JAMS Dispute Resolution *Alert*

The Latest Developments in Mediation & Arbitration

Vol. 10, No. 2

Select Upcoming Events

MCLE Update's Construction Defect Seminar *Jan. 12, 2011 - Costa Mesa, CA*
JAMS Speakers: George D. Calkins II, Esq., Hon. Jonathan H. Cannon (Ret.), and Hon. Stephen J. Sundvold (Ret.)

Intellectual Property Law for the Non-IP Lawyer *Jan. 15, 2011 - Costa Mesa, CA*
JAMS Speaker: Louis J. Knobbe, Esq.

ABA 2011 Mid-Winter Joint Meeting: Construction *Jan. 20, 2011 - New York, NY*
JAMS Speaker: Philip L. Bruner, Esq.

Forecasting the Future: Cutting Edge Issues in ADR *Jan. 28-29, 2011 - Laverne, CA*
JAMS Speakers: Hon. Stephen E. Haberfeld (Ret.) and Thomas J. Stipanowich, Esq.

Arbitration Training Institute hosted by ABA Section of Dispute Resolution
Feb. 24-26, 2011 - Los Angeles, CA
JAMS Speakers: Philip L. Bruner, Esq., Zela "Zee" G. Claiborne, Esq., Richard Chernick, Esq., John W. Hinchey, Esq., R. Wayne Thorpe, Esq., and Hon. Curtis E. von Kann (Ret.)

Details for all events available at www.jamsadr.com.

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ADR News & Case Updates

ADR NEWS

Supreme Court Hears Debate on Class Action Ban in Arbitration Contracts

U.S. Supreme Court justices engaged with counsel in a spirited debate over whether a holding that an arbitration agreement that contains a class action waiver is unconscionable and unenforceable under state law is preempted by the Federal Arbitration Act (FAA).

The question presented in *AT&T Mobility v. Concepcion* (No. 09-893, cert. granted 5/24/2010) is "whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures – here, class-wide arbitration – when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims."

In affirming a lower court's opinion, the U.S. Court of Appeals for the Ninth Circuit ruled that AT&T Mobility's arbitration clause is unconscionable and unenforceable under the California Supreme Court's ruling in *Discover Bank v. Super. Ct.*, 36 Cal.4th 148 (2005) because it forces consumers to arbitrate small-dollar claims on an individual basis.

Andrew J. Pincus, representing AT&T Mobility, said in his opening remarks that the Ninth Circuit's ruling that a state may require the use of a procedure in arbitration as long as state law also mandates its use in litigation directly contradicts the intent of the FAA. He also argued that the ruling runs afoul of the savings clause in Section 2 because it would not be applicable to contracts in general.

Associate Justice Antonin Scalia asked whether the Court could strike down a state court ruling that applied a lesser standard of unconscionability to arbitration based on its own law. Pincus responded, "If it wants to apply a lesser standard to arbitration clauses, yes, absolutely you can, because that would…violate what is at the core of the provision, which is discrimination against State law."

A little later, Associate Justice Ruth Bader Ginsburg noted that there was nothing explicitly in the opinion that said the Court was applying a different unconscionability analysis to arbitration than it would to any other challenged contract. Pincus disagreed, suggesting that California law calls for an unconscionability analysis to occur at the time a contract is signed but the *Discover Bank* holding is premised on a court determining unconscionability when a dispute arises.

Associate Justice Elena Kagan challenged Pincus' analysis by noting that *Discover Bank* was premised on a case that did not involve arbitration, saying, "However different it may seem to you from normal contract provisions, its rule applied both in the arbitration sphere and in the litigation sphere."

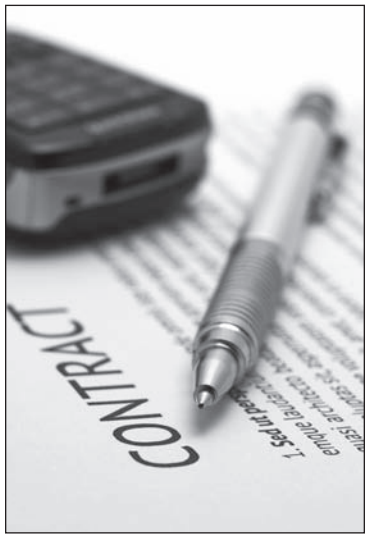
Pincus responded that even if it is applied in both contexts, it still disproportionately affects arbitration and runs afoul of the FAA.

Kagan also asked why the Court should impose its own determination of unconscionability when it is clearly a state law issue and one that may evolve over time based on the decision of state courts or legislatures. Pincus countered that it is not in fact the state's unconscionability doctrine but rather is only applied in the context of class action waivers in an arbitration agreement.

In closing, Pincus stated that it is the responsibility of the Court to determine

whether a state court is applying its unconscionability analysis in a manner that directly discriminates against arbitration. He said, "If the state has devised a rule that clearly discriminates, but has simply put the label on – of unconscionability, surely the FAA permits the Court to look at that. Otherwise…the protection will be reduced to nothing."

Deepak Gupta, representing Vincent Concepcion, opened by saying that the Court should not be asked to step into the shoes of the California Supreme Court, but rather to decide whether state law in question is subject to the savings clause in Section 2 of the FAA, which expressly allows state court to refuse to enforce arbitration clauses based on generally applicable contract defenses.



Gupta went on to say that the state law at issue is enforceable because it is applied equally to all contracts and it ensures that arbitration was consented to and represents a forum choice. "And third, the State law at issue is a correct and legitimate application of the State's common law to which this Court should defer," he added.

Associate Justice Sonia Sotomayor asked Gupta to provide the Court with a test that they could establish, which would allow courts to distinguish between "facially neutral contract law defenses that implicitly discriminate against arbitration and those that do not."

Gupta suggested that the Court start by deferring to a state court and assume that it is not engaging in any subterfuge and honestly applying a law in a manner that does not discriminate against arbitration. Then, the Court would have to determine whether the rule being applied is "tantamount to a rule of non-enforceability of arbitration agreements."

Justice Ginsburg brought up the Court's ruling in *Stolt-Nielsen S.A., et al. v. AnimalFeeds International Corp.* (No. 08-1198, 4/27/2010), which held that absent express consent, class arbitration is unavailable. She asked why it is not dispositive of the case, noting that AT&T Mobility had not consented to class arbitration.

Gupta responded that it stands for the premise that a party may not be forced into class arbitration but the case here is one of contract interpretation and whether it is unconscionable and unenforceable under state law. He added that AT&T Mobility has stipulated that if it does have to face a class proceeding, it would prefer a class action in court, not a class arbitration.

Associate Justice Kagan noted that AT&T Mobility has suggested in its brief that no one will choose class arbitration, so this ruling could effectively kill off arbitration in the consumer context. Gupta countered that parties have selected class arbitration and arbitration providers have administered them in the past. "Class arbitration has existed for a quarter century, so it's not something that is foreign to arbitration," he added.

