SYMPOSIUM

PANEL 1: TRENDS IN INTERNATIONAL MEDIATION AND ARBITRATION

HAGIT ELUL

PARTNER, HUGHES HUBBARD & REED LLP

Hagit Elul is a partner in the New York office of Hughes Hubbard & Reed LLP, practicing in the fields of litigation and arbitration. Ms. Elul has served as counsel in arbitrations under all major institutional rules. Ms. Elul has represented international clients in a wide array contract and licensing disputes involving financial services, energy, pharmaceutical, construction, and professional services. She has also advised on investment and bilateral treaty disputes. Ms. Elul has also served as an expert witness on New York law in proceedings in other countries.

Ms. Elul writes and speaks widely on the subject of arbitration. She has been recognized as a Rising Star in the 2013 Commercial Arbitration Expert Guide and as a name to know by Global Arbitration Review.

Ms. Elul also has an active appellate practice, which includes her service on the Second Circuit Pro Bono Panel. After graduating cum laude from Columbia Law School, Ms. Elul clerked for the Honorable Martha Vazquez, United States District Court, District of New Mexico.

ANK SANTENS

PARTNER, WHITE & CASE LLP

Ank Santens is a partner in the international arbitration group of White & Case LLP, based in the New York office. In her over a decade of experience in international arbitration, clients and leading directories have said: "'Great lawyer' Ank Santens is tipped by market sources as a 'future leader in the profession,' and is currently involved in a number of matters for key clients of the firm.

Ms. Santens has served as counsel or arbitrator in commercial,

investment, construction and sports arbitrations under all major international arbitration rules (ICC, ICDR/AAA, ICSID, LCIA, UNCITRAL, Court of Arbitration for Sport), as well as in ad hoc arbitrations and arbitrations under the rules of several regional centers. These arbitrations have involved countries and legal systems around the world. Ms. Santens has extensive experience in infrastructure, construction and energy. She has also handled significant disputes in the insurance, telecommunications, metals and mining, maritime, pharmaceutical, financial services, logistics, waste management and consumer goods industries. Ms. Santens has handled a wide range of commercial disputes (often arising out of distribution, supply or licensing agreements), post-M&A disputes, and disputes concerning joint ventures and other shareholder arrangements. In the public international law area, she has advised sovereign clients on oil and gas concessions, border disputes, and the impact of land reform.

Ms. Santens also handles arbitration-related litigation before New York courts. She regularly advises on the drafting of dispute resolution clauses in international contracts. In several cases, she has been able to obtain an early resolution through up-front strategic and creative thinking and the effective use of negotiation and/or mediation.

Ms. Santens advises clients in English, Spanish, French, and Flemish/Dutch. She practiced in White & Case's Paris office from 2004 to 2006. Before joining White & Case, she worked in the legal department of a pharmaceutical company in New Jersey.

Ms. Santens was named one of Global Arbitration Review (GAR)'s "45 under 45" (a list of the 45 leading global international arbitration practitioners under the age of 45) in 2011 and one of the New York Law Journal's 44 "Rising Stars" in the legal profession in New York State in 2013.

She is also a former Member of the Advisory Board of the Center for International Commercial and Investment Arbitration (CICIA) of Columbia Law School and of the International Commercial Disputes Committee of the New York City Bar. She is also a member of ARBITRALWOMEN, CEPANI 40, ICDR Y&I, International Arbitration Club of New York, International Council for Commercial Arbitration (ICCA), YAF ICC, and YIAG LCIA. She is listed on the roster of arbitrators of the Câmara de Conciliação, Mediação e Arbitragem CIESP/FIESP, Sao Paulo, Brazil.

Ms. Santens has written on a variety of international arbitration topics for publications including

Arbitration International, Financier Worldwide Magazine, Global

Arbitration Review, International Arbitration Law Review, the International Bar Association's Arbitration Newsletter, kluwerarbitrationblog.com, Mealey's International Arbitration Report, and The Institute for Transnational Arbitration's News and Notes. She authored the chapter on Belgium for the World Arbitration Reporter (Juris) and is an international correspondent of the Romanian Review of Arbitration.

Ms. Santens frequently speaks on international arbitration at conferences around the world, including recently at ICC, LCIA, IBA, ICDR, JCAA, FIDIC, ITA, CPR, CAM Santiago, AIPN, NYSBA, SAA, and PLI conferences. She has lectured on international arbitration at Columbia Law School and at a summer program organized by the Institute for U.S. Law in affiliation with the George Washington University Law School.

She chairs White & Case's New York's Women's Network and is past Secretary of White & Case. She serves on the Board of The Flemish in the World USA, Assoc.

MARTIN GUSY

MEMBER, COZEN O'CONNOR

Martin Gusy joined Cozen O'Connor's New York office in 2013 as a member in the firm's International Arbitration and Litigation practice and is the chair of Cozen O'Connor's International Arbitration Practice Group. Martin has more than a decade of experience as an international dispute resolution attorney and was formerly the head of Gusy Van der Zandt LLP's Litigation & Arbitration practice. Gusy Van der Zandt was the 2010 Corporate Intl Magazine "International Arbitration Advisory Firm of the Year in the USA." Martin also regularly advises European businesses in the process of setting up their U.S. structures.

Martin has represented domestic and international parties in about 100 U.S. court and international arbitrations. His arbitration experience includes legal work in more than 50 international arbitrations as counsel and 17 cases as an arbitrator (both commercial and investment (AAA/ICDR, ICSID, ICC, LCIA, DIS, VIAC, UNCITRAL, ad hoc)). These matters include technology, energy, manufacturing, distribution, agency, IP licensing, construction, mining, joint venture and post-merger disputes. Martin has also represented oil & gas and energy companies in disputes resulting from investments in Europe, Latin America, the Middle East and Asia.

In January 2011, Martin was listed as a Leading Lawyer 100 in the field of Dispute Resolution by Lawyer Monthly. Martin is a member of the AAA/ICDR Roster of Arbitrators and Mediators, the Chartered Institute of Arbitrators (MCIArb) and co-author of A Guide to the ICDR International Arbitration Rules published by Oxford University Press.

Martin holds German law degrees and an LL.M. from Cornell Law School. He is fluent in German and can read French and Spanish.

MATTHEW WELDON

COUNSEL, COZEN O'CONNOR

Matthew Weldon joined Cozen O'Connor's New York office in 2013 as counsel to the firm's International Arbitration and Litigation practice. Matthew joined the firm with Martin Gusy from

Gusy Van der Zandt LLP. Matthew is an experienced litigator, taking an extensive role in international arbitrations and litigations representing clients before U.S. courts and arbitral tribunals constituted under FINRA, AAA/ICDR and UNCITRAL rules.

Matthew earned his law degree at the Benjamin N. Cardozo School of Law - Yeshiva University. He was the symposium editor of the Cardozo Public Law, Policy and Ethics Journal and a symposium coordinator of the Cardozo Arts and Entertainment Law Journal. In 2009, he was a visiting researcher at Oxford University, Centre for Socio-Legal Studies. He earned his bachelor's and master's degrees from Case Western Reserve University.

