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

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THE RESOLUTION EXPERTS JAMS

DELAWARE BUSINESS COURT ARBITRATION PROGRAM PROVIDES FAST RESOLUTION PATH FOR FORTUNE 500 COMPANY DISPUTES

IN DEPTH

The Delaware Chancery Court's arbitration program draws more use as companies opt into the business dispute program to limit the costs and time associated with resolving complex, high-dollar corporate disputes.

However, along with increasing use comes greater scrutiny, as evidenced by a recently filed lawsuit challenging the arbitration program's constitutionality on First Amendment grounds.

William B. Chandler, former Chancellor of the Court of Chancery and an attorney with Wilson Sonsini Goodrich & Rosati in Georgetown, Delaware, described the program as "a consensual process, where at least one party to the arbitration must be a Delaware corporation or entity, as defined under state law, or have its principal place of business located in Delaware," he added.

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WHAT'S INSIDE

ADR CONVERSATIONS

A Q&A about new UNCITRAL Online Dispute Resolution Rules

BY JUSTIN KELLY

An interview with Vikki Rogers from PACE University discusses how the United Nations Commission on International Trade Law (UNCITRAL) will change its rules to the Online Dispute Resolution program, including enforcement between countries and the addition of arbitration to its process.

Q. What led UNCITRAL to begin developing model rules covering online dispute resolution for cross-border disputes?

A. In 2010, the U.S. delegation to the Organization of American States (OAS) submitted a proposed framework for the creation of an ODR system to resolve low-value, high- volume e-commerce disputes. The proposal was part of a larger array of proposals offered by the U.S. to address the topic of consumer protection, the focal point of the Seventh Inter-American Specialized Conference on Private International Law (CIDIP VII) at the OAS.

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Delaware Chancery Court Arbitration Program Continued from Page 1

He went on to explain that "no party to the dispute may be a consumer and, if money damages are in question, the amount in controversy must exceed $1 million. Thus, any dispute or controversy within the Court's jurisdiction may be arbitrated if the parties consent to arbitration and otherwise meet the qualifications and criteria."

"The process, by statute 10 Del. C. section 349(b), is deemed confidential in exactly the same manner and for the same reasons that mediation proceedings in Chancery are confidential and in exactly the same manner and for the same reasons that guardianship and many trust and will matters are deemed confidential and not open to the public," he said.

According to Chandler, the "arbitration statute authorizing arbitrations was enacted for the same reasons that the mediation statute and the technology disputes statute were enacted—because the Legislature, the Governor and the Delaware Bar Association believed this was an important and valuable public service that the Delaware Court of Chancery could, and should, offer to litigants. Given the extremely high costs of litigation in this country, alternative dispute resolution has become an important service that is annexed to judicial proceedings all over the United States; indeed, it is a service available all over the world."

"Business entities and the investors in business entities frequently complain about the costs and delays incurred in modern litigation. The arbitration and the mediation processes are a direct response to this growing concern and social cost," he said. "The Court of Chancery had an established history of providing high-quality mediation services in cases filed in the Court, especially in the guardianship and the trusts and estates section of its jurisdiction, a mediation process that was highly successful and highly valued by litigants and the bar."

"The Court of Chancery's success in mediations suggested that it could also successfully reduce the volume of litigation, and the costs and delays of litigation, if it offered an arbitration program that matched its mediation program," he said. "Finally, the Court had heard from its constituents—members of the corporate bar, the investor community and market participants—that its alternative dispute processes were highly valued and reputable, and should be expanded, so the idea was to offer, in discrete instances where it seemed likely to work, an alternative to the incredibly expensive and costly litigation process."

In addition, the program was viewed as "a way to save time and money for business entities and their investors, while it also would simultaneously preserve the Court's resources and time by reducing the volume of drawn-out trials and hearings. The arbitration process is more streamlined, with abbreviated decision schedules and reduced emphasis on discovery and motion practice—all of the features of regular litigation that make it so time-consuming and expensive, and that drain limited judicial resources," he said.

According to Chandler, the types of cases most likely to end up in arbitration include those where "business entities…have entered into contract, license or joint venture agreements with other business entities and a dispute about the enforcement or interpretation of that contract or license or joint venture agreement has arisen."

Chandler did not view having sitting chancellors also serve as arbitrators as an area of concern, saying, "The members of the Court of Chancery are already quite experienced and experts at alternative dispute resolution, and much of it has long occurred in alternative, non-public settings, including mediations and settlements in corporate and similar matters. In addition, the involvement of a member of the Court in the process, as opposed to a private arbitrator, was thought to increase the likelihood of success—meaning that the rate of successful arbitrations diverting cases from costly and time-consuming litigation would be increased," he added.

