Summer 2013

JAMS DISPUTE RESOLUTION ALERT

An Update on Developments in Mediation and Arbitration

THE RESOLUTION EXPERTS

U.S. Supreme Court Rules on Class Arbitrations

IN DEPTH

Two recent cases ruled on by the U.S. Supreme Court will have significant implications for class actions in arbitrations. *American Express Co. v. Italian Colors Restaurant* and *Oxford Health Plans LLC v. Sutter* address the mechanics and viability of collective adjudication in alternative dispute resolution.

The *Amex* case analyzed whether the Federal Arbitration Act (FAA) permits courts to invalidate routine arbitration agreements that mandate bilateral arbitration—over class arbitration—of a federal claim. The Supreme Court decided that an arbitration agreement that precludes arbitration brought by a class of plaintiffs is enforceable under the FAA even if the proposed class of plaintiffs proves that it would be economically infeasible for individuals to pursue arbitration on their own.

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WHAT'S INSIDE

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ADR CONVERSATIONS

New Silicon Valley Patent Office Plans to Tap Local Information Technology Expertise

The following interviews were conducted with attorneys specializing in patent law and ADR, including Scott Donahey, a mediator and arbitrator in Palo Alto; Mark Kirkland, an attorney with Fish & Richardson in Silicon Valley; Nan Wu, an attorney with Cooley LLP in San Francisco; and Pete Tormey, an attorney with Antero & Tormey in San Francisco.

The U.S. Patent and Trademark Office recently opened a new satellite location in Silicon Valley that will provide inventors, companies and attorneys with the opportunity for face-to-face meetings with examiners and give the government the ability to tap into the vast local information technology expertise.

Michelle Lee, the new director of the USPTO in Silicon Valley, said at a speaking engagement earlier this spring that the distance from Washington, DC, has made the patent examination process problematic. The purpose behind opening

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U.S. Supreme Court Rules Continued from Page 1

The case against American Express originated in a series of lawsuits filed by restaurants and retailers claiming antitrust violations related to the credit card acceptance agreement. Specifically, the merchants asserted they shouldn't be forced to accept Amex's new credit cards, which, unlike the company's premium cards, don't require full payment each month, because the credit cards aren't worth the high American Express fees. The retailers argued the arbitration agreement's prohibition against class arbitration effectively blocked them from sharing the costs of a $300,000 market-study report—critical evidence in antitrust cases—and prevented them from sharing information related to arbitrations.

> **"It's really only a case in the unlikely situation of an arbitrator who decides the parties have agreed to authorize class arbitration."**
>
> –Josh Davis

In the District Court, American Express successfully moved to compel arbitration of a Sherman Act tying claim. But the Second Circuit declined to enforce the arbitration agreement, holding that its prohibition on group claims made it impossible, practically speaking, for individual merchants to assert federal antitrust claims against Amex. Before the Supreme Court, Amex argued the Second Circuit ruling undermined *AT&T Mobility LLC v. Concepcion*, a 2011 Supreme Court decision that permits companies to use arbitration contracts to prevent employees and consumers from asserting collective claims. Amex argued that to rule otherwise is counter to the purpose of the Federal Arbitration Act and would violate the "federal substantive law of arbitrability."

The Second Circuit had held that the *Concepcion* case didn't apply when the ban on collective arbitration deprives plaintiffs of the ability to vindicate their rights under federal law. In the Supreme Court, the retailers further argued that the law at issue in *Concepcion* was a California state law at odds with the FAA.

Meanwhile, in *Oxford Health Plans LLC v. Sutter*, the Supreme Court also heard arguments about a contract provision that provided "no civil action concerning any dispute arising under this agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration."

In the case, Oxford Health entered into a contract, which contained that arbitration provision, with a physician named Sutter. Sutter sued Oxford in a class action regarding Oxford's reimbursement claims processing. Oxford attempted to compel arbitration, and the arbitrator concluded that the agreement's language authorized class arbitration. The District Court and the Third Circuit affirmed. Those rulings were consistent with the Second Circuit, but in conflict with the Fifth Circuit, which has held that arbitration contract language covering "any dispute" and making available "any remedy" did not amount to consent to class arbitration. Oxford contends the agreement simply provided that individual claims would be arbitrated.