CARDOZO'S INTERNATIONAL DISPUTE RESOLUTION SYMPOSIUM-2014

PANEL 1: TRENDS IN INTERNATIONAL MEDIATION AND ARBITRATION

MS. ALEXANDRA SIMMERSON: So everyone we're going to go ahead and get started, good evening, my name is Alexandra Simmerson and as symposium chair for the Cardozo Journal of International and Comparative Law, I am so happy that you have all been able to make it here and join us this evening. I would like to welcome you to our first International Dispute Resolution Symposium. Before we get started I just want to say a few quick words of thanks, first thank you to all of our moderators and our panelists this evening. We have a great program planned, so I'm very excited to hear what they have to share with us. Second, thank you to the Journal for being a sponsor, and to my two assistant symposium chairs, Alexandra Douglas, and Alexandra Katich. Thank you, also to Ariel Diamond for doing all of the graphic design work for our invitations and our programs.

And, finally thank you to Cardozo's Dispute Resolution Society for agreeing to serve as a cosponsor for tonight's event and for doing much of the preparation and organization. At this point, I will pass it off to their President, Daniella Isaacson, thank you.

MS. DANIELLA ISAACSON: [Pause] So, thank you all so much for attending our inaugural Cardozo Dispute Resolution Society, Cardozo Journal of International AND Comparative Law, International ADR Symposium. My name is Daniella Isaacson and I am the co-president of the Cardozo Dispute Resolution Society. Before giving you a brief introduction of our moderators and the agenda, I just wanted to take some time to, again, say a quick thank you, just echo what Alexandra said, but thanks to the CJICL, to all of the Alexandra's who put in a lot of hard work on this event. And to my team at the CDRS, Zachary Levy, Angelo Adam, my co-president, Micah Kantrowitz, Marybeth Winningham, and Sara Doody, you're all incredible, so thank you.

And thank you to all the moderators and Pamela, who took the

time out of their busy schedules to really make this event as amazing as I've seen on the group panel emails and which I know it will be tonight. We're starting with panel one, which is the discussion on International Trends in Mediation and Arbitration. And I'm just going to give you a brief introduction on Matthew Weldon, who is our moderator on panel one. And then when panel one has ended, I will come back up and briefly introduce Russell Semmel, who is our moderator on panel two. We should conclude our event by 8:30, but please feel free to stay and network with other attendees, panelists and students.

That said, our first panel is Trends in International Mediation and Arbitration and its moderator is Matthew Weldon, he's a graduate of Cardozo and counsel at Cozen O'Connor. He has wide ranging experience in business and corporate law, international law, international arbitration, as well as litigation. He is an experienced litigator, and he has extensive experience in international arbitrations and litigations before U.S. Courts and arbitral tribunals. He also has experience with running symposia, so he knows what we're going through.

And he was a visiting scholar at Oxford, and he has both a bachelors and a masters from Case Western. And I'm going to stop talking about him, and just let him speak, so thank you very much for coming.

MR. MATTHEW WELDON: Well, thank you Daniella, and all of the Alexandra's and everybody else who participated in organizing this event. I was a symposium editor during law school, so I do understand the effort in organizing an event like this, and the efforts are very much appreciated. I guess I will also thank Cardozo Law School, it's kind of fun to be back to be on this side of the panel, I've been to a lot of panel discussions here on that side of the room. It's a little bit different, but it's already started out to be great because of all of these tremendous panelists that we have tonight with us. I guess, first of all, it might be interesting to note, we didn't really know what type of audience would be here, whether it was mostly students or some practitioners as well.

So, maybe a show of hands to figure out; have you ever heard of international arbitration? Is this something completely new or. . .? Yes, I have heard of international arbitration, okay. So, maybe a brief introduction is not quite necessary, but I guess as an overview,

arbitration in general is a dispute resolution mechanism whereby parties agree to stay out of a court system, say. So it's a contract that obligates the parties to, rather than go into a court to resolve their dispute, to participate in an arbitration, between an arbitrator or more than one arbitrator and the result is binding that means that there is very limited ways to challenge the arbitration award, and it acts very mcuh like a judgment would coming out of a regular national court, whether that's a federal court or a state court.

What's kind of been funny, is recently I've seen in newsletters tons of these actually, these events, Trends in International Arbitration. I somehow feel left out, I think, I wondered was there something I was missing, what are all these trends, like monthly trends in international arbitration. There's some sort of ridiculous turmoil in the community that I'm missing, but I think that, what sets this panel apart, is that, like I said, we have fantastic panelists and the topics that they've chosen to present on, I think are actually very much sort of recent developments and important developments in the field. Before, I guess, I go and introduce them I will make the point that in correspondence to all of these events that I've been seeing, Trends in International Arbitration, the—it's clear that the popularity of this way of resolving disputes is increasing.

And the number of cases being filed and institutions are increasing. The press, the attention that this type of dispute resolution is achieving is palpable. But I think what's important, in the topics that we'll discuss this evening, is that there is a bit of a balance, so as international arbitration is increasing in popularity, there seems to be a bit of a struggle within the community where we are trying to address the increase in popularity but remaining true and preserving the goals and objectives that international arbitration is supposed to promote, such as economy, and things like that. So in this context our panelists will discuss, first, the appearance of ethics guidelines. Last year some institutions started promulgating ethics guidelines and then we'll also address recent developments in interim relief.

And then some major features of currently ongoing revisions of one of the major international arbitration rules, the ICDR rules. I will introduce the panelists now, in the order that they will speak, first Ank Santens, did I pronounce that right?

MS. ANK SANTENS: Yeah that's correct.

MR.WELDON: Okay, great. Ank is a partner in the international arbitration group at White & Case, and has over a decade of experience in the field. Her accolades have been recognized in the Global Arbitration Review 100, as well as Chambers U.S.A. She served as counsel and foreign arbitrator in commercial investment, construction and sports arbitrations under all of the major arbitration rules. Her cases involve multiple countries and legal systems, and she has experience in a variety of industries, including mining energy and the financial services industry. She studied at Columbia Law School and she's from Belgium originally and went to the Catholic University in Leuven. It said something else in Dutch, but I didn't dare to try to pronounce it.

I guess above all, and with her prior permission, I also found a quote in her bio online, which was really quite amazing and it goes, like this, it's a testimonial, I believe probably from a client, "Ank Santens, showed a dedication and commitment I have rarely encountered. You can be sure she will really fight for your case with all her resources." And here's the best bit, "She also seems to really enjoy her job." So in a profession where, sort of, that features disgruntled and curmudgeon-y lawyers, I think that's quite a compliment and I guess something we can all aspire too.

