JAMS Dispute Resolution Alert

ADR News & Case Updates *page 3*

In Depth *page 10*

ADR Conversations *page 15*

International Focus *page 18*

Good Works *page 20*

Worth Reading *page 22*

The Latest Developments in Mediation & Arbitration

Vol. 10, No. 1 • Summer/Fall 2010

Editorial Note

With a new decade well underway, it is the perfect time to update the *Dispute Resolution Alert*, designed for those interested in the latest developments in mediation, arbitration and other areas of ADR. The most obvious change to the *Alert* is the "greener" format. While we will still print a quarterly publication, it will be more compact and printed on recycled paper. We hope this will make it easy for everyone on the go to take it with them. We are expanding our case update section, which will keep you informed of major ADR case law and other developments. We will also offer **JAMS ADR News and Case Updates** electronically on a monthly basis and encourage readers to sign up to receive the *Alert* electronically.

In addition, there are many hot ADR topics of interest to attorneys and we are launching our first **ADR Conversations** feature to spotlight some of these issues. For those advocates involved in international arbitration and mediation, we have included an **International Focus** section. We are also very pleased to welcome Justin Kelly as a contributing editor. Many of you will remember Justin as the co-founder of ADRWorld.com and someone who has closely followed developments in ADR for years. We will feature an occasional **In Depth** column, which will be a deeper exploration of what is new in ADR.

Our **Good Works** section highlights community organizations, non-profits, educational institutions and individuals making a difference through creative conflict prevention and dispute resolution programs. From time to time, we will also include reviews of books that we think are **Worth Reading**. As always, we enjoy your feedback, so please send comments to alert@jamsadr.com.

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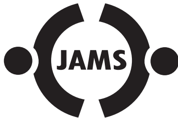

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ADR News & Case Updates

ADR NEWS

Supreme Court Agrees to Review FAA Preemption of State Arbitration Laws

Under the law of some states, including California, arbitration agreements that require arbitration on an individual basis (and bar class actions) are unenforceable in consumer contracts. In those states, the arbitration agreement cannot be enforced even when an individual claimant brings the arbitration and may vindicate rights on an individual basis. The U.S. Supreme Court has agreed to decide whether the Federal Arbitration Act preempts state laws that condition enforcement of arbitration agreements on the availability of procedures when the procedure is not necessary for the parties to pursue their claims.

In February 2002, Vincent and Lisa Concepcion contracted with AT&T for wireless service that provided them with free phones based on their two-year commitment to the use of the service. However, AT&T charged the Concepcions $31 in sales tax based on the sales value of the phones. Included in the cell phone agreement was a mandatory arbitration clause that contained a class action waiver.

AT&T modified the contract in 2006 to include a premium payment clause of $7,500 to be paid if an arbitrator awarded a claimant more than AT&T's final settlement offer. Just prior to the addition of the clause, the Concepcions filed suit in district court, which was later consolidated into a putative class action suit. AT&T responded by filing a motion to compel arbitration under the revised agreement that included the premium payment clause.

The district court rejected the motion and ruled that the arbitration agreement's class action waiver was unconscionable and unenforceable under California law and the state law was not preempted by the FAA. AT&T appealed but the U.S. Court of Appeals for the Ninth Circuit affirmed the district court in an October 27, 2009 ruling in *AT&T Mobility LLC v. Concepcion* (08-56394) after concluding that the arbitration clauses satisfied the three-part test for unconscionability for class action waivers in consumer contracts set out by the California Supreme Court in *Discover Bank v. Sup. Ct.*, (113 P.3d 1100, 2005).

Under *Discover Bank*, a class action waiver in an arbitration clause will be found unconscionable if the disputes likely involve small dollar claims and the party with superior bargaining power has set out to deliberately cheat a large number of consumers.

AT&T opened its petition for a writ of certiorari by suggesting that the case "presents a recurring issue of extraordinary importance to the continued viability of tens of millions of arbitration agreements in the State of California (and elsewhere in the country)."

AT&T argued that since the high court passed on deciding the issue in *Southland Corp. v. Keating* (465 U.S. 1, 1984), the need to resolve whether a state may condition the enforceability of arbitration agreements on the availability of class actions, even when the availability of the class-wide procedure is not necessary for the vindication of a claim, "has increased significantly."

According to AT&T, most states that have addressed the issue have enforced

such agreements so long as substantial costs would not be borne by the non-drafting party nor limits set on available remedies. However, under California law, arbitration agreements that require arbitration on an individual basis are unenforceable in consumer contracts, even when the claimant may vindicate rights on an individual basis, it added.

The Ninth Circuit's ruling effectively invalidates millions of contracts in California and since it has been extended to citizens of other states, invalidates millions more, AT&T argued, and "the question whether the FAA preempts state-law rules barring agreements to arbitrate on an individual basis is thus of exceptional importance."

In *AT&T Mobility LLC v. Concepcion* (09-893, cert. granted May 24, 2010) the high court will answer the question presented: "Whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures – here, class-wide arbitration – when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims."

FINRA Proposes Rule to Increase Arbitrators Available for Selection on Panels

The Financial Industry Regulatory Authority (FINRA) recently proposed a change to its arbitration rules that would increase the number of arbitrators on selection lists from eight to 10 for each member of an arbitration panel.

The proposed rule change, SR-2010-022, would increase the number of arbitrators generated by the Neutral List Selection System (NLSS) for single arbitrator cases from eight to 10 and from eight to 10 for the public chair-qualified, public and non-public arbitrators on a three-member panel. If a panel consists of three non-public arbitrators, the NLSS would generate 20 rather than 16 arbitrators on the non-public arbitrator roster and 10 rather than eight non-public arbitrators from FINRA's non-public chairperson roster.

The proposed rule also would change the number of arbitrators that must remain on the list after parties exercise their strikes from four to six.

Linda Fienberg, president of FINRA Dispute Resolution, said in a statement, "With a larger pool of arbitrators to select from, parties will be able to present cases before arbitrators they helped choose. Adding two names to each list will give parties in most cases the panelists they have selected rather than an arbitrator randomly selected by a computer."

FINRA noted in its rule proposal that prior to 2007, parties were free to strike all arbitrators from a list and once that occurred, a new random list, an extended list, was generated but parties were then prevented from striking names and could only challenge arbitrators for cause. In response to concerns raised by parties about that system and the use of extended lists, FINRA, in April 2007, approved amended rules that limited the number of strikes available to parties.

"The rules limiting strikes have significantly reduced extended lists and thus increased the percentage of cases in which FINRA initially appoints arbitrators from the parties' ranking lists," it said in its rule proposal.

"The additional names will increase the likelihood that the parties will get panelists they chose and ranked, even when FINRA must appoint a replacement arbitrator," it said. "In cases with more than two parties, expanding from eight to 10 arbitrators on each list should significantly reduce the number of arbitrator appointments needed from extended lists."

CASE UPDATES

Federal Circuit Courts

Rules applicable to death of arbitrator do not apply to resignation, even where resignation is for dire health reasons

Insurance Co. of North America v. Public Service Mut. Ins. Co. C.A.2, June 23, 2010

PSMIC entered into arbitration with ICNA regarding reinsurance disputes. Each party chose an arbitrator who chose a third. All arbitrators granted summary judgment to PSMIC.

