

# JAMS DISPUTE RESOLUTION ALERT

An Update on Developments  
in Mediation and Arbitration

THE RESOLUTION EXPERTS



## THE UNIFORM MEDIATION ACT TURNS 10 THIS YEAR

IN DEPTH

By Justin Kelly

**The Uniform Mediation Act, adopted 10 years ago, has provided a clear privilege on mediation communications and in the states where it has been adopted, it has been well received by practitioners, parties and the courts, according to academics and practitioners.**

The National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the UMA in 2001 and the American Bar Association followed a year later.

The UMA is designed to provide uniform confidentiality protections for mediation communications across the country. The act establishes a privilege for mediators and mediation participants to refuse to disclose and prevent others from disclosing communications in subsequent legal proceedings. The privilege is held by the parties, the mediators and non-parties that are involved in the mediation process.

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### ADR CONVERSATIONS

## Tax Mistakes Attorneys Make When Negotiating Settlements

**Tax expert Robert W. Wood, author of *Taxation of Damage Awards and Settlement Payments*, among other treatises, and an attorney with San Francisco's Wood & Porter, answered questions about how lawyers can avoid tax mistakes during settlement negotiations.**



Robert W. Wood  
a tax lawyer with  
Wood & Porter,  
San Francisco

**Q. What are typical tax-related mistakes that attorneys make when negotiating settlements?**

**A.** The three biggest mistakes are not considering taxes early enough in settlement negotiations, not having a clear tax plan of what their client wants and what support they can show the other side to get what they want, and not having a tax adviser waiting in the wings to vet language and break a logjam if one develops.

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## The Uniform Mediation Act Turns 10 This Year Continued from Page 1

It applies to any mediations ordered by a court or an administrative agency, those where the participants agree in writing that mediation communications would be privileged, and those where the neutral holds him or herself out as a mediator. The privilege against disclosure may be waived if all parties agree in writing or orally during the course of the mediation.

Instances where the privilege would not apply include if the mediation is required to be open according to law, where there are threats of violence, or where the communications are needed to prove or disprove a claim of misconduct filed against a mediator. It also provides that mediation communications are confidential to the extent agreed to by the parties or other laws of the state.

Under the UMA evidence otherwise admissible or subject to discovery would not become inadmissible simply because it was used in mediation.

An international supplement to the UMA, which incorporates the United Nations Model Law on International Commercial Conciliation was adopted in 2003, two years after the original act was approved by NCCUSL.

**Although the UMA creates a privilege against future disclosure of mediation communications for domestic disputes, the international supplement excludes mediation statements and documents from use in subsequent legal proceedings.**



Although the UMA creates a privilege against future disclosure of mediation communications for domestic disputes, the international supplement excludes mediation statements and documents from use in subsequent legal proceedings.

However, if parties to an international mediation agree the Model Law does not apply to their dispute, then the provisions of the UMA govern the mediation.



**Richard C. Reuben,**  
James Lewis Parks  
Professor at the  
University of Missouri  
School of Law

Richard Reuben, a law professor at the University of Missouri-Columbia School of Law and associate reporter for the UMA drafting committee, explained the drive behind the creation of the UMA. According to him, “there

was not much doubt that confidentiality was important, but there was doubt whether there was a need for uniform legislation on confidentiality.”

Reuben noted that when work began on the UMA, “there were hundreds of confidentiality laws that were very different, which demonstrated a pretty critical need for uniformity in the treatment of mediation communications.” He added that while the “norm may have been that people were willing to abide by confidentiality of mediation communications, there were no guarantees in the law.”

He said that the drafting committee began work on the UMA without a pre-conceived notion of how to approach mediation confidentiality but

after some research and discussion it recognized that the absolute ban adopted in California, an exclusionary rule, “was too broad because there would be situations where there is a need for some flexibility on confidentiality.”

Research also showed that “lower state courts were not honoring the dictates of excluding all evidence from mediations.” However, the drafting committee was cognizant of the fact that courts “knew how to deal with privilege, which could avoid uncertainty in the application of the law and that there were legitimate public policy reasons for some exceptions to confidentiality.” These factors among others led the drafting committee to settle on a mediation privilege as the basis for the law.



**Nancy Hardin Rogers,**  
Michael E. Moritz  
Chair in Alternative  
Dispute Resolution at  
Moritz College of Law

Nancy Rogers, a law professor at the Ohio State University Moritz College of Law and reporter for the UMA drafting committee, noted that once the drafters settled on the privilege approach they recognized that “clarity in the UMA would

lessen litigation around it” and that a balancing test would allow courts some leeway when faced with motions to breach the confidentiality of the process.

Rogers suggested that the privilege contained in the UMA “helps people understand when they can speak candidly” and the overall act assists parties in understanding the nature

of the mediation process. "It's also important in terms of serving the broader justice," she added.

According to Reuben, the UMA "hasn't changed the mediation process but what it has done is bring the public laws into alignment with what mediators say the process needed. It should inspire party confidence in the process because mediators can say with veracity that mediation communications will not be later used against them." He added that in states where the UMA has been adopted, "lawyers are more likely to suggest the use of mediation to clients."

Rogers said a sign that the UMA was well crafted is the limited amount of case law surrounding it. "By the end of 2009 there were only 30 reported cases and there were very few where a court was confused about the privilege and its application," she noted, adding, "It's a good sign that the courts are consistently getting it right."



**James Coben,**  
Senior Fellow, Dispute  
Resolution Institute  
at Hamline University  
School of Law

James Coben, a law professor at Hamline University School of Law and co-author with Nancy Rogers of a treatise on the UMA set for publication by Thompson Reuters later this year, echoed her point, noting that "in California

there is a lot of litigation over the confidentiality statute. People just aren't litigating UMA issues."

He said there is "not much of a trend in the cases addressing the UMA." Where it is the subject of litigation two issues that comes up are whether a

party has waived the privilege and did the party's actions indicate that they were mediating.

