



**Arbitration vs. Litigation:
“Weighing The Pros and Cons of
Each Form of Dispute Resolution”
and
“Global Litigation Concerns:
Location, Location, Location”**

ROBERTO SCALESE: Good afternoon. The Association of Corporate Counsel and SmartPros Legal and Ethics welcomes you to today's webcast: Location, Location, Location, Arbitration vs Litigation and Global Litigation Concerns.

[The instructions provided here were intended for attendees of the live webcast when it was originally broadcast.]

Our presentation today will be moderated by Miriam Smolen. Miriam is associate general counsel for Fannie Mae, and at this point I am going to turn the program over to her. Take it away, Miriam.

MIRIAM SMOLEN: Thank you, Roberto. Welcome to the fourth presentation in the Litigation Masters Series. This presentation will focus on arbitration versus litigation, weighing the pros and cons of each form of dispute resolution, and the second half will focus on global litigation concerns. The presentation and the entire Litigation Masters Series have been sponsored by the ACC Litigation Committee and Lex Mundi.

I'm Miriam Smolen, past chair of the Litigation Committee for the Association of Corporate Counsel and I just wanted to tell you a little bit about the Litigation Masters Series. It's been a four-part series focusing on areas of importance to the in-house litigation community. Each presentation focused on two key litigation-related issues, and we hope that the in-depth knowledge that our presenters brought to their topic will make a difference in your day-to-day practice.

This is the final one of the presentations. I want to highlight the topics that we presented in the other three presentations, and you can find each of those webcasts on the ACC Web site. The prior presentations were Litigation Assessments and Maximizing Strategic Relationships With Outside Counsel, Establishing Procedures for Internal Investigations and Litigation Holds, and the third one was What In-House Litigators Need to Know About Indemnification, D&O and Disclosure Issues.

Before we proceed, I need to thank Lex Mundi and its Litigation, Arbitration and Dispute Resolution Practice Group for its generous sponsorship of this series. Lex Mundi has 160 law firms worldwide and they have a longstanding relationship with ACC, providing legal expertise for ACC's members over very many years, and they have really been a terrific support for our series.

With that said, we are going to go ahead and turn to our presentation. And let me introduce our first two speakers.

[The CLE code and instructions provided here were for use only by attendees of the live webcast.]

MIRIAM SMOLEN: Presenting in this first part is John DeGroot. John DeGroot serves as the president, chief legal officer and secretary to Bearing Point, Inc., a global management and consulting technology firm, and as the company's chief legal officer, John led all the legal aspects of the company's Chapter 11 filing in February of 2009 and the subsequent sale of

substantially all the businesses around the world. And, more dear to my heart, John was one of the prior chairs of the ACC Litigation Committee.

Joining John will be Terry Kasiborski. Terry is counsel to Butzel Long, based in the firm's Detroit office. Terry focuses his practice in the areas of labor and employment law, business litigation and alternative dispute resolution, and he can also bring us his view from the other side of the chair, because he also is an arbitrator serving on the American Arbitration Association Employment Panel and he conducts private arbitrations. So, let me go ahead and turn the panel over to the two of you.

JOHN DEGROOTE: Thanks, Miriam, very much for that kind introduction. It's very good to be back with the ACC's Litigation Committee and Lex Mundi with this series. Pretty excited about the series and some fantastic content that's up there.

Today we're going to talk a little bit about arbitration and litigation and help weigh the pros and cons of each form of dispute resolution. And before we move on, I guess I want to set expectations of where we're going to go here. And that's really: What are the fundamental differences between the two, and why might you prefer one over the other?

Miriam, if we could get the next slide? And then the next one? The prior slide was simply how to reach us, reach John or Terry, following the chat, but back to the content.

What do arbitration and litigation have in common? Frankly, together they are both binding and both distributive. What effectively that means for you, the practitioner or the client, is that somebody else makes the decision and one of the parties wins and one of the parties loses. Now, I have heard a lot about arbitrators splitting the baby, and we'll talk about that a little bit, but in effect you're asking somebody else to make a decision between a range of options. Did somebody breach the contract and what are the damages, for example? The difference here is that the question is not how is it that we can perform the contract so that everybody in the dispute can make more money. On to the next slide.

Does arbitration offer advantages regarding the selection of the decision-maker? And to me, this is one of the key advantages of arbitration for many of us that practice in this area. In litigation, you get a blind draw for decision-maker. Whether it's a jury or even a judge, there are very few places where there is only one choice of judge, and so you really don't know exactly who it is that's going to be driving your case, whereas in arbitration it's a bit different. You get input into the selection of the arbitrator, whether it's as to qualifications, including background. And one of the key attributes also is that you're not bound from a geographic perspective.

In Bearing Point's contracts—these are now public, so I have no problem revealing the fact that we had an arbitration clause in our contracts. And one of the key provisions we put in our IT contracts is that the arbitrators had to be qualified; had to have experience in information technology disputes. And from my perspective—from the practitioner's perspective—what that did was that ensured that I would get somebody who was able to work through the complex technology issues that were underneath a lot of—drove a lot of our disputes.

And on the next page: Is confidentiality of the procedure a consideration? And in many cases it is. Obviously, some of the smaller cases you may not particularly care about, but for many of us,

the matters that are going to be addressed in litigation, even if it's an employment matter, are going to go to the heart of what our companies do, whether it's the products we offer, our customer lists, our communications with our customers, our future strategies, or many other things that are confidential.

