JAMS DISPUTE RESOLUTION
ALERT
An Update on Developments in Mediation and Arbitration

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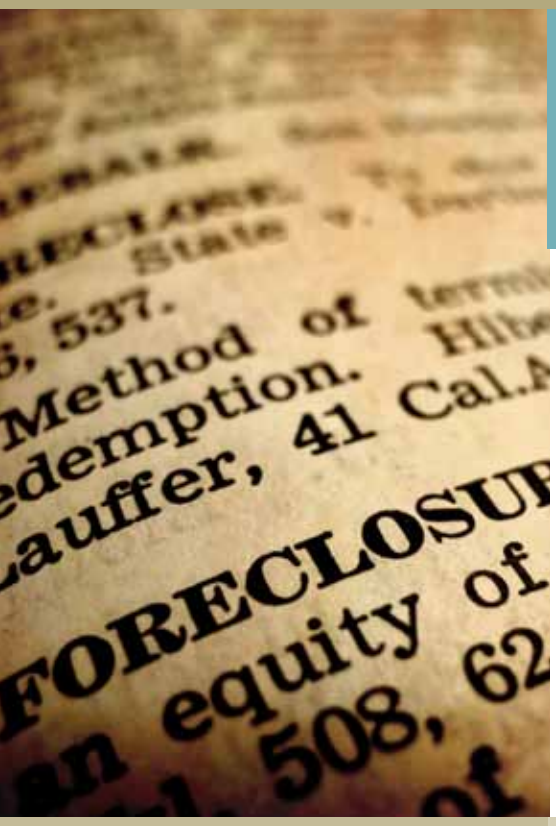
THE RESOLUTION EXPERTS JAMS



STATE MEDIATION FORECLOSURE PROGRAMS SHOW SUCCESS AFTER INITIAL START-UP DIFFICULTIES

By Justin Kelly

IN DEPTH

State mediation foreclosure programs have grown in use over the past few years in response to the ongoing residential foreclosure crisis. After facing some initial difficulties getting ramped up, they are becoming more effective in resolving foreclosure actions in both judicial and non-judicial foreclosure states, according to program managers.

Jacqueline Hagerott, manager of the Dispute Resolution Section at the Ohio Supreme Court, who hosts a monthly call with state mediation programs from across the country, said, "Overall as a concept, foreclosure mediation has been very successful for homeowners and lenders."

However, most state foreclosure mediation programs did face a few problems getting started, such as achieving effective communication between lender and homeowners facing foreclosure, and exchanging proper documents, she noted.

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WHAT'S INSIDE

ADR CONVERSATIONS

A Q&A with FINRA Dispute Resolution Executive Vice President George Friedman

This article explores why various rule changes were proposed by the Financial Industry Regulatory Authority (FINRA) over the past several years, how they have been implemented and to what extent they have improved the alternative dispute resolution process at FINRA for investors and brokers.

George Friedman
FINRA Dispute Resolution Executive Vice President

Q. Over the past several years, FINRA has proposed numerous rule changes to the Codes of Arbitration Procedure. What is the driving force behind these changes? Were they undertaken in the normal course of business, or were they driven by a grander plan aimed at improving the process?

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A. We have been working off a high-level blueprint formed back in 1996 with the publication of the Ruder Commission Task Force Report, which recommended several improvements to our dispute resolution forum. The report card we published in 2007 shows that we did an excellent job implementing these recommendations. We have also made improvements over the years not envisioned by the Task Force, such as making greater use of the Web. Our plan is driven by FINRA's mission of "investor protection." I would add fairness and efficiency for all parties are the driving forces behind our efforts to improve the forum.

"Fairness and efficiency for all parties are the driving forces behind our efforts to improve the forum."

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Q. A number of rule changes seems to have directly addressed areas of concern to investors—2007-21, Motions to Dismiss; 2009-008, Amend Uniform Registration Forms to Report Claims against Unnamed Parties as examples. How have they been received, and have they improved the process?

A. Again, the key driver for what we do here is investor protection. That's behind many of these changes. For example, the change we rolled out earlier this year to allow investors to opt for a panel consisting only of public arbitrators—that is, arbitrators with no connection to the securities industry—was implemented to address investor perceptions that it was not fair to have a non-public arbitrator on each three-arbitrator case.

In late 2008, the SEC approved SR-FINRA-2007-021, a rule change to significantly limit the number of dispositive motions filed in the arbitration forum, to curb abuses concerning the filing of dispositive motions and ensure that investors maintain the right to have their arbitration claims heard. The rule strictly limits the grounds for dispositive motions filed before the conclusion of a party's case-in-chief. In other words, the rule is designed to ensure that the investor gets their "day in court." Dispositive motions filed in its forum decreased by 66 percent as a result of the rule.

Another example of a 2009 rule change geared toward investor protection requires registered firms to report allegations of sales practice violations against an individual broker made in arbitration claims or civil lawsuits that do not specifically name the broker as a respondent or defendant. Before, firms were required to report customer allegations against a broker in an arbitration claim or civil litigation complaint only if the case specifically named the broker as a respondent or defendant. A settlement or ruling resolving the allegations also was not reported if the broker was not named as a respondent or defendant. Consequently, that important information was unavailable to regulators, to prospective broker-dealer employers and to the investing public through FINRA BrokerCheck. Under the new rule, firms are required to report customer allegations against a broker in an arbitration claim or civil litigation complaint not only if the legal document specifically named the broker as a party, but also if the broker was named in the body of the claim or civil complaint or could reasonably be identified from the content of those documents.

Q. A couple of rule changes —2008-47, Increased Single Arbitrator Threshold to $100,000; 2009-15, Expedited Promissory Note Cases—were directed at streamlining or limiting delays in the arbitration process. Have they had their intended effect, and how have they been received by parties?