While the motion to rehear the claim was pending, the INA arbitrator informed the others that he had cancer and had to withdraw. All parties accepted his resignation. When a dispute arose as to how to replace the INA arbitrator, the other two ordered INA to find a replacement. INA argued that the panel ought to be reconstituted. PSMIC refused to assent to reconstitution. When PSMIC copied the INA arbitrator on all correspondence, INA asserted that it was inhumane to contact its arbitrator at this time in his life. PSMIC ceased contacting him.

INA filed a motion in district court enjoining the arbitration and ordering the parties to create a new panel. The district court granted the motions, holding that it would be "unfair to force INA to submit its motion for [re]consideration [to] a panel comprised of two arbitrators who heard argument on, and ultimately decided, the summary judgment motion for which reconsideration is requested and one arbitrator who did not."

Shortly thereafter, the INA arbitrator recovered and was working again as an arbitrator. When PSMIC presented INA with an offer to have the INA arbitrator rejoin, INA refused, arguing that the entire panel was now flawed. PSMIC discovered that INA knew long before that its arbitrator had recovered.

The district court granted a rule 60(b) motion filed by PSMIC. It noted that when it ordered a replacement panel, it did so based on rules regarding permanent unavailability and in this instance, where INA knew its arbitrator was recovered, it ought to have made that information known to the district court so the court could have exercised its authority to order the arbitrator back to work on this claim.

On appeal, the Second Circuit Court of Appeal held that the rule regarding reconstitution of a panel when an arbitrator dies is inapplicable when an arbitrator resigns. The Court also ruled that it was proper to grant PSMIC's rule 60(b) motion because PSMIC could not reasonably have known about the recovery of the INA arbitrator after INA's effort to shield him.

The Court held that the district court was well within its authority to order the INA arbitrator back to the panel, or in the alternative, to have INA appoint a substitute.

Appeals Court reverses District Court finding that raising arbitration as affirmative defense preserves right to arbitrate despite engaging in 15 months of litigation (in addition, the contract to arbitrate was unconscionable)

Nino v. Jewelry Exchange, Inc. C.A.3 (Virgin Islands), June 15, 2010

Rajae Nino, a Jordanian national, took a job with Diamonds International (DI dba "The Jewelry Exchange"). He worked at stores in Aruba and Alaska before being transferred to the St. Thomas store. There, he was required to sign an employment contract with a dispute resolution clause, which required him to jump through a series of difficult hoops before he was allowed to file for binding arbitration of "all employment-related disputes." He also signed a

document stating that he had read the employee manual, which contained a similar but not identical dispute resolution clause.

When Nino revealed to his co-workers that he was gay, they began to harass Nino both verbally and physically. When Nino received a suspension for alleged use of profanity (which Nino denied), Nino took the suspension as a constructive discharge and he filed suit in federal court alleging discrimination based on gender and national origin.

DI filed a 10-part answer, with one part claiming that Nino was limited to relief in arbitration. However, DI proceeded to litigate for 15 months, filing motions and engaging in discovery, before filing motions to dismiss and to compel arbitration.

The district court granted the motions, noting that while the arbitration clauses contained unconscionable aspects, those could easily be severed from the agreement. The court also held that DI had not waived its right to arbitrate because it raised arbitration as an affirmative defense. Nino appealed.

The Court of Appeals for the Third Circuit found that the contract was both procedurally and substantively unconscionable. The contract was a "take it or leave it" contract between one of the largest diamond sellers in the world and a man who was dependent on the company for his ability to remain in the United States (he was on a work visa) and was therefore procedurally unconscionable. In addition, the various obstacles imposed by the contract before Nino could vindicate his rights (e.g., that a complaint must be filed within five days of any alleged cause of action arising) rendered the contract substantively unconscionable as well. The Court analyzed several other matters from choice of arbitrator to costs and found the contract to be "one-sided in the extreme."

The Court turned to the question of severability and concluded that it was not possible to sever offending clauses as "the one-sided nature of the arbitration agreement reveals unmistakably that DI was not seeking a bona fide mechanism for dispute resolution, but rather sought to impose a scheme that it knew or should have known would provide it with an impermissible advantage."

In addition, the Court held that the district court erred when it concluded that DI did not waive its right to arbitrate despite litigating for more than a year. The Court weighed six factors found in prior cases: [1] the timeliness or lack thereof of a motion to arbitrate…; [2] the degree to which the party seeking to compel arbitration has contested the merits of its opponent's claims; [3] whether that party has informed its adversary of the intention to seek arbitration even if it has not yet filed a motion to stay the district court proceedings; [4] the extent of its non-merits motion practice; [5] its assent to the court's pretrial orders; and [6] the extent to which both parties have engaged in discovery. Each of these factors might have been enough to reverse the district court as four were heavily weighted in favor of the conclusion that DI waived its right. "The fifteen-month delay between the service of the complaint and DI's invocation of arbitration was significant, and DI's delay "caused [Nino] the expense of litigating in court, as well as…making [Nino] endure [fifteen months] of what would have been (had [DI] succeeded) wasted litigation. While we are mindful of the fact that "waiver is not to be lightly inferred, it is not appropriate to compel arbitration where, as here, the demand for arbitration came long after the

suit commenced and when both parties had engaged in extensive discovery."

District Court may not vacate award merely because of "shocking" size; failure to disclose only results in vacatur when the matter would favor one side over the other

Lagstein v. Certain Underwriters at Lloyd's, London, C.A.9 (Nev.), June 10, 2010

Zev Lagstein worked as a cardiologist and disability examiner. He obtained an insurance contract through Lloyd's that would pay him $15,000 per month for five years if he were unable to work. When he suffered a heart attack and began to have severe migraines, he filed for disability benefits under his insurance policy. When Lloyd's refused to pay, Lagstein returned to work (against the advice of his doctors) and he sued Lloyd's. The action was stayed pending arbitration.

The parties each picked an arbitrator and those two picked a third. The arbitrators ruled in Lagstein's favor, awarding him $900,000 in compensatory damages and an additional $1.5 million in emotional distress damages. The dissenting arbitrator stated that he would have awarded only $11,000. At a subsequent hearing on punitive damages, two of the three awarded $4,000,000 to Lagstein.

Lloyd's found out later that two of the arbitrators were involved in an alleged ethics breach. It moved to vacate the award and the district court granted the motion to vacate, holding that "the size of the awards was excessive and in manifest disregard of the law, and that the punitive damages award contravened public policy and exceeded the panel's jurisdiction." The court noted that the failure to disclose the ethics allegations did not qualify as a grounds for vacatur.

On appeal, the Ninth Circuit Court of Appeals reversed. It held that "a district court may not vacate an award simply because it disagrees with its size." The Court found the award to be reasonable and not in manifest disregard of any law or policy.

As to Lloyd's argument that the panel lacked jurisdiction to award punitives after the first award, the Court held that the panel retained jurisdiction, and this was obvious to the parties at the time of the first hearing.

Finally, the Court reviewed the allegation that the arbitrators should have disclosed the pending ethics violations and it held that failure to disclose is only grounds for vacatur when the matter held back favors one side over the other.

The Court concluded that "[w]e previously have observed that, possibly because the nature of our review in these cases is so unusual, there may be a tendency for judges, often with the most unobjectionable intentions, to exceed the permissible scope of review and to reform awards in [the judge's] own image of the equities or the law. Under the FAA, however, the reform of arbitration awards, including the severe remedy of vacatur, is limited by those grounds established by Congress in the Act. Because we conclude that vacatur in this case was not warranted by any of the grounds permitted by §10 of the FAA, we reverse the district court's vacatur of the arbitration awards and remand for confirmation of all of the awards."

