in a particular proceeding. Although courts refer to the Texas Disciplinary Rules of Professional Conduct as guidelines for deciding questions of procedural disqualification, a violation of the Texas Disciplinary Rules is neither essential to, nor automatically requires, procedural disqualification. *Meador,* 968 S.W.2d at 350-51. In contrast, a Texas lawyer is only subject to professional discipline by the State Bar of Texas if the lawyer violates one or more of the Texas Disciplinary Rules.

In *Meador*, an employee of the defendant, covertly and without authorization, copied privileged information of the defendant-employer and gave the information to the plaintiff and

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THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 665

December 2016

QUESTIONS PRESENTED

1. What are a Texas lawyer's obligations under the Texas Disciplinary Rules of Professional Conduct to prevent the inadvertent transmission of metadata containing a client's confidential information?

2. What are a Texas lawyer's obligations under the Texas Disciplinary Rules of Professional Conduct when the lawyer receives from another lawyer a document that contains metadata that the receiving lawyer believes contains and inadvertently discloses confidential information of the other lawyer's client? For example, is the receiving lawyer permitted to search for, extract, and use the confidential information, and is the receiving lawyer required to notify the other lawyer of the receipt of the confidential information?

STATEMENT OF FACTS

Lawyer A represents a client in the settlement of a civil lawsuit. Lawyer A sends a draft settlement agreement to opposing counsel, Lawyer B, as an attachment to an email. The attachment includes embedded data, commonly called metadata. This metadata is digital data that is not immediately visible when the document is opened by the recipient of the email but can be read either through the use of certain commands available in word-processing software or through the use of specialized software. In this case, the metadata includes information revealing confidential information of the client of Lawyer A related to ongoing settlement negotiations. Lawyer B has no reason to believe that Lawyer A intended to include this metadata in the attachment.

DISCUSSION

In this opinion, "confidential information" refers to both privileged information and unprivileged client information, as defined in Rule 1.05(a) of the Texas Disciplinary Rules of Professional Conduct.

The exchange of electronic documents is an essential part of modern law practice. When an electronic document is created or edited, some computer programs will automatically embed information in the document. Embedded information that describes the history, tracking, or management of an electronic document is commonly known as "metadata." A common example of metadata is embedded information that describes the identity of the owner of the computer that created the document and the date and time of creation. Similarly, some computer programs use

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Metadata Issues, per Texas SCt's Ethics Committee

- Has the sending attorney violated any ethical principles?

  "Lawyers … have a duty to take reasonable measures to avoid the transmission of confidential information embedded in electronic documents…."

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Metadata Issues, per Texas SCt's Ethics Committee

- What about the receiving attorney?

  "[T]he Texas Disciplinary Rules do not prohibit a lawyer from searching for, extracting, or using metadata and do not require a lawyer to notify any person concerning metadata obtained from a document received …."

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Inadvertent Disclosure, *In re Meador* (Tex. 1998)

- What about the receiving attorney?

  "If a lawyer receives privileged materials because the opponent inadvertently produced them in discovery, the lawyer ordinarily has no duty to notify the opponent or voluntarily return the materials."

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Inadvertent Disclosure – Be Careful

- Other jurisdictions may have different rules
  - ABA Model Rule 4.4(b) (if inadvertently sent, notify the sender)
- Texas ethics opinions are non-binding authority
- Potential disqualification fight . . .

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Texas Supreme Court on Unauthorized Disclosure

- When receiving opposing party's privileged information, attorneys

  "should aspire to" ABA opinion which provides that, upon discovery that information was from an unauthorized source, attorneys should

  (1) stop reviewing it, (2) notify opposing counsel, and (3) follow opposing counsel's instructions or await court ruling.

- But no specific Texas disciplinary rule.

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Unauthorized Disclosure, per TSCt's Ethics Committee

- "[A] Texas lawyer who fails to provide notice to opposing counsel upon receipt of an opposing party's confidential information outside the normal rules of discovery does not necessarily or automatically violate the Texas Disciplinary Rules. The answer is the same whether the information is obtained in an unauthorized manner or inadvertently."
- But remember, disciplinary rules for fraud, criminal conduct, dishonesty, or misrepresentations.

