Reports on the Panels at the DRS Annual Meeting

Our student reporters provide detailed descriptions of our sessions on January 27, 2011:

Topics in International Arbitration

By Glen Parker, JD *and LL.M. in Dispute Resolution and Advocacy candidate Cardozo School of Law*

The annual meeting of the NYS Bar Association's Dispute Resolution Section began with a panel discussion chaired by James M. Rhodes, Esq, addressing recent attitudes and trends in the field of International Arbitration.

William Rowley discussed criticisms of international arbitration which called it "a broken process", on "a dangerous track" and "a far cry from its roots," with which he emphatically disagreed. Rowley, an arbitrator in London and Toronto, gave three possible reasons for these views.

First, critics find fault with the seemingly closed-ranked group of senior arbitrators, whom he called "the Mafia," who may prevent newcomers from entering the field. Rowley stated that they are simply well-known arbitrators who have been proven to add value to the process and are consequently sought out; that the parties are the ones who determine who is in "the mafia" and vote with their feet by choosing well-qualified arbitrators with the best reputations.

Secondly, Rowley cited concerns over "pro forma, unduly long procedures which are blindly followed" as another reason for criticism of international arbitration. Rowley cautioned that the standard process is only a guideline or road map to draft your own process and procedural order, emphasizing that getting off to a good start, with no surprises down the road, is important, and that the parties should discuss and consider everything at the first meeting. Lastly, the third basis for discontent with international arbitration is that it is too costly, to which Rowley rhetorically asked, "Compared to what?" Noting that Arbitration involves far less document disclosure than regular court proceedings, which account for upwards of 70% of the cost of litigation, here again, "the cost is in the hands of the parties." According to Rowley, citing an ICC study, the cost of the tribunal comprises only 16% of the total cost of the arbitration. Any additional costs are predominantly the costs of the lawyers. In short, the parties control the process. Parties may take advantage of the inherent flexible nature of international arbitration by making the process reflect their needs, financial and otherwise. However, if they fail to do so, it is no wonder that such criticism would result.

The second speaker, Luis Martinez, Vice-President of the International Centre for Dispute Resolution, concurred that international arbitration is not a broken process. He reported seeing

increasing usage of the process around the world. Last year, the ICDR, the international arm of the American Arbitration Association, had well over 800 international arbitrations.

Martinez reported that the United States Supreme Court has decided 8 cases dealing only with arbitration in the past 2 years. A leading case, *Stolt-Nielsen S.A. V. Animalfeeds International Corp.*, 130 S.Ct. 1758 (2010), held that class-action arbitration is not available if the arbitration clause is silent on the matter. Although this decision undermined the court's previous ruling in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003)[holding that the question of whether a class-action arbitration is appropriate or not is a question for the arbitrator to decide], the ruling has not had a significant effect on the class action docket at the AAA, according to Martinez.

John Fellas, of Hughes Hubbard & Reed, addressed the role of the New York courts in assisting parties in international arbitration, even when the seat of the arbitration occurs outside the United States.

A party may seek provisional relief to aid arbitration by bringing an anti-suit injunction in U.S. courts, which is commonly used in cases of parallel litigation where the parties bring suit against one another in two different countries; i.e. A sues B in the U.S. and B sues A in the U.K. New York federal courts may act to enjoin parties from pursuing claims in foreign courts in violation of arbitration clauses. See *Amaprop Ltd. v. Indiabulls Financial Services Ltd., No. 10 Civ. 1853, 2010 WL 1050988 (S.D.N.Y. March 23, 2010).* The question of whether an anti-suit injunction will issue pursuant to a foreign arbitration clause turns on (1) whether the U.S. court has authority based on personal jurisdiction, and (2) whether it seems appropriate to exercise that authority, which entails balancing the federal court's tendency to favor arbitration versus its concern for international comity in not wanting to interfere with the laws and judicial process of another state.

Similarly, New York law is particularly suited to assist in the enforcement of an arbitration award. A party may invoke New York CPLR section 5225(b) which permits a prevailing party to commence a special proceeding against anyone holding the property of the debtor or losing party. In 2009, the New York State Court of Appeals held that a court could order a bank in Bermuda to produce a debtor's assets which were being held in Bermuda if the court had personal jurisdiction over a branch of that bank which in which the debtor maintained an account. See *Koehler v. Bank of Bermuda, 12 NY3d 533 (2009).* If the court finds personal jurisdiction, a New York court could order a bank to transfer assets located anywhere in the world, stated Fellas. Although the dissenting opinion in Koehler pointed

out that the decision creates a forum shopping opportunity, Fellas and audience members welcomed such an opportunity to "make New York the center of [international] arbitration."

The last speaker, Efraim Chalamish, addressed recent trends in Investor-State arbitrations which mainly occur through "ICSID," the International Centre for the Settlement of Investment Disputes. Increasingly, more countries are utilizing Bilateral Investment Treaties, "BITs," to protect investor's interests and attract investments.

