AMERICAN BAR ASSOCIATION
Section of Dispute Resolution

JUST RESOLUTIONS ENEWS

YOUR LINK TO THE SECTION OF DISPUTE RESOLUTION

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In This Issue

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SUBMISSIONS

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GREETINGS FROM THE CHAIR

Only a few days after I became the Section Chair in August, our director resigned (no cause and effect I have been assured!) Fortunately, we have a very talented staff and they were able to fill in the gaps. We were aided immensely by the efforts of our Acting Director Gina Brown, even while she "telecommuted" from Golden, CO. I'm pleased to say that our former staff attorney David Moora agreed in October to become our new Section Director, and David has now worked in that capacity for several weeks.

As I write this I have just returned home to Atlanta after attending the Section's annual Advanced Mediation and Advocacy Skills Institute in Fort Lauderdale. Even though the weather in Fort Lauderdale was sunny and warm, we managed to keep the nearly 100 Institute attendees (and 40 faculty) inside for two days of superlative programs. I want to thank our Institute faculty, and particularly Institute Chair Bruce Meyerson for putting on a terrific program, as well as our cooperating organizations: Alabama State Bar ADR Section, Florida Academy of Professional Mediators, Georgia Bar DR Section, Louisiana Bar ADR Section, Mississippi Bar ADR Section, Broward County Bar ADR Section, Inter-American Bar Association International Arbitration Law Committee, Association of South Florida Mediators and Arbitrators, and the Florida Bar ADR Section.

The Institute was followed by a quarterly Section Council meeting on Saturday, at which our Council voted to adopt a Section Diversity Implementation Plan. This plan is the work product of our Diversity Task Force under the energetic leadership of Section Chair-Elect Debbie Masucci; watch for continuing significant diversity initiatives especially throughout this and the next bar year. The Council also approved a recommendation of the Commission on Mental and Physical Law supporting the Disability Diversity in the Legal Profession Pledge for Change.

Preparatory to the meeting I submitted a fairly lengthy Chair Report which I commend to those who think they might want to know the answer to this question: What in the world could the Chair possibly have to say that took eleven single-spaced pages.

Finally, I hope many of you were able to attend one of the Mediation Month events that we sponsored in October. This month-long recognition of mediation was intended most basically to promote mediation to a wide variety of constituencies including judges, lawyers, parties, and students. Along with a variety of state and local bar groups we sponsored National Mediation Month celebratory events in nine cities across the country: Atlanta, the Bahamas, Honolulu, Columbia, MO., Missoula, MT., Nashville, Richmond, San Francisco and Washington, D.C. I personally attended four of the events in Atlanta, Missoula, Columbia, and Washington, DC. At the event at ABA headquarters in Washington I had the pleasure to introduce our speaker, Ken Feinberg, to an assemblage of about 75 lawyers, mediators and students. Ken provided some poignant reminders that every mediation case involves real people with real problems, often the most important matters going on in the lives of the mediation participants. I have described these great events more fully in that eleven-page Chair Report (and you really ought to read it.)

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COLLEGE OF COMMERCIAL ARBITRATORS PROTOCOLS

By John Hinchey

Responding to mounting complaints that commercial arbitration has become as slow and costly as litigation, The College of Commercial Arbitrators decided in 2008 to convene the following year a National Summit on Business-to-Business Arbitration. The goals were to identify the chief causes of the complaints and explore concrete, practical steps that can be taken now to remedy them. The National Summit was convened in Washington, D.C. at the end of October, 2009. In addition to the ABA Section of Dispute Resolution, the Summit included the American Arbitration Association, JAMS, the International Institute for Conflict Prevention and Resolution ("CPR"), the Chartered Institute of Arbitrators, the Straus Institute for Dispute Resolution of Pepperdine University School of Law and seventy-two Fellows of the College.