A. Yes, these rule changes have streamlined the process and have been well received by the parties. In February 2009, the SEC approved a rule change to amend the FINRA Codes to raise the amount in controversy that would be heard by a single chair-qualified arbitrator to $100,000. Parties benefit from the new rule by one, reduced case processing times; two, reduced time reviewing potential arbitrators; and three, reduced hearing session fees.

The number of promissory note cases has more than doubled in the past two years. In April 2009, the SEC approved a change to the Industry Code to expedite the administration of promissory note cases. The new procedures streamline the process for these cases and reduce expenses for the parties while maintaining the procedural safeguards in the Industry Code for the associated person against whom a member asserts a claim. Specifically, the expedited procedures provide for the appointment of a single arbitrator, simplified discovery procedures and an arbitrator's decision based on written submissions.

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State Mediation Foreclosure Programs Show Success after Initial Start-up Difficulties Continued from Page 1

Some of the difficulties in achieving effective communication stem from "homeowners being terrified over the prospect of losing their home and having difficulties getting to the right lender department," she explained.

Jacqueline Hagerott
Manager of the Dispute Resolution Section at the Ohio Supreme Court

Hagerott said that on the lender side, there was some initial reluctance to using mediation, but "since lenders have realized that mediation works well and now have a better understanding of the process, they have become more comfortable with mediation and are more willing to use it to resolve foreclosure actions."

Therefore, once state programs "were able to get borrowers and lenders to the table to mediate, they have been able to get resolution in a solid percentage of cases," she said. "We are seeing good success rates, with homeowners and lenders coming up with mutually acceptable solutions," she added.

Another key to success in mediation comes with having borrowers meet with a housing counselor, especially one approved by the Department of Housing and Urban Development (HUD), she said. Housing counselors assist parties with getting a hold on their expenses, which gives them a clearer understanding of what they can and cannot afford with regard to their home, she explained.

"Homeowners meeting with a HUD-approved housing counselor prior to mediation is critical to success," she stressed. Homeowners must have all their financials in order to have an effective mediation and to ensure that any resolution reached during mediation can serve as a long-term solution, she added.

Hagerott explained that Ohio, a judicial foreclosure state, has had solid success with its program based on its design and by getting buy-in from lenders, which was achieved by including them in the initial design process. Being a judicial foreclosure state also simplified the process somewhat because the courts are empowered to order the parties to mediation to resolve a foreclosure action, she added.

Carol Gilbert, Assistant Secretary, Division of Neighborhood Revitalization in the Department of Housing and Community Development, said the mediation foreclosure program in Maryland, a state with both judicial and non-judicial foreclosures, was initially established in the spring of 2010. "The motivation behind the law was recognition that many homeowners had been put in foreclosure before a final loss mitigation review had been completed."

Maryland lawmakers adopted legislation that provides homeowners with the option to request mediation prior to a foreclosure moving forward, she said. Once requested, the court will send the case to the Office of Administrative Hearings, where "our very well trained administrative law judges, who are steeped in the state's foreclosure process and foreclosure resources, serve as mediators," she explained.

Carol Gilbert
Assistant Secretary, Division of Neighborhood Revitalization in the Department of Housing and Community Development

According to Gilbert, the mediation program was structured to allow only administrative law judges (ALJs) to serve as mediators because "we have this infrastructure in place, which serves as a well-oiled mediation machine." In Maryland, ALJs functioning as mediators may conduct only facilitative mediation, she noted.

Initially, "we had fewer mediations than predicted, but the lower number can be attributed to the national robo-signing controversy, which forced many lenders to freeze foreclosure actions in the fall of 2010, and the need for lenders to adapt to the new law," she explained. However, "we are beginning to see an uptick in initial foreclosure filings," she added.

According to Gilbert, the process was "complicated for borrowers, so in 2011, lawmakers passed a reform of the law that streamlined the process and made the order of documents sent to borrowers more uniform." The revised law is "more consumer-friendly" by providing homeowners with 25 days to respond instead of 15 and requiring that the mediation option form be on colored paper and placed near the top of the pile of documents homeowners receive, she explained.

"We are seeing good success rates, with homeowners and lenders coming up with mutually acceptable solutions."

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State Mediation Foreclosure Programs Show Success after Initial Start-up Difficulties Continued from Page 3

"Currently, the success rate is 40 percent, and while we're not unhappy with this, we would like to see some improvement," Gilbert noted. Some mediation foreclosure programs are getting rates closer to 60 percent, she added.

Two very effective ways to raise success rates would be to ensure that "borrowers are prepared for mediation by HUD housing counselors or have legal representation," she said, adding that parties are "much more likely to reach resolution through mediation if those factors are present."

Karen Borgstrom
Director of the New Hampshire Judicial Office of Mediation and Arbitration

Karen Borgstrom, Director of the New Hampshire Judicial Office of Mediation and Arbitration, said that in response to the growing foreclosure crisis in 2009, New Hampshire put together a committee to look at the issue and involved all the stakeholders in the process, including lenders, consumer advocates, mortgage servicers, attorneys and ADR neutrals, to develop a mediation process to handle foreclosures. In response to the committee's work, legislation was passed establishing a voluntary mediation foreclosure program, she added.

According to Borgstrom, mediation has worked well where local lenders were involved because they understand the foreclosure process in New Hampshire and were aiming to resolve foreclosures prior to the establishment of the mediation program.

"Large national lenders have worked well with us once they've became familiar with the mediation foreclosure process," which in New Hampshire is a non-judicial process, Borgstrom remarked.

"In April 2011, borrowers began asking courts to stay foreclosures, and courts are now authorized to order borrowers and lenders into the mediation program so foreclosure can be handled by our own mediators," she said. "Courts were glad to have mediators handle cases, and lenders are assigning local counsel to handle the actions," she noted, adding that "we know who we're working with, which makes scheduling easier and has lead to some success."

"Mediation foreclosure programs serve a useful purpose connecting the borrowers and lenders and getting them to the table," she said, adding, "We hope the good experience lenders have in Superior Court–ordered mediation will encourage them to use the voluntary pre-suit program." ●

New Hampshire

"In April 2011, borrowers began asking courts to stay foreclosures, and courts are now authorized to order borrowers and lenders into the mediation program so foreclosure can be handled by our own mediators... we know who we're working with, which makes scheduling easier and has lead to some success."