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Be Careful Out There

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Ethical and Practical Considerations Regarding Alternative Fee Arrangements

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Today's Presentation

- Types of AFAs
- Ethical Considerations and AFAs
- Addressing Ethical Considerations

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AFAs – Background

- Predictability for client
- Shared risk
- Lower cost
- Better alignment of lawyer and client interests
- 35% of legal spend in 2015
- Fixed fees most popular

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Types of AFAs

- Pure Contingency Fee
- Partial Contingency Fee
- Blended Rate
- Fixed Fee
- Holdback/Success Fee
- Phased Fee
- Multiple Matters Fixed Fees
- Reverse Contingency
- Payment with Stock
- Group Counsel

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AFA Ethics - - Key Issues, Model Rules 1.5(a), 1.7, 1.8(a)

- Reasonable fee?
- Disclosure and client consent
- Discharge of lawyer
- Business relationship with client
- Security of fee and collection
- Changes in rates and hours during engagement
- Payment with stock
- When are fixed fees earned?

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Reasonableness – Model Rule 1.5(a)

- Applies to AFAs
- Tests for reasonableness
- When determined?

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Disclosure and Client Consent [1.7(a)(2), 1.7(b), 1.8(a)]

- Detailed disclosure, informed consent
- Staffing example
- Conflicts and waiver if business relationship with client
- In-house counsel ease problems
- Separate counsel needed?

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Other Issues

- Changing fee during matter
- Payment with stock
- Collection of fee, disputes

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Tips for Recognizing and Reducing AFA Ethics Problems

- Outside and in-house counsel – proceed thoughtfully, use internal review/approvals
- Is the AFA fair and reasonable, now and if circumstances change?
- Is the disclosure of outcomes, and other key matters adequate and consented to?
- Can the AFA be changed if surprises?
- Determine if need for separate counsel
- Phased approach can reduce risk of extreme results
- Other?

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September 26, 2016

Institutional Guidelines for Arbitrator Disclosure v. Evident Partiality

By: Odean Volker

Arbitral institutions strive to provide the parties they serve with a fair and impartial dispute resolution process that results in an unassailable final award. Since "evident partiality" in the arbitrators is one of the limited means to attack an award, the selection of unbiased arbitrators is fundamental to that goal, and most arbitral institutions have some requirement or guidance arbitrator disclosures. Recently, the International Chamber of Commerce's International Court of Arbitration (the "ICC") produced issued guidelines outlining circumstances arbitrators should consider in making disclosures.

While disclosure requirements manifest the intent to provide a fair and impartial process, they are of little use to a party that finds itself in that rare circumstance where an award has been entered and it is believed that there is "evident partiality". Institutional guidelines do not alter the U.S. Federal Arbitration Act's ("FAA")[i] test for "evident partiality."

The test for "evident partiality" is elusive and disputed, which may explain why some arbitral institutions have felt the need to develop detailed disclosure guidelines. The disunity regarding "evident partiality" is rooted in *Commonwealth Coatings Corp. v. Continental Casualty Co.*[ii] The Court's opinion was delivered by Justice Black with three justices dissenting. Justice White (joined by Justice Marshall) concurred stating he was "glad to join my Brother Black's opinion" but desired "to make . . . additional comments."[iii] Reconciling Justice Black and Justice White's opinions, however, has proven difficult. Indeed, courts even disagree on whether Justice Black wrote for a majority or a plurality of the Court.[iv]

In Justice Black's view arbitrators "must avoid even the appearance of bias.[v] Justice White wrote that arbitrators are not "automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial."[vi] The contrast between the two opinions is drawn in sharpest focus when considering their respective analogies to judicial ethics. Justice Black wrote that since judicial disqualification "is a constitutional principle, we can see no basis for refusing to find the same concept in the broad statutory language that governs arbitration proceedings and provides that an award can be set aside on the basis of 'evident partiality' or the use of 'undue means.'"[vii] For his part, Justice White started his concurrence stating "[t]he Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges."[viii] Considering the stark contrast between Justice Black and Justice White's opinions, it is no wonder that U.S. courts have struggled with the "evident partiality" standard.