Chief Justice Roberts accepted the case for consideration by the Court at the conclusion of oral arguments. A ruling is expected before the end of the year or by early 2011.

http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-893.pdf

CASE UPDATES

Federal Courts

Language that "this contract supersedes all prior contracts" nullifies earlier agreements to arbitrate

Cohen v. Formula Plus, Inc.
D.Del., November 8, 2010

Formula Plus entered into a series of agreements with brokers and salespeople to market oil products to Ghana. Several of these individuals had prior agreements with Formula Plus that described the percentage commission they would receive as a result of sales they brought in. When the Ghana deals were first discussed, Formula Plus renegotiated the amounts and percentages to be paid.

Distrust began to grow between the individuals and Formula Plus, so new individual contracts were drawn up between the company and each salesperson or broker. These contracts all contained language that made it explicit that the new agreements superseded all prior agreements.

When the first sale to Ghana was complete, Formula Plus paid no commissions at all. The aggrieved individuals sued, and Formula Plus moved to compel arbitration. Formula Plus argued that the prior agreements contained arbitration clauses. The plaintiffs argued that the new agreement did not contain such a clause and that should be dispositive.

After a lengthy discussion of the parole evidence rule, the Court found that each of the parties' home states would not allow evidence of the prior contracts to be admitted when determining whether the parties intended to arbitrate. Because the language in the last contracts was so clear regarding the fact that the last contracts effectively wiped the others out, no admissible evidence existed as to the parties' intent to continue to be bound by the arbitration clauses in prior agreements.

Thus, the Court ruled that the parties had not consented to arbitrate, and Formula Plus' motion to compel arbitration and dismiss the case was denied.

Georgia

Non-binding fee award may not be confirmed under Georgia law

Farley v. Bothwell
Ga.App., November 16, 2010

Ilene Farley retained Mike Bothwell to represent her in a series of complex whistleblower disputes. In that litigation, Farley received $550,000, and Bothwell was awarded attorney's fees of approximately $1.5 million.

Farley pursued arbitration under a state program for parties who believe their attorneys overcharged them. Farley prevailed. "The arbitrators found that Bothwell's failure to submit any billing to Petitioner over the five years of his representation in this matter constituted a waiver of any claim for his billed hourly fee over and above the contingency fee agreement amount, that the settlement was for $2 million, and that Bothwell was entitled to 50 percent of that amount in addition to $53,393 in advanced expenses. The arbitrators thus directed Bothwell to "refund" $396,606 to Farley."

When Farley moved to confirm the award, the trial court refused, because the Georgia law requires both parties to consent to the award. If the respondent is a lawyer and the respondent does not consent, the petitioner is given a lawyer to represent her at a later civil hearing, and the arbitration award is admissible as prima facie evidence of the unfairness of the fee.

Farley appealed, and the Georgia Appellate Court affirmed the result below. It noted that the motion to confirm was the wrong venue for the dispute. "Neither the trial court nor this court has considered the merits of the initial fee contract or of

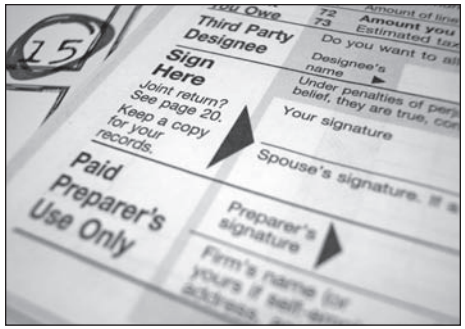
the settlement agreement, because the procedure Farley used to seek a judgment against Bothwell in superior court was limited to the narrow question of whether the award could be confirmed or not. This is not a finding that the 'binding arbitration' provision in the fee contract is inapplicable, as Farley asserts, nor is it a finding that the subsequent settlement agreement's arbitration provision prevails over the fee contract's arbitration provision, as Bothwell argues."

Texas

In absence of "enforcement" language, FAA trumps New York law/Texas court follows *Prima Paint* rule and orders arbitration despite allegation of fraud

BDO Seidman, LLP v. J.A. Green Development Corp.
Tex.App.-Dallas, November 9, 2010

Green entered into a tax consulting agreement with BDO. The agreement contained the following arbitration clause:



"If any dispute, controversy or claim arises in connection with the performance or breach of this agreement and cannot be resolved by facilitated negotiations (or the parties agree to waive that process), then such dispute, controversy or claim shall be settled by arbitration in accordance with the laws of the State of New York, and the then-current Arbitration Rules for Professional Accounting and Related Disputes of the American Arbitration Association ('AAA')."

BDO recommended a tax strategy involving characterization of some assets as distressed. The IRS later found the strategy to be an illegal tax evasion scheme, and it assessed more than $5 million in penalties.

Green sued BDO and BDO moved to compel arbitration. The trial court denied the motion, and BDO appealed.

The Texas Appellate Court first addressed the question of which law should apply: the FAA or New York law. The Court ruled that New York law only applies when the agreement is explicit that New York law is to govern both the creation and the enforcement of the agreement. "A choice of law provision, which states that New York law shall govern both 'the agreement *and its enforcement*,' adopts as binding New York's rule that threshold Statute of Limitations questions are for the courts. In the absence of more critical language concerning enforcement, however, all controversies, including issues of timeliness, are subject to arbitration."

In this case, because the agreement lacked the specific language called for by the New York law, the FAA would apply.

The Court also ruled that the type of dispute was one contemplated by the agreement and, despite Green's argument that he was less sophisticated and that he was defrauded by BDO, that the arbitration agreement was not unconscionable. The Court referred to the *Prima Paint* line of cases requiring that a party who wishes to get out of an arbitration agreement must show that the arbitration clause, not the underlying agreement, was the product of fraud. In this instance, the Court ruled that an arbitrator must determine whether BDO fraudulently induced Green to pursue the tax evasion scheme.

The case was reversed and remanded with orders directing the trial court to compel arbitration and stay the case. ■

In Depth *by Justin Kelly*

Dodd-Frank Financial Reform Addresses Mandatory Arbitration

The Dodd-Frank Wall Street Reform and Consumer Protection Act, which was passed over the summer by Congress and institutes reforms in the financial services industry, includes a provision that directs the Securities and Exchange Commission (SEC) to investigate the use of mandatory pre-dispute arbitration in securities industry disputes.

Under current law and regulations, investors with securities-related disputes are required to go through arbitration with financial firms, which are administered by the Financial Industry Regulatory Authority (FINRA).

The language in the Dodd-Frank Act directing the SEC to look into mandatory pre-dispute arbitration came from the Obama Administration and passed through both chambers of Congress unaltered. The language does not explicitly tell the SEC how to go about this task or call for a formal study but rather directs that if it finds that mandatory pre-dispute arbitration runs against the public interest or does not further the protection of investors, it may limit or prohibit its use.

SEC spokesperson John Heine said the Commission is currently soliciting input on mandatory arbitration in securities-related disputes. He explained that the SEC was currently taking comments at a dedicated link on the SEC website for those interested in commenting on what, if any, actions the SEC should take with regard to mandatory pre-dispute arbitration in securities industry disputes. The comments can be accessed at ***www.sec.gov/comments/df-title-ix/pre-dispute-arbitration/pre-dispute-arbitration.shtml***. Based on the comments received so far, there is about an even split between those in favor of keeping the practice and those calling for making arbitration an option for parties to consider post dispute. A few commenters suggested making arbitration compulsory for financial firms but optional for investors.

