Developments in Arbitration Law:
Testing the Boundaries of Court Intervention

May 20, 2015 – 2:00 p.m. – 3:15 p.m. ET

Speaker: Eric P. Tuchmann and Theodore Cheng

The period of time and the circumstances in which a court may become involved in an arbitration depend on a number of factors. Many courts have clearly delineated the limited role courts play in the arbitration process. However, certain issues arise with greater frequency that test the boundaries of the courts’ role. The outcomes of some of these challenges can have significant consequences for an arbitration proceeding or the enforceability of an award. This 75-minute webinar will discuss how certain issues have been handled by reviewing courts.

**AGENDA**

2:00 p.m. Welcome and Introduction of Speakers (5 minutes)

2:05 p.m. Discussion of Court Intervention on:
- Interim Relief
- Preclusive Effect of Arbitration Awards on Subsequent Proceedings
- Arbitrator challenges in Pending Arbitrations
- Modification of the Statutory Grounds for Vacating Awards

2:55 p.m. Conclusion and Questions (5 minutes)

3:05 p.m. Evaluation (5 minutes)

3:20 p.m. Adjourn
Theo Cheng practices in general commercial litigation, counseling, and alternative dispute resolution (ADR), with a focus on copyrights, trademarks, patents, trade secrets, and other intellectual property matters. He heads the firm’s Trademarks and Unfair Competition Practice. With nearly 20 years of experience handling a broad array of business disputes in federal and state courts, he counsels high net-worth individuals and small to middle-market business entities in industries as varied as high-tech, telecommunications, entertainment, consumer products, food and hospitality, retail, and financial services. In 2007, he was named one of the Best Lawyers Under 40 by the National Asian Pacific American Bar Association. He is licensed to practice in both New York and New Jersey.

As an ADR professional, Mr. Cheng provides private mediation, arbitration, and dispute resolution consulting services. He is a member of both the Roster of Neutrals and the Mediation Panel of the American Arbitration Association, a neutral with Resolute Systems, a federal courts mediator, and a small claims court arbitrator. As a neutral, Mr. Cheng has conducted over 225 arbitrations, mediations, settlement discussions, and inquests. He has also received a 2013 American Arbitration Association A. Leon Higginbotham, Jr. Fellowship and regularly speaks and publishes on ADR and intellectual property.

Mr. Cheng received his A.B. cum laude in Chemistry and Physics from Harvard University and his J.D. from New York University School of Law, where he served as the editor-in-chief of the Moot Court Board. Before joining the firm, he was a senior litigator at several prominent national law firms. He was also a marketing consultant in the brokerage operations of a major insurance company, where he was designated a Chartered life Underwriter and Chartered Financial Consultant, as well as a Series 7 General Securities Representative. Mr. Cheng served as a law clerk to the Honorable Julio M. Fuentes of the U.S. Court of Appeals for the Third Circuit and the Honorable Ronald L. Buckwalter of the U.S. District Court for the Eastern District of Pennsylvania.

Mr. Cheng is a member of several professional associations, for which he serves on various litigation, intellectual property, and ADR sections and committees, including the New York City Bar Association’s Task Force on ADR in New York City Courts, the New York State Bar Association’s Dispute Resolution Section, the New Jersey State Bar Association’s Dispute Resolution Section, and The Association of Conflict Resolution of Greater New York. He also serves on both the New Jersey Supreme Court’s Arbitration Advisory Committee and the Committee on Complementary Dispute Resolution.
Eric P. Tuchmann
General Counsel and Corporate Secretary
American Arbitration Association

Eric P. Tuchmann is General Counsel and Corporate Secretary of the American Arbitration Association. As the Association’s chief legal officer, Mr. Tuchmann is responsible for managing the legal affairs of the organization including litigation related matters involving the Association and its arbitrators, and drafting *amicus curiae* briefs submitted on behalf of the Association. Mr. Tuchmann analyzes state and federal legislation impacting alternative dispute resolution, the unauthorized practice of law, and attorneys’ professional rules of responsibility. Mr. Tuchmann chaired the Association’s committee that drafted the Supplementary Rules for Class Arbitrations, and has been involved in numerous policy initiatives related to alternative dispute resolution, including acting as the Association’s liaison to the committee to revise the Uniform Arbitration Act and the committee revising the Model Standards of Conduct for Mediators. In his capacity as Corporate Secretary, Mr. Tuchmann oversees the governance of the Association and is responsible for organizing the varied activities of the Association’s Board of Directors.