Based on the Summit discussions among representatives of: (a) business users and in-house counsel; (b) institutional arbitration providers; (c) outside counsel; and (d) arbitrators, the College developed and published in the fall of 2010 a significant document entitled, "Protocols for Expeditious, Cost-Effective Commercial Arbitration - Key Action Steps for Business Users, Counsel, Arbitrators and Arbitration-Provider Institutions". The lessons of the Protocols are essentially as follows:

Be deliberate and proactive. Promoting economy and efficiency in arbitration depends, first and foremost, on deliberate, aggressive action by all stakeholders, starting with choices made by businesses and counsel at the time of contract planning and negotiation and continuing throughout the arbitration process.

Control discovery. Discovery is the chief culprit of current complaints about arbitration morphing into litigation. Arbitration providers should offer meaningful alternative discovery routes that the parties might take; the parties and their counsel should strive to reach pre-dispute agreement with their adversary on the acceptable scope of discovery, and arbitrators should exercise the full range of their power to implement a discovery plan.

Control motion practice. Substantive motions can be the enemy or the friend of the effort to achieve lower costs and greater efficiencies. Some see current motion practice as adding another layer of court-like procedures, resulting in heavy costs and delay. Others see current motion practice as missing an opportunity for reducing costs and delay, where clear legal issues that might be disposed of at the outset are instead deferred by arbitrators, to allow parties to conduct discovery and then offer their proofs. The challenge is to be deliberate and sparing in the use of motions in arbitration.

Control the schedule. Since work expands to fill the time allowed, it is critical to place presumptive time limits on activities in arbitration or on the overall process, coupled with "fail safe" provisions that ensure the process moves forward in the face of inaction by a party. At hearings, for example, the use of a "chess clock" approach is of proven value in expediting examinations and presentations.

Use the Protocols as tools, not a straitjacket. These Protocols offer actions that might apply to the broad range of cases, and yet embedded in them is recognition that parties' needs vary with circumstances and that a well-run arbitration will at some level be custom-tailored for the particular case.

Remember that arbitration is a consensual process. Arbitration is almost always based on an arbitration agreement made when the parties were in a constructive mode. When a dispute arises, the reaction will vary. These Protocols aim to meet the diverse settings in which cases arise, recognizing that the prescribed behavior ultimately cannot be imposed but can only be encouraged, in a context where the constituencies' efforts permit formulation of the best plan for the particular case.

It is the fervent hope of the Section, the CCA and all involved that publication of these Protocols will sound a call to action by all constituencies involved in business arbitration, whether in U.S. domestic or international cases, encouraging prompt adoption of effective measures to dramatically reduce process costs and delay, and restoring arbitration to its rightful place as a valuable and efficient alternative to litigation in the resolution of business disputes. A downloadable version of the protocols can be found on the CCA web site: http://www.thecca.net/CCA_Protocols.pdf

John W. Hinchey is a partner with King & Spalding, LLP in Atlanta, Georgia and a member of the JAMS Global Engineering and Construction Panel of arbitrators and mediators. Mr. Hinchey is a Vice-chair of the Section of Dispute Resolution Arbitration Committee and a member of the College of Commercial Arbitrators. He can be reached at jhinchey@kslaw.com.

RECENT CASE LAW AND LEGISLATIVE UPDATES

By Lisa Pex Shevlin

Arbitration Case Summaries

AT&T Mobility LLC v. Concepcion (2010 WL 3210456 (U.S.))
United States Supreme Court

The Supreme Court heard oral arguments on November 9, 2010 on whether the Federal Arbitration Act (FAA) preempts state unconscionability law. Plaintiffs brought a class action claim alleging that AT&T acted fraudulently when it offered a "free" phone to new subscribers, but then charged the sales tax for the retail value of the phone to the subscribers. The arbitral clause in the service agreement between the parties specifically precluded class arbitration. The 9th Circuit held that the class action waiver was unconscionable under California law and that the FAA did not preempt California unconscionability law.

Andrew Pincus argued on behalf Petitioner asserting that Section 2 of the FAA "provides that an arbitration agreement may be held unenforceable under State law only if the State law rule being invoked to invalidate the agreement qualifies as a ground that exists in law or equity for the revocation of any contract." Pincus continued by explaining there was a distinction between litigation and arbitration when defining unconscionability even though the FAA used the terms "any contract." He reasoned that if the procedure and processes were identical in arbitration and litigation, then it would defeat the purpose of stipulating arbitration in the agreement. Meaning that unconscionability should be determined at the time of contracting, and different standards should be used to find unconscionability than are used in litigation.