Section 921(a) of the Dodd-Frank Act amends the Securities and Exchange Act of 1934 and states that the SEC "by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors."

Further, section 921(f) amends the Investment Advisers Act of 1940 and, using the same language as in subsection (a), authorizes the SEC to limit or prohibit the use of mandatory pre-dispute arbitration in securities disputes.

Nancy Condon, spokesperson for FINRA, said in response to a question about FINRA's role in the Dodd-Frank Act directive that the SEC look into mandatory pre-dispute arbitration that "decisions have to be made by the Securities and Exchange Commission" and FINRA will act according to the directives of the SEC.

Constantine Katsoris, a law professor at Fordham University and a public member of the Securities Industry Conference on Arbitration (SICA), said that no one knows yet what the SEC will do about mandatory arbitration but noted that FINRA recently proposed a rule that would extend and broaden a two-year-old pilot program and allow all parties to opt for an arbitral panel consisting solely of public arbitrators.

Katsoris suggested that the rule proposal

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— V. James Mann, Esq., JAMS neutral

might "make it more difficult to get rid of mandatory arbitration" because investors would have the ability to bring their cases before public arbitrator-only panels. A consistent complaint about mandatory arbitration has been that investors have to try cases before panels that include industry arbitrators, but this would change under the proposed rule, he said.

An additional consideration that the SEC will have to take into account if it does decide to alter the current system is whether you can force the industry to arbitrate while allowing investors to take their dispute to court if you do away with mandatory arbitration, he noted.

James Mann, a former in-house attorney for Merrill Lynch and current JAMS neutral, said, "Mandatory arbitration has been under attack in the consumer context, and the securities area may have gotten swept up with that movement."

"The reality is that you have a business that is mostly verbal, so there will be disputes, but having to defend lawsuits all around the country would be an onerous burden on the industry," he said. Arbitration "serves a valuable function for both sides" by providing a forum for resolving securities disputes and avoiding the cost and delay of court, he added.

Mann noted the argument that the system is not fair to investors because FINRA rules require an industry arbitrator sit on panels is not always supported by the actions of investors. He cites the statistic that in the pilot program, which allows investors to opt for an all-public arbitrator panel, only 50 percent of those given that option have chosen to have a public arbitrator-only panel. Seemingly, those investors and their counsel believe that having industry expertise on the panel is valuable and does not impact the fairness of the outcome, he added. "Making the pilot permanent" would be a good way to address the fairness argument, he suggested.

Mark Segall, former head of litigation at JPMorgan Chase and current JAMS neutral, echoed that sentiment, saying that parties have expressed the belief that it is "good to have an industry arbitrator on the panel because their expertise can help inform the work of the other arbitrators on the panel."

He said, "Arbitration in the securities context is a good idea that has been done for many, many years and produced final results for less time and expense than going to court would." In particular, it guarantees that investors with small-dollar cases will have access to a forum to resolve their disputes because the costs of litigation could, if mandatory arbitration is ended, lead investors to abandon pursuing claims against firms in court, he suggested.

According to Segall, a widely cited statistic used to criticize FINRA-administered arbitration is that 70 percent of arbitrations are decided in favor of industry. This is misleading because "firms settle cases they believe they will lose" before an arbitration proceeding gets very far, he offered.

Segall said his practice while in the industry, and that of many others, was to determine whether there was wrongdoing on their part and, if so, "to try to settle the case for what the firm was liable for." In fact, a number of financial industry firms have early-assessment programs designed to identify legitimate claims and settle them well before an arbitration hearing takes place, he noted.

According to Segall, it is certain that the financial industry will comment to the SEC, but the comments would likely come from an industry association, not from individual firms.

Steven B. Caruso, an attorney with Maddox, Hargett & Caruso in New York and past president of the Public Investors Arbitration Bar Association (PIABA), said he hopes that in looking at mandatory arbitration, the SEC takes the side of investors and makes arbitration optional rather than mandatory.

He said, "FINRA has made great strides in improving the system for investors, in particular the rule on an all public arbitrator panels." FINRA also has improved the transparency and fairness of the system, and while he is "happy to arbitrate in most instances to avoid the costs and delays of litigation, investors must have the right to take their claims to court." However, if the SEC does get rid of mandatory arbitration, it should still allow parties post dispute to compel arbitration with firms.

Jason Doss, an attorney specializing in securities law in Atlanta and current PIABA Treasurer, said the SEC should direct that mandatory arbitration be treated as a one-sided clause, which requires firms to arbitrate but always preserves the right of investors to go to court if they so choose. Investors "should always have the option to opt out of arbitration," he suggested, adding that such a change "would be a positive development for investors."

He acknowledged that FINRA, through a number of rule changes, has over the past several years made the process fairer, but nevertheless, arbitration should always be an option for investors, not a requirement.

Doss went on to note on the fairness question that arbitration statistics from FINRA demonstrate that wealthy investors who take their cases to arbitration do not fare as well as small investors. This may be because of the perception by some arbitrators that as wealthy investors, they should be more sophisticated with regard to their investments, he suggested. This demonstrates the need for investors to have the option of taking their case to court rather than always being required to arbitrate disputes, he added.

Another criticism identified by Doss is that arbitral awards may not serve as precedent in future cases, and because securities disputes are for the most part decided in the arbitral forum, case law in the area has not developed. Mann countered that he is pleased arbitral decisions cannot serve as precedent because they are not rendered by judges in court. He also suggested that "there is a lot of case law out there, and certainly enough to guide arbitrators issuing decisions in securities disputes." There are few areas more sharply defined as the securities arena, and courts have been issuing rulings for over 75 years, he added.

"FINRA has made great strides in improving the system for investors, in particular the rule on an all public arbitrator panels. [I am] happy to arbitrate in most instances to avoid the costs and delays of litigation, investors must have the right to take their claims to court."

— Steven B. Caruso, Esq. Maddox, Hargett & Caruso

Doss said PIABA is preparing comments and plans to meet with the SEC to discuss the issue of mandatory pre-dispute arbitration insecurities disputes.

Caruso suggested that the SEC should do more to solicit comments and make the comment page more visible for those interested, especially if the SEC wants comments from a broader swath of interested parties.

Congress Directs Broad Study of Consumer Arbitration

Title X of Dodd-Frank establishes the Consumer Financial Protection Bureau (CFPB) and directs it to conduct a study of mandatory pre-dispute arbitration in consumer financial product or service contracts

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— Mark E. Segall, Esq. JAMS neutral

and then report back to Congress. Section 1028 says the CFPB "shall conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services."

Treasury spokesperson Peter Jackson said the CFPB "is in the early stages of putting the study together." No timeline has been set for release or completion of the study.

The CFPB is set up as an independent agency within the Federal Reserve Board and will take over enforcement of federal consumer protection and fair lending laws, including the Truth-in-Lending Act (TILA), the Equal Credit Opportunity Act and the Real Estate Settlement Protection Act.