Josh Davis, Professor and Director, Center for Law and Ethics at the University of San Francisco School of Law

In *Oxford*, the Supreme Court unanimously affirmed the arbitrator's decision in this case, which determined that the contract survives judicial review under the Federal Arbitration Act. The case involved settling the circuit split that resulted from *Stolt-Nielsen SA v. AnimalFeeds Corp*, which held that parties must "affirmatively agree" to class arbitration and that arbitrators exceed FAA authority if they find an agreement based solely on broad contractual language precluding litigation without evidence of the parties' intent.

Over the long term, the *Oxford* case is likely to matter "very little," says Joshua Davis, a civil procedure professor who writes about class actions and complex litigation and directs the Center for Law and Ethics at the University of San Francisco School of Law. "It's really only a case in the increasingly unlikely situation of an arbitrator who decides the parties have agreed to authorize class arbitration." Because more and more contracts will contain explicit bars on class-wide arbitration, the leeway of the arbitrator doesn't matter much. As a result, the *Oxford* decision will likely have "little effect" and can be regarded largely as "a vestige of a bygone era. Indeed, it's likely irrelevance may explain the Court's unanimity."

"In the Amex decision, the Court used the FAA to undo much of Federal Rule of Civil Procedure 23 and state class actions."

–Josh Davis

In contrast, the *Amex* case, which concerns deference to arbitration agreements, effective vindication and prohibitive costs, is "extraordinarily important," Davis says. "And it's really about class actions."

The Court held that the FAA does not permit courts to invalidate arbitration agreements simply because the cost of individual arbitration may be high. According to the Court, nothing in federal law guarantees plaintiffs "an affordable procedural path to the vindication of every claim." Moreover, the Court found that the judicially created "effective vindication" exception to the FAA could not be applied simply because individual arbitrations are more costly to litigate than they are often worth. According to SCOTUSblog.com, a website devoted to comprehensively covering the Supreme Court of the United States, "the Court's message was loud and clear: Class proceedings are an exception to the usual rule, not an entitlement. It would be remarkable for a court to erase an agreement to arbitrate pursuant to the usual rule."

The traditional exception to barring class-wide arbitration is if the plaintiffs are not otherwise able to vindicate their federal statutory rights; that is, if those rights couldn't otherwise be enforced in any meaningful way. In the *Amex* case, the plaintiffs carefully created an evidentiary record in their claim that the costs of experts meant it was incredibly uneconomical to bring an individual claim, according to Davis.

"In the *Amex* decision, the Court used the FAA to undo much of Federal Rule of Civil Procedure 23 and state class actions. To a large extent, it gutted them, and many potential class actions won't get brought at all—not as class actions because they are barred and not as individual actions because they are not viable," he says. "As a result, many legal rights that Congress and the states created on the books won't be enforced in practice. They will be violated routinely without any meaningful legal recourse. The Court recognized this reality but seemed not to care."

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a satellite office in Silicon Valley is to provide all the stakeholders in the patent field with easy access to the patent and trademark process, she explained.

"...more patents will be issued, which will lead to more litigation in the patent field, and a number of those disputes will end up in mediation or arbitration."

–Scott Donahey

According to Lee, the local office also will allow for in-person interviews with patent examiners as part of the USPTO's broader effort to resolve issues in a more efficient manner and address the backlog of patent applications. Also, challenges to the validity of a patent could be considered in a hearing held locally, she suggested.

Lee also noted the benefits of moving between working in government and the private sector, adding that the new office would benefit from the interaction between patent office personnel, the legal community and businesses.

Acting Under Secretary of Commerce for IP and Acting USPTO Director Teresa Stanek Rea said at a patent forum in March that six judges will join Lee at the new office. They are currently working out of a temporary office in Menlo Park, she said, adding that the permanent location will be in San Jose, Santa Clara, Sunnyvale or Mountain View.

She went on to note that the USPTO recently entered into a new partnership with the software community called the Software Partnership.

Q. What were the main reasons behind establishing a Silicon Valley Patent Office?

A. **Donahey** said it was part of the America Invents Act of 2011 (AIA), which directed the USPTO to open three or more satellite offices around the country in an effort to provide those in the patent field with more direct access and to address the backlog of patent applications.

According to the AIA, the new offices are part of an "effort to increase outreach activities to better connect patent filers and innovators with the Office; enhance patent examiner retention; improve recruitment of patent examiners; decrease the number of patent applications waiting for examination; and improve the quality of patent examination." An office in Detroit is open, and two more are slated for Denver and Dallas.

