Winter 2012

JAMS DISPUTE RESOLUTION
ALERT

An Update on Developments
in Mediation and Arbitration

THE RESOLUTION EXPERTS JAMS

HOW ADR INTERSECTS WITH MULTIDISTRICT LITIGATION

IN DEPTH

In a 12-month period ending September 30, 2011, the U.S. Judicial Panel on Multidistrict Litigation (MDL) handled more than 43,750 cases and considered motions for centralization in no fewer than 400,000. The packed multidistrict litigation docket included, among others, asbestos personal injury cases, securities claims and products liability cases related to the Darvocet/Darvon pain-management drug and the DePuy Orthopaedics ASR hip implant products.

Established by Congress in 1968 in response to an early-1960s price-fixing scandal at General Electric that overwhelmed the federal courts, the MDL Panel processes the federal courts' most complex multidistrict cases. Seven experienced federal court judges appointed by the Chief Justice of the U.S. Supreme Court determine whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one

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WHAT'S INSIDE

ADR CONVERSATIONS

Increased Diversity in ADR Essential to Keep Up with Evolving Global Marketplace

Contributing Editor Justin Kelly conducted the following interview with Thomas L. Sager, senior vice president and general counsel at DuPont Legal, and Deborah Masucci, the immediate past chair of the American Bar Association's Section of Dispute Resolution and vice president of Dispute Resolution in the Litigation Management Division of Chartis.

Alternative Dispute Resolution would benefit greatly by diversifying the neutrals and other related professionals in light of the increasingly global marketplace. According to leading practitioners, businesses, providers and users of ADR would be better served with a more diverse range of people available to resolve all types of disputes.

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How ADR Intersects with Multidistrict Litigation

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district court for coordinated or consolidated pre-trial proceedings. In MDL cases, one designated transferee judge, instead of several, hears the same case. The purpose of an MDL transfer is to consolidate and economize cases for pretrial proceedings and ensure consistency among different but related cases. In particular, the centralized process prevents discovery duplication and inconsistent pretrial rulings and preserves the resources of the parties, counsel and the court.

When MDL cases reach the trial stage, however, they each return to the forum from which they came, pursuant to the 1998 U.S. Supreme Court ruling in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*. As a result, MDL cases are exceptionally complicated because the transferee court must apply law of the transferor court, which could actually include several jurisdictions depending on how many cases are consolidated. MDL courts also hear so-called tag-along cases—related cases filed after the transfer—which are automatically bundled into the transfer unless a party objects.

"There's so much diversity in multidistrict litigation," he says. "Cases require a variety of techniques. With factual as well as legal complexity, MDL cases can lend themselves to mediation."

Judge John G. Heyburn II
U.S. District Court of Kentucky
Chair of the MDL Panel

"The benefits of MDL can be many, both to plaintiffs and defendants, since it provides a means for coordinating discovery and pre-trial proceedings," explains Gretchen Nelson, a Los Angeles-based class action lawyer with Kreindler & Kreindler, who has litigated many MDL cases, including the Toyota unintended acceleration cases consolidated in Orange County, Calif. While plaintiffs can pool and synchronize their resources, both financial and human, "the disadvantages to plaintiffs can be a hold-up in their case for resolution as a result of the MDL process," Nelson says.

Gretchen Nelson
Class Action Lawyer
Kreindler & Kreindler
Los Angeles

Indeed, the upside of MDL may be greater for defendants. While publicity surrounding an MDL case can spark new plaintiffs to file suits, it's still far cheaper to defend a case in one court instead of many. Also, defendants usually prefer witnesses to be deposed as few times as possible to minimize inconsistencies, which is achieved with MDL.

Jeffrey Greenbaum, chair of the class action practice group at New York's Sills, Cummis & Gross, agrees that plaintiffs sometimes don't favor MDL consolidation. "They fear they'll get lost among other cases," he explains. The subject matter of MDL cases can range depending on the economy and "what's in the public discourse," according to Greenbaum. Right now, for example, mortgage-backed securities cases are "in vogue" and filling up the MDL Panel's docket. In Greenbaum's experience, other cases likely to get sent to the MDL Panel are securities fraud class actions (often related to a stock drop), antitrust cases and product liability class actions or "mass actions." Typically, product liability cases often involve pharmaceuticals, and the individual case differences regard only damages or varying timelines as to when the plaintiffs took the drug.

Once transferred, many cases wind up settling in the transferee forum. "Usually, you see sophisticated counsel on both sides" of MDL cases, which is useful because the cases are "big, with many layers, often including insurance carriers," Greenbaum notes. "But it's still helpful to have a skilled, talented neutral in the middle." Greenbaum recalls once working on an MDL case with a significant fee dispute. The parties agreed to a high-low range but hired a neutral to mediate a specific number and then, if they couldn't, to arbitrate it. (The parties waived the conflict when the same person performed both the mediation and the arbitration.) The issue wound up being arbitrated, and the MDL Panel judge deferred to the neutral.