Coben said that he was "not a proponent of the UMA when it came out but the more I study litigation the more I've become convinced that the approach the drafters took was the correct one." He said in "states with multiple mediation confidentiality laws, the UMA forces them to examine these various mediation confidentiality statutes and decide which to keep."

According to Coben, looking at the big picture and the national nature of some mediation, the "uniform objective is a very good one because it can alleviate the choice of law problem and dealing with a patchwork of state laws applicable to mediation." Another thing that "demonstrates the value of the UMA is that courts in states without the UMA still cite the UMA and its provisions when issuing rulings related to mediation and confidentiality," he said.

A recent ruling by the California Supreme Court in *Cassel v. Superior Court* (S178914, 1/13/2011), highlighted the difference between the exclusionary approach taken in California and the privilege approach of the UMA. In reversing an Appeals Court opinion that crafted an exception in the mediation confidentiality law for attorney-client communications where a claim of malpractice was at issue, the Court reaffirmed that there can be no judicially crafted exceptions to the exclusionary rule.

However, practitioners in California and outside the state noted that the Court went so far as to suggest that the Legislature is free to consider providing for an exception in malpractice cases. Justice Chin, in a concurring opinion, expressed some discomfort with the result because it could prevent

malpractice actions from going forward. He went so far as to suggest that the Legislature consider adopting an exception for malpractice claims where the communications are only used for the malpractice issue but which also shields the other participants in the mediation process.



**The Honorable  
Ming W. Chin,**  
California Supreme  
Court Justice

"As the majority notes, the Legislature remains free to reconsider this question. It may well wish to do so," Justice Chin concluded. The language suggested by Justice Chin is similar to the language in the UMA for an exception

to privilege for communications used for the purpose of proving or disproving a malpractice claim.

Some practitioners agreed that the result in *Cassel* was unfortunate and were concerned that people in California might refuse to use mediation because they can't be assured of their legal rights relating to civil suits. Other were uncomfortable with the potential for coercive or inappropriate actions being shielded but said that for the most part the confidentiality law is working and parties like the strong confidentiality protection provided for in California.

Hanan Isaacs, an attorney and mediator in New Jersey, said the UMA "has been a huge benefit, a major public policy success and one of the best laws for the state." He noted that it is "rare to have this kind of unmitigated success," adding, "that there has not been a single appellate case that got the law or privilege wrong since it was enacted in 2004 and added to the Rules of

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Evidence in 2008 as Rule 519. We have excellent appellate case law based on the principles of the UMA.”

According to Isaacs, having certainty with regard to the confidentiality of mediation communications is “to our benefit as mediators and also very good for the public because they can be certain of the confidentiality of the process. The exceptions to the privilege also provide solid guidance for when the privilege may be pierced.”

He went on to note that “no other privilege in the history of New Jersey law provides that the service provider holds the privilege and can assert it to prevent disclosure of communications. Doctors, lawyers, and priests cannot prevent disclosure if parties agree to reveal communications but a mediator can.”

“We are way better off than states that do not have the UMA,” he said, explaining that next door in New York mediators may be forced by courts to testify about mediation communications.

**According to Isaacs, having certainty with regard to the confidentiality of mediation communications is “to our benefit as mediators and also very good for the public because they can be certain of the confidentiality of the process.”**



It also has helped to “professionalize the practice and raises the profile of mediation in general,” he added.

John Bickerman, an attorney and mediator in Washington, D.C., had a different take on the law, saying, “I have not seen a big impact on the practice of mediation.” He added that “while the biggest issue is confidentiality, it did not have as big an impact as people thought.”

Bickerman said he has always been “troubled by who holds the privilege. Mediators should not hold the privilege because it is the party’s process and if they want to breach the confidentiality of the process, the mediator should not be able to stop them by asserting the privilege.” While this formulation protects the mediator, it is unnecessary because the mediator does not need such protection, he added.

“It is fine for the parties to hold the privilege, it’s their process and as a mediator we must respect the autonomy of the parties if they want to disclose communication or waive the privilege,” he concluded.

The act has been adopted with varying degrees of uniformity in 11 jurisdictions including District of Columbia, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington. It has been endorsed by the American Arbitration Association, JAMS, CPR Institute for Dispute Resolution, and formally approved by the American Bar Association.

Reuben said that “having 11 jurisdictions adopt the UMA is not bad for new uniform legislation and is especially significant when you recognize that it is difficult to get a legislature to move on ADR legislation. Even where the mediation community

gets behind the UMA, such as in New York where it is yet to be enacted, it is still hard to get ADR legislation considered by state lawmakers.

He suggested that “momentum for more adoption is going to come when you get a bad outcome or bad court ruling and then the UMA will look better. If it gets passed in half the states we’ll have done a really good job,” he said, adding “getting a really good law in place is really good work.”

Reuben said the UMA also has “provided a baseline for the confidentiality issue, provides a measure for states and serves as a great teaching tool on privilege and exception.”

**John Bickerman, an attorney and mediator in Washington, DC, had a different take on the law, saying, “I have not seen a big impact on the practice of mediation.” He added that “while the biggest issue is confidentiality, it did not have as big an impact as people thought.”**



Rogers noted that “the mediation community is concerned over what the federal courts will do.” Currently, there is a split in the federal circuits, with three district courts recognizing the privilege while one appellate court did not. However, “even if the UMA is not adopted by Congress, the courts can still develop it as a common law privilege,” she said. ●



## JAMS International Opens London Headquarters, Hires Publishing Entrepreneur



London, England.

JAMS International opened its London headquarters at 70 Fleet Street in May 2011 and hired former legal journalist and publishing entrepreneur, Matthew Rushton, to serve as Deputy Director.

Lorraine M. Brennan, Managing Director of JAMS International, said Rushton was hired as deputy director because “he knows the field, the professionals and the mediation market in the UK.”