Mr. Tuchmann’s additional responsibilities include providing advice on issues that impact cases administered by the Association, and negotiating contracts and leases for the Association’s offices nationwide. Mr. Tuchmann also provides assistance to the department of Neutrals Education, is the in-house liaison between the Association and outside counsel in connection with patents filed on various Association systems, and is a member of various internal committees. Mr. Tuchmann was the Association’s Associate General Counsel before being named General Counsel.

Prior to joining the Association’s legal department, Mr. Tuchmann was Director of the International Centre for Dispute Resolution (ICDR) where he managed the Association’s division responsible for providing international arbitration and mediation services. Mr. Tuchmann also served as Director of the Commercial Department for the Association’s New York regional office, where he was responsible for the management of all commercial dispute resolution services.

Mr. Tuchmann makes frequent presentations and has authored numerous articles on issues related to alternative dispute resolution. He received his law degree from New York Law School and his undergraduate degree from the University of Wisconsin-Madison. Mr. Tuchmann is a member of the state bars of New York and New Jersey, the Supreme Court of the United States, the Association of the Bar of the City of New York, the American Bar Association, and the International Bar Association.
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Case Citations

*Yahoo! Inc. v. Microsoft Corp.*, 983 F. Supp.2d 310 (S.D.N.Y. 2013)


*Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126 (2d Cir. 2015)


*Employers Ins. Co. of Wausau v. OneBeacon Am. Ins. Co.*, 744 F.3d 25 (1st Cir. 2014)

*Freecharm Ltd. v. Atlas Wealth Holdings Corp.*, 499 F. Appx. 941 (11th Cir. 2012)

*W.J. O’Neill Co. v. Shepley, Bulfinch, Richardson & Abbott, Inc.*, 765 F.3d 625 (6th Cir. 2014)

*In re Sussex*, 781 F.3d 1065 (9th Cir. 2015)

*Uniformed Firefighters v. City of Long Beach, Local 287*, 762 N.Y.S.2d 819 (2d Dept. 2003)


*Campbell’s Foliage, Inc. v. Fed. Crop Ins. Corp.*, 562 F. Appx. 828 (11th Cir. 2014)

*Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 931 (10th Cir. 2001)

*Southco, Inc. v. Reell Precision Mfg. Corp.*, 331 F. Appx. 925, 926-28 (3d Cir. 2009)

*Rollins, Inc. v. Black*, 167 F. Appx. 798, 799 n.1 (11th Cir. 2006)

*In re Wal-Mart Wage and Hour Em p1. Practices Litig.*, 737 F.3d 1262 (9th Cir. 2013)

AAA’S ADMINISTRATIVE REVIEW COUNCIL

The American Arbitration Association (“AAA”) strives to provide an efficient and cost-effective arbitration process. Keeping time and costs down can be particularly challenging in the context of large and complex cases when a party challenges an arbitrator’s continued service, hearing locale, and/or the AAA’s authority to administer an arbitration. To address this, since early 2013, such challenges arising in the American Arbitration Association’s (“AAA”) large and complex domestic caseloads have been decided by the AAA’s Administrative Review Council (“Council” or “ARC”).

The Council, created at the impetus of AAA Chief Executive Officer and President India Johnson, was instituted to ensure that these pivotal administrative issues are decided by high level AAA executives through a transparent process. As of August 22, 2014, it has decided a total of 340 issues occurring on 285 different cases (some cases have presented multiple issues): 229 challenges to an arbitrator’s continued service, 61 submissions challenging AAA’s administrative authority, and 50 locale disputes.