Jeffrey Greenbaum
Chair of the Class Action Group,
Sills, Cummis & Gross
New York

Judge John G. Heyburn II of the U.S. District Court for the Western District of Kentucky serves as chair of the MDL Panel. "There's so much diversity in

John G. Heyburn II
U.S. District Court
for the Western
District of Kentucky

multidistrict litigation," he says. "Cases require a variety of techniques. With factual as well as legal complexity, MDL cases can lend themselves to mediation." But because the MDL Panel is composed of "very experienced judges who've been on the bench longer," they tend to handle settlement conferences themselves, occasionally sending them to Special Masters. Still, Heyburn adds, "ADR is always useful."

The number of matters being transferred through the MDL process has "substantially increased over the years," Nelson adds. Because of that, in her experience, ADR providers are assisting MDL judges not only in settlement discussions, but also in pre-trial proceedings. That has occurred, for example, with the Toyota unintended acceleration cases, in which a few retired judicial officers have been assisting in discovery and related issues.

The benefits of MDL can be many, both to plaintiffs and defendants, since it provides a means for coordinating discovery and pre-trial proceeding.

Gretchen Nelson
Class Action Lawyer
Kreindler & Kreindler
Los Angeles

But ADR has the potential to play a far bigger role in streamlining the management of the often unwieldy MDL cases, according to Nelson. "ADR providers may be able to assist more in MDL cases by providing additional assistance in individual cases that have been looped into the process, such as settlement conferences early on for some of the individual cases transferred from other districts that find themselves essentially in a holding pattern while the larger issues in the case are being addressed," she explains. "My sense of this is that, particularly in the area of personal injury cases, you may have a large collection of cases with vastly different damages and some of the smaller cases may benefit by being offered an opportunity to seek a resolution earlier on."

JAMS Senior Vice President and COO Kimberly Taylor and JAMS neutral Cathy Yanni, Esq. wrote in an article for *InsideCounsel* that, for litigants, a key element of MDL settlement strategy is creating a national settlement team with the sole job of resolving the litigation. That team should include an experienced lead counsel whose only focus is settling the case. That team should work closely with both trial and in-house counsel to learn the case and strategize for settlement, and be able to work effectively with many opposing counsel.

In that manner, discovery, which is often the most expensive aspect of litigation, can be focused on key issues.

As Taylor and Yanni suggest, there are many paths to coordinating mediation in MDL matters, including having a mediator or mediation panel help the parties resolve the case in coordination with

Kimberly Taylor
Senior Vice President
and COO
JAMS

national settlement counsel and a plaintiffs' steering committee. Often, transferee judges take an active role in resolving their assigned MDL matters, including holding mediations at the courthouse with the assistance of the mediator.

"MDL matters will likely continue to increase in numbers, but ADR processes such as mediation can and should play a central role in streamlining and resolving these to everyone's benefit," said Taylor.

"Usually, you see sophisticated counsel on both sides" of MDL cases, which is useful because the cases are "big, with many layers, often including insurance carriers," Greenbaum notes. "But it's still helpful to have a skilled, talented neutral in the middle."

Jeffrey Greenbaum
Chair of the Class
Action Group,
Sills, Cummis & Gross
New York

Increased Diversity in ADR Essential to Keep Up with Evolving Global Marketplace Continued from Page 1

Q. Why is diversity in ADR important to the profession?

Thomas J. Sager
Senior Vice President and General Counsel at DuPont Legal

A. ***Sager:*** "ADR is the last bastion within our legal profession that diversity and inclusiveness have failed to make meaningful inroads. The limited amount of diversity creates a lack of cultural, language, socio-economic and real-life experiences to be a part of the dispute resolution process, which would only enhance and bring further credibility to this means of dispute resolution. I think employment, construction and complex commercial cross-border disputes would greatly benefit from a greater pool of diverse professionals."

Deborah Masucci
Dispute Resolution and Vice President of Dispute Resolution Litigation Management Division of Charts

A. ***Masucci:*** "We live in a diverse, global world, and as a result, the ADR profession must catch up with societal needs by embracing diversity. The U.S. is a country of immigrants with an extraordinary explosion of diversity all across the nation. As corporate employee demographics shift and companies develop programs to resolve employee disputes, they seek a diverse panel of mediators and arbitrators to meet their needs."

"Global companies have a diverse customer base drawn from diverse markets, and demand is increasing for counsel with diverse viewpoints and problem solvers with cultural sensitivities and diverse ideas."

"It is critical that the ADR profession evolves to meet this demand."