Rushton was the founder and editor of The Mediator Magazine, and developed DisputesLoop.com, a brokerage site for ADR professionals.

According to Brennan, Rushton’s “first priority is to work with me to get an international panel in place.”

The panel will be “pan-European” and will include mediators and arbitrators from Italy, the Netherlands, Ireland, Spain, England, France and other EU countries, Brennan said. Panelists will have expertise in a wide range of fields, including construction, intellectual property, arts and entertainment and complex business transactions.

Rushton’s hiring demonstrates that JAMS is “very serious about its international expansion and is taking appropriate steps to ensure that the new venture be viewed favorably by the ADR community in the EU,” Brennan said.

JAMS International is a partnership among JAMS, ADR Center in Italy and Result ADR in the Netherlands. ●

## France Adopts New Arbitration Law Guaranteeing Party Autonomy

A new arbitration law effective May 1 guarantees party autonomy in the arbitral process, codifies existing practice and case law and marks France as a very pro-arbitration jurisdiction for both domestic and international arbitrations, according to practitioners.

The report accompanying the new law explains that “after 30 years, the reform appeared necessary to consolidate case law, as well as to complement the existing text and conserve its efficacy.” It adds that the new law “integrated some provisions inspired by foreign laws, which have proven useful.”

Christopher Ryan, a partner in the International Arbitration Group at Shearman & Sterling in Washington, DC, applauded the passage of the new law, saying that while the French arbitration law first adopted in 1981 was pro-arbitration, the new law, Articles 1442 to 1527 of the French Code of Civil Procedure, goes even further in marking

France as a “pro-arbitration country.” The drafters of the new law “wanted to make clear what effects 30 years of jurisprudence have had on the law and create a clearer codification of the law and existing practice,” he noted.

The drafters of the new law wanted to enhance party autonomy by “creating a system where parties can go through an entire arbitration without recourse to or interference from national courts,” he said. However, where parties need assistance, such as appointing an arbitrator when the parties are unable to agree on one, they may seek the assistance of a supporting judge, he noted.

“The perception in France is that party autonomy is very important for the arbitration process. It creates a process where parties can go through arbitration without any interference from a host country’s courts,” he said.



Palais de Justice, Nice, France.

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## Tax Mistakes Attorneys Make When Negotiating Settlements Continued from Page 1



### Q. What are the primary tax considerations for plaintiffs in settlement negotiations?

A. Understandably, plaintiffs want to maximize their take home. After attorneys fees and costs, they may have a good sense what the remaining cash will be. But taxes are another matter. They want a tax computation, which can be counterintuitive. For example, although a client may be entitled to 60 percent of the net proceeds, if the lawyer receives 40 percent, the tax law generally treats the client as receiving 100 percent, even if the plaintiff's lawyer is paid directly and separately by the defendant. Many plaintiffs cannot deduct some or all of the legal fees, so they may receive 60 percent of the settlement monies, but paying tax on 70 percent, 80 percent or more. Tax-deduction rules, especially under the Alternative Minimum Tax, are very complex.

### Q. What are the primary tax considerations for defendants?

A. Defendants want to obey tax laws and not cause themselves any liability or scrutiny from a tax or financial statement point of view based on how they treat settlement dollars. Defendants want the case resolved, but they don't want to compromise their tax or reporting duties, or to mischaracterize the settlement.

### Q. What is the optimal time to address tax issues and the downsides of not doing it then?

A. This is a delicate subject. In some cases, you can wait until there's an agreement in principle on the dollars. But often that's too late. For example, the plaintiff should have a tax game plan before a mediation, even though one never knows whether the case will resolve. But failing to have an outline of what one wants from a tax perspective when commencing a mediation is a mistake. You don't want to find

yourself scrambling and expected to sign documents without the necessary tax ammunition. Inevitably, taxes are material to the take-home dollars from the case. How can a plaintiff know what that take home will be without addressing tax implications early?

### Q. What kinds of disputes tend to have the most tax consequences during settlement?

A. Employment. They aren't the most complicated disputes, but they inevitably have tax components. There will almost always be a wage component, which requires withholding of income and employment taxes. Many plaintiffs fight this. An even bigger dispute may erupt over whether any portion of the settlement can be excluded from the plaintiff's income as nontaxable damages for personal physical injuries or sickness.

### Q. What tax-related documents are required at settlement?

A. First, let's be clear what we mean by "settlement." When a settlement figure is reached at mediation and a term sheet is signed, no tax documents are required. No tax documents are even required when a final settlement agreement is signed. But before money changes hands, most defendants will insist on taxpayer ID numbers. And there may be withholding.

So before the settlement agreement is signed—and ideally even before a term sheet for settlement is signed—you should have some idea what the tax treatment is going to be. The only way to do that reliably is to have an explicit agreement about tax issues and an allocation in the settlement agreement. One set of tax documents that will show up in January after the year of

See 'Tax Mistakes Attorneys Make' on Back Cover

## Search for Common Ground Brings Unique Approaches to Conflict Resolution

Search for Common Ground, a Washington, DC-based international organization, uses creative and innovative strategies and devices in numerous countries around the world to drive change and persuade people to use collaborative action to find lasting resolution of disputes.

Susan Koscis, director of communications for Search for Common Ground (SFCG), described SFCG as “a very positive, enthusiastic, can-do organization that while not being sure of the work required, understands the differences and acts on the commonalities, hence the name. Often in post-conflict situations or during conflicts, the common ground is lost, but this can be changed through innovative approaches to conflict resolution.”

Koscis noted that conflict resolution of complex disputes takes time, which SFCG understands and which is one of the reasons it is still working in countries even after the conflict that brought the organization there in the first place has been addressed. The changing nature of conflicts also requires that SFCG adapt its programming to reflect the changing nature of a conflict, she added.