One way to address this is to just ensure that your arbitration—assuming you have an arbitration—is confidential. And you can put that in your underlying agreement with your clients, vendors, employees and others as you are drafting that contract.

On the flip side, if you are in litigation, or you anticipate you could be in litigation, just think about whether it's going to matter to you whether the public is able to see the information that underlies your case. With that, I'll turn it over to Terry to pick up from there.

TERRY KASIBORSKI: Thank you, John, and good afternoon, everyone. Thank you for listening in to us. As Miriam indicated, I do have experience as both a litigator and an arbitrator, so hopefully I can give you some perspectives from both sides of the table.

Now, let's talk about whether or not arbitration offers you some advantages regarding scheduling, and I would submit that it gives you a lot more flexibility. I think as litigators, many of you have walked into court for a pretrial or scheduling conference and you've perhaps agreed with opposing counsel that you need nine months for discovery, and the court will say, "Nope, you get six months." In an arbitration setting, I think you'll find most arbitrators will work with you, and particularly if the claimant or the petitioner is comfortable with nine months for discovery, that's what you'll get.

Another thing that you can consider in weighing the advantages or disadvantages of arbitration are a date certain from the arbitrator. Now, when I have my arbitrator hat on and I am scheduling a hearing and blocking off dates, I tell the parties that I am going to give them a lot of flexibility in terms of extending dates or changing dates, except for once we get to the hearing. And I commit to them: I will make myself available for the hearing on those dates and at those times so that the parties can have their witnesses lined up and they can do their preparation once. As a practitioner, it's very frustrating to prepare for a trial, to make all the arrangements, to walk into the court on the morning of trial to find out there are two other matters also scheduled to start trial, and you, as the user of legal services, then have to pay your legal team to prepare a second time or perhaps a third time. So, date certain, I think, is a wonderful feature of arbitration.

And last, I believe that—it's my experience that when you are in the arbitration setting you are much more likely to get the full day's attention of the arbitrator. The arbitrator is not going to be taking time off to do perhaps criminal sentencings or to deal with a motion or other matters. I think you may be able to obtain a fuller, longer hearing day, which hopefully can result in some cost savings for you.

Next thing we should consider is addressed in the next slide: Do you prefer more or less formality in the proceedings? It may depend on the type of case that you have. It might be a type of case where you think an informal approach would be more amenable—more useful to you—than having to stand up in front of the judge or a jury. In arbitration, consider that you are very likely to have more input into start times on a given day, recesses, [and] when you end at the end

of a day. You will not be subject to the edict of a judge who may say, “We start at 8:30 every morning; I don’t care what the two parties want to do.”

Also consider the availability to present testimony and evidence in alternative fashions. While some courts will permit you to present testimony of a witness through telephone, most arbitration procedures also let you present testimony via affidavit. Arbitrators will often say, “I am going to give less weight to evidence presented through the affidavit of a witness than I would a live witness, since I don’t have the opportunity to observe demeanor and the opposing party doesn’t have the opportunity to cross-examine,” but yet it is a feature of arbitration.

You should also consider the differences in the availability of discovery from the opposing party. And we are going to consider this in two ways. First, obtaining discovery from your opposing party, and in a moment we’ll discuss obtaining discovery from a third party. I am sure many of you are familiar with the Federal Rules of Civil Procedure, and it’s my experience most state rules have provisions comparable to the federal rules for discovery. However, the rules pertaining to discovery may be non-existent in an arbitration setting, or certainly very vague. Also, many times the parties are able to spell out in an arbitration agreement the type of discovery that will be engaged in. You might build in a limit on the number of depositions, the number of interrogatories, the length of depositions, and so forth.

Another thing for you to consider the pros and cons, and it may depend on the level of cooperation you might expect from the opposing party: Are you going to need sanctions in the event the opposing party drags its feet or simply refuses to make discovery? What do you do in the case of an arbitration if your rules or your agreement call for discovery but the opposing party is simply dragging its feet? I think it’s fair to say that you’ll generally obtain more liberal, more full discovery in a civil action than in an arbitration proceeding.

A very important difference that may not have occurred to you when considering differences between litigation and arbitration are your need for, and the availability of, discovery from nonparties—a third party—who may have relevant information, but is not subject to the arbitration agreement. I think all of you have probably been in the situation where you or your outside lawyers have used subpoenas to nonparties to obtain documents, perhaps depositions in the context of civil litigation. However, there are a number of decisions from various courts that have concluded that nonparties do not have to comply with an arbitrator’s subpoena for discovery. These cases have been decided under the Federal Arbitration Act.

Now, in some cases, the courts will try to distinguish a subpoena for a hearing as opposed to a pure discovery subpoena, and they will say if the documents or the testimony is being sought for a hearing—even an evidentiary hearing short of the full final actual hearing—they’ll enforce it, but if it’s a pure discovery subpoena in an arbitration setting, you’re going to have a very hard time getting that enforced. So, consider your need to obtain documents from a third party when weighing the pros and cons.