California

***Gentry* case and *Discover Bank* case do not combine to create new unconscionability analysis – analyses are to be conducted independently**

Arguelles-Romero v. Superior Court
Cal. App. 2 Dist., May 13, 2010

Arturo Arguelles-Romero and Evangelina Amezcua bought a $38,000 truck and financed $30,000. When they fell behind in their payments, R&A received notice that AmeriCredit Financial Services, Inc. (AC), the assignee of their automobile financing contract, intended to sell the truck. AC sold the truck for $8,400 and insisted that R&A

pay the remaining balance of $16,000. R&A attempted to pursue a class action against AC alleging violations of unfair competition laws, and the Automobile Sales Financing Act. AC moved to compel individual arbitration. R&A argued that the class action waiver was unconscionable. The district court granted the motion and R&A appealed.

The Court of Appeal for the Second District reviewed the two relevant California cases (*Discover Bank v. Sup. Ct.* and *Gentry v. Sup. Ct.*). *Discover Bank* did not help plaintiffs, as it was a case that helped define unconscionability (a bill stuffer notice of class action waiver was deemed procedurally unconscionable) and the bounds of an exculpatory waiver (a $29 fee would never result in individual prosecutions). *Gentry* did not help as it held only that a class waiver may be deemed a violation of the *Armendariz* principles (that a contract to arbitrate must meet certain requirements) but stopped short of defining a class waiver as a per se unconscionable clause. The Court noted, "In this case, plaintiffs argued only unconscionability, although they attempted to do so by combining some elements of the unconscionability analysis of *Discover Bank* with some of the factors considered in the discretionary determination in the rule of *Gentry*. But the rule of *Gentry* factors are not, as plaintiffs argue, 'indicia of unconscionability.' They may be considered, in the proper circumstances, but the rule of *Gentry* did not expand the *Discover Bank* analysis to include all of the *Gentry* factors – it simply established a different, discretionary, determination. In this case, the trial court performed an unconscionability analysis."

In the case at bar, the Court held that "the trial court did not err in concluding that the plaintiffs failed to establish the class action waiver is unconscionable as a matter of law." However, the Court also held that the trial court failed to analyze the *Gentry* factors alleged in plaintiff's complaint, and so the case was remanded so that the trial court could perform a discretionary determination under *Gentry*.

Georgia

Georgia holds *Hall Street* to eliminate manifest disregard standard for vacatur

Brookfield Country Club, Inc. v. St. James-Brookfield, LLC Ga., June 28, 2010

Brookfield leased its country club property to St. James. Brookfield averred that it had a fee simple and would ensure that it enabled St. James to operate without mishap. The contract between the two contained an arbitration clause. When St. James discovered that Brookfield had failed to obtain sufficient water for the golf course, St. James filed a complaint in arbitration.

The arbitrator ruled in favor of St. James and ordered Brookfield to obtain the permits that would allow St. James enough water for the golf course.

Brookfield filed a motion to vacate which was denied on each of the many grounds Brookfield claimed, including a claim that the arbitrator had manifestly disregarded the law. The court denying the motion held that the only grounds for vacatur were those listed in the Georgia law, which parallel the FAA and do not include manifest disregard.

On appeal, the Georgia Supreme Court found the United States Supreme Court opinion in the *Hall Street* case to be worth following. The Court found *Hall Street* to have eliminated manifest disregard as grounds for vacatur, and therefore, it was

no error of the lower court to deny the motion without considering the manifest disregard claim.

New York

Fee arbitration subject to *de novo* review; failure to provide reasons for fee prevents court from completing such review, so case sent back for further fact finding

Sachs v. Zito, N.Y.Supp., May 25, 2010

Patricia Zito hired Michael Sachs to defend her in an action in which the other side wanted $25,000 in compensatory damages. While the parties signed no formal agreement, it appeared from the bills that the billing rate started at $200/hr and rose to $225/hr. Zito paid all bills on time and without complaint.

The claim in which Zito was a defendant could not be settled. A jury awarded the plaintiff $16,000, but with interest and costs, the total was approximately the same as the original demand.

Sachs submitted a bill totalling nearly $25,000 – $22,000 in fees and $2,000+ in costs. Zito sought fee arbitration. The arbitrator's award required Sachs to refund nearly $6,000 to Zito. Sachs sought to vacate the award and Zito to confirm it.

The New York Superior Court characterized the arguments as follows:

> *Defendant Zito essentially seeks, in her moving papers, to "confirm" the Arbitration Award, asserting that Plaintiff's attempt to void the consequence of the arbitration award is untimely pursuant to C.P.L.R. § 7507 and that Plaintiff has failed to offer any evidence that warrants a vacatur of the award as required by C.P .L.R. § 7511.*
>
> *Plaintiff, in response, asserts that the award is defective on its face since its issuance was untimely, and thus in contravention of its own guidelines, and that the arbitrators failed to articulate a basis for their decision. Plaintiff further asserts that the arbitration award arising out of the fee dispute resolution, and its review, is not even governed by Article 75 of the C.P.L.R., that the services were rendered in a competent manner and that Defendant's counterclaims should be dismissed in their entirety and Plaintiff awarded judgment.*

The Court held that the arbitration award was being attacked by Sachs as a matter of law, and according to the rules, he was entitled to *de novo* review.

The Court was unable to reach a conclusion. "On the record presented, the Court is unable to decide [a delineated list of] issues as a matter of law nor is it able to determine the reasonable value of the services rendered by Plaintiff; the determination of which is arrived at by taking into consideration the following elements: the character of the services rendered, the nature and importance of the litigation, the degree of responsibility assumed by the attorney, the amount or value involved, the length of time expended, the ability, the skill and experience required and exercised, the character, qualifications and standing of the attorney as well as the results achieved."

The Court denied Sachs' motion for summary judgment but granted it insofar as it required the trial court to grant a *de novo* hearing at which both sides could present evidence as to whether the fee was appropriate given the services rendered and the result achieved.

Washington

Heirs not required to arbitrate wrongful death claims despite agreement between facility and decedent

Woodall v Avalon Care Center
Wa. App. Div.1, May 10, 2010

Henry Woodall was admitted to Avalon Care Center, a skilled care facility. He signed an agreement that required that he arbitrate all disputes and claims for damages arising from care in the facility.

After his death, his heirs filed a lawsuit alleging wrongful death and a survival ac-

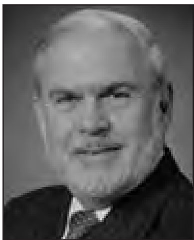
tion. Avalon moved to compel arbitration. Despite reluctance, the trial court split the actions, sending the survival action to arbitration while keeping the wrongful death action in court. Avalon appealed.