The directive to examine mandatory pre-dispute arbitration instructs that in studying whether to limit or outright prohibit its use, the CFPB must find "that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers."

Voluntary arbitration agreements entered into after a dispute arises would not be subject to any new restrictions. Section 1028, Subsection (c) explicitly states that the authority to limit pre-dispute arbitration "may not be construed to prohibit or restrict a consumer from entering into a voluntary arbitration agreement with a covered person after a dispute has arisen."

Any regulation or prohibition would apply only to future contracts and would not be effective until 180 days after effective date of the regulation.

Prohibitions on Enforcing Mandatory Arbitration

The Dodd-Frank Act does contain other provisions that explicitly prohibit the enforcement of mandatory pre-dispute arbitration agreements in certain areas.

Section 748 amends the Commodity Exchange Act to include a prohibition against the enforcement of mandatory pre-dispute arbitration agreements in whistleblower actions. It says the rights and remedies provided for in the section may not be waived due to pre-dispute arbitration agreement. It goes on to explicitly say, "No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."

Further, in Section 1414 the Truth-in-Lending Act is amended to include a prohibition against enforcing mandatory pre-dispute arbitration agreements in residential mortgage contracts. It says, "No residential mortgage loan and no extension of credit under an open-end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction."

However, it does not preclude parties from agreeing post dispute to use arbitration to resolve their claims. It says the previous paragraph "shall not be construed as limiting the right of the consumer and the creditor or any assignee to agree to arbitration or any other nonjudicial procedure as the method for resolving any controversy at any time after a dispute or claim under the transaction arises." ■

ADR Conversations

The State of Mediation Training

The following interview was conducted by JAMS Executive Vice President and General Counsel Jay Welsh, Esq., with JAMS Neutral Bruce Edwards, Esq.

JAY WELSH, ESQ.
JAMS Executive V.P. & General Counsel

BRUCE EDWARDS, ESQ.
JAMS Mediator & Arbitrator

Q. ***Bruce, you have trained mediators all over the world. How has mediation training changed?***

A. I first started training mediators in the United States almost 25 years ago largely out of necessity. At the time, we were seeking to expand and develop a broader ADR marketplace, and we needed to identify and train high-quality mediators for our first commercial enterprise, the Bates Edwards Group. Those early trainings emphasized developing a process expertise that sought to engage the parties and respect their right of self determination.

As you would expect, over the past 20 years, mediation training has evolved and been refined as each year hundreds of mediator hopefuls, often attorneys and retired judges, seek an alternate career path through mediation training. To meet this growing demand, mediation training has become more institutionalized, and through industry leaders, such as the Straus Institute for Dispute Resolution at Pepperdine University, it's now possible to choose from dozens of mediation-related courses in pursuit of advance credentialing.

My pet peeve in the U.S. are the ready supply of two- to five-day mediation training courses, which involve predictable lesson plans and scripted role plays. In this cottage industry of mediation training, mediator hopefuls seem interested only in learning new settlement techniques to add to their mediation toolbox or otherwise looking for shortcuts to commercial success.

One of the greatest challenges for mediation training today is how to respect our roots of developing mediators who possess great process skills while being prepared to work in a marketplace of increasingly sophisticated and demanding consumers.

Q. ***What new modes of training are you seeing done outside the United States?***

A. I've been teaching mediation internationally for the past six years, primarily in Europe, so I want to be careful not to generalize. Although it's tempting to describe the commercial mediation market in Europe as being in the same position as the United States 10 to 15 years ago, that would overlook some important distinctions. While the development of commercial mediation in Europe, particularly in the area of cross-border disputes, is still largely in the shadow of arbitration, there are clearly signs that mediation is emerging from its nascent stage of development.

Because the European Union member countries are largely ahead of the U.S. in their requirements for mediator certifica-

tion, mediation training is taken very seriously. As an example, Austria requires mediators who wish to be registered with the government to complete almost 500 hours of mediation training. Consequently, mediation training in Austria is extremely sophisticated and offers a multi-dimensional approach to learning.

The best example is the International Summer School on Business Mediation, held every other summer in the small Austrian village of Admont. The conference itself is the co-creation of two of Austria's leading mediation trainers, Dr. Mario Patera and his wife, Ulrike Gamm, both trained psychotherapists and mediators. The conference brings together trainers from all over the world and offers a far-ranging curriculum. Imagine a day of mediation training that begins with a lecture on recent findings in neurobiology and the implications of that research on decision making in mediation. The day continues with an interactive seminar on body language in mediation taught by a professor of pantomime. The day's coursework completed, the interactive learning moves to an evening hike in the Alps with European-based mediators discussing various business models for the expansion of commercial mediation.

This is one example of a pedagogically different approach to training mediators that is viewed by many as the gold standard in Austria and has important lessons for our own domestic mediation training.

Q. ***What do you see the future of mediation to be in Europe?***

A. I'm very bullish on the growth potential for mediation in Europe. We are already witnessing an accelerated startup curve led by the European Union Directive slated for implementation in March 2011. That Directive will require all 27 member countries to adopt laws promoting the mediation of cross-border disputes. Some countries, such as Italy, have taken the Directive a step further and have already passed laws mandating the use of mediation in all domestic-based civil litigation.

Moreover, the international consolidation of law firms and major corporations, including insurance companies, means that many of the potential users of mediation in Europe may be only one or two steps removed from co-workers in their own companies or firms who have direct experience with U.S.-based mediation.

As we seek to hasten the advance of commercial mediation in Europe, it's critical for us to remember that our audience is far from homogenous. Indeed, the 27 EU countries are characterized by major differences in language, culture and legal systems. It's also critical for us to keep in mind that the future of mediation in Europe will be carried forward on the backs of European-based mediators. The impetus for the creation of JAMS International was the opportunity to partner with two of Italy's premier mediator/trainers, Giuseppe De Palo and Leonardo D'Urso, and other premier providers throughout the EU.

Q. ***You just returned from training in Malaysia. How was that different from training in the U.S. and Europe?***

A. The 50 students in our class in Kuala Lampur were mostly attorneys, skilled in the requirements of arbitration, but understanding very little about mediation. As a former British Colony, Malaysia has a legal system based on English law, which gave us common points of reference. As a group, the class was eager to learn about mediation and exceedingly hospitable throughout the six-day training.

Perhaps the most obvious difference that became apparent in training was the rich cultural diversity of the group and its implications for training new mediators to understand and work within an environment of profound cultural differences. Approximately 60 percent of Malaysians practice Islam, while many others practice Buddhism or Hinduism. These differences promoted candid classroom conversations, which ranged from the practical, i.e., not mediating on Friday afternoons during the Muslim call to prayer, to the theoretical, i.e., why not attempt to co-mediate using mediators of different backgrounds to span this cultural divide.