Q. What about ADR in particular makes it important that there is diversity across the profession?

A. ***Sager:*** "ADR must continue to evolve in order for this critically important process to expand." He noted that the "courts are in dire straits in the U.S. due to an overburdened docket and a lack of funding, and outside the U.S., the developing markets need these alternative dispute resolution avenues available to corporations due to the absence of the rule of law or the inordinate time it takes to have a matter resolved in their various court systems."

A. ***Masucci:*** "I recently spoke on a state bar panel on the topic of the importance of gender diversity in ADR. One of the attendees in the audience made the case that diversity is an imperative for ADR. When a dispute is resolved in the court system, the jury and the judge available to resolve the dispute are diverse. The private justice system that provides mediation and arbitration services must be just as, if not more, diverse if it is to maintain credibility."

Q. What are the best approaches to increase diversity in ADR?

A. ***Masucci:*** "ADR providers are working hard to increase diversity, but many arbitration cases aren't administered by an ADR provider."

"It is very common for a case to be self-administered by the parties," she said, suggesting that "parties and counsel can collaborate to form a diverse panel. Each time parties consider a party-appointed arbitrator, the list should include women and minorities, and once the party-appointed arbitrators are selected, the parties should demand that the umpire be selected from a diverse slate," Masucci counseled. "Similarly, parties and counsel can collaborate to ensure that mediators considered for appointment to resolve a particular case are drawn from diverse backgrounds."

She proposed that one way neutrals could help increase diversity or at least the visibility of minority neutrals would be for them to "recommend diverse alternative neutrals" when they are unable to serve.

"There should be incentives to encourage women and minorities who remain in law firms to participate as a mediator or arbitrator so they can be exposed in this different role, and if the role of dispute resolver is valued by the firm, women and minorities may see it as a viable and lucrative career track," she suggested. "Everyone needs to take responsibility for seeking out qualified women and minorities and then selecting them for cases," she added.

Q. How can businesses, legal departments in particular, drive an increase in diversity in ADR?

A. ***Sager:*** "Businesses could insist that the team of outside counsel representing them in their commercial and other disputes consist in part of diverse professionals. Start any discussion with their in-house professional responsible for handling a dispute to use whenever possible a diverse mediator or arbitrator and begin developing a list of proven diverse ADR professionals for reference when new disputes arise," he added.

A. ***Masucci:*** "A best practice for global business is to adopt a company policy for diversity and inclusion. The policy is not limited to hiring employees, but includes every relationship the company enters into," she explained, adding, "The company policy is driven down to all of its business and departments emphasizing the importance of communicating the diversity requirement to their legal and non-legal suppliers."

"As legal departments enter into professional relationships with law firms and other legal service vendors, they include diversity as a criterion for engagement, and the policy should be extended to requiring consideration and selection of mediators and arbitrators with diverse backgrounds," she suggested. "Having a policy is the first step, but actually influencing behavior is what is desired; thus, metrics should be developed to monitor progress and demonstrate true change, and law firms that meet the diversity objectives should be rewarded," she proposed.

Q. How can law firms work to increase diversity?

A. ***Masucci:*** "Law firms and corporations are risk-averse when it comes to making decisions about resolving their disputes, which means selecting mediators and arbitrators whom they know. Law firms can increase the opportunity to appoint diverse dispute resolvers by seeking out prospective candidates before they actually have to select them for a case, and then invite them into the firm to deliver a presentation and get to know the person outside of the dispute resolution process," she suggested. Then, "when the lawyers are later asked to recommend a diverse dispute resolver, they can say that they met with the person and have personal knowledge of the dispute resolver's capabilities." She also suggested that firms "select women and minorities when faced with equally qualified candidates."

"Firms should expose their young diverse professionals to ADR as an advocate and as a staff attorney supporting the work of more senior, established mediators and arbitrators within the firm."

Q. How can providers push diversity?

A. ***Sager:*** "Providers should expand their approved lists to include more diverse candidates and reach out to minority- and women-owned law firms to solicit new prospects and offer advanced training to interested diverse attorneys. They can also work with the NALP Foundation to conduct research into the current state of diversity in the ADR practice area and reach out to 20 prominent mediators and enlist their support to create internships for young aspiring lawyers from diverse backgrounds."

A. ***Masucci:*** "ADR providers are beating the bushes every day to identify qualified women and minorities, and the steps they have taken include fellowships, mentoring and talking to law firms and judges to identify candidates. ADR providers should push the envelope to develop women and minorities who may not join their ranks, but instead may ultimately be a dispute resolver in a specialized field that the provider does not consider part of its market," she added.

"For example, sponsor networking activities and invite diverse dispute resolvers outside your panel to meet your clients." While they may not be on a panel, "you will build up goodwill and credit by helping develop them," she said. "Invite diverse dispute resolvers to shadow your most experienced mediators and arbitrators, and in fact, encourage them to mentor women and minorities," she added. "Each of these actions broadens the diversity of the field and is a way to give back to the local and global community," she concluded.