Another thing to consider in weighing the benefits and pitfalls of the two different procedures: Is it a case that is going to be perhaps ripe for a dispositive motion? Is the dispositive motion something that you believe would be necessary or useful in your case or not? Some arbitration rules do not expressly provide for the concept of dispositive motions. And some parties will try

to persuade the arbitrator, “Well, the arbitration rules say that you’re able to afford any relief or remedy that’s available to us in court, and therefore you ought to read into that your ability to grant a dispositive motion.” Even if the arbitration rules or your arbitration agreement provide for a dispositive motion, I think you’ll find there is a reluctance among arbitrators to grant a motion that would be akin to a motion for summary judgment, and part of that is driven by the fact that in an arbitration setting, you have a very limited right to appeal. So, when I sit as an arbitrator, I rarely grant a dispositive motion which would dismiss a claim in total unless it is absolutely crystal clear to me. I am very reluctant to do it, and I tell the parties up front: “You can go ahead and file them, but it’s going to have to be a very special case for me to grant it.”

Let’s go to the next slide and look at some of the differences in the enforceability of subpoenas regarding the attendance of witnesses and/or the production of documents at trial. Is the availability of a subpoena and the enforceability of a subpoena going to be a factor that you should consider? I think the rules and procedures for attempting to enforce a court-issued subpoena are very well-established. But what do you do if you’re in the situation where you are in arbitration, the arbitrator has issued a subpoena to a witness—a nonparty—for the production of documents or testimony at hearing, and that party just simply says, “I’m not coming”? Well, it seems to me you would have to go to a court with jurisdiction over that person—perhaps out of state—start some type of miscellaneous civil proceeding, and ask the court in the locale of that witness or that person holding documents to enforce the arbitrator’s subpoena issued in an arbitration proceeding in some perhaps far-off place. So, if you’re dealing with a case in which you believe there are documents or witnesses that may have to be subpoenaed to hearing, you may decide, “I am better off in court than in an arbitration proceeding.”

Moving along, let’s consider some of the differences in the rules of evidence. I suspect that the rules of evidence in both federal and state court are more familiar to you. They are well-known to your lawyers or outside lawyers. And while we can argue about them and their interpretation, they’re comprehensive [and] cover a variety of subjects and situations.

By contrast, the rules of evidence in an arbitration proceeding are very, very generally stated and are much less comprehensive. For example, I am going to read you the rule of evidence as set forth in the commercial arbitration rules of the American Arbitration Association.

“The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to the legal rules of evidence shall not be necessary.”

That’s it. And there is some thought that arbitrators let everything in—let all the evidence in—to make the award appeal-proof. Consistent with the concept that the arbitrator is obligated to give the parties a full hearing, some arbitrators interpret that to mean, “Let’s let it all in. We’ll sort it out later.”

Another important difference in the two procedures for you to consider are your rights to appeal. Do the more expansive rights to appeal in the civil litigation context offer you an advantage or a disadvantage? Remember that in civil litigation, I am not aware of any situation where you are not permitted at least one appeal as a matter of right. However, there is no appeal as a right from a final and binding arbitration award. First of all, you have to commence a court action to appeal,

and second, the grounds for appeal from an arbitration award are very, very limited. For example, under the Federal Arbitration Act, the grounds for appeal are limited to examination of whether or not the arbitrator exceeded his or her authority or power; whether the arbitrator was prejudiced, biased, not impartial; whether or not the award was procured by fraud or corruption, either due to the arbitrator or the opposing party; or last, other misconduct of the arbitrator. And I think you'll find that from reading reported decisions, courts tend to be quite deferential toward upholding an arbitration award.

I am getting close to running out of time. Let's just look very quickly at the difference between arbitrations administered by a third-party agency and private arbitrations. Third-party administrators will provide you with a panel of arbitrators, rules, and perhaps a place to conduct a hearing. However, if you engage a private arbitration, you have total control over the process, the applicable rules, how an arbitrator is picked and so forth. And a third-party administration by one of the well-established agencies involves perhaps some additional costs: filing fees, administrative fees and so forth.

Last—or I guess we're getting near the end; we're not quite last—give some thought to whether or not you're better served with one arbitrator or three arbitrators. Some agreements provide for a single arbitrator; some provide for a panel of three arbitrators. And if you're in the situation of three arbitrators, consider whether you're best served with three neutrals, or there is another concept—the so-called interest arbitration—in which each opposing party nominates or selects one arbitrator, [and] the two arbitrators nominated by the opposing parties get together and they appoint the third, who is the only true neutral. And the arbitrators appointed by a party are expected to, in effect, advocate the position of the party that appointed them.

Last, try to consider whether or not ultimately arbitration is less expensive and gets you to a final decision sooner than litigation. You're going to perhaps obtain some savings from obtaining a date certain, some of the informality of the procedure in arbitration, the undivided attention of the arbitrator. On the other hand, you're going to have to pay the arbitrator and perhaps a third-party administrator. And since you don't have much right of an appeal, are you going to get to a final decision sooner and is that one of your goals? So, hopefully John and I have given you some things to consider when you are weighing the advantages and disadvantages of arbitration versus litigation. I am going to pass it back to John to discuss mediation and facilitation with you.

JOHN DEGROOTE: Thanks, Terry, very much, and we'll spend just the next three or four minutes to hit on mediation versus arbitration. As we noted at the top of the hour, they are two fundamentally different things. In arbitration, somebody else decides, and in mediation, in effect, you decide. And as it says on the slide, mediation/facilitation is voluntary, whereas arbitration is not. And one of the ways that I often describe to my clients is mediation really is a lot more akin to shuttle diplomacy, whereas arbitration really is a lot closer to a traditional courtroom setting, although it may be done in a conference room.

