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JAMS Issues New Optional Expedited Arbitration Procedures

By Meredith N. Reinhardt

Although arbitration was initially touted as a more efficient and less expensive alternative to litigation, some practitioners question whether this still holds true. In response to these concerns, one of the main arbitration providers, JAMS, The Resolution Experts, unveiled new "Optional Expedited Arbitration Procedures," effective October 1, 2010. The new procedures provide parties with the option of electing to proceed with an expedited framework for arbitration with limited depositions, document requests, and e-discovery within a specific fast-tracked time frame for moving a case along from start to finish.

According to a press release announcing the new procedures, "JAMS has taken an industry-leading role to ensure arbitration remains an attractive alternative to litigation. To save clients time and money, JAMS has instituted new procedural options that allow the crafting of a process that is commensurate with the dispute." Press Release, JAMS, The Resolution Experts, JAMS Leads ADR Industry in Providing Quicker, Less Expensive Option for Business Commercial Arbitration (Oct. 7, 2010), *available at* www.jamsadr.com/jams-leads-adr-industry-in-providing-quicker-less-expensive-option-for-business-commercial-arbitration-09-29-2010. The new expedited procedures are set forth in Rules 16.1 and 16.2 of JAMS Comprehensive Arbitration Rules and Procedures (JAMS Rules). This article explores how the new optional procedures work and how they compare with

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The Implications of Cloud Computing on E-discovery

By Liam Ferguson and John Cleaves

The City of Los Angeles recently contracted with Google, the Internet giant, to host all Los Angeles city employee emails for the next five years. As a result of this decision, the City of Los Angeles will have less pressure to modernize its information technology (IT) infrastructure and will need fewer IT staff to maintain the current system, as the infrastructure will be handled by Google. But don't expect to see Google staff roaming the halls of power—the IT infrastructure is being handled remotely, via the "cloud." David Sarno, "Los Angeles Adopts Google E-mail System for 30,000 City Employees," *L.A. Times*, Oct. 27, 2009, *available at* http://latimesblogs.latimes.com/technology/2009/10/city-council-votes-to-adopt-google-email-system-for-30000-city-employees.html.

What Is Cloud Computing?

A definition of "cloud computing" is as nebulous as the infrastructure it is built on. The term "cloud computing" is derived from the underlying technology Internet Protocol (IP), the method or protocol by which data are sent from one computer to another on the Internet. This technology is usually depicted in network diagrams as a cloud, a ubiquitous entity whose inner workings the end user does not need to know. We like to think of the cloud as having "DEPTH"© (i.e., Distributed External Processing/Storage by a Third Party).

Cloud computing promises elasticity, modernity, and ease of implementation. In addition, the cloud is flexible both in use

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The Restatement of the U.S. Law of International Commercial Arbitration in Context

By Steve Y. Koh, Jared D. Hager, and Jeremy L. Ross

Imagine that you are an in-house lawyer for Builder, Inc., a Delaware corporation with its principal place of business in California. Builder has been sued in the U.S. District Court for the District of Delaware by a German company, Deutsche AG (DAG), seeking to enforce an arbitration award it obtained in London against Builder. The underlying dispute arose from a contract for construction services that Builder executed and performed in Texas. The contract included the following arbitration clause:

> All disputes arising out of or in connection with the present Contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce in force as of January 1, 2007 by one or more arbitrators appointed in accordance with the said Rules. The language of arbitration shall be English. The place of arbitration shall be London. The arbitration shall be governed by the substantive law of Germany, without regard to its choice-of-law rules.

Builder wants to resist the enforcement action, but how and on what grounds? You know that the Convention on the Recognition Enforcement of Foreign Arbitral Awards, art. I, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (New York Convention), applies because both Germany and the United States are signatories. *See* United Nations Commission on International Trade Law, Status—Convention on the Recognition and Enforcement of Foreign Arbitral Awards. You also know that the New York Convention allows a party to challenge the enforceability of a foreign arbitral award on specific but narrow grounds, including the following:

- The parties lacked capacity or the arbitration agreement is otherwise invalid.
- There was a lack of proper notice or other violation of due process.
- The arbitral tribunal lacked jurisdiction.
- The arbitral tribunal or procedure violated the arbitration agreement.
- The award is not binding or has been set aside.
- The dispute was not arbitrable.
- Recognition or enforcement of the award would violate public policy.

New York Convention, *supra*, art. V. For a thorough discussion of each ground for refusal or recognition and enforcement, *see* Blackaby and Partasides, *Redfern and Hunter on International Arbitration* §§ 11.55–11.120 (5th ed. 2009).