The Washington Court of Appeal held that because Henry and Avalon are the only ones to have signed an agreement to arbitrate, that agreement cannot bind his heirs. The Court found that Avalon "failed to establish that the heirs are bound to arbitrate their wrongful death claims against Avalon under any of the limited exceptions to the general rule that (non-signatories can sometimes be bound to arbitrate). Moreover, the conflicting authorities in other jurisdictions are not dispositive in deciding the arbitrability question under Washington law." The Court held that wrongful death claims are not derivative of the claims contemplated by the arbitration clause, but are, instead, new causes of action. The Court concluded that "Henry's heirs are not required to arbitrate their wrongful death claims against Avalon. They did not sign the agreement to arbitrate. Moreover, they are not bound to arbitrate by any of the recognized exceptions to the general rule that a non-signatory to an agreement to arbitrate cannot be required to arbitrate." ■

In Depth *by Justin Kelly*

Commercial Arbitration Protocols Aim to Bring Arbitration Back to its Roots

The College of Commercial Arbitrators recently released protocols for commercial arbitration that are meant to provide best practices for an efficient and cost-effective arbitration process. The CCA's *Protocols for Expeditious, Cost-Effective Commercial Arbitration* are not a new set of rules but rather serve as a guide for in-house counsel, arbitrators, outside counsel and parties to arbitrations on the best ways to manage the process in a manner that returns arbitration to its roots as a quicker, more cost-efficient means of resolving disputes outside the court system.



"Statistics showed that discovery is the largest contributor to cost and delay. [A]rbitration has become heavily bogged down with discovery, depositions, and interrogatories."
— Hon. Curtis E. von Kann (Ret.)

Thomas J. Stipanowich, the William H. Webster Chair in Dispute Resolution and Academic Director of the Straus Institute for Dispute Resolution at Pepperdine University School of Law and a JAMS neutral, is editor-in-chief for the Protocols. He states that "arbitration has become a very different process than it was just 10 years ago. I left arbitration for five years and upon my return it looked much more like litigation."

Curt von Kann, an arbitrator and mediator with JAMS in Washington, D.C., and president of the College of Commercial Arbitrators, said the main concerns are that arbitration has become too costly and too slow, which is in direct contrast to the reason that most parties are interested in using arbitration to resolve their disputes. Notably, however, there has been "little complaint about the outcome of arbitrations or the fairness of the process," he added.

Von Kann said that "statistics showed that discovery is the largest contributor to cost and delay. In the view of many, discovery has gotten out of control. Arbitration has become heavily bogged down with discovery, depositions and interrogatories."

In response to concerns raised about the direction arbitration has taken over the past several years, a national summit was convened in October 2009 that brought together the four major stakeholders in ar-

bitration – in-house and outside counsel, arbitration provider organizations and arbitrators – to address the situation and begin to develop protocols to return arbitration to its roots. The summit was organized under the auspices of the CAA and supported by JAMS, the American Arbitration Association, the Chartered Institute of Arbitrators, the American Bar Association Section of Dispute Resolution, the International Institute for Conflict Prevention & Resolution and the Straus Institute for Dispute Resolution.

Panels were established at the conference where all the stakeholders could bring their perspectives to the issue and discuss a draft report that was prepared in advance for the summit, von Kann explained. The draft proposals were well received and there "was a general consensus that commercial arbitration is a process worth preserving," he said.

According to von Kann, in-house counsel acknowledged the need to be more involved in the process, outside counsel acknowledged the need to tell in-house counsel the real costs of a case and arbitrators submitted that they need to be more "muscular" in their approach to managing the process. There was a "clear mutual desire to recommend improvements to the process," he added.

Protocols Provide Guidance for All Stakeholders

The Protocols are broken out into four parts to separately provide guidance to in-house counsel and businesses, outside counsel, arbitration providers, and arbitrators.

The first section provides guidance to in-house counsel and business on how best to achieve cost controls and ways to limit the time it takes to resolve a case in arbitration.

Von Kann suggested that "people focus on what is essential when there are shortened timeframes" and the shorter process should also "serve to limit discovery and force the parties to set a hearing for the dispute. This is the single most important recommendation in the Protocols," he said.

"Arbitrators have a key role in the process and can effectively manage it by remaining proactive throughout and by nipping problems in the bud."

— Thomas J. Stipanowich, Esq.

Discovery limits can be established in the original agreement between the parties, after the disputes arises, or by having the arbitrator or arbitration panel set limits on discovery, von Kann said. However, it is clear from practice and experience that the most effective way to limit discovery is to include the limits in a pre-dispute agreement, he stressed.

Businesses are also encouraged to use fast-track arbitration in appropriate circumstances, which would return arbitration to its original structure, he said. They also could set up a three-tiered system whereby the simplest cases would be completed in six months, more complex cases would be resolved in nine months and only the most complex cases would last more than one year, he explained.

The next section of the Protocols looks at ways that provider organizations can promote cost and time savings. Stipanowich said that early in the drafting process it became clear that the provider organizations are critical to any change in the practice of arbitration. They already have done a considerable amount of work to drive efficiency by providing parties with greater choice in how arbitration is conducted, by training arbitrators and by efficiently administering cases, he noted.

The Protocols also stress that provider organizations and arbitrators "must be aware of the need to make a greater effort informing parties that they need to make some hard choices by setting time and discovery limits," he said. They also need to

publish rules that parties can use to limit discovery and establish strict timelines for completion of arbitration, he added.

According to Stipanowich, there has been "reluctance on the part of arbitration providers to push parties to use expedited processes," but the Protocols stress that this must be done in order to drive users into a more efficient use of arbitration. "Use of expedited rules can be promoted through the training of arbitrators and lawyers and through testimonials from satisfied users," he added.

The Protocols also promote effective motion practice, he said. Procedures should be established that would allow arbitrators to "distinguish between motions that should be heard and considered versus reflexive motions that are filed but only serve as time wasters," he said.

The next section provides guidance for outside counsel on how they can assure a cost-efficient and timely arbitration. Outside counsel are encouraged to pursue their client's goals in an expeditious manner. They also are encouraged to select arbitrators with strong management skills and to be clear with arbitrators from the outset about their desire to be part of an efficient process.

The final section includes ways that arbitrators can make the process more efficient and attractive to business users and both in-house and outside counsel.

"If the Protocols were to be adopted and made part of arbitration, this would be a very positive development for the dispute resolution process."

— Phillip M. Armstrong. Esq.

Stipanowich said arbitrators have a "key role in the process and can effectively manage it by remaining proactive throughout and by nipping problems in the bud." They also are essential to setting discovery limits and enforcing them in order to move the parties to a hearing, he said.

Since lawyers often push for as much discovery as possible, "arbitrators need to provide a failsafe process whereby parties can bring a discovery issue to the chair or panel where it can be dealt with," he said. This will "allow arbitrators to facilitate the discovery process and resolve any conflicts that arise by being a proactive problem solver."

The Protocols stress that "arbitrators must have a solid understanding of motion practice and be willing to consider dispositive motions that could get rid of a certain percentage of the case," he said. This is a major challenge along with discovery, he added.

According to Stipanowich, the Protocols stress that convening a pre-hearing conference is critical and that the arbitrator must place more emphasis on the pre-hearing process. The pre-hearing conference will allow the arbitrator to establish a reasonable schedule for discovery and the overall arbitration process. It also will allow the arbitrator to issue a case management order early in the arbitration.

Arbitrators also are encouraged to actively manage the process, anticipate issues, set the agenda, tell the parties how the process is going to work and maintain control throughout the arbitration. In addition, arbitrators are encouraged to make parties aware of settlement opportunities. Finally, they are instructed to conduct fair but expeditious hearings and issue awards in a timely manner.