With regard to whether certain disclosure requirements of publicly traded companies could adversely impact confidentiality, Chandler noted that "nothing in the Court's rules or in the authorizing statute purports to limit or affect in any manner federal or administrative legal requirements that apply to business entities." He also explained that "much of the Court of Chancery's traditional equity jurisdiction has been conducted in confidential proceedings designed to facilitate a socially wholesome resolution, an amicable resolution that is much less likely to occur in the klieg light setting of a courtroom battle." "The same should be true with the arbitration process, which is built on a similar business model," he added.

Brian Quinn
Professor at Boston College Law School

Brian Quinn, a professor at Boston College Law School, said the arbitration program deals with business disputes and mergers and acquisitions cases, and while the end result will be known where publicly traded firms are involved, "it will limit future deal-makers from knowing what the whole context of the case was." This "could lead to the

long-term erosion of case law" and limit knowledge about how a neutral may rule in a case involving similar facts or circumstances, he suggested.

As to whether the arbitration program could limit the development of precedent and case law in Delaware, Chandler said, "Only if the program were to become so successful that it began to crowd out the regular docket, which seems highly improbable. The Legislature and the Bar Association both viewed the arbitration program as an adjunct to the Court's regular dispute resolution processes—one tool in the tool kit—and not as a process that will displace the regular adjudicatory processes of the Court of Chancery."

"Thus, the risk that the Court of Chancery's historical role in generating a rich body of precedent that guides practitioners will be eroded in some fashion by the arbitration program is, in my opinion, too marginal to worry about," he concluded.

First Amendment Challenge to Arbitration Program

David Finger, an attorney with Finger & Slanina in Wilmington, Delaware, said the Delaware Coalition for Open Government is challenging the constitutionality of the arbitration program based on First Amendment case law, which guarantees, in most instances, public access to court proceedings.

"There is no problem with private companies conducting arbitration in a confidential manner, but in the Chancery Court program, chancellors are ruling on cases in private, which is offensive to the First Amendment and the public's right of access to the courts," he said. Retired judges serving as arbitrators in private proceedings have become common practice, but sitting chancellors are functioning in that same role while the public is excluded from the process entirely, he added.

David Finger
Attorney at
Finger & Slalina

The First Amendment right at issue "helps check to make sure judges are acting in an impartial manner and ensures the public believes in the court system," he said, noting that this what the U.S. Supreme Court said was one of the main reasons behind guaranteeing the public's access to court under the First Amendment.

There is also a general concern that this program could lead to a "loss of case law and precedent" and add to worries "that one set of laws will be applied in arbitration and another to cases in court," he said.

Chancellor Leo E. Strine, Jr., responded to the lawsuit challenging the constitutionality of the program in a statement, explaining that the "legislation was designed to make sure that Delaware remains the most attractive domicile in the world for the formation of business entities. Throughout American history, it has long been recognized that not all aspects of the judicial process are subject to public access, and the courts of this state regularly mediate disputes among citizens, including businesses, and can only do so effectively if the confidentiality of the process is respected."

"Likewise, public access has been historically limited in cases dealing with family matters such as child custody, marital relations or guardianships, which are tremendously sensitive and personal, but which must be decided by a court," he said. "The General Assembly unanimously chose on two occasions to make confidential arbitration services available to Delaware entities through the Court

> **"Given the extremely high costs of litigation in this country, alternative dispute resolution has become an important service..."**

of Chancery and the Superior Court to advance compelling public policy interests related to Delaware's economic vitality. This litigation will be addressed in the appropriate way to defend the constitutionality of the statute."

Lawrence Hamermesh
Professor at
Widener Law School

Lawrence Hamermesh, a professor at Widener Law School, said there is no absolute right of public access to court. He noted that the First Amendment is already undermined by the encouragement on the part of federal and state courts that parties use alternative dispute resolution, including arbitration and mediation, to resolve their disputes.

He suggested the arbitration program gives parties to litigation more options for resolution, encourages them to use Delaware corporate formation laws and gets more cases resolved in Delaware by judges with experience in corporate law.

A Q&A with Vikki Rogers Continued from Page 1

Vikki Rogers
Director of the Institute of International Commercial Law at Pace Law School

Recognizing that the idea of ODR could have global applicability and benefit, the U.S. delegation to UNCITRAL also recommended that the UNCITRAL Secretariat conduct a study on possible future work that UNCITRAL might engage in on the subject of online dispute resolution in cross-border e-commerce transactions and suggested the Secretariat consider holding a colloquium of experts on the matter. Specifically, the U.S. delegation suggested UNCITRAL undertake work identifying the types of disputes most suitable for ODR, whether rules should cover business-to-business (B2B) disputes and business-to-consumer (B2C) disputes, and the need for a single entity that would maintain a list of approved ADR providers.