"We live in a diverse, global world, and as a result, the ADR profession must catch up with societal needs by embracing diversity"

Deborah Masucci Dispute Resolution & Vice President of Dispute Resolution Litigation Management Division of Chartis

Q. Is there diversity in ADR? If so, at what levels? Is this a new trend or a mature one?

A. ***Sager:*** "There is a tremendous dearth of minority and women mediators and arbitrators, with the possible exception of labor arbitration."

A. ***Masucci:*** "Making progress has been slow and difficult, but today it definitely is a business imperative with an accelerating importance because of our global society."

Five years ago, there were few minorities in attendance at the ABA Section of Dispute Resolution Annual meeting; however, "the attendees at this past April's annual meeting evidenced a dramatically different composition, but we still have a long way to go." ●

FEDERAL CIRCUIT COURTS

Right to Compel Arbitration Waived Where Party Failed to Make Timely Request, Litigation Machinery Engaged and Motion to Compel Would Not Be Futile

Garcia v. Wachovia Corp.
2012 WL 5272942
C.A.11 (Fla.), October 26, 2012

In 2009, Melanie Garcia and other customers of Wachovia Bank (and later, Wells Fargo Bank) sued in five putative class actions alleging improper charges for overdrafts. The agreements between the customers and the bank contained binding arbitration clauses that require individual arbitration.

The bank brought motions to dismiss but did not move to compel arbitration, despite the district court urging it to do so in 2009 and again in 2010.

The next year of discovery lead to the production of 900,000 pages of documents and more than 20 depositions.

In April 2011, the U.S. Supreme Court decided the case of *AT&T v. Concepcion*, ruling that class action prohibitions are not per se unconscionable.

Two days after the *Concepcion* decision, the bank moved to compel arbitration. The district court denied the motion, finding that the bank waived its right to arbitrate because it engaged extensively in litigation.

The U.S. Court of Appeal for the Eleventh Circuit affirmed, finding that the bank waived its right to arbitrate in two ways: first, by failing to move to compel in a timely way (despite being urged to by the district court two different times) and second, by "substantially invoking the litigation machinery prior to demanding arbitration."

Finally, the Court found that the bank could have moved to compel arbitration prior to the decision in the *Concepcion* case, and such a motion would not have been futile. The Court wrote, "[The bank] could have argued exactly what the Supreme Court held in *Concepcion*: that the Act preempts state contract laws that condition the enforceability of consumer arbitration agreements on the availability of class-wide arbitration procedures."

Constructive Knowledge of Arbitration Agreement Does Not Create Implied-in-Fact Contract to Arbitrate

Gorlach v. Sports Club Co.
2012 WL 4882328
Cal.App. 2 Dist., October 16, 2012

Susan Gorlach worked for Sports Club Co. In early 2010, Sports Club put its first mandatory arbitration clause in its employee handbook. Gorlach was assigned the task of getting signatures from all affected employees. She reported that all but four had signed. She did not identify herself as one of the four. She updated supervisors about her plans to get everyone to sign, but she never signed herself. Gorlach resigned later in 2010.

In 2011, she filed a sexual harassment claim against Sports Club. Sports Club moved to compel arbitration arguing that Gorlach implicitly assented to the contract by misleading Sports Club into believing she had signed the agreement. The trial court denied the motion, finding no valid agreement to arbitrate. Sports Club appealed.

The California Court of Appeal considered two arguments: (1) Gorlach was equitably estopped from contending that the arbitration agreement does not apply to her, and (2) an implied-in-fact arbitration agreement existed between Gorlach and Sports Club. To the first argument, the Court found that there was no evidence that Sports Club relied to its detriment on Gorlach's implied representations. To the second, the Court found that there was no implied-in-fact agreement. The mere mention of the obligation to arbitrate in the employee handbook did not overcome the requirement that the affected employee sign a document attesting to their acquiescence. The denial of the motion to compel was affirmed.

After Law Changes, Grant of Previously Denied Motion to Compel Not an Abuse of Discretion

Phillips v. Sprint PCS
2012 WL 4378199
Cal.App. 1 Dist., September 26, 2012

In 2003, Timothy Phillips and others sued Sprint in a putative class action alleging that Sprint misrepresented its fees. Sprint moved to compel individual arbitration under a clause that mandated

arbitration of all disputes and precluded resolution "on a class-wide basis." The agreement specifically named the FAA and "not California law" as the law for the decision.

The trial court denied Sprint's motion under the then-valid Discover Bank rule, a rule that invalidated most class prohibitions in arbitration. While the matter was still pending, the U.S. Supreme Court decided *AT&T v. Concepcion*, overruling Discover Bank.

Sprint renewed its motion to compel, and the motion was granted.

Phillips appealed, arguing that some customers were not bound by the arbitration agreements and therefore, a class action was still appropriate. Phillips also argued that there should have been a res judicata effect for the first decision on the first motion to compel. Sprint argued that the decision to grant the motion to compel arbitration is not appealable.