This article will provide an overview of the AAA’s Administrative Review Council Guidelines and will highlight the Review Standards, statistics, and a selection of court decisions reviewing Council determinations for all three areas of Council review.

I. GUIDELINES

The Council is a rotating group of current and former high-level AAA executives who bring an extensive amount of experience in ADR and AAA case administration to the decision-making process by following guidelines that set forth the structure, meeting frequency, scope of authority, and internal process for submitting issues and decision making. The Council includes five voting members, including a chairperson and a vice chairperson, who may be constituted from among internal, divisional and corporate executives, and external members such as retired AAA executives. The Council may also include additional non-voting members as determined by the chairperson, such as a member of the AAA’s legal department.

1https://www.adr.org/aaa/faces/services/filecase/casemanagement/casemgmtadminreview

2Supra note 1. Although not discussed in this article, the Council Review Standards also include best practice tips covering how issues should be submitted to the Council, and the administrative steps that may be taken in light of a submission.
The Council convenes weekly—although additional Council meetings are scheduled on an as-needed basis—and as a result it has been very successful in deciding issues in a timely manner. Decisions are often rendered no later than a week after being submitted for Council review.

While every contested arbitrator challenge and hearing locale disagreement arising from AAA's large and complex domestic caseload is referred to the Council for determination, it is within the discretion of the AAA executive in charge of the office where the case is being administered whether or not to submit a challenge to the AAA's administration to the Council. The Council may also review objections and challenges arising from cases with claim amounts less than the large and complex threshold, subject to approval by the chairperson or vice chairperson to accept the submission.

All written comments submitted by the parties in connection with the issue are circulated to all Council members and each issue to be decided is then discussed by the Council via conference call. All decisions are made by a panel of at least three Council members designated by the chairperson or vice chairperson and are based upon applying the Council Review Standards to the issue. The Council does not entertain oral argument by the parties, but on a case-by-case basis issues may be escalated for additional review.

II. ARBITRATOR CHALLENGES

The AAA rules allow for any party to object to the continued service of a neutral arbitrator. An arbitrator may be subject to disqualification for: (1) partiality or lack of independence, (2) inability or refusal to perform his or her duties with diligence and in good faith, and (3) any grounds for disqualification provided by applicable law. In determining whether removal of the arbitrator is warranted for partiality or lack of independence, the Council bases its decision on the information provided by the arbitrator on the disclosure form or any subsequent disclosure made by the arbitrator and the parties’ comments, according to the Review Standard’s four-part test, examining whether the disclosure is: direct, continuing, substantial, and recent. Weighing these factors together serves as a guide as to whether the disclosure rises to the level of warranting the arbitrator’s removal from the case. Ultimately, the Council’s determination is based on whether the disclosure creates, to a reasonable person, the appearance that an award would not be fairly rendered.

Of the 229 challenges to the arbitrator’s continued service, the Council removed the arbitrator in 97 cases (42%) and reaffirmed in 132 cases (58%). The most common objections were based on an arbitrator’s initial disclosure, however there were also a number of objections based on an arbitrator’s alleged non-disclosure that a party discovered later, or after a supplemental disclosure was made by the arbitrator while the arbitration was pending. Another common issue was partial disclosures by arbitrators.

A number of courts have already reviewed Council decisions in connection with court challenges that have been brought. Owens v. VFSC, Inc. et al. is an example of an arbitrator’s partial disclosure that led to the arbitrator’s removal by the Council, a decision that was upheld by a Minnesota state court. The facts in Owens: The AAA appointed a panel of three arbitrators, all of whom completed the AAA Notice of Appointment forms. One of the disclosure questions on the form asks: “[h]ave you had any professional or social relationship with counsel for any party in this proceeding or the firms for which they work?” The chair of the panel responded “no,” but two days later provided a supplemental disclosure that after reviewing the disclosure provided by another panel member, he was reminded that he was “briefly consulted by one of the attorneys in my law firm with regard to a FINRA matter in which both the law firms [representing claimant] and [another law firm] were involved.” The chair had represented Claimant’s Law Firm by filing an Answer, responding to discovery, stipulating to a Protective Order and the scheduling of motions, and appearing at a pretrial conference on behalf of Claimant’s Law Firm. The matter involving Claimant’s Law Firm was dismissed.