Keen to insulate arbitral awards from "evident partiality," arbitral institutions have fashioned their own disclosure requirements. The current version of The Code of Ethics for Arbitrators in Commercial Disputes[ix] (the "Code") sets forth "generally accepted standards for ethical conduct for the guidance of arbitrators and parties in commercial disputes."[x] Canon II of the Code requires arbitrators to disclose:

1. Any known direct or indirect financial or personal interest in the outcome of the arbitration;
2. Any known existing or past financial, business, professional or personal relationship which might reasonably affect impartiality or lack of independence in the eyes of any of the parties;
3. The nature and extent of any prior knowledge they may have of the dispute; and
4. 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.[xi]

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However, by its own terms, the Code “does not establish new or additional grounds for judicial review of arbitration awards.”[xii]

For its part, The ICC recently issued its “Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration”[xiii] (the “Note”). The Note calls on arbitrators to assess what circumstance, if any, might call into question his or her independence or give rise to reasonable doubts as to his or her impartiality paying attention to:

- whether the arbitrator or prospective arbitrator or his or her law firm:
  - has represented one of the parties or one of its affiliates,
  - acts or has acted against one of the parties or one of its affiliates,
  - has a business relationship with one of the parties or one of its affiliates,
  - has a personal interest of any nature in the outcome of the dispute,
  - acts or has acted for one of the parties its affiliates as director, board member, officer or otherwise, and
  - is or has been involved in the dispute, or has expressed a view on the dispute in a manner that might affect his or her impartiality,
- whether the arbitrator or prospective arbitrator:
  - has a professional or close personal relationship with counsel to one of the parties or the counsel’s law firm,
  - acts or has acted as arbitrator in a case involving one of the parities or one of its affiliates,
  - acts or has acted as arbitrator in a related case, and
  - has in the past been appointed as arbitrator by one of the parties or one of its affiliates, or by counsel to one of the parties or the counsel’s law firm.[xiv]

Significant effort has gone into development of these guidelines, but in a post-award environment they are of little use. The fact that an arbitral institution goes beyond the statutory standards in drafting its own code of ethics does not lower the threshold for judicial intervention.[xv]

As explained by the Seventh Circuit in *Merit Ins. Co. v. Leatherby Ins. Co.*:

> [e]ven if the failure to disclose was a material violation of the ethical standards applicable to arbitration proceedings, it does not follow that the arbitration award may be nullified judicially. Although we have great respect for the Commercial Arbitration Rules and the Code of Ethics for Arbitrators, they are not the proper starting point for an inquiry into an award's validity under section 10 of the United States Arbitration Act . . . The arbitration rules and code do not have the force of law.[xvi]

Relying on *Merit Ins. Co. v. Leatherby Inc. Co.*, the Fourth Circuit likewise found arbitral rules have no role in determining “evident partiality”.[xvii] The Second[xviii] and Eighth Circuits[xix] have likewise determined that institutional guidelines do not alter the standard by which courts judged arbitral awards. The *en banc* Fifth Circuit was succinct when considering the issue: “Whether [the arbitrator’s] nondisclosure ran afoul of the AAA rules, however, is not before us and plays no role in applying the federal standard embodied in the FAA.”[xx]

Against this tide of respectful disregard for institutional guidelines is the Ninth Circuit which allows some reliance on arbitral rules to augment the analysis of “evident partiality”. In the Ninth Circuit, an arbitrator’s lack of knowledge of the presence of a conflict does not excuse non-disclosure “where the arbitrator had a duty to investigate.”[xxi] While there is no general duty for an arbitrator to investigate for conflicts,[xxii] the Ninth

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Circuit has found a duty in certain institutional rules, and has relied on those rules to augment its analysis of "evident partiality."