A terrific example of the innovative approach taken by SFCG to conflict is its work in Macedonia, which is “very divided along ethnic lines,” she said. There, SFCG started the “first interethnic kindergarten in the country, but it was hard to get parents to send their kids to the school,” she explained. “While we supported the kindergarten, the government did not. Our goal was to make the kindergarten part of the national education system, and after years of work, this just happened,” she noted.

“In order to deal with conflict, it must be societal and needs to reach broadly and deeply, which is why SFCG uses media to reach a wide audience,” she said. Along those lines, SFCG created a “hugely popular television drama series called ‘Nashe Maalo,’ or ‘Our Neighborhood,’ which was aimed at adolescents ages 8 to 14 that is still being aired in Macedonia,” she added.

SFCG aims to “reach hearts and minds to impact behavior and excels at this by being creative and innovative in its approaches to conflict,” she said.

It is starting new programs in Yemen, Sri Lanka, Madagascar, Tanzania, Sudan and Zimbabwe, she said.

In 2001, SFCG established an office in Morocco to build and reinforce a philosophy of mediation, dialogue, tolerance and moderation in Moroccan society.

Emma Reilly, SFCG country director for Morocco (SFCG-M), said, “The overriding aim of our Morocco office is to instill a culture of mediation in

Morocco, providing alternatives to litigation for all Moroccans, increasing social cohesion and reducing the possibility of conflicts escalating during the long wait for a legal case to be heard. We also provide training in non-violent communication to facilitate more constructive communication between Moroccan government officials and the population, which is particularly important in the current regional context.”

SFCG recently received a \$50,000 grant from the JAMS Foundation to fund a project to help institutionalize social and family mediation in Morocco.

According to Reilly, the “JAMS Foundation grant will allow us to consolidate and expand our work in the area of mediation. On one side, it will be used to create a database of mediators and mediation centers in Morocco, as well as a network of non-governmental organizations working on mediation. These will make mediation more accessible in practice to the Moroccan population and ensure the exchange of best practices.”

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Skopje, Macedonia.



## U.S. SUPREME COURT

### U.S. Supreme Court Invalidates Ninth Circuit Rule Regarding Contractual Prohibition of Arbitral Class Actions

*AT&T Mobility v. Concepcion*  
2011 WL 156956  
United States Supreme Court  
(April 27, 2011)

Vincent Concepcion and others sued AT&T Mobility in federal court in California alleging that the company had violated the law when it advertised “free” cell phones for anyone who signed up for one of its calling plans, and then charged sales tax based on the retail prices of the phones.

AT&T moved to compel arbitration pursuant to a clause in the contract between itself and each customer. The district court denied the motion, holding that the rule announced in *Discover Bank v. Superior Court* invalidated the arbitration clause. That case required that an arbitration clause that prohibits class actions is unconscionable where the damages for each plaintiff are sufficiently small that no economically minded plaintiff would pursue the action. As arbitration provided no adequate replacement for a class action in this matter, the district court invalidated the clause.

The decision was upheld on appeal to the Ninth Circuit Court of Appeals, which held that the Federal Arbitration Act (FAA) did not preempt the rule in *Discover Bank*, because the rule was merely a refinement of California law regarding unconscionability.

In a 5-4 decision written by Justice Scalia, the United States Supreme Court reversed. It found that the clause in the FAA that permits contract defenses to a contract to arbitrate does not protect “state-law rules that stand

as an obstacle to the accomplishment of the FAA’s objectives.” It went on to hold that “requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” The Court noted that the purposes of the FAA are primarily to ensure that judges enforce valid agreements to arbitrate and secondarily to promote efficient resolution of disputes. The majority found the *Discover Bank* rule to frustrate both.

The Court discussed the argument that class action arbitration is necessary when damages are small, and they concluded that the natures of class arbitration and bilateral arbitration were very different. A rule that turned one into the other was suspect. They stated, “Class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.” The Court made it clear that it disfavored class arbitration and was unlikely to “force” it on an unwilling defendant. The majority held that “arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well.”

The matter was reversed and remanded. Justice Thomas wrote a short concurrence.

Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan, wrote a lengthy dissent arguing that the rule in *Discover Bank* was, as the Ninth Circuit held, merely a refinement of state contract law.

## FEDERAL CIRCUIT COURTS

### Manifest Disregard Not the Right Standard for Review of Public Policy Challenge to Railway Labor Act Arbitration

*Air Line Pilots Association, International v. Trans States Airlines*  
2011 WL 1642627  
USCA, Eighth Circuit (May 3, 2011)

Trans States Airlines (TSA) fired a pilot for misusing his employee travel pass. Air Line Pilots Association, International (ALPA, the union) brought a grievance that eventually resulted in an award of reinstatement and back pay to the pilot. The district court granted ALPA’s motion to confirm the award, and TSA appealed.

TSA’s primary argument was that ALPA improperly loaned the back pay money to the pilot and this violated public policy. ALPA argued that the proper standard of review of this matter was “manifest disregard” rather than the usual “de novo” standard. The Court of Appeals for the Eighth Circuit was un-persuaded. They noted that they had previously held that the *Hall Street* decision from the U.S. Supreme Court had eliminated the manifest disregard standard and, moreover, even were the standard intact, ALPA did not make a convincing case that the standard should apply. “ALPA fails to explain how a defunct vacatur standard under the FAA determines the standard of review for the distinct public policy exception to the otherwise narrow grounds on which a court may set aside an arbitration award under the RLA (the act governing the arbitration).”

The Court seemed to take some umbrage at the idea that a party could contract for a more limited review of a public policy than that required by law. However, even under the more stringent standard, the award was still confirmed.