So, flipping on to the next page, mediation/facilitation is integrative as opposed to distributive, and the important distinction there is the possibility of a win-win outcome is there. I mean, I think most people know about *Getting to Yes*, the famous book written by Fisher and Ury, I guess about 30 years ago now, and it is truly the reason I think that mediation has been so

popular is because of the potential for win-win negotiations. Rather than fighting over who breached the contract, instead, I think parties can do a lot more like my wife and I, or like I say when I come home sometimes: “Honey, let’s not focus on how we got here, let’s focus on where we’re going.” And I think that’s what mediation can be about.

Let’s look to the next page, Miriam, and that’s that mediation/facilitation is possible at all stages. But the issue there is that mediation can take place before a lawsuit is filed. Frankly, it can take place before a dispute really arises, and you can have a facilitated discussion to get through a problem, particularly in the context of major clients of major companies as disputes occur, because nobody wants the important relationship to be permanently broken, although the problem does have to be solved. And I do put one thing to you there, and that is: Think about the possibility of resolving your dispute before you even have to go through the entire document lockdown/e-discovery effort. Obviously you need to retain your core documents if there is any dispute at all, but before you go through all that effort, if you can resolve it at an early mediation, all the better.

On the next page, which is 23, mediation is completely confidential, and there are a lot of decisions now coming out of California and some other places about the contours of that. But the good news is that your settlement discussions can be maintained as confidential.

On the next page, one of the key drivers of mediation is that it is an experienced third party who is facilitating the discussions. You have someone who, quite frankly, is paid to help get your case settled, and obviously you need to be there and be ready to get your business done, but you have somebody there who is trained in negotiation tactics and has the experience of reading people to help know when to push and when not to push in the negotiations.

On the next page, the parties can control the mediation. Clearly, this is a benefit. The date, the place, the time, things like that. You control the process. And on page 26, mediation can allow for creative solutions. I know I have less than a minute left, so what I will say here is that you can settle part of your case, rather than the entire case and save a lot in terms of costs there, without going into great detail. If you Google the term “settle halfway,” I think you may get the point. There’s an article that I wrote that comes up with that search, and it’ll help you to see how to resolve part of your case to save a ton of litigation costs, even if you can’t settle it all.

And then, lastly, there are hybrid procedures that mediators can go through in order to get your case settled. So with that, I’ll take a breath.

MIRIAM SMOLEN: There are a couple questions from our audience that I wanted to pose to both of you. Here’s one: What about enforceability of an arbitrator’s award for relief, primarily equitable on third parties? Does a third party have to obey an arbitrator’s injunction?

TERRY KASIBORSKI: This is Terry Kasiborski. I would say not. Arbitration is essentially a creature of contract, and an entity that is not a party to an arbitration agreement cannot be bound by the arbitrator’s award. One of the things I try to do as an arbitrator is make sure that before I start the case, all of the named parties are subject to the arbitration agreement, or I get their agreement at the time we start the proceeding. I don’t want to spend all that time and effort only to have somebody say, “I am not a party to the agreement; I am not bound. Thanks. See you.”

MIRIAM SMOLEN: Let me just add one question, a related question that came in: Does that mean, then, for the parties, that they can agree that the arbitrator will have the power to issue an injunction, either temporary or permanent, if that is the relief being sought?

TERRY KASIBORSKI: Yes, that's the short answer. Yes. But it can't bind a third party. They can agree that they themselves, the parties to the arbitration agreement, will be bound by an equitable or injunctive order. They can't say that C, a third party, will be bound unless C agrees.

MIRIAM SMOLEN: There's another question here, which is that this person has spent quite a bit of time researching arbitrators, researching—especially when they were prior judges—their former opinions that have been published, and where they haven't been judges, trying to talk to other parties who have used those arbitrators, but has not really found that that research has paid off in being able to predict how the arbitrator might rule or what their preferences would be. Do you, Terry, have any advice, as an arbitrator, in terms of how much it is worthwhile doing all of this intensive research?

TERRY KASIBORSKI: I think we all do it, and I guess if you can't predict how the arbitrator is going to rule that hopefully shows that the arbitrator is impartial and decides based on the facts of a particular case. I would not tell anyone not to do it. I think it's important to try to do it. I'm constantly sending e-mails to colleagues and around my office asking for feedback on potential arbitrators. John, what's your thought? I am sure you've tried to research arbitrators.

JOHN DEGROOTE: My experience is that it's very important to do it and it's not particularly helpful. I think you need to do it, and I think it gives you some insight, but at the same time, the circumstances are never close enough that they're actually really predictive. But I think they give you some insights that can be helpful as you make your presentations.

MIRIAM SMOLEN: Great. Well, on that note, let us turn to the next part of our presentation, on dealing with global issues: factors in determining where to sue or coping with a foreign world. Let me introduce our two speakers. We have Carla Swansburg. Carla is senior counsel with RBC law group. She manages complex litigation involving the Royal Bank Financial Group and many of its subsidiaries throughout the world. Carla handles commercial claims and class actions relating to fraud, banking, securities, breach of contract and trust, among other matters, and she frequently leads investigations and deals with cases involving multijurisdictional matters.