Q. ***In addition to training, you've been mediating every day for more than 20 years now. How do you keep it fresh so that you are delivering your best every day?***

A. Years ago, someone asked Larry Bird, a former professional basketball player for the Boston Celtics and now Hall of Famer, how he could perform at such a high level night in and night out. He replied that it was simple; he just had to remind himself that there may be someone in the audience watching who had never seen him play and he owed it to that fan to perform at his very best. I try to keep that in mind, especially on days that I'm fatigued or tempted to cut corners.

I'm also reminded of the career advice given by my father, which was "love what you do and you'll never work another day in your life." I love the challenge of finding ways to connect with people and to help resolve increasingly complicated disputes. These challenges help keep me fresh.

Q. ***Can you describe a particularly memorable moment in your international mediation training?***

A. This past year I was enjoying the quiet serenity of Chinese tea service with a Professor of Negotiation from Peking University in Beijing, Andrew Wei-Min Lee. We had just finished talking about how the Chinese central government has decreed that a law favoring mediation will be drafted and implemented in the months ahead when the conversation shifted. Professor Wei-Min Lee asked if I was familiar with the ancient Chinese character writing. He proceeded to show me that the Chinese word for mediation, *tiao jíe*, is written using two characters or symbols; the first symbol represents tuning an instrument (its Western interpretation suggesting repairing a relationship), while the second symbol suggests cutting the horns off a bull – perhaps eliminating the threat of future harm. The most memorable lessons are not always in the classroom.

Q. ***Where do you see mediation going in the United States in the next 10 years?***

A. I foresee continued growth, particularly in smaller markets around the country. [People living in] communities with populations less than 100,000 historically had to travel to major metropolitan areas or import someone to gain access to a skilled mediator. Now, most of these communities have at least one burgeoning ADR practice as well as many part-time mediators.

It's obvious that our system of public justice is a shrinking resource, with judicial time and courtroom availability increasingly allocated away from complex civil disputes. This can only serve to fuel an expanding demand for ADR services.

These observations are supported by an economic analysis of the ADR industry as a whole. National surveys have attempted to calculate how many dollars are spent in the U.S. on ADR services as a fraction of major law firm revenue. By any analysis, these surveys suggest significant growth potential for mediation before it achieves its rightful place in the hierarchy of "Appropriate Dispute Resolution." ■

International Focus

UN Arbitration Group Begins Work on Transparency in Investor-State Arbitration

A United Nations Commission on International Trade Law (UNCITRAL) working group recently began work developing a legal framework that would govern transparency in treaty-based investor-state arbitrations.

The UNCITRAL working group is directed to determine the best legal framework for promoting transparency in investor-state arbitrations by taking into account the subject matter of disputes, the effect on public policy, the public interest, confidentiality and protecting the interests of parties to the arbitration and those third parties potentially affected by the arbitration.

The legal framework could take the form of a model clause on transparency that could be included in the dispute resolution provisions of international treaties or drafting arbitration rules that specifically address transparency, which could take the form of separate rules or an annex to the existing UNCITRAL Arbitration Rules. It also could take the form of guidelines on transparency in investor-state arbitrations that would be used to inform the drafters of international treaties, arbitral tribunals and parties to an arbitration.

International investment agreements take the form of treaties between states for the reciprocal encouragement, promotion and protection of investments. The settlement provisions in these treaties allow investors in a state covered by a treaty to bring a claim in arbitration against the state party to a treaty. Currently, there are more than 2,500 international investment agreements, and "international investment arbitration is one of the fastest-growing areas of international dispute settlement," according to UNCITRAL.

The decision to pursue a legal framework for treaty-based investor-state arbitrations came during the working group's recent work revising the UNCITRAL Arbitration Rules, completed in July 2010. A decision was made not to address transparency in the revisions, but rather to pursue it as a separate matter with its own dedicated work sessions.

Work on transparency in investor-state arbitration is needed, according to UNCITRAL, because of the increase in the number of such arbitrations; a growing number of frivolous claims; high-dollar awards; inconsistency in awards, which leads to legal uncertainty; and "uncertainties regarding how the investor-state dispute settlement system interacted with important public policy considerations." Resolving those issues and creating some sort of legal framework could provide the public with a better understanding of the process and the issues involved and enhance the credibility of the process, it said.

The working group also was directed to take into account that "both transparency and confidentiality can be considered as legitimate interests of investor-state treaty-based arbitration." With that in mind, it was further asked to "consider whether a right balance should be found to protect both interests and whether it would be useful to formulate policy considerations on principles underlying transparency in treaty-based investor-state arbitration."

University of Georgia law professor Peter B. "Bo" Rutledge, an observer at the UNCITRAL meeting who is speaking in an individual capacity, said the delegates began the session with two days of general discussion and then moved on to the specifics of what type of legal framework should be developed.

According to Rutledge, most of the discussion centered on creating an annex to the UNCITRAL arbitration rules, establishing guidelines similar to the International Bar Association's arbitration guidelines, or writing organizing notes. After much discussion, the delegates came down on the side of creating an annex to the arbitration rules, or drafting guidelines, he said.

While an annex or guidelines could provide a useful legal framework for promoting transparency, the issue of what effect they would have on previously negotiated and ratified treaties, whether they could or would be retroactive, was a major issue of discussion, especially in light of the report from United Nations Conference on Trade and Development (UNCTAD) that few new treaties are in the works, Rutledge explained. "Thus, if the legal framework only refers to future treaties, it would have a limited impact," he noted. The working group wants to have and understands that any legal framework should have a "meaningful impact" and agreed that it should work on a "way to have them apply to existing treaties," he said.

One proposal was to have parties that enter into a treaty-based investor-state arbitration opt into the annex, which pre-supposes that an annex is the ultimate framework developed, he said. Another competing proposal from the Swiss delegation was to develop a protocol that individual states could sign, acceding to a legal framework on transparency, he added.

"This attracted a great deal of interest," Rutledge said. He added, "This approach could well be what comes out" of the work of the working group.

According to Rutledge, an issue that arose in connection with transparency and how parties would be tied to a legal framework is the idea of shirking, which refers to the instance where both parties decide to keep the proceedings confidential and would thus be in violation of the legal framework. The working group was unable to completely resolve the issue but did discuss providing some standing to third parties, which would force the proceeding into the open, or a requirement that the state where the investor resides be notified of the proceeding, to address the issue, he said.

The working group also discussed the scope of what to publicize about the arbitration, Rutledge said. The delegates agreed that the existence of the arbitration and the arbitration award should be publicized, but they were unable to agree on whether to publicize the pleadings or exhibits, or whether hearings should be public, he noted. The strongest reservations expressed involved the publication of exhibits that contain documents of a sensitive nature, including of trade secrets, security information and confidential business information, he added.

Rutledge said that the discussion of publicizing various components of the arbitration lead to a discussion of who exactly would do the publicizing. Because the UNCITRAL rules and the International Centre for Settlement of Investment Disputes (ICSID) rules, which are used most often in the context of investor-state arbitration, are structured as self-administered rules, there is no administrative body in place to handle the task.