In *Schmitz v. Zilveti* and again in *New Regency Productions v. Nippon Herald Films* the Ninth Circuit considered an arbitrator's duty to investigate potential conflicts. *Schmitz* reasoned that an "arbitrator may have a duty to investigate independent of its *Commonwealth Coatings* duty to disclose. A violation of this independent duty to investigate may result in a failure to disclose that creates a reasonable impression of partiality under *Commonwealth Coatings*."[xxiii] *Schmitz* relied on the NASD rules and *New Regency* American Film Marketing Association rules as imposing such a duty. *Schmitz* found that the arbitrator's failure to fulfill that duty in conjunction with the lawyer arbitrator's constructive knowledge of the conflict resulted in a reasonable impression of partiality under *Commonwealth Coatings.*[xxiv]

Whether the Ninth Circuit's use of institutional guidelines as part of its "evident partiality" analysis survives *Hall St. Assoc., L.L.C. v. Mattel, Inc.* is unclear.[xxv]

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[i] 9 U.S.C. § 1 et. seq.
[ii] 393 U.S. 145 (1968).
[iii] *Commonwealth Coatings Corp.*, 393 U.S. at 150 (White, J. concurring).
[iv] *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994) ("*Commonwealth Coatings* is not a plurality"); *ANR Coal Co., Inc. v. Cogentrix of North Carolina*, 173 F.3d 493 n.3 (4th Cir. 1999) ("Because the vote of either Justice White or Justice Marshall was necessary to create a majority, courts have given this concurrence particular weight."); *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 281-282 (5th Cir. 2007) (*Commonwealth Coatings* is a "plurality-plus" decision with the concurrence being the Court's "effective *ratio decidendi*)"; *Applied Indus. Materials Corp. v. Ovalar Makino Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 136-137 (2nd Cir. 2007) (Justice Black wrote for "a plurality" of a "fractured Court" and "did not speak for a majority of the Court").
[v] *Commonwealth Coatings Corp.*, 393 U.S. at 150.
[vi] *Commonwealth Coatings Corp.*, 393 U.S. at 150 (White, J. concurring).
[vii] *Commonwealth Coatings Corp.*, 3393 U.S. at 148.
[viii] *Commonwealth Coatings Corp.*, 393 U.S. at 150 (White, J. concurring).
[ix] American Arbitration Association and America Bar Association Task Force, "The Code of Ethics for Arbitrators in Commercial Disputes" (Mar. 1, 2004).
[x] Code, Preamble.
[xi] Code, Canon II (A)(1)-(4).
[xii] Code, Notes of Construction.
[xiii] International Court of Arbitration of the International Chamber of Commerce's "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration" (July 13, 2106).
[xiv] Note, art. (III)(A)(20).
[xv] *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983), *mandate amended* 728 F.3d 943 (7th Cir. 1984).
[xvi] *Merit Inc. Co.*, 714 F.2d at 680-81.
[xvii] *ANR Coal Co.*, 173 F.3d at 499.
[xviii] *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 76-77 (2nd Cir. 2012) (we do not think it appropriate to vacate an award solely because an arbitrator fails to consistently live up to his or her announced standards for disclosure).
[xix] *Montez v. Prudential Securities*, 260 F.3d 980, 984 (8th Cir. 2001) (a federal court cannot vacate an arbitration award based on a failure to disclose merely because an arbitrator failed to comply with NASD rules.); compare *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 160 (8th Cir. 1995) ("Our view is especially fair because it realizes the terms of the parties' arbitration agreement in this case. Section 23 of the NASD arbitration rules, which the parties agreed would govern the arbitration proceedings, requires arbitrators to disclose, among other things, any existing or past financial, business, or professional relationships that 'might reasonably create an appearance of partiality or bias'.").
[xx] *Positive Software Solutions v. New Century Mortg.*, 476 F.3d 278, 285 n. 5 (5th Cir. 2007) (en banc).
[xxi] *New Regency Productions, Inc. v. Nippon Herald Films, Inc.,* 501 F.3d 1101, 1107 (9th Cir. 2007).
[xxii] See e.g. *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994); *New Regency Productions, Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101 (9th Cir. 2007).

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[xxiii] *Schmitz*, 20 F.3d at 1048.
[xxiv] *Schmitz*, 20 F.3d at 1043.
[xxv] *Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (textual features of the FAA are at odds with enforcing the parties' agreement to expand judicial review following an arbitration).