## **Arbitrator, Not Court, to Decide Whether Arbitration Clause In Neutrality Agreement Was in Effect at Time of Demand for Arbitration**

*Unite Here Local 217 v. Sage Hospitality Resources*

2011 WL 1631651

USCA First Circuit (April 29, 2011)

During the renovation of a building into a hotel, the union and the developer/owners entered into an agreement according to which the union could organize and the owners would not interfere. In return, the union agreed not to picket or strike. The agreement contained an arbitration clause that was to “be in full force and effect from the date it is fully executed...until 30 months from the full public opening of the hotel, or if sooner upon the Employer’s recognition of the Union.” The Agreement did not define the term “full public opening.”

Some four years later, after a “soft opening,” the union requested recognition, but the owners rejected it as untimely. The union argued that the full public opening had occurred at a ribbon-cutting ceremony that was within the 30-month window. The dispute festered until the union filed a lawsuit in federal district court to compel arbitration. The union argued that the matter should be decided by an arbitrator. The owners argued that the court should decide whether a valid agreement to arbitrate was in effect. The district court ruled in favor of the union, and after some procedural jockeying around motions to enforce and motions to stay, the owners appealed the case to the First Circuit Court of Appeals.

The Court held that the duration clause was ambiguous, and that ambiguity was a dispute over the interpretation of the contract, not the validity of the contract

to arbitrate. As such, it was within the scope of the matters the parties agreed to arbitrate.

The judgment of the district court was affirmed, and the matter sent to arbitration.

As a side matter of some passing interest, Justice David Souter, formerly of the U.S. Supreme Court, sat on the matter by designation.

## **Agreement to Arbitrate Distribution of Libyan Hijacking Fund Not Immunized by Diplomatic Resolution of Dispute between Nations**

*Pan Am Flight 73 Liaison Group v. Davé*

2011 WL 1544670

C.A.D.C. (April 26, 2011)

In 1986, Libyan terrorists hijacked Pan Am Flight 73, holding it on the runway in Pakistan, killing 20 people and injuring dozens more. After a period of normalization between Libya and the U.S., the countries entered into a Joint Prosecution Agreement. The agreement contained a provision that stated that any disputes that might arise between survivors and the “Liaison Group” regarding money would be handled through arbitration.

The survivors brought a suit against the government of Libya. The U.S. and Libya settled the suit through a diplomatic agreement that would grant Libya immunity in return for the payment of \$1.5 billion, which would be used as a fund for U.S. victims of Libyan terrorism.

Two sisters who were among the survivors brought an action in California state court against the Liaison Group, asking for a declaration that the Joint

Prosecution Agreement did not cover money obtained under the settlement agreement and was otherwise invalid. The Liaison Group moved a federal district court in the District of Columbia to compel arbitration. That motion was granted. The sisters appealed, arguing that the “Libyan Claims Resolution Act” immunized them from an arbitration order. The United States Court of Appeals for the D.C. Circuit affirmed, holding that the immunity clause only protected their property from being attached. The Court stated that the agreement “requires only that the Davés submit their dispute with the Liaison Group to arbitration. The district court’s order compelling arbitration therefore did not violate the terms of the Libyan Claims Resolution Act’s grant of immunity.”

## **Volt Trumps Mastrobono Where Choice of Law Is Specific; D.C. Revised Arbitration Act Has Retroactive Effect; Unripe Claims Do Not Impact Panel’s Jurisdiction**

*Foulger-Pratt Residential Contracting v. Madrigal Condominiums*

2011 WL 1576095

U.S.D.C. for the District of Columbia (April 27, 2011)

Madrigal Condominiums (Madrigal) contracted with a builder to build some condominiums in Washington, DC. The contract contained an arbitration clause with a choice of law provision naming Washington, DC, as the controlling jurisdiction. After a series of disputes, Madrigal fired the contractor and hired Foulger-Pratt Residential Contracting (F-P) to substitute.

Madrigal and F-P had a series of disputes, some of which were resolved through negotiation and

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others proceeded to arbitration. The arbitral panel ruled largely in favor of F-P, and F-P successfully moved the U.S. District Court for the District of Columbia to confirm the award and Madrigal to vacate.

The Court first resolved the issue of whether D.C. law or the FAA would apply. They noted that despite the fact that the *Mastrobuono* case held that the FAA trumped a “general” choice of law clause, the *Volt* case required that a specific choice of law be honored where it does not undermine the purposes of the FAA.

In addition, the parties argued whether the D.C. Arbitration Act (in place at the time of the formation of the contract) or the D.C. Revised Arbitration Act (DCRAA) (in place at the time of the dispute) should control. The Court reviewed the newer act and concluded that it had retroactive effect and thus controlled the instant dispute.

Madrigal argued that it was denied a “full and fair hearing” as required by the DCRAA, as it desired to present evidence of latent defects in the skin of the building, and the arbitral panel ruled that some portions of the dispute were not ripe. Madrigal argued that all skin defects were reserved for a second hearing and that the award was based on findings that included evidence about skin defects. The award was therefore a violation of Madrigal’s right to present evidence and also jurisdictionally invalid. The Court held that it was appropriate for the panel to bifurcate issues into those that were ripe for decision and those that were not, especially where Madrigal had not concluded that there were any unknown problems, but was merely investigating. Moreover, the Court noted that there was no “bifurcation” order separating the skin issues out for a second

hearing; rather, the panel had stated that it could only decide issues that were properly before it and that issues under investigation that had not yet blossomed into disputes were outside its purview. They concluded, “Madrigal does not meet its burden on this claim, as it has failed to demonstrate that the Panel definitively postponed this issue to a second hearing. Madrigal has not presented any other credible grounds for its assertion that the Panel took actions affirmatively denying it an opportunity to rebut Foulger-Pratt’s argument....”

The Court concluded that vacatur was unjustified and that the panel acted properly in all respects, including an award of prejudgment interest and a determination of continuing contractual obligations of the parties.