Nan Wu, attorney, Cooley

Wu said the opening of the office is "great for the field and will provide for face-to-face meetings between inventors and examiners, which is key because direct communication is much better than arguing an issue on paper." In-person meetings also will allow the inventor to provide more context for the proposed invention, she added.

Q. What role is there for ADR, and could ADR have a larger role over time?

A. **Donahey** said that with the opening of the satellite office, "more patents will be issued, which will lead to more litigation in the patent field, and a number of those disputes will end up in mediation or arbitration. Currently, lots of patent cases are going through arbitration because the court process takes so long and a result in court could change the meaning of a patent.

Scott Donahey, meditator and arbitrator

"Certain industries are taking their patent disputes out of litigation and into arbitration before neutrals with IP law expertise or to neutrals with knowledge specific to the patent in dispute," he said. "In-house counsel are drafting very specific procedures for arbitrators to follow, with strict limits on discovery and the issue or issues that may be addressed and resolved in arbitration."

According to Donahey, parties to a patent dispute also may begin turning more to mediation "early in the process to work out disputes, since the process is private." As an example, Donahey suggested that a patent holder "with royalty rates based on various licensing strategies can keep them confidential by using ADR to resolve a dispute."

Companies also see ADR as a cost- and time-saving measure for resolving patent disputes that could take up to two or three years to resolve in court, he suggested.

Tormey said the AIA forces the USPTO to get more involved in litigation, which may drive lawyers to look to put disputes in ADR because they would have more control over the outcome.

Importantly for ADR, parties to disputes increasingly want people with subject matter expertise or a science background involved in the decision process and believe that in certain instances they will get a better-quality decision by using an ADR process, he said.

There is one provision in the AIA that authorizes arbitration of derivation proceedings. It says that parties may elect to resolve their dispute in arbitration under the Federal Arbitration Act and any award rendered would be "dispositive of the issues to which it relates." Tormey explained that the provision came into effect only very recently and thus there is no track record of use of the new process.

"It is reasonable to assume that the Silicon Valley office will become the default office for IT and IP patent applications."

–Nan Wu

Downtown San Jose, the heart of Silicon Valley.

Q. Will the office, over time, become the default location for IT and other computer-related patent applications?

A. **Kirkland** expressed hope that the Silicon Valley office would become the primary location for patent applications coming from information technology and related computer fields because of the convenience for inventors and the concentration of high-tech companies and expertise throughout the area.

Wu suggested, "It is reasonable to assume that the Silicon Valley office will become the default office for IT and IP patent applications." Both Donahey and Tormey agreed with the prediction.

Q. What specific expertise could be brought to the office that could benefit the patent field?

A. **Tormey** said local talent and expertise could be tapped into through outreach and education efforts aimed at educating the public about the patent process. The office also could serve as a facilitator to join inventors with companies that have the money to invest in new patents and technology.

Kirkland said having the new office provides "a great opportunity for the patent office to do more outreach and educate companies and inventors about the patent process. In addition, hiring local talent would increase the number of examiners with expertise in the IT field and help speed the process of reducing the current backlog of patent applications, which is difficult on patent applicants. This would make the program better and make the process more efficient."

FEDERAL CIRCUIT COURTS

Money Handler May Not Enforce Arbitration Clause of Debt Restructurer

Rajagopalan v. NoteWorld, LLC

2013 WL 2151193
C.A.9 (Wash.), May 20, 2013

Amrish Rajagopalan had difficulty repaying debts entered into a contract over the internet with First Rate Debt Solutions. Rajagopalan claimed that First Rate promised that all fees would not exceed $2,000. The 13-page contract contained an arbitration clause requiring arbitration in Florida; Rajagopalan was in Washington.

NoteWorld was later designated by First Rate as a "vehicle for payment processing" and Rajagopalan was told that NoteWorld has no other contractual relationship with Rajagoplan or First Rate.

After less than a year, Rajagopalan was unsatisfied and canceled his membership. Some monies were refunded, but NoteWorld kept more than $2,000.

Rajagopalan sued NoteWorld in federal court in Washington. NoteWorld moved to compel arbitration and the district court denied the motion. That court stated that the clause was unconscionable and in any event, NoteWorld was not a signatory and not entitled to enforce the agreement to arbitrate.

The case was affirmed on appeal. The U.S. Court of Appeal for the Ninth Circuit found that NoteWorld was not a signatory and then stated "the district court properly concluded that NoteWorld may not invoke the arbitration clause on the basis of equitable estoppel. We have never previously allowed a non-signatory defendant to invoke equitable estoppel against a signatory plaintiff, and we decline to expand the doctrine here."