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Frequently Invoked but Rarely Successful: Objections to Non-domestic and Foreign Arbitral Awards in U.S. Federal Courts

Odean L. Volker, Robert Carlton

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Courts occasionally remind litigants that challenges to arbitral awards, whether motions to vacate or objections to recognition, enforcement or confirmation,[1] are "frequently invoked but rarely successful." The aphorism articulates the consequence of the U.S. emphatic federal policy favoring arbitral resolution. The U.S. interest in promoting enforcement of international arbitral awards is even more acute. This paper tests the accuracy of the aphorism, as applied to objections to arbitral awards subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or "Convention") through a survey of federal court decisions from 2010 to 2015. The findings of the survey overwhelming confirm the truth of the aphorism — objections to New York Convention awards though often asserted are rarely sustained.

Methodology

This survey considered only those decisions analyzing awards pursuant to the New York Convention. References herein to awards or arbitral awards mean arbitral awards subject to the New York Convention.

The decisions surveyed were identified through searches of multiple online databases. The goal of the database searches was to identify all cases during the survey period mentioning the New York Convention. From that collection of almost 700 decisions, those cases addressing whether to enforce or reject an arbitral award were reviewed. Decisions addressing a motion to compel arbitration or to remand a case removed to federal court under section 202 of the U.S. Federal Arbitration Act (the "FAA"), or other issues were not included in the survey.

For the decisions reviewed, the objections considered, the court's decision on each objection and the resulting impact on the award were noted. Most of the decisions were explicit as to the objections considered while some required the application of judgment to categorize the objection. Unless otherwise indicated, the survey counts every decision considering a motion to confirm, enforce, recognize or vacate an award, and every objection addressed in each decision, even if the decision was reconsidered or overturned on appeal.

[1] For ease of reference, efforts to obtain recognition, enforcement or confirmation are generally referred to herein as efforts to enforce.

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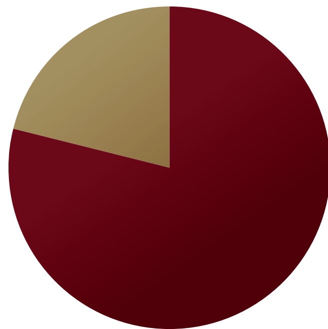
A typical decision to enforce an arbitral award may not be viewed as important from a publishing perspective. A court enforcing an award could easily justify a one page order or final judgment rather than a multipage opinion. A judgment alone is unlikely to be picked-up for publication or available in online databases. Therefore, this survey likely overstates the relative frequency of decisions sustaining objections and rejecting awards.

Awards are Overwhelmingly Enforced

The survey identified 195 decisions entered from 2010-2015 where federal courts considered the validity of arbitral awards. In 41 of those decisions, a court either sustained an objection to an award or refused to consider enforcement of the award for a reason external to the New York Convention.

ALL AWARDS

Enforced
Not Enforced

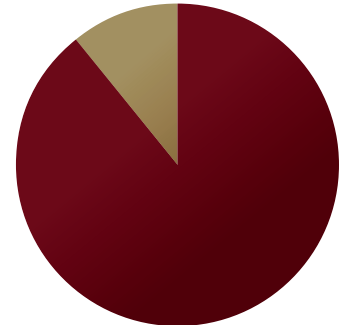


Of the 41 decisions rejecting an award, 20 rejected an award for a reason external to the New York Convention. The most common of the reasons external to the Convention that were relied on to refuse consideration of an award were lack of personal jurisdiction or the application of the U.S. Foreign Sovereign Immunities Act.

The survey identified only 11 decisions that rejected arbitral awards for one of the reasons specified in Article V of the Convention or Section 10 of the FAA. Ten other decisions rejected awards for other reasons that are arguably tied to the New York Convention such as the lack of an arbitration agreement, limitations or that the dispute was non-commercial.

AWARDS REJECTED BASED ON A CONVENTION OBJECTION

Awards
Convention Objection



Excluding those decisions for which a reason external to the New York Convention was relied upon to refuse consideration of the award or for which an agreement to arbitrate was lacking, 92% of the decisions during the survey period enforced the awards under review.