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*The Minnesota court also vacated the panel’s interim and final orders. Id. at *13.
approximately a month and a half before the chair signed the Notice of Appointment in the arbitration. Id. at *4.

Respondents did not raise an objection to the chair’s continued service at that time. After an arbitration hearing, the panel issued a unanimous Interim Award, of more than $3 million in damages. After the Interim Order was issued, respondents learned the extent of the chair’s prior representation of the law firm representing claimant (“Claimant’s Law Firm”) in the arbitration.6

About a week after the Award was issued, respondents objected to the chair’s continued service and the Council removed the chair from the matter. The Court focused on three factors “1) the timeframe that [the chair] represented [Claimant’s Law Firm]; 2) the amount of involvement that [the chair] had with the [matter involving Claimant’s Law Firm]; 3) the AAA’s removal of [the chair].” Id. at *10-11. Ultimately, the Minnesota state court agreed with the Council’s decision and stated that: “[s]imilar to the reasoning adopted by the AAA, this court finds that the relationship between [the chair] and [Claimant’s Law Firm] is significant and material . . . .” Id. at *13.

III. FILING REQUIREMENTS

Filing requirement disputes impact the AAA’s determination as to whether or not to administer a matter in its entirety or as to a particular party. These disputes include arguments made by some parties that the AAA has no authority to administer an arbitration because the parties never agreed to arbitrate, never signed an agreement to arbitrate, or are not obligated to arbitrate for other reasons. Neither the AAA nor the Council is authorized to make arbitrability determinations and those determinations are instead either made by an arbitrator or a court. However, the Council may need to determine whether or not the AAA will proceed to administer an arbitration in light of an argument raised by a party regarding the arbitrability of a dispute. When the AAA does so, the AAA is very clear that a determination to proceed with the administration of an arbitration is not a legal determination regarding the arbitrability of a dispute, simply that the Claimant has presented a prima facie argument that the dispute is subject to arbitration and that the filing requirements contained in the AAA’s rules have been met.7

In reviewing filing requirement disputes, the Council determines whether the claimant filed a demand for arbitration accompanied by an arbitration clause, submission agreement or court order providing for arbitration under AAA Rules or naming the AAA as the dispute resolution provider along with the necessary filing fee as set forth in the appropriate administrative fee schedule. If the Council determines that an arbitration should proceed, it also does so with the direction that the parties may present their arbitrability dispute to the arbitrator once appointed.

Of the 61 submissions involving minimum filing requirement disputes, the Council decided that the filing requirements were met in 55 cases (90%) and were not met—and thus the AAA did not continue to administer the matter in its entirety or as to a particular party—in 6 cases (10%). When faced with a question about whether there is an agreement to arbitrate, the Council looks to the parties’ comments and if a colorable argument is made as to why the parties may be bound by or may enforce the arbitration agreement, the Council will find that the AAA’s minimum filing requirements have been met and instruct that parties may raise the substantive arbitrability issue to the arbitrator once appointed.