Appellate Court Finds 12(B)(6) Standard Inappropriate in Motion to Compel Arbitration

Guidotti v. Legal Helpers Debt Resolution, L.L.C.

2013 WL 2302324 C.A.3 (N.J.),
May 28, 2013

Dawn Guidotti got into personal financial trouble, owing nearly $20,000 to a variety of creditors. She contracted with 22 entities that told her they could restructure her debts and prevent the need to declare bankruptcy. These included banks, debt restructuring companies, escrow agents, document handlers and others.

Two documents of particular importance that Guidotti signed were the attorney retainer agreement (ARA) and the special purpose account application (SPAA). The ARA contained an arbitration clause requiring arbitration in the event of a dispute. The SPAA merely refers to the "account application" and requires that the signer of the SPAA acknowledge signing the account application and accept its terms.

Later, Guidotti concluded that the various entities "participated in a conspiracy to fleece her of her remaining assets without negotiating with or protecting her from her creditors." Guidotti filed a putative class action in New Jersey state court. The defendants removed the action to federal court and then moved to compel arbitration.

Twenty entities moved pursuant to the clause in the ARA and two moved pursuant to a clause in the account agreement, which read "in the event of a dispute or claim relating in any way to this Agreement or our services, you agree that such dispute shall be resolved by binding arbitration in Tulsa, OK utilizing a qualified independent arbitrator of Global's [one of the two entities] choosing. The decision of an arbitrator will be final and subject to enforcement in a court of competent jurisdiction."

Guidotti claimed that the account application was not sent to her until three weeks after she entered into the program. The two defendants claimed she had notice because of the ARA. The district court found that there was insufficient evidence that the account agreement was signed by Guidotti and as a result, the motion to compel arbitration was denied as to the two defendants who were relying on the account agreement's arbitration clause (and the motion was granted as to the other 20 defendants).

On appeal, the U.S. Court of Appeal for the Third Circuit first noted that the law on which standard to use to decide a motion to compel is confusing. Some case law says that the standard is the same as that for summary judgment, while other cases treat it as a motion to dismiss. The Court noted that the district court did not reveal which standard it used.

The Court found that both standards were appropriate, but in different circumstances. "Our split pronouncements on the standard for deciding a motion to compel arbitration are reconcilable. Where the affirmative defense of arbitrability of claims is apparent on the face of a complaint (or ... documents relied upon in the complaint), the FAA would favor resolving a motion to compel arbitration under a motion to dismiss standard without the inherent delay of discovery ... That approach appropriately fosters the FAA's interest in speedy dispute resolution. In those circumstances, the question to be answered ... becomes whether the assertions of the complaint, given the required broad sweep, would permit adduction of proofs that would provide a recognized legal basis for rejecting the affirmative defense."

"In many cases, however, a more deliberate pace is required, in light of both the FAA's insistence that private agreements be honored and the judicial responsibility to interpret the parties' agreement, if any, to arbitrate. Thus, a Rule 12(b)(6) standard is inappropriate when either "the motion to compel arbitration does not have as its predicate a complaint with the requisite clarity" to establish on its face that the parties agreed to arbitrate, or the opposing party has come forth with reliable evidence that is more than a 'naked assertion ... that it did not intend to be bound' by the arbitration agreement, even though on the face of the pleadings it appears that it did." In such a case, limited discovery might be appropriate and there may be a need for findings of fact.

The Court found that Guidotti's complaint made it fairly clear that she knew about the various arbitration clauses at the times relevant to the motion to compel and as such, the motion to dismiss standard would have been appropriate. On the other hand, Guidotti produced evidence that she did not sign the account application, as the other documents all had her e-signature and the account application did not. In light of this fact, the Court viewed this situation as one containing a "genuine issue of material fact" and that "the District Court should not have denied the Appellants' motion to compel arbitration without first allowing limited discovery and then entertaining their motion under a summary judgment standard."

The district court's order denying the motion to compel was vacated and the case remanded for further findings.

Investors' Direct Claims Not Subject to Arbitration

Askenazy v. KPMG LLP

83 Mass.App.Ct. 649, 2013 WL 2233874, Mass.App.Ct., May 23, 2013

After losing huge amounts of money in the Bernie Madoff scam, plaintiffs brought suit against every entity involved in any way, including KPMG for failing to do its job as an auditor.