Considering only challenges based on Article V and Section 10 objections, Convention awards fared even better. Excluding those decisions that considered awards, but were focused solely on objections other than Article V or Section 10, 95% of those decisions enforced the award at issue. Taking into consideration that three of the decisions rejecting awards under Article V or Section 10 were reversed on appeal, the ultimate success rate for awards during the survey period was 98%.

Objections to Arbitral Awards

In the 195 decisions reviewed, the survey identified a total of 281 objections to arbitral awards. Many decisions considered multiple objections while others analyzed whether to enforce an award despite the lack of an opposition. Of the 281 objections, 35 were external to the Convention, 118 were based on Article V, 69 were based on Section 10, 31 were based on manifest disregard for the law, and 31 were based on other Convention or FAA provisions.

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Objections to Arbitral Awards Based on Article V of the New York Convention

Pursuant to Section 207 of the U.S. Federal Arbitration Act, a court "shall confirm [an arbitration award falling under the New York Convention] unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the Convention." The New York Convention specifies only seven bases upon which a court may decline to recognize or enforce an award. Those bases are found in Article V of the Convention:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

   (a) the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

   (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

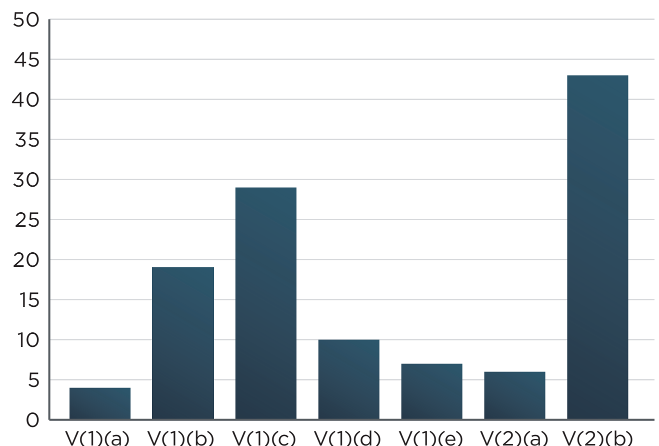
   (c) the award deals with a difference not contemplated by or not falling within the term of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

   (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

   (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Each of the Article V objections was entertained at least once by a U.S. federal court during the survey period with objections based on Article V(1)(c) and V(2)(b) being the most frequently asserted.



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Article V Objections in the Aggregate

The 118 Article V objections identified in the survey comprised 54% of the objections to awards that were based on Article V, Section 10 or manifest disregard of the law. Only nine instances of an Article V objection being sustained were identified with one of those reversed on appeal. As a group, 92% of all Article V objections were denied. Taking the one reversal into consideration, 93% of Article V objections were unsuccessful.

Objections Based on Article V(1)(a)

Article V(1)(a) authorizes a court to refuse recognition and enforcement of an award if it is demonstrated that the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

Only four instances of an Article V(1)(a) objection were identified in the survey making it the least often asserted objection during the survey period. No decision was identified during the survey period that sustained a V(1)(a) objection.

Objections Based on Article V(1)(b)

Article V(1)(b) authorizes a court to refuse recognition and enforcement of an award if it is demonstrated that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

Objections under Article V(1)(b) were the second most frequently identified Article V(1) objection and is third among all Article V objections. Nineteen instances were identified comprising 28% of Article V(1) objections and 16% of the Article V objections identified in the survey. Of the 19 Article V(1)(b) objections identified, only one was sustained.

Objections Based on Article V(1)(c)

Article V(1)(c) authorizes a court to refuse recognition and enforcement of an award if it is demonstrated that the award deals with a difference not contemplated by or not falling within the term of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

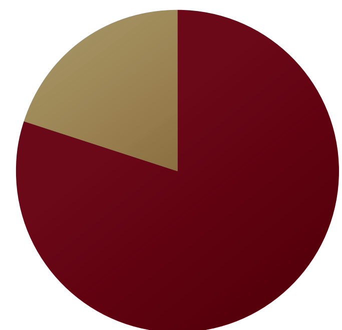
Article V(1)(c) objections were the most frequently asserted objections under Article V(1), and the second most frequently asserted of all Article V objections. Article V(1)(c) objections represent 42% of the Article V(1) objections identified in the survey and 25% of the all Article V objections identified. Despite the frequency with which Article V(1)(c) objections are asserted, no instance of an Article V(1)(c) objection being sustained was identified.