In response to the proposal, the UNCITRAL Secretariat, the Pace Institute of International Commercial Law and the Penn State Dickinson School of Law organized a colloquium of leading experts in the ODR field that examined issues surrounding ODR, including the impact of new technologies on B2B and B2C transactions in the global marketplace, the legal framework for e-commerce transactions, current efforts to develop regional ODR mechanisms, practicalities of establishing a global ODR system and the most efficient ways to ensure compliance with any awards arrived at through ODR.

Q. What recommendations came out of the colloquium, and did UNCITRAL take all of them?

A. First, a general consensus emerged from the colloquium that while domestic e-commerce has grown rapidly over the past 10 years, it is in stark contrast to the relative stagnation of cross-border e-commerce, due in part to the uncertainty regarding the practical availability of forums to resolve disputes and a lack of a certainty that decisions could be enforced across borders. It was determined that the creation of a global ODR mechanism could help relieve these uncertainties. However, given that potential future ODR systems could potentially resolve millions of low-value disputes annually, it was urged that system designers and legislators think outside the box and not necessarily resort only to traditional ADR mechanisms in their system design and rules. It was also made clear that going forward, any set of rules would have to accommodate for electronic and mobile commerce (m-commerce), the latter emerging as the primary access to the online market in the developing world. Lastly, given the nature of the online marketplace, it was recommended that there was no reason to distinguish between B2B and B2C transactions for the purposes of developing model ODR rules and processes for low-dollar, high-volume transactions.

In 2010, states overwhelmingly supported the assignment of ODR to a Working Group. In the first Working Group meeting, states identified their mandate to include developing procedural rules for the resolution of disputes arising from low-value e-commerce and m-commerce (the use of mobile phones to conduct banking and other consumer activities) transactions, without distinction between B2B and B2C transactions.

It was also noted that the Working Group would develop guidelines for ODR providers and neutrals, principles on which to resolve the disputes and a cross-border enforcement mechanism.

Q. Since the ODR rules and framework would be global in scope, are there any specific issues outside of dispute resolution the Working Group must consider?

A. The Working Group has undertaken this work with a clear understanding that many countries have very strong consumer protection laws in place and any rules or procedures that get adopted by it must take these laws into consideration. The working group further understands that the ODR rules could not serve to weaken or undermine these existing consumer protections.

Another factor the Working Group must take into account is the myriad of cultural issues that would be implicated by any global ODR rules or framework, including how neutrals are selected, their function in resolving issues, access to technology and how various cultures approach conflict resolution.

The working group also must take into account the huge numbers of disputes that could potentially be subject to the ODR rules and platform. The average ADR provider can manage more than 600 new cases a year, while a global ODR system would likely need to handle tens of millions of disputes. The eBay/PayPal ODR system handles on average 60 million disputes a year.

Q. Is the Working Group basing its work on any previously developed ODR rules or procedures, and what are the key legal and dispute resolution issues under consideration by the member delegations?

A. In the past, UNCITRAL working groups have had the relative luxury of being able to refer to experience, as well as a myriad of existing domestic rules or procedures, and amending, expanding or narrowing them to reach the best compromise solution. Here, however, they have to work largely from the ground up, as many existing systems do not account for cross-border scenarios and are not intended to scale at the same rate.

The Working Group is also debating the use of arbitration as a step within the dispute resolution process. The inclusion of arbitration raises issues to the extent that consumers are likely a party to a low-value transaction. States are considering whether consumers should be subject to pre-dispute binding arbitration agreements and whether final and binding arbitration awards are appropriate, or if consumers should always be entitled to resort back to their national courts. This latter point is weighed against the fact that recourse back to the courts is not practical or realistic. States are also considering whether sellers should also be able to assert a claim against a buyer, or only vice-versa. This discussion is a bit more abstract, as the Working Group has only identified the rules as generic rules, so it is hard to determine exactly the types of claims they are contemplating. Given the scope of the mandate, it seems appropriate that claims would be limited to very simple claims related to the sale of goods, similar to the scope of claims that can be filed in the U.S. chargeback system.

They also are tackling standards for ODR providers and what type of enforcement mechanism or protocol to attach to the rules and procedures. While the New York Convention applies to international arbitration awards and is well established, it is questionable whether it is the ideal enforcement mechanism. Thus, the Working Group has been tasked with focusing on alternative methods to enforcement, including, possibly, trustmarks.