KPMG argued that it had no direct relationship with the plaintiffs and because the plaintiff's claims are derivative of the claims against other companies, KPMG can compel arbitration pursuant to clauses in contracts between plaintiffs and other Madoff entities.

The trial court found that the claims were direct and it denied KPMG's motion to compel. KPMG appealed.

The Massachusetts Court of Appeal limited its scope of review. "We examine KPMG's contentions only to the extent necessary to determine whether the plaintiffs' claims are subject to the broad-form arbitration provisions contained in the engagement letters—which none of the plaintiffs signed—and not whether the claims have been pleaded sufficiently to withstand scrutiny under Mass.R.Civ.P. 12(b)(6), 365 Mass. 754 (1974)."

The Court noted that the trial judge had correctly found that the claims against KPMG arose out of "KPMG's misstatements and professional incompetence." The Court also endorsed the judge's rulings that "plaintiffs' claims against KPMG for losses sustained by the plaintiffs as a result of paying taxes on so-called phantom income are also direct and not derivative because "the [Madoff] Funds were pass-through tax entities, so the profits and losses of the Funds were allocated to the individual partners. The plaintiffs allege that, as a result of false information provided to them by KPMG in their Form K–1 tax statements, they each paid taxes on income which did not exist. Because the Madoff Funds themselves did not pay taxes, these tax-related losses are necessarily individual."

The Court also found that equitable estoppel didn't help KPMG. While the Court acknowledged the idea that a nonsignatory may be forced to arbitrate if their conduct evinces an intent to be bound, there was no such conduct in this case.

The Court affirmed the order on "KPMG's motion to compel arbitration as it properly was decided. Specifically, the claim of aiding and abetting breach of fiduciary duty is to be dismissed, and the remaining claims against KPMG shall go forward."

Handling the Oncoming Tide of Generic Top-Level Domain Name Disputes

Christopher K. Larus, Partner, Robins, Kaplan, Miller & Ciresi

As early as late summer 2013, the Internet Corporation for Assigned Names and Numbers (ICANN), the nonprofit entity that oversees domain names, will launch as many as 500 new Generic Top-Level Domain names (gTLDs). A top-level domain name is the last part of an Internet address, after the final "dot." The most common current top-level domain names are .com, .net and .org. Under the gTLD program, however, ICANN invited applications from individuals, companies and organizations to create many new top-level domains. Some of the proposed gTLDs include .book, .music, .app and .buy.

During the dot-com boom of the early 2000s, many brand owners spent a significant amount of time and money fighting off trademark infringement caused by cybersquatting or even just unintended brand confusion.

With the new gTLDs, those expensive battles could be coming back.

"Many anticipate a 'land rush' toward registering a wide variety of new top-level domains, many of which may constitute or incorporate trademarks," said Christopher K. Larus, a partner in the IP Litigation Group at Robins, Kaplan, Miller & Ciresi L.L.P. in Minnesota. "This has generated substantial concern among trademark owners since ICANN first announced the expansion of designations that can serve as top-level domains. Given the large numbers of disputes arising from the registration of domain names incorporating trademarks and various country-specific top-level domains, this concern seems justified."

Maria Crimi Speth, IP Litigator, Jaburg & Wilk

The new gTLDs could also create a new kind of domain name trademark dispute, particularly those that are generic industry terms.

"If the gTLD is a generic industry term, the registration of a brand in connection with that industry could be a problem," said Maria Crimi Speth, an IP litigator with Jaburg & Wilk, P.C., in Arizona, who also sits on the gTLD subcommittee of the International Trademark Association. "For example, Subway is a registered trademark for restaurant services and for amplifiers. Consider the implications if the owner of the Subway trademark in connection with amplifiers decided to register the domain name 'subways.restaurants.' We expect to see these types of disputes."

What should trademark owners do? There is some recourse available through ICANN, which has established Rights Protection Mechanisms (RPMs) designed to resolve disputes related to gTLDs.

"The Trademark Clearinghouse is a mechanism that allows brand owners to list their brands in a central repository," said William D. Schultz of the IP firm Merchant & Gould in Minneapolis. "Once listed, the brand owners may obtain domain names on an expedited basis. Additionally, third parties designing to register domain names that relate to the brands in the clearinghouse are notified of the brand and may stop the registration with that knowledge. If the registration proceeds, the brand owner is notified of the registration and may act accordingly."