Although each BIT is different, generally the standards of treatment of foreign investments should be fair and equitable, non-discriminatory and provide for security for foreign investors. Chalamish questioned whether there will be growth in such cases resulting from the financial crisis of 2008 with the United States subsidizing US car manufacturers and financial institutions and whether a foreign investor could claim discrimination; from the nationalization of industries in some countries; from the growth of democratization in the developing world; and with more countries becoming ICSID members.

Metaphors in Mediation: Sirens' Songs and Michelangelo's *David*

A Report on the Panel Discussion in Program II: Developing Trends and Controversial Topics in Mediation

By Kate Heidbrink, J.D.-M.B.A. Candidate, Regent University

The second program of the NYSBA Dispute Resolution's annual meeting on 1/27/2011 featured a panel discussion on emerging trends in Mediation, moderated by Abigail Pessen, a New York City mediator and arbitrator of business and employment disputes. The lively panel included the Hon. Elizabeth S. Stong, a Judge of the U.S. Bankruptcy Court for the Eastern District of New York, David H. Burt, in-house counsel for E.I. DuPont de Nemours & Company, Anne Golden, of Outten & Golden LLP, representing employees in employment disputes, and Simeon Baum, Esq., President of Resolve Mediation Services.

Ms. Pessen began the session by questioning the utility of the joint session in mediation. Ms. Golden highly recommended a joint session as a good for both parties in employment disputes: "You can see them and they can see you," and the joint session will serve as an overview of what court will be like if mediation fails. She encourages and coaches her clients to speak for themselves in the joint session and to give a 5 to 10 minute opening statement reporting on 3 personal issues: 1) What

happened, 2) Why there was a legal harm, and 3) Why that party felt hurt. If the attorneys alone give the opening statements, rather than the parties, they are less effective since they are "just hired guns" with no personal stake in the contract and often have the facts wrong in some respect. Ms. Golden prepares her clients for the joint session by saying, "You will hear things that are not true and very insulting" and alerts them to understand that this is the opposing party's case.

Mr. Burt agreed that a joint session is important and stated that it is "absolutely beneficial to hear the other side's case," that it helps both parties focus on the issues in chief, and that it may limit motion practice. Burt noted that even in business disputes, often the parties' feelings are involved and they may be concerned about losing market advantage. A joint session helps move the dialogue from "chest thumping" to a collegial atmosphere and, even if the parties later litigate, may lead to economy in the conduct of the litigation

Mr. Baum explained that the mediator can maximize the value of the joint session by setting expectations and orienting the parties toward trying to understand each other resulting in changed perceptions. Mr. Baum encourages lawyers to let their clients talk and hear the other side by giving them an image of Ulysses from Homer's, The Odyssey when he was strapped to the mast while passing the Island of the Sirens. Unlike his ship's crew who stuffed their ears with wax, Ulysses was able to hear the Sirens' song but was unable to move or react to it.

Judge Stong mediates commercial disputes referred to her by other Judges which have often been ongoing for 5 to 10 years in multiple forums and she seeks to "put a stop on [the litigation] and get a solution." Judge Stong prefers to hold the joint session with only the lawyers first and utilizes this as an opportunity to change the relationship between the attorneys. At the joint session, Judge Stong will start with the attorneys making opening statements on the record, while she sits behind the bench in her robe and then she proceeds to change the culture of the dispute by unzipping her robe, stepping down from the bench, and sitting down between the attorneys. In such a joint session, Judge Stong attempts to chisel away at the case and build that trust between and among the attorneys. She sees her role as finding the hidden core issues - "somewhere, within the block of marble, is a David."

The next topic was the importance of confidentiality in mediation. Ms. Golden noted the importance of the mediator maintaining known confidences of either party. Mr. Burt said, "Everything we do in the presence of the mediator is calculated and prepared—we're not taking our clothes off." Rather, we will leak things out little by little. Also, he suggests that his clients reveal bad facts deliberately, since they will come out eventually.

Mr. Baum noted that, confidentiality is fundamental and central to build and maintain trust. Under the Model Standards of Conduct for Mediators as well as the Uniform Mediation Act, the mediator has a duty to preserve trust and maintain confidences; however, such a duty would not prevent a mediator from encouraging the parties and recognizing areas of the overlap.

Judge Stong said the mediation process upends the usual ethical rule of candor before a tribunal. Rather than openness, everything is cloaked in a shield of confidence. However, she cautions the parties that although "everything is confidential, there is no amnesia. You may see a discovery request [for an item discussed] down the road." As to confidences discussed in caucus with only one party, Judge Stong usually asks each party to alert her if there is anything she should preserve in confidence from the other side, rather than asking permission for each individual disclosure.

The discussion next addressed the value of having a judge or former judge rather than a non-judge as a mediator. The panel generally agreed that while there may be case specific reasons to select a judge as mediator, the parties tend to overemphasize the importance of factual or legal knowledge in selecting a good mediator. Rather than legal expertise, the key to choosing a good mediator is the mediation process skill of the mediator. As Mr. Burt stated, "You want a smart, flexible multi-tasker who listens and feeds back to the parties" their input, breaking down complex issues. Ms. Golden noted that she seeks a mediator who is an expert in psychology, language, and can understand what people really want.