The California Court of Appeal treated the appeal as a petition for a writ of mandate and skipped over the ripeness issue. The Court noted that "[r]efusing review at this point thus would result in a significant waste of time and judicial resources. In the interest of justice and to avoid unnecessary delay, we will treat the appeal as a petition for a writ of mandate and proceed on that basis."

The Court found that the change in the law gave rise to Sprint's renewed motion to compel and it was not an abuse of discretion for the trial court judge to entertain the new motion. The Court noted that "renewal of a previous motion is expressly permitted for both interim and final orders if there has been a material change of law. A final and appealable order denying a motion does not necessarily preclude renewal of that motion."

Similarly, the Court found that Sprint did not waive its right to compel arbitration when it declined to appeal the denial of its original motion. An appeal would have been futile prior to the *AT&T v. Concepcion* decision, and "waiver should not be found on the basis of a party's refusal to undertake a futile act."

Finally, while Phillips argued that the contract was unconscionable, the Court found this to be a question for the arbitrator, as unconscionability went to the entire contract and not to the arbitration clause.

Email Notice Insufficient to Create Obligation to Arbitrate

Schnabel v. Trilegiant Corp.
2012 WL 3871366
C.A.2 (Conn.), September 07, 2012

Edward Schnabel and members of his family joined Trilegiant's online service that promised travel discounts and cash back on recreational activity offers. Shortly after joining, they viewed various web pages and received a variety of emails with offers attached. The Schnabels unwittingly joined something called "Great Fun."

When the Schnabels discovered that they were being billed about $15 monthly for Great Fun, they asked Trilegiant for a refund and then filed a putative class action. Trilegiant moved to compel arbitration pursuant to an email sent to the Schnabels after their enrollment. The Schnabels denied ever realizing that the email contained an arbitration clause.

The district court denied the motion concluding that the contract between the Schnabels and Trilegiant consisted of whatever was clear to the Schnabels at the time they joined Great Fun. New terms and conditions, like an arbitration clause, were not valid, as they were added later. Trilegiant appealed, arguing that the email notice was valid.

The U.S. Court of Appeal for the Second Circuit affirmed. The Court used a constructive knowledge test, stating that "in cases such as this, where the purported assent is largely passive, the contract-formation question will often turn on whether a reasonably prudent offeree would be on notice of the term at issue." The Court found the email insufficient to give the Schnabels reason to believe their contract was being modified. "Here, Trilegiant effectively obscured the details of the terms and conditions and the passive manner in which they could be accepted. The solicitation and enrollment pages, along with the fact that the plaintiffs were not required to re-enter their credit-card information, made joining Great Fun fast and simple and made it appear—falsely —that being a member imposed virtually no burdens on the consumer besides payment." ●

New York Task Force Recommends Pilot Mandatory Mediation Program for Commercial Cases

In February, Jonathan Lippman, chief judge of the New York Supreme Court, commissioned a task force to study the trial court's Commercial Division. The aim, he said, was to ensure that the state's trial court helps New York "retain its role as the preeminent financial and commercial center of the world."

Driven by the financial crisis, New York's Commercial Division has faced an unmanageable volume of cases with cutting-edge legal issues in recent years. Led by co-chairs Judith S. Kaye, former New York state chief judge and now of counsel at Skadden, Arps, Slate, Meagher & Flom, and Martin Lipton, a founder of Wachtell, Lipton, Rosen & Katz, the 34-member Task Force on Commercial Litigation in the 21st Century spent six months analyzing how to mend the trial court's inefficiencies and cope with reduced financial resources. The goal is for New York to maintain a world-class commercial adjudication system on par with Delaware's Court of Chancery and international business dispute centers like London and Hong Kong.

After consulting with in-house counsels, private judges and judges from other jurisdictions, the Task Force in June reported its recommendations, which included hiring more Commercial Division judges, raising the threshold for Commercial Division cases from $150,000 to $500,000, providing for an accelerated adjudication procedure in some cases and limiting certain discovery. In addition, the Task Force proposed establishing a pilot program for mandatory mediation, which "would illuminate for the Bench and the Bar the efficacy of mediation to help parties resolve their business disputes promptly and cost-effectively, and would help ensure that judicial resources are used where they are needed most."

Specifically, the Pilot Mandatory Mediation Program would require that every fifth newly assigned case in Manhattan's Commercial Division be automatically sent to mediation unless all parties opt out or any one party demonstrates good cause for not mediating. The goal is to promote early dispute resolution with a speedy, streamlined and price-conscious process.

"Both parties and the court system commonly can achieve even greater benefits to the extent that the parties are able to resolve their disputes before engaging in the protracted and expensive disclosure and motion practice that modern business litigation typically entails," the report states. As a result, the Task Force recommends that the program be structured to "provide for mediation before the parties have reached this tipping point."