Next is Hagit Elul. Hagit is a partner at Hughes, Hubbard & Reed. And focuses her practice on litigation and arbitration. She regularly represents international clients on a wide array of contract and licensing disputes. Again, she's involved in various sectors, including the energy sector, and she also advises on investment and bilateral treaty disputes. She has been recognized as a rising star in the 2013 Commercial Arbitration Expert Guide and as a name to know by the Global Arbitration Review. She's also a graduate of Columbia Law School and has an undergraduate degree from UC Berkeley. She clerked for a district judge in New Mexico and she's very active in the Second Circuit Pro Bono Panel, which is quite cool.

MS. HAGIT ELUL: Yeah, it's a lot of fun.

MR. WELDON: Yeah, I've heard a lot about it, so it's one of my goals. Finally, is Martin Gusy, and Martin and I work together. Martin is a partner at Cozen O'Connor, in Cozen O'Connor's litigation,

commercial litigation department and chair's the firm's international arbitration practice group. He was listed as a Leading Lawyer 100, in the Lawyer Monthly Magazine, as a member of the triple A, ICDR roster of International Arbitrators and Mediators. He's also the coauthor of a Guide to the ICDR International Arbitration Rules, which is a leading industry guide published by Oxford University Press. Martin has also more than a decade of business dispute resolution experience as a counsel and as an arbitrator. He's been counsel or an arbitrator in nearly 70 international arbitrations under the major rules.

He advises on matters and areas of sovereigns, technology, oil and gas, energy and international finance. He is a German National, and was trained as a lawyer in Germany and has his LLM from Cornell Law School. And he's a Rechtsanwalt in Germany, which means he's licensed to practice law there as well as here in New York. And he's overall a great individual and a pretty decent squash player, as well, so not particularly well reported in the bios, but worth noting, certainly. So with that I will pass the torch to Ank who's going to start us off with her thoughts on the recent developments in international arbitration relating to ethics.

MS. SANTENS: Thank you, Matt. Good evening, [Clears throat] and thank you all for your willingness to spend your precious hours as a law student coming to listen to us. As Matt said, I have decided to focus my remarks on a specific area, specific trends, which is the advent of ethical rules in international arbitration. Not to say that there weren't any ethics before, but we do see a proliferation of ethical rules in the last year or so. So imagine you are acting in an ICC arbitration, you're representing an American client, in an arbitration seated in Brussels against a Brazilian party. And you're handling the case, and the hearing arrives and you need to decide am I entitled to prepare my witnesses for a hearing, for their testimony at the hearing, which is something you would, of course, typically do if you were acting in a U.S. domestic dispute, litigation.

But, does that become different if your arbitration is seated in Brussels? Which, let's assume, has a rule against preparing witnesses for their testimony in an arbitration. Should that change your mind, as to whether or not this is ethically allowed? And what about the fact that your Brazilian opposing counsel has a rule in her jurisdiction preventing, forbidding, the preparation of witnesses for trial, does that

make a difference? These are questions that are very complicated to resolve because they, of course, raise, give rise to the question, well what rule applies here? And traditionally in arbitration for these kinds of ethical issues a conflict of law analysis was employed with, two, I would say, main contenders.

One being the ethical rules enforced at the place of arbitration, so in our case, that would be Brussels. And that is the solution that has been, for instance, adopted in the United States in the ABA Model Rules of Professional Conduct; article 8.5 of those rules provides that for conduct in connection with a matter before a tribunal, the rules of professional conduct to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provides otherwise. So, as I said, in our case that would lead to the application of the ethical rules enforced in Brussels. Does that make sense? I'm a U.S. lawyer, I have a Brazilian opposing lawyer, neither of us, well I may, because I'm also from Belgium, as you just heard, but neither of us will know what the ethical rules in Brussels are.

So, why do we now need to go look at what the ethical rules in Brussels say, just because our arbitration is seated in Brussels? Does that make sense? Another more common choice is to look at the ethical rules enforced at the jurisdiction of counsel. So, in my example, that would be I am bound by the ethical rules enforced in New York. And my opposing counsel is bound by the ethical rules enforced in Brazil, that seems to make sense. We both know our rules, we apply them in our usual conduct, and so we can just continue to apply the rules that we're applying on a day to day basis. But, it gives rise to another difficulty, which is that there's no level playing field here, because I am allowed to prepare my witness for the hearing, but my opposing counsel is not. So clearly I now have an advantage going to the hearing.

And what if I, as I am, a member of two bars, so I'm a member of the New York Bar and I'm a member of, I'm sort of a member of Wales, where again, they have a rule that solicitors cannot prepare their witnesses for testimony at the trial. So I am now facing two opposing ethical rules, what do I do? And what about the fact that in arbitration, you don't even need to be a lawyer, to represent a client? You can—there are construction cases, for instance, where clients are represented by non-lawyers, who can see it in labor cases, as well. They have no ethical rules of a bar applying to them, of course, because they're not

licensed in any jurisdiction. So that doesn't seem to be a great solution, either. Another issue is that our field, is really a field onto its own, with its own practices and people, as I just illustrated for you, from different jurisdictions, and so just going back to the domestic ethical rules doesn't always work in our field, because they don't address the type of situations that we encounter.

So over the years, a number of practices and procedures, and best practices, I would say, have been developed in our fields, but the problem is, of course, that those are just best practices, they're not binding, they are unclear, as long as arbitration was a relatively minor field with repeat players, that they could somewhat be identified. But as the field is growing and more lawyers from around the world are taking on arbitration cases, it becomes increasingly difficult to pinpoint any given practice or principle and to say, well that's the ethical rule that we consider is binding and one we should abide by. So we're in a situation where it is unclear which rules govern, and so as a result, as counsel, even if you want to be ethical, it's quite difficult to be so, because you don't quite know what to do.

And so there've been recent initiatives, and that's what I wanted to talk about, to try to give content to these rules and to have some framework for counsel doing what we do, to know what guidelines we should abide by. And one initiative is the IBA Guidelines on Party Representation International Arbitration, I think you may have received copies, I asked that they be distributed, so you should have them. So these were adopted by the IBA, the International Bar Association, after having been discussed for a long time in the arbitration committee, which is a big subcommittee, of the IBA. And they are a move away from this traditional choice of law approach that I talked about before. What they do is they establish a uniform set of guidelines that will apply to counsel from all around the world, and regardless of the place of arbitration. So the rules are the same for everyone, and they are now codified somewhere, so that you can go read and say, yeah that's the rule.

Now, application, of course, remains a problem. Arbitration is a creature of consent, and so these rules do not apply mandatorily. So how can they apply? One thing parties could do, but they really don't, but they could incorporate these rules in their arbitration agreements. More typically what you will see is when we start a case in the

beginning, because arbitration is flexible, and there are not so many rules at the beginning of a case, you typically discuss the procedure. What rules are we going to abide by? And so at that point in time, the parties on the tribunal can agree that they will abide by the IBA Guidelines. Or if that hasn't happened, and an issue arises during the arbitration, a party could point to the guidelines and say, "Well that's what the guidelines say," and so the tribunal could take inspiration from the guidelines.