The Working Group also needs to give further consideration to the audience for these rules. Will it be governments, for purposes of implementation and administration, or will they only have an oversight and accreditation role? Or will more private systems develop, such as in the case of PayPal? These questions impact how sellers will become bound to the system, how buyers will find the system and the enforcement of the decisions. In other words, thinking about how the rules will be used will have a profound impact on their development and their ultimate success.

Q. What is the basic structure of the ODR rules to date?

A. Right now, the ODR rules envision a voluntary process whereby both sides have agreed to rely on the ODR rules for their resolution. The rules contemplate a two-stage process. First, negotiation would be conducted online using software to facilitate the process. They assume that most disputes would be resolved through negotiation.

"The average ADR provider can manage more than 600 new cases a year, while a global ODR system would likely need to handle tens of millions of disputes."

The second stage is arbitration. Once a neutral is appointed, the rules provide that the neutral may conduct a facilitated settlement, if deemed appropriate. If a settlement is not reached, the neutral is empowered to render a decision based on the submissions of the parties, without a hearing.

Q. What would the global ODR framework include, and who would administer the ODR system?

A. The Working Group has conducted two sessions to date and still has not directly addressed the possible operation and administration of a cross-border system, whether it can be established globally, regionally, nationally or within private online intermediaries—e.g., the PayPal model, with some additional government oversight and/or accreditation. In the last Working Group meeting, my institute and the National Center for Technology and Dispute Resolution presented a proposal for the possible architecture for a global ODR system. The Secretariat has also issued a paper highlighting the more probing questions in the design of an ODR system. Hopefully, this paper will help inform the discussion in the next few Working Group meetings. ●

FEDERAL CIRCUIT COURTS

U.S. Supreme Court Rules That FAA Requires Lower Courts to Rule on Arbitrability of Each and Every Claim, Even if Multiple Litigation Is the Result

KPMG LLP v. Cocchi
2011 WL 5299457
U.S. Fla., November 7, 2011

Nineteen investors who lost money in a Bernie Madoff investment scheme sued all the parties involved, including KPMG who audited the transactions. KPMG was accused of four violations: negligent misrepresentation, violation of the Florida Deceptive and Unfair Trade Practices Act, professional malpractice, and aiding and abetting a breach of fiduciary duty. KPMG moved to compel arbitration based on the audit agreement between it and the investment firm that sold the securities. The district court denied the motion to compel and that denial was affirmed by the Court of Appeal, which noted that "none of the plaintiffs ... expressly assented in any fashion to the audit services agreement or the arbitration provision." In its opinion, the court of appeal held that Delaware law (the chosen law in the contract) would allow arbitration of derivative claims, but not direct claims. The court noted that the negligent misrepresentation claims and the FDUPTA claim were direct claims and therefore non-arbitrable, but the opinion was silent as to the malpractice and fiduciary duty claims.

The sole issue on appeal to the United States Supreme Court was whether the lower courts had erred in failing to send the remaining two claims to arbitration. The Court found that it had. In a Per Curiam opinion, the Justices noted that "when a complaint contains both arbitrable and nonarbitrable claims, the Federal Arbitration Act requires courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums."

The case was remanded so that the district court could make a ruling on the remaining two claims.

Actions Inconsistent with Arbitration Amount to Waiver

Roberts v. El Cajon Motors, Inc.
2011 WL 5343692
Cal.App. 4 Dist., November 8, 2011

Yaube Roberts sued El Cajon Motors in a putative class action alleging unlawful failure to disclose financing charges which resulted in illegal interest. El Cajon answered the complaint and discovery ensued. After interrogatories were propounded and answered, El Cajon moved to compel arbitration. Roberts responded to the motion by arguing that the arbitration provision was unconscionable.

Roberts later learned that El Cajon had sought out other potential class members and tried to induce them to waive claims by offering them $50 checks. Roberts filed a motion requesting additional discovery to determine the extent of El Cajon's efforts to undermine the class action and to stay the motion to compel until the discovery could be completed. The court granted the motion.

Ultimately, the trial court denied the motion to compel arbitration, finding that El Cajon had acted inconsistently with its expressed desire to arbitrate. The court also found that even if there was no waiver, the agreement was unconscionable.

On appeal, the California Court of Appeal affirmed. It held that the five months between the filing of the complaint and the request for arbitration, and the seeking out of class members in an attempt to settle were inconsistent with the desire to arbitrate and the extensive discovery that Roberts engaged in would be useless if the motion to arbitrate were granted.

The Court did not reach the issue of unconscionability and it suggested that the class waiver would be valid under the recent Supreme Court ruling in AT&T v Concepcion.