Finally, the panel discussed whether a mediator should make a settlement proposal to the parties. The general consensus was that a mediator-led proposal is disfavored because it can derail the parties' own problem-solving efforts to reach agreement. As Mr. Burt put it, a mediator's proposal can "encourage people to be codependent and cede solving problems" to the mediator. Mr. Burt also noted that law school generally takes a "free-spirited and open sponge of a person" and narrows his focus "to the vanishing point," in contrast to the mediation process which encourages active, right-brained thinking. Mr. Baum agreed, noting that in over nine hundred mediations, he has made fewer proposals than the fingers on one hand. A proposal, he said, can turn parties into witnesses instead of active participants who explore "the broad possibilities of mediation." Judge Stong suggested talking about figures for settlement in private caucus with only one party present and using the following language: "I ran the numbers this way . . . tell me how it feels [to you]."

Although, as Mr. Burt noted, mediation is in its adolescence, this lively discussion of best practices and creative ideas may help the field mature.

Many Ways to Skin a Cat: Ethical and Practical Issues concerning Arbitral Settlements

By Mark Irlando, Cardozo Law School, J.D. Candidate, June 2011

"Promoting Settlement from Within Arbitration: Ethical and Practical Issues," the third program of the NYSBA Dispute Resolution Section's Annual Meeting, surveyed topics ranging from whether the parties want the arbitrator to promote settlement to ethical issues involving aggressive scheduling. Sherman W. Kahn, of Morrison and Foerster LLP, chaired the panel and posed questions to distinguished speakers: Deborah Masucci, of Chartis Insurance, Professor Jacqueline Nolan-Haley, of Fordham Law School, Edna Sussman, of SussmanADR and chair of the Dispute Resolution Section, and John Wilkinson, an arbitrator and mediator with JAMS. Over the course of the program, the panelists explored ethical and practical considerations regarding the parties, the arbitrator, and procedures and hybrid processes to encourage settlement within arbitration.

Kahn began the discussion by questioning whether the parties wanted the arbitrator to suggest settlement during the arbitration. Masucci noted that disputants have often exhausted other processes—negotiation and mediation—before finally opting to arbitrate. Sussman stated that an arbitrator's suggestion to mediate, in appropriate circumstances, might alleviate any concern that such a suggestion by a party might be seen as a sign of weakness. From the ethical perspective, Nolan-Haley averred that by suggesting settlement, the arbitral panel would be acting within its bounds so long as it did not pressure the parties into mediation. She also suggested the panel should consider the disputants' expectations when balancing the desire to propose mediation with its own obligations.

Then Kahn continued to explore the arbitrator's role in promoting settlement by asking Wilkinson whether an arbitrator should reveal a view of the case before all evidence has been presented. Even if the parties mutually consent to a pre-settlement take on the case, Wilkinson cautioned against offering any reasoning before a final award is issued. He noted that such disclosure would likely anger one party and the arbitrators' conclusions on the merits could change as more information became available. Sussman cautioned that an arbitrator proceed carefully in proposing mediation to avoid any party misconception that such a proposal is a view of the merits of the case. Ideally, the arbitrator would explain that he/she routinely proposes mediation at a number of predetermined points in the process and then proceed to suggest it as an option at those specified points.

The discussion continued by considering various procedures and hybrid processes to promote settlement. As in-house counsel, Masucci commented on summary dispositions which she worried

could embolden one side not to settle since some issues would be decided prior to a final award. Professor Nolan-Haley commented on the ethical issues surrounding aggressive scheduling to promote settlement. However, the panel concurred and cautioned against using any such technique as a means to pressure or force settlement.

Wilkinson addressed the usage of depositions which are often excluded in arbitrations and noted that although depositions might slow down the arbitration process, if limited in number and time spent, they might disclose information important to settling the matter.

The final discussion addressed hybrid processes such as Arb – Med – Arb with the panel agreeing that such processes are risky and that mixing the roles of arbitrator and mediator present conflicting ethical duties which may be irreconcilable. An example of such conflicting duties is that an arbitrator may not engage in or consider *ex parte* communications whereas a mediator in caucus may discover information which must be kept confidential and secret from the other side. Nolan-Haley worried that the competing professional obligations could make some arbitration awards vulnerable. Sussman suggested that a completely separate arbitration and mediation could proceed simultaneously with different neutrals involved; however, she noted that such simultaneous processes could be quite costly. Sussman provided other alternatives such as: having the two wing arbitrators on a panel act as mediators while the chair could continue acting as a sole arbitrator to decide the case, if needed; eliminating *ex parte* communications and the caucus when holding settlement discussions in the middle of an arbitration; or completing the arbitration process and issuing a sealed award whereupon, the arbitrator(s) continues as mediator(s), and if settlement is reached, the award remains sealed and is discarded, but if no settlement is reached, the award is unsealed and issued.

During this final program of the Section's annual meeting the panelists raised several concerns—both ethical and practical—in promoting settlement within arbitration; however, they all agreed that if the parties gave informed consent and the arbitrators took appropriate precautions to avoid ethical dilemmas, disputants might benefit from reaching a settlement agreement rather than having the arbitrator(s) issue an award.