ALTERNATIVE RESOLUTIONS

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION

CHAIR'S CORNER
By Susan Schultz, Chair, ADR Section

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Susan Schultz

Spring is in the air (my sympathy to allergy sufferers), and wildflowers are showing their colors. Around the state, we are also acutely aware that our biennial (although it sometimes seems perennial) legislative session is under way. Leaving budget bills to another forum, I would invite you to peruse bills concerning our shared interest in this Section: dispute resolution processes. According to a quick online text search of Texas legislative bills, variations of the words "mediation" or "arbitration" appear in bills that just by way of example touch on:

- Collective bargaining by firefighters and police officers
- Texas windstorm insurance claims
- Disputes between DADS and assisted living facilities
- Restorative justice program for juvenile offenders
- Property tax disputes
- Uniform Collaborative Family Law Act

That's quite an array and another reminder how dispute resolution processes can span many subject matter areas and touch people in various facets of their lives. The Section reactivated the Legislative Committee this year to flag some of the ADR bills that might be of interest to you and allow for individual conversations to start. As I look over some ADR bills, I'm again struck by the constant need to inform/educate those around us about basic ADR principles. For example, when a bill addresses a mediation program, do you believe that it's important for the mediator to have some skills training in mediation (such as the training requirements under Chapter 154)? As we review ADR bills, we should take the opportunity to pause and consider: what ADR tenets do we hold dear?

ADR Organizations Dialogue: just as our Section encourages conversation among our members, I also believe that it's vital to a cohesive maturation of the ADR field in Texas to engage in conversations across ADR organizations. Thus, over the past year, representatives of our Section have met twice with representatives of the Texas Association of Mediators, Texas Mediators Credentialing Association, Texas Mediation Trainers Roundtable, and the Association of Attorney Mediators. The intent of the discussions is foremost to establish a forum for dialogue. Many of us are members of

Inside This Issue:

REVISED POLICY RECOMMENDATION

The ADR Section of the State Bar of Texas has approved for submission to its membership at the annual meeting of the State Bar Convention on June 23, 2011 at 1 p.m. the following Policy:

The ADR Section of the State Bar of Texas currently extends the privilege of ADR Section membership to individuals who are not licensed to practice law but are practicing professionals in the area of mediation, arbitration, or other alternative dispute resolution processes. These individuals are defined in the Section's bylaws as "public members" and although a member of the ADR Section, are not and do not become members of the State Bar of Texas.

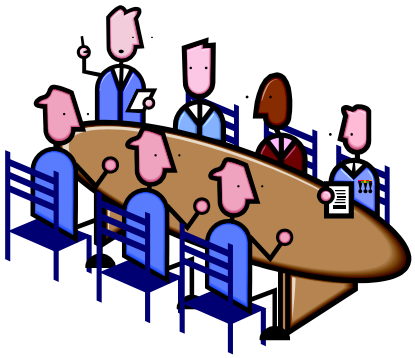
The public member may not include any identifying mark or number in any communication that suggests the public member has a membership in the State Bar of Texas. Further, as a condition of such membership, a public member of the ADR Section must, in any communication, advertisement or promotion that states he or she is a member of the Section, include the following statement:

"The individual identified in this communication is not a member of the State Bar of Texas and is not licensed to practice law in the State of Texas." Failure to comply with these conditions shall result in revocation of membership in the ADR Section. The reason for this Policy is that our Section has been informed that some ADR trainers have suggested to their students to obtain a State Bar number and join the ADR Section and that some nonattorney public members in turn, who are ADR providers have used the State Bar membership number as part of their advertisement which has misled the public to believe that the provider was a member of the State Bar of Texas and to some was interpreted to mean that the provider had rights and privileges which only attorneys have. We believe this Policy will stop that practice.

several ADR organizations: how can each organization best meet the needs of its members? Are there areas of overlap or that we are missing altogether? Are there possibilities for coordination? If any proposed action stems from these dialogues, we will bring it back to our respective memberships for consideration.

Outreach to TYLA and law students: In addition to reaching out to our colleagues and across organizations, let's also encourage those starting out in the ADR field. Our Bylaws provide that a TYLA representative can serve as ex-officio on our ADR Section council. So, we invited the TYLA president to appoint a TYLA representative to serve on our council, and Daren Brown will be participating in our April 9 meeting. Also, our section was invited to have a speaker at the UT Law School career day to talk about the opportunities in the ADR field. Greg Bourgeois very nicely stepped up to provide a group of law students a glimpse into the day-to-day world of a mediator. They had lots of questions, and Greg did a masterful job responding to them.

Upcoming annual meeting: I hope that you have a big star on your calendar for June 23 to attend our ADR section annual meeting during the State Bar conference in San Antonio. Joey Cope provides more detail about the program later in this newsletter. This is an opportunity for us to put faces to names and connect – come, and we'll get acquainted!



2011 ADR COURSE SETS RECORDS

By Don Philbin

Attendance at the Section's annual ADR course, held in Houston on January 28, 2011, was 14% above its previous all-time high and quality matched quantity. "Excellent . . . best State Bar CLE taken in 35 years of practice," raved one participant." Another wrote" I can only sum this course up in one word . . . Incredible!"

Lawyers and judges from all over the state gathered as nationally recognized author and speaker Doug Noll trained us to use micro-interventions to avoid impasse. Before a crowd of business lawyers and general counsel, wills, trust, and estate lawyers, and of course litigators and ADR practitioners, Noll took us on a deep dive into brain science research before demonstrating how practitioners could use that knowledge to prevent impasse in real time.

Noll lightened a tough look at difficult personalities with movie clips depicting Miranda Presley in the Devil Wears Prada and the other sorts of outsized egos that often wander into mediation. Each segment included small group exercises and discussion to give participants real-time experience applying these concepts to deepen understanding. That was easier with some topics than others. Participants dealt with conflicts involving deeply held beliefs and other sources of intractable conflict. Working with the wide range of emotions flowing from Israeli and Palestinian mothers, each of whom lost strikingly similar daughters when the Palestinian daughter felt compelled to become a suicide bomber in response to claimed Israeli oppression, made working with the range of emotions in litigated cases seem small by comparison.

Noll reasoned that stepping back into litigated cases would be easier after learning micro-invasive techniques designed to deal with the egos of Miranda Presley-type characters and raw conflicts like those surrounding violence in the Middle East. By all accounts, he was successful. Participants had high acclaim for the program both during the course and in the evaluations that followed:

"Great course. It was informative to real life scenarios in dealing with human emotional conflicts. Trying to have a successful result while having a difference of opinions is difficult to accomplish. Overall great job. This ADR course should be a mandatory course for ALL lawyers because emotional conflict does not only occur during mediations."

"Very good course. Excellent presenter."

"Excellent course and far better than the typical CLE. The material is new and innovative. Presented well and triggers some out of the box thinking. Movie examples and demonstrations showing successful use of the technique in practice. Course materials were challenging and thought provoking. Well worth the time and money! I don't say that often about CLE."

"I'm a working litigator not a mediator. I thought the insights offered here would be hugely helpful for purposes of client relations (and yes internal law from coexistence). This is a great program and lightly modified ought to be offered to all lawyers as a human relations tool."

"Interesting. A new and different approach to understanding decision making and how to deal with emotional decisions as a mediator."

"Excellent. Discussed certain myths – venting of emotions that caused some introspection and discussion."

"This particular format was wonderful and it was better than talking heads. Let's see more programs like this and the Pepperdine presentation from two years ago. Hands-on training and workshops like this are more of what we need."

"I am not a mediator but I have an active family law collaborative practice and am able to utilize these same techniques in dealing with in the collaborative process. I find Doug Noll's presentation fascinating."

MCLE PROGRAM

FROM THE EDITORS

By Steve & Wendy Huber

This column consists of a potpourri of items related to ADR topics that interested your editors, and that we hope also will be of interest to Section members. First, we consider two bills related to arbitration that were filed in the current session of the Texas Legislature that merit thought, even though they surely will not be enacted. Second, we present an unpublished case regarding a purported waiver of the right to arbitration that was decided by the Eleventh Circuit Court of Appeals, *Citibank v. Stok & Associates*. This seemingly unimportant case suddenly achieved national prominence when the United States Supreme Court granted a writ of *certiorari*. The appeal will be heard no earlier than October, 2011. Finally, we consider the use of mediation for family disputes in England.

A. Legislative Proposals to Amend Texas Arbitration Law

This section discusses two bills filed during the current session of the State Legislature. Although these proposals will almost certainly not be enacted – that, after all, is the fate of nearly all proposed legislation – the bills encompass interesting ideas, and may reappear in subsequent sessions.

1. H.B. No. 3444, filed by Representative Jackson on March 11, 2011

This bill, titled "Disclosure Required," would add a new section 154.0521 to the Texas ADR Act. It provides prior to appointment as an "impartial third party to facilitate an arbitration " the arbitrator-designate "must disclose to all parties the nature of any financial or other relationship the person has to any party."

Current section 154.051(a), titled Appointment of Impartial Third Parties, applies to multiple ADR procedures, and authorizes a court to "appoint an impartial third party to facilitate the procedure." "Facilitate" is a useful umbrella term which referring to a range of ADR procedures, but it seems a strange way to speak of arbitration. What does it mean to "facilitate" an arbitration? [No doubt the drafter of the bill sought to parallel the existing section 154.051(a) language, which is usually a sound approach.]

In thinking about what the bill envisions as "arbitration." it is important to note that the proposal is an amendment to the ADR Act – *not* the Texas General Arbitration Act (TGAA). The arbitration provision in the ADR Act, section 154.027, is limited to "nonbinding arbitration" – and the arbitral award "serves only as a basis for the parties' further settlement negotiations." Of course, where the parties agree that an arbitration award will be binding, that contractual provision will be enforced – but pursuant to the TGAA rather than the ADR Act.

It is likely that the drafter of H.B. 3444 sought to address concerns about the neutrality of arbitrators, with expanded disclosure of potential conflicts the solution. Legislation to that effect has been adopted in California and several other states. To be meaningful, however, the expanded disclosure approach should be quite specific, so that arbitrators are informed about what is required of them, and courts can police failures to make proper disclosure. As the need for more disclosure is most significant in the context of binding arbitration, any such legislation belongs in the TGAA rather than the ADR Act.

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S.B. No. 1216, filed by Senator Estes on March 7, 2011

This bill, titled "Determination of Validity and Enforceability of Contract Containing Agreement to Arbitrate," would add a new section (171.027) to the TGAA. It states that where a party opposes a motion to compel arbitration and asserts that the entire contract is invalid, the district court may order arbitration only upon determining that "the contract con-

taining the arbitration agreement is valid and enforceable against the party seeking to avoid arbitration." And, this approach governs even where the contract includes an express provision to the contrary.

The effect of this provision is to repeal the separability (a/k/a severability) doctrine. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) is the leading case. As that doctrine is part of the substantive law under the Federal Arbitration Act (FAA), the proposed legislation would be preempted with respect to any transaction that involves commerce. However, if the parties make a clear choice to arbitrate under the provisions of the TGAA, then this provision would govern. In fact, quite the contrary will occur, as parties that draft arbitration agreements will be sure to include a choice of law provision that rejects resort to Texas law.

The separability doctrine states that a court may not look at the substantive contract – often referred to as the "container contract" – in determining whether to order arbitration. Instead, only defects with the arbitration agreement (and perhaps related procedural arrangements) provide a basis for refusing to order arbitration and/or to stay litigation. (Such a general statement necessarily oversimplifies the separability doctrine.) Arbitrability claims are heard as motions, which means quickly, rather than going to the end of the queue to await a docket setting.

The proposed legislation calls for court to "promptly" try the issue of the validity of the container contract. However, the assumption that state district courts can dispose of such issues rapidly, as is true when only the arbitration provision is at issue, is incorrect. A common defense to a breach of contract claim is that the agreement is invalid due to fraud in the inducement – that was the main claim in *Prima Paint*. Under the proposed legislation, this fact intensive defense would be heard and decided by the trial court. In effect, the court would often be effectively deciding the case on the merits, in the guise of determining whether to order arbitration – and to do so would require testimony from multiple witnesses who present conflicting versions of the key events. Courts are quite capable of doing this work, but the consequence would be to largely undermine arbitration.

The effective date of the proposed legislation presents an additional problem. The new provision would apply only to contracts entered into after the law went into effect. Many contracts that call for arbitration of disputes have been in force for many decades. Important examples include right-of-way and royalty agreements. Such contracts are often subject to amendments; is the resulting product a new contract or a mere adjustment to an existing agreement? Often the answer will be far from self-evident, with the disputants being successors-in-interest to the original contracting parties. As the abandonment of the separability doctrine would be such a fundamental change in arbitration law, this approach to determining an effective date is a mistake. Instead, the effective date should be a date certain – the day the legislation goes into effect, or a stated period of time thereafter.

B. Citibank, N.A. v. Stok & Associates, P.A., 387 Fed.Appx. 921 (11th Cir. 2010), cert granted by the U.S. Supreme Court in February , 2011.

This short unpublished *pe*
r curiam decision by the 11th Circuit Court of Appeals would have passed without notice in the legal firmament but for the fact that the Supreme Court has agreed to review the case.

Stok, a Florida law firm, brought suit against Citibank in connection with their banking relationship. Citibank moved for enforcement of the arbitration agreement, but the district court refused on the basis of waiver. The 11th Circuit reversed, which meant the dispute will proceed to arbitration.

Since waiver of arbitration disputes are fact intensive, it is necessary to examine the procedural history of the dispute. The major events are listed in chronological order:

1. 12/12/08. Stok brings suit in state court.

2. 1/30/09. Citbank answers – no mention of arbitration.

3. 2/5/09. Stok files reply, readiness for

trial.

4. 2/12/08. State court sets 6/1/09 trial date.

5. 2/23/06. Citibank sends election of arbitration to Stok.

6. 3/25/09 Citibank files arbitration if federal district court.

7. 3/26/09. State court stays discovery to let federal court act.

8. 5/27/09 District court denies arbitration due to waiver.

Review by the court of appeals is *de novo* regarding waiver, but a clear error test applies to factual findings. The court signaled its concern about waiver with a quotation from the Supreme Court's decision in Moses Cone, 460 U.S. 1, 24-25 (1983) (emphasis added by court):

> as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself *or an allegation of waiver,* delay, or a like defense to arbitrability.

The 11th Circuit uses the common two part test for waiver of arbitration: factual determination of waiver and prejudice to the other party. The burden of proof is on the party opposing arbitration, and it is a heavy burden due to the presumption in favor of arbitration. Substantial litigation activity is the usual basis for a finding of waiver. The duration of pre-arbitration activity is an important but not dispositive factor in making the waiver determination. As shown by the time-line above, the extent and duration of the Citibank activity in the state court was relatively limited.

The court of appeals skipped over the facts regarding waiver by *assuming* (without deciding) that the necessary factual showing was made, whereupon the court moved directly to the question of prejudice. The court readily concluded that prejudice had not been proven by Stok, the party asserting waiver. The period for potential prejudice was less than one month – from the time Citibank filed its answer to the date it filed to move the case to federal court. Stok argued that, as a small firm, this litigation was onerous and imposed significant costs, but that is insufficient to constitute prejudice.

One would have expected the Court of Appeals decision would be the end of the matter. As Stok noted, it is a small firm, and appeals to the Supreme Court are expensive. The firm, now known as Stok Folk + Kon, consists of seven attorneys – the three name partners and four associates. See the firm web page: <Stoklaw.com> Only a tiny percentage of cert petitions are granted, and success at that stage means the far greater costs associated with the briefing and hearing of the case by the Supreme Court. No doubt these costs are borne more readily by a law firm that can do its own legal work, the publicity may result in additional business for the firm, but the up-front costs are likely to exceed any eventual benefits.

The question certified by the Court is: "Under the FAA should a party be required to demonstrate prejudice after the opposing party waived its contractual right to arbitrate by participating in litigation, in order for such waiver to be binding and irrevocable?" The answer desired by Stok is No. Even if Stok prevails before the Supreme Court, the court of appeals would then have to determine whether Citibank waived the right to arbitration – a matter *assumed* rather than decided by the 11th Circuit. As the conduct alleged to constitute waiver took place within a five week period, the likely conclusion would be that this activity did not amount to waiver. In that event, Stok would end up having won the battle but lost the war.

Finally, one wonders why the Supreme Court agreed to hear *this* case. In its motion for *certiorari*, Stok argued that the Supreme Court should hear the case because there is a division between the circuits about whether prejudice is an element of the waiver cause of action. Stok is correct in so asserting, but that does not explain why the Court decided to address the topic at the behest of this petitioner. Waiver of arbitration is a significant topic with a

considerable body of recent case law, and the Court has never addressed this topic. These factors explain why the Court would agree to hear a waiver of arbitration case, but not why it reached out to review this unreported decision when many seemingly better candidates were available.

C. Family Mediation in England

England – includes Wales, but excludes Scotland and Norther Ireland – is dramatically expanding the use of mediation in divorce proceedings. Consideration of mediation is now required for parties seeking a divorce in England. Exceptions include domestic violence, child protection, and uncontested divorces. The new rules were announced by Justice Minister Jonathan Djanogly in February 2011, an approach agreed to by the judiciary. [If this approach appears unusual, recall that England does not follow the separation of powers approach that is standard in the United States.] While the benefits of mediation no doubt was a significant factor, budgetary constraints also played a major role – the annual cost of operating the English family courts is circa £800m.

A Ministry of Justice spokesman said: "For couples who have decided separation is the only course of action, mediation means they can decide the terms of their split between themselves, helped by a trained and impartial mediator, rather than fighting each other through lawyers, with a judge making the key decisions which will shape their lives." Mediation will provide "a quicker, cheaper and more amicable alternative" for the "over-worked family courts"

The Law Society, whose member solicitors stand to lose income from increased resort to mediation, spoke of mediation in a manner that can best be described as "damning with faint praise." President Linda Lee put the matter this way:

> As a matter of course any lawyer aims for an agreed solution through negotiation because going to court is stressful and expensive. This is not always possible and, in some cases, the court is the only appropriate way of resolving the problems. The government is creating a myth that mediation is a panacea in order to justify cuts to legal aid which will take areas such as this, where people desperately need advice out of scope.

In view of the established practice of standing orders for mediation in many family courts in Texas, this development might hardly seems worthy of mention, particularly since parties need do no more than think (one hopes, seriously) about mediation. The British press, however, has treated the matter as one of novelty and considerable importance. [Thanks to the wonders of the internet, one can quickly canvass the leading English newspapers on the day of publication.] Among the expressions used to describe the new mediation requirement were: "tough rules;" "controversial measure;" "radically reform the system;" and "shake-up of the divorce system"

Effective April 2011, parties to a divorce proceeding will have to show they have been in contact with an accredited mediator, and that they have at least considered attending a session to look at how mediation might work for them. If either side, or the mediator, decides that mediation will not be helpful then the parties will be permitted to proceed to court.

Sessions with a trained mediator will encourage couples who want to split up to do so amicably. They will be asked to think about dividing their property fairly and to come to a mutually agreeable arrangement over who will care for their children without resorting to the divorce courts. The cost is reported to be up to £140 – which sounds quite inexpensive to these Texas ears. English aggregate data may be of interest. Some 132,000 divorce petitions were filed in 2009, with 137,000 children involved. National Audit Office estimates for processing these disputes are 110 days to completion for mediated cases versus 435 days for court cases. The cost of mediation is £535 per person compared to £2,825 for court cases. These figures are best treated as rough approximations.

In order to promote the use of mediation by the indigent, legal aid is not available for contested divorce trials but it does pay for mediation. Publicly funded mediations have increased dramatically in recent years – from 400 in 1997 to 14,500 in 2009.

Between Arbitration and Litigation: Interim Measures and Freezing Orders in International Commercial Arbitration

By Andrew E. Costa*

I. Introduction

A common misperception about arbitration is that an agreement to arbitrate obviates the need for or possibility of court involvement aside from compelling arbitration or enforcing any award from the arbitration tribunal. Such is not the case, however, as there is a variety of situations in which court involvement is desirable, if not necessary. The need for court involvement may be especially acute in the context of an international arbitration where the challenges presented by varying national procedural rules and the transient nature of assets, evidence, and the parties themselves present unique situations that require timely and effective judicial intervention. The need for such intervention may be all the more acute and timely in the event the arbitration tribunal has not been seated, is unable to act, or the prospects of enforcing any order are dim. At time, however, it is sufficient and preferable to obtain relief from the tribunal itself. To that end, it has become increasingly common for arbitration disputants to seek what is commonly referred to as an "interim measure," "interim order," or "provisional measure" from a court (arbitration agreement notwithstanding) or from the tribunal itself.

An interim measure or interim order is issued by a court or tribunal that stays in place for a period of time that may last for the duration of the dispute or just a portion thereof.[1] It may be sought before the arbitration is initiated or while the proceedings are pending. While it is often sought before a court, such orders are also often available from the arbitration tribunals themselves. These orders seek some sort of preservation of the status quo and, as such, are not a ruling on the merits. Importantly, a party may obtain the order on an *ex parte* basis, in which case an *inter partes* hearing takes place afterward wherein the order is confirmed, rejected, or refined as appropriate. Interim measures are available to require, *inter alia*, a party to preserve evidence, commonly called an "*Anton-Piller*" order,[2] specific performance,[3] or prevent a party from pursuing court proceedings contrary to an agreement to arbitrate any disputes (known as an "anti-suit injunction").[4] Perhaps the most common – at least, the most infamous – interim measure is what is commonly known as the "*Mareva* injunction" or "freezing order."

A *Mareva* injunction, named after *Mareva Compania Naviera SA v. International Bulk Carriers SA (The Mareva)*,[5] is a pre-judgment order that prevents the respondent from dissipating, hiding, or encumbering its assets (*i.e.*, it "freezes" the respondent's assets) before an award is rendered so as to prevent actions intended to make a party judgment proof. In most respects, the *Mareva* injunction is a departure from the traditional view that a claimant without a judgment would have no interest in a debtor's property and, as such, would have no right to interfere with the debtor's use of that property.[6] Because of the potential (if not real) likelihood for freezing orders to substantially interfere with a party's operations, opinions on their propriety vary from appreciation to hostility. Given the ease with which a party can move and hide its assets, some view a freezing order as "an essential weapon in the armoury of the court."[7] Others use more histrionic language, characterizing freezing orders as "the nuclear weapon of the law"[8] and those who use them as "litigation terrorists."[9]

Although first implemented (in its modern form) as a creature of English common law, the *Mareva* injunction was then codified under British law and adopted in varying forms throughout the Common-

wealth. Outside the Commonwealth, freezing orders have enjoyed only limited acceptance. Foremost among these jurisdictions that have not embraced freezing orders is the United States. The U.S. Supreme Court has held that a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure – commonly regarded as the most appropriate vehicle for seeking a *Mareva* injunction – does not empower a federal court to interfere with a party's assets absent a judgment against that party.[10] This decision, however, leaves untouched the availability of state-law attachment vehicles and Rule B maritime attachments in aid of arbitration (international or otherwise). Despite their availability as a matter of procedure, these options are uncertain in the context of international arbitration as many courts will decline to entertain these motions based on the view that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") prevents any court action aside from referring the dispute to arbitration and then enforcing the tribunal's award.[11] Many U.S. courts will also decline to entertain such applications out of deference to the tribunal, reasoning that, in most cases, the arbitration tribunal itself is empowered to issue interim orders generally and, as the forum chosen by the parties to resolve the entire dispute, is best suited to decide upon the propriety of any freezing orders.

Because of this deference to the tribunal, particular attention must be paid to the extent to which international arbitration institutions empower their tribunals to issue interim orders as not all bodies have the same powers.[12] While the differences between the rules on interim measures between the International Chamber of Commerce ("ICC"), American Arbitration Association ("AAA"), London Court of International Arbitration ("LCIA"), United Nations Commission on International Trade and Law ("UNCITRAL") Arbitration Rules, and International Centre for Settlement of Investment Disputes ("ICSID") may appear subtle, the apparent subtleties can have a profound impact on whether interim relief is available, by what means, and under what terms. Because arbitral tribunals do not have the same coercive powers that courts have, court enforcement of the tribunal's interim orders is often necessary, but national courts' recognition of these orders varies. As a result, the "who" and the "how" of recognition and enforcement are important considerations before an order is sought from a tribunal and unavoidable considerations after the tribunal has issued the an order.[13]

Ultimately, and as with many other legal issues, the availability of interim measures – whether in the form of a freezing order or some other type of relief – largely depends on where it is sought (both in terms of the jurisdiction and the dispute resolution body), when it is sought in the arc of the dispute, who it is sought against, and where it is to be enforced. The relationship between these variables provides a window from which to look onto not only on how courts view their own powers, but also how they view these powers in relation to the parties' agreement to arbitrate, especially in light of the requirements of the New York Convention. Similarly, the willingness or reluctance of an arbitration tribunal to grant a freezing order (or any other interim measure, for that matter), and a national court's recognition of that order also give insight into how both courts and the tribunals view the *tribunals'* powers.