Deepak Gupta argued on behalf of Respondents and asserted that the test for determining unconscionability is to look at the public effects. The public effects, in this case, would be similarly situated people who entered into agreements with AT&T that did not know whether they would be one of the few that detected fraud, and then had the means to bring forth a claim. Gupta distinguishes the California law from *Stolt-Nielsen* by stating that where the defendant has elected to exclude the class arbitration, they cannot also be excluded from class-wide proceedings in court. He reasoned that the FAA was meant to put arbitration on equal footing with other contracts, but could not be used as a vehicle to evade liability.

Arcidiacono v. Limo, Inc. (2010 WL 4511083 (M.D.Fla))
United States District Court, M.D. Florida
Mr. Arcidiacono and Mr. Pfannes filed a class action against The Limo and Veolia Transportation. The defendants filed a motion to dismiss, since the arbitral clause clearly prohibited class arbitration, and moved to compel arbitration. The court granted the motion to compel arbitration, but held that the question of whether the clause permitted class arbitration was a question for the arbitrator. The court reviewed cases, including *Stolt-Nielsen*, but found that since the parties explicitly included the American Arbitration Association's Commercial Rules and Procedures it had intended for Rule 3 of the Supplementary Rules to apply. Rule 3 states that the arbitrator shall have the authority to decide threshold issues, such as whether the arbitration clause permits the parties to proceed on behalf of or against a class.

Lumbermens Mutual Casualty Co. v. Broadspire Management Services, Inc. (2010 WL 4009186 (C.A. 7))
United States Court of Appeals, Seventh Circuit
Lumbermens sold Broadspire, an insurance administration business, and included an arbitral clause in the agreement. Broadspire agreed to calculate and pay annual earnouts based on the financial year to Lumbermens for the next four years. A dispute arose as to the calculations made to determine the earnouts. The issue on appeal was whether the court or the arbitrator should decide the question of whether necessary preconditions to arbitration had been satisfied. The court reasoned that *Howsam v. Dean Witter Reynolds, Inc.*, made clear that procedural questions were for the arbitrator. Therefore, the court found that condition precedents to the dispute was a procedural question and was reserved for the arbitrator.

Ahcom, LTD v. Smeding (2010 WL 4117736 (C.A.9))
United States Court of Appeals, Ninth Circuit
Ahcom, a UK corporation, entered into a contract to buy almonds from Nuttery Farms. After Nuttery Farms failed to deliver the almonds, Ahcom pursued and prevailed in international arbitration for breach of contract. Ahcom attempted to collect on the award in California, but Nuttery Farms had already filed for bankruptcy. The question on appeal was whether a creditor (Ahcom) had standing to assert a claim against Nuttery Farms sole shareholders on an alter ego theory or whether that claim would reside solely with the corporation's bankruptcy trustee. The court found that California law did not recognize an alter ego claim, but that Ahcom may proceed against the shareholders directly to recover on the arbitral award.

Edward E. Gillen Co., v. Insurance Company of the State of Pennsylvania (2010 WL 4314266 (E.D. Wis.))
United States District Court, E.D. Wisconsin
Edward Gillen Company was hired to stabilize the ground for a new school when the neighboring property owner sustained damages. The parties pursued arbitration and the property owner was awarded over $2 million. Gillen had insurance through Liberty Mutual, The Insurance Company of the State of Pennsylvania, and Lexington Insurance Company. Liberty paid $1 million, and Gillen sought payment from the other companies. Lexington moved for arbitration and Gillen filed for a preliminary injunction claiming that the arbitral clause in the insurance policy did not apply to him. The court granted the injunction reasoning that the form containing Gillen's insurance policy and requiring mandatory arbitration had not been submitted for approval by Wisconsin's Insurance Commissioner. Furthermore, the court found that Gillen's interest in staying the arbitral proceedings outweighed Lexington's interests since parties "forced into an unauthorized arbitration proceeding is irreparably harmed by being forced to expend time and resources arbitrating an issue that is not arbitrable, and for which any award would not be enforceable."