Objections Based on Article V(1)(d)

Article V(1)(d) authorizes a court to refuse recognition and enforcement of an award if it is demonstrated that the composition of the arbitral authority or the arbitral procedure was not in accordance with the parties' agreement, or failing such agreement, was not in accordance with the law of the country where the arbitration took place.

ARTICLE V(1)(d) OBJECTIONS

- Overruled
- Sustained



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Article V(1)(d) objections comprise 14% of the Article V(1) objections identified in the survey, and 8% of all Article V objections identified. Two instances of a court sustaining an Article V(1)(d) were identified. Article V(1)(d) objections experienced a 20% success rate.

Objections Based on Article V(1)(e)

Article V(1)(e) authorizes a court to refuse recognition and enforcement of an award it is demonstrated that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Article V(1)(e) objections comprise 10% of Article V(1) objections identified and 6% of all Article V objections identified. Only one instance was identified where a court sustained an Article V(1)(e) objection giving Article V(1)(e) objections a 14% success rate.

Objections Based on Article V(2)(a)

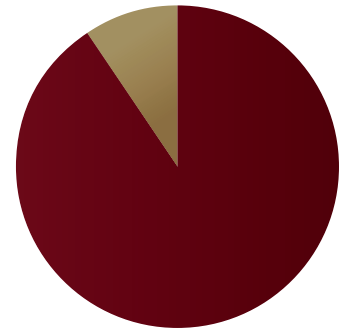
Article V(2)(a) authorizes a court in the country where recognition and enforcement is sought to refuse recognition and enforcement of an arbitral award if the court finds that the subject matter of the parties' dispute is not capable of settlement by arbitration under the law of that country.

Article V(2)(a) objections comprise 12% of the V(2) objections identified in the survey and 5% of all Article V objections identified. Only one instance of a court sustaining an V(2)(a) objection was identified giving V(2)(a) objections a 17% success rate.

Objections Based on Article V(2)(b)

Article V(2)(b) authorizes a court in the country where recognition and enforcement of an arbitral award is sought to refuse recognition and enforcement if the court finds that doing so would be contrary to the public policy of that country.

ARTICLE V(2)(b) OBJECTIONS



Objections under Article V(2)(b) were the most often asserted of any objection to a New York Convention award. Article V(2)(b) objections identified comprise 36% of all Article V objections and 88% of Article V(2) objections. While Article V(2)(b) objections were the most frequently sustained Article V objection, with four such instances identified, only 9.5% of all Article V(2)(b) objections identified were sustained and one of those was reversed leaving V(2)(b) objections with a 7% success rate.

Objections Based on Section 10(a) of the U.S. Federal Arbitration Act

Most, but not all, federal courts agree that a New York Convention award entered in the United States is subject to the vacatur provisions of Chapter 1 of the FAA. Assuming that a motion to vacate is authorized, the bases for such a motion are found in Section 10(a), and are:

(a) In any of the following cases, the U.S. court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

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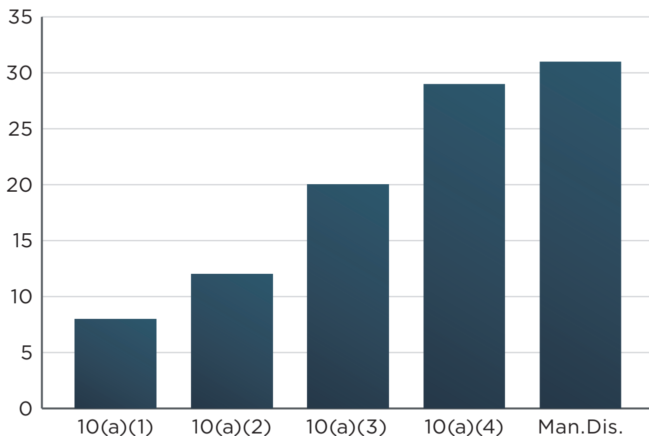
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Some, but not all, federal circuits will also entertain a motion to vacate based on an objection that the arbitrators committed "manifest disregard for the law."