She is joined by Joe Sepulchre, who specializes in international contract law as well as international litigation and arbitration. Joe is located in Belgium with his firm, Liedekerke, and we're very fortunate that he is calling us from—I am not sure how much later it is there, but it's certainly not in the middle of the afternoon. His firm is a member of Lex Mundi and Joe serves as the current chair of the Lex Mundi Litigation, Arbitration and Dispute Resolution Committee. And let me go ahead and turn this over to the two of you.

CARLA SWANSBURG: Thank you, Miriam, and thank you, everyone who is tuned in today. Joe and I are going to take a slightly different approach, and you'll find this unfold more like a conversation with questions that we have for each other.

One of the original points I wanted to make was that although we, at the outset, we say choosing where to sue, but I wanted to raise the point that in fact there is also often the opportunity to

choose where you are sued. For example, when you are drafting contracts, including some significant contracts for your organization, you might want to think about not just choice of law, but choice of forum and jurisdiction. Joe will also talk a little bit later about opportunities for pre-emptive actions that help you to choose the forum. And another situation where it might occur is occasionally we see litigants who commence litigation in several jurisdictions to preserve limitation periods or for other reasons, and in some jurisdictions you can voluntarily choose to respond and evoke the process of one of those jurisdictions and thereby choose the forum.

So, let me get started. Joe, I wanted to ask you a little bit about what kinds of cultural or factors relating to local customs and procedures might affect your decisions?

JOE SEPULCHRE: Hello, Carla. Hello everybody. Cultural factors are something that will certainly affect litigation and a choice of courts by any party. Now, let me get back to you immediately, Carla, with one question. One of the crucial differences between the European legal system—at least continental Europe—and the U.S. legal system is the availability of discovery. Now, Carla, for you as an in house counsel, is discovery a tool that you wish to be available? Is that something you would want to use, or is it something you would want to avoid?

CARLA SWANBURG: Discovery is a very important factor here in choosing whether or not to invoke a particular court or custom. In North America, of course, discoveries are a significant factor. Often, there is a downside when you are suing or being sued because of significant cost. There is a very thorough revelation of all possible facts in the background of the case, and to the extent that you have an opportunity to assess a live witness, that's another factor.

For us, it would very much depend on the type of case. We are used to our system where, in fact, by the time you go to court you have a lot of information, you understand how a witness will be in terms of credibility on the stand, if you have examined them, and you will know essentially all of the evidence that the other party will have to put before the court. In many cases, that's preferable if you feel confident about your case than simply filing materials and written affidavits and so forth before the court.

One of the issues that comes up in discovery, Joe, is obtaining foreign evidence and letters rogatory. Perhaps you can talk about whether or not that's a procedure that's available in Europe as it is in North America.

JOE SEPULCHRE: I will. Before that I'll make one point. When talking about discovery there's two things you want to be aware of, or two questions you want to ask. One, is it available in the jurisdiction whose courts will hear the dispute when you agree on a choice of court agreement? When you designate a court, you want to look for that. But also, will the parties be at level playing field? I have seen cases—a dispute, for example, between a French party and a U.S. party—going to U.S. courts, there is full discovery of U.S. party, of course. They are on the U.S. territory. And then the U.S. party turns to the French party and says, “Now, look, let's look into your drawers; let's open your computers.” And the French party puts one hand on its heart, the other hand on its forehead, and says, “We are very sorry. It is not possible because of privacy laws. We cannot disclose that. It is public policy.” And that is something that you want to be aware of—that you might be at a disadvantage if you are in a legal system before a court that has

discovery, that you might have to show everything, submit everything you have, [and] open all your computers, without being certain that the other side will have to do the same thing.

Now, coming to witness depositions and testimonies, you'll find a huge gap in the attitude between the U.S. legal system on one side of the Atlantic and the European legal system—at least, I am talking here about continental Europe—that the weights of witness depositions (evidence given by witnesses) is very light in Europe, where most jurisdictions, most courts, will rely on documents, on written evidence, and even affidavits. They are available, it happens, but courts won't give that much credit to affidavits. Courts will really want to see documents; written evidence.

Now, you are seeing little by little, slowly, the gap between the two continents closing, and the Atlantic Ocean is becoming slightly shallower, and a number of European courts and jurisdictions are becoming increasingly open—flexible—towards discovery, at least when it comes to cooperation and helping out a dispute that is being carried out and fought before U.S. courts.

The French Embassy in Washington, I understand, has a few—or at least one—resident judge who is there just to help with judicial cooperation, obtaining evidence, and courts that 10–15 years ago would have kicked out any request for discovery coming from the U.S., now, because of the Hague Convention, because of just minds being broader, more open-minded, will very often go [to] great lengths to accommodate orders or requests coming from the U.S. And I have seen a few cases here in Belgium with judges taking a whole list of 650 questions coming from the U.S. court asked to a witness resident in Belgium, and insisting that the witness answer the 650 questions and come up with documents. So, little by little, maybe the two systems are trying to cooperate [and] are getting closer to each other.