Motors Liquidation Co. v. General Motors LLC (2010 WL 4449425 (S.D.N.Y))
United States District Court
In 2009, General Motors filed for bankruptcy and sent "wind-down agreements" to dealers terminating their dealer agreements in exchange for payment and other consideration. Soon after, a new General Motors solicited proposals for operating a new Chevrolet dealership in the region where Rally Motors was operating. Rally Motors did not receive the dealership and filed a demand for arbitration under the Dealer Arbitration Act. Rally Motors was awarded authorization to operate three of the four dealerships it had operated prior to the wind-down agreement, but for sales of Chevrolet vehicles. General Motors sought enforcement of the wind-down agreement pertaining to Chevrolet, and Rally filed a motion to stay pending appeal. The court denied appellants motion, finding that Rally Motors only stood to suffer minimal irreparable harm since it had relatively succeeded in arbitration.

Mediation Case Summaries

Sarei v. Rio Tinto, PLC (2010 WL 4190718 (C.A.9))
United States Court of Appeals, Ninth Circuit
Plaintiff was a California resident alien when he filed the complaint, alleging that he and a class of other Bougainville residents were victimized by Rio Tinto and the Papua New Guinea government. The class "seeks certification for a "War Crimes Class" and an "Environmental Right to Life Class" to include more than 10,000 people who suffered from the civil war, the blockade, and the Panguna mine's environmental damages." The Court of Appeals referred the case to Judge Edward Leavy

to explore the possibility of mediation. Circuit Judge Kleinfeld dissented to the order claiming that the court lacks jurisdiction and that mediation would be imprudent given the facts and history of the case. Jurisdiction is questioned since the Plaintiff now resides in Bougainville, and Rio Tinto is a British–Australian corporation. The majority supports its order reasoning "mediation allows for compromise and creativity in a way that litigation cannot," especially since this case has been pending for ten years in federal courts and has the potential to continue for several more. Judge Leavy had twenty eight days to decide whether to proceed with mediation on October 26, 2010.

Ascom Hasler Mailing Systems, Inc. v. United States Postal Service (2010 WL 4116858 (D.D.C.))
United States District Court, District of Columbia
Defendant, USPS, filed a motion to recuse magistrate judge from deciding the merits of the case when the same judge had participated in mediation or settlement discussions with parties on the same issue previously. The case concerns the purchasing of postage stamps through third parties, called resetting companies, using a Computerized Remote Meter Resetting System. Companies would pay the resetting companies for a certain amount of stamps, and when they used up the stamps the resetting company would transfer the money to USPS. In 1995, the USPS passed regulations that prevented the resetting companies from earning interest on the pre-paid stamps. Magistrate Judge Facciola participated in a previous mediation between Pitney Bowes and USPS on the same issue. The present case was referred to him for settlement discussions in 2007. Judge Facciola denied defendant's motion for recusal stating that neither of the statutes pertaining to personal bias or prejudice (28 U.S.C. §144 and 28 U.S.C. §455) applied in this case.

Legislative Update
Agriculture Credit Act 2010
The Agricultural Credit Act of 2010 was signed by the President on August 16, 2010. The Act reauthorizes state agricultural mediation programs under title V of the Agricultural Credit Act of 1987. (PL 111-233).

Lisa Pex Shevlin is a third year law student at The Pennsylvania State University, Dickinson School of Law. She is also pursuing a joint master's degree in International Affairs, and is the Secretary for the International Law Society.

ADR IN THE NEWS

Whether you authored one of the briefs in *AT&T Mobility v. Concepcion* or you read arbitration cases to cure insomnia you will enjoy Dahlia Lithwick's coverage of the Supreme Court arguments on November 9th: **Can You Hear Them Now?** The Supreme Court reads the fine print on your cell phone contract, click here.