## STATE COURTS

### California: Court Upholds Substantial Award against Hospital That Interfered with Doctor’s Specialized Practice

*Shahinian v. Cedars-Sinai Medical Center*

2011 WL 1566971

Cal. App. 2d. District (April 27, 2011)

Hrayr Shahinian was heavily recruited by a senior administrator to move his specialized New York–based practice to Cedars-Sinai Medical Center (Cedars). He did, but the doctors in the unit to which he was recruited did not welcome him. Disputes arose between Shahinian and the hospital, including failure of the hospital to adequately maintain the equipment necessary for

his practice. Shahinian was terminated, and the matter was settled without the need for a decision from a court or arbitrator.

The settlement allowed Shahinian to continue his practice, and it gave him the right to be free from disparagement by members of the Cedars staff. It also provided details about maintenance of equipment.

Disputes continued. Shahinian was first sent a letter prohibiting him from conducting surgery at Cedars for a period of time. Shahinian negotiated an exception for five previously scheduled surgeries, and he requested additional equipment and maintenance. The hospital assented in a letter but later refused the equipment requests, and the surgeries were performed elsewhere. A third letter told Shahinian that he could return to Cedars if he complied with a list of requirements.

Shahinian filed suit, and the matter was sent to arbitration.

The arbitrator found the hospital’s behavior to be retaliatory and that the hospital produced no evidence that its behavior was usual, precedent or warranted. The arbitrator concluded that Cedars had “knowingly and intentionally interfered with Shahinian’s medical practice, both his relationships with scheduled patients and also his prospective ability to practice his profession....”

The arbitrator awarded a bit more than half a million dollars in economic damages, \$1.6 million in emotional distress damages and \$2.58 million in punitive damages. The award also was deemed a voluntary withdrawal by Shahinian of staff privileges at Cedars.

The award was confirmed, and Cedars appealed. The California Court of Appeals affirmed.

“Defendant contends the arbitrator exceeded her powers when she assessed emotional distress damages by doubling the economic damages, an approach defendant says was ‘arbitrary’ and did not ‘weigh the evidence and apply reasoned judgment.’ In addition, defendant argues the award violates public policy by ‘circumventing the peer review hearing process’ and by ‘violating the constitutionally-imposed public policy limits on punitive damage awards.’ None of defendant’s contentions has merit.”

The Court noted that it had no authority to question an arbitrator’s reasoning about the amount of emotional distress damages. Cedars provided nothing to prove that the arbitrator was arbitrary; it was merely its own opinion that the damages were not a “reasoned judgment.”

Cedars’ argument was that public policy required that peer doctors, not arbitrators, decide medical competency. The Court found that there was never any reason to believe Shahinian was incompetent, and Cedars never alleged incompetence. Rather, Shahinian’s specialty was based in skull surgery, and he was not a neuroscientist. The neuroscientists at Cedars were reluctant to allow anyone without a specialization in neuroscience to perform surgery in their unit, and they made Shahinian a pariah. They never had any valid reason to deem him incompetent in his specialty area.

The Court took the public policy argument seriously (“Our Supreme Court has recognized the importance of the peer review process to protect the health and welfare of the people of California, and to protect competent doctors from being barred from practice for arbitrary or discriminatory reasons.”) but found it unavailing (“None of these rules of law or public policies

is implicated when a hospital becomes embroiled in a dispute with a doctor that has nothing to do with the doctor’s competence or the doctor’s professional conduct that puts patient care and safety at risk. When the dispute arises from business aspects of the doctor’s and hospital’s relationship, there is no need to submit the dispute to a panel of expert medical peers for determination.”).

Cedars argued that the punitive damages were “constitutionally excessive.” The Court noted the arbitrator’s opinion contained 20 pages of findings on the subject of punitive damages and found that the ratio of punitive damages to compensatory damages was very reasonable under the circumstances of this case (1.22 to 1).

### **Illinois: Insurer’s Request for Trial De Novo after Losing Arbitration Not a Violation of State Public Policy**

*Phoenix Ins. Co. v. Rosen 2011 WL 1500013 Ill. (April 21, 2011)*

Martha Rosen was injured in an accident with another driver. The other driver had minimal insurance, so Rosen claimed against her own underinsured motorist (UIM) policy. The policy contained a mandatory arbitration clause but stated that if the amount awarded by an arbitrator exceeded a statutory minimum, either party had 60 days to reject the award and proceed to trial.

Rosen was awarded \$382,000, and Phoenix filed a notice in court rejecting the award and requesting a jury trial. Rosen responded with a motion to

enforce the award, arguing that the trial de novo provision in the contract was a violation of Illinois public policy. Rosen lost at the trial court and appealed.

The Court of Appeals reversed, finding the trial de novo provision to be inapplicable to UIM claims and against the public policy of resolving such claims expeditiously for consumers.

On further appeal, the Illinois Supreme Court reinstated the judgment of the trial court and allowed the trial de novo. The Court started its analysis noting that “our public policy analysis asks whether the contract provision at issue threatens harm to the public as a whole, including by contravening the constitution, statutes, or judicial decisions of Illinois.” The Court’s 18-page analysis may be summarized simply: The idea of contracting for trial de novo in a UIM claim does not offend Illinois public policy. The Court is careful in noting the similarities and distinctions between uninsured and underinsured policies, and finds them to be more similar than different from a policy perspective. Legislative silence about UIM arbitration must be understood in the context of de novo trials in the UIM context. The Court is also clear that while there is a state policy favoring arbitration, there is no requirement that the arbitration be final and binding.