Bernard J. Fried
JAMS Neutral

JAMS neutral Bernard J. Fried, who served on the Task Force, doesn't expect the Pilot Mandatory Mediation Program to face hurdles in adoption. In fact, mediation is already "done regularly," and the recommendations are "not a radical departure from power a judge already has," explained Fried, who served as New York judge for 32 years, including the last eight in the Commercial Division. In particular, Rule 8 of New York's Uniform Rules requires parties to discuss using ADR in anticipation of the preliminary conference, and Rule 3 authorizes justices to refer cases to mediation. In addition, panels of qualified neutrals have been created throughout New York: Part 146 of the Rules of the Chief Administrative Judge established minimum training and experience requirements for mediators and neutral evaluators. Yet while more than 90 percent of business disputes already end up in settlement, according to the Task Force's report, "there's a disparity among judges in how mediation is used," according to Fried.

The Task Force's recommendations have been sent to the Chief Administrative Judge, who is organizing a staff that will examine how best to implement the proposals. While the precise structure of the proposed program could be modified, mediation provides "enormous incentive economically" for the parties and the court, Fried said, and he expects some close version of the program to be adopted. "Any right-thinking person knows that mediation is a good thing."

The Task Force report addressed arbitration as well. Because parties' preferred venue for arbitration often depends on the degree to which courts in that venue are considered sophisticated in international commercial arbitration law, the Task Force proposed designating specific New York County justices for lead responsibility over every international arbitration-related matter that passes through the Commercial Division. Designating specialized international arbitration judges will "enhance the Commercial Division's knowledge of the issues involved in international arbitration context and also help raise the Commercial Division's profile in the international business and legal community, thus enhancing the Commercial Division's reputation generally."

Fried believes the same holds true for the reputation of ADR. "The real impact of the report's strong support for mediation," he said, "is it can only enhance the climate for mediation."

Nonprofits Aim to Reduce Community Tensions through Pilot Program

The Public Conversations Project (PCP) has partnered with Welcoming America (WA) to run a pilot program in New Orleans using structured dialogue and collaborative processes to address the growing tensions between longstanding residents and recent arrivals over immigration.

The joint pilot project will be based in New Orleans' West Bank section, which houses Haitian, Palestinian, Vietnamese, Honduran, Dominican and Mexican populations and longtime African American and Caucasian residents.

David Joseph
Mediator and Vice President for Programs at PCP

WA's affiliate, Puentes New Orleans, and PCP plan to develop a specific approach and process that will "bridge the differences between U.S.-born and foreign-born residents," which could serve as a catalyst to reduce tensions and resolve conflicts in a peaceful and productive manner, said David Joseph, a mediator and Vice President for Programs at PCP, who will serve as Project Director.

According to Joseph, PCP convened a workshop on immigration several years ago after growing concerns about the increased tensions nationwide over the most recent wave of immigration to hit U.S. shores. As a result of the workshop, PCP was able to gather invaluable information from WA about the issues arising between existing communities and recent immigrants' communities, and the need to address the tensions.

The catalyst for the pilot in New Orleans was a local high school fight last year between African American and Latino students over rising immigration tensions. The pilot will also include the involvement of existing community organizations, which will more clearly identify, based on locals' experiences, the issues and underlying causes of the conflict between different communities, he added.

The pilot project will utilize PCP's Reflective Structured Dialogue (RSD) process to bring stakeholders together, including students, teachers, parents, administrators and community leaders, Joseph said. He explained that RSD, which has been used by PCP in similar situations, guarantees that "everyone's voice gets heard, allowing for new perspectives and possibilities between groups that had previously seen themselves as enemies."

The process, which uses questions to elicit discussion, also "enables people to be seen as individuals, not simply just part of a group. Through these shifts of perspective and relationships, people often identify underlying shared values, as well as see their ongoing differences as sources of enrichment, rather than division," he said.

It is hoped that the structured dialogue and PCP training of identified community leaders in collaborative and dispute resolution processes will result in an understanding between different communities that they share a "common humanity and that differences can exist without threatening your way of life," he said. PCP and WA want participants to come to understand that "differences are inevitable, but conflict is optional."

Jessy Molina, Region Two Program Director for WA, said the pilot program

New Orleans

aims to ensure that students, parents, teachers, administrators and the community come together "to have an open, honest conversation about the roots of violence and come up with ways to address the situation."

Jessy Molina
Region Two Program Director for WA

The pilot will be "tailored to the communities' needs according to what the community organizations and stakeholders identify as their needs," she said.

At the end of the pilot program, quantitative and qualitative surveys will be taken to address how community groups were engaged, whether trust and respect were increased, whether people were better able to understand divergent perspectives and whether the community groups are interested in collaborating further, the pilot program grant proposal says.