Support for Protocols

Phillip Armstrong, Associate General Counsel at Georgia-Pacific in Atlanta, said arbitration has moved away from its roots as a streamlined process, both in terms of cost and time spent resolving a dispute.

This makes arbitration less attractive to businesses, he suggested. He explained that if companies are going to spend the same amount of time and money that they would in litigation, some may prefer to keep their

"E-discovery has opened Pandora's box because lots and lots of information that used to get thrown away is now available to the parties."

— Michelle M. Leetham, Esq.

cases in the court system, which provides an extensive appeals process, rather than using arbitration where review of the decision is limited.

For the Protocols to have a meaningful impact on arbitration, all the stakeholders – in-house counsel, outside counsel, arbitration provider organizations and arbitrators – "must be involved in promoting them and their incorporation into arbitration," Armstrong said. He remarked that "if the protocols were to be adopted and made part of arbitration, this would be a very positive development for the dispute resolution process."

According to Armstrong, in-house counsel need to control the outside counsel they hire to handle arbitrations and "arbitrators will need to take full control of the process." In addition, arbitration provider organizations are going to need to adapt their rules based on the Protocols and outside counsel are going to have to work within the framework established by the rules and agreements between the parties, he added. Armstrong stressed that "in order for behavior to change, all four stakeholders will have to do their part."

Michelle Leetham, Of Counsel for Ogletree, Deakins, Nash, Smoak & Stewart in San Francisco and former principal litigation counsel for Bechtel Corporation, suggested that in-house counsel are going to need to stay actively involved in the process. They should attend the scheduling conference and make their views known on the need to limit discovery, she said, adding that this is happening more and more.

In addition, in-house counsel "are limiting the number of depositions and including discovery limits when drafting the arbitration agreement," she said. However, arbitration agreements still need to provide arbitrators with some discretion with regard to discovery and time limits, she suggested. Arbitrators should "limit discovery to what is essential to the case and not mimic court discovery. It is also important to set time limits and make sure they are enforced."

Leetham said that "e-discovery has opened Pandora's box because lots and lots of information that used to get thrown away is now available to the parties" as most communications and information is now stored electronically by companies.

In addition, courts have established precedents in e-discovery, which impose a huge burden on companies. Arbitration could distinguish itself from litigation and make the process more attractive to companies if arbitrators become more conversant in e-discovery and streamline or limit e-discovery during the process, she suggested. All of these undertakings should "help empower arbitrators to limit discovery."

Larry D. Harris, a shareholder with Greenberg Traurig in Washington, D.C., said, "Lawyers are used to the discovery process, are familiar with it and look to use the same process in arbitration."

Importantly, the Protocols provide clear guidance and suggestions for ways to limit the scope of discovery, discuss what limited discovery entails, and how to give arbitrators more authority over the process, he said.

"Outside counsel have a good bit of control in arbitration, so if a client demands adherence to the Protocols, they will go along with their client's wishes," he said. "They will accept the Protocols as good guidance for practice in arbitration but there also must be buy-

"Outside counsel have a good bit of control in arbitration, so if a client demands adherence to the Protocols, they will go along with their client's wishes."

— Larry D. Harris, Esq.

"I prefer arbitration because it has the great advantage of getting disputes resolved relatively quickly and inexpensively."
— William J. Nissen, Esq.

in from clients." All of this "requires good communication and cooperation between outside and in-house counsel," he added.

Harris applauded the section in the Protocols that suggests outside counsel meet with their client to discuss expectations for arbitration and then based on those, develop and implement a budget and plan for arbitration. Outside counsel could further improve the process by "showing in-house counsel how the budgeted money will be spent and investigating alternative fee structures," he said.

Arbitration also will be effective if outside counsel clearly communicate to their clients that they must conduct themselves differently in arbitration than in court. While outside counsel may refrain from objecting too much, it is important for clients to understand that they remain strong advocates for them, he added.

According to Harris, in situations where an arbitration agreement does not include limits on discovery, attorneys will look to expand the process in an effort to get the best result for their client. This issue could be addressed "if those involved in arbitration get involved in drafting the arbitration agreement," he suggested.

William Nissen, a partner with Sidley Austin LLP in Chicago, said that while he has witnessed increasing use of discovery and motions practice in arbitrations outside investment-sector disputes, those handled under self-regulatory organization rules have remained truer to arbitration as a quick, cost-effective process for resolving disputes. "I prefer arbitration because it has the great advantage of getting disputes resolved relatively quickly and inexpensively."

Self-regulatory organizations have retained a lot of the benefits of arbitration by structuring their rules to keep the process less expensive and time consuming, he said. Importantly, there are no depositions in investment disputes, which helps maintains arbitration as an inexpensive and quick process, he noted.

Nissen said the approach taken by the drafters of the Protocols should be effective in getting them adopted or referenced in arbitration agreements because they involved all the stakeholders in the process and wisely drafted protocols for each of the stakeholder groups: in-house counsel, arbitrators, arbitration providers and outside counsel.

Outside counsel may push back on the section that calls for limiting or streamlining discovery because of their desire to obtain as much information as possible before heading into a hearing, but this pushback could be dealt with by in-house counsel communicating to outside counsel their desire to keep the arbitration process inexpensive and quick, he suggested.

Harris said he believes the Protocols will be well received by outside counsel. Agreement among in-house counsel, arbitrators, arbitration providers, and outside counsel to use or rely on the guidance in the Protocols should have a positive impact on arbitration going forward.

"The Protocols are well drafted and well thought out, and should bring the issue of the need to reform arbitration to the forefront," Armstrong said. Leetham agreed, saying there is a real need for this type of effort to get companies interested again in using arbitration.

The fact that all four constituent groups came together, were involved in the process and acknowledged its importance should keep the momentum going to fix arbitration, she suggested. ■

For more information about the Protocols, visit the College of Commercial Arbitrators website at www.thecca.net.

ADR Conversations

U.S. Supreme Court's *Stolt-Nielsen* Ruling on Class Arbitration Discussed

A recent U.S. Supreme Court ruling that has received a lot of attention is *Stolt-Nielsen S.A., et al. v. AnimalFeeds International Corp.* (No. 08-1198, 4/27/2010). The *Alert* spoke with **S.I. Strong, Associate Professor of Law; Senior Fellow, Center for the Study of Dispute Resolution, University of Missouri,** about the ruling.

Background

The Court ruled that imposing class arbitration on parties when the arbitration clause is silent on that issue is inconsistent with the Federal Arbitration Act.

The high court also ruled that the arbitrators exceeded the scope of their powers under FAA Sec. 10(a)(4) by imposing their conclusion on the parties that public policy favors class arbitration even though the parties did not consent to the procedure in contract or post-dispute. It stated that the proper role of arbitrators is to decide which law applies to determine the intent of the parties – here the FAA, New York law or maritime law – and base their decision on it, not public policy grounds.

Additionally, the Court explained that its plurality opinion in *Green Tree Financial Corp. v. Bazzle*, (539 U.S. 444, 2003), which also addressed the issue of contracts that are silent on class arbitration, only held that arbitrators, not courts, are authorized in the first instance to decide whether to permit class arbitration under a contract. However, it did take the opportunity presented to build upon that opinion, holding that based on the requirement in the FAA that parties agree to arbitrate disputes, arbitrators are precluded from ruling "that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."