New York State Bar Calls for Creation of International Arbitration Center in NYC

A New York State Bar Association task force that looked at New York law relative to international law and practice has recommended the creation of an international arbitration center in the city that would be available to all parties involved in international disputes.

Joseph T. McLaughlin
New York State Bar Association, JAMS neutral

Joseph T. McLaughlin, chair of the task force and a JAMS neutral based in New York, said the *Task Force on New York Law in International Matters*, a panel of international legal experts aiming to strengthen New York's role in international arbitration, issued a series of recommendations related to international law and practice for the state. The one that has attracted the most attention calls for the establishment of a "permanent center for arbitration available to parties from all over the globe to resolve their disputes."

He noted that such centers already exist in London, Paris, Geneva, Singapore, Hong Kong and Beijing, but not in New York. Currently, many parties wishing to resolve international disputes in New York end up holding their arbitration sessions in hotels. "This is not good for the confidentiality of the process or for the handling of documents, and is very expensive," he added.

According to McLaughlin, "no matter the rules, whether ICC rules, an ad hoc arbitration or other rules, meeting rooms would be available to anyone. This would be much better for the confidentiality of the process and for the parties involved. An international arbitration center would be of great convenience for parties and clients, and help us maintain New York's standing and grow it in the world," he suggested.

McLaughlin said the task force looked into what such a center might generate in revenue for business, the city and state. It found that if current law firm business were expanded by 10 percent, an additional $200 million in revenue would be generated; if business were to expand by 20 percent, $400 million in revenue would be generated, he noted. He also remarked that additional revenues would be generated by increased use of "hotels, court reporters, experts, and all these additional revenues would add to the tax base of the city and state." These findings make the center "very attractive from the economic point of view," he added.

Stephen Younger
Immediate Past President of the New York State Bar Association

Stephen Younger, Immediate Past President of the New York State Bar Association, a task force member and attorney with Patterson Belknap Webb & Tyler, said, "The world has become flat, the law has become flat, and we now need to attract legal business to New York." He noted that "$7 billion is exported annually by lawyers instead of being generated domestically."

According to Younger, New York possesses "a stable body of law, a great stable of advocates and arbitrators and a great set of providers." Establishing a center would "cement New York as a center for international arbitration," he added.

New York

Judith Kaye, of counsel at Skadden, Arps, Slate, Meagher & Flom, Chief Judge of the New York Court of Appeals from 1993-2008 and a task force member, said it would be "tremendously useful for all to have an international arbitration center in New York City."

She said that she recently "came off the bench and scratched her head as to why there is no permanent center in New York City." This was made even more evident after a recent visit to the new international arbitration facility in London, she added.

"We have the spark; now we need to kindle the flame," she said.

Younger said that while mediation is heavily used domestically, the same cannot be said in the international context. Setting up an international arbitration or alternative dispute resolution center could "help get people in the international sphere to understand the benefits to using mediation and convince them to use it more often to resolve their disputes," he said.

According to McLaughlin and Younger, the proposal to establish an international arbitration center received a high-powered endorsement when Mayor Michael Bloomberg publicly announced his support.

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UN Passes First Resolution on the Use of Mediation to Peacefully Resolve Conflict BY KEVIN ASCHENBRENNER

This summer saw a watershed moment in the promotion of international conflict resolution, with the United Nations General Assembly adopting text calling on member states to make the most of mediation to peacefully resolve disputes. Noting the "untapped potential" of mediation, the resolution, drafted as a joint effort by groups in Finland and Turkey, encourages countries to optimize their use of mediation and other tools outlined in Chapter VI of the UN Charter for the peaceful settlement of disputes as well as conflict prevention and resolution. The text, adopted unanimously without a vote, is the first resolution on the use of mediation ever passed by the United Nations.

Doug Noll
Professional Mediator and Author

"This was an epic event, symbolizing the UN's new efforts to use mediation in the peace process," said Douglas E. Noll, a professional mediator and the author of the book *Elusive Peace: How Modern Diplomatic Strategies Could Better Resolve World Conflicts.* "Mediation is at the core of a 21st century approach to international negotiations."

"The UN's support and expansion of mediation recognizes the unique advantages of a peace-building process, which is universally applicable to all cultures."

The General Assembly resolution also marks mediation's rise to prominence on the international stage.

"Mediation is experiencing international growth as a court-related tool for providing greater access to justice," said Lynn H. Cole, president of Mediators Beyond Borders, the not-for-profit that brings together volunteer mediators and allied professionals to collaborate on building conflict resolution capacity in underserved areas. "Mediation is in use by several leading commercial dispute resolution organizations to enhance global economic transactions. The UN's support and expansion of mediation recognizes the unique advantages of a peace-building process, which is universally applicable to all cultures."

The resolution also lays a foundation for the expanded use of mediation in peacefully resolving conflict.

"It provides an anchor for the UN and other actors who want to strengthen their mediation efforts," said Simon Mason, Senior Researcher at the Center for Security Studies, ETH Zürich. "The process involved to agree on the text meant that very different actors had to discuss and debate mediation, and therefore become more aware of what mediation is and how it can be used."

In addition to calling generally for the use of mediation in resolving conflict, the General Assembly text specifically encouraged member states to "promote women's equal, full and effective participation" as lead mediators and to "develop national mediation capacities in order to ensure coherence and responsiveness." This emphasis on geographic diversity as well as the role of women is seen as crucial to the success of mediation as a universal tool for peace.

"Women consistently bring issues to the peace table that men in patriarchal cultures ignore and dismiss," said Noll. "These are issues around children, education, health, food, water and other vitally important issues to families. This acknowledgment is a significant shift in UN policy."

The ultimate test of the General Assembly's resolution will be the real-world impact of the principles laid out in the text. And, note observers, the devil will be in the details.