Many issues remain, however, such as whether Delaware is a proper forum for the enforcement action, what law applies, and whether the arbitration agreement is void for some reason. Depending on the specific terms of the arbitration agreement, any combination of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–307, the Revised Uniform Arbitration Act or other state arbitration laws, foreign arbitration laws, or multilateral arbitration treaties, such as the UNCITRAL Rules, might apply in some way to an enforcement action. As one commentator has noted, "[t]he plethora, density and overlap among these different sources have created both ambiguities and gaps." George A. Bermann et al., "Restating the U.S. Law of International Commercial Arbitration," 113 *Penn St. L. Rev.* 1333, 1335 (2009).

If the American Law Institute (ALI) completes its latest effort, the starting point for addressing these issues will be the *Restatement (Third) of the U.S. Law of International Commercial Arbitration*. The project, which began in December 2007, is still in its infancy and will take nearly a decade to complete. *See* Press Release, Penn State Law, Professor Rogers Presents Progress on Restatement of U.S. Arbitration Law (Feb. 8, 2010), www.dsl.psu.edu/news/restatement (last visited Oct. 12, 2010). Once finished, the *Restatement* will contain six chapters addressing international arbitration agreements, the judicial role in international arbitral proceedings held in the United States, recourse from and enforcement of international arbitral proceedings in the United States, the judicial role in international arbitral proceedings held abroad, enforcement of international arbitral awards rendered, the preclusive effect of international arbitral awards, and arbitrations arising under the International Centre for Settlement of Investment Disputes Convention. *See* Am. Law Inst., Restatement Third, The U.S. Law of International Commercial Arbitration, www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=20 (last visited Oct. 12, 2010).

The need for the *Restatement* cannot be overstated—the myriad federal and state statutes, as well as international conventions, "have not led to consistency or clarity in the field." *Restatement (Third) of the Law: The U.S. Law of International Commercial Arbitration*, Reporters' Memorandum, at xvi (Tentative Draft No. 1, Mar. 29, 2010). For example, though "U.S. law now has a now long-established history of providing strong support to both party autonomy in arbitration and to the enforceability of arbitral agreements and awards," foreign and American lawyers and judges "find it challenging to assess the sometimes intricate relationships between international and domestic sources." *Id.* Simply put, the legal regime governing international arbitration in the United States is "complex and difficult for newcomers to navigate." *See* Bermann, *supra*, at 1334.

In May 2010, the ALI approved Tentative Draft No. 1, which tentatively

lays out part of chapter 1, "Definitions," and all of chapter 5, "Recognition and Enforcement of Awards," which covers three main topics: (1) obligation to recognize and enforce international arbitration awards, (2) grounds for denying recognition and enforcement, and (3) actions to enforce awards. For in-house counsel, the helpfulness of the *Restatement* can be illustrated by referencing the Tentative Draft with respect to three of the issues raised by our hypothetical: (1) jurisdiction and venue, (2) applicable law, and (3) grounds for challenging an arbitral award. While the *Restatement* will be no substitute for advice from specialized international arbitration counsel, it will provide a useful starting point for those with little or no understanding of the customary practice of international arbitration.

In our hypothetical, DAG filed in Delaware presumably because Builder incorporated there. As explained in the *Restatement*, section 207 of the FAA creates a federal cause of action to enforce arbitral awards under the New York Convention and independently confers subject matter jurisdiction on federal courts to entertain such actions. *See Restatement* § 5-18 & cmt. a. Because Germany and the United States are both parties to the New York Convention, DAG's award would be considered a "Convention Award," distinct from a "Non-Convention Award" that could be brought only in state court, unless there is an independent basis for subject matter jurisdiction, such as diversity jurisdiction. *Compare id.* § 5-18 & cmt. a *with id.* § 5-18(b) cmt. d (noting that, in the context of international arbitration, diversity jurisdiction is easily satisfied in most instances).

While jurisdiction poses no discernible hurdle for DAG, "[t]he adequacy of jurisdiction over the defendant . . . is subject to the generally applicable statutory and constitutional standards governing the exercise of personal jurisdiction." *Id.* § 5-19(a). The same holds for challenges to venue. *See id.* § 5-21. Moreover, chapter 2 of the FAA, under which DAG has filed suit, imposes a three-year statute of limitations for bringing an action to enforce a convention award. *Id.* § 5-24(a) & cmt. a. Under the limited facts of the hypothetical, Builder lacks any apparent challenge to personal jurisdiction, and there is no indication that the statute of limitations has lapsed. If Builder would prefer to defend enforcement of the award in California, a forum non conveniens motion seeking to move the action to federal court in California may be filed. *Id.* § 5-21(b).

The second issue is applicable law. The *Restatement* surveys many choice-of-law issues that arise in the context of challenges to recognition and enforcement of arbitral awards. *See id.* §§ 5-8 to 5-14. The substantive law that applies to issues raised on the merits of the enforcement action will depend on the circumstances; candidates include the law of the arbitral seat, the law of the place of the agreement, or the law designated in the agreement. *See generally, id.* § 5-3. While some grounds for denying enforcement involve application of U.S. law, other grounds may require application of another jurisdiction's substantive law. *See id.* § 5-3(e) & cmt. e. Moreover, as the *Restatement* notes, U.S. courts have occasionally viewed foreign decisions interpreting provisions of the New York Convention as persuasive authority. *See id.* § 5-3, Reporters' Note e.