According to the grant proposal, "It is the hope of both PCP and WA that the lessons learned from this pilot will be applied throughout WA's work in immigrant communities nationally, and that the lessons will influence other immigrant support groups to take a broader,

Continued on back cover

EU Seeing Growth of Mediation Clauses in Commercial Contracts

Businesses across the European Union are increasingly including mediation clauses in contracts and moving toward greater utilization of the dispute resolution process to resolve conflicts and maintain ongoing commercial relationships.

Wolf von Kumberg
European Legal Director and Assistant General Counsel
Northrop Grumman

Wolf von Kumberg, European legal director and assistant general counsel for Northrop Grumman, said, "There is a growing trend to include stepped clauses in commercial agreements, which include mediation as a step prior to litigation/arbitration. It started about five years ago but has recently increased in common law jurisdictions."

"I have also seen them in some transaction agreements," he said. "They are, however, rare in any other type of agreement that I have seen. This is largely due to the fact that mediation has increasingly been seen as a tool for resolving commercial disputes, but there has been little emphasis on other types of agreements from what I can see."

Michael McIlwrath, associate general counsel for litigation at General Electric Oil and Gas in Florence, said, "We are seeing increasing examples of both mediation and use of mediation in recent years. The increase is likely due at least in part to legislative changes in member states following the issuance of the mediation directive." 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.

Additionally, parties have become much more aware of mediation as a tool for resolving disputes in specialized areas, and this has led to greater interest in mediation, he noted.

Michael McIlwrath
Associate General Counsel for Litigation
General Electric
Oil and Gas
Florence, Italy

An example of increased usage is in his own company, which is doing a pilot in two countries to try to offer the use of mediation instead of relying on the courts, he said. According to McIlwrath, "The arbitration institutions in Europe with decades of historical data about their caseloads have also reported healthy increases in demand in recent years for the mediation services they offer."

Von Kumberg said, "The increase in uptake is largely due to better education and training in the field of ADR. There is now more of an effort to make commercial parties aware of the benefits of early dispute resolution, which in turn has led to a bigger uptake. I believe few commercial organizations know anything about the directive and few lawyers are educating their clients."

McIlwrath explained that characteristics of some national laws necessitate certain considerations when mediation is involved. "One example is the Italian procedural law's requirement of specific written acceptance of any agreement in which a party waives their right to submit a dispute to the court for determination. This is potentially an issue with arbitration clauses, but it may also impact a mediation requirement in a contract. The usual solution is to ensure there is a separate, specific acknowledgment of the dispute resolution clause containing the ADR requirement," he said.

McIlwrath said the impact on the field "has somewhat followed the balkanization that occurred with arbitration providers in recent years, with a number of new, local institutions appearing in many locations and others that previously offered only arbitration services now also offering mediation."

He said this "aspect has led to the development of a business practice in which the party with greater leverage in the negotiation will be able to insist on ADR being done locally. In virtually all EU countries, there are now local/regional institutions that can offer an acceptable quality of both arbitration and mediation services. A dozen years ago, this was certainly not the case," he added.

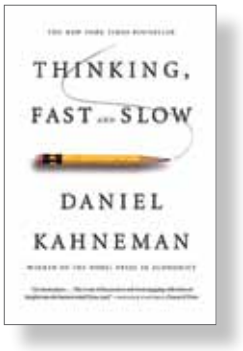
Von Kumberg said there is still some reluctance in many commercial organizations to commit to mediation at the contractual stage. "The argument is that mediation is a step and comes too early in the dispute process and they prefer to wait until a dispute arises," he said. "Additionally, outside of the common law countries, there is still a lack of knowledge about what mediation does or how it works."

McIlwrath said that lawyers have started to come around to mediation. "Parties are still in the dark in many countries," said McIlwrath, "until they experience a mediation themselves and see how it can be more effective than traditional litigation for achieving optimal outcomes."

Thinking, Fast and Slow

By Daniel Kahneman

REVIEWED BY RICHARD BIRKE



Imagine you own an advertising agency. You strike a deal with a client for an ad campaign worth $500,000. The anticipated profit will be $200,000.

However, before you can even begin work, you get a call informing you that your services are no longer required. Investigation reveals that a rival firm has somehow stolen the contract from you. You contact your lawyer, who tells you that you have a claim for something called "tortious interference with contractual relationships."

Litigation proceeds more slowly than you would have hoped, and now nearly two years have elapsed. The lawyer for the other side calls your lawyer, who conveys an offer to you. She says, "They are offering to settle the whole thing if you will take $100,000."

The trial could get you $200,000 or maybe nothing. The $100,000 could be in your hand by the end of the week. So do you accept? Should you make a quick, gut-level decision, or should you take some time to think it over?