Neal v. American Arbitration Association, Inc. et al.8 is an example of a non-signatory issue decided by the Council and upheld by a New York state court. In Neal, respondent argued that the AAA could not administer the arbitration given that respondent was not a signatory to the arbitration agreement naming the AAA that was filed by claimant. As was recognized by the Court, claimant presented the argument to the AAA that respondent—as an owner of the signator company and an alleged third-party beneficiary of the contract—was bound by the arbitration provision.9 The Court upheld the Council’s

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6 Id. at *3-5.
8 No. 7991-2013 (N.Y. Sup. Ct. Orange County Feb 26, 2014).
9 Id.
decision that the AAA’s minimum filing requirements had been met. As stated by the court, the contract at issue incorporated by reference the AAA’s rules, accordingly the question of arbitrability was left in the first instance to the arbitrators. Whether or not the non-signatory is ultimately found to be bound by the arbitration agreement, the AAA was not wrong in continuing to administer the matter and directing the parties to raise the arbitrability issue with the arbitrator once appointed.

Another common objection made pursuant to the AAA’s filing requirements is that while the clause may incorporate the AAA’s rules, the clause does not specifically indicate that the AAA should be the administering organization. However, each of the AAA’s rules includes a rule explicitly stating that if the parties’ agreement provides that disputes are to be resolved pursuant to the AAA’s Rules, then the AAA shall also administer the arbitration. Therefore, so long as the clause cites the AAA rules, then the Council will deem that the filing requirements have been met and the AAA will continue to administer the matter.

Additionally, the Council has seen a number of filing requirements objections based on alleged improper service of the Demand for Arbitration, where a party argues that the Demand for Arbitration should have been served in a manner similar to a court filing. However, AAA rules simply require that the filing party shall simultaneously provide a copy of the Demand for Arbitration and any supporting documents to the opposing party. The rules also provide that notice to the last known address of the respondent is appropriate.

### IV. LOCALE

The AAA’s rules provide a process for determining the locale of evidentiary hearings. If the parties’ contract contains a designated hearing location, the Council will set the locale at that hearing location. Otherwise, the Council weighs the following nine factors: location of parties, location of witnesses and documents, location of site or place of materials, consideration of relative cost to the parties, place of performance of contract, laws applicable to the contract, place of previous court actions, necessity of an on-site inspection of the project, any other reasonable arguments that might affect the locale determination. Depending on the applicable set of AAA rules, the Council’s locale determination may or may not be subject to the arbitrator’s power to finally determine locale.

### V. CONCLUSION

The AAA is committed to keeping time and cost in arbitration to a minimum while maintaining the integrity of the process. The work of the Council has made significant contributions to those goals. Whether it is a challenge to an arbitrator’s continued service, challenge to the AAA’s authority to administer an arbitration, or a locale dispute, each submission receives careful consideration and decisions are made in a deliberate and timely fashion based upon the parties’ submissions, AAA rules and Administrative Review Council Review Standards. In cases where court challenges have been brought to review Council decisions, the decisions have typically sided with the Council. As the Council continues its service, we expect to see an increase in the published case law favorably reviewing Council determinations. With the introduction of new Council Procedures and Submission Form, parties to non-AAA administered arbitrations will also be able to take advantage of the Council’s decision making ability, via party agreement, concerning objections or challenges to the arbitrator(s) continued service.

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9See ARC Review Standards at 4: https://www.adr.org/aaa/faces/services/fileacase/casemanagement/casemgmtadminreview

10See Commercial Arbitration Rules (October 1, 2013) R-11, the AAA shall determine the locale, subject to the power of the arbitrator to finally determine the locale; Commercial Arbitration Rules (June 1, 2009) R-10, the AAA’s decision is final and binding. However, Commercial Rule (June 1, 2009) R-22 provides that the arbitrator has the authority to “set the date, time and place for each hearing” within the locale determined by the AAA; Construction Industry Arbitration Rule R-12, the AAA’s decision is subject to the power of the arbitrator to finally determine the locale within 14 calendar days after the date of the preliminary hearing; Employment Arbitration Rule 10, the AAA’s decision is subject to the power of the arbitrator(s), after their appointment, to make a final determination on the locale.
Click here to go to the Commercial Arbitration Rules

Click here to go to the Commercial Arbitration Rules
Effective 10/1/13

Click here to go to the Construction Arbitration Rules

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