Simon Mason
Senior Researcher at the Center for Security Studies, ETH Zürich

"One challenge will be when a mediation-related topic becomes hot in the General Assembly," said Mason. "Take for example the upcoming General Assembly vote on Palestinian statehood. How will a General Assembly committed to mediation react to such a question? Can the member states of the General Assembly recognize Palestinian statehood while at the same time following the mediation logic that would push for serious negotiations between Palestinians and Israelis as a path to statehood?"

The answer, say some, may lie in the greater integration of mediation within the functioning of the UN. To some extent, this is already underway, but more work is needed.

"The UN several years ago recognized the exponential growth of mediation by developing the Mediation Support Unit under the direction of Kelvin Ong," said Cole. "There is also now an Assistant Secretary-General for Ombudsman

United Nations

"Mediation is in use by several leading commercial dispute resolution organizations to enhance global economic transactions. The UN's support and expansion of mediation recognizes the unique advantages of a peace-building process, which is universally applicable to all cultures."

Lynne Cole
President of Mediators Beyond Borders

and Mediation Services, which is mostly focused on internal issues. That these services are located inside the political department may have some advantages and disadvantages. Both services can and need to be greatly expanded and well-funded."

Mediators Beyond Borders, said Cole, is working with these groups and others within the UN to build on this framework and grow their capacity and skills. She noted the role of private providers such as Mediators Beyond Borders, JAMS and others will be crucial to the implementation of the UN's goals.

"Private NGOs and others need to collaborate on a large scale to support this UN resolution in its implementation," said Cole.

She points to a current joint effort between JAMS and Mediators Beyond Borders in Ecuador as an example of this collaboration.

"In March 2010, Mediators Beyond Borders and JAMS embarked on the Ecuador Project," said Cole. "The project seeks collaboration with Ecuador's ADR leaders and ADR practitioners with the goal of further enhancing confidence and participation in the use of mediation in Ecuador."

Cole said the project will assist in the development and expansion of Ecuador's ADR curriculum and practice, and in the promotion and increased use of mediation for resolving disputes in both the private and public sectors of Ecuadorian society. The project, added Cole, is even more important due to current developments in the country.

"In light of recent changes in the judicial structure of the Ecuadorian government, it is anticipated that the interest and need for mediation expertise will grow," she said. "The Ecuador Project will benefit Ecuadorian society on a macro level by promoting greater use of mediation in the resolution of disputes."

Despite the hard work that lies ahead, however, Cole is optimistic about what the General Assembly's resolution means for the use of mediation.

"The text is workable and applicable," she said. "That the United Nations has now officially adopted it is an exciting prospect and bodes well for peace-building." ●

FEDERAL CIRCUIT COURTS

Eleventh Circuit Follows U.S. Supreme Court to Find Class Action Waiver Enforceable

Cruz v. Cingular Wireless, LLC
2011 WL 3505016
C.A.11 (Fla.), August 11, 2011

Lourdes Cruz and a putative class of similarly situated people filed a lawsuit in federal court alleging that their cell phone provider had charged them a "roadside assistance plan" that cost $2.99 per month and that they never requested. The provider moved to compel individual arbitration pursuant to a clause in the cell phone contracts that required all disputes to be resolved through arbitration and that purportedly waived the right to proceed in a class action.

In opposition to the motion to compel, Cruz argued that Florida law prohibited the enforcement of that clause because to do so would effectively immunize the carrier from liability for wrongful acts. The district court granted the motion and Cruz appealed.

The Court of Appeals for the Eleventh Circuit upheld the ruling compelling arbitration, noting that while the case at bar was pending, the U.S. Supreme Court decided the case of *AT&T Mobility LLC v. Concepcion*, which held that state laws which classified most collective-arbitration waivers in consumer contracts as unconscionable, and thus unenforceable, was preempted by the Federal Arbitration Act. Following *Concepcion,* the Court held that the agreement was enforceable.

They stated, "In light of *Concepcion*, our resolution of this case does not depend on a construction of Florida law. To the extent that Florida law would require the availability of classwide arbitration procedures in this case—in spite of the parties' agreement to submit all disputes to arbitration on an individual basis only —simply because the case involves numerous small-dollar claims by consumers against a corporation, many of which will not be brought unless the Plaintiffs proceed as a class, such a state rule is inconsistent with and thus preempted by FAA § 2."

Third Party Insurer not Allowed to Enforce Arbitration Contract between Plaintiff and Different Insurer

Lawson v. Life of the South Ins. Co.
2011 WL 3476876
C.A.11 (Ga.), August 10, 2011

Barbara and Jerry Lawson bought a used Chevy Blazer from a dealership. They financed the car and the finance agreement contained an arbitration clause. The loan agreement also gave the Lawsons the right to buy term life insurance for a one-time payment of around $530. The Lawsons elected to purchase the insurance, the price of which would be added to their loan.

The Lawsons also signed a credit term life policy with Life of the South Insurance. This policy did not contain an arbitration clause.

The Lawsons later sued Life of the South in a putative class action alleging that Life had kept accrued interest that should have been returned to its customers. Life removed the case to federal court and moved to compel arbitration under the contract the Lawsons signed with the dealership. That motion was denied and Life appealed.

The Eleventh Circuit Court of Appeals affirmed the ruling below, first holding that state law applies in such questions and that "Life of the South contends that it can enforce the arbitration clause in the loan agreement, to which it was not a party, against the Lawsons who were parties, under two traditional state-law principles. Life of the South essentially argues that it can compel the Lawsons to arbitrate under their loan agreement with the car dealership because it is a third party beneficiary to that agreement's arbitration clause, or that it can do so under the doctrine of equitable estoppel. We disagree."

Regarding the third-party beneficiary argument, the Court found that despite the fact that the arbitration clause was quite broad, it applied only to the Lawsons, the dealership and the insurer (Chase) and its assignees.