Questions Presented

In *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444 (2003), the Court granted certiorari to decide a question that had divided the lower courts: whether the Federal Arbitration Act permits the imposition of class arbitration when the parties' agreement is silent regarding class arbitration. The Court was unable to reach that question, however, because a plurality concluded that the arbitrator first needed to address whether the agreement was in fact "silent." That threshold obstacle is not present in this case, and the question presented here – which continues to divide the lower courts – is the same one presented in *Bazzle*: Whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*

The Supreme Court stated that the proper role of arbitrators is to decide which law applies to determine the intent of the parties — here the FAA, New York law or maritime law — and base their decision on it, not public policy grounds.

Q. ***Does the ruling provide clarity and direction for district and appellate courts when they are asked to enforce a decision by an arbitrator or arbitration panel ordering class arbitration or denying a party's motion for class arbitration or will the lower courts be forced to interpret the ruling to some extent?***

A. No. This decision is narrowly drafted and is limited largely to the facts. Rather than curtail class arbitration, the opinion will actually increase litigation in this area, since parties have been given little guidance as to when class arbitration is permitted. For example, the majority notes that simply agreeing to arbitrate a dispute is not enough to allow for class proceedings in situations where the agreement is silent or ambiguous as to multiparty treatment; instead, the agreement must demonstrate the parties' intent to allow class proceedings. However, the Court fails entirely to indicate what parties must do to demonstrate that intent. Indeed, footnote 10 states explicitly that the Court has "no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." That question will be left to the lower courts to decide. Though the Court does suggest that arbitrators can refer to controlling law (in this case, the FAA, New York or maritime law) to find the necessary consent, the opinion does not provide any sort of detailed road map for future courts or arbitrators to follow.

Q. ***Does the ruling clarify the holding in*** **Bazzle** ***or will it cause confusion over what precedent was established by the plurality opinion in*** **Bazzle*****?***

A. The decision casts significant doubt on *Bazzle* by disputing the interpretation given to the decision by the arbitrators. The Court also appears to reframe *Bazzle* by claiming that the key question in class arbitration is whether the parties have agreed to arbitrate with the other parties (the question of "with whom" the arbitration agreement was made) rather than what procedure was intended to be used (the apparent holding in *Bazzle*). However, the Court indicated that it need not revisit the issue of the arbitrators' interpretation of *Bazzle* given the parties' agreement to assign this issue to the arbitrator, which again leaves the door open to further litigation.

Q. ***Does the ruling provide parties with a clearer understanding on how to structure or draft arbitration agreements to either permit or prohibit class arbitration or is it limited to agreements that are silent on class arbitration?***

A. This decision is limited to agreements that are silent on class arbitration – it does not discuss situations where the parties have explicitly considered class treatment, nor does it give advice as to how to structure arbitration agreements going forward. Of course, the more explicit parties are about their intent, the better.

Q. ***Would there have been a different result if the arbitration panel had considered whether the Federal Arbitration Act itself provided the answer or considered whether federal maritime or New York law provided the answer?***

A. I don't have access to the arbitration award, but Justice Ginsburg certainly suggests that the arbitrators did in fact undertake the analysis outlined by the majority. She states that "the panel tied its conclusion that the arbitration clause permitted class arbitration…to New York law, federal maritime law, and decisions made by other panels pursuant to Rule 3 of the American Arbitration Association's Supplementary Rules for Class Arbitrations." Thus it seems that the majority simply disagreed with the way the arbitrators decided the matter, even though that is not sufficient grounds for vacating an arbitral award.

Though the Court does suggest that arbitrators can refer to controlling law (in this case, the FAA, New York or maritime law) to find the necessary consent, the opinion does not provide any sort of detailed road map for future courts or arbitrators to follow.

Q. ***Will the ruling cause arbitration provider organizations to amend their rules on how arbitration panels must handle requests for class arbitrations?***

A. The opinion does not require arbitration providers to amend their rules on class proceedings, although such institutions will presumably be keeping a close eye out for future rulings on the ability of courts to review any partial final awards that are issued regarding the construction of contractual provisions on arbitration or on the determination of any classes. Although the majority refused to address the matter, claiming that the parties had waived any such argument, Justice Alito suggests in footnote 2 that he, at least, would be amenable to permitting early review. Justice Ginsburg, however, takes a very different view, relying on the recent precedent in *Hall Street* to conclude that parties may not, by their own accord, expand court review of arbitral awards. If the lower courts adopt Justice Ginsburg's position, then some arbitral providers may need to rethink their use of partial final awards.

Q. ***Is the ruling limited to arbitration agreements entered into by sophisticated parties bargaining at arm's length or will it apply to all arbitration agreements, including those in employment and consumer contracts?***

A. The majority does not appear to limit the decision to any particular type of class proceedings, but Justice Ginsburg notes in dissent that the parties are sophisticated entities that have a particular trade usage that benefits the claimant by allowing the claimant to choose the agreement containing the arbitration provisions. As a result, she believes that the majority does not address "contracts of adhesion presented on a take-it-or-leave-it-basis." This would of course leave the door open to unlimited use and development of class arbitration in the consumer or employment contexts. Certainly the issue will be litigated in the lower courts.

Q. ***What are the two or three main issues under discussion in the arbitration field as a result of the ruling? Has any consensus formed around those issues?***

A. The primary debate right now is whether class arbitration has been effectively eliminated as a result of *Stolt-Nielsen*. Though some very early commentary suggested that the decision marked the end of class arbitration, I do not believe that is the case, nor do a number of my colleagues. The growing consensus seems to be that the decision will lead to extensive litigation in the lower courts and will require the Supreme Court to readdress the matter within the next 10 years. People also seem to be focusing on the question of manifest disregard of law, which was noted but not addressed in the decision. Although the opinion adds nothing to the debate, the statement that "[w]e do not decide whether 'manifest disregard' survives our decision in *Hall Street*" is enough to fan the flames of debate. ■

Florida Adopts UNCITRAL Model Arbitration Law to Increase ADR Business

In an effort to increase business and raise Florida's profile as a center for international dispute resolution, Gov. Charlie Crist (I) recently signed into law a bill to adopt the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"). Primary Senate sponsor Sen. Dan Gelber (D-Miami Beach) said the rationale behind adoption of the Model Law is that "if Florida shares the same procedural arbitration rules as many other countries, parties with disputes would find the state a more inviting jurisdiction in which to conduct arbitrations."

According to Gelber, the Florida Bar International Law Section was behind introduction of the legislation, HB 821, and suggested that adopting the Model Law would drive more dispute resolution business to the state by providing parties with a familiar set of arbitration rules and procedures. Lawmakers agreed and enacted the law with strong support from the business community, he added.

The new law was endorsed by the Florida Chamber of Commerce, Associated Industries of Florida, and the Miami Arbitration Society. In addition to increasing use of dispute resolution services in the state, the new law also should help the hospitality and legal services industry, he suggested.

Gelber noted that the new law, the Florida International Commercial Arbitration Act (FICAA), closely tracks the language in the Model Law and replaces the existing law governing international arbitrations in Florida, the Florida International Arbitration Act (FIAA).

FICAA will apply to international arbitrations, which include agreements between parties that reside in different countries, agreements where one party resides in a place different from where the business is conducted, and where the parties have explicitly stated that the subject matter of the agreement relates to more than one country.

Under the new law, parties must be treated equally and given the opportunity to present their case. Arbitration tribunals are authorized to conduct the process as they see fit, decide discovery rules, and appoint experts. In addition, they have the authority to determine their own jurisdiction but their decision could be appealed to the circuit court with responsibility to oversee the arbitration.