II. *Mareva* and Its Progeny

A. Generally

The topic of the general features of *Mareva* orders is well trodden, but a brief summary is worthwhile. As noted above, freezing orders are often referred to as "*Mareva* orders" or "*Mareva* injunctions." The plaintiff in *Mareva* was the owner of a vessel, the Mareva, which was chartered to the defendant, International Bulk Carriers SA ("IBC"). The Mareva was subsequently sub-chartered for a voyage on which it carried cargo from Bordeaux to India. The party that sub-chartered the vessel paid IBC at its bank located in London. IBC made its initial installment payments as required by the primary charter but failed to make the last payment, whereupon the owners of the *Mareva* treated the charter as repudiated and filed suit. While awaiting service of IBC, the owners of the *Mareva* applied for an *exparte* injunction to prevent dispersal of money in the respondent's London bank account.[17]

The Court of Appeal noted its "unlimited power to grant an injunction in any case where it would be right or just to do so," limited only by the fact that the Court "will not grant an injunction to protect a person who has no legal or equitable right whatever."[18] To avoid the danger of the ship owners not receiving payment, however, the Court granted an injunction to prevent the respondent from disposing of any payments received in its London bank account.[19] Thus, the elements of a freezing order that emerge from *Mareva* are (1) the movant has a real and arguable case, (2) a danger the debtor may dispose of assets to frustrate a judgment, and (3) that the injunction is just and convenient.[20] Even in creating this right and articulating its elements, the court was aware (although perhaps insouciant) of the inconvenience a freezing order may cause to the respondent. Lord Denning stated that "if the defendants have any grievance about it when they hear of it, they can apply to discharge it."[21] Justice Roskill agreed with the decision, but observed that it was a departure from prior practice, and cautioned that the Court should not be too quick to issue freezing orders.[22]

Since *Mareva*, the English courts' ability to issue freezing orders has expanded to arbitration matters and become codified under English law, while the courts have refined the necessary showing and scope of such orders. Initially, an English court could issue a *Mareva* injunction only if the court had jurisdiction over the substantive claim,[23] a limitation that initially prevented use of freezing orders in support of arbitration or foreign proceedings. Because, fundamentally, a freezing order can issue as long as the court has personal jurisdiction over the respondent,[24] English courts were persuaded that the parties' agreement to refer a dispute to arbitration does not vitiate this power.[25]

The interplay of court-granted freezing orders with respect to arbitration proceedings was eventually codified in Section 44 of the English Arbitration Act of 1996. Section 44 intends to balance the respective rights and jurisdictional reach of courts against the authority the parties agreed to give to the arbitration tribunals. As a threshold matter, Section 44 extends to British courts the same power to issue orders in arbitrated disputes as the courts would have in litigated disputes.[26] As a result, English courts are empowered to issue orders regarding the preservation, collection, and inspection of evidence, the sale of goods that are the subject of the proceedings, and interim measures.[27] Importantly, the power to issue such orders extends only so far as (1) the party seeking the order does so with the permission of the arbitration tribunal,[28] or (2) the arbitration tribunal is powerless or otherwise unable to do so.[29]

While the availability of freezing orders has clearly expanded since *Mareva*,[30] it is important to state what a freezing order does not do. It does not amount to a ruling on the merits of a dispute. Moreover, the order is *in personam* in nature, meaning that it limits the rights of the respondent to deal with its property but does not touch the property itself. As a result, it does not enforce a judgment, attach assets, or provide security for a claim.[31] If granted, it gives the applicant no property rights in the respondent's assets and gives the applicant no priority over other creditors.[32] Moreover, and perhaps most importantly, the *Mareva* injunction does not prevent the respondent from paying its creditors in the usual course of business.[33] These limitations are important to keep in mind in general and with respect to the elements of a freezing order in particular: a good, arguable case, real risk of dissipation of assets, and that the relief is just and convenient.

1. Good Arguable Case.

The showing required to prove a "good arguable case" is not substantial. The applicant must show that it has a "sufficiently arguable case" that it has an accrued cause of action.[34] This showing can be – and usually is – made by affidavit submitted by the applicant's counsel.[35] This element does not require the applicant to prove that it will probably succeed on the merits.[36] English courts, in fact, have been reluctant to put a threshold on the chance of success a party must reach to satisfy this element.[37] Nor does the applicant need to show that it will recover a certain amount or even an amount equal to the value of the assets it is seeking to freeze.[38] Clearly, such a low threshold of proof and how it can be satisfied is a cause of concern as it poses a risk of abuse in the event an applicant seeks to use the order to harass

the respondent or seeks the order primarily to hamper the respondent's operations.

2. Real Risk of Dissipation of Assets.

In some respects, the risk of a potential judgment debtor dissipating its assets so as to frustrate a future judgment is the gravamen of a *Mareva* injunction. It reflects a fundamental concern that the just claimant will be unjustly deprived of any judgment it may obtain. Despite this concern, however well-founded, English courts acknowledge that it cannot be allayed by preventing the respondent from conducting its regular business.

In its decision striking a freezing order issued against the national oil company of Venezuela, the English High Court of Justice provided yet more clarity for the contours of this required showing. Following Venezuela's expropriation of oil and gas assets, Mobil Cerro Negro Ltd. ("Mobil"), a subsidiary of ExxonMobil, initiated arbitration proceedings against Venezuela's national oil company, Petroleos de Venezuela SA ("PDV") before an ICSID tribunal.[39] While the appellate court ultimately ruled it did not have jurisdiction to restrain PDV, it provided extensive analysis of some of the issues ExxonMobil raised in its application. The use or disposition of assets must be "unjustifiable."[40] Importantly, further, the fact that the potential debtor is not credit worthy does not, by itself, support issuance of a freezing order.[41] As a result, as the court held, the applicant must show that there is a real risk the assets "will be used otherwise than for normal and proper commercial purposes."[42] While this requirement sounds reasonable, it does not require anything as substantial as a showing of fraud.[43]

3. Relief is "Just and Convenient."

This final element of the *Mareva* injunction is enigmatic, at best. It requires the applicant to show that the freezing order is "just and convenient." On its face, this showing appears to be a vague, generalized catch-all that provides a court an equitable "out" from granting an application. At times, application of this element appears to rely heavily on the analysis of one of the other two elements or simply comes down to the court's *ipse dixit*. In the Mobil/Venezuela dispute addressed above, for example, the court considered the respondent's conduct with respect to the assets sought to be frozen and "which should or may lead the court to conclude that the grant is just and appropriate."[44] This consideration, in addition to jurisdictional concerns, led the court to conclude that a strong justification was warranted to counter the principles of comity and respect for the arbitration tribunal's jurisdiction.

B. The Parties' Duties of Disclosure.

Obtaining a freezing order is often bracketed by two duties of disclosure, one imposed on the applicant and, the other, on the respondent.

1. The Applicant's Duty of "Full and Frank Disclosure."

Given the generally *ex parte* nature of freezing orders (*i.e.*, because the non-movant is not initially present to defend its interests),[45] applicants are held to a high duty of disclosure to the court. English courts impose a "heavy duty of disclosure" on those applying for a *Mareva* injunction, a duty that "must be stringently enforced."[46] The duty is not a passive one – it requires the movant to "make proper inquiries" before even applying for a freezing order.[47] As a result, the duty is not to disclose only what is known, "but also any additional facts which [the applicant] would have known if he had made such inquiries."[48]

Not every omission will require overturning a freezing order. First, unless the omitted information is "of sufficient materiality," the omission will not require overturning the order.[49] What is "of sufficient materiality" is a matter for the court to decide.[50] However, it necessarily includes "all matters relevant to the Court's assessment of the application, including matters which may be adverse to the application."[51] Any inquiry is likely to be fact specific. Second, failure to disclose a material fact still may not require discharge of the order if the failure was innocent in that it was not known to the applicant or the applicant did not appreciate its importance.[52] Thus, a freezing order may survive the movant's failure to disclose a material fact if that

failure was innocent or the omitted information was immaterial.

2. The Respondent's Duty of Disclosure.

A freeze imposed on a party's assets, alone, is largely considered to be of limited use absent knowledge of what those assets are. As a result, English courts will impose on the respondent a duty of disclosure.[53] In many ways, disclosure is considered so fundamental that it is required in the standard form of order for freezing assets.[54]

C. Extraterritoriality and Third Parties.

In order to draw a sharper contrast with its U.S. and arbitral counterparts, it is important to identify some of the broader aspects of freezing orders. An important aspect of the *Mareva* injunction is that it can extend to assets outside of England and bind third parties, whether or not subject to the court's jurisdiction. Whereas many analogous orders in the U.S. (Rule B attachments, for example[55]) are based on jurisdiction over the property, the *Mareva* injunction is based on personal jurisdiction over the respondent, but somehow has the power to bind third parties not necessarily subject to the court's jurisdiction.

When first used, however, *Mareva* orders often applied to only those assets within the court's jurisdiction, personal jurisdiction over the respondent notwithstanding.[56] Over time, however, the English courts recognized that an order over a party subject to their jurisdiction binds that party wherever else it may be located or have assets.[57] With that said, English courts acknowledge that "[w]orldwide freezing orders are made only sparingly. In cases where they are made there is usually compelling evidence of serious international fraud."[58]

The potentially extraterritorial scope of *Mareva* injunctions places a burden on the third party that is dealing in the respondent's assets but has no notice of the order. This precise concern led the English courts to develop the "*Bananaft* proviso." Through a *Babanaft* proviso, a freezing order would have no extraterritorial effect on third parties who do not have notice of the order.[59] As described in a later matter, the *Babanaft* proviso attempts to address the precise problem that "[c]ourt orders only bind those to whom they are addressed."[60]

III. Reception in the United States and International Arbitration Institutions

Despite its status as a frequently utilized procedural vehicle in the courts of England and elsewhere in the Commonwealth,[61] the *Mareva* injunction has enjoyed only a muted reception other jurisdictions. Foremost among these jurisdictions is the United States, where many of the concerns regarding pre-award/pre-judgment restraint on a party's assets have been persuasive. Two additional concerns have figured prominently in the courts' view of freezing orders: (1) a perceived lack of authority to expand their equitable powers so significantly; and (2) a wariness of taking steps that would be contrary to the parties' agreement to arbitrate and, as a result, violate the New York Convention.

A. The Varying Treatment of Freezing Order Analogs in the United States.

A repeated observation is that U.S. courts are a notable exception among common law countries' general willingness to issue *Mareva*-style freezing orders.[62] There are, however, direct analogs to English freezing orders by way of Rule B attachments for maritime cases and preliminary injunctions under Rule 65 of the Federal Rules of Civil Procedure and state-law counterparts. Importantly, however, these analogs are just that, analogous, and not identical, to freezing orders. While these procedural vehicles share some similarities to English freezing orders – namely, the ability to restrain a respondent in advance of a final judgment – their scope and the burdens they impose on an applicant differ greatly from English freezing orders.

1. Preliminary Injunctions & Grupo Mexicano.

While an attachment under maritime Rule B may be the most direct analogy to *Mareva* injunctions (the basis for jurisdiction notwithstanding), the preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure may be the most common.[63] As a

clear contrast against the "commonplace" nature of *Mareva* injunctions, U.S. courts emphasize that the preliminary injunction is an "extraordinary remedy."[64] In order to obtain a preliminary injunction, the movant must prove: (1) a likelihood of success on the merits; (2) irreparable injury; (3) a favorable balance of the hardships; and (4) that the injunction is consistent with the public interest.[65] As applied, each of these elements requires a greater showing than their most analogous counterparts under *Mareva* and its progeny. When invited to extend Rule 65 to the limits of a *Mareva* injunction, however, the U.S. Supreme Court expressly refused to do so.

As early as the 1980s, the Supreme Court was presented with, but denied to consider, whether Section 3 of the FAA prohibited a court from issuing a preliminary injunction pending the resolution of the arbitration proceedings.[66] The only case in which the Court directly addressed prejudgment freezing orders is *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*,[67] wherein it struck a preliminary injunction designed to prevent the defendants from disposing of their assets. The defendant, Grupo Mexicano de Desarrollo S.A. ("GMD") issued $250 million of guaranteed, unsecured notes, guaranteed by its subsidiaries.[68] GMD eventually defaulted on the notes, which were then accelerated and the holders of the notes filed suit in the U.S. District Court for the Southern District of New York, a forum assented to by GMD.[69] In their complaint, the plaintiffs alleged that GMD was either at risk of insolvency or already insolvent and that GMD was dissipating its assets in favor of Mexican creditors.[70] Based on these claims, the note holders sought a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure. The district court granted the preliminary injunction, enjoining GMD "from dissipating, disbursing, transferring, conveying, encumbering or otherwise distributing or affecting any [petitioner's] right to, interest in, title to or right to receive or retain" GMD's primary assets that secured the notes.[71] The Second Circuit affirmed the preliminary injunction which was then appealed to the Supreme Court.

The Court began with the premise that the equitable powers of U.S. federal courts, including their authority under Rule 65, are limited by those powers exercised by English Courts of Chancery at the time the Judiciary Act of 1789 was passed.[72] Any expansion of these powers required congressional approval. As a result, the propriety of preliminary injunctions of the sort placed upon GMD depended on whether the power to issue this type of relief was of the type traditionally available to courts of equity. The Court analogized the preliminary injunction at issue to a "creditor's bill" used to discover and attach assets as well as to set aside fraudulent conveyance.[73] Such bills, however, could issue only if the creditor already had a judgment against the debtor.[74]

The Court also looked to and distinguished a number of cases in which it was asked to grant relief similar to that the bondholders were seeking. In one of these cases, *Deckert v. Independence Shares Corp.*,[75] the availability of a freezing order was due to the fact that the plaintiffs therein were seeking equitable, and not exclusively legal, relief.[76] In the other case the Court distinguished, *United States v. First Nat'l City Bank*,[77] an order freezing a party's assets was permitted because it was authorized under the tax statute that informed the underlying claims for relief.[78] Ultimately, the Court declined to follow *Mareva*, stating that such an expansion of its equitable powers was "incompatible with our traditionally cautious approach to equitable powers, which leave any substantial expansion of past practice to Congress, to decree elimination of this significant protection for debtors."[79]

Subsequent to *Grupo Mexicano*, courts have relied on it to reject preliminary injunctions that pre vent disposition of assets pending arbitration of a dispute.[80] Thus, while at first blush it may appear that *Grupo Mexicano* forecloses the availability of freezing orders in support of arbitration, such is not necessarily the case. The first words in the court opinion – identifying the context as "an action for money damages" – point to the initial limits of its holding. In distinguishing *Grupo Mexicano* from *Deckert*, for example, the Court observed that the fact that the bondholders were seeking legal (rather than equitable) relief prevented the Court from upholding the preliminary injunction/freezing order.[81] In the context of a preliminary injunction sought in support of an international arbitration, this legal/equitable distinction raises the question of whether an underlying

equitable claim or the relation to arbitration would make relief under Rule 65 more likely. In applying *Grupo Mexicano*, however, courts have cautioned against salting a lawsuit with a placeholder claim in equity,[82] and the Second Circuit denied an application for a freezing order requested in support of an international proceeding.[83]

As yet another limitation on *Grupo Mexicano*'s perceived ban on freezing orders is that the Court left open the possibility of, and almost invited congressional action to permit, freezing orders. Perhaps the most important limitation within *Grupo Mexicano* is the fact that the Court was addressing only whether federal courts have the power to issue a *Mareva*-style preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure.[84] The court did not address – but strongly suggested that – Rule 64 could permit the relief sought in *Grupo Mexicano* if it were available under state law.[85] As such, *Grupo Mexicano* did not foreclose the availability of "every remedy . . . available under the law of the state where the court is located" which "provides for seizing a person or property to secure satisfaction of the potential judgment."

2. *Relief Under Federal Rule of Civil Proc. 64.*

Thus, perhaps, the broadest exception from the reach of *Grupo Mexicano*'s core holding is that it does not foreclose analogous state-law relief under Rule 64. While limited, Rule 64 is not an empty option as numerous state laws allow the attachment of assets in support of international arbitration.[87] New York law, for example, allows courts to "entertain an application for an order of attachment or for a preliminary injunction" in connection with a domestic or international arbitration. With certain variations, the laws of California,[88] Connecticut,[89] Florida,[90] North Carolina,[91] Ohio,[92] Oregon,[93] and Texas[94] provide similarly, each with its own variations on the nature and scope of the relief available. Thus, while some form of freezing orders in support of arbitration are available after *Grupo Mexicano*, this option does have its limitations as attachment orders must usually be directed at specific property and, as a result, the breadth of the *Mareva* injunction is often out of reach for parties seeking this form of relief in the United States.[95] With that said, some state statutes appear to imply that *Mareva*-style relief is available. Under North Carolina law, for example, courts have the authority to grant "[a]ny other order that may be necessary to ensure the preservation . . . of assets . . ., the . . . absence of which would be likely to prejudice the conduct or effectiveness of the arbitration."[96] Even setting this issue aside, the scope and bounds of state attachment laws will vary from state to state, including whether they can be utilized in support of international arbitration.[97] Compounding these limitations is the fact that federal courts themselves are divided as to whether they have jurisdiction to hear such applications in light of the presumption of arbitrability.

3. Abstention Based on Deference to Arbitration.

For decades, U.S. courts, following their British counterparts, were hostile to arbitration, viewing it as an unacceptable displacement of the courts' jurisdiction.[98] The passage of the FAA in 1925 officially ended that hostility. The FAA created an unwavering (and oft-repeated) presumption in favor of the validity of arbitration agreements.[99] U.S. courts have struggled with how this presumption of arbitrability impacts the propriety of interim measures in aid of arbitration when those orders are sought from U.S. courts. A divergent case law has emerged, one in which courts have started with the exact same premise – giving appropriate deference to the arbitration process – but then reached opposite conclusions so that either (1) no interim order is issued out of deference to the arbitration process to allow the tribunal to consider, or (2) an order is issued to preserve the status quo out of deference to the panel.Those courts that decline to issue an interim order in aid of arbitration do so based on the rationale that it is inappropriate for a court to entertain an application for an interim order when the dispute it is related to is subject to arbitration. The courts that decline to entertain interim orders in aid of arbitration refuse to do so to *support* arbitration. One of the earliest cases in which a federal court considered the relationship between court-ordered interim measures and a party's prior agreement to arbitrate disputes is the Third Circuit's decision in *McCreary Tire & Rubber Co. v. CEAT S.p.A.*[100] At issue was the propriety of the state court's pre-removal issuance of an

order of attachment of foreign assets in the context of an international dispute governed by an arbitration clause.[101] Given the established facts that the transaction at issue was both commercial and international in nature, the upon method of settling disputes."[104] As a result, per the Third Circuit, a court considering an application for interim measures can do no more than refer the parties to arbitration.

McCreary's rationale has persisted for both prudential and statutory reasons. The Fourth Circuit, in rather conclusory fashion, has elected to follow *McCreary*.[105] As a matter of policy, courts have leaned toward denying interim measures on the basis that the body which will hear the substance of the matter is best suited to hear all related proceedings. As a result, the Ninth Circuit, when confronted with this question, upheld a district court's denial of a preliminary injunction because the same relief was available from a Swiss tribunal.[106] Given the presumption of arbitrability and the parties' agreement to refer all disputes to arbitration, "it would have been inappropriate for the district court to grant preliminary injunctive relief."[107] Although the characterization of this Ninth Circuit precedent as a *per se* rejection of court-ordered interim measures in the context of arbitrable disputes seems excessive,[108] subsequent precedent from within the Ninth Circuit appears to support this characterization. A federal district court sitting in California, for example, relied on Ninth Circuit precedent in observing that the FAA "leaves no place for the exercise of discretion" with respect to a dispute in which the parties had agreed to arbitration.[109] As a result, the parties' agreement to refer all disputes to arbitration under the UNCITRAL rules was all encompassing, notwithstanding the fact that those rules allow a party to seek interim measures before a judicial authority.[110] The court also noted, relying expressly on aforementioned Ninth Circuit precedent, that it was prohibited from granting any relief in relation to an arbitrable dispute when the panel itself can grant the same relief.[111]

These courts have adopted the principle that a court should grant a preliminary injunction only if the parties' agreement to arbitrate includes language allowing for such court-ordered relief or if that relief is available from the arbitral tribunal. Thus, while such relief is available in theory, it is rarely granted in practice.

4. ***Arbitration and the Doctrine of Compatibility.***

The rationale in *McCreary* has received a great deal of scholarly and judicial criticism.[112] This criticism is largely centered by the doctrine of compatability, which posits that a request for judicial intervention is compatible with an agreement to arbitrate.[113] The criticism first began in 1977, when a California District Court granted a request for an interim order in aid of arbitration in *Carolina Power & Light Co. v. Uranex*.[114] The transaction at issue concerned the delivery of uranium from a French seller to a utility based in North Carolina which did not take place due to a dispute over who would bear the responsibility for an escalation in the price of uranium that took place between the execution of the agreement and the delivery date.[115] Notwithstanding the parties' agreement to arbitrate any disputes in New York, the purchaser filed in San Francisco court an *ex parte* motion to attach an $85 million debt owed to Uranex by a local mining corporation.[116] The district court acknowledged that the New York Convention applied to the agreement arbitration, but noted that "nothing in the text of the Convention itself suggests that it precludes prejudgment attachment."[117] Ultimately, therefore, the court concluded that the availability of court-ordered provisional remedies "encourages rather than obstructs the use of agreements to arbitration."[118]

Those courts that have followed *Uranex* seize upon its main argument: nothing in the New York Convention prevents a court from issuing an interim order despite an arbitration agreement.[119] These same courts, however, have also expressed a willingness to issue interim orders on the basis that such orders *support* the parties' agreement to arbitrate by making the resulting arbitration meaningful. Based on this view, there is nothing inconsistent with the arbitration process – and, in fact, it is complementary to that process – for a court to grant an interim order when that order is likely to make a possible recovery effective.[120] Thus, a court can appropriately issue an interim order in case of an emergency to preserve

the status quo if it would be impossible to return the parties to the status quo in the future.[121] Additionally, when confronted with a dispute that has been submitted to arbitration before a body that permits resort to judicial bodies for interim orders, many courts view their issuance of an interim order as wholly consistent with the arbitration rules that the parties had agreed to.[122]

5. Rule B Attachments in Support of International Arbitration Proceedings.

A direct, long-standing, and often overlooked analog to the *Mareva*-style freezing order is the Rule B attachment for maritime cases. In many respects, the Rule B attachment and its antecedents anticipated the *Mareva*-style freezing order as admiralty courts permitted attachment in maritime cases at least as early as the nineteenth century.[123] Rule B attachments are similar to *Mareva* orders in that they both permit a movant to seek relief *ex parte*, in effect permitting a party to interfere with another's business before the non-movant has notice or an opportunity to be heard. Rule B attachments and *Mareva* orders also share the same goal: to preserve assets to assure satisfaction of a judgment.[124] This same consideration is believed to explain the increasing use of interim measures, including those freezing a party's assets.[125]

In modern practice, a party seeking attachment of another's property under Rule B must show that (1) it has a valid, prima facie admiralty claim against the defendant, (2) the defendant cannot be found in the district where the attachment is sought, (3) the defendant's property can be found in the district where the attachment is sought, and (4) there is no bar to the attachment.[126] Importantly, and similar to what appears to be a minimal showing for a *Mareva* -style freezing order, the burden of proof for a Rule B attachment is not substantial as it is based on the policy determination that, because of transitory nature of assets in maritime matters, broad latitude should be afforded to a plaintiff to allow it to attach assets to satisfy a judgment.[127]

Unlike a *Mareva* injunction, which requires personal jurisdiction over the defendant, a Rule B attachment presupposes that the court in which relief is sought has no personal jurisdiction over the defendant but, instead, over the defendant's property.[128] As opposed to relief under Rule 65 of the Federal Rules of Civil Procedure, similarly, Rule B contemplates *ex parte* relief as one of its requirements is that the defendant is not present in the district in which relief is sought.[129] Importantly, Rule B attachments are widely accepted even when the parties have agreed to submit all disputes to arbitration.[130] This acceptance is due, in large part, to an express "carve out" in the FAA for pre-award relief in maritime matters. Specifically, section 8 of the FAA permits a party to pursue "seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings . . .."[131] Rule B attachments and related measures, long viewed as particular to maritime law,[132] fit squarely within this exception. Courts that have applied this exception, moreover, have observed that the ability to grant such relief in aid of international arbitration is in no way inconsistent with the New York Convention and, in fact, court involvement actually supports the parties' agreement to arbitrate.[133]

The appreciation that Rule B orders support, rather than undermine, the parties' agreement to arbitrate may suggest that there is ample precedent in support of *Mareva*-style freezing orders under some of the procedural vehicles addressed above. Both in theory and in practice, however, the availability of Rule B attachment has not led to a wide-spread acceptance of *Mareva*-style freezing orders. Rather, the application of section 8 of the FAA would suggest the opposite, namely that through section 8 congress intended to allow entertainment of interim measures in support of arbitration proceedings and, by failing to provide an exemption for other forms of interim measures, meant for them to be unavailable.