The Court also found the equitable estoppel argument to be unavailing where the legal cause of action was

not based in the original contract. The class action had nothing to do with the car loan or the term life insurance, and as such, was not a proper case for an estoppel argument to prevail.

Arbitration Clause Enforceable Against Signatory Entity, not Against President or Vice President

Covington v. Aban Offshore Ltd.
2011 WL 3500992
C.A.5 (Tex.), August 10, 2011

Aban hired Beacon to perform work on its oil rig. When the work was alleged to be unsatisfactory, Aban relied on a clause in its contract with Beacon and initiated arbitration against Beacon, and against Guy and Russell Covington, Beacon's president and vice president. The Covingtons petitioned the Texas state court to declare them to be excluded from the reach of the arbitration clause. Aban moved in federal court to compel arbitration.

The federal district court granted the motion, holding that "federal and Texas state courts have allowed non-signatory agents, employees, and representatives of a signatory principal to compel arbitration when the non-signatories' alleged wrongful acts relate to their behavior as agents and fall within the scope of the arbitration agreement." The Covingtons appealed to the Court of Appeal for the Fifth Circuit.

The Court followed the Texas case law and the Third Restatement of Agency to conclude that the district court had erred. "We conclude that under established principles of agency and contract law, the fact that Beacon entered into the contract with Aban, thereby agreeing to the arbitration clause, did not cause Beacon's agents, the Covingtons, to be personally bound by that agreement, even though Guy Covington executed the contract on behalf of Beacon. The Restatement (Third) of Agency states: 'When an agent acting with actual or apparent authority makes a contract on behalf of a disclosed principal, (1) the principal and the third party are parties to the contract; and (2) the agent is not a party to the contract unless the agent and third party agree otherwise.' "

The Court concluded, "Under ordinary principles of agency law, their positions as Vice–President and President of Beacon are insufficient to personally bind them to the arbitration agreement. Aban points to nothing that indicates that the Covingtons empowered Beacon to bind them individually. Therefore, we conclude that they are not parties to, or bound by, the arbitration agreement."

STATE COURTS

New York: Defendant Successfully Precludes Plaintiff from Re-Litigating Issue Resolved in Earlier Arbitration with Different Defendant

Bernard v. Proskauer Rose, LLP
2011 WL 3332371
N.Y.A.D. 1 Dept., August 4, 2011

Russel Bernard worked for OCM as a fund and investment manager. He failed to promote a particular fund and in addition, he made plans to purchase real estate without OCM's permission. Bernard consulted with Proskauer on how to structure his departure from OCM. Based on Proskauer's advice, Bernard resigned and started a new venture, taking the real estate investment with him.

When OCM refused to pay Bernard various fees, he initiated arbitration. OCM counterclaimed. In an interim award, the arbitrator ruled that OCM was harmed by the failure to promote the fund and the taking of the investment opportunity. The arbitrator ultimately awarded OCM $19 million.

Bernard then sued Proskauer alleging that it gave him faulty advice. He alleged that had he been given proper advice that OCM would never have sued. Proskauer moved to dismiss and the motions court granted the motion, finding that Bernard had failed to state a cause of action.

On appeal, the New York Appellate Division affirmed, finding that the arbitrator had concluded that Bernard's course of bad acts began long before Proskauer had rendered any advice, and that Bernard had withheld critical facts. The Court found the motions court to have acted properly in using those findings as conclusive evidence of the lack of merit in Bernard's complaint. The Court found the rulings to be conclusive, and it did not matter that Proskauer was not a party to the prior arbitration.

"The factual findings and issues resolved by the arbitrator establish that it was plaintiff's own misconduct prior to and apart from any advice from defendants that led to his termination for cause. The plaintiff had a full and fair opportunity to litigate these facts and issues at arbitration, and the application of collateral estoppel precludes him from re-litigating them in this malpractice action. Because the arbitral findings establish as a matter of law that defendants were not the cause of plaintiff's losses, the motion court properly dismissed plaintiff's complaint. Plaintiff's claim that had he not resigned, he may have been able to hide his fraudulent activities, continue to collect fees, and reach an agreement with OCM is purely speculative and does not raise a triable issue of fact."

New York: Arbitrator's Ruling of Law Outside Scope of Review, But Failure to Abide by Limitation on Remedies Results in Partial Reversal

Merrick Union Free School Dist. v. Merrick Faculty Association
2011 WL 3310358
N.Y.A.D. 2 Dept., August 2, 2011

When a school district and its unionized teachers ran into a dispute, they went to arbitration pursuant to their collective bargaining agreement. The arbitrator concluded that a particular civil service memo had the force and effect of law, and ruled in favor of the teachers. The arbitrator gave both prospective and retrospective relief.

The school district successfully moved to vacate the award in the Supreme Court, arguing that the arbitrator exceeded his authority in determining that the memo could trump the CBA. The teachers appealed.

On this issue, the New York Court of Appeal found the lower court to have erred. "Even if the arbitrator misconstrued or misapplied substantive rules of law, his determination did not exceed his authority and is not subject to judicial review."

However, the Court did find that in this case the arbitrator exceeded a specific limitation on his power in granting a remedy that violated a term of the CBA limiting remedies to prospective remedies.

The Court cited the CBA's relevant provision. "[I]n the event any provision or provisions hereof are held to be unlawful, the remaining provisions of this Agreement shall remain in effect and the parties thereto shall meet [forthwith for] the purposes of modifying the same to conform with the law and/or negotiating provisions in lieu thereof." They went on to conclude that "the only appropriate relief that the arbitrator could have crafted was the one specifically enumerated in [the CBA]." They remanded the case to the court below with instructions to order the arbitrator to "fashion a prospective remedy consistent with the determination in the arbitration award that the Memo has the force and effect of law and in accordance with… the CBA."

Georgia: Allegation of Arbitral Bias Fails for Lack of Evidence

Azordegan v. Ebrahimi
2011 WL 3370450
Ga.App., August 5, 2011

A party who was aggrieved by an arbitration award moved to vacate, alleging arbitral bias. However, he failed completely to provide evidence to meet his burden of proof so the confirmation of the award against him was confirmed.