The delegates were clear that they were interested in a central administrative body that they could turn to in matters related to the transparency legal framework, Rutledge said. UNCITRAL, the Permanent Court of Arbitration at The Hague (PCA), states themselves and regional bodies were all discussed, but no final decision was made due to underlying issues still unresolved, he added. UNCITRAL offered up its services, noting that the Office of Legal Affairs at the UN currently handles similar duties. PCA also offered its services. ■

Good Works

A Look at Four Weinstein Fellows As They Gain Valuable ADR Experience

The Weinstein International Fellowship, part of the JAMS Foundation, brings alternative dispute resolution practitioners from around the world to the United States to study and learn skills and practices and gain a broader understanding of the field from highly experienced neutrals and ADR educators.

The fellows have the opportunity to study in an academic setting or concentrate their time among practitioners, or both, in their effort to develop new skills, hone existing ones, or learn about new areas of practice. Once they have completed their fellowships, which can last from one month to one year, they return to their home country to spread their knowledge, work to promote the increased use of ADR and develop domestically based programs.

The program has already hosted 16 Fellows from countries as diverse as Nigeria, Ukraine, Israel, Ireland and South Africa. They begin with a networking weekend at the Weinstein Mediation Center in Napa and then move on to the JAMS Resolution Center, other organizations or a university. Following are profiles of four Fellows.

The 2010 Weinstein International Fellows Class at the Weinstein Mediation Center in Napa in September. From left: Ralph Zulman (South Africa), Hagit Shaked-Gvili (Israel), Lilian Vargas (Argentina), Nicola White (Ireland), Judge Daniel Weinstein (JAMS Foundation), Aminu Gamawa (Nigeria), Fraser Sampson (United Kingdom), Jay Folberg (JAMS Foundation), Tilahun Retta (Ethiopia) and Galyna Yeromenko (Ukraine).

XIMENA BUSTAMANTE is an attorney in Ecuador and formerly served as deputy director of the Arbitration and Mediation Center at the Quito Chamber of Commerce. Her stated goals in pursuing the fellowship were to hone her mediation and negotiation skills and use those skills to further develop the nascent practice of ADR in Ecuador.

Bustamante said she saw the fellowship program as a chance to learn about mediation in the country where it is most well developed and treated as a full-time profession. She also noted that while arbitration is an important part of legal practice internationally, mediation has not yet gained the widespread acceptance that arbitration has. "Ecuador is no exception, and despite important steps that have been taken for the enhancement of mediation, there is still a limited number of professionals knowledgeable about the mechanism, and even less committed to it," she said, adding, "The practice of mediation is not yet considered a profession."

Turning to specific skills and knowledge she was able to develop while here, Bustamante said her studies at Pepperdine allowed her to understand the theory behind mediation. She also said, "While at JAMS, I have been able to witness the functioning of the process and to learn from the experience."

"In general terms, however, now I feel confident that I will be able to handle successful mediations in Ecuador," she said. According to Bustamante, she learned how to convene a case, the importance of preparing for mediation and the kind of information one needs to look for before the mediation day.

In addition, she said she learned "the importance of allowing the parties and the lawyers to have their day in court at the beginning of the process, the different negotiation strategies, various ways to deliver offers, the importance of keeping the negotiation moving, the possibility to create various meetings during the mediation, the need to have the lawyers on your side, the importance of timing, and closing techniques, including the mediator's proposal."

"Ecuador, where the judicial system is facing a crisis and the access to justice is really limited, is in need to explore alternative ways for conflict resolution."

— Ximena Bustamante

In her fellowship proposal, she mentioned that one barrier to ADR development in Ecuador is its litigious nature. During her fellowship, she said she learned the valuable lesson that one of the key ways to bring people around to using mediation is "to demonstrate, demonstrate and demonstrate." She explained that it was a point driven home at the Weinstein International Fellows gathering in Napa.

This knowledge has convinced her that the best way forward "will be to have a group of professionals seriously devoted to mediation and demonstrating its effectiveness by convening mediations in specific cases," she said. Teaching ADR should also help convince people to use mediation, she added.

"Along with that demonstration, the involvement of the courts is essential," she said. While here, she learned the important role that judges in the United States played in developing the ADR field and hopes she can replicate it in Ecuador.

Bustamante said that arbitration clauses are included in many business contracts in Ecuador, but few mention mediation as a possible avenue for resolving disputes. Some do include a mediation step, but "the way to encourage a broader use of mediation requires an elevation of the settlement

"Under this fellowship, I had the opportunity of visiting many public interest mediation programs run by women in Boston. I plan to conduct mediation training for women lawyers in Nigeria, with particular focus on matrimonial cases, especially divorce, because the court system in Nigeria cannot adequately provide for the justice needs of women."

— Aminu Gamawa

rates," she said. "That will probably result in an increase of mediation use through time," she suggested.

"I am convinced that mediation is not only an effective way of managing conflicts, but also provides the opportunity to construct more peaceful societies," she said. "Ecuador, where the judicial system is facing a crisis and the access to justice is really limited, is in need to explore alternative ways for conflict resolution, and mediation brings such an alternative by empowering the people with the responsibility of peacefully resolving their own disputes."

AMINU GAMAWA is an attorney, mediator and human rights activist from Nigeria who is pursuing an S.J.D at Harvard Law School. He is concentrating on developing conflict resolution skills with the goal of increasing the use of mediation in Nigeria as an alternative to its congested court system and as a device to promote civil justice and peace.

He described the Weinstein Fellowship as "a great opportunity for personal and professional development in the field of ADR and an opportunity for acquiring skills and knowledge on ADR from international and comparative perspectives. The mentoring component of the fellowship was one of the reasons why I choose the Weinstein Fellowship, and I believe the fellowship will prepare me for a successful career in this field," he added.

Gamawa said the opportunity to shadow highly experienced mediators and arbitrators at JAMS' Boston office demonstrated to him the skills that are required to successfully handle complicated cases and work with parties to reach a satisfactory outcome. "Watching them do this magic has enabled me to acquire many practical skills, including facilitation, problem solving, handling emotions, moving from position to interest and the importance of confidentiality and neutrality," he said.

According to Gamawa, "while Harvard is giving me all the theoretical tools that I need to understand and analyze disputes, the JAMS neutrals showed me how these theories and ideas work in practice."

Gamawa explained that another project he would focus on before returning to Nigeria is developing an ADR training manual for use back home. He said his experience serving as a mediator and trainer with the Harvard Mediation Program was enriching and would help with his work introducing an ADR course and developing the training manual. "I am working closely with Professor Robert Bordone to develop a teaching manual on ADR that will focus on practice and experiential learning," he added.

Turning to the experience sought and gained relevant to increasing the use of mediation as an alternative to the domestic court system, Gamawa said the teaching methods and aids that he saw used in U.S. law schools provided a more comparative and practical perspective. He plans to use them to teach ADR and introduce a mediation clinic at the University of Maiduguri and Ebonyi State University that "will train students to become skilled mediators so that they can help the poor, who cannot afford to go to court, and those who prefer to settle out of court."

"I will use the Harvard mediation clinic model and will start by training a couple of my colleagues who are already teaching to ensure that we have the adequate manpower to manage and supervise the clinical students," he said.