In our hypothetical, the arbitral seat is London, England, the parties executed the agreement in Texas, and the agreement selects the substantive law of Germany. Any of these laws may be controlling or persuasive authority and may help or hurt a challenge to enforcement depending on the specific grounds for challenge. *See id.* § 5-8(b) cmt. c & Reporters' Note c (noting that the parties can litigate conflict-of-law issues to their respective advantage). It is important that in-house counsel know the scope and nature of the problem before negotiating arbitration clauses or engaging the assistance of specialist arbitration counsel. The *Restatement* provides a helpful overview of choice-of-law issues with respect to enforcing awards. *See id.* § 5-3.

The third issue is whether there is any ground to challenge enforcement of the award. Arbitral awards are presumed enforceable under the New York Convention. *See* New York Convention, art. III; 9 U.S.C. § 9; *see also Restatement* § 5-1(a) & cmt. a. They may be enforced simply by filing an original or certified copy of the award and the arbitration agreement. *Restatement* § 5-1(b)(i). In our hypothetical, if DAG complies with these two requirements, Builder will have the burden of establishing the agreement's invalidity (or of the other express grounds for nonenforcement). In reviewing DAG's award, the court owes no deference to the arbitral tribunal's findings whether a ground exists for denying recognition or enforcement of a convention award. *Id.* § 5-6(b).

> To preserve objections to procedural aspects of the arbitration, parties must timely raise them before the arbitral tribunal to permit correction or remediation of defects.

In our hypothetical, absent extraordinary conduct of the tribunal amounting to a denial of due process, a challenge to the existence or validity of the arbitration agreement would likely be Builder's best defense to the award. As the *Restatement* notes, a court may deny recognition or enforcement of a convention award "to the extent that no arbitration agreement exists or the arbitration agreement is invalid." *See id.* § 5-8(a); *but see id.* § 5-6(c) (noting that even if some ground for denying enforcement exists, the court may, in exceptional circumstances, enforce the award). The agreement may be invalid because it was executed by a person who lacked capacity—either actual or apparent authority—to bind Builder, or because of fraud, duress, impossibility, or unconscionability. *See id.* § 5-8 cmt. b. In a recent case, Bolivia has challenged an arbitration demand made by a European telecommunications company, which seeks over € 700 million in damages, on grounds that the former Bolivian Minister of Legal Affairs acted outside the scope of her authority in executing agreements

that purported to submit Bolivia to an ad hoc arbitration and to waive critical rights of Bolivia in connection with that dispute. Complaint at 1, Bolivia v. E.T.I. Euro Telecom Int'l N.V., No. 1:10-cv-01704-RBW (D.D.C. filed Oct. 5, 2010).

In our hypothetical, Builder's other potential grounds for challenging an international arbitral award include lack of notice or opportunity to present its case (*Restatement* § 5-9); and improper constitution of the tribunal (*id.* § 5-11); the award decides matters that are beyond the terms of the arbitration agreement (*id.* § 5-10) or are incapable of arbitral adjudication (*id.* § 5-13); the award was set aside by a foreign court of competent jurisdiction (*id.* § 5-12); and the award violates public policy (*id.* § 5-14). On the limited facts of our hypothetical, none of these grounds seems to apply.

The *Restatement* discusses an additional important hurdle to challenging enforcement of an arbitral award—waiver.

> [A] party may waive its right to invoke an objection that might serve as a basis for resisting recognition or enforcement of a Convention award at any time after the basis for such objection is known or should have been known. Such a waiver may be the result of either express consent or a failure to raise such objection in a clear and timely manner.

Id. § 5-17(a). To preserve objections to procedural aspects of the arbitration, parties must timely raise them before the arbitral tribunal to permit correction or remediation of defects. *Id.* § 5-17 cmt. a. Objections that have not been preserved will—absent extraordinary circumstances—be deemed waived by a court reviewing the award. *Id.* § 5-17(c).

In sum, the *Restatement* is general enough in its black-letter provisions to be useful for the uninitiated but specific enough in its comments and notes to aid even the most seasoned practitioner. Though still a work in progress, the first tentative draft's discussion of issues related to enforcement and recognition of arbitral awards previews the *Restatement*'s utility. In time, counsel and courts are likely to consult the *Restatement*'s outline of principles to form a more accessible and coherent body of law on the many complex issues that arise in the practice of international arbitration.

Given the increasing globalization of business and the prominence of alternative dispute resolution, the ALI's effort to restate the U.S. law of international commercial arbitration is a welcome development. For the in-house litigator charged with managing arbitration—whether negotiating agreements, arbitrating disputes, or enforcing awards—the *Restatement* promises to assist in understanding the complexities of international arbitration.

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