"According to Azordegan's appellate brief, the arbitration resulted from a dispute concerning obligations pursuant to an agency agreement with appellee Noujan Paul Ebrahimi. No agency agreement has been made a part of the appellate record. What is more, the record fails to reveal what issues were presented for specific decision by the arbitrator. The record does reflect that a hearing was held before the arbitrator, who thereafter issued the contested award." In the absence of more information, the Court concluded that the loser in arbitration failed to meet their burden of proof. ●

National Association for Community Mediation Serves as Clearinghouse of Information and Unites People with Local Centers

The National Association for Community Mediation (NAFCM), an Arizona-based organization, serves as an umbrella organization accumulating knowledge and information that can be used by local community mediation centers to enhance and broaden their ability to serve the public.

Justin R. Corbett, executive director, said it serves as a national clearinghouse of information related to community mediation by "aggregating wisdom in the field, providing trainings and helping to amplify the voice of community mediation throughout the country."

"We also help create a sense of community, which is important due to the stressful, difficult, day-in and day-out work that those involved in community mediation programs face," he said.

NAFCM also uses its vast knowledge of the field to assist in the establishment of new community mediation centers when contacted by individuals or organizations interested in providing this valuable service in a new jurisdiction, he said. "We have also helped organize and obtain funding for community mediation centers in more than 40 countries," he added. The JAMS Foundation has assisted NAFCM by providing quality control and start-up funds, he noted.

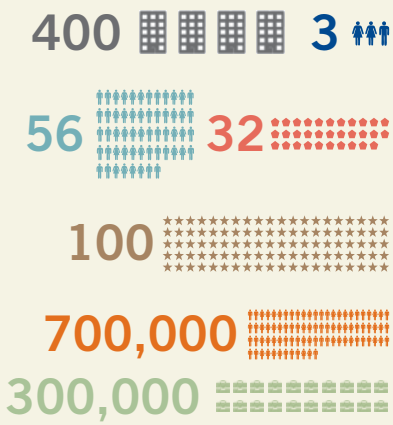
NAFCM has recently asssisted local centers' involvement in Veteran Reintegration Programs by providing training for volunteers and mediators, and directing veterans, their families and co-workers to local centers. The work revolves primarily around helping veterans deal with family, workplace and community conflict, and aims to "get them back into a community mind-set," he said.

Corbett said NAFCM has a long history of steering people to local community mediation centers. This function was enhanced in January 2011, when NAFCM "made this process more public-friendly by incorporating an interactive online map of programs directly into our website. Now, individuals need only zoom, click and call their nearby program, rather than first contact NAFCM in search of a referral. Since the launch of this online map, we've received thousands of hits per month," he explained.

NAFCM is also creating a national database that will include mediation training agendas, mediation descriptions, sample mediation forms and best practices that will be available to various community mediation centers around the country, he said. It also "hosts national calls with the community mediation centers, hosts a national listserv, a topic listserv, and connects centers through

See 'Good Works' on Page 12

The State of Community Mediation: 2011



- There are 400 community mediation programs or centers in the U.S., with an average of three staff members per program.
- The average number of volunteer mediators associated with the centers is 56, and they offer 32 distinct types of ADR services, including conciliation, small-group facilitation, parenting education and public presentations.
- The centers also offer almost 100 distinct mediation case services, including agricultural, court-connected small claims, elder, foreclosure, peer, police/citizen and victim-offender.
- The report found that there were more than 700,000 annual service recipients, with an annual volume of more than 300,000 cases.
- It also found that there currently are more than 20,000 volunteer community mediators.

= 100 mediation programs or centers = 10,000 annual service recipients / volunteer community mediators = 10,000 cases

National Association for Community Mediation Serves as Clearinghouse of Information and Unites People with Local Centers Continued from Page 11

social media, including YouTube, ADRhub, Facebook and Twitter," he added.

According to Corbett, it is "getting more difficult for community mediation centers as state budgets have to be balanced and their line items are getting slashed, with New York alone cutting funding 50 percent this year." However, as funding gets reduced, NAFCM can step in and lobby to restore funding or, in the alternative, help local centers identify and apply for grants, he noted. NAFCM will also apply for national grants that local centers are not eligible to apply for, he added.

Corbett said that as a result of these cuts in state budgets, NAFCM will soon begin to provide list of foundations offering funding to community mediation programs and help local centers with leads to these various funding sources.

NAFCM recently released a report titled "The State of Community Mediation: 2011."

According to the findings in the report, there are 400 community mediation programs or centers in the U.S., with an average of three staff members per program. The average number of volunteer mediators associated with the centers is 56, and they offer 32 distinct types of ADR services, including conciliation, small-group facilitation, parenting education and public presentations.

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The 2011 report can be found at http://go.nafcm.org/TheState.

"People in community mediation centers are doing fabulous work and making a real difference in the communities," he stressed. "There is a great collection of people who want to help and give back to their community through local mediation centers," he concluded. ●

Continued from Page 5

New York State Bar Calls for Creation of International Arbitration Center in NYC

McLaughlin said, "We're in discussions with the mayor and the Economic Development Corporation to help make space for us. We're also talking to the United Nation's economic council about space there and the Port Authority about using space in one of the new buildings going up where the World Trade Center once stood."

In the meantime, JAMS and the ICDR have offered the use of their meeting rooms until a more permanent space can be found, he explained. With 34 meeting rooms at JAMS and another 14 at the ICDR, parties to international disputes would have ample space in which to conduct arbitrations, he added.

McLaughlin said the task force also recommended that New York adopt the Revised Uniform Arbitration Act and the UNCITRAL Model Law. He noted that a number of countries, including most recently France and Ireland, have adopted or revised their arbitration laws to make them more attractive to parties to international disputes. France in particular has designated certain judges to handle all cases and issues related to international arbitrations, he added.