Another of Gamawa's stated goals is to apply the knowledge gained during his fellowship to training women lawyers in Nigeria in mediation and dispute resolution skills. "Under this fellowship, I had the opportunity of visiting many public interest mediation programs run by women in Boston," he noted. "I plan to conduct mediation training for women lawyers in Nigeria, with particular focus on matrimonial cases, especially divorce, because the court system in Nigeria cannot adequately provide for the justice needs of women."

"Training women lawyers as mediators and equipping them with skills on how to handle emotion and psychological issues will help tremendously in promoting access to justice and amicable resolution of disputes," said Gamawa, noting that he is "in constant communication with leaders of the women lawyers in Nigeria and they are very passionate and interested in becoming mediators and using [their skills] to solve disputes."

HAGIT SHAKED-GVILI is a practicing mediator and served as the administrator of the first court-implemented ADR case management program in Israel. She ventured to the U.S. to learn about nonbinding arbitration, neutral case evaluation and online dispute resolution (ODR).

Shaked-Gvili was able to observe a number of JAMS neutrals. She said her observations demonstrated the value to the process that comes from neutrals with solid experience and backgrounds relevant to the dispute. "The experience that the neutrals present, both in process and essence, is highly respected by the parties, and that background often assists in evaluating the merits of the case and contributes to the effectiveness of the process," she said.

One technique that Shaked-Gvili said she was introduced to in the U.S. is the occasional practice of co-mediation, which allows mediators to bring their mutual experience to the process. She added that it "surely will be implemented in my mediation practice in Israel. My hope is that this practice will be expanded to international disputes where cross cultural issues are in stake."

One stated goal of hers was to learn more about how ADR is taught and bring that knowledge back to Israel. She said she was able to gain a broader, deeper understanding of how ADR is taught and how attorneys are encouraged to use ADR.

"More accessible dispute resolution methods are of the essence. Israel has been known as an innovative nation leading in high tech and so [it] will be the ideal environment for creating [an] ODR system for use in Israel and beyond."

— Hagit Shaked-Gvili

"Teaching in the Gould Negotiation and Mediation Program in Stanford Law School pointed out the need to educate the new generation about the nature of different ADR options, equipping the students with a tool kit that will enable them to advise and represent their clients in a way that will best serve their interests," she said.

Interacting with other Fellows showed her the value of learning from one another, Shaked-Gvili said. She added, "The information I have gathered has helped me identify what might be applied from the American system to the Israeli one."

Her study of ODR showed that there is an increasing demand for the service and that its use is growing rapidly. "In an increasingly globalized technological community, it is self-evident that ODR in its variant applications will become [an] in-

"While my fellowship period at JAMS lasted three months, this fellowship for me is a lifelong fellowship and one which I know will make a lasting impact on the growth of ADR in Ireland and will provide access to justice for its citizens."

— Nicola White

tegral part of the world of ADR," she said.

According to her, "more accessible dispute resolution methods are of the essence. Israel has been known as an innovative nation leading in high tech and so [it] will be the ideal environment for creating [an] ODR system for use in Israel and beyond," she suggested.

NICOLA WHITE is currently a legal expert and researcher on ADR at Ireland's Law Reform Commission. She sought a fellowship in order to study court-annexed dispute resolution and learn how pro bono ADR programs are set up and function.

White said she was attracted to the Weinstein Fellowship Program because JAMS is internationally regarded as a leader in ADR and it presented an opportunity to "learn from the best." "While one can study and learn from textbooks about ADR and mediation, the education gained through practical observation and experience during such a fellowship is immeasurable," she added.

Turning to her study of court-annexed programs, she said the most important thing she learned is that while legislation can aid in establishing programs, the real need is for "a cultural change like what happened in California in terms of both citizens and the legal profession valuing such a program." According to White, "without the commitment of the legal profession, citizens won't get the encouragement or advice that is needed for them to attempt resolving their dispute through that system."

White went on to say, "I've also come to realize that the most successful court-annexed ADR systems in California, such as the one in San Mateo, need to have the right infrastructure and people involved in order for it to be a success." It will be important for Ireland to properly implement and execute a court-annexed program and not rush the process of designing and planning for it, she added.

Learning about pro-bono ADR programs was one goal of hers, and she said she gained valuable knowledge about them during her fellowship, mostly from her project work at the JAMS Foundation. "Each of these projects are a flagship for how pro bono initiatives can assist in the development of ADR and benefit not only the ADR community, but the general community."

According to White, there is a large number of trained mediators in Ireland, but because there are not that many mediations, much of this skill goes to waste. "My hope is to establish a pro bono mediation service whereby citizens who cannot afford to pay for a mediation would be able to use the skills of these mediators to resolve their dispute," she said. "The advantage for the mediators in such a pro bono program would be that they would be in a position to increase their mediation workload and build their experience mediating small-value disputes," she added.

Turning to the effect her experience will have on her work for Ireland's Law Commission, she said her work at the JAMS Center "greatly helped" in writing a final report and mediation bill, which was launched by Ireland's Chief Justice on November 16. "It gave me the opportunity to learn best practices in the field and incorporate those into the report and legislative provisions," she added.

"While my fellowship period at JAMS lasted three months, this fellowship for me is a lifelong fellowship and one which I know will make a lasting impact on the growth of ADR in Ireland and will provide access to justice for its citizens," she concluded. ■

Worth Reading *Reviewed by Richard Birke*

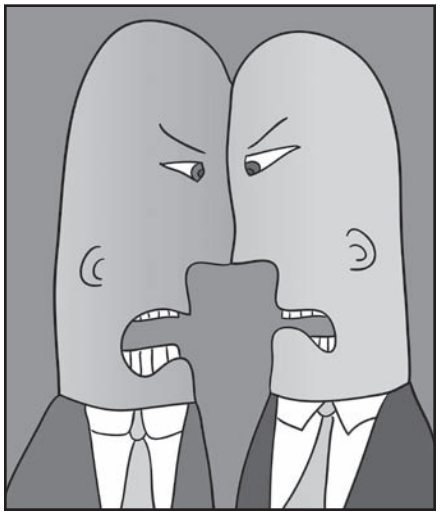
Challenging Conflict: Mediation through Understanding

by Gary Friedman and Jack Himmelstein, ABA Press (2008)

Few mediators are as committed to joint sessions as are Gary Friedman and Jack Himmelstein. In their book, Challenging Conflict: Mediation Through Understanding, Friedman and Himmelstein lay out the arguments for joint sessions and against caucuses, or separate sessions, and their arguments are persuasive.

Joint sessions, the authors claim, allow parties to make decisions jointly, to work together, to take responsibility for the resolution of the dispute and to uncover what lies beneath the "level at which the parties experience the problem." Caucuses vest too much power in the mediator and too little in the parties. By engaging in the former and not the latter, the parties avoid the "conflict trap."