So what's the contents of the guidelines? The overarching principle is that party representatives, and that is defined as anyone representing a party in arbitration, whether or not legally qualified or admitted to a domestic bar. So it also applied to a non-lawyer party representatives. And so the overarching principle is that party representatives should act with integrity and honesty and not engage in activities designed to produce unnecessary delay or expense. Then it codifies a number of these practices and principles that I've already eluded too, which have been existing for many years. A very typical one, is the rule against ex parte communications in arbitration. It's a principle that once the arbitral tribunal is appointed, you should not, as counsel, speak to your arbitrator outside the presence of opposing counsel and the other tribunal members, of there are three, about the arbitration, that's a principle that's very well-known. It is now in the guidelines, that's one example.

Another one, is that the guidelines specifically say that a party should not make a false statement of fact to the arbitral tribunal. And should not submit witness or expert evidence that he or she knows to be false. And if that is done anyway, the party representative should take measures to correct the statements, and if necessary, withdraw from the representation, that's a newer one. It may be surprising, but that's a newer one, and it's actually a bit of a controversial one. It's one that it took some laboring to get it in there, but it's there. And we will see how that evolves. It's only about statements of fact, there was a deliberate decision not to include duty to represent the law accurately. Because that was—there was too much opposition to a rule like that, so it was ultimately decided not to include that. Another example is that it is made explicit in the guidelines, that a party can prepare, in the preparation of testimony, those in an affidavit, which we call a witness statement or at the hearing, so that's another example of a rule.

So the guidelines do have several concrete rules, I've only highlighted a few, there's many more. What they then also do, is at the end, they specify that the tribunal can—has a range of remedies at its disposal if the advanced rules are not complied with from an admonishment to allocation of costs against the party that is represented by the party representative, engaging in a misconduct, and any other remedy that the tribunal considers appropriate. So this is—these are the guidelines, big change, really novel for us, I haven't seen them applied in my arbitrations yet, they came into force in May of last year, so they are quite new. But I do expect they will; the IBA has issued a number of other guidelines in arbitration, but they've all been frequently cited and relied upon.

So, I do think it'll be the same with these. How much more time do I have, now?

MR. WELDON: Maybe a couple more minutes.

MS. SANTENS: Okay. One other related development I wanted to point out, is there's an arbitral institution now, the LCIA or the Lawman Court of International Arbitration, which is one of the more well-known institutions in the world, has now taken the next step and has proposed, in its new rules on arbitration, the LCIA has arbitration rules, which I think, date from '90/'98, so they're overdue for revision. And in the revisions, the LCIA is the first institution that would now propose to incorporate ethical guidelines in the rules. And how they would propose to do that, is to have a new article that would say, each party shall ensure that all its legal representatives have agreed to comply with the General Guidelines contained in the annex to the LCIA rules as a condition of appearing by name before the arbitral tribunal.

So if this comes into effect, and I suspect that it will, if a party thereafter will choose, or if two parties and their contract, chose LCIA arbitration as a method of resolving their dispute, they will thereby automatically sign on to this rule and have an obligation to ensure that its legal representatives agree to play by the ethical rules. And so there will be an annex to the LCIA rules with these ethical principles. They're more limited than the ones in the IBA Guidelines, the ones that are there are very similar, a legal representative should not engage in activities intended to unfairly to obstruct the arbitration or to jeopardize the finality of any awards. Prohibition on ex parte communications,

prohibition on submission of false statements on false evidence, and other similar principles. These proposed rules were—came out two or three weeks ago, really very, very new developments, and I think we will see more of this, I think this is just the first step, I do think this will be included, and I think other arbitral institutions will follow suit.

And I think it's a good development. I was just talking with Matt before, there are some that consider that there's over regulation in international arbitration, that it should remain a very flexible dispute resolution method, and we shouldn't over regulate it and I typically agree with that, but I think in this particular field that is wrong. Because I do think the choice of law approach doesn't work here, we need specific rules for our fields. And I think the only way we can have a level playing field, and a certain comfort as counsel, that at least the rules are clear and my opposing counsel is at least knows things; the rules are the same as I do, whether they going to abide by them, is a different thing. But at least that I know, we are at least playing—we know the rules are acts, I think, is very, very, very important to us counsel.

Because there's nothing more frustrating as counsel when you have the impression that your opposing counsel is not playing by the same rules. So, I think, this is a positive trend and that we will only see continuing.

MR. WELDON: It's such a controversial issue, maybe somebody on the panel wants to raise a counterpoint that there is an argument probably to be made, that we don't need ethical rules or guidelines at all, and then maybe secondly, is there a difference between having ethical guidelines and then putting the ethics rules into the institutional rules?

MS. HAGIT ELUL: Well, I would say that if you're a member of—most practicing jurisdictions are already governed by ethical guidelines, and to the extent that you breach them, whether it's in a court proceeding, or in an arbitral proceeding, or even in a, just in interaction with another lawyer, not in any proceeding, you could be subject to various sanctions by the disciplinary committee of the court. So more than ethical rules, I think, that that's really what guides attorneys in their conduct. But it's certainly an interesting development.

MS. STANTENS: I guess I just find—we've had a few situations where opposing counsel, in our view, wasn't abiding by their bar rules. But to take the extra step to go to a bar and, you know China or wherever and to actually go file a complaint there, it is so rare that you would take that step. Whereas, I think, if you have them in the LCIA rules, which also has these sanctions again associated with them, it is so much—it's not easy, believe me. A tribunal will be very careful before they impose a sanction on a lawyer for violating these types of rules. But I just think it's—it gives some extra teeth, and makes life easier, yeah for the other lawyers to bring it up, just in the arbitration where you can see costs, which in my view is probably the most common sanction that would be requested.

MR. MARTIN GUSY: Maybe two comments, it so happens that unfortunately one of the founders of what we perceive to be international arbitration these days has passed away two days ago, his name is Pierre Lalive and he was very influential in the '80s and early '90s in setting the rules and standards that were applied in international arbitration. In those days, the idea was, this is a tailor-made process, to resolve disputes between two parties from different jurisdictions. And it's probably only a testament to time that today we sit here, 'bout 20 years later and ask ourselves do we have to codify things. Pierre Lalive, in those days, called it the [00:31:17 foreign language] that the fury[Laughs] to codify rules and he was one of those advocates that strongly argued against it. But maybe, and this is to give tribute to what Ank said, if your opposing counsel is from Italy and is prohibited entirely from preparing a witness, because it's a crime in Italy, then you do have an issue, even if you wanted to prepare your witness because then the tribunal would be forced to treat the parties unequally.

And that, by itself, would render the award potentially unenforceable. But maybe my question to Ank, what would you do if you knew your opponent does not understand preparing a witness the way we prepare a witness, that is by means of guiding testimony, but maybe by dictating testimony, what would you do?