Schultz noted that in the case of clear-cut trademark infringement, ICANN

William D. Schultz, Merchant & Gould

also offers the Uniform Rapid Suspension (URS) system, which provides brand owners with an expedited process to take down infringing websites. Another process is the Post-Delegation Dispute Resolution Procedure (PDDRP), an administrative proceeding to handle allegations of trademark abuse.

There is also recourse available outside of ICANN's processes.

"Litigation, either for trademark infringement or violation of the Anti-Cybersquatting Protection Act, remains an available option," said Marc C. Levy, a partner with Faegre Baker Daniels in Denver.

Given the cost of litigation, however, and the delays created by an overburdened U.S. court system, brand owners might also consider arbitration for certain gTLD disputes.

"Trademark owners might wish to use arbitration to resolve close or difficult questions of domain name ownership," said R. Shawn Gunnarson, a shareholder with Kirton McConkie PC in Salt Lake City who advises clients on Internet strategy and ICANN matters.

Schultz noted arbitration can be effective in disputes involving non-U.S. entities, as notice can be served by email.

"Additionally, under the registration rules, the decisions from the panel are binding on the registrars, regardless of whether the domain name is registered

See "Handling the Oncoming Tide" on Page 12

Innovative Program Teaches Mediation Skills to American and Middle Eastern Teens

Photo courtesy of Hands of Peace.

Hands of Peace, a 10-year-old interfaith organization, is working to create a new generation of peace-builders through its summer programs that engage Israeli, Palestinian and American teens in dialogue about Middle East conflicts.

The organization's new San Diego program complements the existing program in Chicago, which offers mediation and leadership training for Jewish-Israeli, Palestinian, Arab-Israeli and American teens. An intensive 17-day program of educational and social activities promoting tolerance and cross-cultural understanding, it admits 45 teenagers representing religious, geographic and political diversity.

In the morning dialogue sessions, which are led by adult facilitators, teens learn to engage in active listening even when they disagree. "Folks come in and have never had a conversation with anyone on the other side," explains Roy Gordon, a Hands of Peace facilitator. "They see the other party as a stereotype, not a person. They think, 'A Jew is a Jew. A Palestinian is a Palestinian. Everything I have against them, I put on you.' In the beginning, these kids really feel they're representing their people and feel a responsibility to not be soft or to give in, to not back down from what their people have stood for."

Through the dialogue sessions, teens are educated in a deeply personal way about "the other side," building surprising relationships along the way. They also practice conflict-resolution and mediation skills and are taught to think critically about history and politics.

In the afternoon and evenings, students take part in typical teenage activities, such as theater productions, a ropes course, baseball lessons, field games, film production and a cultural cooking day. Through those activities, the teens build trust and camaraderie and hone their communication and leadership skills.

"They tell their stories, share things that are not political. They share where they came from, how they got their names," Gordon explains. "Gradually, they come to see themselves as teenagers. They're bonded by being teenagers rather than separated by their cultures."

Towards the end of the session, participants reflect on what they've learned and consider how they might promote peace in their own communities. The whole process is designed to get them to work with the other side, to realize they don't have to agree, but they do have to be able to work together and see the other side as human, according to Gordon. Essentially, they learn that they can be both pro-Israel/pro-Palestine and pro-peace.

"When they first arrive, they say they came because they really wanted to learn about the other culture. But by the end of the camp, we learn that what they really wanted was the other side to meet and understand them," says Gordon, who also works as a volunteer mediator with adult and juvenile courts and calls the Hands of Peace program "a highlight of my year."

For many American participants, Hands of Peace is their first global engagement experience, and they play an important role as part of "the triangle" in the room, Gordon adds. "They're the neutral third party—it's why mediations work so well. They're able to ask the questions, like 'Why can't you just share the land?' They're able to be a bridge between the two parties."