6. *Court-Ordered Interim Measures and Waiver of the Agreement to Arbitrate.*

Referral to arbitration is, by its nature, a product of the parties' consent to decline adjudication in either's court and, in exchange, agree to resolve their dispute in a certain, neutral forum. Similar to any

other agreement, however, an agreement to arbitrate can be waived.[134] It is likely for that reason that nearly every major arbitral body permits disputants to seek freezing orders from national courts (under certain circumstances) and, more importantly, declines to view them as a waiver of the agreement to arbitrate. The position of non-waiver rests squarely on the doctrine of compatibility addressed above.[135] The AAA Rules of International Arbitration are an apt example, providing that "[a] request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate."[136] The UNCITRAL[137] and Stockholm Chamber of Commerce[138] rules provide similarly, while the rules of the Singapore International Arbitration Center do not make mention of resorting to a national court for interim measures.[139]

The fact that these rules permit seeking court-ordered interim relief addresses is only one half of this issue as it is important to identify how long this right lasts. Seeking interim measures from a court while arbitration proceedings are pending, in effect, creates two parallel proceedings over the same dispute. These parallel proceedings undermine the benefits the parties desired to gain from arbitration – speed, efficiency, certainty of forum, and confidentiality. For this reason, for example, the English Arbitration Act allows for court intervention only in limited circumstances.[140] These limitations notwithstanding, the court will not act except to the extent the tribunal does not have the power or is unable to act.[141] As shown above, U.S. practice regarding whether and when court relief is appropriate varies. The institutional rules themselves provide guidance but, alone, do not always give the degree of clarity needed.

The AAA and Stockholm Chamber of Commerce provisions on this matter, for example, do not limit when a party may seek outside judicial assistance, a notable omission given that, once the tribunal is formed, both the tribunal and appropriate national court would have concurrent over the same dispute. The rules of the London Court of International Arbitration similarly recognize, but also limit, a party's right to seek court-ordered interim measures. The LCIA rules note that the tribunal's power to issue interim measures do not inure to the detriment of a party's right to seek such orders from any judicial both "before the formation of the Arbitral Tribunal."[142] The right to do so after formation of the tribunal, however, is expressly limited to "exceptional cases" and excludes the parties' ability to from a judicial authority an order for security for that party's costs and fees (as they are available from the tribunal).[143]

The ICSID arbitration rules deviate significantly from the others as the ICSID arbitration rules put substantial limitations on the parties' ability to seek extra-arbitral interim measures. These rules give no general right to recourse to national courts for interim measures nor a safe harbor for seeking such relief. Whatever right a party to an ICSID arbitration may have is expressly limited to the agreement that is the subject of the arbitration. Specifically, the parties to a dispute must have provided in their agreement that they are permitted to seek court-ordered provisional measures, whether before or after the initiation of a proceeding.[144] These limitations are likely due, in large part, to the nature of ICSID disputes wherein one of the parties to the dispute is a sovereign. Having ceded its sovereignty to a semi-public international dispute resolution body, sovereigns are loath to still face a risk of litigation in a foreign jurisdiction. These issues are explored further in relation to the ICSID tribunal's power to issue interim orders.[145]

B. Authority to Issue and Recognition of Interim Orders Issued by International Arbitration Institutions.

Often lost in the clash of jurisdictions' treatment of the propriety of freezing orders in international arbitrations is the permissibility and reception of these orders under the rules of the international arbitration panels themselves. This commonly overlooked aspect of thee orders implicates two fundamental issues, namely: (1) the extent to which international arbitration tribunals themselves have to power to issue freezing orders; and (2) how seeking relief from a *court* order is compatible with the parties' agreement to refer disputes to arbitration.

1. ***Interim Measures Under the ICC, AAA, and Other International Arbitration Institutions.***

Nearly every prominent international arbitration institution empowers its tribunals to issue interim orders. In keeping with the consensual nature of arbitration, the tribunals' powers to issue interim orders are defined and limited by the parties' agreement, with the institutional rules as the default. Whether this baseline authority is interpreted to allow freezing orders or another form of interim relief and the extent to which such powers are exercised is not clear, however. These bodies do not observe *stare decisis*. Even absent *stare decisis*, however, there is no real body of decisions from which a custom or practice can be discerned. This lacuna is because most major arbitration institutions, including the ICC, AAA, LCIA, and Stockholm Chamber of Commerce have a default rule of confidentiality.[146]

The arbitration rules of the International Chamber of Commerce ("ICC"), for example, permit the tribunal to order appropriate interim measures "as soon as the file has been transmitted to it."[147] As most other institutional rules provide, this power is limited by any modifications the parties may have agreed to.[148] In order to protect the interests of the respondent, the tribunal, applying ICC rules, is permitted – but not required – to order the applicant to provide adequate security.[149] Perhaps as an additional measure of protection for the respondent, any interim measures the tribunal grants must include the reasons for the order.[150] The ICC rules also provide an avenue for obtaining court-ordered interim measures if either (1) the tribunal has not been formed, or (2) "in appropriate circumstances thereafter."[151] As shown above, many U.S. courts will entertain an application for interim measures in the event the tribunal cannot do so – an eventuality that contemplates either (a) the tribunal has not been formed, or (b) the tribunal, once formed, does not have the power to issue such orders.

The LCIA rules expressly enumerate the types of interim measures the tribunal can make, including ordering a party to provide security for a potential award, preservation of property that is the subject of the dispute, or any relief the tribunal may have in a final award.[152] These powers do not prohibit a party from seeking provisional relief from a judicial authority (1) before the LCIA tribunal is formed, or (2) "in exceptional cases," after formation of the tribunal.[153] Based on the AAA's analog to this rule, for example, a New York district court held that because a tribunal had not been formed to hear the dispute, one party's request for interim measures from the court was appropriate as it was precisely what was agreed to under AAA rules.[154]

2. Interim Measures in ICSID Proceedings.

The ICSID Rules of Arbitration for Arbitration Proceedings impose significantly greater limitations on interim measures than are contained in other institutions' arbitration rules. Rule 39 of the ICSID Arbitration Rules allows a party to "request that provisional measures for the preservation of its rights be *recommended* by the Tribunal."[155] As a result, it would appear that whereas an ICC or AAA tribunal may "order" interim measures, an ICSID tribunal may only "recommend" such measures. The clear language of Rule 39 notwithstanding, some ICSID tribunals view the choice of using the word "recommend" rather than "command" (or some alternative language) to be meaningless. As a result, "provisional measures are tantamount to orders, and are binding on the party to which they are directed."[156] While this reading is more prevalent than one would expect given the express language of Rule 39, it is by no means uniformly held.[157] Any recommendation from the ICSID tribunal could be given only after giving each party an opportunity to be heard – i.e., *ex parte* relief is unavailable.[158] No recourse to national courts is permitted unless the parties personally agree it would be acceptable.[159]

Unlike proceedings under the ICC, AAA, or LCIA arbitration rules,[160] ICSID tribunals are often public. This difference reflects the fact that ICSID is a public international organization intended to address investment disputes involving private parties and sovereigns. The ICSID Convention and ICSID Arbitration Rules contain no language about confidentiality and publicity. Given the fact that the rules of arbitral institutions choose to state that confidentiality is the default rule, at least one ICSID panel has

viewed silence to be ambiguous.[161] Despite any views to the contrary, the decisions of ICSID tribunals are usually publicized, providing a body of work from which to draw. The weight of these published decisions, however, should not be mistaken for *stare decisis* or having any real precedential effect. It does, however, provide a window to look into how certain tribunals, composed of an array of arbitrators from varied backgrounds, predominantly selected by interested parties, perceive these powers in a variety of factual situations.[162]

In practice, ICSID tribunals recognize that the authority granted under Rule 39 is limited and to be used sparingly. As a result, the applicant must meet a threshold greater than that typically applied to interim measures. Before reaching a "recommendation," there must be a showing that the measures requested be "necessary and urgent."[163] In one decision, the tribunal rejected the position that this burden requires the applicant to show "irreparable loss."[164]

The limitations on interim measures within the ICSID Arbitration Rules are likely attributable to the role of ICSID in international dispute resolution. The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which created ICSID, suggests its purpose – to provide an institution for resolving investment disputes between contracting states and nationals of other contracting states.[165] ICSID was conceived as a method for resolving disputes involving sovereigns in a manner that, in theory at least, depoliticizes those disputes by presenting them before a neutral, sophisticated, international forum.[166] An unavoidable fact of this agreement to arbitrate is that states that agree to ICSID arbitration, to some degree, are ceding their sovereignty to the tribunal.[167] This reality has created a degree of tension wherein an ICSID tribunal is faced with the push and pull between exercising and maintaining its authority while also affording appropriate deference to the sovereign prerogatives of the state before it. For example, while ICSID tribunals are clearly empowered to grant awards to private citizens in the matters before them, the nature and breadth of those awards is limited by the fact that the tribunal can command a sovereign to do only so much.[168] On this basis, ICSID tribunals have the power to "recommend" only those order interim measures that the states themselves specifically agree to (and not through the convention) in order to minimize any real or perceived intrusion on state sovereignty.[169] As an ICSID tribunal observed, the tension is clear: "It is pertinent to recall that in any ICSID arbitration one of the parties will be a sovereign State, and where provisional measures are granted against it the effect is necessarily to restrict the freedom of the State to act as it would wish."[170] In this matter, the panel also acknowledged that, while the propriety of duly constituted awards is an important consideration, it "cannot be conclusive or preclude the Tribunal from exercise of its power to grant provisional measures."[171] As a result, an ICSID tribunal is unlikely to grant provisional measures, those that are granted are only recommendations rather than orders.[172]

3. National Court Recognition of Tribunal-Issued Interim Measures.

While most panels have a degree of power over the parties appearing before it, this power does not necessarily compel compliance with any interim orders that would be granted. Unlike a court that can draw on (depending on the legal system) its own or a co-equal branch's police power, an arbitration panel has no power to directly coerce a recalcitrant party.[173] Most tribunals cannot impose penalties for non-compliance unless the parties agreed to create a procedure for imposing those penalties.[174] As a result, interim orders often must be enforced through national courts which may or may not recognize the tribunal's authority to have issued the order. Although the power of an arbitration tribunal to grant interim measures is widespread under the rules of most arbitration institutions, it is not uniformly recognized in all national jurisdictions where they would have to be enforced.

The New York Convention would seem to obviate this concern. Specifically, Article III of the Convention requires signatories to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon." The Convention provides

narrow exceptions to this default rule of recognition and enforcement.[175] Little is done to define the awards that are enforceable pursuant to the Convention, however. In This gap has left tribunal-ordered interim measures susceptible to being unenforceable in certain jurisdictions where a final award would be enforceable.

Historically, the power of an arbitral tribunal to grant interim measures has been viewed with skepticism under the premise that a tribunal does not have the authority to exercise such coercive powers.[176] While some of this skepticism has abated, it has not disappeared altogether. Instead, a trend has emerged under which tribunal-ordered interim measures are treated in one of the following ways: (1) they are unenforceable because these orders are reserved exclusively for the court regardless of whether the tribunal has been constituted and is existing, as in Argentina, Austria, China, and Italy;[177] (2) they are reserved exclusively for the panel once it has been constituted, as in the United States;[178] or (3) both the tribunal and, under certain circumstances, the court have the authority to issue interim measures, as is the case under English, French, German, and Singapore law as well as the UNCITRAL Model Law on International Commercial Arbitration.[179] An apt (although possibly dated) example of domestic hostility to tribunal-issued interim awards was acknowledged by a panel of the ICC when it conceded that it was powerless to modify a freezing order that was previously issued by a Moroccan court. The panel concluded that it had no jurisdiction to modify this order – even though it was between the same parties who had agreed to arbitrate the dispute – given that the law of the seat of the arbitration (Switzerland) did not recognize the tribunal's power to do so and that Moroccan law was silent on this issue.[180] A contrary example is a case from the Seventh Circuit Court of Appeal in the United States. In considering the enforceability of an interim order under the New York Convention, the court described the attempt to distinguish that "order" from an "award" to be "an extreme and untenable formalism."[181] Instead, the court concluded, it was appropriate to look to the substance of the award to determine if it was entitled to treatment under the New York Convention.[182]

The varying treatment of interim measures is an important consideration when evaluating the contents of any arbitration agreement. As a result, careful consideration must be paid to one's counter-party, where the counter-party is located, where its assets are located (which may be in an entirely separate location), and where a tribunal's interim order may be enforceable.[183] Often, the location of the applicant's adversary or its assets will suggest that a tribunal-ordered freezing order will not be enforceable. It is exactly for this reason that a party to an arbitration agreement, fearful of being unable to enforce any award it thinks it is entitled to, will seek a freezing order directly from a court rather than waiting for the formation of a panel or seeing emergency relief from the institution.

IV. Conclusion

An investigation of freezing orders, both alone and as a subset of interim measures in general, provides a useful window from which to look onto the relationship between arbitration and litigation. It reveals how certain jurisdictions view the reach of a tribunal's powers and how the tribunals view their own powers. Ultimately, and, perhaps unsurprisingly, the hesitance, or outright refusal, to enforce freezing orders suggests that the notion of international dispute resolution is something of a misnomer. While it may aptly describe the relative positions of the parties or the nature of the transaction giving rise to their dispute, from a procedural perspective it is more appropriately broken down into its constituent parts – domestic disputes that are inter-connected and inter-dependent. Whether a tribunal's provisional orders are enforceable in a certain jurisdiction or whether that jurisdiction will issue interim orders in the face of an arbitration agreement are but two, differently colored threads showing that international arbitration is not woven of whole cloth. This construct is especially apt in the context of freezing orders given the varying levels of scrutiny they enjoy.

A close look at interim measures in general, and freezing orders in particular, lays bare a number of misconceptions regarding the role of national courts in international commercial arbitration proceedings.

As a threshold matter, is the misconception that national courts have no role in international commercial arbitration proceedings aside from enforcing the agreement to arbitrate and then enforcing tribunal's award. As the push and pull of court action through interim measures make clear, national courts have a fairly recurring role in international commercial arbitration proceedings outside of the beginning and end. The flip side of this misconception is that there is a consensus that practitioners *don't* want any court involvement in arbitrated matters. While hardly a scientific poll, the widespread criticism of *McCreary* and related cases that approach international arbitration proceedings with "hands off," suggests that courts can play a positive role in the arbitration process outside of enforcing the agreement and the award. Finally, the mixed reception of tribunal issued interim orders suggests that judicial acceptance of arbitration is hardly settled.

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1. RICHARD H. KREINDLER, TRANSNATIONAL LITIGATION: A BASIC PRIMER, at 113 (1998); GARY B. BORN, II INTERNATIONAL COMMERCIAL ARBITRATION, at 1944-45 (2009) ("Properly defined, 'provisional measures' are awards or orders issued for the purpose of protecting one or both parties to a dispute from damage during the course of the arbitral process."). *But see* ALI YESILIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION 4 (2005) (stating that there is no widely accepted definition of interim measures).
2. *See Anton Piller KG v. Mfg. Processes Ltd.* [1976] Ch. 55.
3. *See, e.g.*, *Channel Tunnel Group Ltd. v. Balfour Beatty Constr. Ltd.* [1993] A.C. 334, 337 (considering an injunction restraining respondent from ceasing work related to the Channel Tunnel).
4. *See, e.g.*, *Ibeto Petrochemical Indus Ltd. v. M/T Beffen*, 475 F.3d 56, 65 (2d Cir. 2007); Arbitration Act, 1996, c. 23 (Eng.) § 9(1) (allowing a party to an arbitration agreement to seek from British courts an order staying legal proceedings initiated in contravention of the agreement to arbitrate).
5. [1975] 2 Lloyd's Rep. 509 (Eng. C.A.). While commonly considered to be the first case in which a freezing order was issued, many consider *Nippon Yusen Kaisha v Karageorgis* [1975] W.L.R. 1093, to be the first case in which a freezing order was issued. *See, e.g.*, STEVEN GEE, COMMERCIAL INJUNCTIONS § 1.014, at 12 (2004).
6. *See, e.g.*, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319-20 (1999) ("'[U]ntil the creditor has established his title, he has no right to interfere, and it would lead to an unnecessary, and, perhaps, a fruitless and oppressive interruption of the exercise of the debtor's rights.'" (quoting *Wiggins v. Armstrong*, 2 Johns. Ch. 144, 145-46 (N.Y. 1816)).
7. Henry Suen & Sai On Cheung, Mareva *Injunctions: Evolving Principles and Practices Revisited*, CONSTR. L.J. 117, 117 (2007)
8. *Grupo Mexicano*, 527 U.S. at 329 (quoting R. OUGH & W. FLENLEY, THE MAREVA INJUNCTION AND ANTON PILLER ORDER: PRACTICE AND PRECEDENTS xi (2d ed. 1993)).
9. John Fordham, *Disarming Litigation Terrorists*, NEW L.J., May 9, 2008, at 649 (recounting ExxonMobil's efforts to freeze the assets of Petroleos de Venezuela SA in aid of an arbitration proceeding before the International Center for the Settlement of Investment Disputes).
10. Refer to Part III.A.1, *infra* (discussing *Grupo Mexicano*).
11. Refer to Part III.A.2, *infra* (discussing the availability of freezing order analogs under U.S. federal practice after and outside of *Grupo Mexicano*).
12. Refer to Part III.B.1, *infra* (addressing the availability of interim measures under the rules of various international arbitration institutions).
13. Refer to Part III.B.2, *infra* (discussing the treatment of tribunal-issued orders in various jurisdictions).
14. [1975] 2 Lloyd's Rep. 509, 509 (Eng. C.A.).
15. *Id*. at 510.
16. *Id*.
17. *Id*. ("[T]hey believe that there is a grave danger that these moneys in the bank in London will disappear.").
18. *Id*.
19. *Id*. at 511.
20. *Id*. at 510.
21. *Id*. at 511.
22. *Id*.
23. *Siskina v. Distas Compania Naviera S.A.* [1979] 2 A.C. 210, 253 (H.L. 1977) (stating that the request of a court-ordered injunction "presupposes the existence of an action . . . claiming substantive relief which the High Court has jurisdiction to grant and to which the interlocutory orders referred to are but ancillary"); *see also ETI Euro Telecom Int'l v. Bolivia* [2008] 2 Lloyd's Rep. (C.A.) 421, 430-31.
24. *Mercedes Benz A.G. v. Leiduck* [1996] A.C. 284, 297; *Channel Group v. Balfour Beatty Constr. Ltd.* [1993] A.C. 334, 362; *Haiti v. Duvalier (No. 2)* [1990] 1 Q.B. 202, 210.

25. *Channel Group* [1993] A.C. at 358 (Lord Mustill) (concluding that it is appropriate for the court to take action to make the tribunal's orders more effective as the court has "territorial jurisdiction over the respondents, and the means to enforce its orders against them").
26. *See* Arbitration Act, 1996, c. 23 (Eng.) § 44(1). The powers extended to English courts are subject to the relief sought. All of the powers under the Act are available if the seat of the arbitration is in England, Wales, or Northern Ireland. *Id*. § 2(1). The availability of these powers are more limited if the seat of the arbitration is outside these jurisdictions. If the seat of the arbitration is outside these jurisdictions, the court's power to entertain orders the proceeding can be exercised subject to the court's discretion in the event the designated or likely seat of arbitration makes any court action "inappropriate." *Id*. § 2(3).
27. *Id*. § 44(2).
28. *Id*. §44(4). This standard applies in the absence of any urgency to the application.
29. *Id*. §44(5). Such would be the case in the event relief is sought before the tribunal is formed or the tribunal simply does not have the power to issue and interim order. The latter circumstance begs the question of whether a court-issued interim order therein would be in disregard of the parties' arbitration agreement. In any event, this approach – using the formation of the tribunal as a rough dividing line for determining whether court intervention is appropriate – is common. KREINDLER, *supra* note 1, at 116; Charles N. Brower & Michael W. Tupman, *Court-Ordered Provisional Measures Under the New York Convention*, 80 AM. J. INT'L L. 24, 25 (1986).
30. Concern over the increasing popularity and expanding applicability of *Mareva* injunctions was a motivating factor behind the U.S. Supreme Court's decision to reject such relief to the extent sought under Rule 65 of the Federal Rules of Civil Procedure. Refer to Part III.A.1, *infra*.
31. *Mercedes Benz A.G. v. Leiduck* [1996] A.C. 284, 300; *Iraqi Ministry of Defense v. Arcepay Shipping Co. S.A.* [1981] Q.B. 65, 71-72.
32. *Mobil Cerro Negro Ltd. v. Petroleos de Venezuela S.A.* [2008] 1 Lloyd's Rep. 684, 691; *Mercedes Benz*, [1996] A.C. at 300.
33. *Polly Peck Int'l plc v. Nadir (No. 2)* [1992] 2 Lloyd's Rep. 238, 241 (noting that the *Mareva* injunction in question contained language allowing the respondent's bank to make payments in the ordinary course of business up to a certain amount); *Iraqi Ministry of Defense* [1981] Q.B. at 73.
34. *Mobil Cerro Negro Ltd. V. Petroleos de Venezuela SA,* [2008] 1 Lloyd's Rep. 684, 691. Often, courts will say no more than that the applicant has a good arguable case and avoid commenting on the merits of the case any further. *Ninemia Maritime Corp. v. Trave Schiffahrts GmbH & Co. KG (The Niedersachsen)* [1983] 1 W.L.R. 1412.
35. *Haiti v. Duvalier (No. 2)* [1990] 1 Q.B. 202, 210.
36. *Mobil Cerro Negro*, [2008] 1 Lloyd's Rep. at 691.
37. David Capper, *The Need for* Mareva *Injunctions Reconsidered*, 73 FORDHAM L. REV. 2161, 2163 (2005).
38. *Mobil Cerro Negro* [2008] 1 Lloyd's Rep. at 691; Capper, *supra* note 37, at 2164 (observing that the amount frozen is normally limited by the maximum amount of the applicant's claim).
39. *Mobil Cerro Negro* [2008] 1 Lloyd's Rep. at 686. ExxonMobil also sought security for its arbitration claim through attachment proceedings initiated in the Southern District of New York. *See* Order of Attachment, *Mobil Cerro Negro, Ltd. V. PDVSA Cerro Negro S.A.*, Case No., 07-CV-11590 (DB) (Dec. 27, 2007) (granting motion to attach $300 million in funds belonging to PDVSA Cerro Negro).
40. *Mobil Cerro Negro* [2008] 1 Lloyd's Rep. at 686.
41. *Id*.
42. *Id*. (quoting *Mediterranean Feeders LP v. Berndt Meyering Sciffarts* [1997] E.W.C.A. Civ. 1796); *see also Nat'l Bank of Canada v. Melnitzer*, 1991 CarswellOnt 2064 ¶ 27 (stating that the freezing order "should not have the totally draconian effect of putting that person into a defenceless and penurious state pending the final outcome of the litigation which gives life to the freezing order").
43. Issues of fraud often go to the scope and reach of the injunction.
44. *Mobil Cerro Negro* [2008] 1 Lloyd's Rep. at 691.
45. *See Brink's Mat Ltd. v. Elcombe* [1988] 1 W.L.R. 1350, 1358 ("[T]he fact that the court is asked to grant relief without the person against whom the relief is sought having the opportunity to be heard makes it imperative that the applicant should make full and frank disclosure of all facts known to him or which should have been known to him had made all such inquiries as were reasonable and proper in the circumstances."); *see also Congentra AG v. Sixteen Thirteen Marine SA (The Nicholas M)* [2008] 2 Lloyd's Rep. 602, 616; *Haiti v. Duvalier (No. 2)* [1990] 1 Q.B. 202, 208.
46. *Swift Fortune Ltd. v. Magnifica Marine S.A.* [2008] 1 Lloyd's Rep. 54, 60; *Congentra* [2008] 2 Lloyd's Rep. at 616 ("The importance of making full and frank disclosure to the court of all matters material to the court's decision on an ex parte application for relief cannot be emphasised too strongly . . .."); *see also Kelly v. Brown*, 1999 CarswellOnt 441 ¶ 18 ("A *Mareva* injunction demands the utmost candour from those applying.").
47. *Brink's Mat Ltd.* [1988] 1 W.L.R. at 1356.
48. *Id*. at 1356, 1358.
49. *Congentra* [2008] 2 Lloyd's Rep. at 616; *Brink's Mat Ltd.* [1988] 1 W.L.R. at 1357.
50. *Brink's Mat Ltd.* [1988] 1 W.L.R. at 1456 ("[M]ateriality is to be decided by the court and not by the assessment of the applicant or his legal advisers . . .."), 1357 ("Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application.").
51. *Congentra* [2008] 2 Lloyd's Rep. at 616.
52. *Brink's Mat* [1988] 1 W.L.R. at 1357.
53. *Congentra* [2008] 2 Lloyd's Rep. at 161 ("The purpose of disclosure is to make the freezing order effective."); *Mobil Cerro Negro Ltd. v. Petroleos de Venezuela S.A.* [2008] 1 Lloyd's Rep. 684, 702 ("The requirement for disclosure is