Lack of Written Agreement about Services to be Provided Precludes Arbitration Arising out of Those Services

Ehlen Floor Covering, Inc. v. Lamb
2011 WL 4922017
C.A.11 (Fla.), October 18, 2011

Ehlen signed an agreement with a pension manager. An addendum to the agreement contained an arbitration clause that included "any claim arising out of the rendition or lack of rendition of services under the Agreement." The agreement referred to a "Section VI" which would outline the services to be provided, but no such section was ever written.

The plan turned out to be out of compliance with IRS pension rules and significant tax penalties were assessed against Ehlen.

Ehlen filed an action in state court asserting claims of negligence, breach of fiduciary duties and more. The case was removed to federal court and complaints were amended and remanded. The plan managers moved to compel arbitration. The district court denied the motion and the plan managers appealed.

The Court of Appeal for the Eleventh Circuit affirmed, finding that "Ehlen Floor and the plan managers intentionally limited the scope of arbitrable matters by specifying that not all disputes would be sent to arbitration, only those directly linked to the provision of services under the contract. As we examine their contract to determine what those services are, the absence of the mysterious Section VI creates a problem. We see a laundry list of available services but, ultimately, no selection of services to be provided. It is impossible for us to say that a dispute arose out of services under the Agreement when the Agreement does not stipulate any services."

STATE COURTS

California: Agency Cannot Invalidate Pre-dispute Arbitration Clause

Kolev v. Euromotors West/The Auto Gallery, Motorcars West, LLC
2011 WL 4359905
C.A.9 (Cal.), September 20, 2011

Diana Kolev bought a used Porsche from Motorcars West. When the car didn't perform well, she sued, alleging breaches of warranty under the Magnuson-Moss Warranty Act (MMWA) and various actions under California law, including that the arbitration clause in her contract was unconscionable. The district court granted Motorcars' motion to compel arbitration. The arbitrator ruled in Motorcars' favor and the award was confirmed.

On appeal, Kolev argued that the MMWA acts as a bar to mandatory pre-dispute arbitration of her warranty claims. Given that the Federal Trade Commission had construed the MMWA to bar such arbitration, the Court had to determine how much deference to give the agency's construction of the MMWA. Using the analysis from the classic Chevron case, the Court found that while the statute did not bar pre-dispute arbitration on its face, it also found the FTC's interpretation of the MMWA to be a "reasonable construction of the statute."

The Court found that "the 1975 Magnuson–Moss Warranty Act is different in critical respects from every other federal statute that the Supreme Court has found does not rebut the FAA's pro-arbitration presumption.... in none did an authorized agency construe the statute to bar pre-dispute mandatory binding arbitration... only in the MWWA and in none of these other statutes did Congress say anything about informal, non-judicial remedies, and do so in a way that would bar binding procedures such as mandatory arbitration.... in the MMWA alone did Congress explicitly preserve, in addition to informal dispute settlement mechanisms, a consumer's right to press his claims under the statute in civil court... only the MMWA sought as its primary purpose to protect consumers by prohibiting vendors from imposing binding, non-judicial remedies. By contrast, the FAA's proarbitration policy ...is intended to expedite disputes through efficient, dispute-specific procedures and not to advance the interests of consumers."

The Court did not reach the issues about unconscionability or the other state law claims.

New York: New York Adopts "Reasonable Person" Standard to Determine Evident Partiality

U.S. Electronics, Inc. v. Sirius Satellite Radio, Inc.
2011 WL 5526016
N.Y., November 15, 2011

U.S. Electronics (USE) and Sirius arbitrated a dispute arising out of an agreement to distribute electronics supporting the Sirius radio network. The panel ruled unanimously in favor of Sirius. USE moved to vacate that award alleging evident partiality on the part of the panel, specifically that the son of the chair of the arbitral panel had been extensively involved with Sirius. The New York Appellate Division denied the motion, finding that USE failed to meet its "burden of proving by clear and convincing evidence that any impropriety or misconduct of the arbitrator prejudiced its rights."

On appeal, the New York Court of Appeal affirmed, but corrected the lower court's reasoning. The Court indicated that the proper standard to use in determining whether the panel was evidently partial is that used by the Second Circuit, that is, whether a "reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." The Court found the evidence did not support the allegations of impartiality and affirmed the denial of the motion to vacate.

New York: Failure to Preserve First Amendment Claim not Fatal to Motion to Vacate Where Mistake of Law or Disregard of Evidence Would not Provide Grounds for Vacating Award

Adolphe v. New York City Bd. of Educ.
2011 WL 5526605
N.Y.A.D. 1 Dept., November 15, 2011

(This opinion was so short that it was simpler to reprint it than to summarize it. What follows is the entire relevant text.)