Each of the Section 10(a) objections was entertained at least once by a U.S. federal court during the survey period. Objections based on Section 10(a)(4) and 10(a)(3) were the most common of the numbered objections. Manifest disregard, though not universally recognized as a basis to vacate an award, was the most commonly asserted of the objections.

OBJECTIONS BASED ON SECTION 10(a) AND MANIFEST DISREGARD FOR THE LAW



Among the decisions reviewed for the survey, efforts to vacate arbitral awards under Section 10(a) were rarely successful.

The 69 Section 10(a) objections identified in the survey comprised 32% of objections based on Article V, Section 10 and manifest disregard of the law. Only three instances of a Section 10(a) objection being sustained were identified with two of those reversed on appeal.

Objections to awards based on alleged manifest disregard for the law fared the worst of any group of objections to arbitral awards. A total of 31 objections based on manifest disregard for the law were identified, comprising 14% of the objections based the Article V, Section 10 and manifest disregard for the law. None of the identified manifest disregard for the law objections was sustained.

Section 10(a) Objections in the Aggregate

The survey identified a total of 69 Section 10(a) objections. Of those, only three were sustained, and two of those were reversed on appeal. As a group, 96% of all Section 10(a) objections were denied. Taking the two reversals into consideration, 99% of Section 10(a) objections to Convention awards that identified in the survey were unsuccessful.

Objections Based on Section 10(a)(1)

Section 10(a)(1) authorizes a court to vacate an award where the award was procured by corruption, fraud or undue means.

Section 10(a)(1) objections were the least frequently asserted of the Section 10(a) objections. Eight instances of a Section 10(a)(1) objection were identified in the survey, however none of those objections were sustained.

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Objections Based on Section 10(a)(2)

Section 10(a)(2) authorizes a court to vacate an award where there was evident partiality or corruption in the arbitrators.

Section 10(a)(2) objections were the second least frequently asserted 10(a) objections comprising 17% of the 10(a) objections identified. Of the objections identified, only one was sustained, but that ruling was reversed on appeal. Taking that reversal into consideration, the survey identified no successful Section 10(a)(2) objections.

Objections Based on Section 10(a)(3)

Section 10 (a)(3) authorizes a court to vacate an award where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

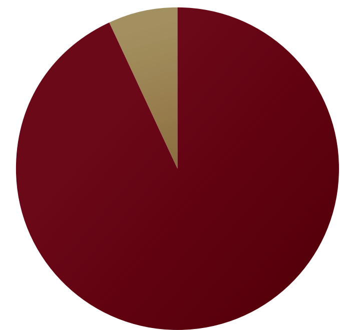
Objections under Section 10(a)(3) were the second most commonly asserted of the Section 10(a) objections comprising 29% of the Section 10(a) objections identified. None of the 10(a)(3) objections identified was sustained.

Objections Based on Section 10(a)(4)

Section 10(a)(4) authorizes a court to vacate an arbitration award where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

SECTION 10(a)(4) OBJECTIONS

- Overruled
- Sustained



The most frequently asserted Section 10(a) objection was Section 10(a)(4) comprising 42% of the Section 10(a) objections identified. Only two of the 10(a)(4) objections identified were sustained, and one of those was reversed on appeal. As a result of that reversal, Section 10(a)(4) objections saw a 4% success rate.

Objection for Manifest Disregard of the Law

Manifest disregard for the law is not universally recognized as a valid objection to an arbitral award. Some federal courts recognize the objection while others do not. Those federal courts that recognize the objection generally require a showing that what the law allegedly ignored was well defined, explicit and clearly applicable, and that the arbitrators appreciated the existence of the clearly governing legal principle but decided to ignore it or pay no attention to it. Despite the split among federal courts on the existence of manifest disregard for the law as a valid objection, it remained the second most commonly asserted of all objections identified. Thirty-one instances of a party claiming manifest disregard for the law were identified in the survey. None of those instances were sustained.

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