important, for without it the freezing order would be toothless.").
54. *Aon Ltd. v. JCT Reinsurance Brokers Ltd*. [2009] E.W.H.C. 344 ¶ 19 (Q.B.).
55. Refer to Part III.A.3, *infra*.
56. *Ashtiani v. Kashi* [1987] Q.B. 888.
57. *Crédit Suisse Fides Trust SA v. Cuoghi* [1998] Q.B. 818, 827 (observing that when the respondent is domiciled in England, an order prohibiting it from disposing of assets located outside England "cannot be regarded as exorbitant"); *Derby & Co. Ltd. v. Weldon (Nos. 3 & 4)* [1990] 1 Ch. 65, 86.
58. *Mobil Cerro Negro Ltd. v. Petroleos de Venezuela SA* [2008] 1. C.L.C. 542, 546; KREINDLER, *supra* note 1, at 122 (noting that worldwide freezing orders are more common in Canada than in England but, in either event, usually require a showing that the defendant has been "unscrupulous").
59. *Babanaft Int'l Co. S.A. v. Bassatne* [1990] 1 Ch. 13, 44.
60. *Derby & Co.* [1990] 1 Ch. at 82.
61. Nearly every court in the British Commonwealth has embraced the *Mareva* injunction. *See* STEPHEN C. MCCAFFREY & THOMAS O. MAIN, TRANSNATIONAL LITIGATION IN COMPARATIVE PERSPECTIVE, at 46 (2010); *see also, e.g.*, *Canadian Pac. Airlines Ltd. v. Hind*, 1981 CarswellOnt 119 9 (Ont. Sup. Ct. High Ct. of J.) ("The *Mareva* injunction . . . has become commonplace.").
62. *See, e.g.*, MCCAFFREY & MAIN, *supra* note 61, at 46 ("Indeed, the United States is the only major common law jurisdiction where the *Mareva* injunction has not flourished."); Capper, *supra* note 37, at 2161.
63. *See, e.g.*, *Guinness PLC v. Ward*, 955 F.2d 875, 900 (4th Cir. 1992) (comparing the *Mareva* injunction to a preliminary injunction under Rule 65(b)).
64. *See, e.g.*, *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 376 (2008); *Reed v. Town of Gilbert, Arizona*, 587 F.3d 966, 973 (9th Cir. 2009); *Brynum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 1999).
65. *See, e.g.*, *Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations, Inc.)*, 502 F.3d 1086, 1093 (9th Cir. 2007) (holding that the traditional preliminary injunction standards apply to enjoining arbitration proceeding against Chapter 11 debtor); *Oklahoma, ex rel., OK Tax Com'n v. Int'l Registration Plan, Inc.*, 455 F.3d 1107, 1112 -113 (10th Cir. 2006); *Globe Nuclear Servs. & Supply (GNSS), Ltd. v. AO Techsnabexport*, 376 F.3d 282, 287 (4th Cir. 2004) (considering request for preliminary injunction to require delivery of product contracted for pending resolution of arbitration proceedings in Stockholm, Sweden).
66. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum*, 469 U.S. 1127, 1127-28 (1985) (White, J., dissenting from denial of cert.).
67. 527 U.S. 308 (1999).
68. *Id*. at 310.
69. *Id*. at 312.
70. *Id*. at 312. The assets in question were notes for a toll road that GMD had built and then ceded to the Mexican government in exchange for notes guaranteed by the Mexican government. *Id*. at 311.
71. *Id*. at 313. The district court's analysis closely tracked the *Mareva* factors, including the observations that (i) there was a risk of insolvency, if not actual insolvency, (ii) GMD planned to use its primary assets to satisfy Mexican creditors at the expense of the plaintiff note holders, and (iii) there was a likelihood that any judgment obtained by the plaintiffs would be frustrated. *Id*. at 312. The district court did not, however, ignore those elements required to earn a preliminary injunction that did not overlap the *Mareva* factors.
72. *Id*. at 318-19.
73. *Id*. at 319.
74. *Id*.
75. 311 U.S. 282 (1940).
76. *Grupo Mexicano*, 527 U.S. at 324-325. Based on its review of *Deckert*, the Court concluded that "[t]he preliminary relief available in a suit seeking equitable relief has nothing to do with the preliminary relief available in a creditor's bill seeking equitable assistance in the collection of a legal debt." *Id*. at 325.
77. 379 U.S. 378 (1965).
78. *Grupo Mexicano*, 527 U.S. at 325-26.
79. *Id*. at 329.
80. *ContiChem LPG v. Parsons Shipping Co. Ltd.*, 229 F.3d 426, 430 (2d Cir. 2000) (holding that, "[a]bsent a prior judgment," the requested preliminary injunction in support of an international arbitration was properly rejected); *Matrix Partners VIII, LP v. Natural Resource Recovery, Inc.*, No. 1:08-CV-547, 2009 WL 175132, at *4 (E.D. Tex. Jan. 23, 2009) ("[A] judgment fixing the debt is necessary before a court in equity can interfere with a debtor's use of his property.").
81. *Grupo Mexicano*, 527 U.S. at 325.
82. *See, e.g.*, *U.S. ex. rel. Rahman v. Oncology Assocs. P.C.*, 198 F.3d 489, 495 (4th Cir. 1999) (restating defendants' argument that, to evade the holding in *Grupo Mexicano*, "any artful pleader could . . . merely sprinkle[e] a bit of equity on a suit at law for money damages"); *Matrix Partners*, 2009 WL 175132, at *5 ("[I]t may be more appropriate for courts to engage in a more penetrating analysis than a cursory examination of a complaint with boilerplate allegations of equitable claims."). In *Matrix Partners*, the court opted for extra scrutiny for equitable claims in light of the serious nature of the preliminary injunction sought, "the asset-freezing preliminary injunction." *Id*.
83. *ContiChem*, 229 F.3d at 430 (holding that the district court did not have authority to issue a preliminary injunction, but did have authority to order maritime pre-judgment attachment and garnishment). Refer to Part III.A.3, *infra* (addressing the availability of Rule B attachments in support of international commercial arbitration proceedings).
84. *Grupo Mexicano*, 527 U.S. at 318 ("We turn, then, to the merits question whether the District Court had authority to issue the preliminary injunction in this case pursuant to Federal Rule of Civil Procedure 65.").
85. *Id*. at 330-31. The Court observed that arguments were made that New York law supported the injunction but, because these arguments were first raised on appeal, they would not be considered. *Id*. at 318 n.3.

86. FED. R. CIV. P. 64(a). Rule 64 states, further that attachment, garnishment, replevin, sequestration, and "other corresponding or equivalent remedies" are available regardless of how they are denominated or whether state law requires an independent action to seek them. *Id*. R. 64(b).
87. N.Y.C.P.L.R. § 7502(c) (2010) (allowing courts to issue "[a]n order of attachment . . . to assure that the award to which applicant may be entitled is not rendered ineffectual by the dissipation of party assets."); *see also* Order of Attachment, *Mobil Cerro Negro, Ltd. V. PDVSA Cerro Negro S.A.*, Case No., 07-CV-11590 (DB) (Dec. 27, 2007) (relying on Rule 64 and articles 62 and 75 of the New York Civil Practice law to grant motion to attach $300 million in funds).
88. CAL. CODE CIV. P. §§ 1297.93(a) (2010), 1297.11 (stating that these provisions apply to international commercial arbitrations).
89. CONN. GEN. ST. ANN. §§ 50a-109 (2010) (allowing general recourse to "an interim measure of protection in support of arbitration), 50a-101 (providing that these provisions apply to international commercial arbitrations).
90. FL. STAT. ANN. §§ 684.16 (allowing disputants to seek relief from the tribunal or the court) (2010), 684.03(1) (2010) (applying this and other provisions to international commercial arbitrations).
91. N.C. STAT. ANN. §§ 1-567.39 (allowing courts to grant, inter alia, "[a]n order of attachment or garnishment" in support of an international arbitration proceeding, but only if no panel has been formed or the tribunal is unavailable) (2010), 1-567.31 (applying this and other provisions to international commercial arbitrations).
92. OH. REV. CODE ANN. §§ 2712.15 (providing that a court may grant "measures of protection," including an order of attachment) (2010); 2712.02 (applying this and other provisions to international commercial arbitrations).
93. OR. REV. STAT. ANN. §§ 36.470 (allowing court intervention for interim orders, including orders of attachment and preliminary injunction for goods that are the subject matter of the dispute) (2010), 36.454(1) (applying this and other provisions to international commercial arbitrations).
94. TEX. CIV. PRAC. & REM. CODE §§ 172.175 ("A party to an arbitration may request an interim measure of protection from a district court.") (2010), 172.001 ("This chapter applies to international commercial arbitration . . . .").
95. Martin Davies, *Court-Ordered Interim Measures in Aid of International Commercial Arbitration*, 17 AM. REV. INT'L ARB. 299, 216 (2006).
96. N.C. STAT. ANN. § 1-567.39(c)(6); *see also*, *e.g.*, OH. REV. CODE ANN. § 2712.15 (permitting courts to grant "[a] n order of attachment . . . to assure that the award to which the applicant may be entitled is not rendered ineffectual by dissipation of party assets").
97. Prior to its amendment, for example, the New York law regarding attachment in aid of arbitration was held to apply to only domestically arbitrated disputes. *See Cooper v. Ateliers de la Motobecane, S.A.*, 442 N.E.2d 1239 1241-42 (N.Y. 1982).
98. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 & n.4 (1974).
99. *See, e.g.*, *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 479-80 (1989) (acknowledging the federal courts' prior hostility to arbitration but noting the current federal policy "which strongly favors the enforcement of agreements to arbitrate as a means of securing prompt, economical and adequate solution of controversies"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27, 632-33 (1985) (observing the federal policy in favor of arbitration and concluding that there is no reason to exclude statutory antitrust claims from the scope of the parties' agreement to arbitrate); *Scherk*, 417 U.S. at 510-11 & n.4 (recognizing that the U.S. Arbitration Act "revers[ed] centuries of judicial hostility to arbitration agreements" and explaining the source of past judicial hostility). Most, if not all, states espouse the same policy in favor of arbitration. *See, e.g.*, *Menna v. Plymouth Rock Assurance Corp.*, 987 A.2d 457, 464 (D.C. Ct. App. 2010) (observing the policy under the Uniform arbitration Act in favor of enforcement of arbitration agreements); *Lujan v. Life Care Centers of Am.*, 222 P.3d 970, 977 (Colo. Ct. App. 2009) (acknowledging Colorado's "strong public policy in favor of arbitration"); *EPIX Holdings Corp. v. Marsh & McClennan Cos., Inc.*, 982 A.2d 1194, 1205 (N.J. Super. A.D. 2009) (referring to New Jersey's "strong public policy" that "favors arbitration" and "requires liberal construction of contracts in favor of arbitration" (internal quotations and citations omitted)); *Hayes v. Oakridge Home*, 908 N.E.2d 408, 411-12 (Ohio 2009); *Classified Employees Ass'n v. Matanuska-Susitna Borough School Dist.*, 204 P.3d 347, 352-53 (Alaska 2009).
100. 501 F.2d 1032 (3d Cir. 1974).
101. *Id*. at 1035. Unlike later courts, the Third Circuit did not commit any meaningful analysis to the language of the arbitration clause or the forum selected, noting only that all disputes with respect to the agreement at issue were to be resolved in Brussels, Belgium, under the rules of the International Chamber of Commerce. *Id*.
102. *Id*. at 1036-37.
103. New York Convention art. II(3) ("The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."); *see also McCreary Tire*, 501 F.2d at 1037 ("There is nothing discretionary about article II(3) of the Convention. It states that district courts shall at the request of a party to an arbitration agreement refer the parties to arbitration.").
104. *McCreary*, 501 F.2d at 1037; *see also Metropolitan World Tanker Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional*, 427 F. Supp. 2, 4 (S.D.N.Y. 1975).
105. *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75, 77 (4th Cir. 1981); *Alamia v. Telcor Int'l, Inc.*, 920 F. Supp.

658, 675 (D. Md. 1996) (following the holding in *I.T.A.D.* and denying motion for pre-judgment attachment in aid of international arbitration); *see also Bahrain Telecommunications Co. v. DiscoveryTel, Inc.*, 476 F. Supp. 2d 176, 179 n.1 (D. Conn. 2007) (criticizing *I.T.A.D.* for "contain[ing] no analysis at all" and "merely parrot[ing], in a single sentence, *McCreary*'s holding").

106. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 625 (9th Cir. 1999) (observing that the International Chamber of Commerce rules of arbitration, which governed the underlying dispute, permitted such relief).

107. *Id*. at 726. In *Simula*, although the Ninth Circuit appeared to rely on the presumption of arbitrability only directly in relation to whether the underlying claims could be referred to arbitration, its discussion of this issue colored its discussion of the unissued preliminary injunction. *Id*. at 719-25 (holding that, because of the presumption of arbitrability, plaintiff's antitrust, Lanham Act, defamation, and misappropriation of trade secret claims were arbitrable); *see also Manion v Nagin*, 255. F.3d 535, 539 (8th Cir. 2001) (holding, in the context of a domestic arbitration, that the district court properly denied an application for a preliminary injunction given the absence of qualifying language permitting it to do so). The Eighth Circuit's analysis in *Nagin* is peculiar in that it held that the following language did not permit a party to seek court-ordered interim measures: "the power conferred by this [arbitration] paragraph is without prejudice to the right of a party under applicable law to request interim relief directly from any court . . .." *Id*. at 537. The court reasoned that the right to "request" such relief was insufficiently qualifying.

108. *See, e.g.*, *Drago v. Holiday Isle, LLC*, 537 F. Supp. 2d 1219, 1222 (S.D. Ala. 2007) (aligning *Simula* with *Nagin*); *Bahrain Telecommunications*, 476 F. Supp. 2d at 179 (restating defendants' argument that *Simula* supports the conclusion that the FAA deprives the court of jurisdiction to entertain any request for interim orders while an international arbitration is pending).

109. *Ever-Gotesco Resources & Holdings, Inc. v. Pricesmart, Inc.*, 192 F. Supp. 2d 1040, 1042 (S.D. Cal. 2002).

110. *Id*. at 1043-44; *see also* UNCITRAL R. ARB. R. 26(3). In reaching this conclusion, the Court relied on the parties' agreement which provided that if there was a conflict between the agreement to arbitrate and the UNCITRAL rules, the parties' agreement would prevail. *Ever-Gotesco*, 192 F. Supp. 2d at 1044.

111. *Ever-Gotesco*, 192 F. Supp. 2d at 1044; *see also Greenpoint Techs., Inc. v. Peridot Associated S.A.*, No., C08-1828 RSM, 2009 WL 674630, at *1 (W.D. Wash. March 11, 2009) (holding that write of garnishment granted by state court before removal was improperly granted under *Simula*); *China Nat'l Metal Prods. Import/Export Co. v. Apex Digital, Inc.*, 155 F. Supp. 2d 1174, 1182 (C.D. Cal 2001) (holding that the court has no authority to issue a writ of attachment when the agreed arbitration rules provided for a means of obtaining provision relief even though the tribunal could not directly issue such orders).

112. II BORN, *supra* note 1, at 2037-38 (arguing that "all developed jurisdictions other than the United States reject *McCreary*"); YESILIRMAK, *supra* note 1, at 78 (observing that *McCreary* has received little support in the U.S. or abroad); *Bahrain Telecommunications*, 476 F. Supp. 2d at 180 ("*McCreary*'s reasoning . . . has long been harshly criticized by courts and commentators."); *Channel Tunnel Group Ltd. v. Balfour Beatty Constr. Ltd.* [1993] A.C. 334, 365 (disagreeing with *McCreary* because interim "measures serve to [reinforce], not to bypass" the parties' arbitration agreement).

113. II BORN, *supra* note 1, at 2054; YESILIRMAK, *supra* note 1, at 75; JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL ARBITRATION, at 267 (2003) (stating that "most national laws" adhere to the doctrine of compatability"); *UNCITRAL Model Law on International Commercial Arbitration*, art. 9 (1985, am. 2006) ("It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such a measure.").

114. 451 F. Supp. 1044 (N.D. Cal. 1977).

115. *Id*. at 1045.

116. *Id*.

117. *Id*. at 1051.

118. *Id*. at 1052.

119. *See, e.g.*, *Bahrain Telecommunications Co. v. DiscoveryTel, Inc.*, 476 F. Supp. 2d 176, 181 (D. Conn. 2007) ("Contrary to the holding in *McCreary*, this Court can discern nothing in the Convention that divests federal courts of jurisdiction to issue provisional remedies . . . when appropriate in international arbitrations . . .."); Wang Shengchang & Cao Lijun, *The Role of National Courts and* Lex Fori *in International Commercial Arbitration*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION, at 155, 173 (Louis A. Mistelis & Julian D.M. Lew, eds. 2006) (observing that most jurisdictions espouse this view); YESILIRMAK, *supra* note 1, at 77 (stating that almost all countries that have acceded to the New York Convention view Article II as applying to the substance of a dispute and not prohibiting court intervention to protect rights or assist in proceedings).

120. *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990) ("Entertaining [a preliminary injunction] is not precluded by the [New York] Convention but rather is consistent with its provisions and spirit."); *Bahrain Telecommunications*, 476 F. Supp. 2d at 182 ("A prejudgment remedy does not interfere with the arbitral process but merely ensures that there will be assets available to satisfy any judgment the arbitrators themselves may render."); *James Assocs. (USA) Ltd. v. Anhui Machinery & Equipment Import and Export Corp.*, 171 F. Supp. 2d 1146, 1150 (D. Colo. 2001) ("Therein lies the court's role in this matter, to assist the parties to enter arbitration."); *Lentjes Bischoff GmbH v. Joy Environmental Techs., Inc.*, 986 F. Supp. 183, 186 (S.D.N.Y. 1997) (stating that a preliminary injunction can be "necessary to protect the integrity of a pending arbitration"); *see also Channel Tunnel Ltd. v. Balfour Beatty Constr. Ltd.* [1993] A.C. 334, 365 ("The purpose of interim measures . . . is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute.").

121. *Drago v. Holiday Isle, LLC*, 537 F. Supp. 2d 1219, 1222 (S.D. Ala. 2007); *Danieli & C. Officine Meccahiche*

S.p.A. v. Morgan Constr. Co., 190 F. Supp. 2d 148, 154 (D. Mass. 2002); *Lentjes Bischoff*, 986 F. Supp. at 186.

122. *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 116 (2d Cir. 2009) (observing that the ICC Rules of Arbitration permit a party to appeal to a judicial authority for interim relief which "is precisely what [the applicant did in this case"); *Bahrain Telecommunications*, 476 F. Supp. 2d at 182. This rationale, however, often overlooks the qualification in many arbitration rules that the court-ordered interim measures are permitted, for example, "in exceptional cases." *See, e.g.*, LONDON CT. INT'L ARB. art. 25.1. For a discussion of international arbitral institutions' rules on interim measures and national court recognition of same, refer to Part III.B, *infra*.

123. *Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44, 47-48 (2d Cir. 1996). In *Aurora*, the Second Circuit traced the history of maritime attachments under U.S. law to at least as early as 1825, concluding that "Rule B is simply an extension of this ancient practice." *Id*. at 47-48. In suggesting their limited scope and application, however, the court emphasized that such attachments are "characteristic feature" of admiralty law. *Id*. at 48.

124. *Swift & Co. Packers v. Compania Colombiana Del Caribe. S.A.*, 339 U.S. 684, 691 (1950) (stating that Rule B is to "assure satisfaction in case the suit is successful"); *Denak Depoculuk ve Nakliyechilik A.S. v. IHX (HK) Ltd.*, No. 08 Civ. 9746(JGK), 2009 WL 497357, at *1 (S.D.N.Y. Feb. 26, 2009).

125. Kaj Hobér, *Interim Measures by Arbitrators*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?, at 721, 721 (Albert Jan van den Bern, ed. 2006) (pointing to a study by the AAA showing twice as many requests for interim measures in international arbitration as in domestic arbitration).

126. *ProShipLine, Inc. v. Aspen Infrastructures, Ltd.*, 585 F.3d 105, 112-13 (2d Cir. 2009) (quoting *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434, 445 (2d Cir. 2006)). That the property attached belongs to the respondent is essential, as the Second Circuit recently clarified in considering a Rule B attachment in the context of a dispute between two companies (one based in India and the other, in Singapore) to be arbitrated in England. Despite the agreement to arbitrate in England, one party obtained a Rule B attachment over the other's electronic funds transfers ("EFTs") that passed through New York. The Second Circuit held that these funds passing between these banks in New York were not, in fact, property of the respondent's and, therefore, there was no jurisdiction. *The Shipping Corp. of India Ltd. v. Jaldhi Overseas PTE Ltd.*, 585 F.3d 58, 69 (2d Cir. 2009).

127. *Aqua Stoli*, 460 F.3d at 443 ("This policy has been implemented by a relatively broad maritime attachment rule, under which the attachment is quite easily obtained.").

128. *Shipping Corp. of India*, 585 F.3d at 69 n.12.

129. *DSND Subsea AS v. Oceanographia, S.A. de CV*, 560 F. Supp. 2d 339, 348 (S.D.N.Y. 2008) (clarifying that Rule B is "intended to provide district courts with *quasi-in-rem* jurisdiction").

130. *See, e.g.*, *Shipping Corp. of India*, 585 F.3d at 60-61; *Denak Depoculuk ve Nakliyechilik A.S. v. IHX (HK) Ltd.*, No. 08 Civ. 9746(JGK), 2009 WL 497357, at *2 (S.D.N.Y. Feb. 26, 2009) ("[C]ourts in this and other districts have upheld Rule B attachments whose sole purpose was to provide security for the enforcement of foreign judgments or arbitration awards." (citing cases)).

131. 9 U.S.C. § 8 (2010).

132. *Aurora Maritime Co. v. Abdullah Mohamad Fahen & Co.*, 85 F.3d 44, 48 (2d Cir. 1996) (describing such attachments as a "characteristic feature" of admiralty law).

133. *E.A.S.T., Inc. v. M/V Alaia*, 876 F.2d 1168, 1173 (5th Cir. 1989); *Denak Depoculuk*, 2009 WL 497357, at *1-2; *Castelan v. M/V Mercantil Parati*, Civ. A. No. 91-1351, 1991 WL 83129, at *1-2 (D.N.J. May 8, 1991) (concluding that *McCreary* did not foreclose recourse to pre-arbitration arrest of vessels).

134. *See, e.g.*, *Dumont v. Saskatchewan Government Insurance (SGI)*, 258 F.3d 880, 886 (8th Cir. 2001); *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 661 (5th Cir. 1995) ("'[T]he right to arbitration, like any contract right, can be waived.'" (quoting *Miller Brewing Co. v. Forth Worth Distribution Co.*, 781 F.2d 494, 497 (5th Cir. 1986)); *DHL Info. Servs. (Americas), Inc. v. Infinite Software Corp.*, 502 F. Supp. 2d 1082, 1083-84 (C.D. Cal. 2007) (acknowledging that, under the domestic arbitration rules of the AAA, seeking interim measures before a court did not constitute a waiver of the arbitration clause but that the interim measures were best decided by the arbitration panel).

135. Refer to Part III.A.2.c, *supra*.

136. ICC INT'L ARB. R. art. 21(3).

137. UNCITRAL ARB. R. art. 26.3, *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf (last accessed on Feb. 4, 2011) ("A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.").

138. STOCKHOLM CH. COMM. R. INT'L ARB. art. 32(5) ("A request for interim measures made by a party to a judicial authority is not incompatible with the arbitration agreement or with these Rules.").

139. Singapore law, however, was recently amended so as to adopt, in effect, the doctrine of compatability. After some years of uncertainty due to conflicting precedent, Singapore recently amended its International Arbitration Act to permit parties to seek interim measures from the tribunal or the Singapore High Court, depending on the circumstances. Singapore International Arbitration Act §§ 12 (regarding panel-issued interim relief), 12A (setting out procedure for securing interim measures from the Singapore High Court, whether the arbitration seat is or is not in Singapore).

140. Refer to notes 175, *infra*, and accompanying text; *see also* Shenchang & Lijun, *supra* note 119, at 171 (describing the courts as "the forum of last resort").

141. Arbitration Act, 1996, ch. 23 (Eng.) § 44(5).

142. LONDON CT. INT'L ARB. art. 25.3.

143. *Id*.