The petitioner failed during the arbitration proceeding to preserve his argument that his First Amendment rights were violated. As a result, and contrary to petitioner's contention on appeal, the issue was improperly raised for the first time in his petition before the court. Were we to consider this argument, we would find it without merit.

Petitioner's contention that the hearing officer's decision was based on mistakes of law and a disregard of the evidence is unavailing, since these are not grounds for vacating an arbitration award.

Texas: Stand Alone Arbitration Agreement Trumps Illusory Promise in Employee Manual

Sun Fab Indus. Contracting, Inc. v. Lujan
2011 WL 5404097
Tex.App.- El Paso, November 9, 2011

Eric Lujan worked at Sun Fab. When hired, he was presented with an employee manual that contained an agreement to arbitrate. In addition, there was a one-page agreement to arbitrate. Later, he sued Sun Fab for discrimination. Sun Fab moved to compel arbitration, but the trial court denied the motion based on testimony that Sun Fab could modify the employee manual at any time and that the manual contains language that states that it is not a contract. The court found the agreement to arbitrate to be illusory.

On appeal, the Court of Appeals of Texas reversed, finding that the one-page arbitration agreement stood alone, could not be unilaterally modified, was binding on both parties and therefore, not illusory. The Court held that "because the arbitration agreement is valid, non-illusory, and enforceable, the trial court's denial of Sun Fab's motion to compel arbitration and stay proceedings constitutes an abuse of discretion." ●

TECHNOLOGY UPDATE

JAMS Launches Its New ADR Blog

JAMS recently announced that it launched a new blog to discuss trends, news and issues within the Alternative Dispute Resolution and legal communities.

Some of the topics covered include discussions about legal processes affecting ADR, articles from specific practice areas, posts that highlight organizations supporting ADR and more.

"This is another example of JAMS being an innovator and leader within ADR," said Chris Poole, JAMS president and CEO. "We're very excited to join the 'blogosphere' and continue communicating with our clients, colleagues and those in ADR about new trends and discussions related to mediation and arbitration."

The majority of the posts are authored by Mr. Poole, along with submissions from JAMS panelists, senior management as well as guest authors.

To visit the JAMS ADR blog, please go to www.jamsadrblog.com. ●

Recent Blog Headlines

- Arbitration: Still an Effective Method of Resolving Business Disputes?
- ADR and the Occupy Movement: The Importance of Dialogue
- Five Steps to Facilitate a Fair and Efficient Arbitration
- Mediation could save Ireland millions in legal costs

Peacemaker Program Develops Computer-Based Conflict Resolution Training for Schools

The New York-based Organization also Provides Support and Training to Families, Workers and Communities to Settle Disputes.

Steve Robinson
Executive Director of the Peacemaker Program

The Peacemaker Program, a dispute resolution services provider based in Oneida County, New York, is currently developing a computer-based conflict resolution training program for teachers and schools that will be available free of charge starting in spring 2012.

Steve Robinson, executive director of the Peacemaker Program, said a grant from the JAMS Foundation enables the program to develop this innovative computer-based conflict resolution program, which will train teachers in dispute resolution techniques. Once trained, teachers can then use the program to train students in the use of conflict resolution techniques to resolve all manner of disputes that arise in school settings, he added.

The Peacemaker Program is part of the statewide network of Community Dispute Resolution Centers (CDRC) responsible for assisting citizens with resolving small claims, family and custody disputes and more, he said. The CDRC network was established in 1994 when the "state saw the need for a way to resolve disputes that could alleviate a clogged court system," he noted.

According to Robinson, the module being developed for elementary and middle schools will use a video game format, called "Space: the Conflict Frontier," to teach kids about conflict resolution and help them develop the skills necessary to deal with conflict in school.

The other module being developed, "Paths to Resolution," is designed for high school students, he said. He explained that this program will focus on developing skills to deal with conflict around relationships and substance abuse issues, among others that arise in the teenage years.

The "core mission of the program is to provide an alternative way for people to resolve their conflicts in a peaceful and constructive manner," he said. Primarily, the program assists citizens with resolving small claims cases, neighbor-to-neighbor disputes and disputes in the workplace, he explained.

In addition, the program provides a lot of family mediation around custody and support issues and parent-child mediation, he said. Parent-child mediation primarily concerns conflict in the teenage years and helping kids deal with the effects of divorce, he added.

Parent-child mediation "grew out of the juvenile detention system and the recognition that mediation could help people live harmoniously within the home. Mediation is used to help parents maintain control of the household and develop communication skills between them and their teenage children," he explained.

"We do a very detailed analysis of how helpful these types of mediations are and follow up with families three, six, nine and 12 months after the mediation," he said.