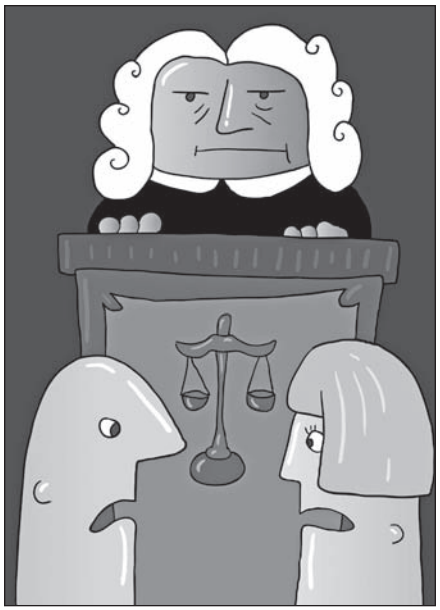
What is a conflict trap? It is "a set of mutually reinforcing responses to conflict that keeps the parties locked in battle," typically characterized by attempts to attack the other, to persuade the other that he/she is wrong and to convince the other to back down. While these attempts may seem to be focused on resolving the conflict, they have the effect of causing people to dig in even deeper to their positions.



Friedman and Himmelstein don't lecture to the reader. Instead, they recount mediations that are lightly fictionalized accounts of real disputes they mediated. They weave these stories into the process of a mediation – one that may be typical for them, but not necessarily typical for most mediators or parties.

In their writing about the first phase of conflict, the authors introduce the reader to siblings whose first conflict is about who will decide the conflict. The siblings own a farm resort in South America, and they are having battles about the use and care of the property. At one particularly vituperative juncture in the siblings' relationship, a local judge is called by one of them to come to the property to keep the peace. "The mediator" is there, and he asks the siblings whether the judge is going to decide the dispute. The siblings agree that they don't think the judge should decide the dispute at that time, although they hold open the possibility that the judge may decide the dispute at some later date. The mediator seizes on the idea that the parties want to retain complete control over the decision and that a powerful decision maker will take that away from them.

What is a conflict trap? It is "a set of mutually reinforcing responses to conflict that keeps the parties locked in battle."



Friedman and Himmelstein contrast a third-party decision with an "understanding-based alternative." In the traditional model, an imposing judge figure hovers over a small pair of siblings (shown as bubbles in figures in the book); in the understanding model, the parties loom large above a smaller figure labeled "mediator." The authors suggest that while mediation may be more party-driven than adjudication, the traditional model of conflict resolution infects mediation with a similar mind-set – that the neutral third party is the most powerful figure in the room and that the parties ought to defer to the third party. The authors suggest that the most insidious part of traditional caucus mediation is that the parties are unaware that they have bought into a learned helplessness.

In the second part of the book, Friedman and Himmelstein introduce us to two companies, Radix and Argyle. The companies have been in a titanic, 30-year struggle competing with each other and their portfolio of disputes is valued somewhere around $300 million. The companies are interviewing mediators – the authors and "Jim Black."

The mediator seizes on the idea that the parties want to retain complete control over the decision and that a powerful decision maker will take that away from them.

The differences between them? Black will caucus, keep one side's information secret from the other and use veiled threats and coercion to produce a settlement in one or two days. The authors, on the other hand, will not caucus, will use their skills to make sure parties are aware of their options at every stage of the mediation and will probably take substantially longer than Black. In this chapter, the authors lay out their critique of the traditional system in which lawyers do most of the talking, the claim is discussed primarily in terms of legal realities, and the authors use the secret information gained from one side as a form of tacit threat ("they know something and I know something I can't tell you, but if you knew it you would be scared – but they don't want to tell you in case you go to trial and they want to use it against you – but you should settle because of how scary it is"…these are my words, not the authors'). In contrast, the authors' approach puts business realities ahead of legal realties, not displacing them entirely, but instead relegating them to second seat. An enthusiastic executive gushes, "That's what I came here to do," and he moans how the old mind-set has cost them 30 years of lost time and money spent on unnecessary disputing.

Further along in the book, readers meet a Holocaust survivor having trouble dealing with the author who is working on her biography, a group of 30 people embroiled in an environmental dispute and members of the San Francisco Symphony having trouble with their contracts. Readers are treated to nearly a dozen narratives and mini-scripts in which the mediators guide people into and through the Friedman-Himmelstein mediation process.

And it is a detailed process. The five major steps are Contracting, Defining the Problem, Working through the Conflict, Developing and Evaluating Options, and Reaching Agreement. Each step has discrete substeps. For example, Contracting is broken down into Establishing Contact (engaging the parties), Explaining the Process, Clarify Roles and Responsibilities of Participants (including intentions) and Negotiation of Ground Rules. Other parts of the mediation process are similarly disassembled and examined.

The authors offer tools and skills to help at every stage. One such tool is the "Mediator's Loop of Understanding" in which the mediator understands each party, expresses that understanding, seeks confirmation from the parties that they feel understood and receives that understanding. The authors state clearly, "This last step is crucial. Confirmation completes the loop."

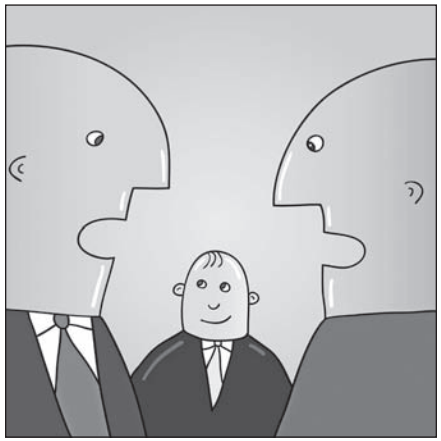
Friedman and Himmelstein note that "we tend to judge ourselves by our intentions" and that "we judge others by the impact of their actions on us." The siblings in South America learn that each had construed the actions of the others as intentional efforts to harm the other, while each saw their own actions as benevolent actions that were misconstrued by the other. The siblings eventually reconcile and refer to the mediation as "the miracle," a lasting breakthrough in their relationship.

Lest the mediators become too self-aggrandizing, they recount how the 30-party environmental mediation dissolves without much progress and with no agreement. It's not all rosy in the land of "no-caucus" mediation.

In the traditional model, an imposing judge figure hovers over a small pair of siblings; in the understanding model, the parties loom large above a smaller figure labeled "mediator."

However, it's pretty rosy. The mediators describe how they move beneath positions to interests, and from there to solutions. They untangle family disputes. They convince hard-boiled attorneys that there is value in meeting face-to-face and not meeting in caucus.

All in all, the book is an excellent mediation primer for anyone who believes that the core value of dispute resolution is in direct engagement. The book is also excellent for anyone who has been mediating for a while and wants to challenge their own assumptions about how and why mediation works. The book is not so great for anyone who wants a view of what the contemporary landscape of mediation looks like. Friedman and Himmelstein offer a view of a landscape that is, for now, rarefied. The current landscape is full of caucuses, private meetings and phone calls, and dominated by discussions of legal rights and dollars. Friedman and Himmelstein have effectively posed a challenge to all the "traditional" mediators out there, but the book underplays the power of caucus. Only time will tell whether Friedman and Himmelstein are pointing to the future or to a hoped-for Utopia. Either way, their book is well worth reading. ■



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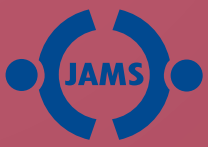

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