MS. SANTENS: As opposing counsel or as a tribunal member?

MR. WELDON: As opposing counsel?

MS. SANTENS: Well I would prepare my own witness. [Laughs]

I think that the difficulty is for the Italian lawyer, and as the Italian lawyer, I would make it very clear to the tribunal that I cannot prepare my witness and that they really need to take this into account. I might ask the tribunal to tell me not to prepare my witness, but I think very few tribunals would go that way and that's—I think very few would. But I think to at least make it known, so that everybody goes into the hearing knowing that there's not a level playing field, is important. And if you are the Italian lawyer, and you make it known, certain clients would certainly supplement you with a legal team that is able to prepare the witnesses, which then raises the interesting question is can you be co-counsel in a case where your witnesses have been prepared? I don't know what the answer to that is, but it does raise—I think if anything the rules, the good—one of the benefits they have is exactly to make this discussion explicit.

Because if you, in the beginning, ask parties as a tribunal, are you willing to incorporate these guidelines into the arbitration? And they say, no; you could ask why not or they could say, we do, but we can't abide by this particular rule, because that rule is not—I can't sign onto. And at least then it would be known, so I think that's a good value of the rules as well. What would you do? I mean you would prepare your witness right?

MR. GUSY: I would; there's only one thing I'd tell a witness, and then I'd guide them by questions, and the one thing I tell them is to tell the truth.

MS. SANTENS: No, but prepare, sorry, by prepare, I'm not saying telling your witness what to say. I mean practice in cross examination so that they are used to the. . .

MR. GUSY: [Interposing] I wanted to make the point, in order for us all to be on the same page. Of course, Ank knows much better than to tell a witness what to say.

MS. ELUL: [Interposing] Although I'll say from experience, it's a difficult task to actually prepare a witness and oftentimes your witnesses will say what they're going to say, no matter how much time is spent preparing them, which is. . .

MS. SANTENS: [Interposing] Absolutely.

MR. WELDON: It was—I was at the IBA conference a few months ago, and there was a very interesting little test that happened, basically the panelists had everybody stand up and then they started to ask them along a spectrum of things, would you do this? And if you wouldn't, please sit down. And it was quite interesting to see that the geographical places where these people came from influenced how far they would go. Even, you know here's the witness statement; would you help him correct it, or would you help your witness do this? And people just start sitting down, and I'm sitting there thinking, of course we do it all the time. But; and I think that raises interesting issues, as well as to the power of the arbitrator, which leads us into our next topic, which is interim relief, and what are some of the recent developments that we're seeing in interim relief?

MS. ELUL: Well before I get to the recent developments, I want to just start with the basics, because show of hands, who knows what interim relief is? Like a couple—a few people. I mean if you're like me, as a law student, you wouldn't know what interim relief is, so basically interim relief or also called interim measures, in our area of practice, is when you need to have something resolved on an emergency basis. And in civil procedure under the federal rules of civil procedure, it's called getting a temporary restraining order or getting a preliminary injunction. So these are real emergency situations, where you can't wait for the entire trial to take place, before you actually get the relief that you need. So, what are some examples when—I mean there's effectively two categories of situations where you would want interim relief. One is to maintain the status quo, pending the resolution of the dispute, so you don't want things to change.

The other would be if somebody's hiding their money, or stealing their money away, or secreting the assets. So let me give you some examples of a type of dispute that might call for interim relief, let's say you represent a company that has entered into an acquisition agreement to buy assets from another company. They put half a billion dollars in escrow, they're ready to close the transaction, they open up the newspaper, and what do they see? They've been jilted, their prospective seller is actually now going to sell those same assets to another party, and that deal is set to close in a week. What do you do? Well you could bring an arbitration, you could try to get damages, what you really want are those assets, there's a value attached to those assets that you're buying them for a certain amount of money, but because you

think they're worth more than that.

And you really want them, so what—that would be an instance where you would want to get emergency relief, for example, stopping the transaction, pending the resolution of the dispute. Another example might be, you have a case going on, it's a construction dispute, all of a sudden, you've learned that your adversary's client has been shredding documents, you don't want them to keep shredding documents, you need those documents for the arbitration. So that might be an instance where you seek emergency relief. I also had a case where we represented the respondent, which is the equivalent of the defendant in an arbitration, in a dispute over the supply of wind turbines. My client was a manufacturer of wind turbines, and my client was in the process of restructuring and making some changes to the company, and our adversary sought interim relief on that basis, saying, "Well they owe us $50,000,000 and because they're restructuring, they're going to be wasting all their assets and we want to have an attachment of their assets."

So that's another example of the type of situation of when you would get interim relief. Now how do you get them? If you're in litigation, it's fairly straightforward, you go to the court, you actually literally go to the court, you run to the court, you take your piece of paper, you take it to the clerk, they stamp it, they say, okay go upstairs to the 12th floor and you sit before a judge and if you really want interim relief, you try to go the state court, because it's easier to get it. And you take it to the judge, you stick your papers in front of the judge, and they sign it or flip through the papers, they're done, sign it. In arbitration you can't do that. Why? Because maybe the arbitration demand has yet to be filed, maybe you don't have a panel in place. And even if you have filed the arbitration demand, it can take a long time for a panel to be put in place.

And that's not because people are dragging their feet, but because there are certain deadlines set in the rules that just dictate a schedule that sets out the time in which the panel is selected. So, for example, I have a case going on right now, where for three months we've been trying to pick a panel, and it just hasn't come together yet, not through any fault of the parties. So in that situation, oh no I have an arbitration agreement, I really need to stop them from destroying their documents, or having this merger go through, or stealing—secreting the assets.

What do I do? Typically, one would go to court and seek what's called an injunction or an attachment or whatever relief that you're trying to seek in aid of arbitration. So that was traditionally what people would do. And there's actually a statute under New York State law, CPLR 7502, for anyone who's interested, that actually provides this exact mechanism to get attachments in aid of arbitration, and it's actually a pretty unique statute. I'm not aware of any other state that has one particularly tailored to arbitration.

And so that would be how traditionally people did it, but in the trend, in recent years has been to grant emergency arbitrators, be authority to hear these types of interim relief applications. And so what the institutions have done, and an example would be, the International Dispute Resolution Center, which is the international branch of the American Arbitration Association, had done, is they've set up a specific procedure where you can, instead of going to court, you have your—you've agreed to arbitrate under the ICDR rules, and you don't want to go to court, maybe because you want to maintain confidentiality, maybe because you want an award that's going to be enforceable in a different country, but for whatever reason, you don't want to go to court, you'd rather do this through arbitration, and so they have a specific procedure where you can go and seek relief in aid of the arbitration.