CARLA SWANBURG: And let me just add a couple of quick points there. You referred to those, Joe, and one is blocking statutes. And the French blocking statute is one that in fact we're familiar with in Canada, which any of you on the call may want to consider if you're dealing with a jurisdiction, in particular the civil system in Europe, where, if the country has a blocking statute that is active and, in fact, enforced, those statutes can actually make it illegal for anyone in that particular country, such as France, to provide documents to another country, such as Canada or the U.S., for the purposes of civil proceedings. And related to that is the issue of secrecy jurisdictions or well-known banking jurisdictions. If in fact you anticipate engaging in litigation with a party that is resident in a jurisdiction like Switzerland or others that are known for not being as free with sharing information, you may want to consider that as a factor for having any litigation within that domestic jurisdiction.

One final point before I hand it back to Joe is jury awards. And, of course, even between Canada and the US that's a huge factor. In Canada, we rarely have civil jury cases. In the U.S., of course, in a matter such as product liability, jury cases are much feared by defendants, and that is certainly, for a lot of corporate citizens, an issue in terms of choosing where or where not to litigate. If we can move on to the next slide.

JOE SEPULCHRE: Oh, wait, before that one last point that we should have added to the previous slide is the availability of full-fledged appeals. In most European continental

jurisdictions, if you take a case to the appeals court, it's going to be a full appeal, including on the merits, on the facts, on everything, as if the first proceedings had never taken place, as if the first case, the lower court's judgments were only a trial, your clients were just exercising before going to the appeals court. And that is something that you may want to consider when you choose a jurisdiction, whether you get one chance or two chances.

Now, next slide. This is really a number of questions for you, Carla. As an in-house counsel, would you be afraid of foreign courts? Do you feel that your company would have a home-field advantage, that you would feel more comfortable at home? And what is your perception and experience with foreign courts? Corruption, but whether or not your actions are biased, whether they are flexible enough to the way you operate, whether they can understand the way you operate, whether they're open-minded and flexible? What is your experience?

CARLA SWANBURG: This is indeed an important point and the reliability of the chosen court. There's a little bit of what I call "the devil you know." Home-field advantage, even to the extent it may not entirely exist, is a perception that it's often hard to shake, and I'll give you a couple of examples where that may come up.

First of all, to the extent that you are operating within a legal framework that is familiar to you as a North American, your peak commercial contracts, agreements, employee relations, everything is really established according to what you consider to be your domestic law. If you have to litigate as a corporation in another jurisdiction where the entire framework and policy background is different, it may well be the case, in fact, that the way that you had expected and anticipated that all of these legal issues would be received might, in fact, be quite different, and that is something to always consider.

There is also the sense in some jurisdictions, decreasingly, I would say, that to the extent, for example, that there is some bet-the-farm litigation in a smaller jurisdiction where, for example, the person you're suing is the largest employer in that jurisdiction, and granting a judgment in your favor may in fact, close down that large, key employer. There could be overriding policy concerns that would be hard to believe would not in any way affect the judiciary. Joe referred to corruption. Again, not really an issue for us most of the time, but think about the jurisdictions where you may have litigation, and do a little bit of research or retain someone to do a little bit of research around whether, for example, there is a judiciary that is known to engage in corruption, because it does happen. And similarly, neutrality is something that with local counsel in most jurisdictions you can try and determine.

Speed of process is another important one for us. We sometimes, for example, have judgments against people in places where we learned that it would be two years to even start getting anywhere in terms of traction for enforcing judgment. There are some jurisdictions in the U.S., for example, where we have all heard of the "rocket docket." Very much dependent on whether it is in your interests to pursue the litigation speedily or to delay the litigation. And I think, Joe, you had a comment on that point.

JOE SEPULCHRE: Yeah, you were talking about a rocket. I'll tell you about a torpedo. There is an expression in Europe—I think it's also a worldwide expression—the Belgian Torpedo. We're very proud of it. The Italians have the same trick, and they call it the Italian Torpedo. It's a sort

of pre-emptive strike, when you want to kill a claim that's coming to you, and you want to put it somewhere on a long track, where it's going to rot and it will never move. We're in a system here where we don't have *forum non conveniens*, so, when a court, under its rules, has jurisdiction by statute, there is no way that the judge can say, "No, in this case, because of circumstances, I won't take the case. I think the case should be taken by a court in another country."

In addition, whatever court is seized first by a claim has priority in deciding whether it has jurisdiction in the claim or not. So, what you can do sometimes in several different countries, if you know a claim is coming to you before another court that you don't like that might move too quickly and order you to pay after a year or two, what you do is: You take a pre-emptive strike and you apply for a declarative order from a court that you know is very slow, very slow, and an order that you don't owe anything to the other party, that the claim that you feel is coming to you has no merits at all. And the other party is then blocked by your pre-emptive strike, has to come to the territory that you've selected that is extremely slow and that will take five, six or seven years in finding that it has no jurisdiction on the claim. Next slide, please.

CARLA SWANSBURG: So, moving on, then, to other factors. We heard a fair bit in the previous half of the presentation on the necessary parties and compellability and engaging third parties. Joe, could you comment on how that same kind of issue might relate to the court process?

JOE SEPULCHRE: We're before courts here—at least in Europe, the system that I know here, these courts are very restrictive, and will not easily allow third parties to be joined to disputes, certainly not if there is a jurisdiction clause. Remember, we're in a system where we have no *forum non conveniens* doctrine, so everything is set by statute. And in order to bring a third party to your dispute, either you need to be in a legal system allows third parties to be joined by their own rules, or you need to have been very careful when you drafted your contract in your jurisdiction clause to make sure that that jurisdiction clause is reflected in all other related contracts you may have with subcontractors, third parties that have an interest in the performance of the contract, etc. Otherwise, you may well be stuck with having to defend against, for example, an employer before one court, if you're the contractor, and attack the subcontractor before another court or arbitration, and that is really something you need to look at in great detail, with great attention, when you draft your contract and all other related contracts.