Daniel Kahneman has advice for you, and given that he's a psychologist who also happens to be a Nobel Prize winner in economics, you should listen. In *Thinking, Fast and Slow*, he suggests that whether or not you accept the offer is going to be influenced mostly by the way you frame the question to yourself. If you think of the $100,000 as a "gain" and the trial as a chance to go play double-or-nothing, you are likely to settle the case. If you think that you are owed $200,000 and that the offer to settle is a rip-off that causes you to lose $100,000, you will likely continue on to the trial. Whether you think of the offer as a gain or a loss will influence your attitude toward risk.

Kahneman has proven that people are more sensitive to losses than to gains. Here's a simple example. If you've owned your house for more than 10 years, it is likely to be worth much more than you paid for it, but it is also likely to be worth much less today than it was in 2005. So if you sell it, are you up or down? You probably feel that selling today would be a loss, and many homeowners set their target price somewhere in the vicinity of the prices that existed at the height of the market.

Kahneman has spent a lifetime analyzing the ways that people make decisions and, together with his deceased research partner, Amos Tversky, has documented hundreds of ways in which people's decisions are impacted by seemingly irrational psychology. He has shown that doctors who focus on saving lives take conservative courses of action (don't gamble when you are "up") and doctors facing the same situations take adventurous actions when they focus on deaths (it's not fun to accept a sure loss). His work explains elegantly why people fund losing lawsuits because of something lay people call "sunk costs."

Kahneman's latest work—and it is an epic work (more than 400 pages of pretty dense reading)—seeks to accomplish two huge and extraordinary tasks. First, he endeavors to capture a lifetime of work in behavioral decision-making, chronicling principles like "loss aversion" (which impacts your decision to settle a case) and many others. Some of my favorites are the "planning fallacy" (the reason why we always think that we will get more done next week or next month than we actually get done) and "the availability heuristic" (the reason we compare our cases and controversies to the ones that are in the news, even though they bear only superficial resemblance.) The list of principles is huge, but concise and important. As Kahneman says, doctors have a vocabulary for describing the things they see, which allows them to talk intelligently to each other. Decision-makers lack a simple vocabulary, and Kahneman notes that the result is that people have a hard time communicating in an organized way about their decisions.

The second task is to take thinking about whether to make "gut" decisions or whether to take time in making decisions to a higher level. In the *New York Times* best-seller *Blink*, author/storyteller Malcolm Gladwell opened readers' eyes to how deliberation can harm decisions. *Blink* may be a fun read, but *Thinking, Fast and Slow* gets it right. Where Gladwell is glib, Kahneman is legitimate. If you enjoyed *Blink* (and millions have), you will learn a lot more from *Thinking, Fast and Slow*.

I cannot recommend this book highly enough. It's a lot of learning in a small volume, but if you take the time to read it, I assure you that you will emerge a better negotiator, mediator, arbitrator and/or decision-maker. That's both my gut instinct and my deliberate opinion. ●

Italy Mandatory Mediation Law Ruled Unconstitutional

The Italian Constitutional Court has declared the Legislative Decree No.28 of March 4, 2010 unconstitutional for "excess of legislative delegation." The decree called for mandatory mediation aimed at conciliation of civil and commercial disputes.

Enacted in accordance with the provisions of the 2008 EU Directive on cross-border mediation, the Decree broadened the scope of mediation to all civil and commercial disputes and meant parties which took their disputes to an unregistered mediator ran the risk that any resulting agreement would be held to lack enforcement. It also enabled the government to issue mediation regulations, so long as they did not obstruct access to justice.

The question as to whether or not mandatory mediation can be introduced into the Italian legal system was not mentioned in the Court's press release, and does not appear to be addressed in the judgment. Some say the Court may rule that the specific language used in the 2009 Act did not encompass mandatory mediation, but that a narrow ruling on the constitutionality of mandatory mediation would be tantamount to an invitation to re-submit the same legislative text, but in the form of an Act, not a Legislative Decree.

Italian commentators therefore expect that the Court will address, in an obiter dictum, whether mandatory mediation violates access to justice. These dicta could then be used to guide Parliament in drafting the new Statute, and proposals to this effect are being written. ●

"Good Works" continued from Page 9

community-based approach to their work. Lessons learned in this pilot will be shared with WA affiliates in 20 states, allowing adaptations to be made in how WA communicates with affiliates and improving communication within each affiliate."

In addition, the pilot program is seen as a beginning, not an end, and that Puentes, hopefully along with other stakeholders' groups, "will remain active in the district so that the project will not conclude at the end of the pilot, but will continue with support and development of collaborations formed as a result of this initiative."

The pilot project was made possible by a grant from the JAMS Foundation. ●

HAVE A BRIGHT IDEA FOR A STORY?

The *Dispute Resolution Alert* is always looking for new and interesting article ideas and suggestions. Please email them to Victoria Walsh at vwalsh@jamsadr.com. We hope to hear from you.

JAMS DISPUTE RESOLUTION
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An Update on Developments in Mediation and Arbitration