And it's article 37, and Martin is going to tell us about changes that are coming to the ICDR rules, so you said that one is not changing. So, there now is a specific procedure in place, in that set of rules, and in most rules of most arbitral institutions there's now a procedure in place for getting emergency relief. So then that raises the next question, okay so you go to your arbitrator, your emergency arbitrator, and you've asked for emergency relief, and they've given it to you. Did they have the authority to give it to you? What do you do with that interim relief that they've given you? How do you actually enforce it? What if the other side's not complying, because after all, maybe they had this deal that was—they're already in breach, they were already hiding their assets, so maybe they're not complying. So what do you do? And the typical answer is, when you have an award, a final award, from an arbitral tribunal, you go and enforce it in court.

And through the New York Convention, which I assume that you've heard of, which is this International Treaty that governs the enforcement of arbitration awards. Now traditionally U.S. courts were

very reluctant to recognize and enforce interim orders from arbitrators, and the reason why is because they viewed them as not final orders, and the authority that's granted, at least under the Federal Arbitration Act, was framed such that they could only recognize and confirm final orders, or orders that were close to final. That is definitely changing, and I wanted to highlight a case that I read today, which was very interesting, although I had heard of it before, it's a dispute that recently took place between Yahoo and Microsoft. And what happened in that case, was Yahoo and Microsoft recognizing that their respective search engines, Microsoft's is Bing and Yahoo's is Yahoo, were not doing well compared to one other big search engine out there.

And they decided to combine their efforts, and combine their search engines, and advertising capabilities in various regions throughout the world. And they entered into an agreement to do that, and started doing it, and then Microsoft announced that its chairman was going to be retiring in the future. And Yahoo took that as an opportunity to say, well we don't know if we're going to like what's happening in Microsoft, and so therefore we're going to stop performing under this contact. And they did what they—they called it pausing, we're going to pause our performance under the contract. And so they stopped doing all the technology migrations that was required for this agreement that that parties had entered into. Microsoft brought an arbitration against Yahoo and also sought relief from an emergency arbitrator. Now what was the emergency?

Well, they said, okay, well we put so much work into this technology migration and if we don't finish it by a certain date, all the effort's going to be lost for some technological reason, that I can't explain to you. But, that was their argument and it was apparently well supported by evidence. And Yahoo's response is well you can't make—to the arbitrator, you can't make us actually perform under this agreement, because you emergency arbitrator, are only one emergency arbitrator. We agreed to arbitrate before three arbitrators and you don't have the authority to issue this relief that would be so final, it would really resolve the entire case. The emergency arbitrator actually did an interesting thing, I think that he or she, it doesn't say, was reluctant to actually tell Yahoo, hey, you actually need to go and do this thing, which is in legal doctrine, called specific performance, I'm directing you to do this thing.

And instead he issued an injunction, which directed them to stop pausing on their performance under the contract. So effectively telling them, you need to perform under the contract and the—resolving the entire dispute in, before it actually came to the full tribunal. And Yahoo tried to argue to the court, when Microsoft went to get that enforced in court, saying that that's not enforceable, the emergency arbitrator didn't have authority to render such final relief, and, by the way, you also can't confirm the award, because it's not final. And the court rejected that, and was pretty clear in this very good decision, saying basically look you consented to the arbitration process, you had your opportunity to be heard, and the emergency arbitrator had the authority and we're going to enforce the award.

So, I think it goes a long way in resolving, first, what authority does the arbitrator have? Does the emergency arbitrator have the authority to issue a decision that's basically going to decide the entire case? And the answer is, yes. And then the next question is, well okay if it's not a final award, that doesn't use the magic language final and in fact you've agreed that this is really an interim process, can it still be confirmed under the New York Convention? And according to the court, the answer was yes. So it was quite interesting and just remember that for the next time you get served with an attachment the day before Christmas, which seems to happen quite a bit in our - -, speaking of ethical guidelines. It happens more than.

MS. SANTENS: [Interposing] They're should be a rule.

MS. ELUL: They're should be a rule against that.

MR. WELDON: Well that also raises this issue, that I guess, is just pervasive in arbitration, is how courts and the arbitral process sort of meet and influence each other which in some ways, leads us to our next topic. There's an increasing, I think, sense in the community that court rules are starting to infiltrate themselves into the institutional rules. And this is apparent in some of the recent revisions in the ICC revision rule - - since last year as well as other recent revisions, including the current revisions of the ICDR rules, which are taking place right now. Maybe Martin has a few comments about revisions of rules, generally.

MR.GUSY: Maybe I should stop pausing my criticism, when it comes to codification of arbitral rules. What I wanted to share is really

the idea that arbitration is a mechanism in which you can agree to the right procedure for the dispute in front of you. Arbitration is not something that is written on the wall, for people to execute from. But what has happened is that as the number of cases has grown, the numbers of practitioners and participating people has grown, and I think there's a—it ties back into my initial comment, which is, at the end it needs to be an equal playing field for parties to resolve their disputes. And there's a particular problem that is, if you have attorneys on one side of the caliber of Ank Santens or Hagit Elul, and on the other end, you have a, I call it neophyte, somebody that has done this for the first time, then it's probably helpful to have, at least, a basic set of procedures that is in place and has been agreed upon.

And that is most often what happens when parties agree on an institutional set of rules. If—the opposite to institutional arbitration's, called, "at hog arbitration," again sticking with Ank and Hagit, if Ank and Hagit had clients that were in a dispute, I'm sure they would be able to figure out a procedure within a short period of time that does justice to the underlying dispute, without having to resort to what is written in rules. If I'm part of that game, maybe I'd prefer to have the ICDR rules in place. [Laughter] Now the typical life cycle of institutional set of rules has been anywhere between 15 and 20 years, maybe with the exception of the ICC rules when they were first revised from '88 to '98. But at 1998 was a year where the LCIA issued rules, the ICC issued rules, and the American Arbitration Institution, I'm sorry the American Arbitration Association had its international set of rules in place.

But it did not yet have, what is now called, the International Center for Dispute Resolution, ICDR, as a division that took until 19-; I'm sorry, that took until 1996, so it had just been formed. One of the guiding principles that merits comment or trends in the revision of international rules versus domestic rules is that international arbitration does not necessarily mirror the Federal Rules of Civil Procedure or the CPLR, quite opposite, the ICDR had, so-called, guidelines in place in 2008, that said that such things as interrogatories, or requests to admit, or even depositions, which are standard to every American litigation, and by now, most often unfortunately or fortunately, part of a domestic arbitration. That at least these typical American practices had no place, or at best, limited place in international arbitration. I am, as Matt pointed out, an advisor to the subcommittee of the board of directors of the American Arbitration Association, revising the international

arbitration rules of the American Arbitration Association is, so-called, ICDR rules.

And there are three things I wanted to highlight, in terms of trends, and they also go along with what happened elsewhere in recent other institutional rules revisions. What an institution is after, is to foster efficiency and the economics of the proceedings. Nobody should waste time and money when resolving a dispute. What the current discussions involve, when it comes to the international rules or revisions, is whether expedited procedures should be made mandatory for disputes that only reach a certain money in dispute. The other thing that is already public is mediation, as such, the Triple A or the ICDR case managers are known in the industry to be a—to apply a so-called, proactive management of cases. That is sometimes they are very proactive in telling the parties what to do. And when it comes to mediation, although it has been promoted in the past, it will be no longer an opt in, mechanism, in the future, once the new rules come into force.