144. ICSID ARB. R. art. 39(6) ("Nothing in this Rule shall prevent the parties, provided that they have so stipulated in

the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.").
145. Refer to Part III.B.1.b, *infra*.
146. ICC INT'L ARB. R. art 6; STOCKHOLM CH. COMM. R. INT'L ARB. art. 46.
147. ICC INT'L ARB. R. art. 23(1).
148. *Id*.; *see also* LONDON C. INT'L ARB. R. art. 25.1 (eff. Jan. 1, 1998) ("The Tribunal shall have the power, unless otherwise agreed by the parties in writing . . .."). The UNCITRAL, Stockholm Chamber of Commerce, and AAA international arbitration rules do not contain this language with respect to interim measures but, rather, each has a general, omnibus clause providing that its rules are subject to modification by mutual agreement of the parties. AAA R. ARB. 1(a); UNCITRAL ARB. R. art. 1.1.
149. ICC ARB. R. art. 23(1) ("The Arbitral Tribunal *may* make the granting of any such measure subject to appropriate security being furnished by the requesting party." (emphasis added)).
150. Id.
151. *Id*. art. 23(2) (stating further that notice of such applications must be given to the Secretariat "without delay").
152. LONDON CT. INT'L ARB. R. art. 25.1.
153. *Id*. art. 25.3. If sought under the latter exception, the party seeking the interim measure must communicate this fact to the tribunal and to all of the parties to the proceedings "promptly." *Id*. This language appears to track the English Arbitration Act. This "exceptional cases" standard appears to impose a higher burden on the party seeking an interim measure after the formation of the tribunal than what is imposed under similar circumstances under ICC rules.
154. *In re Faiveley Transp. Malmo AB*, 522 F Supp. 2d 639, 641-42 (S.D.N.Y. 2007).
155. ICSID ARB. R. 39(1) (emphasis added); *see also* ICSID Convention art. 47 ("Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.").
156. *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6 ¶ 74 (May 8, 2009); *see also Railroad Development Corp. v. Guatemala*, ICSID Case No. ARB/07/23 ¶ 31 (Oct. 15, 2008) ("There is no question between the parties that the Tribunal has the power to grant provisional measures under the ICSID Convention and CAFTA.").
157. *Wintershall AG v Argentine Republic*, ICSID Case No. ARB/04/14 ¶ 62 (Dec. 8, 2008) ("It is said that resort to a domestic court for provisional measures could be conceivably more effective than immediate direct recourse to an ICSID Tribunal - especially *since provisional measures under the ICSID Convention are only recommendatory*." (emphasis added)).
158. Antonietti, *supra* note 157, at 11.
159. ICSID ARB. R. 39(6); *see also* Aurélia Antonietti, *ICSID and Provisional Measures: An Overview*, NEWS FROM ICSID, vol. 21, No. 2, at 10, 11 (2004) ("[T]he parties are not supposed to apply to local courts if they had not so agreed in their consent.").
160. ICC ARB. R. 6 ("The work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to the materials submitted to the Court and its Secretariat."); AAA INT'L ARB. R. art. 34 ("[U]nless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award."); LONDON CT. INT'L ARB. R. 30 (providing for a blanket default rule of confidentiality for awards, submissions, and deliberations and stating that the LCIA does not publish any awards without all of the parties' prior written consent).
161. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 ¶ 121 (Sept. 29, 2006) ("In the absence of any agreement between the parties on this issue, there is no provision imposing a general duty of confidentiality in ICSID arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise. Equally, however, there is no provision imposing a general rule of transparency or non-confidentiality in any of these sources."). Yet another panel has observed that academics and practitioners disagree about the import of the omission of a confidentiality clause in the ICSID Arbitration Rules. *See Beccara v. Argentine Republic*, ICID Case No. ARB/07/5 ¶ 70 (Jan. 27, 2010) (discussing the parties' default confidentiality obligations in the context of an application for an interim measure to protect the confidentiality of the proceedings and various documents exchanged in the dispute).
162. *Railroad Dev. Corp. v. Guatemala*, ICSID Case No. ARB/07/23 ¶ 32 (Oct. 15, 2008) ("Precedents and informal documents . . . reflect the experience of recognized professionals in the field and draw their strength from their intrinsic merit and persuasive value rather than from their binding character.").
163. *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6 ¶ 43 (May 8 2009) (stating further that this test "is a stringent one").
164. *Id*. (observing that the rules do not support this construction).
165. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ch. 1, sec. 1, art. 1(2); *see also International Centre for the Investment Disputes*, ABOUT ICSID, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home (last accessed February 4, 2011).
166. YESILIRMAK, *supra* note 1, at 26; *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1102-103 (C.A.D.C. 1982) (quoting ICSID literature and stating that ICSID tribunals are intended to resolve disputes to avoid foreign court involvement or intergovernmental litigation); Julian Davis Mortenson, *The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law*, 51 HARV. INT'L L.J. 257, 264 (2010)

(noting further that the availability of a neutral forum is intended to promote economic development).
167. Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 165 (2007) (observing that the "number and magnitude" of the ICSID disputes means that "millions of dollars and sovereignty are at stake"); George K. Foster, *Collecting From Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for its Reform*, 25 ARIZ. J. INT'L & COMP. L. 665, 705 (2008) ("In recent years, ICSID and the ICSID Convention have increasingly become targets of criticism by countries facing liability under ICSID awards, who have accused ICSID of being biased in favor of investors, and have described the Convention as a threat to their sovereignty."). States themselves, although they have acceded to the ICSID Convention and thereby agreed to arbitrate investment disputes with citizens of foreign states, argue that questions or decisions put before ICSID tribunals interfere with their sovereignty. *See, e.g.*, *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5 ¶ 35 (June 29, 2009) (restating Ecuador's argument that the challenge of its law intended to increase its share of production sharing agreements is an invasion of Ecuador's sovereignty).
168. *See, e.g.*, *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11 ¶¶ 84-85 (Aug. 17, 2007) (acknowledging that, often, concerns over a state's sovereignty make a return to the status quo ante or specific performance inappropriate); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1 ¶ 87 (July 25, 2007) (holding that restitution requested "would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach" and such action would constitute an "undue interference with [Argentina's] sovereignty").
169. II BORN, *supra* note , at 1947.
170. *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6 ¶ 50 (May 8, 2009).
171. *Id*.
172. *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29 ¶¶ 60-61 (Aug, 27, 2009) (denying request for provisional measure recommending that public corporation established by Pakistan and plaintiff contractor cease parallel arbitration in Pakistan); *Europe Cement Investment & Trade S.A. v Republic of Turkey*, ICSID Case No. ARB(AF)/07/2 ¶ 18 (Aug. 13, 2009) (rejecting claimant's request for provisional measures relating to the protection of documents based on the "assurance that it was the policy of the Republic of Turkey to preserve any documents seized and that this policy was to be applied in the present case").
173. II BORN, *supra* note1, at 1966-67 (observing that an "arbitration tribunal ordinarily lacks the authority directly to enforce its provisional measures"); MCCAFFREY & MAIN, *supra* note 61, at 52.
174. Hobér, *supra* note 125, at 731.
175. New York Convention art. IV(1), (2) (listing invalidity of underlying agreement to arbitrate, lack of notice, overstepping the tribunal's power, procedural irregularities, suspension of award in seat of arbitration, resolution of dispute not capable of being arbitrated in country of enforcement, and violation of public policy).
176. BORN, *supra* note 1, at 1949-50; Shengchang & Lijun, *Role of National Courts*, *supra* note 119, at 169 (stating that "[a] clear disadvantage" of arbitration's contractual nature is that tribunals lack coercive power and its orders ultimately need to be enforced through the courts).
177. Raymond J. Werbicki, *Arbitral Interim Measures: Fact or Fiction?*, *in* AAA HANDBOOK ON INTERNATIONAL ARBITRATION & ADR at 89, 96 (2010); Shengchang & Lijun, *supra* note 119, at 170; Hobér, *supra* note 125, at 724; *see, e.g.*, CODICE DI PROCEDURA CIVILE art. 818 ("Gli arbitri non possono concedere sequestri, ne' altri provvedimenti cautelari, salva diversa disposizione di legge.");
178. Shengchang & Lijun, *supra* note 119, at 170; Hobér, *supra* note 125, at 724; *see e.g.*, Swiss Private International Private Law Act 1987, ch. 12, art. 183.
179. Arbitration Act, 1996, ch. 23 (Eng.) § 42(1) ("Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal."); Singapore International Arbitration Act § 12 (1) (giving broad interim powers to the tribunal), art. 12A (permitting the Singapore High Court to grant interim measures regardless of whether the seat of arbitration is or is not in Singapore); *UNCITRAL Model Law on International Commercial Arbitration* art. 9. The UNCITRAL Model Law on International Commercial Arbitration was passed in 1985. Although originally containing provisions on interim measures, the Model Law was amended in 2006 for the purpose of refining those provisions. *See* General Assembly Res. 61/33, 64th Plenary Meeting (Dec. 4, 2006).
180. ICC Award No. 4998, Award Abstract & Commentary (1985).
181. *Publicis Communications v. True North Communications, Inc.*, 206 F.3d 725, 728 (7th Cir. 2000).
182. *Id*.
183. For example, in case one's counter-party is headquartered or has substantial assets in a country which does not recognize the tribunal's authority to issue interim orders, it may be prudent to include within the agreement arbitration clause language that empowers the tribunal to penalize the party that fails to abide by the tribunal's interim measures.

Mental Health and Capacity to Mediate

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You are hired to mediate a personal injury lawsuit. On the day of mediation, the plaintiff arrives with her attorney. When you introduce yourself, the middle-aged plaintiff appears nervous and withdrawn. The plaintiff's attorney seems distant and morose. The elderly *pro se* defendant arrives a short time later. The gentleman is pleasant and friendly, although you suspect he may be hard of hearing because he keeps asking you to repeat yourself. As you progress with the mediation, you receive short, skittish responses from the fidgety plaintiff; the attorney, if he speaks at all, appears disinterested; and the elderly defendant continuously has you repeat even the most basic concepts.

Now stop. Did you consider the plaintiff might have a panic disorder? Or that the attorney suffered from depression? Could the elderly defendant have advanced-age dementia? Perhaps those mediators with a psychology background suspected as much, but the majority of mediators without such knowledge rarely consider these issues.

The mental health of the parties participating in mediation presents a specific challenge to the mediator, namely: Can the parties effectively contribute to the process in order to fulfill the goal of the mediation? Or in legal terms: Do the parties have sufficient mental capacity to mediate? With a basic understanding of major mental illnesses and the law governing mental health and disability, even the novice mediator can determine the best course of action regarding the mental capacity of the disputants.

A necessary first step to understanding capacity is to understand what mental illness is, and how to spot it. A mediator does not need to be a psychologist to recognize mental illness. It is enough to know that the law defines mental illness as "an illness, disease, or condition, other than epilepsy, senility, alcoholism, or mental deficiency, that (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior." In other words, a person might have a mental illness when it affects their ability to cognitively and emotionally process information correctly and simultaneously causes a decline in daily functioning. Most mental illnesses fall into one of several broad categories: mood disorders; mental retardation; psychotic disorders; anxiety disorders; and amnestic disorders are among the most common. Mood disorders affect a person's emotional state and are one of the most common types of mental illness. The two most common mood disorders are major depressive disorder and bipolar disorder. Amnestic disorders are characterized chiefly by loss of memory and lack of awareness of a person's surroundings. The most common amnestic disorders are Alzheimer's and other forms of dementia. Anxiety disorders cause sufferers to experience intense fearfulness or uncertainty. The most common anxiety disorders include panic disorder, obsessive-compulsive disorder (OCD), post-traumatic stress disorder (PTSD), social phobia (or social anxiety disorder), specific phobias, and generalized anxiety disorder (GAD). One or more of the following often characterizes psychotic disorders: delusions, hallucinations, distorted thought processes, and disorganized speech. The most well known psychotic disorder is schizophrenia. Mental retardation is characterized by below average intellectual functioning (generally an IQ under 70) and impairment in adaptive skills present before age eighteen.

Broadly speaking, two sets of laws are relevant to discussions concerning those with mental illness. At the national level, the Americans with Disabilities Act (ADA) protects people with mental illness. The ADA defines a disability as a "physical or mental impairment that substantially limits one or more major life activities of such individual," and includes

among the major life activities "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." The ADA provides federal protections to all of the mental illnesses previously discussed. The ADA prohibits private entities offering public services, such as accountants and lawyers, from denying a disabled person the opportunity to participate in the professional's service. Essentially, the ADA ensures that professionals treat disabled persons as they would any other patron.

At the state level, the Texas Mental Health Code regulates the care, treatment, commitment, and hospitalization of the mentally ill. The Mental Health Code sets forth as part of the patient's rights, that "a person's voluntary admission . . . does not affect the person's civil rights or legal capacity." The Persons with Mental Retardation Act contains similar guarantees to ensure equal treatment. Further, the Texas Department of Mental Health and Mental Retardation provides that every Texan has "[t]he right to [a] presumption of mental competency in the absence of a judicial determination to the contrary." The law in Texas, then, is that a person is presumed mentally competent in all matters until a court, after due process, orders otherwise.

In the most basic terms, mental capacity involves situational understanding and knowledge of the consequences of one's actions. Under the law, capacity is different depending on one's goal—capacity to write a will is different from capacity to stand trial in a criminal matter. The goal of mediation is to "promote reconciliation, settlement, or understanding," where the best-case result is a written and signed settlement agreement. So to mediate, the parties should have sufficient mental capacity to form a contract, and understand the necessary precursors to contract (e.g., the negotiation process and bargained-for terms). In Texas, it is well settled that a person has capacity to form a contract when the person can "contemplate the ability to understand the nature and effect of the act in which a person is engaged and the business he is transacting." The mediator and parties should understand that the settlement agreement would be unenforceable if any signatory lacked capacity. However, there is more to mediation than the settlement agreement. Working backwards from the end goal, there are other steps to mediation which require a party's capacity.

The Kukin Program for Conflict Resolution at the Benjamin N. Cardozo School of Law in New York is the institutional home of the ADA Mediation Guidelines, which instruct mediators in cases arising out of ADA disability claims. Under these guidelines, capacity to mediate means the mediator should determine on a case-by-case basis whether the party can enter into a contract and whether the party can "understand the process and the options under discussion and to give voluntary and informed consent to any agreement reached." When a mediator suspects a party lacks capacity, the mediator "should ascertain that a party understands the nature of the mediation process, who the parties are, the role of the mediator, the parties' relationship to the mediator, and the issues at hand. The mediator should determine whether the party can assess options, and make and keep an agreement." If a mediator believes a party lacks capacity or has diminished capacity, the mediator should determine if the mental illness is an absolute barrier to the process, or if the party can mediate with the support of an agent, surrogate, or other support person. If the party is mediating with the help of support, it is important that the party retain decision-making power. It is also vital that any support person understand the confidentiality requirements of mediation, and that they be bound by the same standards as the parties. If the party is ultimately unable to participate due to lack of capacity, even with support, the mediator should suspend the mediation until the party obtains a legal surrogate, such as a guardian ad litem.

A mediator may handle the earlier hypothetical differently if he or she is armed with knowledge of the major mental illnesses; the proper competency standards under both the ADA and Texas law—and how to deal professionally with disabled individuals under those laws; and the understanding that capacity to mediate involves capacity to contract and ability to fully participate in the proceedings.

The plaintiff exhibited anxious, nervous behaviors—possible signs of a panic disorder or phobia. Assuming the nervousness does not rise to the level of lack of capacity, what steps should the mediator take

to ensure she could fully participate? Many panic disorders are triggered by externalities, e.g., a crowded room, exposure to a certain object, or confrontation. Try starting out in caucus to lower the stress level.

The elderly defendant showed signs of poor concentration and memory functioning. This is a good situation for a support person. The mediator could try to locate a spouse, child, or caregiver. Remember to ensure the support person subscribes to the confidentiality rules, and that the defendant is still the ultimate decision-maker.

The attorney presents possible signs of depression, a serious mental illness among lawyers. That the attorney is the support personnel only complicates matters. If he is truly unable to represent his client, the best course of action is to terminate the mediation. If the mediator is willing to, he or she could privately discuss with the attorney his or her concerns and let the attorney know that help is available through the Texas Lawyers Assistance Program.

Mental illnesses occur far more frequently than most mediators recognize. By understanding the more common mental illnesses and the most likely situations in which mediators will confront them, they will be better prepared to handle the situations as they arise.

Adam T. Whitten, J.D. Candidate 2012, is the Editor-in-Chief for Volume XIII of the Texas Tech Administrative Law Journal. He completed basic mediation training in the Fall 2010 semester through the Texas Tech School of Law's Advanced Alternative Dispute Resolution Clinic in conjunction with the Lubbock County Office of Dispute Resolution. Born and raised in Denton, Texas, he earned his undergraduate degree from Texas State University–San Marcos. His academic interests include alternative dispute resolution, professional ethics, and legal research and advocacy skills. When he is not sequestered in the law library he enjoys volunteer mediating at the Lubbock ODR. In his limited free time he enjoys good music, graphic novels, and playing golf poorly.

[1.] TEX. HEALTH & SAFETY CODE ANN. § 571.003(14) (West 2010).
[2.] Keep in mind that medical conditions can also cause a change in daily functioning.
[3.] I do not use this term to be insensitive, but for the sake of clarity, employ the most common legal usage.
[4.] National Institute of Mental Health, *The Numbers Count: Mental Disorders in America*, http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america/index.shtml#Mood (last visited March 8, 2011). Approximately 20.9 million American adults, or about 9.5 percent of the U.S. population age 18 and older in a given year, have a mood disorder. *Id.*
[5.] *Id.*
[6.] Alzheimer's Association, 2010 Facts and Figures, *available at* http://www.alz.org/documents_custom/report_alzfactsfigures2010.pdf. Over 5.3 Americans have Alzheimer's disease. *Id.*
[7.] *Id.*
[8.] National Institute of Mental Health, *Introduction to Anxiety Disorders*, http://www.nimh.nih.gov/health/publications/anxiety-disorders/introduction.shtml (last visited March 8, 2011). Approximately 40 million American adults ages 18 and older, or about 18.1 percent of people in this age group in a given year, have an anxiety disorder. *Id.*
[9.] *Id.*
[10.] National Institute of Mental Health, *Introduction to Schizophrenia*, http://www.nimh.nih.gov/health/publications/schizophrenia/what-are-the-symptoms-of-schizophrenia.shtml (last visited March 8, 2011). Approximately 2.4 million American adults, or about 1.1 percent of the population age 18 and older in a given year,11, 2 have schizophrenia. *Id.*
[11.] Center for Disease Control and Prevention, *Intellectual Disability/Mental Retardation*, http://www.cdc.gov/ncbddd/dd/ddmr.htm (last visited March 8, 2011).
[12.] 42 U.S.C.A. §§ 12101 *et seq.* (West 2005 & Supp. 2010).
[13.] *Id.* § 12102(1)–(2).
[14.] *See id.*
[15.] *See id.* §§ 12181(7)(F), 12182(b)(1)(A).
[16.] TEX. HEALTH & SAFETY CODE ANN. § 571.001 *et seq*. (West 2010).
[17.] *Id.* § 572.003(a); *see also id.* § 576.001 (outlining further patient rights under the Mental Health Code).
[18.] *Id.* § 592.001(a).
[19.] 25 TEX. ADMIN. CODE § 404.154(2) (2010) (Dep't of Health Services, Rights of All Persons Receiving Mental Health Services).
[20.] TEX. CIV. PRAC. & REM. CODE ANN. § 154.023(a) (West 2011).
[21.] Jones v. Traders & Gen. Ins. Co., 144 S.W.2d 689, 694 (Tex. Civ. App.—Fort Worth 1940), *aff'd*, 169 S.W.2d 160 (Tex. 1943).
[22.] Cardozo Journal of Conflict Resolution, *ADA Mediation Guidelines*, http://www.cojcr.org/ada.html (last visited March 8, 2011).
23. *Id.*
[24.] *Id.*
[25.] *Id.*
[26.] *Id.*
[27.] *Id.*

[28] *Id.*

[29] Some surveys show upwards of 25% of the bar suffers from a major depressive disorder. *See* Utah State Bar, *Why are so many lawyers depressed?*, http://webster.utahbar.org/barjournal/2008/01/why_are_so_many_lawyers_depres.html (last visited March 8, 2011).

[30] State Bar of Texas, *Texas Lawyers Assistance Program*, http://www.texasbar.com/AM/Template.cfm?Section=Texas_Lawyers_Assistance_Program&Template=/CM/HTMLDisplay.cfm&ContentID=7892 (last visited March 8, 2011).

SUBMISSION DATES FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

Issue	Submission Date	Publication Date
Summer	June 15, 2011	July 15, 2011
Fall	September 15, 2011	October 15, 2011
Winter	December 15, 2011	January 15, 2012
Spring	March 15, 2012	April 15, 2012

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Creating New Models for Dispute Resolution

By Sherrie Abney*

> Imagination is more important than knowledge. For knowledge is limited to all that we now know and understand, while imagination embraces the entire world, and all there ever will be to know and understand. *Albert Einstein*

If you want to see some litigation lawyers run like Indians trying to escape the missionaries, just ask them if they have ever tried to do a Collaborative Law case. Most litigation lawyers know about as much about the collaborative process as the early missionaries knew about the Indians' customs and beliefs, and many are convinced, much as the missionaries were convinced about their approach to salvation, that litigation is the only way to handle conflict. Why? Because that is the way it has always been done.

Stop and ask yourself: where people would be today if Thomas Edison, Henry Ford, Jonas Salk, Marie Curie, Louis Pasteur, and Sister Elizabeth Kenny had been willing to accept the status quo? On second thought, that is not a very good question since many readers would not even be here to do any thinking if it had not been for people who provided the innovations that greatly improved transportation, communication, and the prevention and treatment of disease.

If innovation is good, why are only a few lawyers considering Collaborative Law for their clients? There are many answers to this question. Some lawyers have never heard of the process; some have misinformation; others believe that it will eliminate them being able to continue to represent clients if the collaborative clients' cases do not settle. And there are always a few that fear they will experience a loss of income due to the elimination of formal discovery. Some of these beliefs are partially true, but let's look at some of the facts.

A collaborative lawyer may not serve as a lawyer in any adversarial proceedings regarding the subject matter of a dispute among any of the parties to that particular dispute, so if a collaborative case does not settle, the lawyers must withdraw. However, if these same parties have another dispute but it is over different subject matter, the collaborative lawyers can represent them, so the lawyers have not lost their clients forever.

As far as making less income from discovery, that is true, but it is also true that not as much time will be spent gathering and examining information. However, instead of looking at what the lawyers are losing, is it not more appropriate to look at what the clients are gaining in terms of time, money, relationships – along with less disruption to their businesses and lives?

Creating Benefits for Litigation Clients

Not every person is a candidate for the collaborative process, and even if the client is a candidate, the other party or lawyer may not be. How can Collaborative Law help them? Many collaborative lawyers have discovered that they are able to apply skills they have learned in collaborative training to situations in litigation.

Collaborative lawyers have learned that people's rights under the law do not always coincide with their interests and concerns, so these lawyers have begun using face-to-face meetings with the other lawyers and parties to discover the interests and concerns underlying the dispute. Rights under the law are not important to parties if those rights cannot give the parties what they really want.

Knowing what all of the parties want can lead to the discovery of settlement options that ordinarily would not have been considered. For this reason, collaborative lawyers have learned to listen to their clients **and** to the other parties in their attempts to better understand the issues and how they can reach agreements that will be acceptable to everyone.

In order to quickly compile the facts surrounding the issues, collaborative lawyers will ask for discovery agreements which allow them to avoid spending hours going over useless documents and depositions. Communications and conversations with these lawyers do not waste time arguing over who is at fault; they look forward to solutions rather than backward to blame.

Another benefit for clients is jointly retained experts. If the parties are able to agree on one neutral expert, they have eliminated hours of depositions and testimony. They will also have more choices for experts since many professionals may be willing to give an unbiased opinion, but those same experts may not agree to testify in court.

In his book, The Conflict Resolution Toolbox, Gary T. Furlong wrote, "¼trust is a unique resource, in that trust is expanded rather than depleted the more it is used." Trust is not something that is often excised in litigation, and many lawyers will agree that they trust no one when litigating a case. It is true that lawyers cannot blindly trust other lawyers, but lawyers can build trust for themselves by always doing what they say they will do. This will allow the other parties and lawyers see them as truthful and dependable and will go a long way toward settling any dispute. Lawyers also can gain trust for their clients by expecting and encouraging them to accept responsibility for their part of the problem and the solution. If the other parties are really interested in settling the dispute, these collaborative tools can seal the bargain.

The collaborative process is not for every lawyer or dispute, but collaborative skills certainly can improve any lawyer's ability to provide the best possible services for his or her clients. Lawyers should always remember that once they go on to the next case, the clients they leave behind will have to live with the results of their work. Collaborative skills can sometimes make life after litigation a lot easier for everyone.

If you are interested in collaborative training, the 7th Annual Civil Collaborative Training and Symposium will be conducted August 24-26, 2011, at the Dallas Bar Association. Stu Webb the Minnesota lawyer who was the first to use the collaborative process will be in attendance. For more information contact **info@collaborativelaw.us**

*** Sherrie R. Abney** is a collaborative lawyer, mediator, arbitrator and collaborative trainer. She has served as chair of the ADR and Collaborative Law Sections of the Dallas Bar Association and is a founding director of the Texas Collaborative Law Council. Sherrie is member and past secretary of the Association of Attorney-Mediators, presenter and trainer for the International Academy of Collaborative Professionals, and a member of the Civil Committee of the DR Section of the ABA.