Another comment I'd make is that before arbitrators, it is sometimes not too difficult to get flexibility and to convince arbitrators that a parent company, a related company, should be joined to the dispute because of the group theory. In an arbitration, it is not that easy, but before state courts in Europe? Forget it. That doctrine doesn't work. It's not easy to lift the corporate veil.

CARLA SWANSBURG: So, what I would add to that, then, is for example, if you find yourself likely to or compelled to litigate in a particular jurisdiction, and that jurisdiction has a subsidiary, for example, with no assets, or there are other concerns about that particular subsidiary, whether it would be around for long, whether it's potentially insolvent, you might look for ways to engage the parent or another relevant third-party entities through indemnities that might be relevant to you; any kind of agency agreement that might allow you to pierce that corporate veil; determine, for example, whether that parent company has any other business or has engaged in

any business conduct in the jurisdiction; anything that you may be able to find in terms of grounding jurisdiction against other parties that you'd like to have before that court.

And one of the main reasons you might do that is the next point on the same slide, which is: Where are the assets? Obviously, an overriding factor at least for us, in a lot of these situations, in terms of where we engage in litigation is: Where are we going to be able to enforce any judgment? Where are their assets? What jurisdictions allow you to enforce against assets outside of the jurisdiction? And Joe, I don't know if you want to comment on that fact?

JOE SEPULCHRE: Yes, I would, because indeed it is a very, very important factor in deciding where to sue. In certain jurisdictions, it is at least as hard, takes as much time, is as expensive, to enforce a foreign judgment as it would be to obtain the judgment before the courts in that jurisdiction. And if you know that the party you are going to sue in the dispute is located in that sort of jurisdiction, you may want to sue directly before the courts in that jurisdiction rather than before your own courts or other courts you prefer, because you're just adding three, four, five years of time before you can collect.

In the same context, there are a few jurisdictions—Spain is an example—that are atrociously slow in dealing with claims and in giving you a judgment, [and] sometimes very slow in giving you an enforcement order of a foreign judgment, but once you have it—once you have your judgment, once you have your enforcement order—then it all goes very fast. And the court itself will take care of the enforcement for you: will seek the assets, will issue the attachment orders, etc. So, those are factors you would want to consider. Next slide, please.

Carla, that is again a question again to the senior counsel. Cost and fee-shifting: The fact that certain courts in Europe—England is a perfect example—have the “loser pays” principle, where the party losing litigation will pay the legal fees and costs of the winning parties. Is that something you will consider when you select a court?

CARLA SWANBURG: That is, indeed, another important factor, and I can again refer to the North American microcosm of Canada versus U.S. As Joe referred to, we have a rule in Canada that generally we call “cost following the cause,” or the “loser pays rule,” where even on a procedural motion or, certainly, on a trial, the losing party by and large is going to be ordered by the court to pay as a part of the judgment amount costs of the successful party. There are some variations of that, and of course it's never a full indemnity, but there are, for example, situations where a higher level of indemnity is ordered because of conduct in the case.

Of course, in the U.S., that's much more rare. If you have cost concerns, it really does add to the potential downside risks of litigating, so where, for example, your litigation is strategic—you may not feel as strong about your case—you may want to consider the fact that in certain jurisdictions, like in Canada, you will likely be ordered to pay not only the judgment amount but also the costs of the other side, and that may, in fact, have a chilling effect in other jurisdictions where you can't recover those costs as part of the calculation. Joe, you mentioned the U.K. Are there other jurisdictions in Europe where costs do follow the cause, or is it less common?

JOE SEPULCHRE: No, there are several. I think Germany has the same system too, but the cost is then set by statute, and it's in very difficult, intricate litigation. You don't really get full

recovery of your costs. The U.K. is the typical example, also the worst example, because it's outrageously expensive. And some of my clients tell me that they find out that even though they may be reimbursed of all or part of their costs, they would not want to go to U.K., even on a case that is clearly a winner, because they have the impression that the fee-shifting principle is the main cause behind the very substantial fees that London solicitors—I hope nobody is listening from London—that London solicitors charge.

We did have one question for the attendees—a show of hands we'd like to have here: Is the fee-shifting principle, the availability of reimbursement of costs, something that you consider important and that would be decisive in your choice of a specific jurisdiction? We'd like to have a show of hands on that. We'd like to know how many of you do think it's an important factor. Next slide, please, 35.

CARLA SWANBURG: We'll move on to the next topic as we are very close to the end of our time, and we just want to talk a little bit about some of the other practical considerations, and I'm going to ask Joe to address some of those, but before I do, one that is not on the slide, but that occurred to me recently, is media. You know, we're a large bank; reputation is important. There are some jurisdictions, and even the U.S. and Canada are different here, where a lot of the case is fought in the media. It might be relevant to consider what restrictions are or aren't on both the bar, the judiciary, and the media, in terms of where you choose to have your litigation, if, in fact it is important to you one way or the other. And Joe, what are some of the other considerations that you would put on the table?