Kaye noted that another recommendation calls for designating one or more judges within the Commercial Division to handle all matters relating to commercial and international arbitration cases.

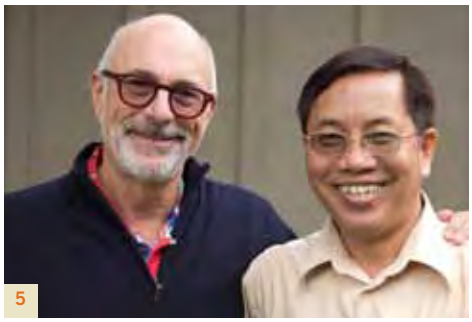
McLaughlin noted that this idea has the backing of New York Court of Appeals Chief Judge Jonathan Lippman. Kaye, who is spearheading this effort with the support of the chief judge, said, "We are moving ahead with getting court rules that could have a combination of a rocket docket and designated judges to handle all international arbitration cases in a short time period." This way, parties would know exactly whom to go to and how long the process would take, which is a very important consideration for parties when they are deciding where to conduct their arbitration, McLaughlin added.

A final recommendation calls for an increase in CLEs related to international arbitration, and in particular related to drafting arbitration agreements and issues specific to international arbitration, he said. CLEs were seen as an effective way to build knowledge in attorneys tasked with handling international arbitrations, he explained

New York is not the only major city in the United States aiming to create an international arbitration center. An effort to establish an international arbitration center is currently underway in Atlanta, lead by the Metro Atlanta Chamber, as well as in Miami where local attorneys established the Miami International Arbitration Society and are pushing for a permanent center in the city. ●

Weinstein International Fellows Connect in Napa

1. The 2011-2012 Class of the Weinstein International Fellowship program. From L-R, Peter Kamminga of the Netherlands; Savath Meas of Cambodia; Gabriela Asmar of Brazil (seated); Paola Cecchi Dimeglio of France; Pema Needup of Bhutan (seated); Michael Jiang of China; Hon. Daniel Weinstein (Ret.); Laila Ollapally of India (seated); JAMS Foundation Executive Director Jay Folberg; JAMS Executive Vice President and General Counsel Jay Welsh; Manuela Grosu of Hungary (seated); Vivian Feng of China, guest; Mushegh Manukyan of Armenia; Dawn Chen of China (seated); Evgeni Georgiev of Bulgaria; Andrew Lee of China; and Dimitra Triantafyllou of Greece.



2. JAMS President and CEO Chris Poole is flanked by Evgeni Georgiev of Bulgaria and Gabriela Asmar of Brazil.

3. The 2011-2012 Fellow Class included three from China. From L-R, Andrew Lee, Michael Jiang, and Dawn Chen.

4. JAMS Chairman of the Board Bruce Edwards, Esq., JAMS Neutral Hon. Rebecca Westerfield (Ret.) and Fellow Dimitra Triantafyllou of Greece.

5. JAMS Foundation Executive Director Jay Folberg and Fellow Savath Meas of Cambodia.

6. Judge Daniel Weinstein introduces Ambassador David Carden who spoke on diplomacy and mediation to the Fellows.

Now in its third year, the JAMS Foundation offered Weinstein International Fellowships to 13 ADR professionals from the around the world. This year's class includes countries like Armenia, Brazil, China, Greece and India. Though they are from very different cultures, they all share the common goal of furthering the growth of ADR around the world. Because many of the Fellows work alone in their respective countries, laboring in near obscurity, the Weinstein program also gives them the chance to make professional connections that will sustain them when they return home.

Over the week of September 6-11, all 13 fellows and members of the JAMS Foundation gathered at the JAMS San Francisco Resolution Center and the Weinstein Mediation Center in Napa Valley for training and networking. The weekend gives them the opportunity to meet their colleagues, develop personal and professional relationships and discuss the future of ADR. ●

JAMS International Strengthens Its Position as Global ADR Leader, Launches More Than 40 New Panelists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1. Lorraine M. Brennan, managing director of JAMS International, gives everyone a warm welcome.

2. Charles Flint QC, of JAMS International from the UK, talks to John Fordham, head of litigation at Stephenson Harwood.

3. New panelists getting to know one another: Jonathan Lux of the UK talks to Machteld Pel of the Netherlands (L-R - Jonathan Lux (JI), Machteld Pel (JI), Tim Wallis of Expedite Resolution)

4. Chris Poole, JAMS president and CEO, delivers remarks at the launch event.

5. Launch party attendees take in the architecture at St. Paul's Cathedral.

JAMS International, the European arm of JAMS, the world's largest private provider of mediation and arbitration services, welcomed more than 40 mediators and arbitrators to its European panel at a launch event on September 22, 2011 at St. Paul's Cathedral in London. The panel brings together some of the most seasoned ADR specialists in the world and cements JAMS International's growing presence in the global ADR community.

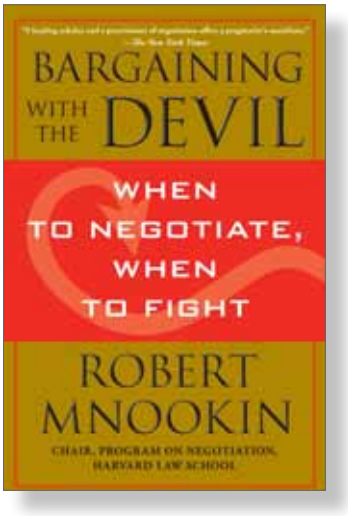
JAMS International provides a valuable option within the ADR market in Europe. The international cross-border ADR specialists reside in countries throughout Europe and handles disputes worldwide. The new panelists are based in Belgium, England, Germany, Italy, the Netherlands, Romania, Russia, Spain and Switzerland. They include accomplished judges and attorneys who have built their careers and reputations in specific market sectors and understand the intricacies of different industries.