ETHICAL PUZZLER

By Suzanne M. Duvall

This column addresses hypothetical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, 4080 Stanford Avenue, Dallas, Texas 75225, or fax it to214-368-7528.

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As an advocate, you have just received the following letter from a mediator you do not know who has been appointed by the court to mediate one of your cases:

"As I am sure you are aware, Mediation is a settlement technique used in the Court System to resolve a lawsuit or dispute which is simpler and less costly than a jury trial. Under the mediation procedure the Mediator can first meet with the attorneys in a joint meeting. The joint meeting then will be followed by a separate private meeting with each side. In the private meeting the Mediator will ask you to set out the facts and evidence supporting your case much like what would be done in a regular trial. The Mediator will then go into the other room and meet privately with the other side, explain your case against them and ask them for an explanation or contrary evidence supporting their case.

After the private sessions with both sides the Mediator will shuttle back and forth between the parties resolving discrepancies in the evidence and assessing what the outcome of the case may be if it goes to trial. At the same time the Mediator will attempt to structure a settlement to which both sides can agree.

Should you have any questions regarding this matter, please do not hesitate to call my office.

Very truly yours.

A "Mediator"

What is your reaction to the letter? Do you respond and if so, how and to whom? The appointing court? The mediator? Please explain.

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John Palmer, (Waco): I would first have to reread the letter to determine if my client was ordered to a mediation or a mediation-arbitration. I would need to clarify the intent of the "mediator." I would first call the "Mediator" with the hope the mediator would review the letter and the ethical standards and agree to revise his or her approach to mediation.

Texas Mediator Credentialing Association (TMCA) Standards of Practice and Code of Ethics Rule 1 states "Mediation is a private process in which an impartial person, a mediator, encourages and facilitates communications between parties to a conflict and strives to promote reconciliation, settlement, or understanding. *"A mediator shall not render a decision on the issues in dispute."* (TMCA R.1. Tex. Sup. Ct. Ethical Guidelines R. 1 uses "should" instead of "shall." These guidelines are based on ADR Section Guidelines promulgated in the 1990's, emphasis added.)

However, much of what the "mediator" is proposing falls within the spirit of the ethical standards. For example, Rule 10 of the TMCA Standards requires a mediator to "encourage the disclosure of information" and to "assist the parties in considering the benefits, risks, and the alternatives available to them."

The "mediator" runs afoul when the mediator promises to "structure a settlement to which both sides can agree." This sentence falls clearly under Rule 1, which states in part "*A mediator shall not render a decision on the issues in dispute. The primary responsibility for the resolution of a dispute rests with the parties."*

If after reviewing the ethical guidelines with the "mediator" and encouraging the "mediator" to rethink the "mediator's" approach to the mediation, and if the "mediator" would not agree to do so, I would first look at the TMCA website at www.txmca.org and review the credentialed mediator list. The TMCA is one of the only mediator organization which uses a mandatory set of ethics with a grievance process. If the "mediator's" name appeared, I would complete the Grievance Form as found on the website and forwarded it to TMCA's secretary.

Unfortunately, I would also contact the Court. I believe the Court should be notifies of the "mediator's unethical practices, and request the court to appoint a different mediator so that the client may be served a proper mediation process that will better serve the client.

C. Bruce Stratton, (Liberty):

Dear Mediator:

In deference to your internet mediation training from Shangri-La, I have a few comments for you to consider. A primary aspect of our Texas mediation system is to attempt a win-win result. In your first private session we need not conduct ourselves as in a trial. We can discuss the facts and evidence in an informal manner. If you meet with the attorneys first, I suggest that you obtain many of the facts from them and them explore more detail in the private "confidential" sessions. Incidentally, I know you will be disappointed to learn that we have excellent confidentiality in Texas so you will only take into the opposing caucus what we allow you to take. Not to disappoint you further, but my client and I do not like evaluative mediation. We only accept facilitative mediation. Do you think you can contain yourself? If not, we may have to make a small objection to your appointment. Also, while you facilitate, my client and I will do our best to aid in the structuring of a settlement with the other party.

Respectfully,

Your Next Best Friend
C. Bruce Stratton

Shelly Hudson, (Sugarland): This may be an ADR Procedure, but it is not mediation, as defined by the Texas Mediator Credentialing Association (TMCA). Here the "mediator" makes numerous errors.

1. The mediator misstates the definition of mediation: the use of mediation is not limited to the Court system, and both the complexity and costs vary with each case.

2. The mediator attempts to characterize the presentation of information in the mediation as "much like what would be done in a regular trial" rather than differentiating the mediation process from Court proceedings.

3. The mediator does not disclose his qualifications.

4. The mediator does not offer alternatives to the processes within the mediation session. Although a mediator can initially meet with the attorneys, here the parties are completely excluded, and no joint session with all participants is offered as an option.

5. The mediator fails to discuss the way information will be exchanged;

6. The mediator evaluated the legal merits of each side's case

7. The mediator structures the settlement agreement.

8. The mediator never mentions the parties, only the mediator and the attorneys.

Each of these examples of the mediator's conduct violates one of the TMCA's Standards of Practice & Code of Ethics, as further described below:

TMCA Standards of Practice & code of Ethics "Relevant Sections:

1. Mediation Defined: Mediation is a private process in which an impartial person, a mediator, encourages and facilitates communications between parties to a conflict and strives to promote reconciliation, settlement, or understanding. A mediator shall not render a decision on the issues in dispute. The primary responsibility for the resolution of a dispute rests with the parties.

5. Mediator Qualifications: A mediator shall inform the participants of the mediator's qualifications and experience.

6. The Mediation Process: A mediator shall inform and discuss with the participants the rules and procedures pertaining to the mediation process.

10. Disclosure and Exchange of Information: A mediator shall encourage the disclosure of information and shall assist the parties in considering the benefits, risks and the alternatives available to them.

11. Professional Advice: A mediator shall not give legal or other professional advice to the parties.

14. Agreements in Writing: A mediator shall encourage the parties to reduce all settlement agreements to writing.

Robert Matlock, (McKinney): My first reaction to the note from the mediator would be a mental "who is this fool?" — followed by "I wonder if the judge knows about this?"

A letter of this type would come as a complete surprise to me because 1) the courts in north Texas have fairly standardized mediation orders that describe the purposes and general rules related to mediation; and 2) the judges are careful about including only experienced mediators on their appointment lists.

As plan A, I would call several local lawyers and ask for suggestions concerning who they would select to mediate the type of case in question. Thereafter, I would call the opposing counsel and suggest that we agree upon substituting of the other candidates for the person appointed by the Court. Given the strange approach outlined in the letter, I would anticipate the other attorney would also be anxious to find a substitute mediator. Assuming an agreement was made, a letter would then be sent to the court stating the parties and counsel had agreed upon a different mediator.

If Plan A did not work, I would ask the judge for a pre-trial conference to discuss the role and responsibilities of the mediator. As tactfully as possible, I would use the mediation statute provisions to point out that the mediator's letter outlines an approach akin to that of an arbitrator rather than a mediator and ask the judge to reconsider the appointment.

If Plan A and Plan B failed, I would explain the situation to my client and prepare to participate in the mediation conference without much hope of reaching a settlement.

Walter Wright, (San Marcos): If I received this letter from a mediator, I would agree that evaluation of the evidence supporting each party's case is an appropriate part of the mediation process. I would also agree that a combination of joint and private sessions is useful during mediation. I would be concerned, however, with the second paragraph of the mediator's letter, which implies the mediator will perform a case evaluation and structure a settlement for the parties.

When I hire a mediator, I am not looking for a case evaluator. The Texas ADR Procedures Act lists four other processes that expressly authorize case evaluation: mini-trial, moderated settlement conference, summary jury trial, and non-binding arbitration. With all of these other options available to my clients if they desire evaluations of their cases, I do not wish to turn mediation into just one more case-evaluation process. I look for mediators who can help my clients and me (as well as the other parties and their representatives) work through the emotions that often inhibit rational settlement discus-

tions that often inhibit rational settlement discussion, identify underlying interests, brainstorm ideas that might meet everyone's interests, look for alternative solutions a court could never order, and engage in the difficult tasks of collaboration and compromise.

When I hire a mediator, I am not looking for a "wise old man" (or woman) to structure a settlement for me. In mediation, my clients and I (and the other parties and their representatives) are responsible for any settlement and its structure. If we cannot structure a resolution, we may later look for someone to evaluate our case and tell us what we should do. Of course, we can always go to trial and let judge or jury tell us what we will do.

Given my misgiving about the mediator's letter, I would first call the mediator and ask some questions, such as: Will the parties be permitted to engage in more than one joint session if they wish? Will the parties have the opportunity to explain their cases to each other (instead of through the mediator) if they wish? Will the mediator spend any time helping the parties identify their underlying interests with the hope of reconciling those interests? Will the parties be allowed to brainstorm their own options for resolution? Will the mediator be willing to accept a role that does not involve case evaluation or structuring a settlement for the parties?

If the mediator answered "yes" to each of the above questions, I would not object to the mediator's appointment, and I would look forward to getting to know the mediator during the mediation of my client's case. If, however, the mediator answered "no" to any of the above questions, I would object to the mediator's appointment, and I would ask the court to appoint another mediator who better conformed to any expectations of a mediator's proper role in mediation. I would also consult with opposing counsel and seek to propose an alternate mediator upon whom we both could agree.

Michael J. Schless, (Austin):

What is your reaction to the letter: Horror.

Do you respond and if so, how and to whom? The appointing court? The mediator? Yes, loudly and clearly. To anyone who will listen. Yes. Yes. A restrained explanation follows.

1. I fervently hope no properly trained Texas mediator would ever think the thoughts contained in this letter, much less express them. The letter consists of eight sentences and, taking them in order, I have an ethical bone to pick with the first seven.

2. As I am sure…" This sentence, and indeed the entire letter, describes mediation in a manner inconsistant with the definition in Code Section 1. It implies that the mediator is a decision maker, a judge, a juror, and / or a seer. Also, while it is a relief that this mediator will be "less costly than a jury trial" no fee is stated as required in Code Section 3.

3. "Under the mediation…" This implies that, except for an initial meeting with counsel, there will be no joint sessions involving the parties. While many mediators have given in to lawyer's demands to do away with a joint session including parties, I believe that in the vast majority of cases, eliminating face to face contact between the parties is ill-advised.

*4. "The joint meeting…."*This sentence is the least ethically offensive, but it seems to predetermine that the process will be caucus style with no input from the participants as to whether they want/need that or not. Grant Seabolt coined the exquisite phrase "Semper Gumby" to express the notion that the mediator should be "Forever Flexible" in meeting the needs of the parties.

5. "In the private meeting…" If this process is "much like what would be done in a regular trial," then what is the point of having a mediation? We often inquire as to the strengths and weaknesses of a party's position, but in no way similar to litigation. Furthermore, parties most often settle disputes for reasons unrelated to the strength of their case.

6. "The mediator will then…" Oh really? No confidentiality? What about Code Sections 8, 9, and 10 which describe a very different process?

7. "At the same time…" "resolving discrepancies in the evidence" sounds like a judge or jury's role, but it is not the role of the mediator of the mediation process.

*8. "At the same time…"*This sentence is inconsistent with the last sentence in Code Section 1: "The primary responsibility for the resolution of the dispute rests with the parties."

We should distinguish between the mediation style and the mediation ethics. There are many styles, and experienced mediators learn how to adapt their customary style to the needs of each set of parties and to differing circumstances. However, regardless of differences in style parries, or circumstances, all Texas mediations should comport to the Texas Ethical Guidelines.

Comment: In response to this *verbatim* excerpt from an actual letter sent by a "mediator" to an advocate, our responders are unanimous: they don't know what the process described is exactly, but they know that it isn't mediation.

Whatever a mediator's style-facilitative, evaluative, or transformative – all forms of mediation share at least two hallmarks; self-determination and confidentiality. Both of these are sadly lacking in this "mediator's" description of his/her services, as are adherence to several of the Ethical Guidelines of the Supreme Court, ADR Section of the State Bar and the Ethical Rules of the Texas Mediator Credentialing Association.

* ***Suzanne M. Duvall*** *is an attorney-mediator in Dallas. With over 800 hours of basic and advanced training in mediation, arbitration, and negotiation, she has mediated over 1,500 cases to resolution. She is a faculty member, lecturer, and trainer for numerous dispute resolution and educational organizations. She has received an Association of Attorney-Mediators Pro Bono Service Award, Louis Weber Outstanding Mediator of the Year Award, and the Susanne C. Adams and Frank G. Evans Awards for outstanding leadership in the field of ADR. Currently, she is President and a Credentialed Distinguished Mediator of the Texas Mediator Credentialing Association. She is a former Chair of the ADR Section of the State Bar of Texas.*

ADR SECTION COUNCIL NOMINATING COMMITTEE RECOMMENDATIONS ADOPTED BY ADR COUNCIL

By John Allen Chalk

The ADR Section Council, at its April 9, 2011 meeting, adopted the recommendations of the ADR Section Council Nominating Committee for the following officers of the ADR Section Council for 2011-2012:

Chair – Joe L. Cope, Abilene, TX

Chair-Elect – Alvin Zimmerman, Houston, TX

Treasurer – Susan Perin, Houston, TX

Secretary–Ronald Hornberger, San Antonio, TX

The following new directors nominated for three-year terms of 2011-2012 through 2013-2014 include:

Hon. John Specia, San Antonio, TX

Robert C. Prather, Jr., Dallas, TX

Guy Hawkins, Lubbock, TX

Susan Soussan, Houston, TX

The Hon. Dwight Jefferson, Houston, Texas, was nominated to fill the remaining one year director term of Susan Perin who will vacate her director position to become Treasurer for 2011-2012.

These five new directors join the following existing directors of the ADR Section Council:

Hon. Anne Ashby, Dallas, TX

Donald R. Philbin, Jr., San Antonio, TX

James Edward Reaves, Jr., Kerrville, TX

Patty Wenetschlaeger, Irving, TX

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REFLECTIONS FROM THE EDGE

FINRA Mediation: What You Need to Know

By Peter Conlon* & Kay Elkins Elliott**

In past articles we discussed financial issues routinely faced by clients, e.g. qualified domestic relations order (QDRO), employment separation. This article will discuss the "what if" factor: what happens when the advice given by a professional concerning financial matters was not accurate or appropriate for the individual seeking the advice? Financial matters are discussed regularly with Financial Planners, Stockbrokers (sometimes called Financial Advisers), Certified Public Accountants (CPA), Bankers, Life Insurance agents, and Attorneys. Each of these professions have preferred ways of resolving complaints filed by their clients; however, the most visible cases are those involving professionals that fall under the jurisdiction of FINRA – the Financial Industry Regulatory Authority.

Everything that is needed to file a complaint, start arbitration or request mediation under the FINRA system is available on their public website, www.finra.org. All the current rules and regulations for dispute resolution as well as the rules governing the members of FINRA also are available at this web site. FINRA mediation is widely successful in producing settlements. The settlement rates were 87% in 2009 and 91% in 2010. The average turnaround time was 120 days.

Contrary to popular belief FINRA does not regulate all professionals that provide financial advice. The FINRA rules are only applicable to member firms and persons associated with a member firm. Many of the professionals mentioned earlier have overlapping registrations and, at times, may fall under FINRA jurisdiction. In reality, over 50% of the financial advice provided to individuals occurs outside of the boundaries covered by FINRA.

One of the goals of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203, H.R. 4173) adopted in July 2010 is to protect consumers from abusive financial services practices by *all* professions providing advice. Provisions of the law will impact each profession differently and the implementing rules have not been finalized. The FINRA rules change frequently in reaction to the needs and demands of the investing public.

As the need for dispute resolution evolved so did the FINRA Code of Arbitration and the Code of Mediation Procedures (FINRA Rule 14000). This article will briefly outline what commonly occurs during mediation under FINRA rules.

Mediation of FINRA complaints, in broad terms, is no different from Mediation of any other financial matter in dispute. However, there are some twists and turns in FINRA mediation that may surprise a person who is new to the process. There is no requirement to use a Mediator from the FINRA Panel of Mediators; however, if an arbitration hearing has also been requested, the use of a mediator from the FINRA panel can reduce costs for the claimant. When using the FINRA Mediation procedure in conjunction with an arbitration claim there are no postponement fees charged if the arbitration needs to be rescheduled to accommodate the mediation session.

The authors have found that mediations under FINRA jurisdiction do present some interesting dynamics that participants, especially mediators, should be aware of prior to agreeing to mediate. Knowledge of the industry is important to a mediator in a case involving FINRA, just as specialized knowledge is important in other types of dispute mediation: construction, intellectual property, probate and ERISA being examples. Just as a mediator with no knowledge of employment issues may be ineffective mediating an EEOC matter, a mediator with no knowledge of the FINRA rules and regulations may be incompetent to deal with that type of

case. Participants in FINRA related mediation expect that the mediator will have a working knowledge of the industry, the terminology used, and the restrictions as to what the respondents can offer in settlement. The parties do not want to spend time and money educating the mediator. They expect a mediator to be able to comprehend the dispute, ask probing questions to clarify the facts, and facilitate a resolution quickly. A majority of FINRA cases can be resolved in a half day, with only a few needing a full day. Occasionally with multi-party cases several days may be needed. These are essentially distributive bargaining encounters – there is not much need to brainstorm multiple solutions or to enhance a future relationship. The mediator then is useful in the facilitation of positional bargaining - and in getting rapid closure.

One of the confusing aspects of FINRA mediation can be: Who is the respondent? In the Brokerage industry stockbrokers can use numerous meaningless titles. According to the FINRA rules they are referred to as either "associated person" or "registered representative" (RR). For the sake of simplicity, we will use the abbreviation RR when referring to the industry individual involved with the dispute. Also adding to the possible confusion is the fact that not all RR's are employees of the member firm that is involved as a respondent; some are classified as "independent contractors" and that will make a difference in who really has the full authority to agree to a settlement. Mediators should clarify that issue as early as possible!

A mediator's style or techniques can appear to be different than in many other types of mediation. One of the authors likes to say that a mediator needs to be a "chameleon" when handling a FINRA dispute between a customer and a RR/firm. These disputes will need to utilize the caucus method after having a joint session at the beginning to accomplish multiple tasks: establish ground rules, answer the authority issue, let the mediator establish the tone of the process and build rapport with both sides. These disputes really are about the MONEY! The joint session then will give the mediator a chance to gauge the dynamics between the client and the respondents.

At times the individual RR involved may not attend the mediation; only a corporate representative and legal counsel representing the respondents will be present. This usually occurs when the RR is an employee. The joint session will provide an opportunity for the respondent to meet the client, sometimes for the first time, thus adding a personal touch to the decision the respondents will be making. As we all know, many disputes can be resolved if the claimant is "heard" by the respondents. Occasionally, the corporate representative may not wish to attend the joint session. We find that having all parties in attendance at the joint session contributes greatly to a settlement.

Why, you may well ask, would the broker not attend? The easy answer is that in a majority of the cases the broker has little input or authority to agree to any settlement when the RR is an employee. Generally speaking, only the FINRA member firm can settle a dispute with a client. For those RR's that are independent contractors they, and their Errors & Omissions (E&O) insurance, will have the primary say in any settlement. For the member Firm using independent contractors, there will be an approval process to assure that their interests are served as to liability and release from future action, but rarely do they *pay* part of the settlement. The firm could have separate legal counsel from the RR, or may agree to use the attorney selected by the E&O carrier.

If the RR is no longer affiliated with the respondent firm, either as an employee or independent contractor, she will usually attend to negotiate with the firm what her participation in the settlement may be. If he is a RR with another firm, FINRA has rules that require his participation. These same rules are binding on the RR for 2 years after separation from employment with the business.

Now we see why the "chameleon" mediator needs to be so adaptable and flexible. During the joint session you have the normal arrangement: the claimant and all the respondents in attendance.. In the caucus the claimant will be in one room and the respondents in another, or possibly two rooms for the respondents depending on the relationship of the RR

to be so adaptable and flexible. During the joint session you have the normal arrangement: the claimant and all the respondents in attendance.. In the caucus the claimant will be in one room and the respondents in another, or possibly two rooms for the respondents depending on the relationship of the RR (s) and the firm. Essentially, the mediator may be doing two mediations simultaneously.

One mediation between the claimant and respondents, another between the respondents themselves. Once the respondents are separated from the claimants there may be issues about who is going to pay. If the RR is an employee of the firm, the firm will usually decide the money issue and handle any repayment from the RR privately in its own offices. However, the RR does have the right to his/her own counsel, and may want the mediator to assist with these negotiations. If the RR is no longer an employee, then the firm will be looking for a concrete agreement regarding what they can collect from the RR. If the RR was an independent contractor he will, within the coverage available from his E&O carrier, be making the decision subject to approval of the final settlement by his member firm.

Implementation of the agreement reached in mediation to pay money to the claimant is ultimately the responsibility of the member firm. Failure to make an agreed payment within 30 days can result in suspension or cancellation of registration.

Clearly the mediation between the respondents will be distributive in nature, driven by the bottom line costs to the respondents – the notorious zero-sum assumption is accurate in these cases. Usually the claimant has already severed any business relationship with the firm and RR, so potential non-cash options will not be appropriate. FINRA rules prohibit or restrict certain types of non-cash offers as part of a mediation. For example, the claimant seeks to have the registration of the RR suspended. This is a decision that can only be made by the disciplinary committee. Possibly the firm could counter that it would make the referral to the committee but that is highly unlikely – if the RR is suspended the firm could not be repaid. Another example would be if the claimant wants a specific security replaced in his account at a specific price; again the respondents do not have the capacity to make such an offer or to make that happen.

A tricky situation is where the claimant and RR have a personal relationship outside of the business relationship that one or both wish to maintain. It has been the experience of one of the authors that when this occurs the claimant does not know that the RR will be responsible for payment of part or all of the settlement, assuming that the corporation will be paying the settlement. Sometimes, but not always, the respondents will allow the mediator to inform the claimant of who will actually be paying the settlement.

Another non-cash offer that is not allowed is for the RR to request a retraction of or expungement of the complaint from his record. The FINRA rules only allow an arbitration panel or court of proper jurisdiction to order an expungement. The rules also set out the criteria that must be met for the request to be considered. Once a complaint is filed by a customer it remains on the RR's registration records for the remainder of the time he is associated with any member firm plus ten years after leaving any association. The RR does have the right to add his explanation of the issue to his record. Generally speaking, that is what normally occurs since it is cheaper and faster for the RR to accomplish this goal rather than to request an expungement.

We mentioned that a distributive mediation style will be needed when working in the respondent caucus room(s). As you can see by the various issues that may need to be handled in the mediation between the respondents, the mediator will need to draw on additional skill sets as well. For the work in the claimant's caucus room the mediator will need to use more empathetic techniques; however, do not let the "chameleon" go to sleep. Claimants or their counsel will at times expect you to be evaluative while you are being empathetic. This is where

During these discussions the mediator may need to point out to the claimants that some of the demands cannot be satisfied, e.g. the claimants' request for registration suspension. Additionally, you may be asked to explain why losses due solely to market fluctuations are not recoverable. Managing the claimants' expectations could be one of the mediators' primary objectives during the caucus sessions. Mediators are more appropriate messengers of bad news than the "enemy" on the other side of the dispute. Mediators in caucus can validate the perceptions and concerns of all parties while remaining focused on standards and on closure.

A big risk for a mediator in FINRA disputes is the *pro se* claimant. Many of these clients have little to no understanding of what a mediator can do for them. Sometimes they have an expectation of receiving 100% of their demands, plus additional requests. Some expect the mediator to act as an arbitrator and issue a decision; others look at the mediator as a personal advocate. It is therefore critical for the mediator to remind *pro se* claimants that they have a right to legal counsel, and that they can stop the process at any time to obtain counsel before signing an agreement.

Under the FINRA rules, the mediated agreement is binding once signed by both parties. Mediators on the FINRA panel have shared with us how they address the *pro se* claimant. During the joint session the mediator reviews all the rules concerning right to counsel, binding agreement and right to stop at any time. During the caucus with the Pro se claimant they remind the party of these rights each time they begin a caucus session. They also have a disclosure statement for the Pro se party to sign that stipulates the claimant has been instructed on these rules and understands them. Why all this effort? There have been times when a Pro se claimant has completed and signed an agreement then refused to abide by it, thus forcing the matter to arbitration. From what we were able to find out, in each case where this occurred the arbitration panel has upheld the mediated agreement and charged the claimant for the costs of the arbitration hearing.

This brings us back to the beginning of this article concerning knowledge of the rules with which a mediator should be familiar. FINRA regularly updates its rules as a response to trends seen in complaints filed. Unfortunately, the rules of conduct on the website may not be the rules that were in effect at the time the alleged wrongdoing occurred. FINRA rules are not retroactive, therefore a rule adopted in 2010 as a result of the market activities of 2007-2009 can not be applied to a complaint arising out of activities prior to that date. Additionally, clients have no private right to recover solely for a rule violation.