JOE SEPULCHRE: Considerations: public policy and how the court is going to look at your contracts. Whether the country—the court you have chosen or where you bring the case—has these crazy laws like we have here in Belgium, that they have in France and Spain and other countries, that basically, in certain types of contracts, allow the court to set aside the contract and decide as per local law. Distribution agreements, commercial agency agreements, or sales representative agreements, as you call them in the U.S.: All those are governed by statutes that are mandatory. The courts will set them aside. And that has caused nasty surprises to many U.S., Canadian, or non-European clients I have.

And then you have enforcement of the contracts. How much will the local court—the court you selected or brought the case to—will it respect the principle of autonomy, or will it look at the contracts from its own perspective?

CARLA SWANBURG: And while governing law is a factor, I would add that it isn't necessarily determinative. Where, for example, the jurisdiction or the forum for the litigation is different than the governing law, we would also consider how likely and easily the foreign court is to consider foreign law. So, for example, we do this, again, even in Canada, where we are applying the law of the U.K., or of a civil law jurisdiction in Europe, or the law of the U.S. or a U.S. state, we have to prove that that foreign law by way of experts almost as a factual matter, so it's not that difficult to do, but you have to very much consider whether or not the foreign court is likely or able to apply the law of another jurisdiction and how that might work. And I'd only add as well some typical issues around language, for example. And that may well be an important factor if you feel you may be disadvantaged, for example, by having to translate for all of your witnesses when your opponents are able to seamlessly put their case to the court in the

local language, which could be another factor.

Now, I see we are nearly out of time, so I'd like to ask Joe to talk a little bit in terms of enforceability and our final point, which is the development of the Hague Convention on choice of courts agreement. So maybe, Joe, you could just conclude with a few words about the Hague Convention.

JOE SEPULCHRE: OK, this is a very, very major development, at least in my opinion. It's a convention that was adopted on June 30, 2005 after a long, long round of negotiations and discussions between the U.S. on the one side and Europe, represented by the European Commission, on the other side. And it's a convention on choice of court agreements that has two purposes: one, to affirm or enforce jurisdiction clauses and make sure that U.S. courts will deny jurisdiction as regards contracts—and only B-to-B contracts—in which there is a jurisdiction clause in favor of a court in another country—Europe, Asia, whatever. And then, also, the second part of that convention is enforcing the judgments that are handed down by the foreign courts.

And the objective of the convention was to mirror the New York Arbitration Convention and to do for litigation what the New York Convention did for arbitration, i.e., to ensure that jurisdiction clauses are considered as valid, enforceable, are given full effect, and that the judgments that are then issued are also given full effect. And the means to resist or challenge a jurisdiction clause, or to challenge a judgment, are very limited. It boils down to public policy, really.

And the convention has been adopted in 2005, has been signed this year—well, two years ago, by Mexico first, and then this year by President Obama and by the president of the European Commission. And it's now in the process of ratification, and once it has been ratified, it will enter into force. And that could be in eight months or 12 months, not sure, but it's coming to us and it's going to radically change, I think, worldwide litigation.

We also have a question on that one for the attendees. In your opinion, would the ratification and coming into force of the Hague Convention that does to jurisdiction clauses—choice of court agreements—what the New York Convention has done to arbitration clauses, will that change your attitude, will it change your perception of litigation in foreign countries, your perception of the effectiveness of choice of court agreements? And will you be more open to discussing choice of court agreements in the future?

CARLA SWANBURG: And with that, I believe that concludes our portion of the presentation.

MIRIAM SMOLEN: Thank you both. You know, there is one question that came through, and that is with all of these changes in the choice of courts, where do American courts lie in this? We hear a lot about when we are litigating abroad in the different circumstances surrounding use of foreign courts. From an American perspective, we tend to feel that our system is certainly far from the best, and therefore would be far down the scale in terms of a choice, but I am wondering, Joe, if you have an opinion about that, or can give us the European perspective on that?

I was just wondering, Joe, if you can hear me, where American courts fall in terms of the desirability of that forum where there are international disputes that have some type of choice, of

which American courts could be one of them?

CARLA SWANBURG: So you're asking how U.S. courts are perceived by foreigners?

JOE SEPULCHRE: How are they perceived here? U.S. courts are generally perceived as reliable, good, with good and competent judges. However, the prejudice that most Europeans have as regards U.S. courts is not about the judges themselves. It is about the punitive damages, about the cost of litigation and particularly discovery. Otherwise, I think most European litigators and lawyers who have experience and who have assisted clients in finding lawyers in the U.S., followed litigation in the U.S., will agree, I think, that U.S. courts are very competent, very intelligent judges, often, [and] that even jury trials are not that terrible. The main concern is cost, because of discovery and punitive damages.

MIRIAM SMOLEN: All right, well, I think we have run out of time. So before we sign off, I want to go ahead and thank John, Terry, Carla and Joe for sharing their expertise with us. I want to also thank again our sponsor, Lex Mundi. And again, remind all the participants and encourage you to check out the earlier presentations on the ACC Web site and to thank you for joining us today.

[The CLE code and instructions provided here were for use only by attendees of the live webcast.]

On behalf of the Association of Corporate Counsel and SmartPros Legal and Ethics, thank you again for listening to today's program. This program is now concluded. Thank you again. Have a great day.