Rosen also made an obligatory unconscionability argument, and the Court responded with an obligatory rejection. ●



## Nudge: Improving Decisions about Health, Wealth and Happiness

Written by Richard H. Thaler and Cass R. Sunstein

### REVIEWED BY RICHARD BIRKE

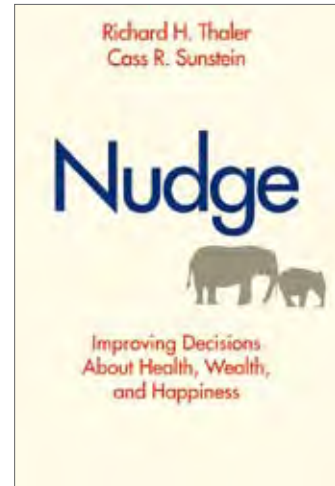
**In a world in which nearly all cases settle and business mergers are generally cooperative affairs, it is imperative to have an array of soft tactics to negotiate deals and resolve disputes. One of the smartest lawyers in the United States, Cass Sunstein, has teamed up with one of the smartest economist / psychologists, Dick Thaler, and together, they have written *Nudge*.**

*Nudge* offers a new and useful addition to the skillset of the negotiator. The book is based on two very interesting and provocative principles: choice architecture and libertarian paternalism.

Choice architecture is inevitable. If you are offering someone a choice, that choice has been designed. If I ask you whether you would like your ice cream in a cup or in a cone, I may influence your choice by listing cup before cone, or vice versa. If I put an item first in line as opposed to last, at eye level or below, highlighted favorably or hidden in shadows, I have designed the choice. The design may have been accidental, random, habitual or intentional, but it has been designed nonetheless. Thaler and Sunstein argue that purposeful or intentional design is generally better than random or habitual.

The authors do not wish to force people into making choices that they prefer. They don't like coercion. They are like many people who recoil at the idea of taking away choice. To these people, the more freedom the better. This is the libertarian part of libertarian paternalism.

However, the authors also know that people sometimes make choices that fail to serve their own interests. They fail to eat a healthy diet, they are sometimes short-sighted about their own happiness and health, and they succumb to advertising that attempts to get them to be indulgent. From a desire to be helpful, the authors are not against giving people a helpful shove in the right direction. This is the paternalism part of libertarian paternalism.



Combine the desire to design choices effectively with the hope to persuade without forcing, and you have *Nudge*.

The book is divided into five major sections. The first is a romp through the various kinds of biases that cause humans to make judgment errors. The authors describe the greatest hits of cognitive and behavioral psychology in a funny and incisive manner. They note that humans can be fooled into believing that the more easily they can picture an idea, the more common it is. (This is why people believe murder kills more people than stomach cancer—there aren't a lot of movies built around stomach cancer deaths.) They note that people can be fooled by mere changes in description. (When a gamble is described as a way to recoup a loss, it feels good to gamble, but when the same gamble is described as a way to increase a gain, the gamble

seems unwelcome. Whether something is a gain or a loss is often a matter of description, not reality.) And they note that people tend to “go with the herd” in a great variety of ways that cause them to make poor judgments about their own situations. Sometimes people need a nudge!

The next three sections discuss just how to use nudges to help people make better decisions about money, health and freedom.

In Money (Part II), one of the nudges is to set the default in a 401(k) to commit to increase contributions in the future, so that when salary rises, so does the percentage of the contribution. This idea is called Save More Tomorrow, and it short-circuits the bad feelings that come from seeing your paycheck go up, then increasing your 401(k) contribution and seeing it go down again. As no one likes to see their take-home pay go down, Save More Tomorrow increases savings with no bad feelings. This system is in use in a vast number of businesses now, and Thaler and Sunstein are the proud parents of an already-successful nudge.

In Health (Part III), the authors discuss government nudges, specifically Medicare Part D. They outline the ways it works and the ways it fails. They also make a very persuasive case that the only state to optimize the system is

Maine, where eligible senior citizens who fail to opt in to Part D are given a plan designed specifically around their current drug intake. In every other state, the default for non-registering citizens is random assignment to a plan, resulting in more than one-third of enrolled seniors seeing their costs rise! Thaler and Sunstein suggest that Maine's prescription-based default is a far better nudge than the one used everywhere else.

In Freedom (Part IV), the authors call for a controversial privatization of marriage. They argue that the state ought to regulate only such things as joint ownership of property, medical decision making and the like, but that the term “marriage” and the associated religious and traditional meanings and ceremonies ought to be left to the private sector. This nudge is to use the choice to refuse the choice.

The final section (Part V) contains a set of replies to common criticisms of the ideas behind *Nudge*. As would be expected from two of America's true academic luminaries, this section is thorough. The authors caution that there might be reason to be concerned about “evil” nudges. If a politician or salesperson is “evil,” there's good reason to believe their nudges will be as well.

**The authors do not wish to force people into making choices that they prefer. They don't like coercion. They are like many people who recoil at the idea of taking away choice. To these people, the more freedom the better. This is the libertarian part of libertarian paternalism.**



The final section also contains 32 additional nudges that extend the original idea to new frontiers. Among these are Give More Tomorrow, transparent airline seat pockets so you never leave things behind, trayless cafeterias and painted patterns that cause people to behave as if they were going over speed bumps. Each of these is thought-provoking and entertaining.

So if you like to get your way but you don't like to be pushy, and if you are willing to expand your negotiation repertoire, you have a great read ahead of you. For our part, we hope this review provided just the right nudge. ●



## France Adopts New Arbitration Law Guaranteeing Party Autonomy Continued from Page 5



**Christopher Ryan,**  
Partner, Shearman & Sterling LLP

According to Ryan, another important provision confirms that French courts will not entertain challenges to the jurisdiction of an arbitration panel; rather, it leaves that decision up to the arbitration panel itself.

Article 1465 provides, “The arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction.”

However, French courts may get involved once an arbitration award has been issued, but here again the new law provides for party autonomy by authorizing parties to waive their right to seek a set-aside of the award, Ryan said. Article 1522 says, “By way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside.” Such an agreement, however, would not impact a party’s right to challenge the enforceability of an award based on five narrow grounds: Jurisdiction was improperly upheld or declined; the tribunal was not properly constituted; the arbitration panel failed to comply with its mandate; due process was violated; or enforcement is contrary to international public policy.