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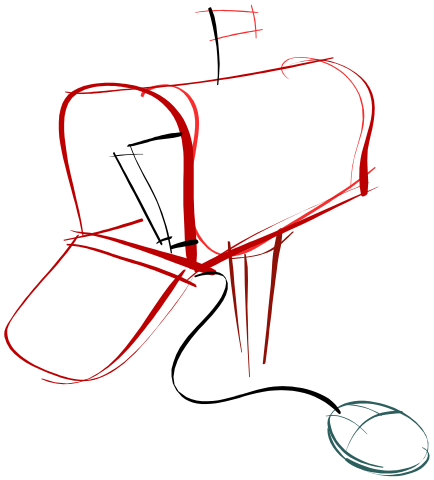

ADR ON THE WEB

By Mary Thompson*

ADR Times

http://www.adrtimes.com/

Premiering in 2010, the ADR Times is sponsored by the Agency for Dispute Resolution. The group provides panels of neutrals to mediate or arbitrate civil disputes and commercial cases in cities across the U.S. Principal and founder Mark Fotohabadi, is a recent Pepperdine MDR graduate, entrepreneur and construction industry professional.

The website has five major topics for content:

Articles provides a variety of ADR Times staff writing as well as links to other blogs and websites.

Videos at present appears to have only the beginning of a (fairly un-engaging) series entitled "Understanding, Managing and Resolving Conflict and Litigation." The entire series can be viewed at You Tube at http://www.youtube.com/user/fairoutcomes.

Hotlinks appears to have a variety of content. The title of this category is not clear since not every piece of content appears to be hot or a link.

Resources includes websites, blogs, books and other publications.

Jobs includes listings for HR, mediator, negotiator, ombuds, and ADR administrator positions.

In addition, there is a Community Forum (http://www.adrtimes.com/community/) section for readers to post and answer questions on mediation practice, share ideas on building a practice, offer a book review, or debate either side of an issue in mediation and dispute resolution.

There are some interesting pieces on the site. A search of the "mediation" articles yields the following examples:

Successful Scaling in Mediation. This article by Fredrike P. Bannick offers techniques for the mediator to help the parties explore exceptions to conflict, degrees of progress, and changing dynamics of the relationship. By asking the parties to rate an aspect of their relationship (collaboration, motivation, trust, respect) on a scale of 10, the mediator can then ask question to uncover hopes, strengths and future possibilities.

3 Sides to a Conversation. This article describes the challenges of encouraging full participation in a mediation. The author discusses three styles: the "question asker", the "quiet person" and the "story teller." Endlessly answering the "question asker's" questions may not move the mediation forward, but posing a question to the questioner may. The "story teller" may be put off by a question, because it interrupts their story, but responding with another story may help make a connection. Finally, the mediator must be careful to structure space for the "quiet person" to participate, and not be dominated by the other two styles.

High Conflict Mediation: 4 Tips for Mediators. Bill Eddy offers ideas for working with high conflict mediation clients who blame other people, are highly defensive, and seem to need considerable validation from others. Eddy's article emphasizes the need for mediators to

1. Establish a relationship through empathy, attention and respect.
2. Provide structure both by clarifying the process at the beginning and by keeping the discussion on track when the client digresses into blaming and defending.
3. Reality testing claims and assumption to address the client's tendency to distort information.
4. Exploring the consequences of the high conflict client's self-defeating behavior.

ADR Times has the feel of a new website: some problems with site navigation, much of the content by the same authors and some of the sections not yet filled out. Nevertheless, the layout is interesting, the key topics have promise (the Debate Desk under Community Forums could be great when it really gets going) and many of the articles and links are well worth checking out.

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MEDIATED SETTLEMENT AGREEMENTS – RECENT TEXAS CASE LAW

By Stephen K. Huber

I. Introduction

The origin of this article with a request from the Co-Editor of Alternative Resolutions, Wendy Huber (also my wife) and that wonderful attorney, mediator and mensch, Alvin Zimmerman, for an update on the case law related to Mediated Settlement Agreements (MSAs) in Texas. Ever the eager researcher, I could not stop with the simple update that Wendy and Alvin needed for a CLE presentation. The fruits of my expanded efforts follow. The central focus of this review of recent MSA case law is Texas state court decisions, along with the less numerous Texas federal court decisions. A few important recent MSA decisions cases from other jurisdictions are also discussed.

A Westlaw search conducted on January 11, 2011 using the search terms "mediated settlement agreement" and "Texas" brought up 58 decisions by Texas courts since the end of 2009. The search included federal as well as state courts. Several characteristics stand out:

1. Almost all these decisions were from state rather than federal courts. Only five of the decisions were by federal district courts, and none were designed for publication.

2. The vast majority of the state court decisions also are unpublished – 44 of 53.

3. Family cases predominate among the MSA decisions.

A few later decisions are considered as well, notably a decision by the California Supreme Court that addresses the confidentiality of mediation proceedings in a malpractice action by a client against his attorney who (allegedly) unduly influenced the client to accept a bad settlement.

Clearly these decisions discussed in this article represent merely the proverbial "tip of the iceberg" regarding consideration of MSAs by state courts, as trial court decisions are not available. Some U.S. district court decisions regarding MSAs are published, but they are few in number. And, of course, the vast majority of MSAs, like other contracts, are fully performed and never receive judicial attention.

II. Texas Supreme Court Decisions

The highest authority on the law of a state is its Supreme Court, so the place to begin the review of MSA case law is with two recent MSA-related decisions by the Texas Supreme Court – one from 2010 and the other from 2009.

A. *Gallagher Headquarters Ranch Development, Ltd. v. City of San Antonio*, 303 S.W.3d 700 Tex. 2010) (short *per curiam* opinion)

The City of San Antonio used voter-approved funds to acquire land for conservation purposes. Seller and a third party disputed the authority of the city to grant power line easements on the land. The trial court (in 2006) decided for the City, but an appeal resulted in a partial reversal and remand. The City then entered into an MSA that purported to resolve this suit and two others. The court of appeals thereupon dismissed the matter. The Supreme Court did not affirm because the MSA insufficiently referenced this litigation, and the claim of the third party.

Due to the uncertainty about the scope of the MSA, the Supreme Court remanded the case to the trial court to make a finding of fact about whether this dispute was governed by the MSA, and to report back to the Supreme Court within three months. The Court noted that the MSA included a mediation provision, so the trial court could send the parties to mediation. The parties subsequently settled the matter, so there were no further proceedings before the Texas Supreme Court.

B. *In re Gayle E. Coppock*, 277 S.W.3d 417 (Tex. 2009).

A judgment may be enforced by contempt only if it clearly orders or commands a party to perform the obligations imposed – the terms to be complied with must be clear and unequivocal. The judgment in this case failed to satisfy this test, so the court set aside the order of contempt.

H and W divorced in 2003. The divorce decree incorporated an MSA between the parties that enjoined them from communicating with one another in a coarse or offensive manner. Over the next two years, W communicated frequently with H via telephone and e-mail in a manner that allegedly violated the decree. The trial court agreed, finding 84 demonstrated independent instances of "coarse or offensive" communications.

Holding W in contempt, the district court ordered that W serve three consecutive sentences of 180 days imprisonment. However, the court suspended W's commitment and placed her on community supervision for three years on the condition that she spend four nights in the county jail and pay $8,770 to H's attorney. When W failed to report for incarceration, the court issued a writ of *capias* for her arrest. The court of appeals denied W's petition for relief. The Supreme Court ordered release of W pending review of her habeas corpus petition. The Supreme Court stated:

> In a habeas corpus action challenging confinement for contempt, the relator bears the burden of showing that the contempt order is void. An order is void if it is beyond the power of the court to enter it, or if it deprives the relator of liberty without due process of law. To be enforceable by contempt, an order must set out the terms of compliance in clear and unambiguous terms. Moreover, a person cannot be sentenced to confinement unless the order unequivocally commands that person to perform a duty or obligation.

The Court ruled for W because the "coarse or offensive" standard was unclear – "especially between warring spouses" the standard is "largely in the eye of the beholder."

> Civil contempt in Texas is the process by which a court exerts its judicial authority to compel obedience to some order of the court. Command language is essential to create an order enforceable by contempt. Merely incorporating an agreement into the recitals of a divorce decree, without a mandate from the court, is not sufficient In this case, the divorce decree does not contain sufficient language to advise the parties that refraining from or engaging in the described conduct is mandatory. Without decretal language making clear that a party is under order, agreements incorporated into divorce decrees are enforced only as contractual obligations. Obligations that are merely contractual cannot be enforced by contempt.

Your author suspects that slippery slope concerns are behind this decision. The Court does not say this expressly, but the express reference of the context of warring spouses suggests recognition of the difficulty. Additional litigation based on incivility between ex-spouses cannot be a sound idea.

III. Published Texas Court of Appeals Decisions

A. *Garza v. Villarreal*, --- S.W.3d ----, 2011 WL 313784 (Tex.App.-San Antonio)

The parties to a land dispute entered an MSA that

met the Rule 11 requirements. The parties later disagreed about the interpretation of the MSA. The trial court rendered a decision, and the court of appeals affirmed. The prevailing party sought and obtained enforcement of the agreement pursuant to his interpretation of the contract, but recovered no damages.

The interesting feature of this case relates to the availability of attorney's fees in the absence of a contractual fee recovery provision, which means a statutory basis musty be found for recovery of attorney's fees. The usual approach is to rely on section 38.001(8) of the Civil Practice and Remedies Code, but that only authorizes attorney's fees when damages have been recovered. *Green Int'l, Inc. v. Solis,* 951 S.W.2d 384, 390 (Tex.1997); *Intercont. Group P'ship v. K.B. Home Star, L.P.,* 295 S.W.3d 650, 653 (Tex. 2009). While the argument for recovery of attorney's fees by the prevailing party was appealing, the court of appeals was unwilling to extend the reach of 38.001(8) in the absence of guidance by the Texas Supreme Court.

> As an intermediate appellate court, we are not in a position to evaluate the argument that the Texas Supreme Court's holding in *Green Int'l* should be modified. ... As an intermediate court of appeals, we are obligated to follow the precedents of the Texas Supreme Court unless and until the high court overrules them or the legislature supersedes them by statute.

Accordingly, the court of appeals denied the request for attorney's fees.

B. *In the Interest of S.A.D.S., A Child*, --- S.W.3d ----, 2010 WL 3193520 (Tex.App.-Fort Worth)

After the Department of Family and Protective Services sought termination of mother's parental rights, she and the Department entered into an MSA – the maternal grandfather was appointed sole managing conservator, and the mother (M) was appointed possessory conservator, of the child. The District Court entered an order that differed from the MSA, and M appealed. The Court of Appeals held that trial court had no authority to enter an order at variance with the MSA.

The Department alleged that the trial court was required to make the finding pursuant to Texas Family Code section 153.131 whenever the court appoints a non-parent as managing conservator. M argued that the agreement was the basis for the order, and the trial court was without authority to vary the agreement in its order.

Section 153.131(a) states a general presumption that a parent be appointed managing conservator in a suit affecting the parent-child relationship unless doing so would significantly impair the child. Another Texas Family Code provision, however, applies to MSAs. Section 153.0071(d) provides that an MSA is binding on the parties if (1) it provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation, (2) is signed by each party to the agreement, and (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed. If the MSA satisfies these criteria, standards a party is entitled to judgment notwithstanding Rule 11 or other rule of law. A trial court may make a best interest of the child finding when issues of conservatorship, possession, and access to children are resolved by a Rule 11 agreement.

C. *Beltran v. Beltran*, 324 S.W.3d 107 (Tex.App.-El Paso 2010)

In this appeal from a divorce pursuant to an MSA that met the requirements of the Family Code, § 6.602(b) action, Wife claimed that she was entitled to a share of Husband's Construction firm. H's brother filed a claim in intervention, arguing that he owned 50 percent of the business. H & W then entered the MSA which specified that, as between Husband and Wife, Husband would receive a 100 percent ownership interest in the business, with wife entirely relinquishing her claim. As the MSA was final and binding, the court of appeal dismissed the appeal as moot.

D. *In re Empire Pipeline Corp.*, 323 S.W.3d 308 (Tex.App.-Dallas 2010)

Gunter sued Empire for breach of contract; subsequently the parties entered an MSA dismissing the suit. In a subsequent suit, Bunter sought to depose Harris, who represented Empire in the MSA The trial court order authorized specified discovery from Harris and others:

> Plaintiff shall be allowed to take the depositions of Robert L. Harris, and any other representatives of Defendants who were present at the mediation held in December 12-13, 2007, provided, however, that no inquiry may be made concerning: (1) communications between and client representatives of Defendants, or (2) trial preparation materials, work product, opinions of counsel, trial strategy, or the mental processes of counsel for Defendants, unless such matters were communicated to the mediator or to Plaintiff or his representatives. Defendants are also ORDERED to produce any notes or drafts of documents given to the mediator or Plaintiff or his representatives, in connection with the mediation or the preparation of documents relating to the alleged MSA

The court of appeals concluded that the trial court abused its discretion, and that Empire lacked an adequate remedy by appeal, so the court conditionally granted the writ of mandamus. A clear failure by the trial court to analyze or apply the law correctly constitutes an abuse of discretion, and may result in appellate reversal by extraordinary writ. Disclosure of privileged information would have a material adverse effect on the aggrieved party's rights,

The court of appeals rested its decision entirely on the confidentiality of mediation proceedings, often (but not always accurately) referred to as the ADR or mediation privilege. [Appellant also raised the work product and attorney-client privileges, but the court found it unnecessary to consider these defenses.] The key statutory provision is found in the ADR Act, section 154.073 of the Civil Practices and Remedies Code, titled Confidentiality of Mediation Proceedings. While the are some exceptions to disclosure related to mediation, "a cloak of confidentiality surrounds mediation, and the cloak should be breached only sparingly" (quoting *Allison v. Fire Ins. Exch.,* 98 S.W.3d 227, 259 (Tex.App.-Austin 2002). The court of appeals closed by holding that all of the requested discovery was barred by § 154.073.

E. *Pena v. Smith*, 321 S.W.3d 755 (Tex.App.-Ft. Worth 2010).

Pena sold land to Smith, but the parties disagreed about whether mineral rights were included. Smith sued, mediation ensued, and the parties executed an MSA. Smith received surface rights, while Pena retained her mineral interests. However, Pena withdrew her consent to the MSA, and refused to execute the necessary documents to effect the transaction. The district court then granted Smith's motion for a final order enforce the settlement agreement. The court of appeals reversed and remanded.

A trial court may not render an agreed judgment after a party has withdrawn its consent to a settlement agreement. *Padilla v. LaFrance,* 907 S.W.2d 454, 461 (Tex. 1995).. After consent has been withdrawn, a court may enforce a settlement agreement only as a written contract. *Mantas v. Fifth Court of Appeals,* 925 S.W.2d 656, 658 (Tex.1996); *see* Tex. Civ. Prac. & Rem.Code § 154.071(a) (providing that a settlement agreement is enforceable in the same manner as any other contract). Thus, the party seeking enforcement must pursue a separate breach of contract claim, which is subject to the normal rules of pleading and proof. When the legislature enacted the ADR statute it did not order the courts to follow a special procedure applicable only to MSAs

Even if the allegations in Smith's motion were sufficient to give Pena fair notice of the contract claim. Smith failed to proffer legally sufficient evidence in support of the claimed breach of the MSA. "When there is no indication that evidence was admitted or considered by the trial court prior to rendering judgment and the record on appeal contains no statement of facts, we indulge no presumptions in favor of the judgment."

Rather than a rendition of judgment for Pena, however, the court exercised its "broad discretion to remand in the interest of justice." There was a real probability that Smith can correct the lack of evidence, and would have done so had the trial court so required.

F. Franks v. Roades, 310 S.W.3d 615 (Tex.App.-Corpus Christi 2010)

Franks sued her attorney Roades, raising claims of improper conduct in a guardianship proceeding that attorney initiated for the client. The district court granted summary judgment for the attorney, and client appealed. Franks claimed that Roades failed in his duty of loyalty in initiating a guardianship proceeding; attorney failed to make full disclosure regarding the guardianship proceeding, and finally that attorney was negligent.

Franks was not a client in the usual sense of a person in charge of her affairs. In 1999, Roades prepared a durable power of attorney for Franks appointing her son Michael as her attorney-in- fact. In 2001, Franks appointed her daughter Carol Thompson as attorney-in-fact in lieu of Michael, and also gave Thompson signing authority for Franks' checking account. Franks' condition deteriorated over time, and by early 2003 she she was unable to handle her affairs and required 24-hour care. Thompson employed people to take care of Franks, and paid them out of her funds. Meanwhile, Michael was unhappy with this approach, to the point of encouraging his mother not to take the prescribe medication and threatening Thompson (his sister) and her family.

Acting at the behest of Thompson, acting in her capacity as attorney-in-fact for Franks, Roades brought a guardianship proceeding to have Thompson appointed the guardian for her mother. Thompson paid Roades with funds belonging to Mrs. Franks. Roades proceeded with the guardianship, considering himself obligated to do so by Texas Disciplinary Rule 1.02(g):

> A lawyer shall take reasonable action to secure the appointment of a guardian ... for ... a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

Michael contested the guardianship; after hearings and the appointment of a temporary guradian for Franks, the court rejected Michael's claims. Franks's attorney ad litem moved to disqualify Roades from representing Thompson, asserting that Roades had a conflict of interest due to his prior legal work for Franks. The attorney ad litem alleged that, even though Thompson used Franks's power of attorney to retain Roades to file the guardianship, in fact, Roades was representing Thompson in the guardianship proceedings. At this juncture, the parties entered into an MSA, which resolved the issues surrounding the guardianship.

Franks could not let go of the matter, so he brought the present suit on behalf of his mother against Rhoades for improper attorney conduct. (Thompson was also named as a defendant, but soon dropped from the proceeding.) In a lengthy and interesting opinion, the court of appeals decided all the claims in favor of Rhoades. As the MSA was not at issue, this discussion is omitted.

G. *Pribyl v. Pribyl*, 307 S.W.3d 882 (Tex.App.-Austin 2010)

Ex-wife sued ex-husband claiming a breach of a collaborative law agreement, *see* Tex. Fam. Code § 6.603, entered into by the parties during their divorce proceedings. Subsequently, H & W entered into an MSA that settled all issues relating to their divorce. The basis for W's present claim was that H had been awarded stock options during the divorce proceeding, which fact was not disclosed by H. The collaborative law agreement provided:

> The parties and their lawyers agree to make full disclosure of the nature, extent and value of the parties' income, and their assets and liabilities, including any factors or developments which may affect any aspect of these components of the case.... Participation in the Collaborative Law process, and the settlement reached, is based upon the assump-

> tion that both parties have acted in good faith and have provided complete and accurate information to the best of their abilities.

The MSA awarded H all benefits related to his employment, including stock options. H admitted that he failed to disclose the options, as asserted by W.

After a trial, the district court awarded W a 50 percent interest in the undisclosed stock options, plus costs and fees. H appealed, claiming res judicata. The court of appeals, in a decision reminiscent of the old forms of actions, decided for H because W did not file her claim in the proper way. She sought to reopen the original judgment, rather than initiate a separate proceeding, and she claimed breach of contract when the proper claim was for fraud. Upon expiration of the time within which the trial court has plenary power, a judgment can be set aside only by a bill of review for sufficient cause. Unfortunately, the court tells us:

> W did not elect to pursue a bill of review or any other direct attack on the 2004 agreed divorce decree. Rather, she alleged a breach of the collaborative law agreement as a means of altering the effect of the 2004 agreed divorce decree. This type of attack on an otherwise valid judgment is not permitted. The problematic nature of Kathleen's claims in this proceeding is illustrated by the fact that, as the record stood after the trial court's 2008 judgment, there was a final judgment from 2004 awarding the stock options at issue to Brian and there was a judgment from 2008 awarding a portion of the same stock options to Kathleen. Neither judgment mentioned the other or attempted to modify or alter the other. The two judgments simply conflicted. This is precisely the type of situation that the doctrine of res judicata is designed to prevent.

And what of the benefits wrongly gained by H? The court of appeals did drop a footnote noting that it did "not want to be read as condoning the actions of H in this case." Since, as the court observes, "had the stock options been disclosed, there is little doubt at least some portion of their value would have gone to Kathleen in the settlement," what did the court do if not condone H's actions?

H. *In re Michael G. Brown*, 277 S.W.3d 474 (Tex.App.-Houston [14th Dist.] 2009)

H and W divorced in 2001, with W appointed as sole managing conservator of the parties' two minor children. The decree and judgment included a finding that H committed family violence within the meaning of section 153.004 of the Texas Family Code. H was permitted only supervised access to the children. The decree was modified in 2006, pursuant to an MSA, to eliminate the supervised access provision. In 2008, W brought the present action, seeking a modification of the child access provisions. H responded by seeking custody of the children, and requesting that the court order a mental examination of W.

The court ordered drug testing for H, and when he tested positive for drugs also ordered that he undergo a psychiatric evaluation. On appeal, H sought mandamus relief from this requirement. The court of appeals ruled that the trial court order did not constitute an abuse of discretion. The district court could modify the child visitation arrangements, notwithstanding the MSA, based on the obligation of the State to protect the best interests of the children.

I. *Wright v. Wright*, 280 S.W.3d 901 (Tex.App.-Eastland 2009).

W sued H for divorce. Three days later H transferred shares in a company owned jointly by H & W to an employee. [This is a dramatic simplification of the underlying facts.] W then named the employee as a co-defendant. All three entered an MSA that settled all issues except W's claim that H's transfer was a fraud on the community. The district court found fraud by H, and the court of appeals affirmed.

On appeal, H asserted that the MSA limited W to an actual fraud claim and that she breached the MSA by amending her trial petition to include constructive fraud. The MSA reserved a cause of action for "fraud on the community, which, the court of appeals ruled, included constructive fraud, and breach

of fiduciary duty.

A fiduciary duty exists between spouses regarding the community property each controls. The breach of this duty is a fraud on the community, a judicially created concept based on the theory of constructive fraud. The two are essentially the same tort. It is constructively fraudulent for one spouse to dispose of the other spouse's interest in community property without that spouse's knowledge or consent.

The case was remanded to the trial court for a determination of the attorney's fees due to W. The divorce decree ordered that each party was responsible for his or her own attorney's fees, expenses, and costs incurred as a result of legal representation through the trial of May 15, 2007 in this case. The general rule in Texas is that each party is responsible for his or her own attorney's fees. Attorney's fees are generally not recoverable from the other party in the absence of a specific statutory or contractual provision

TEX. CIV. PRAC. & REM.CODE ANN. § 38.001 (8) provides that a person may recover reasonable attorney's fees where the claim is based on an oral or written contract. An MSA is a written contract. Under Texas law, a spouse can recover attorney's fees in connection with a suit for breach of a contractual alimony agreement incorporated into a final divorce judgment. Once the right to attorney's fees is established, a court may also award attorney's fees for any appeal.

Here H tried to withdraw his consent to the MSA. W was not required to file a separate suit for enforcement of the MSA. Section 6.602 of the Texas Family Code basically creates a procedural shortcut for the enforcement of MSAs in divorce cases. The trial court had the authority to award W attorney's fees attributable to her claim to enforce the MSA, as well as appellate attorney's fees related to W's suit to enforce the MSA.

J. In the Interest of A.G.C., a Minor Child, 279 S.W.3d 441 (Tex.App.-Houston [14 Dist.] 2009)

Father (F) sought review of judgment terminating his parental rights. The parents were not married but all agreed that F was the father of the child. F's entered an MSA that terminated his parental rights, based on an affidavit to that effect, that was incorporated into a court order. F appealed, arguing that the affidavit was invalid because it does not satisfy the statutory prerequisites of Texas Family Code section 161.103, requiring the mother failed to demonstrate by clear and convincing evidence that the termination was in the best interests of the child, and related claims. The agreement was sufficient to establish the best interests of the child, and separate proof by mother (M) was not required.

The MSA did provide for F to have supervised visits with child, and he agreed to take drug tests, per specifications in the MSA. Disputes regarding the meaning of the MSA would be decided by the former mediator, by consent if possible but otherwise by the mediator acting as an arbitrator. arbitrator (if . Similarly, the parties agreed to resolve any other disputes arising with regard to the interpretation or performance of the MSA or its provisions with the mediator, and if no agreement could be reached, the mediator would act as an arbiter and resolve the issue.

Shortly before the expiration of the 60 day period in which F's affidavit was irrevocable, M and attorneys for M, F, and the child appeared before a visiting judge for a hearing on the termination order. Attorneys for M and F each presented proposed termination orders. The proposed orders were substantively similar, except that F's proposed order contained certain additional details concerning notice, visitation, and drug testing. F's attorney represented that the differences between the two orders were not significant, whereupon the trial court signed M's proposed order terminating Father's parental rights. The order recited that the parties reached the agreements contained in the order in mediation, and that the order represented a merger of the MSA. The order also recited that the trial court found by clear and convincing evidence that F, voluntarily and after advice of counsel, executed an affidavit of relinquishment of parental rights and that termination of

the parent-child relationship was in the best interest of the child.