Beverly Quist
Board President of the Peacemaker Program

Board President Beverly Quist, a professor of criminal justice at Mohawk Valley Community College, said a "key goal of parent-child mediations is to help families develop the skills necessary to resolve issues on their own. Mediation empowers families and allows them to gain knowledge and understanding of how to recognize and resolve conflict."

Another focus of the program is workplace mediation, she noted. In workplace mediations, the program tries to help people identify what type of personality they have in relation to resolving conflicts, and then develop the skills necessary for resolving workplace conflicts, she added.

"An enormous strength of the program and a reason for its success has been innovation, in particular its use of Internet-based programs," she said. The program has been a real leader in conflict resolution in New York and has shown that conflict resolution can be done and be effective." ●

Italian Mediation Law Chipping Away at Huge Backlog of Court Cases

An Italian mandatory mediation law launched this year has shown promise reducing the more than five million cases backlogged in the courts. Although it is subject to push-back from a leading organization of lawyers, it is contributing to a large increase in monthly mediation filings.

Giuseppe De Palo
Co-Founder and President of ADR Center in Italy

Giuseppe De Palo, president of Rome-based ADR Center and co-founding partner of JAMS International, said, "In the seven months that mandatory procedures have been in force, Italy has seen a drastic increase in the number of mediation filings, with more than 7,000 filings per month as compared with 4,000 total filings last year, and expected to reach 30,000 filings per month by 2012. As acknowledged by the European Parliament Resolution of September 13, 2011, these numbers are starting to chip away at Italy's court backlog of 5.4 million cases and eight-year processing time."

According to De Palo, the Italian mediation law, Legislative Decree 28/2010, "capitalized on the opportunity provided by the domestic implementation of European Directive 2008/52/EC and, going beyond the Directive's requirements, enacted mandatory pre-trial mediation procedures for civil and commercial cases, as well as financial incentives for all parties who mediate."

"This is a true cultural shift, and of course, it can be challenging and difficult at times," he suggested. "But what Italy has gained in increased efficiency is countered by the political price it has endured in defending the mandatory mediation provisions against those who ferociously oppose the legislation, namely the leading organization of lawyers who have launched constitutional challenges and even organized a national strike in protest of mandatory mediation."

"As a mediation organization, we understand that such bold changes inherently come with resistance. However, after experiencing the success of the mediation law thus far and noting the significant investments that Italy is making in its infrastructure by registering professional mediation organizations, from 20 to more than 450 accredited organizations in less than a year, and certifying highly trained mediators, it is our hope and our belief that mediation will soon find its place," he said.

"Mediation has great potential to revolutionize dispute resolution in Italy, and when it becomes an established procedure, the Italian public will finally reap the full benefits of having consistent, quality mediation services as a viable alternative to litigation," he concluded.

Marcello Marinari, a mediator with the ADR Center in Rome, explained that while the EU directive applied only to cross-border disputes, the Italian mediation law went further, applying to domestic civil and commercial disputes. The main aim of the new law, "as it is considered by the government, is to reduce the dramatic and increasing impact of the backload of cases for Italian courts," he noted.

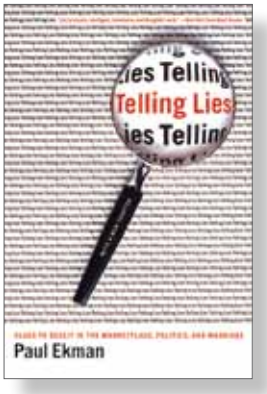
See 'International Focus' on Back Cover

Rome

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

Telling Lies, Clues to Deceit in the Marketplace, Politics and Marriage

Written by Paul Ekman (Norton Press 2009)



REVIEWED BY RICHARD BIRKE

Paul Ekman can tell when you are lying. It must have been a terrible thing to be one of his graduate students who told him that the dog ate their homework. It must also make him a terrific negotiator. Imagine being the car salesman who has to respond to Ekman's question "Can you go any lower on the price?"

How can he tell whether you are lying? Ekman's life is not a comic book adventure, and he lacks the extrasensory power of Professor Xavier of X-Men fame. Nor is he Santa Claus with a list of who's been bad and good.

In his book, *Telling Lies,* Ekman demonstrates how he can tell whether you are telling the truth or a lie by reading your face, body, voice, gestures and words. And while most professionals who are in the business of spotting liars (such as police officers, insurance investigators, loan officers, psychiatrists and CIA polygraphers) succeed at rates exactly the same as chance, Ekman argues that he can teach you to be much better at spotting liars than the average person.