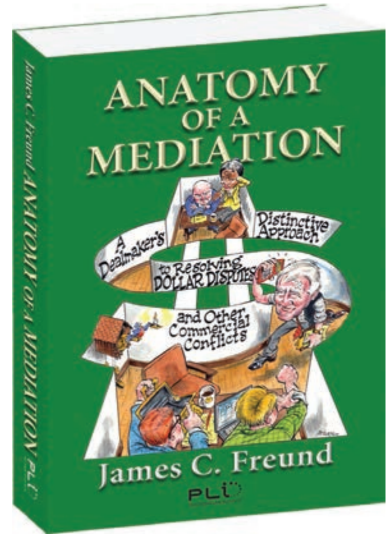
Every year, several participants are invited back for a second summer to engage in higher-level dialogue and act as role models for new participants. Hands of Peace also supports active alumni programs, which provide continuing opportunities to develop communication and peace-building skills. Many alums initiate peace-building projects in their own communities or join peace-building organizations. Several American alums have started school clubs focused on promoting global humanitarian consciousness, and others have pursued college majors or careers in Middle East diplomacy or international development.

Anatomy of a Mediation: A Dealmaker's Distinctive Approach to Resolving Dollar Disputes and Other Commercial Conflicts

By James C. Freund

REVIEWED BY RICHARD BIRKE

James Freund is not your average mediator, and his 10th book, *Anatomy of a Mediation*, is not your average mediation book.



Unlike most mediators, who started life as litigators and perhaps judges, Freund came up through the ranks as a dealmaker, not a dispute resolver. After 30 years doing mergers and acquisitions as a lawyer in a massive international law firm, he became a mediator. Now, more than two decades later, it seems he's pretty darn successful.

Freund distinguishes himself from the pack of mediators. He crafts a unique approach in which he always begins with a joint session (a common practice) and then breaks into caucus (again, very common), but once in caucus, he does not convey offers from one side to the other. Rather, he sees himself as negotiating with each side separately and independently of the other. This places the parties' perspective on the deal rather than on the moves of the other side.

Ever the iconoclast, Freund eschews labels such as evaluative or facilitative, and he is quite willing to offer a mediator's proposal—but he renames it something he calls a "Proposed Resolution of Dispute," or PROD.

Freund's eclecticism manifests itself in the book as well. Where many mediation teachers use theory and refrain from telling personal stories, Freund uses humor, personal stories and a consistent first-person narrative to demonstrate how to mediate in four contexts. He focuses on two-party, one-shot, pure money cases, where both sides are reasonable; the same situation where one or both are unreasonable; situations that are disputes that become deals; and multi-party mediations.

In contrast to most mediation books, which offer a spectrum of approaches to mediation and which discuss the upsides and downsides of the use of various techniques in various situations, Freund offers one approach, no contrasts, and he demonstrates its applicability in four fictional cases.

In the first case, the "Put" case, Freund walks the reader step-by-step through his approach to resolving a dispute over executive compensation. There are two variables: the base amount of compensation and the multiplier to be applied for the executive's severance. Freund starts with a joint session and then spends time in caucus with each side. He retires to think and determines that there is a final resting point in the negotiation at about $6.8 million. He determines that he will try to get the employer to pay $7.1 million and the executive to accept $6.5 million. That way, he's more likely to reach the target of $6.8 million. Freund demonstrates and discusses the various techniques he uses to move the parties toward his predetermined number, and he illustrates ways to use creativity to bridge small gaps at the endgame.

In the second case, "Art," a buyer has been unable to obtain financing for a very expensive painting, and the seller is trying to enforce a substantial liquidated damages clause. Here, Freund follows the same pattern of joint meeting, caucus and determination of the "proper" settlement range, and then the rest of the mediation is about him negotiating the parties toward that range. In the Art case, Freund concludes that the buyer has the stronger legal case and that the seller is being unreasonable in refusing to compromise further. Freund suggests ways to get unreasonable parties to compromise, and he demonstrates how he does it, right down to suggesting language mediators might use.

The book covers two more cases ("Split Up" and "Casino Caper") and lots more

See "Worth Reading" on Page 12

JAMS Ireland Set to Provide Clients with High-Quality ADR Services

JAMS International is partnering with two leading ADR practitioners in Ireland to form JAMS Ireland. The organization will provide highly experienced mediators and arbitrators to the growing number of businesses and individuals seeking resolution of their disputes in a process more efficient than the courts or international tribunals.

Lorraine Brennan, managing director for JAMS International, said JAMS Ireland is a joint venture that "will be a mediation provider but will also provide arbitration services." It will initially concentrate on cross-border disputes and will have offices in Dublin and Belfast, with cases centrally administered in London, she noted.

Brennan said JAMS International's caseload is "up dramatically over the past year." It's anticipated that there will be a caseload increase in Ireland as U.S.-based companies with operations in Ireland bring disputes to JAMS Ireland due to the stature of JAMS in the U.S., she suggested.