"We're pleased to introduce the JAMS International panel, which includes some of the most knowledgeable and experienced mediators and arbitrators in Europe," said Lorraine M. Brennan, JAMS International managing director. "With this distinguished and well respected group, JAMS International takes its place as a leading global ADR provider." ●

Bargaining with the Devil: When to Negotiate, When to Fight

Written by Robert Mnookin (Simon & Schuster, 2010)

REVIEWED BY RICHARD BIRKE



In late 1990, George H. W. Bush was the President of the United States, and Saddam Hussein had just invaded Kuwait. In the run-up to what would become known as "the first Gulf War," Roger Fisher—first author of *Getting to Yes* and then-head honcho at the Harvard Program on Negotiation (PON)—tried his best to prevent the war by encouraging negotiation with Saddam. Fisher took out full-page ads in the *New York Times* and other national publications imploring the President and the people to bargain instead of deploy troops. He put things bluntly: Always negotiate.

In 2001, George W. Bush was President, and the Taliban was seeking to negotiate some sort of arrangement that might end or change the conflicts in which the U.S. was engaged. Roger Fisher—now Professor Emeritus at Harvard Law School—participated in a debate about whether the President ought to negotiate with the Taliban. Fisher stuck by his position: Always negotiate. But Professor Robert Mnookin, Fisher's successor as the head of PON, took a somewhat different view. Mnookin also put things bluntly: Sometimes you don't negotiate.

When are these rare times when one should not negotiate? According to Mnookin, one should consider refusing when bargaining with the devil.

This sounds like good advice. But who exactly is the devil? Is it a terrorist? A hardened criminal? The person on the other side of a lawsuit from you? The driver speeding, texting, eating and swerving into your lane all at the same time? Mnookin defines the devil as someone you do not trust, someone who has harmed you or someone whom you believe to be evil. So under this definition, the terrorist, the criminal, the other litigant and the rest are all devils.

This is the aspect of the book that is most provocative. Even though they are devils, Mnookin suggests you should still take a rational approach to the question of whether to negotiate. Mnookin uses the famous Star Trek character Mister Spock as his model for rational decision making. While hotheaded Captain Kirk would be ready to jump to action, Spock was more circumspect. Where Kirk would fall into emotional traps like demonizing, seeing the negotiation as zero-sum and resorting to instinctual responses like fight or flight, Spock would seek common ground, be interest-oriented and value-creative and never accuse or antagonize.

Mnookin uses history and his own experience to help bring home his points. He points to Winston Churchill, who refused to negotiate with Hitler, and to Nelson Mandela who agreed to negotiate with the South African apartheid government. He describes how Churchill was steadfast in his discussions with his fellows in the war council that negotiation was immoral and unwise, but his private papers revealed that he was less sure in his heart than in his discussions with his peers. Mandela, on the other hand, began to negotiate with the government of South Africa—first with his guards and later with President F. W. de Klerk—to ultimately end apartheid.

From his own experience, Mnookin describes the titanic struggle between IBM and Fujitsu. IBM was then the largest computer company in the world, and it alleged that Fujitsu, the largest in Japan, stole valuable code. The lawsuit would have been devastating to both companies, as it would have produced a winner and a loser. However, Mnookin (and fellow mediator Jack Jones) were able to construct a mediated dialogue that kept both sides in a form of partnership that lasted more than a decade.

There are tales of equally important, but less famous instances of negotiations failing (Rudolf Kasztner was a Hungarian Jew who negotiated with the Nazis for the release of thousands of Jews and was

later castigated as a collaborator) and of refusal to negotiate being lauded (Natan Sharansky refused to cooperate with his Soviet captors. Even when released, he refused to follow directions to walk to his release in a straight line; he zigged and zagged).

But in the end, Mnookin is a professor in a law school, and his work is quite relevant to people embroiled in a lawsuit. Some lawyers used to say that "less than five percent of all civil cases are tried." Now it's more accurate to say "less than one percent." The vast majority are negotiated or mediated to resolution. Mnookin offers four rules to help decide whether you should be in that less than one percent.

Rule 1: Do a systematic cost-benefit analysis, and do not give way to your emotional impulses.

Rule 2: Find a cool-headed advisor, someone who is not emotionally involved in the dispute.

Rule 3: Start with a "rebuttable presumption" in favor of negotiation.

Rule 4: Trust your internal Spock more than your internal Kirk.

In the interest of full disclosure, I once worked for Mnookin. The best lesson I learned from him was when he told me, "Negotiation is only one tool, and you don't always need to use it." Consistent with that thought, when the two of us wrote an article on lessons from the first Gulf War, he admonished that if you are playing chicken and you are driving a Sherman tank and your opponent is driving a broken-down VW Beetle, you might not need to be the one that swerves.

So Mnookin has long dwelled in a world where negotiation is important but is not the only way. When answering his own question of whether one should bargain with the devil, he concludes, "Not always, but more often than you feel like it."

This is a wonderful book that will make you a better negotiator whether you are bargaining with the devil or anyone else. ●

Continued from Page 2

A Q&A with FINRA Dispute Resolution Executive Vice President George Friedman

Q. Why were the rule changes on the makeup of arbitration panels proposed, and how have they been received?

A. We decided it was time to see if a change in the way arbitration panels are selected is a better way to serve and protect the interests of investors.

We tested the concept with the Public Arbitrator Pilot Program, which ran from October 2008 to January 2011. It gave certain investors filing an arbitration claim the option of choosing an all-public panel. We based the new rule on the core elements of the Pilot Program. The rule change, which went into effect February 1, 2011, provides all investors filing arbitration claims the option to have their case heard by an all-public panel or choosing an arbitration panel that has two public arbitrators and one non-public arbitrator, as was previously the case.

The rule change applies to all investor disputes involving any firm and any individual broker; it applies whether the investor is a claimant or a respondent. Investors in 77 percent of eligible cases have chosen the All-Public Panel Option. ●

JAMS DISPUTE RESOLUTION
ALERT
An Update on Developments in Mediation and Arbitration