“The new law also draws a distinction between domestic arbitration and international arbitration, including with respect to confidentiality,” Ryan noted. He explained that in domestic arbitrations, the new law provides that the process is confidential, but for international arbitrations, there is no automatic presumption of confidentiality. However, parties can agree through contract or at the outset of the arbitral proceedings that the arbitration process will be treated as confidential.

Ryan said that “there has been a call for more transparency in arbitration, and in particular investment arbitration. France has taken note of these concerns, and wrote the law accordingly.”

Once an award has been issued, it becomes binding on the parties and, under the new law, there is not an automatic stay if a party moves to set-aside or challenge the enforcement of the award, Ryan said. In such cases, “a moving party must show compelling evidence why an award should be stayed,” he added.

“The new law has been received favorably by practitioners and reinforces Paris as a favorable seat for arbitration,” he concluded.



**Carolyn B. Lamm,**  
Partner, White & Case, LLP

Carolyn Lamm, a partner with White & Case in Washington, DC, said a key provision in the new law “makes clear that arbitration tribunals can order document production and issue interim measures.” Article 1468 provides, “The arbitral tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate, set conditions for such measures and, if necessary, attach penalties to such order.”

Importantly, the new law also “affirms that arbitration tribunals must treat all parties fairly and evenly,” she said. Article 1510 says, “Irrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of due process.”

According to Lamm, a “big thing in international arbitration is enforcement of awards by courts and practitioners, and parties want courts to respect the finality of an arbitration award.” Hence, the new law provides that “challenges to the enforcement of an award must be legitimate and not frivolous,” she said. The new law “makes it clear that French courts will respect the decision of the arbitration tribunal and not second-guess the arbitration process or an award,” she added.

**Ryan said that “there has been a call for more transparency in arbitration, and in particular investment arbitration. France has taken note of these concerns, and wrote the law accordingly.”**



The report on the new law explains that this provision is designed to discourage parties from engaging in bad faith annulment proceedings that seek to delay the enforcement of valid awards.

Another new provision provides that arbitration agreements and their container contracts are to be treated separately and distinct from one another for the purposes of enforcement. Article 1447 says, “An arbitration agreement is independent of the contract to which it relates. It shall not be affected if such contract is void.”

The new law “does provide much more certainty, codifies case law and is one of the best arbitration laws out there,” she concluded. ●

## Search for Common Ground Brings Unique Approaches to Conflict Resolution

Continued from Page 7



“The Team.”

Reilly went on to explain that “on the other side, we will engage decision makers in national debates on mediation through ten roundtables and work with media partners to develop radio programming on social and family mediation. These aspects will ensure that mediation gains momentum in Morocco as a form of ADR. We will conclude an agreement with the Ministry of Justice to try to ensure government commitment to family and social mediation, and their participation in debates.”

Reilly said SFCG-M has used a number of different methods to promote and highlight the benefits of mediation. Earlier this year, it organized a competition among young social mediators who were asked to design media products about the benefits of mediation. The winner, announced in April 2011, created a video documentary that detailed a case that was successfully mediated.

In another effort called MediAction, SFCG-M partnered with the British Embassy in Rabat and the government of Morocco to increase the use of mediation in the country by establishing five mediation centers in disadvantaged communities. Reilly explained that a “National Conference was held by SFCG-M and its partners to discuss the results, success and lessons learned in the program, as well validate a national network of youth mediators. During the project, youth mediators handled more than 9,000 cases, with successful resolution in more than 81 percent of cases. While direct funding for the centers has now ended, they remain active, with young mediators now working to create mediation centers in local schools.”

SFCG-M, with funding from the British government, also teamed up with a Moroccan production company called Ali N Productions to produce a 26-episode dramatic television series

Reilly explained that the show “depicts a fictionalized football team and the conflicts they face in their day-to-day lives. The series elaborates on the subjects of mutual understanding, non-violent communication, tolerance and civic community participation.”



called “The Team,” she said. “The show supported SFCG-M’s mission to promote constructive dialogue and a culture of mediation and conflict resolution among Moroccan youth.

Reilly explained that the show “depicts a fictionalized football team and the conflicts they face in their day-to-day lives. The series elaborates on the subjects of mutual understanding, non-violent communication, tolerance and civic community participation.

All 26 episodes have been broadcast on SNRT in Morocco, and debates in schools and universities across the country have taken place in 20 cities. In partnership with the Mohammed VI Foundation for the Reinsertion of Prisoners, 20 debates took place in different Moroccan prisons. The project is currently being expanded to juvenile detention centers.” ●

## Tax Mistakes Attorneys Make When Negotiating Settlements

Continued from Page 6

settlement is IRS Form 1099. Having an explicit agreement in the settlement agreement will avoid unwelcome surprises with Form 1099.

### Q. What are the immediate and long-term risks associated with tax-related mistakes lawyers make during settlement negotiations?

A. The major reason to care about these tax issues is to help the client. Even if lawyers disclaim any tax services or expertise, unless they strongly advise the client to get tax help—or reach out for tax help themselves—they do the client a disservice. Explicit tax allocations and tax provisions in a settlement agreement don't guarantee that the IRS will agree. But they go a long way toward that end and almost always put clients in a much better tax position than they would be otherwise.

Even if lawyers invest 30 minutes with a tax adviser about the tax building blocks in the client's case, that may materially improve the client's net after-tax recovery. And if lawyers represent defendants, they need to know what they can and cannot do without getting into trouble. Many defense lawyers just ask for tax indemnity, little realizing that indemnity in most cases represents very weak protection.

The primary advice here is not to ignore tax issues. In particular, don't ignore the possibility that the client may have to pay taxes on the legal fees paid to lawyers, even if they are paid directly by the other side. This often occurs outside the fields of employment and pure personal physical injury cases. So that means attorneys-fee tax problems proliferate in the vast majority of cases. I recommend getting some tax help to plan for them. ●

## JAMS DISPUTE RESOLUTION ALERT

An Update on Developments  
in Mediation and Arbitration

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