And this might not be in the category of "news" but USA Network will be adding a show called "Fairly Legal" to its lineup un January. The protagonist is a lawyer turned mediator. This is not a commercial endorsement for the show but merely a heads-up that mediators have made sufficient inroads that there's a dramatic TV show headlining a mediator. We'll be interested to see how the show handles self-determination, conflict checks, and caucuses.

BOOKS FOR HOLIDAY READING

Looking forward to a little down time over the holidays, or need just that perfect book to keep your mind engaged while traveling to a holiday event? Consider some of the Section's recent publications:
Mediating Legal Disputes by Dwight Golann, Making Money Talk by J. Anderson Little,
Challenging Conflict: Mediation Through Understanding by Gary Friedman and Jack Himmelstein
or our recent bestseller, The Organizational Ombudsman by Charles Howard

NEWS FROM THE SECTION

The Arbitration Committee has planned a number of important projects for this year. The Committee is working on a number of projects that will improve quality in practice. In particular, they have made great strides towards annotating the Code of Ethics for Commercial Arbitrators.

The Section's Sixth Annual Arbitration Training Institute, originally founded by former Section Chair Richard Chernick, and chaired this year by Section Vice Chair John Phillips and Arbitration Committee Vice Chair Zee Claiborne, will take place in Los Angeles February 24 to 26, 2011.

Our Ethics Committee (Marnie Huff and Susan Exon, Co-chairs) and our Standing Committee on Mediator Ethical Guidance (Nancy Lesser, Michael Lewis, Co-chairs) both continue to contribute immensely to the enhancement of quality practice in mediation (for historical and admittedly somewhat arbitrary reasons these committees focus only on mediation ethics issues; the Arbitration Committee is responsible for arbitration ethics). The Ethics Committee coordinated production of the fall issue of Dispute Resolution Magazine [link to Fall 2010 Ethics Issue]

We were sad to note the passing of Section Member and leader Betty Murphy. Ms. Murphy served for years as the chair of the International Committee and was awarded the Chair's Award for Service in 2009. The New York Times published her obituary:
http://www.nytimes.com/2010/10/25/us/25murphy.html

LAW STUDENT CORNER

The Section's Representation in Mediation Competition provides law students the opportunity to role-play as advocates and clients in a mediation setting. The competition encourages students to model appropriate preparation for, and representation of, a client in mediation. Each team consists of two students. In each round of the competition one student plays the role of an attorney and the other plays the role of the client. The ten regional competitions are scheduled in late February or early March. The winners of the regional competitions are invited to compete at the National Finals in April 2011 in conjunction with the Section's Spring Conference. Regional competition sites are filled on a first-come, first-served basis, after which teams are assigned to other regions based on availability. Priority for regional assignments is determined by the date the school's registration form is received. Registration closes on January 28, 2011. Register Here

2011 Boskey Essay Writing Competition
The 2011 Boskey Essay Writing Competition will award a prize of $1000 to the best essay submitted by a law student. The essay may address any aspect of dispute resolution practice, theory or research that the contestant chooses. Entries for the competition must be submitted by June 15, 2011. For an entry form and more information visit the Boskey Competition web site.

CALENDAR OF EVENTS

Arbitration Training Institute
February 23 - 26, 2011
Millennium Biltmore Hotel
Los Angeles, CA
For more information, click here
Register online, click here

13th Annual Spring Conference
April 13 - 16, 2011
Sheraton Downtown
Denver, CO
For more information, click here
Register online, click here

TELECONFERENCES
The Brains Behind the Deals: Insights from Neuroscience for
Litigators, Deal Makers and Dispute Resolvers
December 14, 2010
12:00 - 1:15 PM Eastern Time
Download the registration form, click here
Register online, click here

To view all upcoming programs, including those co-sponsored by the Section, click here.

Get Involved, Join a Committee

Are you looking for opportunities to network with your peers? Do you want tips on how to improve and market your practice? Would you like to contribute to the development of ADR policy? The Section has over 30 committees that focus on interest areas – from practice development, arbitration, mediation and international ADR, to construction, ethics and healthcare. **Join a committee TODAY!! click here**.