Arbitration panels are to consist of three neutrals; the previous default was one arbitrator. They will have the same immunity as judges and are required to make continuous disclosures related to their ability to serve in an impartial manner. Parties may opt to have only a single arbitrator hear the case.

Importantly, FICAA includes provisions on interim measures similar to temporary restraining orders, which authorize arbitration tribunals to issue them on the motion of a party to the dispute. Once issued, they would be binding on the parties and could be enforced in any court, in any country. The types of issues they would deal with include orders to maintain the status quo, prevent harm to the arbitral process, preserve assets in dispute, and preserve evidence. There was no similar provision under the FIAA.

FICAA provides that an arbitration award would have to be made in writing, be signed by a majority of the arbitrators, and state the reasons upon which it is based, unless the parties agree otherwise.

Finally, the new law also sets out specific grounds for courts to refuse to enforce an award. These include situations where the complaining party was under some incapacity, the arbitration agreement was invalid under governing law, proper notice was not given, or a court determines that the dispute was not subject to arbitra-

"If Florida shares the same procedural arbitration rules as many other countries, parties with disputes would find the state a more inviting jurisdiction in which to conduct arbitrations."

— Sen. Dan Gelber

tion under applicable law or could not be enforced because it would run contrary to public policy.

The Model Law was adopted by the United Nations in 2002. It has been adopted in 61 countries and domestically by California, Connecticut, Illinois, Louisiana, Oregon and Texas.

International Bar Association Adopts Revised Evidence in Arbitration Rules

The International Bar Association has adopted revised Rules on the Taking of Evidence in International Arbitration in an effort to provide parties from differing legal traditions with a uniform set of rules for submitting and requesting evidentiary material during the dispute resolution process.

The preamble to the revised rules states that they are intended to provide parties with "an efficient, economical and fair process for the taking of evidence in international arbitrations" and to serve as a supplement to existing institutional or ad hoc rules governing arbitrations. It goes on to say that they are not intended to limit the flexibility of parties to design their dispute resolution process, adding that parties and tribunals are free to adapt them as necessary.

A new Article 2 provides for consultation between the parties and the tribunal before arbitration in order for the parties to reach an agreement on a fair and economical evidentiary process. The consultation should concentrate on the scope of discovery, including submission of witness statements and expert reports, the taking of oral testimony, the format of documents, and the level of confidentiality that would be afforded to discovery material.

Article 2 also directs arbitration tribunals to identify to the parties any information it deems relevant to the outcome of the dispute and where preliminary determinations may be made.

Revised Article 3 directs parties to submit all evidence they plan to rely on during the arbitration and any request for the production of documents within the timeframe established by the arbitral tribunal. Requests for production must include adequate descriptions of the material.

In the case of electronic evidence, "the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner," it says. This new provision is meant to limit fishing expeditions.

Article 9 authorizes arbitral tribunals to determine admissibility and assess evidence and lists situations where a tribunal must exclude evidence on the motion of a party. A new section lists issues the tribunal should take into account when making such a decision, including the need to protect the confidentiality of information relating to the provision of legal advice or for the purpose of settlement negotiations, the expectation of the parties, any possible waiver of privilege and the need to maintain "fairness and equality between the parties."

The rules were revised between 2008 and 2010 by an IBA Arbitration Committee task force that included attorneys and neutrals from more than 17 countries in North and South America, Europe and Asia. They were adopted in May 2010. ■

Good Works

In this issue, our Good Works spotlight is on the JAMS Foundation and a few of its recent grant recipients.

Conflict Resolution Training of Teachers A Resounding Success

A JAMS Foundation-supported conflict resolution education program for in-service student teachers aimed at reducing conflict and increasing teacher retention in urban school districts was a resounding success. The program is expanding from four major cities to seven.

Tricia Jones, professor in the Department of Psychological Studies in Education at Temple University and program director of the Conflict Resolution Education in Teacher Education (CRETE) program, said CRETE is partnering with three other education groups to bring its training to additional large urban school districts. Jones said the program was created after statistics showed that many teachers in urban school systems were leaving within three years, with 50 percent gone within five years.

Temple University and Cleveland State University were chosen as pilot locations in 2004 because they were urban education centers with large education programs. "We believed that if CRETE could work there, it could work anywhere," Jones said, adding that the program's success and the support of both teachers and administrators allowed it to expand to the University of Akron and Goucher College in 2007.

"CRETE was well received," Jones said. "Teachers were the driving force behind the expansion. They said they should be getting a lot of this type of instruction and training, which made it very easy to convince administrators of the need for the program."

The program is designed as part of the overall education of student teachers and presented as a stand-alone course offered right before student teachers begin classroom work. The goal is to have CRETE become a "regular, ongoing part of the education and training of teachers," she said. The original plan called for expansion to 10 schools by 2010 but CRETE is already being used in 23 colleges nationwide.

CRETE instructs teachers how to deal with conflict in the classroom and school in general. There are four overarching principles that serve as the basis for training.

The first principle is the need to "de-escalate conflict when it starts," Jones explained. "Teachers are taught to understand how emotions can get away from us and how to turn down the heat." Next, teachers learn how to negotiate and problem-solve. Jones said this portion serves as an "eye-opening and fantastic experience," giving teachers concrete methods for solving conflict and returning to learning and teaching.

Student teachers are then taught to rebuild relationships. "This has proven particularly helpful for middle and high school teachers," she noted. "When all the above skills are put together, real success can be realized."

Student teachers also learn how to deal with bullying situations, including how to intervene and support the victim, the bully and the bystanders. Feedback indicates that conflict resolution training in the bullying area has changed the atmosphere in the classroom, hallways and cafeteria.

A 2008 JAMS Foundation grant enabled CRETE, in conjunction with Educators for Social Responsibility and Creative Response to Conflict, to develop partnerships between colleges of education and the school districts in which they are located. JAMS Foundation funding is enabling school districts in New York, Chicago, Washington, D.C. and San Francisco to provide conflict resolution education to their teachers. San

Francisco State is using CRETE to train student teachers and ESR is using it to train teachers in the San Francisco school system. Another JAMS Foundation grant in 2010 will allow the program to expand to Atlanta, Dallas and Los Angeles. The Western Justice Center Foundation is also participating in the partnership. DePaul University in Chicago is taking CRETE to the Catholic schools, and they are "getting a great response," Jones said.

The JAMS Foundation grants also help cement partnerships between teaching colleges and school systems, which should "outlast the funding and make ourselves obsolete," she said.

Jones said feedback from teachers and administrators has been "very positive and impressive." More data to demonstrate the benefits of the program will be collected in the next couple of years through the Institute of Education Sciences at the U.S. Department of Education, JAMS in Chicago and CRETE in Baltimore. For more information, visit www.creducation.org.

Scholars Launch Effort to Chronicle Diversity in ADR

The JAMS Foundation has awarded a grant to two scholars to begin chronicling the history of diversity in the alternative dispute resolution field. The research effort is aimed at uncovering who the early champions of diversity were, what types of efforts were undertaken, what organizations or governmental agencies initiated them

Feedback from teachers indicates that conflict resolution training in the bullying area has changed the atmosphere in the classroom, hallways and cafeteria.

and which ones worked or didn't work. The scholars will concentrate their efforts on diversity initiatives undertaken between the early 1970's and 2001 and will focus on racial and ethnic diversity.