Ekman draws on his experience as a psychologist and researcher, and he distills the essence of deception into manifestations of behavior and expression. He finds that the emotional states associated with truth telling differ from those associated with lying. These emotional states influence the words one chooses, the gestures one makes, the facial muscles that are activated and the tone of one's voice. Once an observer understands the baseline levels of behavior and manner of an observed person, deviations from the baseline are identifiable as attempts to conceal or deceive.

The first key in recognizing a lie is to unlearn what you may have thought were the telltale signs of a lie. Ekman labels these various behaviors—what poker players call "tells"—manipulators. He warns that "people vary enormously in how many and what kinds of manipulators they usually show." In other words, do not fall for standard scripts, such as a stutterer or someone who uses certain gestures is lying. In fact, the person may always stutter, pause a lot, bite their nails or fidget with their hair. The process of lie detection starts not with observing these behaviors and comparing them to the general population, but instead, comparing them with the person doing the behaving.

Ekman's next lesson helps the lie detector by illustrating the ways in which lies fail. He finds that liars who are too obvious about the feelings they have about lying often get caught. They show themselves. Others are too nervous about being caught, so they are caught. Some feel guilt, more in some circumstances than others. For example, it is easier for someone to lie when they do not benefit from the lie than when they do.

All these feelings are related, in part, to the relationship between the liar and the person being lied to. If the person being lied to has a reputation for being good at catching liars, the nervousness goes up, increasing chances of detection. If the person being lied to has a reputation for punishing harshly, this is a mixed bag. On one hand, the liar will be more nervous, but on the other, the liar has a larger incentive not to get caught.

Some of the highlights are Ekman's chapter on the different kinds of false smiles and his discussion of fleeting "micro-expressions." A terrific video of his micro-expression analysis of Kato Kaelin's testimony in the O.J. Simpson trial can be found on YouTube. Perhaps my favorite part of the book is Appendix A, which starts with a table labeled "Betrayal of Concealed Information Organized by Behavioral Clues" (e.g., "Pauses and Speech Errors – Verbal Line Not Prepared; or Negative Emotions, Most Likely Fear"). The clues are interesting and incredibly telling. The next table is titled "Betrayal of Concealed Information, Organized by Type of Information," which a reverse list of the first. Table 3 is "Clues That an Expression Is False" and contains such tidbits as fear without a reliable forehead expression is likely to be a lie. But the best is Table 4, the "Lying Checklist," which lists 38 questions that will help you detect lies.

Personally, I am a bit skeptical that reading any book can make you a better lie detector, and Ekman seems cautious as well. However, if ever there were such a book, it's *Telling Lies*, and that's the truth. ●

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According to Marinari, voluntary mediation "became popular in the 1990s but has gradually lost its effectiveness over the years. So while voluntary mediation was an acceptable process to the legal community, the mandatory mediation law met resistance from the outset."

"Italian lawyers, who had not been against voluntary mediation, immediately reacted and claimed that the new law is against the Italian constitution and introduces an expensive obstacle to the access to justice," he said. "They also argued that the new law fails to assure the professional skill of mediators, claiming also that the assistance of defense counsel ought to be mandatory too, even though, in fact, the vast majority of parties are assisted by a counsel."

"The National Associations of Lawyers challenged the new legislation, and the administrative tribunal of Lazio referred the case to the constitutional court, which is going to decide on it in a few months," he explained.

"Mediation has great potential to revolutionize dispute resolution in Italy..."

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Michael McIlwrath, associate general counsel for litigation at General Electric Oil and Gas in Florence, said that due to the strikes earlier this year against the mandatory mediation law, many cases have been delayed for up to a year, which unfortunately runs contrary to the purpose of the law to reduce the backlog of cases in the Italian court.

"We welcomed the new law because it makes it easier to get to mediation and provides greater flexibility in resolving disputes," he said. "GE believes strongly in early dispute resolution, with mediation as the preferred form of dispute resolution," he added.

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

McIlwrath said the new law is creating growth in the mediation profession, noting that there were "very few trained mediators before the law became effective." Because of the new law, "both sides in a dispute must take mediation seriously," he suggested, adding, "Hopefully, the demand for mediation will follow the supply," as parties and their attorneys recognize the value of the process for resolving all manner of disputes.

De Palo said that some of the larger bar associations, Rome and Milan in particular, are coming around to the law and have recently set up mediation organizations. "The program run by the Bar Association of Milan has experienced early success," he added.

"Fortunately, it appears there is growing evidence that the opposition may be waning, due to a significant jump in the number of registered mediation organizations in the last month," he said. After very few registrations in January and February, an average of 54 organizations per month were registered between March, when the law went into effect, and October. However between October and November, nearly 130 organizations were registered, bringing the total number to 612, he said. ●

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