Two days after the termination order was signed and just after the sixty-day period in which the affidavit of relinquishment was irrevocable, F sought to revoke the Voluntary Relinquishment of Parental Rights. The trial court denied F's motion. The court of appeals remanded to the trial court to refer the parties to arbitration per the MSA so that the arbiter could address those portions of the order that Father submitted to the court but that were not contained in the trial court's order to terminate parental right.

IV. Unpublished Texas Court of Appeals Decisions

A. In re D.L.S. and C.D.S., Minor Children, 2011 WL 240683 (Tex.App.-San Antonio)

When H and W divorced in 2002, they were named joint managing conservators of their two children. Further disputation about custody and support payments were apparently resolved in mediation, but the MSA was not reduced to writing. The ensuing court order contained all the relevant terms of the disposition. Husband appealed, arguing that the judgment varied from the MSA.

The Family Code MSA provisions are inapplicable because govern only written agreements. The court then turned to Rule 11, but it also is limited to written agreements. Because of judgment did not reflect a complete argeement of the parties, and did not strictly comply with the MSA, the trial court judgment was set aside. The case was remanded to the trial court for further proceedings.

B. McConnell v. McConnell, 2011 WL 286145 (Tex.App.-Hous. (1 Dist.))

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The court of appeals affirmed a trial court order enforcing an MSA that provided for visitation by H's parents of his son, and awarded sanctions against H. Among H's arguments was a claim for fraud, and that the MSA was unconstitutional.

C. Wells Fargo Bank, N.A v. Blackburn, 2011 WL 346951 (Tex.App.-Fort Worth)

While this dispute is between W and a bank, it grows out of a divorce situation. H and W both had Wells credit cards: H as account holder, and W as an "authorized user"– and therefore was not personally liable for the account. H cancelled his account, but Wells failed to change the status of W, so the bank could not collect for charges incurred by W (and her daughter). The MSA between H and W was unrelated to this suit.

D. Montemayor v. Garcia 2011 WL 578603 (Tex.App.-Corpus Christi)

A divorce decree based on an irrevocable MSA was modified by the court, *nunc pro tunc*, which produced the present appeal. The appellate court reversed, because the trial court lacked the power to alter the terms of the MSA.

A trial court may only correct, *nunc pro tunc*, the entry of a final written judgment only if the judgment incorrectly states the judgment actually rendered. Even if the trial court incorrectly renders judgment, it cannot alter a written judgment that precisely reflects the incorrect rendition under a motion *nunc pro tunc*. In this case, the original written judgment precisely reflected the allegedly incorrect rendition of the judgment, making it expressly clear that W's right to determine the residence of the children was without regard to geographic location.

> We recognize that two of our sister courts have held similar nunc pro tunc modifications of trial courts' judgments to be proper. *See Delaup v. Delaup,* 917 S.W.2d 411, 412-13 (Tex.App.-Houston [14th Dist.] 1996, no writ); *Ledbetter v. Ledbetter,* 390 S.W.2d 403, 404-05 (Tex.Civ.App.-Waco 1965, writ dism'd w.o.j.). In each of these cases, however, the record directly reflected that a different judgment was rendered orally than that which was entered in the court's final written judgment. ... In this case, the record does not indicate the rendering of any judgment by the court that was read into the record, nor does the settlement agreement

> appear in the record or by incorporation in the original Final Amended Divorce Decree. Therefore, we must consider the original decree as the only judgment rendered by the court and we therefore consider these cases to be completely factually distinguishable from the present case.

The change here was a substantive one. The trial court's original judgment placed no restriction on W's right to determine the residence of the children, and W was entitled to rely on the final judgment when she moved to Harris County. Because this was a substantive change, and because the trial court altered the terms of the original Divorce Decree, this was necessarily the correction of a *judicial* error, not a *clerical* error.

V. MEDIATED SETTLEMENT AGREEMENTS IN FEDERAL COURTS

One test of the hypothesis that MSAs are used predominantly in family cases was to examine the appearance of MSAs in federal court cases. Among the wonders of Westlaw (and other search engines) is that one can specify a search term and a time period, whereupon by clicking ALLFEDS you instantly have a listing of every published federal court decision, and many unpublished ones, that meets the search criteria. The search term was "mediated settlement agreement" and the time period was the most recent three years (from late January, 2011). Resort to federal cases has the further merit of including trial court decisions, which are reported at the federal but not the state level.

The search yielded 215 decisions for the entire federal court system – including unpublished and bankruptcy decisions. Indeed, bankruptcy cases, which are heard exclusively by the federal courts, dominated the list. (By contrast, MSA-heavy divorce and family law matters are decided entirely by state courts.) Texas dominated the MSA listing with 56 decisions, slightly over 25% of the national total. Texas is a huge state, and a leader in the use of mediation, but these factors cannot explain why a full quarter of federal MSA cases come from this state. The term "MSA" is used more common in Texas than elsewhere. A far broader enquiry that employed "mediation" and "settlement" as search terms, generated 2,400 federal decisions (mostly unpublished or bankruptcy cases). At that point you author quit the counting game.

Of the 215 federal court decisions, only three were decided by U.S. courts of appeals – and only one of them was published. The two unpublished decisions are from the 5th Circuit. Accordingly, we will first consider these three decisions, and then turn to selected district and bankruptcy court decisions. Each of the three bankruptcy cases that were decided by Texas federal district courts was related to a state divorce proceeding.

A. Court of Appeals Decisions

1. J.D. ex rel Davis v. Kanawha County Board of Education, 571 F.3d 381 (4th Cir. 2009).

The only published federal court of appeals decision to use the phrase "mediated settlement agreement" did not involve an MSA, although there was an offer of settlement. Instead, the issue revolved around limited disclosure of the terms of an offer of settlement made in mediation. The court cited one of the few law review articles about MSAs: Ellen E. Deason, *Mediated Settlement Agreements: Contract Law Collides With Confidentiality*, 35 U.C. Davis L. Rev. 33 (2001).

Parents claimed that their disabled child was not receiving a "free, appropriate public education," as required by the federal Individuals With Disabilities Education Act (IDEA). Interaction with the Board did not result in a settlement. In the ensuing administrative hearing, parents prevailed on some but not all of their claims. The federal court case involved the award of attorney's fees to the parents, pursuant to the provisions of IDEA.

The Board argued that IDEA did not authorize the award of attorney's fees under the circumstances of

this case. Such fees are not recoverable if the Board makes an offer of settlement more than 10 days before the administrative hearing that is rejected by the parents, and the relief obtained is not more favorable than the offer. *See* 20 U.S.C. § 1415(i)(3)(D)(i). There was no dispute that the Board made a timely offer that was rejected by the parents. However, mediation confidentiality precluded proof of this circumstance.

2. *Fisher v. Miocene Oil and Gas, Ltd.*, 335 Fed. Appx. 483 (5th Cir. 2009)

This case is about a family feud. Upon H's death, W became the trustee of a testamentary trust. The trust engaged in a transaction with Son's (S) firm at a below market price, which lead Daughter (D) to sue. An MSA between the trust and Miocene released a lease, and assigned property to S's firm. The district court ruled that the Trustee violated Texas law, but denied any relief because D failed to prove monetary loss. D sought to have the challenged transaction undone, and the court of appeals rules that she was entitled to that relief.

3. *Estate of Merkel v. Pollard*, 354 Fed. Appx. 88 (5th Cir. 2009)

W filed for divorce in 1992, which eventually led to a 1995 MSA that was incorporated into the divorce decree. H contested the property division, and the Texas court of appeals reversed the trial court decision. In 2001 another trial court entered another divorce decree, awarding the marital home to W. H appealed again, arguing that the trial court erred in not disqualifying W's counsel. In 2003, the court of appeals agreed, and returned the matter to the trial court. W died in 2004, and in the absence of further action the court dismissed the case for want of prosecution. The house and other assets passed to W's estate, whereupon H petitioned the probate court claiming that H and W were still married at the time of her death, in which case he would have a claim to the marital home. The court ruled that H and W were divorced prior to W's death. H appealed, but the Texas court of appeals in 2007 declined to decide due to the absence of a final judgment or an appealable order. As of late 2009, there were five state court proceedings related to disputation between H and W's Estate.

1. Appeal of probate court denial of accounting;

2. Appeal of divorce court dismissal of divorce proceeding;

3. Probate court administration of estate;

4. Declaratory judgment action re marital status at time of W's death; and

5. Unsecured claims by H against the Estate re personal property.

What does any of this have to do with federal courts? The federal nexus was grounded in an Internal Revenue Service (IRS) tax lien on H's property, including the marital home. In 2006, the Estate filed an action to quiet title against H and the United States, which provided the basis for the federal court jurisdiction. *See* 28 U.S.C. § 2410(a)(1). H claimed a community property interest in the property due to the marriage that the Estate claimed was previously ended. Although the U.S. would benefit if H prevailed, it took no position on the ownership dispute.

The U.S. district court granted summary judgment to H on the question of marriage, based on an analysis of Texas marriage dissolution law. However, a trial was required on the Estate's claim that H had abandoned his claim to the marital home by his departure in 1992. H prevailed, with the court rendering its judgment in early 2009. *Estate of Merkel v. Pollard*, 2009 WL 256508 (N.D.Tex. 2009).

The Estate appealed, and the Fifth Circuit ruled that this was a matter for state rather than federal courts. The consequence was to vacate the U.S. district court decision. In closing, dear reader, let me assure you that I did not make up this unusual saga.

B. United States. District Court Decisions

1. *Leight v. Galveston Independent School District*, 2010 WL 1903604 (S.D.Tex. 2010)

Three employees of the Galveston ISD police force filed a grievance, which resulted in an MSA. A subsequent reorganization adversely affected the employees, who claimed retaliation based on the prior grievance. (The MSA included a "no retaliation" provision, but this claim stated a cause of action under Title VII, 42 USC §§ 2000e *et. seq*. Federal jurisdiction was based on Title VII. On the merits, the court granted summary judgment to GISD.

2. *Sims v. Gay*, 2010 WL 1076064 (E.D.Tex. 2010)

The parties were involved in a state court suit that was terminated by an MSA. The MSA specified arbitration of disputes relating to the MSA. An arbitration ensued but the arbitrator had not rendered a ruling after several months, which led plaintiff to bring this suit claiming that the arbitration provision did not cover some or all of the issues submitted to the arbitrator. As plaintiff initiated the arbitration, the court was kind in stating the claim was "disingenuous." Meanwhile, plaintiff also sued the arbitrator (and his law firm) in state court. Defendant sought an anti-suit injunction, which the federal court denied because the state case would not directly impact or interfere with a federal court proceeding, and the court so no need to insert itself in this messy situation. Subsequently, the arbitrator rendered a decision on the merits. The dispute between the parties involved copyright issues of some difficulty, which provided the basis for federal court jurisdiction – and also might explain the time required by the arbitrator to decide the matter.

3. *Lopez v. Kempthorne*, 2010 WL 4639046 (S.D.Tex. 2010)

Kempthorne is the Secretary of the Department of the Interior, which employed Lopez. She brought an employment discrimination claim against the Department, that resulted in the parties entering into an MSA. Lopez sought to disavow the MSA due to illness during the week of the mediation and the resulting MSA. The MSA provided, in capitalized bold print, that the MSA was not revocable. The court, applying federal law, enforced the MSA. This case was in federal rather than state court only because Lopez was employed by the federal government.

4. *Weaver v. World Finance Corp. of Texas, 2010 WL 1904561 (N.D.Tex. 2010)*

Weaver sued her former employer, World Finance; the ensuing mediation produced a written MSA. Weaver agreed to sign the formal settlement, but then refused to do so. World sought and obtained an order from the court that her inaction violated the MSA. Agreement enforced.

In diversity cases, MSA enforcement is based on state law – in this instance Texas Rule 11. (However, federal law governs procedural matters, notably "the manner or method by which the MSA can be enforced ") All the writing requirements of Rule 11 were satisfied. Under *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex.1995), an MSA can properly be filed be filed with a court notwithstanding the revocation of assent, so long as the agreement is filed before it is sought to be enforced.

In addition, the court noted that inherent power was available for the court enforce agreements that settle litigation. In addition, the district court has considerable discretion regarding enforcement.

Counsel for Weaver sought the permission of the court to withdraw from representation of Weaver. The basis for the required good cause was the unwillingness of client to sign the Settlement documents. The court agreed, and granted the request.

C. Federal Bankruptcy Court Decisions

Mediated settlement agreements are common in bankruptcy cases, because cooperation is usually the optimum strategy for maximizing the assets of the bankruptcy estate, and therefore the amount collected by creditors. [Of course, the matter may be greatly complicated by the fact that different classes of creditors often have different interests and incentives] As with other federal court decisions, there are bankruptcy cases where mediation produced an agreement but the term "mediated settlement agreement" was not used. All three of the Texas bankruptcy decisions are related to family law disputes.

1. *In re Harwood*, 404 B.R. 366 (E.D.Tex. 2009).

Plaintiffs opposed the entry of a Chapter 7 discharge in favor of the Debtor Harwood, on the ground that the debts owed to them by the Debtor were exempt from discharge. Denial of a debtor's discharge requires a showing by plaintiffs that property of the debtor was transferred within one year of the petition, "with an intent to hinder, delay or defraud a creditor or an officer of the estate." *Pavy v. Chastant (In re Chastant),* 873 F.2d 89, 90 (5th Cir.1989).

Debtor failed to list the Hollytree property among his assets, and he executed a special warranty deed to Sherry Harwood (W). However, those events were dictated by the resolution of the divorce action filed by W against the Debtor by a Texas court, based on an MSA. Debtor was divested of the property as of the date of the MSA, and the subsequent transfer of title was "merely a ministerial act." Absent voluntary transfer, such action could be compelled by the family court. *See* Tex. Fam. Code, §§ 9.002 and 9.006. The Trustee agreed, and did not seek to recover any funds from the sale of the Hollytree property. The court ruled for Debtor, and against the plaintiffs.

2. *In re Gordon*, 2009 WL 1065127 (Bkrtcy.S.D.Tex. 2009)

Debtor filed a voluntary bankruptcy petition; prior to the filing, Debtor/H was divorced from W. The real property at issue here was put up for sale pursuant to the divorce decree, The Trustee sought to sell Debtor's remaining interest in the property to W for $2,000 – a sum deemed fair given the value of the property (damaged during Hurricane Ike), tax liens, and other relevant factors. After appropriate notice, the Trustee completed the transaction. Debtor then sought to vacate the sale, asserting that he was willing to pay $4,000 for the property. There was a pre-divorce MSA, but its provisions were incorporated in the divorce decree, with the decree governing to the extent of any inconsistency. The Debtor's motion was denied as untimely. A motion under Rule 59(e) is limited to "allowing a party to correct manifest errors of law or fact or to present newly discovered evidence. *Templet v. HydroChem, Inc.,* 367 F.3d 473 (5th Cir.2004). It may not be used to raise arguments or legal theories that could have been raised in a timely manner.

3. *In re Young*, 2009 WL 2855766 (Bkrtcy. E.D.Tex. 2009)

Shortly after the entry of an order confirming a Chapter 13 reorganization plan, a creditor sought to reopen the proceeding. The creditor was an attorney retained by debtor/wife in a pre-bankruptcy divorce proceeding, that resulted in an MSA between H and W. Attorney proceeded to reduce the $183,000 debt to a judgment (by default) more than a month before the bankruptcy filing. He then proceeded to abstract the judgment and placed liens upon the Debtor's real and personal property.

Debtor/W listed the attorney in her bankruptcy schedules as a creditor with a judgment lien against her real and personal property. In the Reorganization Plan, W proposed to void the Creditor's lien pursuant to § 522(f) of the Bankruptcy Code. After a detailed examination of the bankruptcy proceedings, the court concluded that the Creditor failed to file a

timely proof of claim, object to confirmation, or appear at the confirmation hearing, so his claim failed.

VI. Malpractice: *Cassell v. Superior Court,* 244 P.3d 1080 (Cal. 2011) (6-0-1 decision)

Client sued his own Attorney for malpractice (and related claims) regarding an MSA. Client alleged that he was opposed to settlement, but Attorney coerced him into accept an inferior settlement. Client's claim would, absent legislation proceed to trial, with the attention of both parties focused on what occurred during the settlement process. However, the California mediation statute includes a strong confidentiality provision. Subject to exceptions not applicable here, the rule is that: All communications, negotiations, or settlement discussions by and between participants in the course of a mediation ... shall remain confidential." Calif. Evidence Code, § 1119(c).

At issue in *Casell* was the evidentiary effect of the mediation confidentiality statute on private discussions between a mediating Client and the Attorney who represented him in the mediation. The trial court, at the behest of Attorney, excluded "all evidence of private attorney-client discussions immediately preceding, and during, the mediation concerning mediation settlement strategies and defendants' efforts to persuade petitioner to reach a settlement in the mediation.

The California Court of Appeals disagreed. It reasoned that the mediation confidentiality statutes are intended to prevent the damaging use *against a mediation disputant* of tactics employed, positions taken, or confidences exchanged in the mediation, not to protect attorneys from the malpractice claims of their own clients." Thus, the majority concluded, when a mediation disputant sues his own counsel for malpractice in connection with the mediation, the attorneys – already freed, by reason of the malpractice suit, from the attorney-client privilege – cannot use mediation confidentiality as a shield to exclude damaging evidence of private conversations with the client. The dissenting justice urged that the majority had crafted an unwarranted judicial exception to the clear and absolute provisions of the mediation confidentiality statutes.

The California Supreme Court agreed with the trial court (and the dissenting judge in the Court of Appeals). Restrictions on the admission of relevant evidence necessarily come at the cost of less information being available to courts. The Court recognized the trade-off, and enforced the legislative approach to this problem. The Court put the matter this way: "these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected." The legislative approach did not violate due process or lead to an absurd result, so the Court applied the statute as written. "We express no view about whether the statutory language ideally balances the competing concerns or represents the soundest public policy. Such is not our responsibility or our province."

Justice Chin concurred, albeit "reluctantly." The legislative language supported the majority result, but he was deeply troubled about applying the confidentiality principle to attorney-client disputes.

> This holding will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a *criminal* prosecution against the attorney. This is a high price to pay to preserve total confidentiality in the mediation process.

While courts may depart from a literal interpretation of a statute to avoid an absurd result, Justice Chin concluded – but "just barely" – that this situation did not qualify.

A justification for the literalist approach to the statute is that mediation confidentiality protects all participants in a mediation Accordingly, Chin would decide the matter differently if all the participants except the attorney waived confidentiality. He closed with the suggestion that "the Legislature might also want to consider this point."

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Family Mediation Training * Denton * May 12-15, 2011 * *Texas Woman's University* * For more information contact Christianne Kellett E-Mail: ckellett@twu.edu Phone: 940.898.3466 * Website: http://www.twu.edu/ce/Mediation.asp

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1. Alternative Resolutions is published quarterly. The deadlines for the submission of articles are March 15, June 15, September 15 , and December 15. Publication is one month later.

2. The article should address some aspect of negotiation, mediation, arbitration, another alternative dispute resolution procedure, conflict transformation, or conflict management. Promotional pieces are not appropriate for the newsletter.

3. The length of the article is flexible. Articles of 1,500-3,500 words are recommended, but shorter and longer articles are acceptable. Lengthy articles may be serialized upon an author's approval.

4. Names, dates, quotations, and citations should be double-checked for accuracy.

5. Citations may appear in the text of an article, as footnotes, or as end notes. Present editorial policy is to limit citations, and to place them in the text of articles. "Bluebook" form for citations is appropriate, but not essential. A short bibliography of leading sources may be appended to an article.

6. The preferred software format for articles is Microsoft Word, but WordPerfect is also acceptable.

7. Check your mailing information, and change as appropriate.

8. The author should provide a brief professional biography and a photo (in jpeg format).

9. The article may have been published previously, provided that the author has the right to submit the article to *Alternative Resolutions* for publication.

Selection of Article

1. The editor reserves the right to accept or reject articles for publication.

2. If the editor decides not to publish an article, materials received will not be returned.

Preparation for Publishing

1. The editor reserves the right, without consulting the author, to edit articles for spelling, grammar, punctuation, proper citation, and format.

2. Any changes that affect the content, intent, or point of view of an article will be made only with the author's approval.

Future Publishing Right

Authors reserve all their rights with respect to their articles in the newsletter, except that the Alternative Dispute Resolution Section ("ADR Section") of the State Bar of Texas ("SBOT") reserves the right to publish the articles in the newsletter, on the ADR Section's website, and in any SBOT publication.

ALTERNATIVE RESOLUTIONS

POLICY FOR LISTING OF TRAINING PROGRAMS

It is the policy of the ADR Section to post on its website and in its Alternative Resolution Newsletter, website, e-mail or other addresses or links to any ADR training that meets the following criteria:

1. That any training provider for which a website address or link is provided, display a statement on its website in the place where the training is described, and which the training provider must keep updated and current, that includes the following:

a. That the provider of the training has or has not applied to the State Bar of Texas for MCLE credit approval for ____hours of training, and that the application, if made, has been granted for ____hours or denied by the State Bar, or is pending approval by the State Bar. The State Bar of Texas website address is www.texasbar.com, and the Texas Bar may be contacted at (800)204-2222.

b. That the training does or does not meet The Texas Mediation Trainers Roundtable training standards that are applicable to the training. The Texas Mediation Trainers Roundtable website is www.TMTR.ORG. The Roundtable may be contacted by contacting Cindy Bloodsworth at cebworth@co.jefferson.tx.us and Laura Otey at lotey@austin.rr.com.

c. That the training does or does not meet the Texas Mediator Credentialing Association training requirements that are applicable to the training. The Texas Mediator Credentialing Association website is www.TXMCA.org. The Association may be contacted by contacting any one of the TXMCA Roster of Representatives listed under the "Contact Us" link on the TXMCA website.

2. That any training provider for which an e-mail or other link or address is provided at the ADR Section website, include in any response by the training provider to any inquiry to the provider's link or address concerning its ADR training a statement containing the information provided in paragraphs 1a, 1b, and 1c above.

The foregoing statement does not apply to any ADR training that has been approved by the State Bar of Texas for MCLE credit and listed at the State Bar's Website.

All e-mail or other addresses or links to ADR trainings are provided by the ADR training provider. The ADR Section has not reviewed and does not recommend or approve any of the linked trainings. The ADR Section does not certify or in any way represent that an ADR training for which a link is provided meets the standards or criteria represented by the ADR training provider. Those persons who use or rely of the standards, criteria, quality and qualifications represented by a training provider should confirm and verfy what is being represented. The ADR Section is only providing the links to ADR training in an effort to provide information to ADR Section members and the public."

SAMPLE TRAINING LISTING:

40-Hour Mediation Training, Austin, Texas, July 17-21, 2010, Mediate With Us, Inc., SBOT MCLE Approved—40 Hours, 4 Ethics. Meets the Texas Mediation Trainers Roundtable and Texas Mediator Credentialing Association training requirements. Contact Information: 555-555-5555, bigtxmediator@mediation.com, www.mediationintx.com

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ENCOURAGE COLLEAGUES TO JOIN ADR SECTION

This is a personal challenge to all members of the ADR Section. Think of a colleague or associate who has shown interest in mediation or ADR and invite him or her to join the ADR Section of the State Bar of Texas. Photocopy the membership application below and mail or fax it to someone you believe will benefit from involvement in the ADR Section. He or she will appreciate your personal note and thoughtfulness.

BENEFITS OF MEMBERSHIP

✓ **Section Newsletter, *Alternative Resolutions*** is published several times each year. Regular features include discussions of ethical dilemmas in ADR, mediation and arbitration law updates, ADR book reviews, and a calendar of upcoming ADR events and trainings around the State.

✓ **Valuable information** on the latest developments in ADR is provided to both ADR practitioners and those who represent clients in mediation and arbitration processes.

✓ **Continuing Legal Education** is provided at affordable basic, intermediate, and advanced levels through announced conferences, interactive seminars.

✓ **Truly interdisciplinary** in nature, the ADR Section is the only Section of the State Bar of Texas with non-attorney members.

✓ **Many benefits** are provided for the low cost of only $25.00 per year!

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION
MEMBERSHIP APPLICATION

MAIL APPLICATION TO:
State Bar of Texas
ADR Section
P.O. Box 12487
Capitol Station
Austin, Texas 78711

I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2011 to June 2012. The membership includes subscription to *Alternative Resolutions,* the Section's Newsletter. (If you are paying your section dues at the same time you pay your other fees as a member of the State Bar of Texas, you need **not** return this form.) Please make check payable to: ADR Section, State Bar of Texas.

Name_____

Public Member_____ **Attorney**_____

Bar Card Number_____

Address_____

City_____ **State**_____ **Zip**_____

Business Telephone_____ **Fax**_____ **Cell**_____

E-Mail Address:_____

2011-2012 Section Committee Choice_____

ALTERNATIVE DISPUTE RESOLUTION SECTION

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P.O. Box 12487
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http://www.texasadr.org