"Mediation in particular represents not only an effective and efficient means of dispute resolution for their clients, but is also an exceptional PR exercise in terms of client/public perception."

–Gavin Bonnar

Gavin Bonnar, a barrister and one of the two principals with JAMS Ireland, said that ADR was slow to take off in Ireland due to much lower upfront legal fees, which reduce the incentive of parties to seek less expensive alternatives to litigation early on in the process. Recent court rule changes mandating that parties consider ADR and a growing trend of courts referring cases to early neutral evaluation have begun to change the legal culture toward ADR as a useful process for resolving all manner of disputes. "In particular, there has been a move toward acceptance of the use of mediation or arbitration to resolve commercial cases," he added.

Gavin Bonnar,
Principal, JAMS Ireland

Paul Tweed, one of the two principals at JAMS Ireland and a senior partner at Johnsons Solicitors, said, "ADR has been very slow in taking off in Ireland because both sides of the legal profession have been resistant to the concept of mediation, which they still see as another attempt to dilute fees. The Irish government and the press have been focusing on a reduction in legal fees, rather than accepting that times are changing rapidly. Mediation in particular represents not only an effective and efficient means of dispute resolution for their clients, but is also an exceptional PR exercise in terms of client/public perception.

"However, with the judiciary and the government beginning to be more aggressive in their promotion of mediation, there is now a noticeable shift towards acceptance by the legal profession, albeit primarily in relation to matrimonial and larger commercial disputes," Tweed said.

According to Bonnar, "the EU directive on mediation of cross-border disputes was a game changer for ADR in Ireland and made everyone, especially practitioners, realize that ADR was coming to international disputes." This "made the judiciary more proactive" regarding the support and promotion of ADR, he noted.

The EU directive, Directive 2008/52/EC, requires member states to adopt legislation that provides courts with authority to refer cases to mediation, authorizes the direct enforcement of mediation settlement agreements, protects mediators from being called as witnesses and protects limitations periods once parties enter mediation.

With this in mind, JAMS Ireland will "focus on the EU directive and the opportunity in Ireland for lots of work because many U.S. companies have subdivisions in Ireland" and their disputes would be ripe for resolution through the cross-border mediation process, he said.

Tweed echoed Bonnar's thoughts, saying that while ADR is gaining in use generally, "the EU mediation directive has certainly motivated the Irish government and the judiciary to encourage mediation." Other areas of growth for ADR are "professional negligence, intellectual property and possibly media/entertainment law," he added.

Paul Tweed,
Principal, JAMS Ireland

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with a registrar in the United States or Japan," Schultz said. "Registrars generally comply with the transfer orders because not doing so can result in sanctions."

Arbitration may also better serve the unique needs of parties in domain name disputes.

"Since damages are not usually the goal, arbitration may make sense as being less expensive," said Crimi Speth.

Regardless of how brands will deal with disputes, it is important to have a strategy in advance of the launch of the new gTLDs.

"Brand owners should put a plan in place to determine at what point to take action against a domain name registrant," said Schultz. "Brand owners should assess their policing policies to determine the best course of action for their particular brands." ●

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topics. There is advice on mediation advocacy, advice on how to find a mediator, advice for mediators on how to work through some difficult situations and advice to clients on how to understand the mediation process. There's something in there for everybody.

Anatomy of a Mediation is an easy read, and Freund is a practiced and skilled storyteller. If I had one quibble, it would be that Freund glosses over the ethical issues associated with the mediator arriving at a solution and then bringing the parties there—sometimes without their full awareness of what's going on. Freund is comfortable that he's not doing anything deceptive or unethical, but in my view, he might have discussed this further.

Overall, the book is great, and I would recommend it to anyone interested in learning more about mediation. Freund's style of mediation is not for everyone, but there's still something in this book for every reader to learn. ●

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According to Tweed, Ireland's Arbitration Act 2010 "has generated much discussion and debate, but the impact has, in my experience, been less significant than would have been anticipated, although this situation is gradually changing, particularly with Ireland's profile being raised with its favorable tax treatment of corporations and the capital value of IP."

Tweed said, "It's still too early to assess how the new Court Rules on ADR and changes to the mediation law have impacted or will impact the immediate development of ADR in this jurisdiction, but the changes have certainly created a whole new niche in mediations and arbitrations." ●

JAMS DISPUTE RESOLUTION ALERT

An Update on Developments in Mediation and Arbitration