But, an opt out mechanism, that is the case manager at the ICDR will ask the parties to attempt mediation at an early stage of the dispute. And it is then for the parties to opt out of the procedures. However once they have agreed, very early on in their business relationship, on resolving any and all disputes, in accordance with the ICDR arbitration rules, they now then will also have agreed to at least being prompted to mediate their dispute, which is something I'm sure Simeon might be in favor of.

MR. SIMEON BAUM: Great idea.

MR. GUSY: We'll hear more about that later, do we? The other reflex, I would call it, of the increasing complexity of the international disputes is, the idea of two parties having one dispute is not necessarily always the case, it's most often more than two that are involved and have an interest in it. So you're dealing with the, so-called, multiple party or multiple contract issues, and without discussing what's being discussed within the ICDR rules or revisions. The Hong Kong International Arbitration Center, as of November 1st last year, revised its rules, and provided for the possibilities of joiners and consolidations within international law arbitration, which I think is a merited response to what is going on in the industry. Now what I led into is the emphasis on international arbitration being different than U.S. litigation.

Now I mentioned interrogatories requests to admit in depositions as examples of things you will most likely not practice in international arbitration. However, what does need to be addressed is the exchange of documents, and even the civil law jurisdictions, such as my original jurisdiction in Germany, and I don't know about the recent developments in Belgium on that stage. However, those jurisdictions have given recognition to the necessity that documents that are in the possession of the other party might have to be turned over, at least in the civil law jurisdictions when you want to rely on those documents, then you also have to make them available to the other side. Of course U.S. discovery is entirely different; a request for the production of documents does not necessarily have to be limited to documents that you want to rely on. But the consensus and the trend that has continued, and is also being codified as those that are in possession of the other party and are relevant and material, will have to be made available to the other party to look at, as well.

One last trend I do want to highlight is the American Arbitration Association also revised its commercial rules, which is primarily used in domestic disputes. However there are also international fact patterns in which the parties have agreed to the application of the commercial rules of arbitration. And it does address dispositive motions, motions to dismiss, so motions for summary judgment, as known in U.S. litigation practice. It has been addressed in rule 33 there, and interestingly although it's not quite clear what the intention of the drafters was, it addresses the existence of dispositive motions, even in an arbitration. But secondly it provides for a mechanism to have to ask the arbitrator to allow for such motions to be brought, which is known most often, meanwhile in federal civil litigation here in the United States that many judges have so-called letter practices, where you have to file pre-motion letters to ask for a motion to be made.

However arbitration, again, maybe to tie it back to the early ideas of those that Pierre Lalive would have had is to get to a hearing very quickly. And it is for parties to present their testimony and their evidence at a hearing and then the arbitrators decide the case. Of course when you file a dispositive motion then, no hearing will—and it is granted, then no hearing will take place. But then the question is do we cut short of what the essence is of an arbitration versus a litigation? And maybe having talked about discovery, that might be the answer, why we don't really need dispositive motions in arbitration. Because

the discovery that's conducted is not nearly as extensive as it is in U.S. litigation. I want to make one exception, because it wouldn't be a good rule if it didn't have an exception, and that is a statute of limitation issue should probably be addressed very early on, because that usually resolves a case very quickly.

MR. WELDON: We've actually managed to time this perfectly, which is I'll take all the credit for. I want to open it up for questions now, I realize many of you are students, but please speak up, if you have anything to ask. Yes?

MS. ISAACSON: We kind of touched on the difference between the local laws, and article laws, and international laws and I was just wondering - - the interplay in all of those and how they work in arbitration.

MS. SANTENS: If anybody knew the answer to that question [Laughs] we would have a lot less work.

FEMALE 1: Would you mind repeating the question?

MS. SANTENS: Sure, Daniella asked us to comment on the interplay in between local law, arbitration law, international law. That's one of the reasons why international arbitration is such a fascinating field to practice in. You do have all kinds of law applying, in all kinds of different ways, and there is no any one way they interact. And very often you can makes lots of arguments on choice of law, you can argue there's a false conflict, and so no choice needs to be made. But I think that's one of the reasons why this is such a fun field to practice in, because a lot of what we do is pure persuasion. It is not entirely clear which law applies or what the rule is, and the interaction is not entirely clear and so it's—that's what makes it very fun, and a very creative field. One particular area in which we practice is the area of investment treaty arbitration, which is where an investor will sue a sovereign country on the basis of a bilateral investment treaty between the country in which the investor; has its domicile, and the country in which the investment is made, and there we really make law in the cases.

The arbitral tribunals make law in their rulings and that's why this is a wonderful fascinating field to practice in. It's becoming less so, I guess, because we've had so many cases now that you do see trends and

we're arguing more and more on the basis of precedent. But in the very beginning, this was law creation at its best. And is one of the reasons, as I said, why it's a wonderful field to practice in.

FEMALE 3: Do you think equity comes into play more in arbitration than in adversarial court proceedings?

MS. ELUL: I would not say that it comes into play more, I think equity underlies every single decision, whether it's an arbitration decision, or a judicial decision. And by equity, I mean the facts, who has the better story to tell? I mean it comes down to what I see with—for example my children, the "it's not fair" argument, it really comes down to that. Of the what they're doing, the X,Y, and Z, and it's not fair. And if you can really tell your story in a persuasive way, and that's another reason why I think our field is so fascinating, because I actually find it to be a very creative field, because you're really acting as a storyteller. I mean you're getting this mass of facts, and you're really trying to craft your pitch, your story, your, what you want the arbitrators to hear or the court.

And so I would say that equity always comes into play, having said that, a contract is a contract, and even if you have the best story to tell, if your contract said, well you bargained away those rights, then too bad. And I think that that's also true in court, as it is in arbitration.

MR. GUSY: I have—I think it's even more legally driven as an answer, because again comparing what happens in U.S. courts and in typical international arbitration, what Hagit says, I think, is right. There's an extensive written procedure building up to a hearing. Because you exchange memoranda, and in those, you would argue, both in fact and in law from an early on stage. Whereas, I think, where generally speaking, of course there are corrections provided, but in the U.S. litigation system, the initial paramount task is to develop the facts and then look at it with the law. So I would actually argue that in an arbitration, most likely, you've confronted legal principles earlier. Of course this is not to say that in U.S. litigation you are not bound by your law, of course you have to have a claim and state it.

But the analysis, I think, goes into death in international arbitration, much earlier.

FEMALE 4: So we're talking about the iterim relief order and we were talking about one party destroying papers. What is the remedy for that?