Marvin Johnson, executive director of the Center for Alternative Dispute Resolution, said, "There isn't anything out there that chronicles what the various organizations have been doing in the area of diversity. We know that many efforts were undertaken but without a permanent record, we are left unaware of where the efforts started, who was involved and what types of projects were undertaken."

The research also will help us "find out which organizations reached out to try to increase diversity in the field," he said. Johnson said it is important to unearth this information and make it easily accessible.

Maria Volpe, director of the Dispute Resolution Program at the John Jay College of Criminal Justice at the City University of New York, said, "It is important to really dig through the literature to try to construct the history of diversity in ADR. We will be mining organization's resources, literature, public and private reports, websites and any other relevant material."

Johnson said they will focus their research on efforts by major organizations but will also follow leads to smaller efforts by local and community ADR programs or organizations. "Concentrating on the efforts of large organizations gives a good overall perspective," Volpe suggested.

Volpe said that her earlier research into barriers to participation in the ADR field showed that while it is easy to get into the field, it is difficult to stay and make a living or move up into more lucrative and presti-

gious positions. Some of this can be attributed to the high number of volunteers and pro bono work in ADR, she noted.

Limited finances hindered the ability to do volunteer or pro bono work, which is often a way to gain experience and notoriety in the field, she said. Johnson added that information from ADR users has shown that while they are aware that rosters are not diverse, they also admit to being risk adverse and less than willing to use an unknown entity to assist them with resolving a dispute.

According to the scholars, researching racial and ethnic diversity in the field is a substantial undertaking, necessitating that diversity relating to age, gender and disability be undertaken by future researchers.

"We will pull all this information together to create as comprehensive a piece as possible," she said. "Hopefully this effort

will make it easier for future researchers to examine diversity in the field."

In addition, the research and the resulting product could be useful in policy matters by informing organizations about what worked and what didn't in diversity initiatives, Volpe suggested.

The scholars plan to have a final product by late 2011 that could be published as a journal article and released in more accessible formats. ■

Worth Reading *Reviewed by Richard Birke*

The Science of Settlement: Ideas for Negotiators

by Barry Goldman, ALI-ABA Press (2008)

The study of negotiation has expanded dramatically over the past 20 years. Where once upon a time, a student could read *Getting to Yes* and perhaps Machiavelli's *The Prince*, and be done with it (maybe also *The Art of War* by Sun-Tzu), now the study includes economics, neuroscience, game theory, cultural and cross-cultural study and psychology. It may not be an overstatement to say that the incorporation of cognitive and behavioral psychology into the discipline of negotiation has been the most significant addition to the field in the past two decades.

In recognition of this, author and teacher Barry Goldman has written a terrific, short compendium describing the "greatest hits" of psychology as they apply to negotiation. Goldman's world is one of mental shortcuts, known as "heuristics."

Like most things, a heuristic is not inherently good or bad. In fact, many heuristics are pretty darn good – like a well-baked pastry or a good cup of coffee. But just like those same things, they aren't so good when the consumer overindulges. Let's take a simple example: reactive devaluation. The simple idea is that your enemy doesn't have your best interests at heart. More likely, he would like to obtain results that are good for him and perhaps bad for you. However, if a negotiator evaluates every offer from a negotiation counterpart as if "more for you is less for us," integrative, win-win bargaining flies out the window.

Goldman quotes Congressman Floyd Spence when he "reactively devalues" offers from the Soviets to reduce nuclear stockpiles during the SALT talks. Spence stated, "I have had a philosophy for some time with regard to SALT and it goes like this. The Russians will not accept a SALT treaty that is not in their interests, and it seems to me that if it is in their interest, it can't be in our best interest."

It's a small step to Groucho Marx' statement, "Your proposition may be good, but let's have one thing understood — whatever it is, I'm against it. And even when you've changed or condensed it, I'm against it!"

While reactive devaluation may start out rooted in rationality, in the heads of Spence and the Marx brothers, it causes a negotiator to evaluate a deal purely based on who made the offer, not on whether it is a good deal or not.

Goldman explores not just reactive devaluation, but nearly 60 different principles, many of them heuristics and some of them biases. All of them are of great import to negotiators.

Take focal points as an example. Goldman refers to the Nobel Prize-winning work of Thomas Schelling. Schelling became famous for pointing out that human decision makers gravitate toward or away from focal points for settlement. That's why $99.99 is a better number to sell something than $100. If the buyer can think of a settlement, er, purchase, as below a prominent focal point, instead of at or above it, it's more likely to be acceptable. Similarly, if an offer to settle is $112,587, it's far more likely that the offer will magically transform to $100,000 at some point in the negotiations. Focal points can be at big round cusps or halfway between. If I offer to buy for $28 and you offer to sell me at $81, we're almost certainly going to end up at the focal point of $50.

Goldman's book is thorough without being long – nearly 60 principles covered in only 167 pages. It's scientific without being pedantic. And it's funny without lapsing into schtick. One of the best parts is a nine-page glossary that illustrates every virtue just described. Here are a few choice definitions – all exact quotes from the book:

Affirmation Bias: Our tendency to agree with one another, to go along to get along. You know what I mean, right?

Biased Punctuation of Conflict: The tendency to see our attacks on our opponent as justified retaliation, and their attacks on us as unprovoked.

Fundamental Attribution Error: Attributing a different and usually more admirable cause to my own (or my reference group's) behavior than to someone else's behavior. I was rude to you because I had a headache. You were rude to me because you are a jerk.

Hindsight Bias: The tendency to be insufficiently surprised. We tend to believe after the fact that we knew it all along or we would have seen it coming.

Peak–End Rule: The tendency, when assessing the overall quality of an experience, to give excess weight to the most extreme part and to the end.

Of course, these biases and heuristics and humorous insights into the foibles of human behavior would be of relatively little interest to readers of this newsletter were Goldman not able to demonstrate at every turn how they apply to students of the settlement process. In addition to being an author, Goldman is a mediator and arbitrator, and an adjunct law professor. Just as he combines those identities in his professional work, he has combined these and his training and study of psychology into a simple, invaluable resource for anyone who negotiates or mediates and wishes to understand the people part of the settlement puzzle.

One of Goldman's glossary entries is "Regret Aversion," the tendency to avoid what we sense may increase the risk of regret. If you want to avoid regret, go read *The Science of Settlement*. You'll be glad you did. Take our word for it. (That's "social proof," right Barry?) ■

WHATEVER HAPPENED TO THE IDEA THAT ARBITRATION WOULD COST LESS THAN LITIGATION?

WAS THAT JUST A TRIAL BALLOON?

There's a perception that arbitration now rivals litigation in cost. But it doesn't have to be that way. At JAMS, we've instituted new protocols aimed at curbing disproportionate discovery. Our neutrals function as managerial arbitrators, holding pre-arbitration phone conferences with parties to discuss timelines for motions, boundaries of discovery and other cost-saving measures. And JAMS arbitrators and case managers receive proprietary training that helps assure neutrality, efficient process management and timely awards. For more about how we can design a custom process to help you control arbitration costs, go to www.jamsadr.com/managedarbitration or call 800.352.5267.

Richard Chernick, Esq.
V.P. and Managing Director
JAMS Arbitration Practice

THE RESOLUTION EXPERTS.®