MS. ELUL: Well, that actually touches on, I think, some topics that Ank was raising, I mean that's actually a pretty big source of debate right now, is what do you do when one party has engaged, in what we call, in legal terminology, discovery abuses? Where they've basically abused the process, where they've shredded documents, or they've done whatever. And I think we've all had cases where we have our clients tell us, "oh that document, it was destroyed in the flood." So, I've heard that more often than I'd like too. But, the, if you can demonstrate to an arbitrator that there has been a document, that that document no longer exists, and that you think that document would've supported your position, you can ask the arbitrator to draw, what's called, an adverse inference and that means that the arbitrator will assume, for the purpose of the evidentiary record, that that fact exists. And that's actually a pretty—I mean, if you think about it, it's a pretty bold remedy.

It's fairly noncontroversial to get adverse inferences in U.S. courts, and U.S. litigation is so strict with respect to discovery, that you actually get them probably more often than you should. But I think for an arbitrator, who's really judged with assessing the facts and assessing the credibility for them to take that decision to say, well I actually think that there has been a destruction of documents here, and so I am going to make an adverse inference that had those documents not been destroyed, I think that they would've shown that, you willfully decided to breach this contract.

FEMALE 3: Oh, I'm sorry, is that easy to do?

MS. SANTENS: No it's very difficult.

MS. ELUL: Very difficult.

MS. SANTENS: I'm facing it right now, it's very frustrating and very difficult. Unless, you know of a very specific document, I mean if you have minutes of a board meeting that you know existed and they're destroyed—if it's a specific document you can do it, if it's not, it's very difficult, very difficult. One other—just to go to Hagit's flawed comments, one of the novelties in the IBA guidelines that I talked

about, is that they actually include a litigation hold, which means that U.S. counsel, at the beginning of a case, have the duty to tell your clients that they need to preserve all documents that might reasonably be relevant to the arbitration, which is a typical thing that you would do in U.S. or North America litigation. But is not, at all, typical in any other country in the world, actually. So that's quite novel, so that should—at least U.S. lawyers have the duty to go tell your clients, keep the documents.

MR. WELDON: One more question here.

MALE 1: Can you use polygraph tests in arbitration?

MS. SANTENS: I haven't used it, but if I thought that it would be useful in a particular case, absolutely, why not, I mean any—that's again, the beauty of arbitration, anything goes. So whatever you think is most persuasive, you can do, so if I wanted to do it of my—if somebody else saying my witness is lying, then I would say, "Well I'm happy to submit polygraph evidence." That would be admitted, and so I would do it, yeah.

MS. ELUL: Yeah that is one key distinction between arbitration and litigation, all those nice rules of evidence that you've been diligently studying, matter much less, in arbitration. And so it really, hearsay, forget about it, I mean it's—everything's hearsay in arbitration. And, you know if you're coming from a litigation perspective, it can actually be quite shocking. But, I think you do get to the right result.

MS. SANTENS: The ideas in arbitration is anything comes in and then the arbitrator's decide what weight they give to it.

MR. WELDON: Do you have a question?

MALE 2: I do, briefly. Per international arbitration if there's two parties and one party is—comes from a - - country - - a lesser, industrial legal system, and as an American, I think that those rules are similar to where we came from, but there are competing societal values at play that I'm not aware of 'cause it's not law. How do you deal with that sort of thing, how do you figure out how - - trial values come onto play with arbitration, in terms of ethics?

MS. SANTENS: Well, I think an important—you need to be aware of it, that's point number one, because a lot is going on that you're not aware of and not a trend, I would say, in the field where there's increasing studies on conscious biases, and on how much of our decision-making is based on things we're not aware of. You'd have to give me a specific example—I think you have to deal with these as they come up, I don't think there's a theoretical principle or rule that I could give you, other than I think what Martin as already eluded to, there needs to be an equal opportunity for both parties. If there are differences, the best you can do is acknowledge them and try to be conscious and aware of them.

It's very difficult, you know if you have a prepared witness and an unprepared one, you may tell yourself 20 times, well this one was prepared and this one wasn't, but how does that really effect the testimony, you don't know. It's the same with those issues, you have to try to give everybody a fair chance, equal opportunity, and as I said, to the extent there are differences, try to be aware of them. If this is more of a merits question, I mean that would go into the factual, I agree with Hagit, everything is factual to me in the end. It's all about who else really has the most convincing story to tell.

MR. GUSY: It's rare to see it in the context with American parties, but in, at least in the European, and African, and Arab context, tribunals might even resort to tribunal appointed experts. But that can only work, if counsel has brought it up. So I think that the burden with raising, even something like society values, to the extent they've really influenced the outcome of a case, is primarily with counsel. And if counsel hasn't brought—and the parties, as such, haven't brought good enough experts to explain it, then sometimes tribunals appoint their own expert. But know that there's also a caveat to this, which is the party's have to pay it.

MS. SANTENS: [Crosstalk] And I have to have a right to comment, the opposite is, the parties have to raise it, but if you, as a tribunal member, think there's societal value, that's important, you have to bring—put that to the parties and say, we think this is important, can you please comment. Because the worst, mean there's a lot of bad things that can happen, but I have to say one of the most awful things when you open an award and there's a decision made on an issue that you have never had an opportunity to comment on, that is terrible. And

it happens more often than you would think, where the tribunal, they go off in their room, and you've done four exchanges of briefs, there are 500 exhibits, you have one week hearing, there's been so many opportunities to bring this up, and they come back with a decision that is based on a point that was never discussed, and that they got wrong, that is very, very difficult. [Laughs]

MR. GUSY: I bet that never happens in U.S. litigation but. . . [Pause]

MALE 4: [01:16:40 - 01:17:02 inaudible]

MS. SANTENS: I'm a fan of the latter, I do-would ultimately like to reach the right result and if I think there's something going on here that my other party has breached, I would want to bring it up, but I would bring it up. And if you have to have another hearing or have another rounds of briefs, too bad.

MS. ELUL: I think also part of the answer to your question is, you really have to know your audience. So let's say you represent, hypothetically, a Chinese accounting firm, that screwed up an audit, and they're being sued for malpractice, but the arbitrators are all U.S. arbitrators. You need to make sure that you have an expert that can explain why from the Chinese auditing perspective, the fact that there were missing computers and all of the documents were being kept in some warehouse somewhere, didn't raise these suspicious red flags that a big fraud was going on. So you need to look at your audience, and say, okay well who are these arbitrators? And are they going to understand that coming from this other cultural perspective this was completely normal, what was happening here? And yeah I realize that sitting here as an American, it sounds really suspicious, but really it wasn't. And so I think that what Martin was saying, it's really the job of counsel and getting the right expert, but it's also the job to recognize who your audience is.

And making sure that you're pitching your, and positioning your story in the right way to them.

MS. SANTENS: And if you can't, you pick the right audience. [Laughs]

MR. WELDON: I think we're out of time, so we'd better cut it short there. But I think it just goes to show what an interesting and complex practice it is. Please join me in thanking our panelists with a round of applause. [Applause]